Chapter 6 DEVELOPMENTS TOWARDS AND ARGUMENTS IN FAVOUR OF AN AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

6.1 *Developments towards an African Court on Human and Peoples' Rights*

6.1.1 Early roots, genesis and demise of an idea

Even before the OAU was established African jurists assembled at an African "Conference on the Rule of Law", held in Lagos, Nigeria, in 1961, recommended that an African human rights court should be established. The Commission of Jurists convened the conference. It brought together "194 judges, practicing lawyers and teachers of law from 23 African nations as well as 9 countries of other continents".[1] The resolution adopted at the conference subsequently became known as "The Law of Lagos". The issue of human rights protection on the African level was raised during the proceedings. African governments were urged to "study the possibility of adopting an African Convention on Human Rights". The manner in which this should be adopted was also specified:[2] It had to provide for "the creation of a court of appropriate jurisdiction", available to "all persons under the jurisdiction of the signatory states".

But for a number of years after this initial enthusiasm, **few initiatives** to create an African "Convention" or "court of appropriate jurisdiction" were forthcoming. When the idea of a convention was raised again as a possibility, the idea of a "court of appropriate jurisdiction" seemed to have lost currency during the intervening years. One possible explanation is the fact that in the 1960s and 1970s, so soon after independence, the judiciary in many newly-independent African countries still to a large extent consisted of foreign or foreign-trained personnel. The fear was expressed that these judges would give decisions inappropriate in an African setting.[3] When Nigeria submitted a draft resolution at the 1967 sitting of the UN Commission on Human Rights, it proposed the establishment of human rights commissions (and not courts) where they did not exist.[4]

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1 ICJ (1961) *African Conference on the Rule of Law* at 11.

2 *Ibid.*

3 See eg M'Baye (1992) at 64 - 165, and discussion in ch 8.1.10 below.

4 Mahalu in Kunig *et al* (eds) (1985) 21. At that stage regional commissions existed in Europe and in the Americas. One should be reminded that only one supra-national human rights court, the European Court of

Footnotes continued on next page.

An **exception** to this trend was the conference in 1966, held in Dakar, attended by jurists from francophone Africa.[5] It was proposed at this conference that a system of human rights protection *similar to that already in place in Europe* should be adopted in Africa. The 1969 conference on the establishment of regional commissions on human rights with special reference to Africa, held in Cairo at the initiative of the United Arab Republic, was another exception.[6] At that conference, the possibility of a court was under consideration, although the proposal adopted at the end thereof called for a regional commission on human rights to be established in Africa.

In the **deliberations immediately preceding the adoption of the Charter**, the issue of a judicial implementation mechanism was raised again. At the second ministerial meeting in Banjul (7 to 19 January 1981),[7] where what would eventually be known as the "African Charter" was drafted, Guinea proposed an amendment to the following effect: A tribunal to judge crimes against humanity and to protect human rights should be created.[8] This proposal was (at least implicitly) directed at the situation in South Africa, which had become a focal point of burning concern after the 1976 uprising in Soweto. The rapporteur (M'Baye) gave the following summary of the resulting discussion: "It should be mentioned that a delegation proposed an amendment according to which the meeting was to draft a text establishing an African Court to judge crimes against mankind and violations of human rights. The participants took note of this amendment but were of the opinion that it was untimely to discuss it".[9] The proposal was rejected only after lengthy discussion and is indicative of a reluctance on the part of representatives towards an effective enforcement mechanism.[10] This reluctance also informs the remarks by the Chairman of the drafting committee (also M'Baye) during discussions at the meeting about the "essentially technical

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Human Rights had at that stage been established. By then, this court had also only handed down a very small number of judgments (see ch 5.1 above). The Inter-American Court was to be established only in 1980 (see ch 5.2.1 above).

5 Source quoted in Umozurike (1983) 77 *AJIL* 902 at 903.

6 See Kofuor (1993) 18 *Africa Development* 65 at 75.

7 See par 6.1.5 (c) below.

8 Quoted by Ouguergouz (1993) at 72 (n 47).

9 Council of Ministers 37th Ordinary session, OAU CM/1149(XXXVII), at par 117.

10 See M'Baye (1992) at 164.

terms of reference of the Commission ... (the Assembly of Heads of State and Government being the final decision maker)".[11]

Writing some time later, **M'Baye** refers to the revival of the idea of an African human rights Court during the ministerial conference.[12] M'Baye is of the opinion that the proposition was directed, in the first place, at perpetrators of apartheid.[13]. He offers two reasons why the state representatives were not prepared to accept a judicial body to oversee the African Charter. Politically, they were nevertheless not prepared to be judged themselves by an international court for violation of rights. Philosophically, Africans hesitate to approach a judicial tribunal to obtain a coercive decision. Traditionally, he writes, Africans have resolved their disputes through discussion directed at reconciliation. A decision to intervene is generally based on consensus.[14] The requirement that the Commission should take all appropriate steps to ensure a friendly settlement between parties is a clear embodiment of this philosophy. Conciliation, M'Baye continues, is preferred to a judicial solution that necessitates a winner and loser. Through conciliation both parties would feel that they have not lost anything.[15]

The Charter was adopted with a **commission** as implementation mechanism.[16] Given the alternatives in existence at the time, the African states have opted for a solution midway between a minimalist type of institution (as exemplified by the CERD Committee) and a maximalist institution (such as the European Court of Human Rights). As Ouguergouz observes, the OAU has opted for the "prince" (the medium of diplomacy and politics) rather than the "sage" (judicial means).[17]

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11 CAB/LEG/67/Draft. Rapt.(II) at par 13.

12 (1992) at 164.

13 *Ibid.*

14 (1992) at 166.

15 *Ibid.*

16 See Part II of the Charter.

17 Ouguergouz (1993) at 75.

6.1.2 Academic and other criticism of the lack of a court

Since the adoption of the Charter, **numerous authors** have noted and criticised the absence of a judicial structure provided for under the Charter.[18] **Some of these views** are discussed briefly: Mbaya found the absence of a court a cause for uneasiness and concern.[19] Green observed that the Commission "lacks the authority of a court and its findings do not possess the same obligatory character" as those of a judicial tribunal.[20] Former Secretary-General of the OAU, Edem Kodjo, stressed the need for a court to improve the weak measures of safeguard in the Charter. He continued to state that "without a Court of Justice, like the European Court which plays the role of a genuine tribunal, how can the effective judicial protection of individual rights be assured?"[21] Swanson ascribed the absence of a court to a jealous guarding of state sovereignty.[22] Dlamini found the absence of a court "unfortunate" as it "makes the role of the Charter largely ineffective".[23] Chanda lamented that "the African Charter lacks an effective enforcement machinery, as it does not provide for the establishment of a Human Rights Court".[24] Mavila proposed that a court along the lines of the European and Inter-American Courts should be envisaged to improve human rights protection in Africa.[25] Welch noted that no court was instituted in the Charter "despite the examples of the European and American Courts, and despite the 'Law of Lagos' of the International Commission of Jurists".[26]

Not all scholarly comments were critical of the omission of a court from the organs implementing the African Charter. In 1984, Eze expressed the opinion that a regional human rights court would have been premature. He motivated his view with reference to the difficulties associated with the

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18 In the period between 1979 and the eventual adoption of the Charter Esiemokhai assumed that a Human Rights Court would be established (see (1981) 21 *Indian Jnl of Intl Law* 141 at 142).

19 Mbaya (1984) at 187 ("une ... cause d'inquiétude").

20 (1986) 16 *Israel YB of Human Rights* 69 at 101.

21 Kodjo (1990) 11 *HRLJ* 280.

22 (1991) 12 *NY Sch Jnl of Intl and Comp Law* 307 at 330.

23 Dlamini (1991) 24 *CILSA* 189 at 201-202.

24 (1989-92) 21-24 *Zambia Law Jnl* 1 at 21.

25 (1994) 6 *ASICL Proc* 119 at 127.

26 (1995) at 151.

enforcement of socio-economic rights, the "wide scope of rights and duties enshrined in the African Charter",[27] and the fact that it is "more in accordance with the African condition".[28] Rembe, writing in 1985, declared that the "absence of a court *per se* ... does not weaken the Charter and the institutions established under it".[29] Huaraka found that the "functions and powers of the Commission, its watch-dog role, make up for the absence of a court of human rights in the African régime".[30] Kéba M'Baye, the "father" of the Charter, explained the reason for the absence of a court as both a product of prevailing circumstances, and the "African philosophy".[31] Prevailing circumstances at the beginning of the 1980s dictated that African states were not prepared to be judged by an international court. In Africa, he observed, there is hesitancy to obtain coercive judicial decisions. He found a resolution through conciliation (by a Commission) preferable to judicial solutions (by a Court) which necessitates a "winner" and a "loser".[32]

Starting in Bangalore, India, in February 1988, a series of **judicial colloquia** were organised annually by the Commonwealth Secretariat and the London-based NGO Interights. On each occasion a number of Commonwealth judges convened around the topic of "the domestic application of international human rights norms". This theme inevitably involved a focus on the role of judicial institutions, and indirectly (and later, directly) on the lack of a human rights Court in Africa. Not only the number of African states in the Commonwealth, but also the immediacy of human rights problems in Africa caused the African Charter and its application to be highlighted. The lack of a human rights Court was criticized in no uncertain terms by the first speaker at the third colloquium in the series, held in Banjul from 7 to 9 November 1990. Mnaemeka-Agu, judge of the Nigerian Supreme Court, aired his conviction that a supra-national court was needed to secure the effective operation of human rights in Africa. He concluded: "An efficient and functional African Court on Human Rights will eliminate political pressure and enforced delays in

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27 Eze (1984) at 226.

28 *Ibid.* He added, though, that the Commission's functions "could be expanded to make binding decisions. At that point an African Court on Human and Peoples' Rights would replace the Assembly of Heads of States and Governments as organ having appellate jurisdiction".

29 Rembe (1985) at 138.

30 Huaraka in Tom (ed) (1988) 193 at 194.

31 M'Baye (1992) at 164.

32 M'Baye (1992) at 165.

such proceedings. Judging from the content and large extent of violations of international human rights norms in many parts of the African continent, the need for such a court is not only imperative but also urgent".[33]

The fact that this elicited discussion is clear from the Preface of the colloquium proceedings, published by the Commonwealth Secretariat[34], which notes: "The participants ... expressed their belief that the time may have come for the establishment of an independent African Court on Human and Peoples' Rights similar to the European Court of Human Rights whose decisions would be binding".[35] These convictions were re-stated and in fact included in the concluding "Abuja Confirmation", the concluding statement of the colloquium held in 1991. In this declaration the participants affirmed "the need to establish an independent African Court on Human and Peoples' Rights with jurisdiction over inter-state and individual cases, and with the power to give binding judgments".[36]

Other **seminars** and conferences also highlighted the need for an African Court on Human and Peoples' Rights. One such international colloquium was on the reform of international institutions for the protection of human rights, and was held in La Laguna University, on the Canary Islands, in November 1992. The "La Laguna Declaration", issued at the end of the conference, stated that "the mechanism for the implementation of the African Charter needs to be supplemented by the creation of an African Human Rights Court".[37]

A series of **seminars on regionalised human rights protection** has been organised by the Friederich-Neumann-Stiftung. One of the main concerns raised was the mechanism for implementation under the African system. Given that the other two regional systems already had courts in place, the African system was bound to be influenced via this interaction. The **first conference** was held in 1988, bringing together members of the African Commission and members

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33 *Developing Human Rights Jurisprudence* vol 3 at 36.

34 *Ibid.*

35 *Ibid.*

36 *Developing Human Rights Jurisprudence* vol 4 (1992) at xii.

37 "La Laguna Declaration" (1993) (emphasis in the original).

of institutions active under the European Convention. At the time of this, first "Afro-European" conference, Isaac Nguema was the president of the African Commission. He explained the omission of a court from the Charter's enforcement mechanisms as "in keeping with African tradition".[38] The summary of the proceedings commented that "this thesis came under heaviest fire from the African side of the conference hall".[39] Edem Kodjo, in his opening address, already hinted at the ideal to create an African Court on Human and Peoples' Rights in future.[40]

The **second seminar** in this series was held in 1990.[41] Although the focus was on what the Commission has already accomplished, and ways of improving its effectiveness, the issue of the court also recurred. Malamine Kourouma[42] reiterated that a court would be "imperative for effectively safeguarding the Charter".[43] He referred to the fact that the political background to the adoption of the Charter did not allow for the inclusion of such a court, but he concluded that the position may be different in a future context.[44] The third conference included representatives from all three major regional human rights institutions in Africa, America and Europe. Commissioners from Africa emphasised that the idea of a court was premature: The Commission itself and national judiciaries had to be strengthened first. On the other hand, Ryssdal, President of the European Court of Human Rights, pointed out that "regional systems of human rights protection could not properly function without a genuine judicial body vested with compulsory jurisdiction, not least because of its authority over national courts".[45]

This **trilateral dialogue was extended** in 1994 to include representatives from Asia. Predictably, the human rights record of Asian countries and the possibility of elaborating a regional human rights treaty (or treaties) in Asia took centre stage. While the idea of a court was raised and

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38 Oestteich (1988) (mimeo) at 16 of typed text.

39 *Ibid.*

40 *Ibid.*

41 Heinz (1990).

42 Quoted by Heinz (1990) at 8.

43 *Ibid.*

44 *Ibid.*

45 Benedek Executive Summary at 2.

discussed in international and European contexts, its realisation has to be rooted firmly in African soil. It is there that the continued actions towards establishing a court may be witnessed.

As far as the **commissioners** themselves are concerned, some also came out in favour of a court. Robert Kisanga, commissioner from 1987 to the present, and judge of appeal of the Tanzanian Court of Appeal, identified the "lack of power of sanction"[46] as the major weakness of the African Charter. He concluded that the "protective or adjudicatory role consisting mainly of dealing with communications should be transferred to a court to be created by the amendment" of the Charter.[47] The Commission's second chairman, Oji Umozurike, expressed the fear that, in the absence of a court, "the Charter may well be a paper tiger".[48] At the UN African Seminar on International Human Rights Standards held in Cairo, from 8 to 12 July 1991, the African Centre for democracy and Human Rights distributed a questionnaire to members of the African Commission. In response to questions therein, all the members present expressed their support for the idea of a court.[49] Interviews were conducted with each of the serving commissioners at the 20th session, held in October 1996. All of them expressed support for the establishment of an African Court on Human and Peoples' Rights.[50]

6.1.3 Preliminary work

6.1.3.1 African Charter

The elaboration of human rights instruments in one corner of the world does not take place in isolation. By contributing directly, or implicitly, actors on the international stage impact on the

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46 Kisanga in Peter and Jumba (eds) (1996) at 36.

47 Kisanga in Peter and Jumba (eds) (1996) at 38.

48 (1988) 1 *AYBIL* 83.

49 See Sock (1994) 2 African Topics 9 at 10.

50 See (1996) (Oct - Dec) *AFLAQ*.

process. In the case of the African Charter, the **United Nations** played a significant role.[51] In the years preceding the adoption of the Charter the UN organised numerous conferences and seminars about the promotion of human rights in Africa. These ranged from the conference on regional human rights organised by the UN Commission on Human Rights in 1967, to the Addis Ababa Conference of 1971 under the auspices of the UN Economic Commission for Africa, and to the UN Seminar on ways and means of promoting human rights in Africa, held in Dar-es-Salaam (1973).[52] This process culminated in the UN Seminar held in Monrovia in 1979, which was pivotal in preparing a final version of the Charter.

At its 1979 session, the OAU Assembly of Heads of State and Government adopted a **resolution**, which called on the Secretary-General of the OAU to "organise as soon as possible, in an African capital, a restricted meeting of highly qualified experts to prepare a preliminary draft of an African Charter on Human and Peoples' rights providing, *inter alia*, for the establishment of bodies to promote and protect human rights".[53] After the adoption of this resolution, the OAU Secretary-General invited a group of African legal experts to prepare a draft Charter. On president Senghor's invitation, the meeting took place in Dakar, Senegal, and lasted from 28 November to 8 December 1979. The working group established there made use of an outline for the establishment of an African Commission that had been prepared by Kéba M'Baye.[54] He is rightly referred to as the "father of the Charter". His involvement as Secretary-General of the International Commission of Jurists underlines the importance of this organisation in the process of preparing a draft.[55] After the meeting, members of this group started a lobbying campaign.[56]

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51 For a perspective of the role of the UN and the facts to follow, see Ramcharan (1992) 13 *HRLJ* 307. See also Tolley (1987) at 96 (three advisory services seminars organised by the UN Secretariat "led the OAU to adopt the African Charter") and M'Baye (1992) at 148.

52 See Robertson and Merrills (1992) at 202-206.

53 The resolution was named "Decision 115(XVI)", and was taken in July 1979. Its text can be found in UN doc A/34/552.

54 M'Baye (1992) at 151.

55 See M'Baye (1992) at 148.

56 See M'Baye (1992) at 149.

6.1.3.2 African Court on Human and Peoples' Rights

In contrast with the continuous involvement by the UN in the process establishing the Commission, the driving forces behind efforts to establish a court were NGOs, particularly the **International Commission of Jurists**. Its main contribution lies in the organisation of **NGO workshops** prior to the sessions of the African Commission.

The **first International Commission of Jurists workshop** on NGO participation in the African Commission was held on the eve of the tenth session of the Commission in Banjul (5 - 7 October 1991). A total of 59 persons, representing 35 NGOs, attended the workshop. A number of recommendations were made to improve the realisation of human rights under the African Charter. The establishment of an African Human Rights Court was discussed, but not endorsed: "Given the problems facing the Commission and the unexhausted potential within the mandate of the Commission, it is considered appropriate that the question regarding the establishment of an *African Court on Human Peoples' Rights* be deferred at the present time", reads the last "conclusion" of the workshop.[57]

In January 1993 the International Commission of Jurists organised a **brainstorming session** on ways of improving realisation of the African Charter. It was held in Banjul from 13 to 15 January 1993. The participants comprised human rights experts, academics and lawyers, as well as members of the African Commission.[58] This small group of human rights activists considered strategies to strengthen the African Commission, "as well as to ensure the promotion and protection of human and peoples' rights in Africa, if necessary by the creation of an *African Court on Human Peoples' Rights*".[59] One of the conclusions of the group, as summarised by the Secretary-General of the International Commission of Jurists, reads as follows: "The work of international protection of human rights in Africa which was begun 30 years ago at the Lagos Congress of African Jurists will remain unfinished if Africa does not establish a genuine human

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57 See "Conclusions and Recommendations" of the workshop in (1991) 3 *RADIC* 859 at 863.

58 According to Benedek ((1994) *NHRQ* 85 at 86), a first draft emanated from this session and "was offered" to the 5th NGO workshop by Karel Vasak, Kéba M'Baye, commissioner Beye and Adama Dieng.

59 International Commission of Jurists (1993a).

rights jurisdiction. The creation of an *African Court on Human Peoples' Rights* would be ... an urgent necessity at a time when violence is spreading throughout the continent - making Africa the continent with the largest number of refugees - and, as a reasonable possibility at a time when, fortunately, the wind of democracy is blowing through all the countries of Africa".[60]

Participants either **supported** the idea of creating a court, or **favoured postponing** its creation, though accepting it in principle. The following **statement** was quoted in the "Conclusions and recommendations": "The African concept of the law does not preclude the notion that the evolution of ideas in Africa towards democracy and human rights militates in favour of the proposal to create an *African Court on Human Peoples' Rights*, which dates back to 1961 when it was put forth at the Lagos Congress".[61] The following modality was suggested: The Commission, in conjunction with the OAU Secretariat, should request the permission of the Summit Conference to develop a protocol for the creation of a court.

Less equivocal was the recommendation adopted at the **4th International Commission of Jurists workshop**, again held in Banjul (26 - 28 March 1993). It clearly stated that the discussion about the feasibility of a court could no longer be deferred. Instead, the 60 participants representing 35 NGOs recommended that "serious consideration should be given to the creation of an African Human Rights Court".[62] By November 1993, when the **5th International Commission of Jurists workshop** was held, the momentum for the creation of a court had gathered considerably. In his address at the workshop, Raymond Sock[63] noted that the idea of creating a court has gained wide acceptance. He urged the participants "that active consideration be given ... to the modalities of creating such a Court and the functions to be performed by such a court".[64] This clearly illustrates

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60 *Ibid.*

61 International Commission of Jurists (1993a) at 3.

62 International Commission of Jurists (1994) at 21: Conclusions and Recommendations of the fourth Workshop on NGO Participation in the African Commission.

63 Then director of the African Centre for Democracy and Human Rights Studies.

64 Sock (1993) at 6 of typed paper.

the progress made from convincing people of the idea to making the idea work.[65] The International Commission of Jurists draft was presented for discussion. Consensus was reached on some crucial issues which guided the process further. First of all, agreement was reached on the fact that the improvement of protection of rights under the Charter "necessarily entails the establishment of ... a court".[66] The format in which change should come (a single document such as a protocol) was also agreed to. It was also generally accepted that a court would not substitute, but rather supplement the Commission's work. Consensus was reached that the court's judgments would be final, to be implemented by the OAU Council of Ministers.

An issue extensively debated by the workshop was the question of who could file complaints. **General consensus** emerged that the Commission, NGOs and individuals should be allowed to bring complaints. Some participants were of the opinion that individuals should be allowed to approach the court without first referring the matter to the Commission.[67] The workshop agreed that direct access should be restricted to cases where all domestic remedies had already been exhausted.

The workshop concluded with detailed recommendations that

- an African Court be established,
- the views expressed in the NGO group be considered and incorporated as far as possible by the International Commission of Jurists when the Protocol is being drafted,
- an explanatory document be drafted by the International Commission of Jurists to accompany the draft Protocol, and

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65 See eg "Defining the terrain in Banjul", a report of the 4th NGO workshop, in West Africa 19-25 April 1993: "Also very popular was a call for the creation of an African Human Rights Court along the lines of, for example, the European Court on Human Rights".

66 (1994) 56 *ICJ Newsletter* 2.

67 On the discussions at this workshop, see (1994) *ICJ Newsletter* 1 - 3.

- the final draft Protocol and the explanatory document must then be presented to the Assembly of Heads of state and Government.[68]

As mandated by the 5th International Commission of Jurists workshop, the International Commission of Jurists convened a small working **group of experts** to re-draft the protocol and to prepare explanatory notes to accompany it. A group of African experts met with International Commission of Jurists officials (Adama Dieng and Philip Amoah) and Mona Rishmawi (of the Centre for the Independence of Judges and Lawyers) in Geneva from 26 to 28 January 1994 for a brainstorming session to complete the draft. Representing Africa were Hatem Ben Salem, Vice-president of the Commission, Ben Kioko, OAU Legal adviser, Raymond Sock and Ahmed Motala, then from Lawyers for Human Rights in Pretoria.

At the **6th NGO workshop** (held in Banjul, 15 - 17 April 1994) Raymond Sock presented an "update since the 5th Workshop and what NGOs should do in their own countries to mobilise support". He presented the redrafted Protocol and explanatory memorandum to the representatives.

During the course of the preliminary discussions agreement crystallised about the **form** that institutional reform will have to take. As the establishment of a court represented a radical reform of the implementation mechanism, a protocol to the African Charter was suggested. Such a protocol may either become binding automatically on states parties to the African Charter or may bind only those states which have ratified the Protocol. The Protocol defining the composition and procedures of the Commission of Mediation, Conciliation, and Arbitration is an example of the first category, as it forms an integral part of the OAU Charter.[69] Ratification of the Protocol was therefore superfluous: member states of the OAU are *ipso facto* party to the Protocol.[70] In this respect the OAU Charter may be viewed as being similar to the UN Charter, in terms of which

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68 International Commission of Jurists (1994) at 23: Conclusions and Recommendations of the fifth International Commission of Jurists Workshop on NGO Participation in the African Commission.

69 As prescribed by art 19 of the OAU Charter.

70 See Bedjaoui (1972) 18 *Annuaire Français de Droit International* 86.

member states automatically become party to the Statute of the ICJ.[71] Again, the relevant provision of the UN Charter stipulates that the Statute "forms an integral part of the present Charter".[72] The African Charter leaves open, in general terms, the possibility that special protocols or agreements "may, if necessary, supplement the provisions of the present Charter".[73] However, there is no indication in the Charter that such future protocols form an integral part of the Charter. It is also questionable whether the establishment of a court merely "supplements" the Charter or whether it causes an amendment thereto. Against this background, the course adopted was that of a protocol which will bind only those states which have ratified it.

The preparatory stage emphasises the **importance of NGOs** in the African human rights system. Their role in the process of establishing a Court should not be underestimated.

6.1.4 Window of opportunity

6.1.4.1 The late 1970s: The African Charter

Most commentators regard the drafting and adoption of the African Charter as **Africa's response** to the **human rights abuses** of the 1970s in Amin's Uganda,[74] Nguema's Equatorial Guinea and Bokassa's Central African Republic. The "back-lash to these atrocities", Umozurike wrote, "... had their impact on Africa and the OAU".[75] He added two other factors impacting on the process: the example of other regional human rights regimes, and the greater involvement of the UN in human rights questions. In another contribution, he elaborated on developments on the

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71 *Ibid.*

72 Art 92 of the UN Charter.

73 Art 66 of the Charter.

74 For an account of Tanzanian opposition against the regime, see United Republic of Tanzania (1979). This "war" led to an important debate at the 16th summit of the OAU Assembly of Heads of State and Government in Liberia, touching on the question about the extent to which human rights violations may be regarded as matters of domestic concern only (see eg Naldi (1989) at 108 - 109).

75 (1992) 3.

international scene which favoured the adoption of the Charter.[76] These include the emphasis placed on human rights by the then US President, Carter, the adoption of the Helsinki Final Act in 1975, and the media exposure of the suffering of the "boat people" in Southeast Asia. Certainly, the wide-scale publicity of the massive killings and gross violation of human rights perpetrated under African leaders shocked the world, including many Africans. Despite this, the OAU initially did not raise any voice of criticism. On the other hand, the fact that the OAU had increasingly become regarded as an accepted forum for the resolution of African disputes contributed to the eventual adoption of the African Charter.[77]

Democratisation in some African states also facilitated discussion on a regional human rights instrument. Young identifies three "waves of democratization" in Africa.[78] The first was embodied in the constitutional changes dictated by departing colonial powers. This "wave" had little momentum. Soon after independence, democratic governance largely ceased to exist, being replaced by the doctrines of one-party rule, military dictatorships and Afro-Marxism. The "second wave" came in the period just prior to the adoption of the African Charter. The defining cases of this wave were Ghana and Nigeria. In 1979 the military in Ghana agreed to "full democratization".[79] In Nigeria, Obasanjo effected a peaceful democratic transition. Broad public participation in establishing the Second Nigerian Republic culminated in the 1979 Constitution.[80] In both cases the wave spent itself into military take-over with a measure of public support.

6.1.4.2 The mid-1990s: An African Court on Human and Peoples' Rights

Similarly, the mid-1990s presented Africa with an opportunity. At the 1993 International Commission of Jurists Workshop Raymond Sock referred to the "wave of democratisation", the "wind of change ... blowing across" Africa as "dictatorial and autocratic regimes are being

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76 (1983) 77 *AJIL* 902 at 904.

77 See Kannyo in Welch and Meltzer (eds) (1984) at 129.

78 (1996) 7 *Jnl of Democracy* 53 at 54, following Huntington (1991).

79 Young (1996) at 56.

80 Akende described it as Nigeria's first "autochthonous Constitution" (Introduction to the Nigerian Constitution (1982) at intro).

replaced by governments with some sort of democratic credentials".[81] This followed the fall of socialism with the Berlin Wall in November 1989. In Africa this period has been characterised by multi-party elections. Before 1991 elections have brought about a change of government in only one instance, that of Mauritius.[82] In 1991 elections caused a change of government in Benin, Cape Verde and Zambia. The two pivotal cases are Benin and Zambia. In **Benin**, the Afro-Marxist ruler Kérékou came under pressure from civil society. He saw no way out but to concede to the demand for a "national conference". The conference declared itself sovereign and created transitional institutions. In the election that followed, Kérékou was defeated. Other francophone African states followed this example by holding national conferences and multi-party elections.[83] This led to the substitution of the previous rulers in Congo, Madagascar, Mali and Niger.

The second pivotal case is that of **Zambia**. Responding to the demands of civil society, president Kaunda agreed to a referendum and multi-party elections.[84] He was swept from power in elections held in October 1991. The trade unionist Frederick Chiluba (leader of the MMD, the Movement for Multiparty Democracy) won 76% of the popular vote, ending UNIP (United National Independence Party) domination. This introduced a trend in numerous anglophone African countries, such as Malawi[85] and Kenya.[86]

For Young, this represents Africa's "third wave".[87] Concluding that not all "new democracies" will survive, he finds that many countries have undergone changes that go beyond multi-party elections.[88] These fundamental changes include "a freer and more vocal press, better respect for

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81 Akende (1982) at 1.

82 See sources quoted in Young (1993) 63 *Africa* 299.

83 See also Breytenbach (1996), who contrasted the Benin way of "rupture and replacement" with the South African negotiated transition (at 31).

84 On this process, see Bratton (1992) 3 *Jnl of Democracy* 81.

85 On the exemplary referendum in 1993 and the multi-party elections in 1994, see Ng'ong'ola (1996) 34 *Jnl of Commonwealth and Comparative Politics* 86.

86 Kenya held its first-ever multi-party elections in 1992.

87 (1996) 7 *Jnl of Democracy* 53 at 60.

88 On the complexities involved in consolidating democracy, see Linz and Stepan (1996) 7 *Jnl of Democracy* 14.

human rights, some headway towards achieving the rule of law".[89] He argues that the third wave has already established itself as something more durable than the first two waves. However, it has become increasingly clear that the "window of opportunity" can easily be closed.[90] The very complex processes of "consolidation and institutionalization"[91] must be faced, highlighting that multi-party elections as such should not be equated with democracy.

The second round of post-1990 elections held in Benin and Zambia illustrate the tenuousness of these newly-fledged democracies. In open and competitive elections held in Benin, Kérékou was restored to power.[92] Elections in Zambia were scheduled for 1996. In the period before the elections the government of president Chiluba adopted repressive laws and suppressed individual rights and freedoms.[93] The presidential election was conducted under an amended constitution. In terms of the most crucial amendments a person could only qualify to be a presidential candidate if he or she was a Zambian citizen born in Zambia, and could not qualify if elected as president twice previously. These provisions meant that the previous president, Kaunda, could not contest the elections. Despite severe criticism and pressure, Chiluba persisted.[94] A flawed election, won by Chiluba, resulted.

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89 Young (1996) 7 *Jnl of Democracy* 53 at 67.

90 As Huntington pointed out ((1991) at eg 16), waves of democratisation are usually followed by "reverse waves". His first wave is 1828 - 1926, followed by a reverse wave of autocratic rule between 1922 and 1942. The second wave, spanning from 1943 to 1962, also saw the reflux of a contrary movement (1958 - 1975). In his model, the third wave started when the Portuguese dictator Caetano was deposed on 25 April 1974. This event also reverberated in Africa, but does not signpost the third wave in Young's categorisation. The fall of the Portuguese dictatorship can rather be seen as supporting the "second African wave", which led to the adoption of the African Charter in 1981. Huntington listed a number of factors which may contribute to a "wave transition" (at 290 and further). Two important factors are the weakness of democratic values among key elite groups and the general public, and economic collapse.

91 Young (1996) 7 *Jnl of Democracy* 53 at 60.

92 See Breytenbach (1996) at 31.

93 See eg Mphaisha (1996) 34 *Jnl of Commonwealth and Comparative Politics* 65, who warned that a *de iure* multi-party system should not automatically be equated with democratisation. He gave the following sketch of post-Chiluba Zambia: "Restrictive laws, suppression of individual rights and freedoms and the harassment of the press continue to be the rule rather than the exception" (at 82).

94 For his motivation, see "No-aid threat follows Kaunda ban" (1996) Nov/ Dec *Africa Today* 50.

South Africa presented the clearest example of a democracy replacing an illegitimate and repressive political regime. This process took off very soon into the new decade (on 2 February 1990), when the then president (F W de Klerk) announced the unbanning of the ANC and other political organisations. After the subsequent election (on 27 April 1994) numerous institutions were created to foster a democratic culture. One of the most visible and successful has been the Constitutional Court. It presented Africa with a high-profile domestic precedent of judicial enforcement of human rights. In its first year of handing down judgments, it distinguished itself as pro-individual,[95] independent of state pressure or interference[96] and furthering internationally recognised human rights.[97]

A tendency has developed for military rulers to convert themselves into civilian rulers. Examples of a sustained movement of **military rulers towards democracy** in the 1990s are Ghana[98] and Uganda. Jerry Rawlings staged a coup d'état in 1981 and Ghana was ruled by the Provisional National defence Council ("PNDC") for more than a decade. In a programme of return to civilian government, a Consultative Assembly was established in 1991 to draft a constitution for Ghana. This was followed by presidential and parliamentary election in 1992, won by Rawlings and his party, the National Democratic Congress ("NDC").[99] A gradual process towards democracy started in Uganda after Museveni's National Resistance Movement ousted the military regime of Okello in January 1986.[100] An important milestone was the Constituent Assembly elections of 28 March 1994. The popularly elected assembly set up the framework for elections successfully held in 1996. Following his elevation to Gambian president in a bloodless coup in 1994, Jammeh

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95 See eg cases decided in the sphere of criminal justice (see Viljoen "The Law of Criminal Procedure and the Bill of Rights" in *Butterworths Bill of Rights Compendium* (1996) at 5B1 - 5B101).

96 See eg the Western Cape demarcation case (*Executive Council, Western Cape Legislature v President of the RSA* 1995 4 SA 877 (CC)) and the certification case (*In re: Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744; 1996 10 BCLR 1253 (CC)).

97 See eg *S v Makwanyane* 1995 3 SA 391 (CC), in which the death penalty was declared to be unconstitutional, amongst others, on the grounds that it violated international human rights norms.

98 For a critical view of the process in Ghana, consult Gyimah-Boadi (1994) 5 *Jnl of Democracy* 76.

99 See Ayee (1994) 24 *Africa Insight* 200.

100 3 (1994) *Africa Demos* (A Bulletin of the Carter Centre) 8. See also Oloka-Onyango (1995) 39 *JAL* 156.

received popular approval in a presidential election held in September 1996.[101] Even the infamous Abacha has accepted the wisdom of promising a general election and return to civilian government in Nigeria by 1 October 1998.[102]

These processes have not been limited to francophone and anglophone sub-Saharan Africa, but extended to **lusophone** and, to a very limited extent, to **Arab-North Africa**. In São Tomé e Príncipe the longtime incumbent was ousted in the first transitional elections.[103] The second round of successful elections has already taken place in Cape Verde.[104] Algeria became one of the first African states to experience popular resistance and demands for broader representation, in 1989. This led to constitutional reforms, introducing multi-partism. After the electoral success of the Islamic Salvation Front, the military suspended the process and nullified elections. Algeria plunged into a situation of civil war.[105]

Democratisation also impacted upon **judicial institutions**. In most of the new democratic states constitutionalism and fundamental rights have become emphasised - not only as abstractions, but as essential pillars to uphold newly-established democratic states. To secure that these rights are converted into reality, almost all of these democratic constitutions provided for courts to oversee compliance with these guarantees. Particularly, the institution of a separate constitutional Court has became prevalent. Some of the "civil law countries"[106] modeled their new institution on the French system. Other countries, such as South Africa, also established separate constitutional courts.

Another enabling factor brought about by democratisation was the emergence of "**grassroots-level movements**" which could act as "engines of change" that made it impossible "for undemocratic

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101 Winning 56% of the vote in an 88% election turn-out: "The colonel takes another pace forward - towards democracy?" (1996) Nov/ Dec *Africa Today* 46.

102 "Abacha speaks" (1996) Nov/Dec *Africa Today* 11.

103 See Breytenbach (1996) at 31, naming Guinea-Bissau, Cape Verde and São Tomé e Príncipe as countries that followed the Benin model of a clear break with the past.

104 Young (1996) 7 *Jnl of Democracy* 53 at 60.

105 Addi (1996) 7 *Jnl of Democracy* 94.

106 Previous colonies of France, Portugal and Spain.

regimes to hide themselves behind the facade of nominal democratic institutions".[107] This overlapped with the greater role accorded to NGOs internationally under the UN.[108]

In 1991, ten years had elapsed since the adoption of the Charter. The year 1996 marked the tenth anniversary of the commencement of the Charter; in 1997 the Commission had been in existence for ten years. These landmarks placed the efficacy of the existing system under the spotlight. Overwhelming consensus was reached that the Charter, including the Commission, **has not met expectations**. This perception further facilitated possible strategies for structural amendment to the Charter.

6.1.5 Institutional steps

As far as involvement by the OAU in the amendment of instruments adopted under its auspices is concerned, a relatively rigid and formal process has to be followed. This entails the involvement of the OAU Assembly and the Council of Ministers. For this reason, parallels will be drawn between the process in terms of which the African Charter was adopted in the early 1980s, and the current process of adoption of the Protocol.

6.1.5.1 Official go-ahead by Assembly

Adoption of a human rights instrument becomes an institutional concern within the OAU framework when the matter is raised for the first time at a meeting of the Assembly of Heads of State and Government. This leads to a first resolution by the Assembly of Heads of State and Government, which sets the formal process into motion.

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107 Sock (1993) at 1.

108 For example, NGOs are allowed to submit written statements to CESCR Committee, and may provide expert advice to the Committee on the Rights of the Child. See, in general on the role of NGOs in human rights treaty bodies, Posner in Henkin and Hargrove (eds) (1994) at 405.

i *African Charter*

In respect of the African Charter, this happened at the **1979 session**, held in Monrovia, Liberia. The Assembly adopted a resolution which called for "a preliminary draft of an 'African Charter on Human and Peoples' Rights' providing *inter alia* for the establishment of bodies to promote and protect human and peoples' rights".[109] After the Dakar colloquium of 1978, Senegalese president Senghor had already agreed to sponsor a draft resolution about an African human rights commission at the next OAU Summit.[110] According to Welch, the involvement of Senghor was secured through the persuasion of Kéba M'Baye.[111] At the 1979 summit of Heads of State and Government, the proposal came from two states, Mauritius and Senegal, supported by another two, Uganda and Nigeria.[112] As M'Baye pointed out, the original proposal by Senghor did not refer to "peoples' rights".[113] Two states with "socialist" leniencies at the time, Guinea and Madagascar, pressed for their inclusion.[114] Through their insistence, the African Charter was given its distinctly "African" character. This initial resolution then set the process in motion, culminating in the adoption of the African Charter in 1981.

ii *African Court on Human and Peoples' Rights*

As far as an African Human Rights Court is concerned, the Assembly of Heads of State and Government set the process in motion at its 30th session. The session was held from 13 to 15 **June 1994** in Tunis, Tunisia. Proclaiming preambular awareness of "the need to strengthen the African mechanism for the promotion and protection of human and peoples' rights",[115] the Assembly requested "the OAU Secretary-General to convene a meeting of government experts to ponder in conjunction with the African Commission on Human and Peoples' Rights over the means to enhance the efficiency of the Commission in considering particularly the establishment of an

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109 Resolution AHG/115 (XVI), art 2 (b).

110 Naldi (1989) at 110.

111 (1995) at 164.

112 Kunig (1982) 25 *German Yearbook of Intl Law* 138 at 146.

113 As recounted by M'Baye (1992) at 150.

114 *Ibid.*

115 AHG/ Res. 230 (XXX).

African Court on Human Peoples' Rights".[116] It should be noted that the mandate of the proposed meeting was two-fold: It has to consider improvements to the functioning of the Commission, as well as the establishment of a judicial supplement thereto, in the form of an African Court on Human and Peoples' Rights.

The resolution was passed without debate or dissent during the Assembly session. Ben Salem, a Tunisian and at that stage Vice-President of the Commission, argued that the inference must not be drawn that the Assembly had accepted the principle of an African Human Rights Court.[117] He explained that it had become customary that the Commission would decide which aspects to include in the resolution dealing with its Activity Report. The Assembly had become used to accepting the Commission's proposed resolution without seriously considering it or its possible consequences. Adama Dieng's subsequent reference to "peoples' diplomacy" that helped secure the Assembly's authorisation, seemingly hints at this, too.[118] Another important factor that accounts for the resolution being passed, is the support of the Chairman of the OAU at that stage, President Zine El Abidine Ben Ali of Tunisia.[119]

6.1.5.2 Meeting of experts

The next step is that a group of experts assemble to either present a framework for further discussion, or come up with a drafted proposal.

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116 *Ibid.*

117 Lecture during the 26th study session of the International Institute of Human Rights at Strasbourg, held from 3 to 28 July 1995.

118 See his introductory speech at the "Legal Experts' Meeting on the question of the establishment of an African Court on Human and Peoples' Rights", Cape Town, 4 September 1996.

119 Sock (1994).

i African Charter

A Meeting of Experts of the Organisation of African Unity met from 28 November to 8 December 1979 in Dakar, Senegal, with the stated objective of preparing a first draft of an African Charter.[120] As the official reference to this group indicates, it clearly functioned under the auspices of the OAU. At the first meeting of the group of experts, they agreed on a number of "peoples' rights" and "duties" to complement individual rights.[121] As a guiding principle, the meeting adopted the principle that "the African Charter on Human and Peoples' Rights should reflect the African conception of human rights.[122] The African Charter should take as a pattern the African philosophy of law and should meet the needs of Africa".[123] Under the heading "Measures of safeguard" it was noted that the Commission does not take decisions. It simply reports to the Assembly of Heads of State and Government.[124]

After this draft had been prepared, it was to be submitted to a group of governmental experts ("plenipotentiaires", in French, translated as "plenipotentiaries" or "authorised agents"). Such a meeting was scheduled for 24 March 1980, but never took place for want of a quorum.[125] According to some, this was due to deliberate attempts to derail the process by some states that were not prepared to openly oppose the creation of a Charter.[126] After this failure, the Secretary-General changed tactics. Rather than referring the issue to an *ad hoc* meeting of governmental experts, he initiated a ministerial conference.[127] At his initiative, the President of the one consistently democratic African country (at the time), the Gambia, hosted the meeting in Banjul, where the Charter was drafted.

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120 At the invitation of President Senghor (see M'Baye (1992) at 151).

121 Benedek in Kunig *et al* (1985) at 60.

122 Two prominent Africans whose addresses to the group of experts played a significant role in the subsequent deliberations, are President Senghor and the then OAU Secretary-General, Edem Kodjo (see M'Baye (1992) at 152 - 155, discussing at length quotations from these speeches).

123 "Meeting of Experts for the preparation of the Draft African Charter of Human and Peoples' Rights", quoted as part of Draft African Charter in Kunig et al (1985) 107 - 108.

124 *Ibid.*

125 See M'Baye (1992) at 153.

126 *Ibid.*

127 Almost without exception, African states regularly attend OAU meetings (see M'Baye (1992) at 153).

ii African Court on Human and Peoples' Rights

After the Assembly adopted the resolution, the process toward establishing an African Court on Human Rights nearly grounded to a halt. It appears that the OAU would not have been able to convene the meeting "during the 1994/96 budget biennium due to a lack of allocations".[128] The International Commission of Jurists intervened by mobilising funds to cover the travel expenses of delegates. Its Secretary-General requested the South African Minister of Justice to host the event and to cover all other expenses.[129] The date proposed at that stage was May 1995. The South African government agreed and the meeting of government experts duly took place in Cape Town, but some time later, from 6 to 12 September 1995. It was preceded by a meeting of expert jurists (legal experts), who were not politicians, on 4 and 5 September.

As their point of departure, the states were offered the Protocol drafted under International Commission of Jurists auspices. This should hardly come as a surprise, as the meeting was organised by the International Commission of Jurists, in collaboration with the OAU and the South African Department of Justice. The draft submitted to states beforehand was reviewed and improved by the meeting of legal experts, which was convened by the International Commission of Jurists, the OAU Secretary General and the African Commission.[130] The aim of the initial non-governmental expert meeting was to examine the proposed Protocol article by article, suggesting and discussing possible amendments, before the Protocol was submitted to the governmental experts.[131]

The governmental experts met in Cape Town from 6 to 12 September 1995. Adama Dieng, Secretary-General of the International Commission of Jurists, opened the proceedings. Delegates from 23 countries and nineteen legal experts attended. Countries represented were Algeria, Benin, Botswana, Burundi, Côte d'Ivoire, Egypt, Ethiopia, Gabon, the Gambia, Ghana, Kenya, Lesotho, Malawi, Mozambique, Rwanda, Sierra Leone, South Africa, Sudan, Swaziland, Togo, Tunisia,

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128 Letter by Secretary-General of International Commission of Jurists, dated 22 February 1995, addressed to the South African Minister of Justice.

129 *Ibid.*

130 See OAU/LEG/EXP/AFC/HPR/RPT (I) Rev 1 at par 15.

131 Speech of Adama Dieng, 4 September 1996 (transcript of OAU).

Zambia and Zimbabwe. The legal experts were present to render technical assistance to the government experts. Considering the draft Protocol clause for clause, the meeting reformulated some provisions and adopted a final draft Protocol. Adoption of the provisions of the Protocol proceeded on the basis of consensus. When strong conflicting viewpoints to the contrary were expressed, these were recorded in an accompanying report. On 12 September 1995, the meeting of experts adopted the Protocol ("the Cape Town Protocol") and a report of the proceedings.

As was indicated, the meeting's mandate was two-fold. It not only considered the establishment of a court, but also dealt with ways of strengthening the African Commission. At the Cape Town meeting, this aspect was introduced by the Chairman of the Commission, Nguema. The main problems, as set out by him, relate to the insufficiency of funds allocated to the Commission.[132] Nguema made a number of proposals on the strengthening of the Commission. The first of these was a proposal to establish an African Court on Human and Peoples' Rights.[133]

After the Cape Town draft was discussed by the Council of Ministers, it was referred back for a second meeting of government legal experts. This meeting was scheduled to precede the 21st session of the African Commission. It took place in Nouakchott, Mauritania, from 11 to 14 April 1997. This meeting was attended by 33 delegates from 19 states, members of the African Commission and other resource persons.[134] The Nouakchott Protocol,[135] adopted by consensus,[136] changed the Cape Town proposal in two very significant respects:

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132 See OAU/LEG/EXP/AFC/HPR/RPT (I) Rev 1 at par 11.

133 On these proposals, see OAU/LEG/EXP/AFC/HPR/RPT (I) Rev 1 at par 13, and par 14 on further proposals adopted by meeting.

134 Delegates representing the following countries were present: Algeria, Burkina Faso, Burundi, Cameroon, Chad, Côte d'Ivoire, Egypt, Gabon, the Gambia, Libya, Mali, Mauritania, Mozambique, Nigeria, Senegal, South Africa, Sudan, Togo and Tunisia (see CM/326(LXV)).

135 OAU/LEG/EXP/AFCHPR/PROT(2).

136 See OAU/LEG/EXP/AFCHPR/RPT(2) at par 50.

- It introduced an optional declaration to accept the competence of the Court to receive petitions directly from individuals and NGOs.[137] In the Cape Town Protocol, this competence was an automatic consequence of ratification.

- Fifteen (and not eleven) states are required to ratify the Protocol before it will take effect.[138]

6.1.5.3 Ministerial conference and approval by Council of Ministers

Using the experts' draft as a starting point, an OAU Council of Ministers then takes up the issue. The matter may be discussed at a special ministerial conference or at the ordinary meetings of the Council of Ministers. At a **ministerial conference**, the "appropriate ministers" attend. As far as judicial institutions are concerned, they are the Ministers of Justice. A matter on which a ministerial meeting has reached consensus usually has to proceed to the **Council of Ministers** for its determination. The function of the Council is, amongst others, to narrow down the issues to be discussed by the Assembly, and to prepare the agenda of the Assembly's annual meeting (usually in June or July). The Council of Ministers consists only of Ministers of Foreign Affairs, meeting twice yearly.

i African Charter

In the process of adopting the Charter, a ministerial conference was organised. The OAU Ministerial Conference on the Draft Charter comprised of African Ministers of Justice and other legal experts. They met in Banjul, the Gambia, on two occasions. The first meeting took place from 9 to 15 June 1980. Only the Preamble and eleven articles of the draft were adopted within that week.[139] Much resistance was forthcoming from a number of states that expressed misgivings about the preliminary draft. They described the draft as unbalanced, and favoured a capitalist economic structure.[140] At this rate of progress, the project of establishing the Charter was in danger of losing momentum.

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137 Art 6(5) of the Nouakchott Protocol; see also the discussion in ch 7.2.8 below.

138 See discussion in ch 7.2.35 below.

139 See M'Baye (1992) at 158.

However, at the second session, held from 7 to 19 January 1981, again in Banjul, the whole Charter was finalised. Two factors caused the meeting to accelerate into action when it met for the second time. The first was the fact that some members of the delegation of Upper Volta (now Burkina Faso) were politically victimised after the Banjul meeting of June 1980, putting in a new light "the necessity not only to insist on human rights but also the importance of their effectiveness".[141] The second factor was the result of political pressure of a different nature: At the Seventeenth Ordinary Session of the Assembly of Heads of State and Government, the ministerial meeting was urged to "exert efforts to complete its work".[142] Instrumental in this resolution was the initiative of the OAU Secretary-General Kodjo. He persuaded Gambian President Diawara to table the resolution at the next Assembly session.[143]

On 10 June 1981 Edem Kodjo, the then Secretary-General of the OAU, presented the draft adopted at the ministerial conference to the OAU Council of Ministers. The Council considered the draft Charter. Several of the Ministers raised points of criticism about the draft African Charter. Nevertheless, the Council submitted the Draft Charter for the Assembly's consideration, with a recommendation that it be adopted by the Assembly.

ii *African Court on Human and Peoples' Rights*

Once a protocol establishing a court has been drafted by government experts it is not nearly the end of the road. Confusion about the complexities involved is apparent from the following statement by Sock, writing about the steps to follow the adoption of the International Commission of Jurists draft Protocol in Geneva: "The draft Protocol ... will be submitted to the Council of Ministers of the OAU for consideration and to the next Summit of Heads of State and Government for approval".[144] Not the protocol drafted by the International Commission of Jurists workgroup, but the one requested by the OAU Summit will be considered further. The approval of the Protocol by

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140 See M'Baye (1992) at 157.

141 Balanda in Ginther and Benedek (eds) (1983) 134 at 136.

142 OAU CH/ 1149 (XXXVII).

143 See M'Baye (1992) at 158.

144 Sock (1994) 2 *African Topics* 9 at 10.

the Summit was not to be "at the next OAU Summit", as a few other avenues had to be followed first.

In the case of the Protocol on the Court a ministerial conference was not organised initially, as in the case of the Charter. The matter was referred to the Council of Ministers after the Cape Town proposal was adopted by a meeting of experts. The Council started deliberating the issue when the establishment of a Court was placed on the agenda for the ordinary session of the OAU Council of Ministers, held in Yaoundé from 1 to 5 July 1996.[145] OAU member states were invited to submit comments and observations before this meeting.[146] Only five states complied,[147] forcing the Council of Ministers to postpone consideration of the draft Protocol to its next session, which was to be held in March 1997.[148]

A request was directed to the OAU Secretary-General to "once again circulate the Draft Protocol to Member States inviting their views, comments and observations within a limited period and to submit a report thereon to the 65th Ordinary Session of the Council of Ministers to facilitate consideration of the Draft Protocol".[149] The Committee also approved the recommendations made at Cape Town in relation to the strengthening of the Commission.[150] In its resolution taking note and authorising publication of the Commission's Ninth Annual Activity Report, the Assembly called on the Secretary-General "to forge ahead with the elaboration of the draft instrument establishing the African Court on Human and Peoples' Rights in consultation with the African

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145 Naldi and Magliveras (1996) 8 *RADIC* 944 at 969.

146 *Ibid.*

147 These states are Mauritius (submitted on 8 March 1996), Lesotho (on 13 March 1996), Burkina Faso (on 21 March 1996), Senegal (on 30 April 1996) and Tunisia (on 2 June 1996).

148 See Final Communiqué, 20th Session at par 16.

149 See Resolution on Measures Taken to Implement Resolution AHG/Res 230 (XXX) Relating to the Strengthening of the African Commission on Human and Peoples' Rights and the Establishment of an African Court of Human and Peoples' Rights, CM/Res 16/4 (LXIV).

150 *Ibid.*

Commission".[151] This resolution underlines the pivotal role of the Secretary-General in the institutional steps to secure the establishment of the Court.

At the next meeting of the Council of Ministers, held in Tripoli, Libya, from 24 to 28 February 1997, the matter of the approval of the Protocol again featured on the agenda, but was not brought to a conclusion.[152] At that stage, four more states have submitted their comments.[153] Some of the countries that participated in the Cape Town drafting process, expressed new reservations. Côte d'Ivoire, supported by Nigeria and South Africa, proposed that another meeting of legal experts be held.[154] It was decided at the Tripoli meeting that the next meeting of the Council of Ministers, to be held in Harare from 28 to 30 May 1997, would consider the draft Protocol, as amended in Nouakchott. At the Tripoli meeting it was also decided that governments should include in their delegations to Harare the experts who attended the meeting of experts in Nouakchott.[155] This would ensure that legal and political considerations were considered simultaneously.

At the Council of Ministers meeting in Harare at the end of May, discussion of the Protocol was again postponed.[156] Only a handful of the legal experts who had been involved previously, attended. At the Harare meeting the Council of Ministers adopted the approach that the establishment of a

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151 See Resolution on the African Commission on Human and Peoples' Rights AHG/ Res 250 (XXXIII). The Assembly expressed its "immense satisfaction" with the Commission's work and requested the Secretary-General to submit a report at its next session on steps taken to alleviate the financial difficulties of the Commission.

152 The meeting decided to request that the draft Protocol be circulated among member states once again, inviting them to submit comments to the OAU Secretariat before 30 March 1997, and to "convene a Governmental legal experts meeting in April 1997 to finalize the Draft Protocol taking into account the comments and observations received from Member States" (see CM/326(LXV).

153 The four states are Benin (submitted on 4 September 1996), Côte d'Ivoire (on 13 September 1996), Madagascar (on 26 September 1996) and Ethiopia (on 7 October 1996).

154 This meeting took place in Nouakchott, Mauritania, prior to the 21st session of the African Commission, see par (b) (ii) above.

155 The Council decided to "request all Member States to include the same legal experts in their delegations attending the sixty-sixth Ordinary session of the Council of Ministers" (see CM/326(LXV)).

156 Sequence of events here based on interview with John Makhubela, South African legal expert represented at Nouakchott and Harare.

court should be re-thought. It was felt that the applicable government officials have not been involved sufficiently in the process. Consequently, another meeting is to be held. This meeting, to be held in early December in Addis Ababa, will consist of two phases: experts and diplomats will first meet to finalise a draft; this will be followed by the meeting of Ministers of Justice and Attorney-Generals. If agreement could be reached on a draft at this meeting, it will be forwarded to the Council of Ministers and to the Assembly, hopefully in July 1998. It appears that the whole process has been unduly prolonged because an inter-ministerial conference (involving the appropriate ministers, the Ministers of Justice) had not been organised earlier.

6.1.5.4 Back to the Assembly for its stamp of approval and opening for ratification

The Assembly of Heads of States and Governments must finally discuss and approve or reject the proposal.

i The African Charter

At its eighteenth session held at Nairobi, in 1981, the Assembly adopted the African Charter. This date, now celebrated as a decisive moment for human rights promotion in Africa, passed almost unnoticed at the Assembly session and in contemporaneous press reports, government feed-back or other discussions immediately thereafter. The proposal for the Charter's adoption was postponed until midnight of the last day of the meeting. At that stage, President Jawara of the Gambia pressed for the adoption of the Charter. Perhaps motivated by the late hour and fatigue after days of deliberations, the heads of states present adopted the Charter without debate. No formal vote was even taken on the matter.[157]

ii The African Court on Human and Peoples' Rights

Consideration by the Assembly of Heads of State and Government of the Protocol to the Charter could have taken place in 1997. The Assembly meets once annually, in June or July. As usual, te

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157 See Ouguergouz (1993) at 64.

session of the Council of Ministers immediately preceded the Assembly meeting. Naldi and Magliveras were optimistic and concluded their discussion of the Protocol with the view that it "will be forwarded to the Assembly for formal adoption at the 33rd ordinary session to be held in June 1997".[158] This was not to be, because the Council of Ministers postponed the finalisation of the Protocol yet again, primarily due to the immediacy of the crises in Sierra Leone, where a military regime seized power a few days before the summit meeting began.[159] Discussions during the Assembly meeting (from 2 to 4 June 1997) included whether to endorse military steps by ECOMOG, the ECOWAS multi-national force already deployed in the area.[160] Other focal points were the events in the Democratic Republic of Congo, and the inauguration of the African Economic Community.[161] Although the rhetoric of human rights "peppered the speeches of delegates",[162] no steps were taken to convert the dream of an African Court on Human Rights into reality. The next OAU summit will be held in Ougadougou, Burina Faso, probably in June 1998.

6.1.5.5 Entry into force

i The African Charter

The Charter was opened for ratification immediately after its adoption on 27 June 1981. The number of ratifications required to cause the Charter to come into force, was 26. The process of securing 26 ratifications took off very slowly. Only one state, Mali, ratified the Charter in 1981.[163] A larger number of states, six,[164] indicated their imminent ratification by signing the Charter in

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158 (1996) 8 *RADIC* 944 at 969.

159 They seized power on 25 May 1997.

160 See eg "OAU Yes to Force in Sierra Leone" (4 June 1997) *The Citizen* 12: "The decision to endorse a military option had been adopted first by the OAU foreign ministers in their meeting last week. The heads of state were unanimous in taking a decision not to recognise this regime at all".

161 See "Gloomy Look at Africa's Economy" (4 June 1997) *The Citizen* 12.

162 See "OAU Vows to Get Tough on Coups in Future" (5 June 1997) *Pretoria News* 10. The same newspaper also mentions that quite a number of the 31 heads of state present at the meeting had to leave early.

163 One may note with surprise the fact that the Gambia, so instrumental in its adoption, only ratified in 1983.

164 They were Congo, Egypt, Guinea, Rwanda, Senegal and Sierra Leone.

1981. Of these signatory states, only three followed up their signature with ratification in 1982.[165] Another two states, Liberia and Togo, ratified the Charter during 1982. Another five states ratified in 1983, bringing the total number of ratifying states to eleven. This was still far from the target of 26. Disappointingly, the momentum then seemed to have been lost, when the number of new ratifications dropped to two in 1986. At this point, the International Commission of Jurists undertook a bold initiative, by convening a meeting of states parties about this matter in Nairobi. The president of the International Commission of Jurists, Adama Dieng, thereafter engaged in "proselytizing missions",[166] which accelerated the process of ratification again. The official date on which the Charter turned into force, is 21 October 1986, three months after the deposit by Niger of the 26th instrument of ratification.

ii The African Court on Human and Peoples' Rights

Once the Assembly will have adopted the Protocol, it will be open for ratification by states which have already become party to the Charter. In terms of the Nouakchott draft, the Protocol will be open for both signatures and ratifications. The Protocol will come into force one month after fifteen instruments of ratification have been deposited.[167] This number is much smaller than a simple majority of states parties to the African Charter, which at the present would be 27 - almost the same as the number of ratifications needed for the Charter to have entered into force. By mid 1997, the total number of parties to the Charter stood at 51, the same as the number of OAU member states when the Charter was adopted. Fifteen states represents almost a third of the OAU members and of the number of states parties to the Charter.

It may be a relatively small number, but even this could be difficult to attain. One may speculate on the readiness of states to accept the jurisdiction of a supra-national court and on the likelihood of particular states to ratify the Protocol. A few relevant factors are suggested:

- As in the case with the Charter, the **involvement of states in the drafting process** may be an important factor in decisions to ratify quickly. The Cape Town meeting was attended by

165 Congo, Guinea and Senegal.

166 Welch (1995) at 166.

167 Art 31 of the draft Protocol.

delegates from 23 countries, while the Nouakchott meeting was attended by delegates from only 19 states. Only eleven countries attended both these meetings, indicating a commitment on the part of those states. They are: Algeria, Burundi, Côte d'Ivoire, Egypt, Gabon, the Gambia, Mozambique, South Africa, Sudan, Togo and Tunisia.

- The **attitude of state representatives** during the drafting process may also be indicative of a tendency to ratify in the foreseeable future. At the Nouakchott meeting representatives from Mauritania, the Gambia, Senegal and Tunisia expressed their unreserved support for the idea of a Court during the general debate.[168]

- **Diamond**, in his study of democracy in sub-Saharan Africa, cites nine states which have, according to the 1996 Freedom House score, established **enduring liberal democracies**.[169] These states are: Cape Verde, Mauritius, São Tomé e Príncipe and South Africa (all with a 1.5 rating), Benin and Botswana (with a 2.0 rating) and Mali, Malawi and Namibia (all with a 2.5 score). **Breytenbach** divided African democracies into two categories: the "old" democracies and states in which "new multi-party systems" have been put in place after 1990.[170] Of the first group, five democracies seem to endure. They are Botswana, Mauritius, Namibia, Senegal and Zimbabwe. He lists 31 states in which democratic election have taken place since 1990.[171] Using five socio-economic factors as indicators,[172] he then identified six countries in which a sustained democracy seems more likely. The six "new" democracies likely to survive are Congo, Gabon, Lesotho, São Tomé e Príncipe, Seychelles and South Africa. In his view, at least eleven consolidated democracies will endure in Africa. This makes the difference in the number of ratifications required by the Cape Town Protocol (11) and Nouakchott Protocol (15) very significant. An eventual decision to confirm the increase of the required number to fifteen will be confirmation of the OAU's reluctance to set a working human rights system in motion. Assuming that there is a close link between a democratic style of governance, the

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168 Report of the Second Governmental Legal Experts Meeting, OAU/LEG/EXP/AFCHPR/RPT(2) at par 14.

169 See Diamond (1997) at 54 - 55; a score of 1.0 on the Freedom House scale represents the closest a state can get to a "liberal democracy", the lowest score on the scale is 7.0 (non-oppositional authoritarian regimes).

170 (1996).

171 (1996) at 37 - 38.

172 These factors are population size, *per capita* income, literacy, level of urbanisation and ethnic structure.

existence of a truly independent judiciary and voluntary subjugation of state sovereignty to an international court, it seems that these states stand the best chance of ratifying the Protocol first. As this number of identified "enduring democracies" (eleven) is less than the number of ratifications needed, one may not be criticised for despairing about the possibility of the Protocol ever turning into force. Even developed democracies, such as those in Western Europe, have been reluctant to accept the jurisdiction of an international human rights court.

- **Commitment to human rights in international fora** is also a factor indicative of a deeply-seated human rights commitment. At the 53rd UN Human Rights Commission meeting (in April 1997) only two African states (of the 15 represented on the Commission) voted in favour of establishing a Special Rapporteur on Nigeria. These two countries are South Africa and Uganda.[173]

Ratification of the Protocol by states will depend on a multiplicity of factors, rendering almost futile any prediction about which states are most likely to ratify it first. With reference to the factors listed above, the five most likely ratifying states are Botswana, Mauritius, Namibia, São Tomé e Príncipe and South Africa.[174]

6.1.5.6 Putting institutions into place (operationalisation)

i African Commission, established under the African Charter

The African Commission did not start operating immediately when the Charter entered into force (21 October 1986). In terms of the Charter, members were to be elected by the Assembly. The next meeting of the Assembly only took place in June 1987. After the eleven members had been elected, they could meet to elect a Chairman. Only thereafter did the Commission begin to elaborate and adopt Rules of procedure, in terms of which it could operate. The seat of the

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173 See (June-July 1997) *African Topics* 32.

174 These states are identified in respect of at least two of the criteria above.

Commission had also not been assigned in the Charter. A final decision on this matter occasioned further delay in setting up a secretariat. The seat at Banjul was inaugurated on 12 June 1989.[175]

ii The African Court on Human and Peoples' Rights

Once the Protocol has entered into force, the Assembly will still have to elect the eleven judges. The seat of the Court will have to be determined. The President and Vice-President have to be chosen. Thereafter, the registrar and staff need to be appointed. As the President will be a full-time member of the Court, he or she will have to arrange to end his or her current employment, and to establish himself or herself at the seat of the Court. Rules of procedure have to be adopted to organise the detailed functioning of the Court.

6.2 *Arguments in favour of an African Court on Human and Peoples' Rights*

The case for the establishment of an African Court on Human and Peoples' Rights will now be addressed. In arguing for a Court, many different issues may potentially be raised. Highlighted below are respects in which a Court, *over and above a Commission*, would improve human rights realisation under the African Charter. The detailed functioning of the proposed Court, as set out in the Nouakchott Protocol,[176] is not discussed here. What is under discussion, is the general principle of creating a judicial mechanism to secure the human and peoples' rights provided for in the African Charter. To this limited extent, reference will be made to the Nouakchott Protocol ("the Protocol").[177]

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175 See Second Activity Report at par 13.

176 Reference to "Protocol" is to the latest draft, the one adopted at Nouakchott in April 1997 (see ch 7.2 below).

177 For a detailed discussion of the Protocol, see ch 7 below.

6.2.1 Binding, authoritative and conclusive decisions

The Commission, being a non-judicial body, does not give judgments. It was intended mainly as a promotional body. Its protective functions are limited to investigation and the making of recommendations. These recommendations may be persuasive, but it is not mandatory for implicated states to give effect thereto. They are directed at states and are published in the Commission's annual reports after approval by the OAU Assembly. At the ministerial meeting held to draft the Charter, the Chairman of the committee of experts (M'Baye) drew attention to "the essentially technical terms of reference of the African Commission".[178] His aim apparently was to appease disconcerted states by reassuring them about the limited intrusion allowed by the Charter.

Rembe has pointed out that one of the draw-backs of the Commission is the lack of a mandate to make final binding decisions.[179] Indeed, the Commission is little more than a sub-committee of the OAU, entitled to investigate and recommend to the parent body, but without the power to initiate action. This makes enforcement dependent on the very institutions (governments) against which protection is sought. Rembe therefore recommended that "a court with final decision making power be set up".[180] These decisions will not depend on the consent of another body, but will derive their authority from the Court.[181] No further appeal will be possible, and the decision need not be evaluated or confirmed by a political body.[182] Such decisions will be enforceable, will be followed up and will be implemented.[183]

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178 Annexure to Report of the Secretary-General on the Draft African Charter, at par 13 of the rapporteur's report.

179 Rembe (1991) at 44.

180 *Ibid.* See also interview with Commissioner Amega (1996) (Oct - Dec) *AFLAQ* at 43.

181 See eg comments by Commissioner Ondziel in (1996) (Oct - Dec) *AFLAQ* at 35.

182 The Assembly of Heads of State and Government, or the Council of Ministers.

183 See also the sentiments expressed at eg the Third and Fourth Commonwealth Judicial Colloquia: The Banjul Affirmation (adopted after the third colloquium) expressed its belief that the time has come for a court "whose decision would be binding", while the Abuja Affirmation (adopted after the fourth colloquium) reiterated the need for a court "with the power to give binding judgments".

The Protocol provides for a court that gives final and binding judgments.[184] Once operational, the Court will greatly enhance the effectiveness of the Charter as an African human rights instrument by providing the best available guarantee that human rights violations will be redressed.

6.2.2 Implementation of effective remedies

Complainants who approach the African Commission are required to have exhausted local or domestic remedies to have their complaints considered. The lack of remedies at the national level is the most important reason for the existence and necessity of supra-national recourse. The underlying idea is consequently that, where a state fails to provide effective remedies, the Commission will step in. Although it has taken encouraging and innovative steps, the Commission has not been able to provide effective remedies, or to oversee their realisation.[185] Its efforts in this regard had been erratic and *ad hoc*. This is hardly surprising, given the Charter's silence about any form of remedy that follows a finding of violation.[186] In fact, the Charter only mentions this concept as an obstacle, in the form of the general rule that "domestic remedies" have to be exhausted before the Commission will consider a communication.[187]

Findings of a court, being binding, can be implemented effectively. This will lead to real sanctions and remedies, and not only recommended courses of action.[188] The perception must be firmly established that ordinary Africans stand to benefit from the African Charter and its institutions. Human rights and democracy are closely connected - if not in practice, then in people's minds.

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184 See art 27(2) of the Protocol.

185 See par 3.3.3.1.iv above.

186 This function is not explicitly provided for by the Charter, but a generous and purposive interpretation of s 45(2) can include the ordering of appropriate remedies. This sub-section mandates the Commission to "ensure the protection of the human and peoples' rights", but adds that this has to be done "under conditions laid down by the present Charter". This qualification complicates matters and makes a broadened interpretation unlikely.

187 See art 50 and art 56 of the Charter. Where "redress" is mentioned, it refers to "redress already given" by a state, something which may be relevant in a state's explanation of a violation as part of the inter-state communications procedure (art 47 of the Charter).

188 See eg observations made by Commissioner Kisanga in (1996) (Oct - Dec) *AFLAQ* at 31.

Once the concept of human rights has become important to members of civil society, they will have an added incentive to assist (and even to fight) to ensure continued democratic governance in their country. In this way, the Court may, through its pronouncements, indirectly strengthen democratic values and help consolidate fragile African democracies.

The Protocol provides that the Court may follow a finding of violation with an appropriate order to remedy that violation.[189] The Court may also take interim measures if required. These remedies are ultimately supervised by the Council of Ministers, acting on behalf of the Assembly.[190]

6.2.3 Taking "universalism" seriously

If the universality of human rights is taken seriously, not only substantive norms, but also procedures and mechanisms should be universalised. The definitive regional system, the European Convention system, at present provides for a Commission and a Court. This model has been adopted in the Inter-American system. States should not be allowed to pretend that they adhere to universal norms, while at the same time detracting from the model accepted in other regional human rights sytems.[191]

6.2.4 Development of an African human rights jurisprudence

Human rights documents are by their very nature couched in vague terms, as they embody open-ended norms applicable to an endless configuration of factual situations. This general statement rings even more true in the case of the African Charter. The Charter presents three almost unique characteristics that are in need of authoritative conceptualisation. These features are the concept of

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189 Art 26(1) of the Protocol.

190 Art 29(2) of the Protocol.

191 See Mubiala (1997) 9 *RADIC* 42 at 52: "on ne peut pas prétendre adhérer à un système de valeurs en y soustrayant ce qui apparaît en définitive comme la plus grande conquête en matière des droits de l'homme, à savoir la soumission des Etats à la juridiction internationale".

"duties", the concept of "peoples", and the consequences of including socio-economic rights as "enforceable" rights alongside civil and political rights.

- The African Charter is the first international human rights instrument to give prominence to "duties" as part and parcel of binding treaty provisions.[192] Where the concept had been included previously, it emphasised duties as correlatives to rights, and as a factor restricting the exercise of the rights of others.[193] The concept is elaborated more fully in the Charter, and is for the first time conceived as an obligation that runs "from the individual to the state".[194] The uniqueness of this concept makes its ambit all the more unpredictable. Kunig expressed the opinion that the misuse of the concept of "duties" by governments "is further facilitated by the very general and even vague wording of this chapter".[195] One explanation for this vagueness is that it is the product of a political compromise, included at the insistence of countries at that stage pursuing socialist policies, such as Ethiopia and Mozambique.[196] After an analysis of the duties set out in articles 27 to 29 of the Charter, Steiner and Alston concluded: "The duties are of such breadth and so ambiguous in their connotations that a regime of serious enforcement without some degree of prior elaboration is difficult to imagine".[197] Indeed, as they are formulated, these articles raise numerous questions. With regard to article 29, for example, the possibility of tension with the rights set out in other provisions, such as freedom of conscience, religion, association and assembly are apparent.[198] How should possible conflicts be resolved? The Charter itself provides little to guide anyone seeking answers to questions like these.

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192 This statement does not deny the extensive provision for "duties" in the American Declaration of the Rights and Duties of Man (adopted already in 1948). But it is significant that these provisions were not incorporated into the American Convention. In the case of the African Charter, "duties" are given equal status alongside rights for the first time in a legally enforceable instrument.

193 Notably in the American Declaration.

194 Steiner and Alston (1996) at 692.

195 Kunig *et al* (1985) 59 at 63. "This chapter" refers to ch II of the Charter, which deals with "duties".

196 Gittelman in Welch and Meltzer (eds) (1984) 152 at 154.

197 Steiner and Alston (1996) at 694 - 696.

198 Examples of possible confict are provided by the following: It may be difficult to reconcile the equality guarantee (art 3) with a duty "to respect ... parents at all times". Furthermore, the absolute duty on persons

Footnotes continued on next page.

- The concept of "peoples" is left undefined.[199] Peoples' rights are set out in articles 19 to 24. The nature of the rights accorded to "peoples" does not make it any clearer who the bearers of these rights are. This uncertainty is illustrated well with reference to the right to self-determination of "all peoples". One interpretation is that the concept "peoples" refers to potential nation-states which were denied independence through colonial oppression. When the Charter was adopted, some African states still had to *rid themselves* of this yoke, and to others the colonial experience was a recent memory. The concept may however also be broader, in that it refers to the whole of the population of any independent member state.[200] This interpretation makes the *continued independence* of the newly formed nation state the aim of this collective right, and effectively equates the "people" with the contemporaneous political elite. Another interpretation is that the concept refers to ethnic, religious, linguistic and other minorities (or groups) within the settled borders of the post-colonial state. In Ankumah's view, the Katangese secession case provides an example of how the Commission "shied away from making a pronouncement as to whether or not it had the competence to review self-determination claims".[201]

With one sweep, article 19[202] extends the principle of non-discrimination to both the public and the private spheres. Compared to the elaborate legislative provisions required to attain similar goals in Canada, the USA and the UK, this is surprising and ill-conceived. Such a sweeping provision does not differentiate between governmental actors, non-governmental actors involved in aspects of public life such as housing, and non-governmental actors in the private sphere involving more personal issues.

"not to compromise the security of the State" of which they are nationals or residents may conceivably conflict with the right to associate and assemble freely (arts 10 and 11).

199 See eg Ouguergouz (1993) at 133 - 135, who shows that it lends itself to at least three interpretations.

200 The French version of the Charter refers to both the term "peuple" and "population" (in eg art 21(1)), where the English version uses the term "people" throughout.

201 Ankumah (1996) at 164.

202 All "peoples" are equal, and the principle of non-discrimination applies between "peoples". The concept "people" is quite controversial. The argument here departs from the premiss that these rights may be invoked by individuals belonging to various minority groups within a state.

- In the Charter, some socio-economic rights are guaranteed without qualification as to their enforceability.[203] This may be contrasted with other human rights instruments, which provides for the "progressive realisation" of such rights.[204] The Commission has on occasion touched on socio-economic rights, but made a general finding without any clarification or discussion of the conceptual difficulties involved.[205]

Certainty about what the standards of the Charter are, is needed for the following reasons:

- Information about the Charter is a prerequisite for realisation. For this reason, dissemination has been identified as a central function of the Commission. In practice, dissemination of vague norms is problematic. Especially in a rural, uneducated or illiterate environment these standards should be concretised. The concretisation of these norms will be enhanced once a court gives authoritative interpretations. To merely tell Africans that they have "freedom of expression within the law" or "the right to a general satisfactory environment" means very little. A case-law of examples and precedents will give the Charter a concrete form and will make education about its provisions easier.

- States are required to report to the Commission on measures adopted domestically to enforce the provisions of the Charter. This obligation is difficult (if not impossible) to comply with and to monitor without a clear, conceptualised and concretised standard against which the realisation of specific rights by individual states could be measured.

- Human rights protection in any region requires a regional human rights jurisprudence. The need is all the more pressing in Africa, due to the restrictive formulation of many rights in the African Charter and the need to inspire domestic courts. The development of an African-based

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203 See eg art 16 ("Every individual shall have the right to enjoy the best attainable state of physical and mental health", to an extent qualified in art 16(2)), and art 17 ("Every individual shall have the right to education").

204 See eg the CESCR art 2(1): "Every State Party to the present Covenant undertakes to take steps ... to the maximum of its available resources, with a view to achieving progressively the realization of the rights recognized in the present Protocol by all appropriate means, including particularly the adoption of legislative measures".

205 See ch 3.3.3.3 above.

case-law on human rights could serve as a source of pride and renewed interest in devising "African solutions" for "African problems".

It is true that the African Charter endowed the Commission with a mandate to provide guidance to states in respect of the making of laws.[206] Huaraka accordingly stated that "the Commission could develop a uniform system of law for the promotion, interpretation and enforcement of human and peoples' rights in Africa". The Commission had not been very successful in realising this aim. Several reasons account for this failure. During the African Commission's first discussion about the possible establishment of a court, commissioner Umozurike noted that the Commission "is not really in a position to develop the jurisprudence of human rights in Africa ... as no lawyer had as yet appeared before it".[207] As the Commission is not regarded as a judicial tribunal, no provision is made for legal representatives to appear before it. Being overburdened by numerous cases, with limited time at their disposal and backed by restricted technical assistance, the Commission is not able to analyse issues before it in any depth. Evidence of these drawbacks is found in the sparse reasons given for decisions of the Commission. The facts are lacking, making a meaningful analysis of the decision problematic.

To a certain extent it is true that guidelines about the substance of Charter provisions could be provided by the Commission (or by any quasi-judicial body). Indeed, many of the international monitoring bodies issue general comments, which serve the same purpose. Although some "general comments" have been made by the Commission,[208] these comments often lack specificity or are not made public. An example of the latter category is the following extract from the Commission's Sixth Annual Activity Report: "The Commission examined at its 12th and 13th Sessions the right to development in the light of the African Charter". Without concretising the discussion in a resolution or a "general comment", this information remains meaningless. While an effort has elsewhere been made to distill a systematic and comprehensive "Commission-view" from

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206 Art 45(1)(b): the function to "formulate and lay down principles and rules ... upon which African Governments may base their legislations".

207 Report of the 15th Session of the African Commission on Human and Peoples' Rights, Banjul, 18 - 27 April 1994, at 13.

208 See ch 3.1 above.

comments made during the examination of state reports, this picture remains fragmented and cannot be said to resemble an authoritative interpretation.[209]

In terms of the proposed Protocol, the Court will be required to give reasons for both its advisory and contentious decisions. Dissenting and separate opinions are also allowed in both instances.[210] This provides the system with those prerequisites for the development of a human rights case-law which have been lacking so far. The development of an African-based jurisprudence is not only indispensable for the protection of human rights on the continent, but also to develop an indigenous legal framework. Africans, including lawyers, must have trust in home-grown institutions and approaches rather than instinctively relying on precedents and approaches adopted in other regions of the world.

6.2.5 Publicity will be maximised

One of the crucial respects in which adjudication differs from mediation, conciliation and arbitration is in its public nature.[211] Dissemination of information about the Commission's activities (and, as a consequence, about the Charter itself) has been stifled by some provisions of the Charter as well as its own interpretation thereof.[212] In his speech at the opening of the meeting of experts in Cape Town, the South African Minister of Justice Dullah Omar, remarked that the precise impact of the Court is unpredictable, but expressed his conviction that "its establishment will raise awareness in the field of human rights generally".[213] A court is, by its very nature, a public institution. Its activities are more likely to attract media attention and to capture the public imagination than those of the Commission.

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209 See ch 3.1 above.

210 See art 4(1) (on advisory jurisdiction) and art 27(4) and 27(5) (on contentious jurisdiction) of the Protocol.

211 See ch 8.1.10 below.

212 See ch 2 above.

213 Photocopy of speech at 8, as typed.

In principle, hearings of the proposed Court will be public. However, proceedings may take place in camera under unspecified exceptional circumstances.[214] This is a far cry from the present position, in terms of which the Commission considers and reaches findings on communications during closed private sessions.

6.2.6 Strengthening local courts

Applying human rights provisions in states without a human rights tradition is sometimes risky and requires a courageous judiciary. The decisions provided by a pan-African Court on Human Rights may provide domestic courts with precedents which can be applied locally. In this sense, the hands of domestic judges will be strengthened. They may justify decisions that could embarrass states with reference to cases already decided by the all-African Court. Especially the jurisprudence on claw-back clauses, if interpreted narrowly, will set precedents for domestic courts on which to base a broad interpretation of the term "law".[215] Although such decisions also exist in other jurisdictions, in particular that of the European Court of Human Rights, the use of non-African case-law could easily be countered by arguments against the importation of ideologically unsound tenets into African legal systems. This excuse will lose much of its persuasiveness if the import is of an African origin.

6.2.7 Example of and encouragement for further inter-African co-operation

In spite of the fact that the OAU has been in existence for more than 35 years, inter-African co-operation has not become very visible. The visibility attached to the OAU is almost exclusively due to the annual meetings of heads of state and government. By contrast, a court will function continuously at the supra-national level. As a high profile institution, a court will symbolise the possibility of inter-continental co-operation and may prove instrumental in forging legal unity in

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214 See art 10(1) of the Protocol.

215 In terms of such an expansive reading, "law" in eg art 9(2) ("Every individual shall have the right to free association provided that he abides by the law") does not refer to the local (positive) law, but extends to the legal position under international human rights law in eg the European and American Conventions.

Africa. By installing a common framework of the rule of law, democratic governance and respect for fundamental human rights in African states, the Court will provide viable building blocks for unitary institutions in Africa. As Africa moves in the direction of closer co-operation and unity in terms of the Treaty establishing the African Economic Community, it becomes imperative that cross-continental projects become visible. This will help create much needed momentum toward closer links at different levels. In movements towards regionalism, the institution of the Court may provide a leadership role in counteracting the centrifugal forces of regionalism.

Inter-African co-operation, especially of NGOs, will be necessary to ensure that the number of states required to put the Court in place ratifies the Protocol as soon as possible. Without the mobilisation of inter-African support and pressure on governments to ratify, the Protocol can easily become a dead letter, or take decades to come into force. In this respect, inter-African campaigns are a prerequisite for the establishment of the Court, as much as it may be a by-product of the formation of the Court.

The creation of closer continental co-operation will both lead to and depend on the evolution of one system of law. In relation to the European experience, Koopmans remarked that the growing system of European public law is primarily a set of standards with which law makers at all levels have to comply.[216] Courts play a crucial role in this process because these "standards can only be effective when the courts ensure that their application will be observed".[217] Parliaments and cabinets are inappropriate institutions to settle disputes about the observance of common European standards. They "have been elected or appointed for quite different purposes", which do not include deciding on the compatibility of governmental action with European public law.[218]

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216 (1991) *Public Law* 53 at 62.

217 *Ibid.*

218 Koopmans (1991) *Public Law* 53 at 63.

6.2.8 An impartial tribunal can depoliticise conflict

Human rights disputes are often very politically charged. By their very nature, individual complaints are directed at the authority exercised by the state. Politicised disputes may be addressed at least three levels: at the political level, by a political body; through mediation or settlement, usually undertaken by a quasi-judicial body; or by resolution of a judicial tribunal. Under the current system in Africa, the Assembly dominates the Commission. It is for the Assembly to decide whether recommendations should be converted into binding obligations on states at the political level. It is for the Assembly to decide whether in-depth studies should be conducted in cases of massive violations of human rights.

In the European system a political body, the Committee of Ministers, plays an important role. This body oversees all cases. It also decides cases that had not been referred to the Court. The danger lurks large that, as it is "a political, not a judicial organ, its deliberations (would) tend to be governed by political considerations".[219]

It is suggested that overly politicised issues will often not be efficiently addressed by diplomacy, mediation or friendly settlement. Judicial and political decisions differ in nature. Courts, including international or regional courts, use juridical concepts, their criteria are standards of legality, and their methods are enquiries into legal proof. The tests of validity and the basis of decision "are naturally not the same as they would be before a political or executive organ of the United Nations".[220] The resolution of some of these conflicts by a court may be preferable to resolution through pressure and coercion.[221] It has been suggested that states would sometimes submit disputes for decision by an inpartial tribunal when they do not want those disputes to be resolved in more "political" dispute resolution settings. These would be situations where a state would not want to be seen to give in to a political settlement or to concede. A judicial decision would give a sense of inevitability.

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219 Bartsch in Matscher and Petszold (eds) (1988) 49 at 54. But in practice the Committee has mostly acted as a rubber-stamp, confirming the Commission's findings.

220 Judge Weeramantry in the *Lockerbie case* 1992 ICJ Reports 56 at 166.

221 Bilder in Henkin and Hargrove (eds) (1994) at 328. See also ICJ at 21.

This aspect is reflected in the rational basis required for decisions by the Court. It considers all the relevant evidence and must then decide the case *on the basis of the evidence*, and not on the basis of extraneous (political) factors that have not been placed before the Court.[222]

6.2.9 Change in perceptions may strengthen the African human rights system

Perception and symbols, though not based on fact, are not to be negated. Some observers are of the opinion that the creation of a court will mainly be of symbolical value.[223] The little exposure the African Commission has enjoyed so far has not convinced people that it provides a regional guarantee of the rule of law. In the public perception, also in modernised Africa, a meaningful rule of law has come to be associated with the existence of impartial courts. Without the existence of a court, a system of human rights protection is seen as toothless. The establishment of a court that gives binding judgments will foster the perception that the rights under the Charter are enforceable, and that the system should be taken seriously.[224] Such perceptions are prerequisites for the further development and sustained legitimacy of the system.

6.2.10 Non-acceptance of the court's jurisdiction will expose hypocrites

Much emphasis has been placed on securing universal ratification of the African Charter.[225] In 1996, this has almost been attained. The only exceptions were Eritrea and Ethiopia.[226] This drive to secure ratification by all potential parties is not isolated to the African Charter, but extends to

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222 See art 25(2) of the Protocol.

223 Eg personal communication by Michaelo Hansungule of the Raoul Wallenberg Institute of Human Rights and Humanitarian Law, University of Lund, Sweden, March 1997.

224 See Bilder in Henkin and Hargrove (eds) (1994) at 326.

225 See resolutions by OAU Assembly, the most recent being the Resolution on the African Commission of Human and Peoples' Rights AHG/Res 250 (XXXIII), making "an urgent appeal to Member States of the OAU to ratify the Charter as early as possible if they have not already done so".

226 See Table B above.

other international human rights instruments. In many cases near-universal ratification has only been attained by allowing states to enter numerous reservations and declarations.[227] This pre-occupation with universal adherence has compromised the integrity of the international human rights system. Similarly, in Africa, formal ratification remains unrelated to actual performance.

Accepting the jurisdiction of an African Court on Human and Peoples' Rights provides states in Africa with an opportunity to commit themselves publicly to the meaningful protection of human rights. This "fresh start" will see the emergence of an arrangement of like-minded states, all subscribing to real external mechanisms to check internal sovereignty. As a result, those states only paying lip-service to human rights, will be exposed.

The Protocol gives all states an equal opportunity to "put up or shut up".[228] Two streams of human rights protection will inevitably develop:[229] one for those genuinely committed to the protection of human rights, and another for those states that regard ratification as a goal in itself. In this way, the hypocrites will be exposed, and the integrity of the system will be partially restored.

But, viewed more positively, those leading the way may induce others to follow. Such an optimistic view was expressed by commissioner Dankwa: "The argument in favour of the creation of a court is that those who ratify the Protocol setting up the court will be those who are committed to obeying decisions of a court, and they would by their respect of the decisions show the way for others to follow".[230]

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227 See eg ch 2.4.4 above.

228 See Bilder in Henkin and Hargrove (eds) (1994) at 327.

229 These "two strands" will still be united by their common adherence to the African Charter.

230 Quoted from the interview with him in (1996) (Oct - Dec) *AFLAQ* at 12. See also, in the context of the possibility of an international criminal court, Forsythe (1997) 15 *NQHR* 5 at 16: "The power of positive example by the 'club of the clean' will cause the doubters to become eventually enmeshed in this new governing arrangement".

6.2.11 Enhanced state co-operation

The main duty on states under the Charter so far had been to present reports to the Commission. One of the major problems experienced in the process of examining these reports has been the non-attendance by states which have submitted their reports. The Commission remained powerless to take concrete measures in this regard. It can make recommendations itself, or through the Assembly. As Amoah points out, a court "could compel State action by issue of an appropriate subpoena on government officials".[231] Even if such extreme measures are not adopted, the moral authority of a court will weigh heavier with states.

Those states that accept the jurisdiction of the Court also undertake to comply with the Court's decisions and guarantee their execution.[232]

6.2.12 Consistent approach to violations

One of the criticisms against the Commission is that it has not developed a consistent practice in dealing with violations of the Charter. One inconsistency relates to the possibility of missions to states parties. In such instances, the Commission deals with complaints as manifestations of broader human rights concerns. The aim of the dialogue with the state is to secure an amicable solution. In respect of other complaints, a finding of violation by the offending state is made on the basis of the evidence before the Commission.[233] Another inconsistency relates to the variety of "remedies" ordered by the Commission. In some instances the Commission has declared decrees invalid and ordered the release of a complainant, but in other cases the Commission has been much more vague and tentative.[234] The Commission has also not been consistent in its practice with

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231 (1992) 4 *RADIC* 226 at 239.

232 See art 28 of the Protocol.

233 See ch 3.3.1 above.

234 See eg Communication 27/89, 46/90, 49/91, 99/93 (joined) (*Organisation Mondiale Contre la Torture et al v Rwanda*),: "The Commission ... urges the government of Rwanda to adopt measures in conformity with this decision" and Communication 71/92 (*Rencontre Africaine pour la Defense des Droits de l'Homme v Zambia*): "The Commission ... resolves to continue efforts to pursue an amicable solution in this case".

serious or massive violations of the Charter.[235] Judicial consideration of these issues will in all likelihood result in a more consistent practice, as Courts tend to rely on precedents and give more weight to consistency in their judgments.

6.2.13 Logical culmination of previous efforts

In 1961, the "Law of Lagos" envisaged a court to secure human rights in Africa. When the Assembly set the process of the adoption of the Charter into motion in 1979, it called a meeting of experts to draft a charter and to provide "for bodies to promote and protect human rights".[236] Only a Commission was created, as it was felt that a quasi-judicial institution was the "most" that could be attained at the time. But the African human rights system remains incomplete in the absence of a judicial institution with the competence to make binding findings. In other words, the establishment of a court will bring the gradual process of human rights realisation in Africa to its eventual culmination.[237] From a teleological point of view, the creation of a Court will bring the system closer to its ultimate aim: the best possible system for the promotion and protection of human rights across the African continent.

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235 That is, violations in terms of art 58 of the Charter. See ch 3.3.3 above.

236 Resolution 115.

237 In this respect, Robertson and Merrils were premature to state that the process of human rights protection took a first step with the Law of Lagos and "culminated in the adoption of an African Charter on Human and Peoples' Rights in 1981" ((1992) at 201).