Chapter 8 THE CASE AGAINST THE PROPOSED COURT - ARGUMENTS AND ALTERNATIVES

8.1 Some arguments against establishing an African Court on Human and Peoples' Rights

"I have not yet seen any principled objector to the idea of an African Human Rights Court", Odinkalu remarked in 1994.[1] What follows, are some arguments answering his call that Africans "have to tackle the nuts and bolts of having a human rights court", something not "confronted so far".[2] The arguments raised in this chapter are based mainly on views expressed by others, but my own interpretations come into play in (re)formulating arguments. Each of these arguments is, in turn, evaluated. This chapter does not exhaust all possible arguments. It is also almost impossible (and unnecessary) to regard them as watertight compartments, as they may overlap or inform one another. Most of the arguments against the idea of a court are already in some way also indicative of support for one or more of the alternatives. The **principle** of a Court, as expressed in the proposed Protocol, rather than the **details** of its establishment and functioning, is the basis for discussion in this chapter.

8.1.1 Political sovereignty as main obstacle

8.1.1.1 Argument

The political authority of a state is usually divided into legislative, executive and judicial branches of competence. The creation of a supra-national court represents an inroad into a state's sovereign exercise of the latter of these competences. As in the case of the establishment of the European Court of Human Rights,[3] many objections against its African equivalent may be traced back to considerations of state sovereignty. A supra-national court, by its very nature, acquires jurisdiction over the treatment of individuals by states within the borders of those states. "State sovereignty" is frequently invoked at the international level as a **barrier against international inspection of internal affairs**. Conscious of the frailty of their "sovereign states", African leaders have sought refuge in the classical view of this concept, which postulates that "states hold

---

1 (1994) 2 *African Topics* 11.

2 *Ibid.* But see eg Benedek in Thoedoropoulos (ed) (1992) at 28 – 29.

3 See ch 5.1.1 above.

essentially unfettered powers within their frontiers".[4] In 1945, when the UN was established, the "preservation of sovereign autonomy in domestic affairs" was included as one of its founding principles in the famous article 2(7) of the UN Charter.

These "classic" notions were also incorporated into Africa when the OAU was formed in 1963.[5] The process leading up to the founding and the OAU itself provide clear illustrations of state sovereignty being treated as an overriding concern. Even before the independence of most African countries, debate started about the eventual form which independent Africa would take. Two schools of thought developed as states gained independence. On the one hand, some leaders subscribed to a programme of immediate and total unification of all independent states. Other leaders, on the other hand, proposed a much more cautious approach towards African unity.[6] When the OAU was established, a hands-off approach was adopted. The OAU Charter also made no specific provision for human rights protection. The newly-independent states were more concerned with their recently-won independence and the maintenance of their national sovereignty. Non-interference in the domestic affairs of another state, rather than a collective concern for human rights, is one of the founding principles of the OAU.[7]

At the Cairo Conference of the OAU in 1964, all the states assembled - except Guinea - were vehemently opposed to the idea of political or economic unification of Africa. A resolution adopted at that conference declared that all member states are committed to respect the frontiers existing at the time of their independence.[8] This means that African states sought to define themselves with reference to colonial boundaries. Cerventa explains why the new states collectively clung to the inherited *status quo*: "Since many are vulnerable to external incitement to secession, it was obvious

---

4 Welch (1991) 29 *Jnl of Modern African Studies* 535.

5 See the Charter of the OAU, art 2(1)(c) (the purpose of the OAU is to defend the sovereignty, the territorial integrity and independence of African states) and art 3(2) (the principle of non-interference in the internal affairs of states is affirmed).

6 See eg Sanders (1979) 96 - 120.

7 See ch 3.1 above.

8 Resolution AGH/16.1 of 21 July 1964 on the Intangibility of Frontiers. This amounts to an explicit adoption of the principle of *uti possidetis*, something that could not be agreed upon when the OAU Charter was finalised.

to most OAU members that a reciprocal respect for boundaries, and abstention for demands for their immediate revision, would be to their general advantage".[9] The ICJ later strengthened African resolve to leave intact the sovereignty of states established after colonialism, with its advisory opinion in the *Western Sahara Case*,[10] and its judgment in the *Frontier Dispute Case (Burkina Faso/Mali)*[11] supporting the application of the notion of *uti possidetis* in the African context. Decolonisation meant the substitution of external leaders by national leadership, and not the self-determination of groups within a particular state.[12] These decisions strengthened a static and closed concept of the African state.

When the African Charter on Human and Peoples' Rights was drafted in the 1970s, one of the overriding principles was that it "should not exceed what African states may be willing to accept".[13] It is therefore unsurprising that a court was never seriously considered during these discussions and found no place in the Charter when it was adopted in 1981. One of the main reasons why a court was not included in the African Charter, was that it would have deterred many states from acceding to or ratifying the Charter. Most of the African states became independent relatively recently and jealously guarded their sovereignty. States that gained independence after 1970, but before 1981 (when the Charter was adopted), include Angola, Cape Verde, Guinea-Bissau, Mozambique and Zimbabwe. The currency which state sovereignty continues to enjoy in Africa today, is exemplified in the fact that no inter-state complaint has as yet been brought under the Charter, and in the degree of resistance against the right of individual petition to the proposed Court.[14]

---

9 (1977) at 70.

10 1975 ICJ Reports 12.

11 1986 ICJ Reports 554.

12 See discussion by Naldi (1989) at 10.

13 Sock (1994) 2 *African Topics* 9.

14 See ch 7.1 above.

8.1.1.2 Evaluation

State sovereignty can no longer be held out as shield to foreclose the establishment of an African Court on Human Rights, as it would be against trends in **international law generally** to do so, and because **human rights treaties** (including the African Charter) already contain elements which address these concerns.

Two major trends in **international law** subsequent to the Second World War militate against an arguments based on state sovereignty:

- The first is the **internationalisation of human rights**.[15] In international law it has become accepted that gross violations of human rights raise issues which transcend national borders. It has become the concern of humanity and is no longer limited to the state itself. This process is embedded in another global process, the "shrinking" of the world into a "global village", brought about by universalised media coverage and advances in the field of information technology. For all practical purposes it could be said that article 2(7) of the UN Charter has, as far as human rights are concerned, become a dead letter.

- The second trend is the one towards the **humanising of international law**.[16] The greater focus on human rights as a communal concern has coincided, and was strengthened by, the elevation of the individual as a subject of international law. Initially, international law only considered states as subjects. The elaboration of international human rights instruments transformed the status of the individual to that of a player in international law. Increasingly, treaties allow for individual complaints brought by individuals against their states. If international law is still concerned with the protection of sovereignty, which it certainly still is to an important extent, the object of protection is different. For Reisman, it is "not the power base of the tyrant who rules directly by naked power or through the apparatus of a totalitarian political order, but the

---

15 See Welch (1991) 29 *Jnl of Modern African Studies* 535.

16 *Ibid.*

continuing capacity of a population freely to express and effect choices about the identities and policies of its governors",[17] that has come to constitute sovereignty.[18]

The most pertinent answer to the argument against a court, based on state sovereignty, is the following: State parties have, by the very act of **ratifying the African Charter**, forfeited exclusive jurisdiction of matters regulated by the treaty they have ratified. The very first article of the Charter is unequivocal: State parties "shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them".[19] In this respect, the time-honoured principle that states are bound by their explicit prior agreement to the terms of a treaty, may be invoked.[20] The states have also already accepted the competence of the African Commission to report on and make recommendations on inter-state and individual complaints. Welch has noted the importance of the Commission's role in undermining claims based on sovereignty: "The establishment and functioning of the OAU's newest subsidiary organization, the African Commission on Human and Peoples' Rights, challenges a basic principle of positivist international law on which the OAU has long based its policies: the sovereign domestic control of member States".[21]

Voluntary surrender of political sovereignty is also in line with the ratification by African states of numerous **other international human rights treaties**.[22] In most of those instances African states have surrendered exclusive jurisdiction over parts of their internal affairs to supervisory bodies composed of nationals from other, non-African states. In the case of the proposed Court, external scrutiny will at least be by nationals from other African states.

---

17 Reisman (1990) 84 *AJIL* 866 at 872.

18 One is reminded of the response by Maxwell-Fyfe to similar arguments when the European Convention was drafted. He referred to what "ordinary people want", and remarked that they would not opt for the sovereignty of states to suppress freedoms and deny fundamental rights: see ch 5.1.1(c) above.

19 Art 1 of the African Charter.

20 The principle of *pacta sunt servanda*.

21 Welch in El-Ayouty (1994) at 53.

22 See Table B in ch 2 above.

The invocation of state sovereignty has largely been exposed as **hypocrisy**. Ironically, the South African apartheid state contributed to bringing this concept into discredit. South Africa became the prime example of a state invoking the sanctity of the principle of "non-interference in domestic affairs" to deflect international attention away from its internal policies. The African block at the UN vehemently opposed the application of this principle by South Africa. Gradually the "double standard" inherent in the African position emerged. Once the application of the principle was denied in the South African case, it could no longer be invoked by African states themselves without a lingering feeling of hypocrisy inherent in their stance.[23] Today, the position has been reversed. South Africa is one of Africa's model democracies, with a progressive Constitutional Court interpreting an entrenched Bill of Rights. The question may certainly be posed whether it would be hypocritical for the South African government to be reluctant to accept the possibility of the present Commission overruling the decisions of the Constitutional Court.

However, there are, and must be, limits to the intrusive grasp of international human rights instruments and institutions. In fact, **human rights treaties** (also the African Charter) already accommodate numerous ways of restricting international incision into internal affairs:

- One way of limiting the domestic effect of an international human rights instrument is the possibility of entering **reservations** or "declarations" upon accession or ratification. Although the African Charter does not allow states explicitly to make reservations when ratifying the Charter, this has been done on two occasions.[24]

- Another way is to adopt an **interpretative model which allows for local differences**, serving as a restraint of the despotism of centralised uniformity. The European system also provides evidence that a regional human rights court may allow a measure of "elbow room" to the state. In its interpretation of the Convention, the European Court devised the tool of "the **margin of appreciation**". This notion allows an amount of discretion to states in deciding how to implement the Convention.

---

23 See Weisfelder in Welch & Meltzer (1984) at 90.

24 See ch 3.2.2 above.

No mention of this notion was made in the preceding deliberations or is made in the European Convention itself.[25] It was introduced into Convention jurisprudence in the Commission's report in *Greece v UK*, where the British government invoked article 15 of the Convention.[26] The government sought to justify violations of Convention rights in terms of its capacity to derogate from the Convention when a public emergency exists. The Commission allowed the government to "exercise a certain amount of discretion in assessing the extent strictly required by the exigencies of the situation".[27] The Court also first applied the notion of the "margin of appreciation" to cases of derogation during emergencies.[28]

Later, the notion was transposed to other articles, which deal with limitations to rights.[29] The landmark decision in this regard is *Handyside v UK*,[30] in which the UK government was allowed a margin of appreciation in deciding on its censorship laws. Limitations "necessary" in a democratic society were interpreted to be those arising from a "pressing social need".[31] National authorities possess a margin of appreciation in assessing initially what constitutes a "pressing social need". This decision remains subject to review by the European Court, which is responsible for European supervision. Application of the "margin of appreciation" has become a tool through which the Court can effectively and credibly fulfil its "international supervisory role".[32] The African Charter, different to the European Convention, explicitly allows for a localised discretion in the form of "claw-back clauses".

- Furthermore, the role of international supervision is further institutionalised as **supplementary**, or as a mechanism "of last resort". This factor further insulates states parties

---

25 See Yourow (1996) at 14.

26 The "Cyprus" case, discussed by Yourow (1996) at 15.

27 Quoted by Yourow (1996) at 16.

28 See the *Lawless* case , Series A 2, A3, judgments of 7 April and 1 July 1961.

29 Exercise of the right to freedom of expression may, for instance, be limited if the limitation is "necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder and crime, for the protection of health and morals, for the protection of the reputation or rights of others ...".

30 Series A 24, judgment of 7 December 1976.

31 See also the *Dungeon* case, Series A 59, judgment of 22 October 1981.

32 See Yourow (1996) at 197.

from international supervision. The African Charter already provides that all efforts must be made to settle complaints against states amicably and that complainants have the burden to exhaust local remedies before exposing the state to international inspection.

- If the Protocol is accepted in its present form, states would not automatically accept the right of individuals to bring cases directly to the Court.[33] States will be required to make an **optional declaration**, indicating its acceptance of that possibility.[34] The inclusion of this feature was motivated by considerations of political sovereignty. Its acceptance could shield states further from effective supervision, but may also encourage states to ratify the Protocol.[35]

8.1.2 Inappropriate forum to address most pressing issue of underdevelopment

8.1.2.1 Argument

It is often stated that courts present an inappropriate forum for the resolution of disputes about economic matters because **judges** are not equipped for such decisions. South African Constitutional Court judge Sachs, in his separate concurring judgment in *Du Plessis v De Klerk*,[36] expanded on the reasons why courts are ill-suited to take decisions on social, economic and political questions: "The judicial function simply does not lend itself to the kinds of factual enquiries, cost-benefit analyses, political compromises, investigation of administrative/ enforcement capacities, implementation strategies and budgetary priority decisions ..."[37]

This argument is sometimes placed in a historical context. Writing close to the time independence dawned over Africa, Asante warned that the bills of rights in independence constitutions "might

---

33 See ch 7.2.7 above.

34 See ch 5.2 on similar optional provisions in the other regional human rights instruments.

35 The position set out in art 6(5) of the Nouakchott Protocol is accepted here for the sake of argument. This should not be seen to detract from my opposition to this proposed provision (see ch 7.2.8 above).

36 1996 5 BCLR 658 (CC).

37 At par 180.

well impede not only social and economic progress but also national unity".[38] He provided the following reasons for his warning: Being based on American and European examples, these countries will provide precedents in the interpretative process of bills of rights. This will entail "the importation of values and solutions quite inappropriate for a developing African country ..."[39] Further, because the judiciary in most newly-independent African states consisted of foreigners or foreign-trained personnel, they were prone to be "unresponsive to local aspirations".[40] Citing an American precedent in which the US Supreme Court obstructed social legislation, he observed that courts should not be entrusted with "the awesome responsibility of determining the extent to which individual rights must give way to the wider considerations of social progress".[41] Consequently, in a developing state, the responsibility to secure socio-economic equity should rather lie with "political leaders responsible to the electorate".[42] In these circumstances, so the argument concludes, the struggle for social transformation is not located in the judicial arena, but depends on the executive interference in the broader economic plane.

Many years without alleviating the need for development have passed since independence. Today, the essential thrust of the argument may remain valid, despite the fact that African judges have replaced non-Africans in almost all instances. Addressing underdevelopment is still one of Africa's most pressing priorities. Although colonialism in certain respects contributed positively to African economies, it also left major scars on the economic face of the continent.[43] The promise of accelerated economic growth after independence has also not been fulfilled.

These arguments concerning the role of judges in the application of socio-economic rights, have a particular resonance in Africa, where three important factors interconnect: One: African states are at best fledgling democracies in which the visible and viable integration of the popular will is a priority. Two: In no other continent is the need for socio-economic transformation and

---

38 Asante (1968 - 1969) 1 - 2 *Cornell Intl Law Jnl* 72 at 85.

39 *Ibid.*

40 *Ibid.*

41 Asante (1968 - 1969) 1 - 2 *Cornell Intl Law Jnl* 72 at 86. The case referred to is *Lochner v New York* 198 US 45 (1905).

42 *Ibid.*

43 See eg Khapoya (1994) at 135 - 147.

development more pronounced. This has led to socio-economic rights being given primacy above civil and political rights.[44] Three: The African Charter does not distinguish between the enforcement of civil and political rights, and socio-economic rights. This could definitely problematise the Court's role, as the provision of burdensome "social services and ailing economies are incompatible".[45]

Even if the political role of judges were uncontroversial, and they possessed the requisite expertise to make decisions on socio-economic issues, courts will still focus on civil and political rights. The reason lies in the fact that socio-economic rights are regarded as non-justiciable. The judicial focus on these rights is "a sophistication, a Western imposition and a bane to development".[46] Economic development should precede the realisation of these rights.[47] Development "automatically promotes or will lead to the realisation of democracy and respect for human rights".[48] Rather than seeking to address underdevelopment through law or a rights discourse, emphasis should fall on the construction of a new economic order, and in factors such as the cancellation of debt. Without more favourable trading terms to less-industrialised states, underdevelopment will prevail. This will be the case despite the fact that the African Charter draws no distinction between the implementation or enforcement of first and second generation rights. In connection with the Commission's role in this regard, Umozurike observed as follows: "... in light of the recent problems in the continent, it seems likely that the Commission will be more concerned with civil and political rights; should it venture into economic and social ones, it would find too many

---

44 See eg the question asked by Nyerere: "What freedom has our subsistence farmer? ... Certainly he has freedom to vote and speak as he wishes. But these freedoms are much less real to him than his freedom to be exploited. Only as his poverty is reduced ... will his right to human dignity become a fact of human dignity" (cited by Howard (1983) 5 *HRQ* 476).

45 Umozurike (1988) 1 *AfrJIL* 65 at 71.

46 El-Obaid & Appiagyei-Atua (1996) 41 *McGill Law Jnl* at 853.

47 Writing in 1974, Eze ((1974) 4 *The African Review* 79 at 90) argued that only a "recommendatory" human rights body was at that stage feasible in Africa, and added: "In the meantime the war against illiteracy, disease and want should be relentlessly waged because victory over these represents the backbone to a meaningful protection of human rights both at national and international evels".

48 *Ibid.*

problems in too many countries to cope with".[49] The practice of the African Commission, with its emphasis on civil and political rights, confirms this assertion.

A Court on Human Rights is likely to suffer from the same dilemma. If, as in the case with the Commission, socio-economic claims are not directed to the Court, the inclusion of those rights in the Charter will remain of symbolical value only. If cases are in fact brought, the Court will face the difficulty of making pronouncements which will have very little effect in a setting where economic resources are not available.

8.1.2.2 Evaluation

Even if it is correct that the Court will only succeed in protecting civil and political rights, the interrelationship of these rights and economic development underscores the potential role of the Court to contribute indirectly towards redressing underdevelopment. In this view, the "economic kingdom" follows, rather than precedes, the realisation of a society in which press freedom, freedom of association, democratic elections and other basic civil and political rights and freedoms are guaranteed effectively.[50]

But what about the fact that these rights are included on a par with all the others in the Charter? One possibility is that the Court may decide to treat the two categories of rights differently, at least on a temporary basis. Umozurike has hinted that a Court may approach civil and political rights and socio-economic rights differently. One may recall that the Inter-American Commission, before becoming an organ of the American Convention, created the concept of "preferred rights".[51] Similarly, the Court may concentrate on civil and political rights in its initial jurisprudence. But the Court may also distinguish between the immediate and gradual justiciability of different socio-economic rights. This would in fact be in line with one of the principles adopted as part of the

---

49 (1983) 77 *AJIL* 902 at 911.

50 See eg Bondzie-Simpson (1988) 31 *Howard Law Jnl* 643 at 660: "Economic development must enhance and supplement the dignity of man, not supplant it. What does it profit a people who attain the quintessential development but whose dignity has been debased?"

51 See ch 5.2 above.

Limburg Principles, which reads as follows: "Although the full realization of the rights recognized in the Covenant is to be attained progressively, the application of some rights can be made justiciable immediately while other rights can become justiciable over time".[52]

The spectre of "unenforceability" may be deflated if the Court allows for a flexible approach to the realisation of human rights. The realisation of socio-economic rights cover different nuances, ranging from the primary obligation to *respect* these rights, the secondary obligation to *protect* them, to the tertiary obligation to *promote and fulfil* these rights.[53] The argument above equates justiciability with the last of these obligations. Socio-economic rights provided for in the Charter do not place only obligations to "promote and fulfil" on states parties. This may be the case with the right of individuals "to enjoy the best attainable state of physical and mental health".[54] However, the "positive duty" on states is not unqualified, but is clearly limited by an internal modification to the right. Fulfilment of the right does not entail a limitless duty, but stretches only to the extent to which the state is able to "attain" the right. This makes the judicial role less controversial and the realisation of the right more "justiciable". Other socio-economic rights are more likely to give rise to obligations of states to respect and protect. For example, the state must *respect* the right of the individual to look for and find employment of choice.[55] An interference with, rather than "non-fulfilment" of this right would constitute a violation. But the state may also be required to *protect* the individual in the realisation of this right, as far as equal payment for equal work is concerned.[56]

---

52 The Limburg Principles (on the Implementation of the CESCR, UN doc E/CN 4/1987/17, Annex; also printed in (1987) 9 *HRQ* 122.

53 See De Vos (1997) 13 *SAJHR* 67 at 79 - 91, Eide in Eide *et al* (1995) at 37 - 39 and Shue (1980) at 5.

54 Art 16(1) of the Charter.

55 Art 17(1) of the Charter states that every individual "shall have the right to education".

56 Art 15 of the Charter. Also see Communication 39/90 (*Pagnoulle v Cameroon*), in which art 15 arose in the context of a deprivation of the right to work by the government.

8.1.3 Inappropriate forum to redress massive or gross violations

8.1.3.1 Argument

A court may be an ideal forum to provide effective remedies to an individual complaining against a state which has infringed an identifiable right. Judicial means may therefore be the ideal form of supra-national recourse to redress human rights violations in European states. But human rights violations in Africa are different. They often occur on a "massive" scale, involving numerous victims and the violation of manifold rights simultaneously, are serious in nature, and reveal systematic or institutionalised patterns of disregard for human rights. Four factors in particular make the judicial role inappropriate in redressing violations of this nature:

- The one factor is the **individualistic** focus of a court. A court gives findings on the facts of individual cases presented to it. Its findings are directed at relief to individual litigants. As such, it is ill-equipped to address situations involving numerous victims.

- Secondly, courts are not best suited to resolve **urgent human rights violations**. Because the number of cases is likely to be limited (at least initially in the functioning of the system), the court will be instituted as a **part-time** institution. This makes a quick response difficult. Furthermore, courts depend on facts presented to it by litigants. It can usually not establish facts itself. The process of presentation and evaluation of evidence is inevitably time-consuming.

- Thirdly, a court concerns itself with a **legal text** (such as the African Charter) and the issue to be decided in every case is whether provisions of this text have been violated. This inquiry leaves little room to uncover the (non-legal) causes underlying the violations, or to expose the systematic nature of violations. Judicial consideration, by its very nature, focuses on the analysis of legal provisions, rather than the socio-political context in which gross violations occur. The tag of "violation" may be attached to a particular circumstance, without in any way ensuring that the circumstances will not persist or recur.

- In the fourth place, cases are usually brought by a small number of victims, and not by all affected persons. Only those **victims who are able to gain access to the court are granted**

remedies. The *Velásquez Rodriguez* case,[57] decided by the Inter-American Court, presents an example of this disadvantage. From 1991 to 1994, between 100 and 150 persons were "disappeared" in Honduras.[58] The Inter-American Commission was inundated with a flood of individual complaints, but only "one or two of these cases" could "be sent to the Court, which sits part-time".[59] In terms of the American Convention, remedies could only be ordered in respect of the parties to the dispute before the Court.

A non-judicial institution, such as a Commission, does not suffer to the same extent from these disadvantages. In fulfilling its mandate, it can be more situation-oriented, it may to a greater extent consider political factors, by trying to mediate and reach friendly settlements, and its reaction time may be swifter. The Inter-American Commission has been a good example.

8.1.3.2 Evaluation

These arguments may seem persuasive, but the practical problems experienced by the African Commission provide some perspective on the difficulties which have in fact been encountered by a non-judicial human rights body in Africa. The Commission, as presently constituted and mandated, has four related courses of action available in cases of urgency or mass violations: It may undertake investigations. It may, in reaction to a communication or communications revealing massive or serious violations; report to the OAU Assembly. It may hold extraordinary sessions, and it may appoint a Special Rapporteur. However, the Commission has not used its mandate to any significant effect:

- It has a wide power to undertake "any appropriate method of investigation".[60] Basing its actions on this mandate, the Commission has undertaken **missions** to states parties after numerous communications had been received, but these missions have taken years to be organised. Obtaining the consent of the state concerned was problematic initially, but states

---

57 See ch 5.2 above.

58 See discussion by Pasqualucci (1996) 18 *Michigan Jnl of Intl Law* 1 at 23.

59 *Ibid.*

60 Art 46 of the Charter.

have been more co-operative recently. Even where missions were undertaken, the actions of the Commission have a distinct *ex post facto* character.

- The Commission reported cases of massive or serious violations to the **OAU Assembly**.[61] In none of these instances has the Assembly exercised its mandate to request the Commission to "undertake an in-depth study".[62]

- The Commission may call **extraordinary sessions**.[63] Despite the numerous human rights crises in Africa over the years between 1987 and the present, this competence has been used only twice. When the Commission was convened on extraordinary grounds for the second time, in December 1995, only seven of the commissioners attended. One commissioner, Umozurike, "could not be contacted due to communication problems".[64]

- Procrastination in the appointment of a **Special Rapporteur** after the events in Rwanda has already been highlighted.[65]

In the light of the above, the inescapable conclusion is that the Commission has failed in this important area. It is true that its failure has been due mostly to inadequate financial resources, as well as secretarial and administrative inefficiency. But inherent weaknesses such as the subordinate role of the Commission, the veil of secrecy, and the nature of the Commission's findings will not be rectified if more resources become available or an improved administration is set in place. A Court, with its competence to give binding decisions, is a necessary supplement to the Commission's role of fact-finding and friendly settlement.[66]

---

61 See ch 3.1 above.

62 Art 58(2) of the Charter.

63 Rule 3 of the Rules of procedure.

64 Ninth Annual Activity Report at par 6.

65 See ch 3.1 above.

66 The European Commission and Court have also been forced to deal with gross violations of human rights, which presents new challenges to conduct fact-finding investigations. The Commission has experienced some shortcomings as tribunal of first instance, such as a lack of powers to compel witnesses to testify, and a lack of sanctions for untruthful witnesses (see Reidy, Hampson and Boyle (1997) 15 *NQHR* 161 at 170).

8.1.4 Centrifugal forces: lack of legal and economic integration

8.1.4.1 Argument

Two related, but opposing arguments about the role of the various centrifugal forces in Africa may be forwarded. In the first argument, a court is **unlikely to succeed** because it has to bridge insurmountable and **deep-rooted differences**. Were a court to **succeed**, in the second argument, it will only do so by **subordinating some of these fundamentally different values and principles** to some others. Paradoxically, a single court's success will be built on the domination of one legal system and of certain core values over others. True unification leaves little room for differences which exist at numerous levels, such as the following:

i Different legal systems

Unity in Africa is not only an abstraction or ideal from the past. In many fields of human endeavour unified or unifying concepts of Africa have in fact developed. Without losing sight of the local differences and emphases, African scholars often emphasise common approaches and themes under the umbrella of "African history", "African fiction" and "literature",[67] the "African novel", "African art"[68] or "African religion".[69] In the legal field, such similarities are restricted to pre-colonial or traditional conception of "African law".[70] Little has been done to develop any discourse on a **contemporary** "African jurisprudence" or "modern African case-law".

Why does one find this lack of a discourse on current law in Africa? The main reason is that legal traditions and the language of law differ.[71] Post-independence African legal systems may be divided into two main groupings: the civil law[72] and common law[73] traditions. To this division one should

---

67 See eg Ngara (1982).

68 See Abusabib (1985).

69 See eg Mbiti (1975).

70 See eg Cotran (1975) 157 and M'Baye (1975) 138.

71 This is an update and reworking of data in Mensah-Brown (1976) at 8-16.

72 While countries under the common law umbrella show some coherence, **civil law** traditions are by no means homogenous. It differs according to the colonial power responsible for its introduction. Most of the

Footnotes continued on next page.

add localised African customary law, religious law (particularly Islam or Shari'ah-based systems[74] and Indian customs),[75] (formerly) Soviet law[76] and Roman-Dutch legal systems.[77] This co-exitence creates legal pluralism, or at least, legal dualism, in most sub-Saharan African states.

The dualism of Western/customary law coincides in many states with the urban/rural polarity. Western legal concepts are embedded in urbanised and semi-industrialised socio-economic conditions. To a large extent, customary law prevails in rural and traditional areas. In many instances the lack of permeation of standardised legal norms reflect the failure of the nation-state to encompass the whole population. Zaïre was a good example of a state where state governance held minimal sway over vast expanses of territory, inhabited by many "Zaïrois". Customary law is by no means a unified legal tradition. It is living law and is embedded in the communal identity.

---

civil law countries in Africa (nineteen of them) were under French rule (Algeria, Benin, Burkina Faso, Chad, Central African Republic, Comoros, Congo, Djibouti, Gabon, Guinea, Côte d'Ivoire, Madagascar, Mali, Mauritania, Morocco, Niger, Senegal, Togo and Tunisia). Burundi, Rwanda and Zaïre became "civil law" countries through Belgian influence. Portuguese codes were introduced in Angola, Cape Verde, Guinea-Bissau, Mozambique and São Tomé e Príncipe. Spanish colonial rule in Equatorial Guinea and the Western Sahara brought these territories into the civil law "cluster". Brief periods of Italian occupation introduced Libya and Somalia to this legal tradition.

73 **Common law**-based legal systems are found in the Gambia, Ghana, Kenya, Malawi, Nigeria, Sierra Leone, Sudan, Liberia, Tanzania, Uganda and Zambia. (A total of twelve countries.)

74 In an extreme form eg in Sudan: see report of Commission's mission to Sudan.

75 Eg Zanzibar.

76 In eg Benin and Congo.

77 **Roman-Dutch** law differs fundamentally from the civil law tradition. It is not based on the Napoleonic Code, or any other code. It is based on the writings of 17th to 19th century Dutch authors, decisions of Dutch courts of the 17th century, and legislation adopted at the Cape. When the British occupied the Cape in the early 19th century, they left the legal system intact. Today Botswana, Lesotho, Namibia, South Africa, Swaziland and Zimbabwe show strong influence of this system. However, all these countries (except Namibia) had been under British rule for a substantial period. This caused Roman-Dutch law to be influenced by common law, giving rise to **"mixed"** legal systems in these countries. The impact and influence of English law differs in these states, creating more diversity. A combination of civil and common law accounts for "mixed" legal systems in Cameroon, Egypt, Mauritius and Somalia. In a **category of its own**, defying easy definition, is Ethiopia, a state where a colonial legal order was not imposed. The system is codified, with characteristics of the civil law system.

These differences become important especially when seeking a common procedural approach. This has caused Mhone,[78] writing on the problems and prospects of SADCC,[79] to comment on the different ways in which citizens in the different countries understand terms. He cites the example of a contractual term on which lawyers from states in SADCC may differ.

ii Different value systems

One of the main reasons for the relative success of the European human rights system is the common cultural and ideological background of member states of the Council of Europe. The European countries share a long history of common cultural and economic development. Bernhardt argues that common regional standards in the human rights field can be developed by the regional courts such as the European Court of Human Rights "at least if the States and societies concerned share some basic values and assumptions".

The values underlying states and societies within states in Africa are radically divergent. In terms of religion-based values, differentiation runs along the **Christian-Muslim-animist** divide. These values obviously impact on constitutional aspects, for example the position that women have in a particular society and under the local constitution.[80] Differences about the interrelationship between law and religion are also fundamental, as they determine to what extent law and religion are regarded as separate, and separable.

iii Cultural and linguistic differences

Africa is rich in its diversity of ethnic, cultural and linguistic groups. This makes the invocation of an "African" legal system or approach to law a fallacy. Even before considering factors causing regional diversity, one has to pause and consider the internal fragmentation of many states and the resulting lack of national integration. Due to the drafting of colonial borders many diverse groups were often compacted into one territorial unit.

---

78 (1991) 24 *CILSA* 379 at 383.

79 The predecessor of SADC: see ch 4 above.

80 In Bernhardt and Jolowicz (eds) (1987) at 152.

iv Divergent governmental structure and economic systems

Independent Africa has by no means been homogenous in the nature of political systems which they have adopted. At least five forms of government, each with implications for legal and economic structures, may be identified:

- One-party states: Tanzania became an example of a "democratic" one-party state.
- Military dictatorships: Infamous examples are Amin's Uganda, and Abacha's Nigeria.
- Democracies: Botswana has been a functional multi-party democracy since independence. The Gambia has been under democratic governance until the recent military coup.
- Monarchies: Morocco and Swaziland are still kingdoms, with a significant role for the monarch in the way the country is governed.
- Marxist states: Benin, Congo and Guinea have, to varying degrees, adopted Marxist or socialist models.

As far as economic premises are concerned, independent Africa has seen capitalist and socialist states. The legal regime within a state is obviously affected by the broader context of the governmental structure. The protection of or priority accorded to freedom of association and speech would differ from a military dictatorship to a liberal democracy.

8.1.4.2 Evaluation

The arguments raised above may be refuted by pointing out that they depart from two misconceived premises:

- The premise of the first argument is that **legal unity is a realisable ideal.**

Legal uniformity is not a realistic ideal. Unifying and centralising legal theories have increasingly been questioned in the post-modern age. Previously, Western conceptions of the law have almost exclusively concentrated on formal law, exercised through formal institutions, based on a central instrument. In this view, law is regarded as part of the institutions indispensable to the indirect control exerted by the modern nation-state. This notion has been influenced especially by the codification movement. The Western, Judeo-Christian conception of justice is, to a certain extent,

modelled on the idea of Biblical authority. The "Word" predominates, and is external to, independent from and elevated above its subjects. Similarly, the "Code" has independent and overriding authority. Judges, whose impartiality is linked to this authority, become the oracles who apply the Code in all aspects of human life. Our age has questioned these notions of state-centredness, formality and universality and has revealed the fallacy of this model.

It should not be surprising that this model has not gained equal currency in Africa. Here, everyday-life is influenced too markedly by a plurality of legal systems. This plurality is integrated into the reality of all African societies and the consciousness of most individuals living in Africa. If the idea of legal uniformity within states is not given serious consideration, trans-African equalisation of legal rules, norms or systems seem extremely remote.

- The premise of the second argument is that the establishment of a supra-national court aims at **making legal systems uniform**.

The divisiveness of diversity in Africa should not be celebrated, but neither should it be elevated to become an insurmountable obstacle in the quest for greater unity in Africa. The role of legal reform in a process of legal integration should not be underestimated. However, "Africanisation" of law through the influence of the African Charter (and Court of Human Rights) should not be equated with the total equalisation of legal systems. In the Council of Europe, "Europeanisation" has been given two meanings. It may indicate a **tendency to co-operate and to harmonise laws**, or it may denote, in a looser sense, "the **coming together of legal systems, inspired as much by an internal drive towards reform and improvement as by the exigencies of European politics**".[81] An analysis of the European Court of Human Rights case-law on criminal procedure found that the Court "does not insist on any type of procedure, accepting each system in its own right, provided the end result is compatible with Article 5 and 6 ECHR".[82] The general conclusion of the analysis was that a different legal system cannot be (and has not been) transported into other systems without taking national tradition and outlook into consideration. A key element of success

---

81 Harding *et al* in Fennell *et al* (eds) (1995) 379 at 380.

in the development of any regional legal system lies in allowing for "sensitive and mutually-understood local diversity, regulated ultimately by shared policy objectives in the relevant field of activity".[83]

In other contexts, the European system has provided for the consideration of local circumstances by adopting the doctrine of the "margin of appreciation".[84] This was necessitated, in part, by the reality of difference between states. The European model is often held out as a legal commonality, based on a shared Judeo-Christian tradition, democracy, and mixed market economies. But all regional systems are bound to find itself positioned somewhere on a scale ranging from diversity to commonality. In Europe, diversity is rooted in "historical and cultural differences" which separates "the richer, Protestant, Anglo-Teutonic North from the poorer, Catholic, Latin South",[85] in different legal traditions, in different approaches to incorporating international law into local law, and in different domestic Constitutions. These differences are accentuated in the post Cold War-era. As far as regional diversity is concerned, Africa is positioned somewhere between Europe and Asia. Africa may lack the homogeneity that prevailed at the time the European Court of Human Rights established itself. It also covers a greater number of states than Asia and neo-Europe. But where Asia lacks any significant centripetal force, Africa has sought it in a common loyalty to a geographical unit, as expressed by their political co-operation in the OAU.[86]

---

82 See Jörg *et al* in Fennell *et al* (eds) (1995) 41 at 56, where the case of *Barberà v Spain* Series A 146, judgment of 6 December 1988 is quoted as a case in point. In this case the European Court of Human Rights held Spain to its own, inquisitorial guarantees.

83 Harding *et al* in Fennell *et al* (eds) (1995) 379 at 386.

84 See par 8.1.1 above.

85 Yourow (1996) at 4.

86 It was not always a given that especially Arab-North Africa and sub-Saharan Africa were united in a common bond of loyalty.

8.1.5 Judicialisation as obfuscation

8.1.5.1 Argument

This argument disputes the appropriateness of judicialising political questions, because a judicialised discourse often conceals the political nature of societal conflict.

Removing decisions from the political arena to the judicial sphere undermines the essence of representative democracy by allowing an unelected judiciary to subvert the expressed will of the majority. A supra-national court will have powers of judicial review similar to that of a domestic constitutional court. Judicial review is not limited to an evaluation of the methods used by executive and legislative organs to arrive at certain measures, but is concerned with the merits of the measures as such. Use of the term "evaluation" evokes spectres of unconstrained subjective judicial preferences. The text, which serves as a yardstick for judicial interpretation, provides the primary constraint on unqualified subjectivity. In this case, that text is the African Charter. But its open-endedness and fluidity gives very little guidance to judges faced with the resolution of particular issues.

In other words, the legitimacy of the project of judicial review may be questioned. This has been done in the domestic sphere, where the wishes of democratically-elected representatives have been disregarded by the judiciary. The inception of the latter-day South African constitutional state illustrates the contradictions inherent in the constitutional project. The same constitution that restored universal voting rights introduced a Bill of Rights to limit the popular will. A number of decisions by the Constitutional Court reflect (or reflect on) this tension. One of the arguments raised for the retention of the death penalty in South Africa was the prevailing majority opinion on the issue. A number of the judges of the Constitutional Court responded to this argument (and to one another, albeit implicitly) in their judgments.[87] In his separate concurring judgment, Sachs J stated that the Constitution contemplates "a democracy functioning within a constitutional

---

87 See *Du Plessis v De Klerk* 1996 5 SA 658 (CC).

framework, not a dikastocracy within which Parliament has certain residual powers".[88] In a footnote, he explains "dikastocracy" as "a country ruled by judges".[89]

Questions about the legitimacy of judicial review are even more pertinent if raised in a supra-national context. Judges in most African states are answerable to the executive or legislature, in the sense that the possibility of their removal ultimately depends on the other branches of governance. This may sometimes be in a direct form, but mostly takes the form of a body such as a "Judicial Services Commission". As has been indicated elsewhere,[90] the appointment of these "commissions" is not devoid of control by governments. Being the organ of a political unity of states, answerability of a supra-national institution is removed from the domain of individual states. The proposed Protocol confirms these concerns. Judges are elected by all member states of the OAU, and not only those states that have ratified the Protocol.[91] The fact that states may be "judged" by judges from states not party to the Court, severs the link of answerability almost completely.

Even if the legitimacy of judicial review is accepted in this context, further issues arise:

- It has been pointed out that judges tend to serve the *status quo*. This flows from the manner of appointment, and from the **conservatism that underlies the legal profession**. Glasbeek described judges as coming "from the elite of our society, from the most conservative segments of the population, giving those sections an undue advantage in disputations arising over what are, by definition, fundamental rights".[92] His analysis of Canadian labour law issues led him to conclude that "courts will make it harder, rather than easier, to get state institutions act on behalf of the working classes and at the expense of the employing classes".[93] From this perspective, the two eras noted for progressive law making, the New Deal in the 1930s and the

---

88 Par 181.

89 N 1, referred to in par 181.

90 See ch 3 above.

91 See ch 7.2.16 for a discussion of art 14 of the Noukchott Protocol.

92 Glasbeek (1990) 28 *Osgoode Hall Law Jnl* 1 at 6.

93 Glasbeek (1990) 28 *Osgoode Hall Law Jnl* 1 at 50.

civil rights struggle in the 1950s and 60s, were brief interludes in what has otherwise been a consistently conservative pattern of US Supreme Court constitutional decision-making.[94]

- Even though value judgments are made, the popular perception remains that judicial institutions are able to maintain neutrality and produce determinate and correct results. Once the instability of constitutional adjudication is taken to heart, the fallacy of this perception is revealed. The resolution of conflicts involving rights is unstable over time. Correct and certain outcomes are illusory. No concessions are made to these possibilities in the dominant discourse of the democratic state. To the multitudes, the judiciary is presented as a symbol of hope. Lawyers play along and identify patterns of "improvement" of human rights, basing their views on the small number of judgments likely to be given. This could easily lead to a false sense of accomplishment. Rights-talk can so easily lose track of reality. Whole-hearted acceptance of the judicial discourse may lead to a sense of complacency, as the one of two judicial pronouncement are held out as indications of a human rights regime that is put into place. **Complacency** leads to inactivity.

- In **rights discourse**, all human interaction and conflicts are couched in the language of rights. Rights present a way around the "fundamental contradiction" brought about by the fear of, but also the need and dependence on, other human beings that we all experience.[95] Rights may easily become reified, as it takes on an independent existence of its own. Experiences of solidarity and individuality may become concealed, as they are characterised as an exercise of rights. Tushnet warns about the effect of rights becoming reified: "If we treated experiences of solidarity and individuality as directly relevant to our political discussions, instead of passing them through the filter of the language of rights, we would be in a better position to address the political issues at the appropriate level".[96]

- Emphasis of the rights discourse creates the incorrect impression that all societal, inter-personal conflicts and disputes are of a legal nature and may be **redressed by judicial remedies**. African reality, in particular, reveals this fallacy. Situations of civil war, the

---

94 Bauman (1996) at 74.

95 See Kennedy (1979) 28 *Buffalo Law Review* 205 at 211 - 212 and Kelman (1987) at 62 - 63.

96 Tushnet (1984) 62 *Texas Law Jnl* 1363 at 1384.

deterioration of state institutions and mass displacement of people are embedded in power relations and are therefore deeply political. It is misleading and dishonest to suggest that judicial institutions could be primarily responsible for the resolution of conflicts and ensuing human rights violations under these circumstances.

- Even if, or maybe especially if, the Court starts functioning and performs relatively well, the danger exists that **too much emphasis** will be placed on the role of lawyers, judges and complaint mechanisms. Small legal victories blind us to the unlitigated issues and issues that cannot be litigated and will paralyse civil society.

8.1.5.2 Evaluation

In my view, a grave danger exists that the experience of ordinary people may be that the existence of enforceable rights makes little difference in their lives. This may result from the dishonesty almost inevitably involved in striking compromises. The results of compromise are that states may enter reservations, that they may make declarations, that violations are brushed aside by political and strategic considerations, or that substantive provisions are watered-down. Rejecting the inclusion of a Bill of Rights in the first Tanzanian Constitution, the Presidential Commission disapprovingly referred to the practice in many constitutions to include qualified rights that allow governments to retain their freedom of action. It added: "A Bill of Rights in this form provides little by way of protection for the individual and induces in the ordinary citizen a mood of cynicism about the whole process of Government".[97]

But this does not imply that all efforts to establish a court are doomed form the outset. It highlights the supplementary role of the proposed Court, not only in addition to other structures (such as the African Commission), but also in support of other efforts by non-judicial means in the different African countries to improve the realisation of human rights in Africa.

---

97 The United Republic of Tanzania (1968) *Report of the Presidential Commission on the Establishment of a Democratic One Party State* at 31.

8.1.6 Institutional obstacles and other practicalities

8.1.6.1 Argument

Africa is a vast continent. Apart from the lack of common values occasioned thereby, this fact also impacts on the functioning of any all-African institution. Institutional links between states, between persons in various African states, and also within these states, are weak. Travelling within and between African states is arduous, due to underdeveloped road and railway infrastructures, especially through deserts, mountainous terrain and vast forest areas. Air links are often irregular, require time-consuming stop-overs in other African capitals and are sometimes only possible via a European capital. Flights between East to West Africa are particularly problematic. Distances from one end of the continent to the other (east to west and north to south) are substantial. Visa requirements, numerous borders and a corrupt officialdom, also at airports, are further obstacles to consider. Communication by post, telephone, fax or e-mail is unreliable, costly and often non-existent. One of the curious colonial legacies is that communication is often easier to the "metropole" (Paris or London) than to neighbouring states. When communication is established, linguistic differences present further problems. Little linguistic cross-fertilisation between the two major language groups (English and French) has taken place on the continent. Technological advances (foremost, access to computers and, even more so, the Internet) have not permeated through most African countries.[98]

These factors will impact on the establishment and functioning of the Court, the argument continues. Judges are not appointed on a full-time basis. They will have to communicate with one another and the registrar, and will have to travel occasionally. Linguistic differences will make the operation of a trans-continental court difficult. More importantly, these factors may be significant obstacles to individuals who want to approach their own courts and eventually the African Court on Human and Peoples' Rights on human rights matters. Difficulties related to travel,

---

98 At the beginning of 1996, only four states had full access to the Internet. They were Botswana, Ghana, South Africa and Zambia: see Mulligan (1996) 2 *Nexus Africa* 8.

communication and language already inhibit judicial recourse at the domestic level. Where they exist across the continental divide, these difficulties may become insurmountable.

8.1.6.2 Evaluation

As far as judges and the establishment of the Court is concerned, these problems are less pronounced. Most of these concerns relate to financial considerations, which are discussed elsewhere.[99] Many examples of inter-state co-operation already exist in Africa, presenting sufficient proof that linguistic difference and communication problems may be bridged, provided that sufficient funding is provided and given the necessary goodwill.

However, physical and psychological remoteness of the Court, occasioned by these factors, will inhibit individual access to the Court. People in rural Africa already suffer from centralisation of resources and judicial activity in urban centra. Removing this centre even further from them may make recourse under the African Charter so remote as to render it unimaginable and therefore, impossible. Without a comprehensive system of legal aid at the domestic level, very few individuals will set the process into motion.

Another response to the above argument is as follows: Once an individual has approached the domestic courts and thereafter the Commission, that person need not be involved further. In an ideal world, the Commission will seize the Court and take the complaint further. This would make the argument about practical obstacles largely irrelevant.

---

99 See par 8.1.12 below.

8.1.7 Charter not drafted as a justiciabile document

8.1.7.1 Argument

The African Charter contains "rights" and "duties". But the Charter is not very clear on the question whether these "rights" and "duties" are justiciable (that is, may be applied or enforced by courts). As far as the concept **"right"** is concerned, two phrases in the first two articles of the Charter arguably diminish the legal force of the document. Article 1 places an obligation on states, not to "adopt" measures to give effect to the Charter, but to "undertake to adopt" such measures. Article 2 provides that individuals "shall be entitled to the enjoyment of rights", rather than "shall enjoy" rights. In a restrictive interpretation of this provision, rights are entitlements granted by governments, rather than claimed by individuals. Serious consideration should also be given to views that the "duties" in the Charter may not be immediately justiciable by individuals against either the state or other individuals, or by the state against individuals.

8.1.7.2 Evaluation

The argument about the negative implications of the wording of the first two articles has been deflated by the African Commission itself, who accepted that individuals may claim that governments have infringed their rights. It is quite inconceivable that the Court will back-peddle to adopt an interpretation of the Charter that has become almost irrefutable. The inclusion of "duties" in the Charter serves as a counter-balance to the concept of "individual rights", and provides a platform for the development of an autochthonous African human rights jurisprudence.

8.1.8 Lack of independent and functioning judiciaries

8.1.8.1 Argument

A supra-national court presupposes domestic (national) courts. Such courts can only play a role as "first buffer" in protecting human rights if the following requirements are met:

- Courts must be **independent** from executive domination and interference.
- The **legitimacy** of the courts must be accepted by the community.
- Courts must, in fact, be **functioning**, operating and **accessible** to ordinary nationals.

These three aspects are now considered.

i Judicial independence inoperable in patrimonial societies

Court judgments, also those concerning human rights, do not impact on a void or function in a vacuum. They are directed at and interact with a specific society. A workable judicial system presupposes a society in which the law and independent judicial institutions are held in high enough esteem to guarantee its independent functioning. In many African societies, this is not the case, placing efforts to secure judicial independence under serious suspicion.

Ghai used Max Weber's typology to postulate a theory of the African state. He drew a distinction between the rational-legal and the patrimonial state.[100] In the rational-legal state, legality is the underlying principle and principal source of legitimacy. It derives from rules, or overriding principles. In independent African states, the constitution is the foundation of authority. In the supra-national context, it is the African Charter. As allegiance is not owed to any individual person, authority becomes impersonalised. The legal system, and not a person, is obeyed. "The power of institutions and officials are defined and bounded by the law, and do not arise from the

---

100 Ghai in Adelman & Paliwala (eds) (1993) at 63-64.

personal qualities of the office holder".[101] The patrimonial state, on the other hand, is characterised by "highly personal rule". In the ruler, in his discretion and personality, one finds the source of authority.

A formal legal system and the court structures clearly play an important role in the legal-rational state. Their function is to enhance the authority of the law. Equality before the law is one of the central values of the rational-legal state. Judicial officers are independent legal experts whom the citizens trust. They fulfil their functions impartially and are independent of the personalities of political leaders. In contrast, the *fons et origo* of justice in the patrimonial state is the ruler himself (and only occasionally herself). This means that the ruler is both the law and above the law. Judicial officials are appointed by him personally and rule at his favour. Personal considerations, such as ethnicity, play an important role in judicial appointment.[102]

This distinction corresponds with the differentiation between the *Gemeinschaft* and *Gesellschaft* constructs of society and social values.[103] *Gemeinschaft* (or "community") denotes social relationships of solidarity based on affection and kinship, such as the relationship between members of a family. *Gesellschaft* (or "society"), on the other hand, refers to social relationships based on division of labour and "contractual relations between isolated individuals".

The inoperability of the rational-legal system of judicial review, shaped by *Gesellschaft* values, in a patrimonial state, still heavily based on *Gemeinschaft* values, is illustrated by a series of events taking place in Swaziland during the early 1970s. In terms of Swazi legislation, one Ngwenya was declared a prohibited immigrant. Shortly thereafter, the Swazi legislature passed the Immigration Amendment Act.[104] In terms of the amendment a new tribunal was established to decide all matters concerning citizenship. Importantly, none of the new tribunal's decisions could be subjected to

---

101 Ghai in Adelman & Paliwala (eds) (1993) at 64.

102 See eg the HRC comments on Burundi's state report, which criticised the dominance of the judiciary by members of a single ethnic group (see CCPR/C/79/Add 9 (1992)).

103 These terms were first used by the sociologist Ferdinand Tönnies in 1887. See Bullock *et al* (eds) at 48. See also the distinction drawn by Dicey (1959) between the "rule of law" and the "exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint" (at 188).

104 22 of 1972.

judicial review. Ngwenya sought judicial relief, arguing that the amendment is unconstitutional. This contention found little favour with the Swaziland High Court. A final appeal lay to the Swaziland Court of Appeal. This Court had replaced the Swaziland Privy Council, and consisted of South African judges. Judge of Appeal Schreiner wrote the Court of Appeal's judgment, in which the amendment was found to be in violation of the Swaziland Constitution. This was followed by a unanimous resolution passed by the Swaziland Parliament, stating that the Constitution was unworkable.[105] The King then suspended the Constitution by radio broadcast and assumed all legislative, executive and judicial authority in his person. From the ordinary Swazi's point of view, these steps were justified. It was the dictatorship of the judiciary, in the form of a "South African" court that "interfered with the sovereignty of the country". A fearless judiciary may be inappropriate in patrimonial society. In a society emphasising the communal and personal, the impersonal judgment of a court in the protection of minorities is understood only to a small degree. This clash illustrates that judicial activism in the wrong kind of society may have dire consequences.

ii Lack of independence

Attempts to ensure judicial independence through constitutional guarantees have been sketched above.[106] The conclusion was reached that the independence of most African judiciaries is suspect. Dominance by the executive branch is a general occurrence.[107] Wolfgang Benedek extrapolated this argument to the supra-national sphere, when he expressed the opinion that the initial decision to erect the African system without a court "would have to be seen in connection with the fact that at present there are problems of guaranteeing the independence of such a court".[108]

---

105 See Hund (1982) 15 *CILSA* 276 at 282.

106 In ch 3.4.4 above.

107 See eg the concern expressed by the HRC on the position in Libya and Morocco, where judicial independence is threatened by executive dominance or interference (reports CCPR/C/79/Add 45 (1994) and CCPR/C/79/Add 44 (1994) respectively).

108 Summarised in Heinz (1990) at 8.

iii Courts are not functioning

Whatever the details of its functioning or structure, the proposed Court will operate supra-nationally. As the requirement that domestic remedies must first be exhausted seems accepted, the Court will generally be a court of appeal on the record of evidence presented to domestic courts.[109] Such a system can only function effectively in a functional hierarchy of courts, where there is meaningful access to lower or domestic courts. This factor has been highlighted in relation to the work of the Commission, and will similarly, or even to a greater extent, apply to the functioning of a court. In this regard, the present Chairman of the Commission, Nguema, noted the following: "(I)f a judiciary is not functioning properly then we should not expect that the Commission will be able to change things automatically or make a very big difference".[110]

In most African countries the quest for legal remedies become a futile exercise, because domestic legislation is not applied and the legal system does not function. In Zambia, for instance, a task force under judge Sakala investigated and reported on the judicial system.[111] The task force found the infrastructure to be lacking. Court and office accommodation was inadequate. The report concluded that the "whole country needs new local court buildings".[112] "In some parts of the Country", the report concludes, "where there are no court buildings, sessions take place in other government institutional buildings".[113] In some local courts there are "no benches and tables for the public and the justices themselves".[114] As far as material and equipment were concerned, the report noted a critical shortage of typewriters, stationary and other office equipment at all stations. Where libraries existed, they were not well stocked. When they were stocked, it was with old editions. The publication of law reports was lagging far behind. There was a lack of training programmes for staff, and a lack of record-keeping to facilitate policy and planning. Finally, salaries were inadequate.

---

109 Unless the case is referred directly to the Court, or if local remedies need not be exhausted.

110 Interview in (1996) (Oct - Dec) *AFLAQ* at 7.

111 See *A Report of the Advisory Task Force on Judicial Performance*, dated 2 September 1994. Zambia is chosen, not because its position is particularly illustrative, but because this data was available to me.

112 See foreword, conclusions at i - iii.

113 *Ibid.*

114 *Ibid.*

Under the heading of article 26 of the Charter,[115] the recent country report presented to the African Commission by Zimbabwe also ascribes problems in the promotion and protection of rights to "shortages of judicial officers and court rooms due to financial constraints".[116]

8.1.8.2 Evaluation

There is much merit in the argument that African courts do not generally function well or independently. It may to some extent be countered by the fact that local remedies do not always have to be exhausted within the domestic legal system. In clear cases of interference with the judiciary, where remedies are non-existent, when courts do not function, or when serious human rights violations are taking place on a massive scale, a complaint may be addressed directly to the institutions of the African Charter.[117]

But it must be conceded that more pervasive and institutionalised forms of interference will be difficult to establish. If the exhaustion of local remedies is still required in such instances, the likelihood of eventual recourse to or redress by the Court on the supra-national level remains remote.

---

115 The state's duty to guarantee the independence of the courts, see also ch 3.1 above.

116 At 61 of typed report. The is contrasted with "interference by the Executive or the Legislature" as a factor undermining judicial independence. The reality of non-functioning courts need not exclude the possibility of executive or legislative interference, which has been discussed in ch 3.1.

117 Decisions taken by the Commission in this regard are of relevance, as this argument relates to the functioning of the Commission as well. See ch 3.3.2 above.

8.1.9 Lack of democratic basis to ensure compliance

8.1.9.2 Argument

Benedek has pointed out that in Europe the constituent states all subscribe to democracy, and a certain level of compliance with human rights norms is required before a state can become a member of the Council of Europe. This meant that the European Convention never became a vehicle for radical governmental reform, or caused a legal revolution in any of the states concerned. The norms set out are aimed at fine-tuning, and not at overhauling the whole engine. A similar trend has been underway in the OAS, confirmed by the Protocol of Washington, which provides for the suspension of any member whose democratically constituted government has been overthrown by force.[118]

A matching requirement has not been introduced at the political level by the OAU. To the contrary, much emphasis has been placed on attaining the ideal of continental ratification. The ratification of Swaziland on 15 September 1995 illustrates the disadvantages of an approach of ratification at all costs. Prior to the ratification, and again some time thereafter, the absence of a basic democracy was brought to the foreground by pro-democracy strikes organised by the Swaziland Democratic Alliance ("SDA"). Members of trade unions were detained and allegedly maltreated.[119]

Democracy in European states does not merely entail formal adherence to multi-party elections. One of the essential ingredients is a free press, leading to informed public opinion. Even though judgments of supra-national courts are "binding", they cannot be enforced directly in member states.[120] Ultimately, public opinion is the means through which pressure may be exerted on states to ensure compliance. Even where multi-party elections were held in Africa since 1990, this does not necessarily mean the institution of liberal democracy. A lack of a political culture of tolerance

---

118 See Buergenthal & Shelton (1995) at 44.

119 See (5 February 1997) *Business Day* 3.

120 The Convention as such may be invoked directly in those states with monistic systems.

and democratic values is still evident even where functional democracies are in place. The dominant role of the security forces and the ideologies to which they adhere had been identified as a primary source of gross human rights abuses in Latin America.[121] Even in nominally democratic states in Africa the military and security forces remain a force to be reckoned with. This fact may detract from the role of domestic and international judicial institutions.

8.1.9.2 Evaluation

Any responding argument would have to depart from the concession that many African states lack a democratic tradition and still do not function democratically. But everyone agrees that any proposed Court would have to be established by way of a protocol amending the African Charter. This would entail that the Court will start functioning only in respect of those states ratifying the Protocol. The Protocol may serve as a "filter" to ensure that only those states committed to democracy and human rights enter into the system. But the decision to ratify remains entirely subjective. This differs from the position in Europe. In that system, the Council of Europe poses pre-conditions for admission. Experts are first sent out to assist in "overhauling" the domestic legal system. In the African system, one would expect a limited number of ratifying states initially - those states seriously committed to democracy. For such states - that may include Botswana, Namibia, South Africa and Tunisia - the objection should fall away, making it irrelevant to the functioning of the Court as such.

In recent times there have been encouraging signs that the attitude of governments towards the Commission is changing. An increasing number of states have allowed delegations of the Commission to visit their countries. More and more states have also started sending official representatives to the sittings of the Commission.[122] This illustrates greater commitment on the part of states to take the implication of becoming "democracies" seriously.

---

121 See Heyns (1995) at 172.

122 Eleven OAU member states were represented at the 20th session in Mauritius, and nineteen states parties to the Charter were present at the 21st session (see paras 5 and 7 of the Tenth Annual Activity Report).

8.1.10 Inevitable delay before entry into force

8.1.10.1 Argument

The argument that creating a Court on Human Rights in Africa will be an unacceptably lengthy process is premised on the view that the pressing human rights crisis in Africa deserves immediate attention. As a court is bound to take a long time before it will start operating effectively, other measures should enjoy priority.

The establishment and functioning of an African Court on Human Rights will be prolonged by numerous factors, such as the following:

- The **drafting of the Protocol** has already taken a number of years. At the last meeting of the Council of Ministers, indications were that the process will not be finalised soon.[123]
- Once a draft Protocol has been elaborated, the OAU Assembly must still **adopt** it formally.
- The requisite number of states must then **ratify** the Protocol.
- Once the Protocol has entered into force, the **judges have to be elected**. The President of the Court will have to vacate his or her present position.[124]
- The **seat** of the Court has to be finalised, a court premises must be acquired and a building needs to be converted or will have to be newly built.
- **Rules of procedure** have to be drafted and adopted.

Only then can cases be submitted, either by the Commission, or by an individual or NGO from a state which has accepted the Court's competence to allow direct access. This will eventually lead to a hearing and the Court's decision. This whole process may take up to ten years, and will definitely not be finalised before well into the next century.

---

123 See ch 6.1 above on the historical background to and immediate prospects of the adoption of a Protocol to establish an African Court of Human Rights.

124 If the proposal in art 15(4) of the Nouakchott draft is adopted (see ch 7.2.17 above).

8.1.10.2 Evaluation

While it is correct that the likelihood of fifteen states ratifying the Protocol is not great, it must be kept in mind that the Charter was ratified by nine OAU member states[125] in the first two years of opening for ratification. When the Charter had just been adopted, Umozurike lamented that it required "too many ratifications to come into force - a majority of African states ie 26".[126] To his surprise, the Charter was ratified by the requisite number of states only five years after it opened for ratification. Ten years thereafter, it enjoyed almost complete African ratification.[127]

At the stage when the Charter was adopted, African states did not maintain a good record in the ratification and accession to human rights treaties.[128] The state of African ratification of some important human rights treaties as at 1 July 1982 was:[129]

CCPR : 15 ratifications
CESCR : 16 ratifications
CEDAW : 4 ratifications

This contrasts sharply with the position as at 31 March 1997, which was as follows:[130]

CCPR : 41 ratifications
CESCR : 41 ratifications
CEDAW : 45 ratifications

The contrast between the rate of ratification by African states in 1982 and 1997 illustrates an increased acceptance by these states of the legitimacy of international human rights law. It also evinces their greater confidence to participate in the international arena and to allow limitations of

---

125 They are Congo, the Gambia, Guinea, Liberia, Mali, Nigeria, Senegal, Togo and Tunisia.

126 In Ginther & Benedek (eds) (1983) 112 at 127.

127 At the tenth celebration of the Charter taking effect the only OAU members not party to the Charter were Eritrea and Ethiopia.

128 See Umozurike in Ginther & Benedek (eds) (1983) at 127.

129 Umozurike in Ginther & Benedek (eds) (1983) at 129.

130 See Table B in ch 2 above.

their political sovereignty. But, mostly, it resulted from a general awareness that embracing human rights rhetoric is inevitable.

The number of ratifications required to secure the entry into force of the Protocol is of the utmost importance. As presently proposed, fifteen states must accept the Court's jurisdiction before it will be established.[131] It is my opinion that the number of ratifying states should be reduced to nine, as previous drafts required.[132] The period within which ten African states are likely to ratify the Protocol will be significantly shorter than the period required to ensure ratification by fifteen states.[133] It is unlikely that the gradual but progressive increase in ratification experienced in respect of the Commission will be repeated with regard to the Court. Binding court judgments differ from the recommendatory and consensus-seeking views of the African Commission. States are more likely to resist the prospect of accepting binding decisions.

It is also true that, once it turns into force, the number of states parties to the Protocol may remain limited for quite some time. But this lack of all-African involvement need not be a negative factor. The prize may well be universal ratification, but the price is the weakening of the system. Only through the gradual involvement of more states will the integrity of the system be safeguarded.[134]

8.1.11 Inconsistency with the African way of resolving disputes

8.1.11.1 Argument

One of the arguments often raised against a regional human rights court for Africa, is that it would somehow be inappropriate to establish such an institution because of Africa's preference for other

---

131 In terms of art 33(3) of the Nouakchott Protocol. See also ch 7.2.35 above.

132 See discussion in ch 7.2.35 above.

133 See the discussion in ch 6.1.5.4 above.

134 See Bayefski in Henkin & Hargrove (eds) (1994) at 263.

methods of resolving disputes, in which dialogue and conciliation is emphasised.[135] The fact that a court was not provided for in the African Charter is also explained with reference to a preference for "customary and traditional methods of reconciliation", as against "the procedures in common law, [and] legal and judicial establishments".[136] Traditional Africa, so the argument continues, avoided conflict resolution that ended in "open-confrontation-type win/lose" modes of adjudication.[137]

By way of introduction to this discussion, a range of **dispute resolution methods or mechanisms** are discussed briefly. These methods range from negotiation to the use of force. Negotiation is used when parties to the dispute strive towards a solution that would benefit both parties, in which a compromise should be reached to accommodate the differences. The use of force, at the other extreme, is the attempt by one party to impose its will on the other:

- *Negotiation*: In the absence of any third party, the disputants enter into a dialogue aimed at resolving their dispute. The resolution is the result of the parties' own making, and is not imposed or influenced by external authority. The settlement is "some mutually acceptable, tolerable resolution of the matter in dispute, based on the assessed or demonstrated strengths of the parties".[138]

- *Mediation*: In the process of negotiation, a third party enters the scene, called the mediator. The mediator is appointed to facilitate a solution between the parties. The mediator, just like the conciliator, lacks overriding authority to impose a decision. The arbitrator and adjudicator possess this authority.

- *Conciliation*: A third party, the conciliator, usually meets both parties and presides at a meeting between them. If a settlement is not reached, the conciliator may give an assessment

---

135 See eg Mbaye (1992) at 164 - 165, who gives this "philosophical" reason for the omission of a Court, referring to the "palabres" where conflicts were discusssed and underscoring that African justice is essentially conciliatory. Decisions to intervene in a situation is generally based on consensus. See also the arguments cited in Sock (1994) 2 *African Topics* 9.

136 Eso (1996) 6 *African Human Rights Newsletter* 9.

137 Amoah (19920 4 *RADIC* 226 at 238.

138 Gulliver in Nader (1969) 11 at 17.

of the likely outcome of a trial. This is designed not to bind the parties, but to persuade them to reach a consensual solution.[139] The conciliator differs from the mediator in that the mediator never offers his or her own views or try, even by implication, to impose a viewpoint on the disputing parties.

- *Arbitration*: This method is employed "when parties submit their dispute to a (or several) mutually agreed upon, third party decision maker(s) who has (have) the authority to issue a binding judgment".[140] Arbitration is used especially when particular expertise is required. In such circumstances (eg involving complicated commercial disputes, or disputes about the construction of a building) the application of established legal principles may be inappropriate or the ordinary judges may lack the required knowledge, skills or insight. Arbitration resembles adjudication as far as the formality of the procedure applied and the enforceability of the outcome are concerned.

- *Adjudication*: In seeking the essence of "adjudication" one can hardly do better than refer to Fuller's seminal essay "The Forms and Limits of Adjudication".[141] In this process, he wrote, decisions are reached "within an institutional framework that is intended to assure to the disputants an opportunity for the presentation of proofs and reasoned arguments".[142] This necessarily implies the adjudicating role of an impartial judge. "Adjudication is, then, a device which gives formal and institutional expression to the influence of reasoned argument in human affairs. As such it assumes a burden of rationality not borne by any other form of social ordering."[143] The application of rational principles has the effect that "issues tried before an adjudicator tend to become claims of right or accusations of fault".[144] Adjudication essentially differs from the above not in the binding nature of the decision, or the adversarial nature of proceedings, but in its public and open nature which requires a higher level and more visible display of rationality.

---

139 Iwai (1991) 10 *Civil Justice Quarterly* 108 at 109.

140 Gobbi & Gray (1991) *New Zealand Law Jnl* 270.

141 (1978) 92 *Harvard Law Review* 353.

142 Fuller (1978) 92 *Harvard Law Jnl* 353 at 365.

143 Fuller (1978) 92 *Harvard Law Jnl* 353 at 366.

144 Fuller (1978) 92 *Harvard Law Jnl* 353 at 369.

- *Use of force*: When other options have failed or are likely to frustrate one party, one or both of them may have recourse to force.

i *Domestic systems*

Traditional Africa

The way in which a specific society resolves disputes cannot be considered in isolation. Methods of dispute resolution relate and are connected to the world view in that society, the prevailing political order, and the role of "law" more generally within a specific historical and cultural context. The world view of traditional African societies is one in which the religious predominates. This domination has caused a fusion of what in Western thought are dichotomies: order/disorder; war/peace; conflict/agreement; legality/illegality, and left some commentators with doubts whether "the concept of solving a conflict legally can really play an appropriate role in African society".[145]

For Legesse, the Western notion most removed from African ideas about human interaction and conflict is that of "the sacralized individual whose private wars against society are celebrated".[146] The individual who asserts him or herself against society can never be a hero in traditional Africa, as the "very idea of advertising cultural values by personifying them in the lives of individuals is a very strange idiom to an African".[147] The political order is generally regarded as communitarian, with a non-competitive system of government in which "palaver" (talking out) plays an important role.[148] This system is directed at consensus, and is attained through a process of non-partisan debate in which numerous members of the tribe may participate. Traditional Africa also did not know a professional class of lawyers, nor did it perceive of "law" as a separate discipline or source of moral authority.

---

145 Kunig in Kunig *et al* (1985) at 37.

146 Legesse in Thompson (1980) at 124.

147 Legesse in Thompson (1980) at 125.

148 Howard (1987) at 22.

The following characteristics of traditional ways of resolving private disputes in relatively decentralised African societies may be listed:[149]

- There is **no specialised enforcement machinery**. Indigenous law consists of self-sanctioned rules and regulations, internalised by those to whom it applies. Law is not enforced by specialised machinery, because it "draws the strength of its influence and power from the elaborate network of mystical beliefs, rituals and observances that constitute a large part of the social structure".[150] The desire to conform to generally accepted standards, for acceptance in the social group, and the fear of social retaliation (in its worst form, expulsion) dictate individual compliance. Internal, voluntary and instinctive conformity with the required norms makes **structured enforcement unnecessary**. The concept of **collective responsibility,** which is tied closely to the predominance of religious and supernatural powers, also minimises the role of enforcement on an individual basis.

- The process is **decentralised**. Geographically, temporally, emotionally and intellectually, the process takes place in **close proximity** of those affected thereby. The dispute is heard in the area where the disputing parties reside; it is heard soon after the event by elders of the same group to which they belong, whom they know and whose authority they respect; the dispute resolution is based on principles that are well-established and well-known to those concerned. This is clearly distinguishable from a court system, with its alien bureaucracy, consisting of independent, anonymous and interchangeable professionals within a centralised structure.

- It is **concerned more with facts** than with "law". The rules applicable usually need not be ascertained, as they are well-known. What needs to be established, are the facts.[151]

- The process is non-formal and **commonsensical**. Specialised Rules of procedure do not apply.

- The process provides for **attendance and participation** by members of the group.

---

149 These general observations are based on an overview of the literature on this topic, exemplified by the works of Allott, Cotran and Ebo.

150 Ebo (1979) 76 *Vierteljahresberichte* 139 at 144.

151 Ebo (1979) *Vierteljahresberichte* 139 at 146.

- It is aimed at **retaining social solidarity**. The process is not directed at identifying or tagging one of the parties as "aggressor" or "violator" or "transgressor". Rather, the process seeks to restore the equilibrium that has been upset. It is acknowledged that the parties will remain part of the same closely-knit circle, that the relationship between them has to be restored, and that the "offender" has to be re-integrated into the fabric of society. None of the disputing parties must be seen as the "loser".[152]

Clearly, then, the Western-inspired notion of "formal law", applied by an institutionalised judiciary, contrasts sharply with the ways in which pre-colonial Africa resolved disputes.[153]

Post-colonial Africa

The existence of courts is an inescapable feature of all modern African states. But their institutional incorporation does not imply wholesale acceptance or reliance on judicial methods of conflict resolution. Although Western-style courts have been instituted and function, many disputes are still resolved by clandestine, *ad hoc* tribunals. In these settings traditional African law is still applied and the procedure is still that of pre-colonial times. Some of the reasons why courts have remained alien in many African states are the low levels of education and literacy, the lack of adaptation to and absorption of the new political culture, and inaccessibility of courts.[154] A lack of deep-rooted reliance on courts to resolve disputes and to ensure order in society is further reflected in resort to self-help. In many African states "mob justice"[155] is not an uncommon occurrence.

---

152 *Ibid.*

153 From a law and literature view, this contrast is clearly set out in Achebe's *Things Fall Apart*, where the judgment of the elders is contrasted with the colonial judicial administration.

154 See Eze (1984) at 53.

155 See eg Sembony "Angry Mob Beats Suspected Thief to Death" (16 January 1995) *The Guardian* (Tanzania), Anonymous "Mob Justice Victim Dies" (8 January 1995) *The Daily News* (Tanzania), Hlatshwayo "Mob justice Rules in Swaziland" (28 November 1996) *Sowetan*: "Two days after King Mswati III warned the public against taking the law into their own hands and resorting to mob justice, a 30-year-old man suspected of practising witchcraft was battered and burnt to death by an angry mob in Mbelebeleni, 25 kilometres north of Manzini".

This also applies to countries in which formal courts have generally functioned well.[156] In many modern African states the protection of human rights is not the exclusive function of courts. **Ombudsman institutions** and **human rights commissions** are increasingly becoming popular mechanisms to provide for non-adjudicatory methods of ensuring the realisation of rights.

Eze showed how the institution of the ombudsman developed soon after independence in countries such as Ghana, Mauritius, Nigeria, Sudan, Tanzania[157] and Zambia.[158] Zimbabwe followed later, when its Parliament enacted the Ombudsman Act in 1982.[159] The wave of democratisation which hit Africa in the 1990s has also secured the inclusion of this institution in democratic constitutions or in legislation. In Botswana, for example, the office of an ombudsman was provided for by legislation passed in April 1995.[160] It was recently made part of the constitutional framework in Lesotho,[161] Malawi,[162] Namibia and South Africa.[163]

---

156 Eg South Africa: Fourteen people suspected of being stock thieves were butchered by villagers near Lusikisiki in the Eastern Cape ("14 'stock thieves' butchered" (28 January 1997) *The Citizen*).

157 The Tanzanian model, the Permanent Commission of Enquiry (PCE) was established in 1966. This was established when Tanzania reconstituted itself formally into a one-party state. The Report of the Presidential Commission on the Establishment of a Democratic One-Party State in Tanzania remarked on the need to "ensure that any new arrangements ... will not unnecessarily encroach on the freedoms of the individual ... We therefore recommend that the new constitution should provide for a permanent commission to be appointed by the President, with a wide discretion to enquire into allegations of abuse of power by officials of both government and party alike" (quoted by Ayeni in Kasuto & Wehmhörner (eds) (1996) at 36).

158 Eze (1984) at 49-55. In Zambia, the institution is called the Commission for Investigations, and is headed by an Investigator-General (see Mumba in Kasuto & Wehmhörner (eds) (1996) at 233). It was created in 1973 to consider complaints within the one-party state context.

159 Chigwedere in Kasuto & Wehmhörner (eds) (1996) at 200.

160 Nwako in Kasuto & Wehmhörner (eds) (1996) at 87.

161 Nts'aba in Kasuto & Wehmhörner (eds) (1996) at 177.

162 Included in both the transitional Constitution and the final Constitution of 1995 - see Chirwa in Kasuto & Wehmhörner (eds) (1996) at 104.

163 The interim and final Constitutions both provide for the institution of a Public Protector. It had predecessors under the previous government, in the office of the Advocate-General (established in 1979,

Footnotes continued on next page.

But in Africa the Swedish precedent was adapted to help overcome the problems presented by the formal court structure. In Tanzania, for example, it was decentralised through the appointment of various ombudsman offices throughout the country.[164] In most of the other instances, efforts were made to integrate the ombudsman into the local political culture by using local languages, informal procedures,[165] and by ensuring minimal delay and minimal cost.[166] Commenting on the Lesotho experience, the local ombusman remarked that "the Ombudsman has mediated successfully in cases where there could have been discord if cases were sorted out by the adversarial method typical of a court of law".[167] Rather than confronting officialdom, the ombudsman has engaged in constructive efforts to reform the public service, and if necessary, even legislation. Through these efforts, the institution has not alienated itself from the law enforcement agencies or the public, but has endeavoured to retain the trust of both. These features may account for the frequent use that has been made of African ombudsman institutions. The number of cases presented has been steady or has increased in all instances, reaching an average of 100 complaints per month in South Africa[168] and 2 115 cases for the year 1991 in Zimbabwe.[169]

At its 4th session the African Commission adopted a resolution recommending that human rights commissions be set up at the national and regional levels.[170] Such domestic human rights commissions have been established in, amongst others, Malawi, Namibia, Nigeria, South Africa and Uganda. These commissions are mainly aimed at promoting a human rights culture, but may

---

after the "Information scandal", which was converted into an Ombudsman in 1991: see Baqwa in Kasuto & Wehmhörner (eds) (1996) 147).

164 The occasional traveller through the heartland of Ghana will be struck, as I was, by the presence of ombudsman offices in the dusty streets of rural towns far removed from the capital.

165 Mumba, writing about the Zambian Commission of Investigations, observed: "Because of the simplicity of procedure and the practice of confidentiality, people from all walks of life find it easy to approach the Commission and lay complaints against any public official regardless of status or authority" (in Kasuto & Wehmhrner (eds) (1996) at 236).

166 See Eze (1984) at 53 and Mumba (in Kasuto & Wehmhörner (eds) (1996) at 237): "... its services are free of charge ... The Commission refunds all personal expenses incurred by witnesses at its motions".

167 Nts'aba in Kasuto & Wehmhörner (eds) (1996) at 180.

168 Baqwa in Kasuto & Wehmhörner (eds) (1996) at 153.

169 Chigwedere in Kasuto & Wehmhörner (eds) (1996) at 203.

170 Second Activity Report at par 23.

also have quasi-judicial powers such as investigation. The South African Human Rights Commission is given the rather unique duty to "require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation" of the socio-economic rights in the Bill of Rights.[171]

ii Resolution of disputes at international level

In pre-colonial Africa the notion of statehood had not been developed in the sense it is understood today. In the post-colonial era, however, African states started engaging in international relations, setting up sub-regional and regional institutions, and started interacting at the international level. Such interaction could and inevitably did lead to international conflict. The ways in which these anticipated conflicts were regulated and have in fact been resolved, present examples of a preference for both mediation and adjudication.[172] Mediation and other non-judicial means of resolving disputes, are exemplified by the following:

- At the founding of the OAU, the preference for non-judicial methods of conflict-resolution was evident. The **OAU Charter** does not provide for any judicial institution. As far as conflicts between states are concerned, a Committee for Mediation, Conciliation and Arbitration was established in terms of the OAU Charter. It was replaced by another non-judicial institution, the Mechanism for Conflict Prevention, Management and Resolution in 1993.[173]

- The scepticism of OAU member states towards judicial resolution of dispute is further demonstrated by their reluctance to institute a **judicial commission** as specialised commission under the OAU umbrella.

- This trend was continued in a number of **regional treaties**. The African Convention on the Conservation of Nature and Natural Resources, adopted in 1968, and the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted in 1969, provide

---

171 S 184(3) of the 1996 Constitution.

172 See also Sanders (1979) at 30, who observed that the initial reluctance of African countries to accept the compulsory jurisdiction of the ICJ was caused partially by "their traditional preference for diplomatic negotiation".

173 See ch 3.1 above.

examples. Both provide that "any dispute between State signatories ... relating to its interpretation or application, which cannot be settled by other means, shall be referred to the Commission for Mediation, Conciliation and Arbitration" of the OAU.[174] In contrast, disputes between parties to the UN Convention on Refugees about its application and interpretation which cannot be settled by other means "shall be referred to the International Court of Justice at the request of any one of the parties to the dispute".[175]

- When the OAU adopted the **African Charter on Human and Peoples' Rights** in 1981, no provision was made for a court. Rather, a non-judicial institution, the African Commission, was created. In the Charter itself friendly settlement is emphasised. An individual, in the terminology of the Charter, directs "communications" - he or she does not "complain" or institute an action or "claim" to a court.

- The **reservations** entered by a number of African states when ratifying CERD are also indicative of reluctance to accept international adjudication.[176]

iii Summary

The argument, briefly summarised, is that judicial means of resolving conflicts is alien to Africa. This is true for both pre-colonial (traditional) and post-colonial (independent) Africa, and also applies to the resolution of international conflicts. Pre-colonial African law was characterised by its consensual and conciliatory nature, leaving little room for formal, judicial legal structures. While it is true that courts have been established in colonial Africa and still form part of the legal system of all post-colonial African states, the impact of these structures has been minimal. This is illustrated by frequent resort to self-help and by the role of non-judicial structures such as human rights commissions and ombudsman institutions in numerous African states. The African

---

174 Art XVIII of the first, and article IX of the second convention. Weis made the following observation in relation to the OAU Refugee Convention: "This is in accordance with the Charter of the Organisation of African Unity and reflects the known reluctance of many African States to accept the compulsory jurisdiction of the International Court of Justice" ((1970) 3 *Revue des Droits de l'Homme* 449 at 462).

175 Art 38.

176 See ch 2.4.1.3 above.

preference for non-adjudicatory resolution of disputes is not restricted to the domestic sphere, but extends to international affairs. The best and most apt illustration in this regard is the creation of a commission, and not a court, to supervise the African Charter on Human and Peoples' Rights.

8.1.11.2 Evaluation

i Domestic adjudication

Traditional Africa

The argument that judicial dispute resolution is not the "African way" has limited **validity** and **applicability**.

Its **validity** is limited, because it does not sufficiently account for the "public law" nature of human rights conflicts and for the position in more centralised societies, even in traditional Africa. "Public law" disputes involve grave misconduct which threatens the security of the whole community. In such cases, the presiding traditional official or group acts more rigidly, by imposing the appropriate penalty prescribed by custom.[177] While traditional Africa may have preferred amicable settlement, this preference did not exclude litigation, and traditional (or "native") courts.[178] The underlying premise of the argument is that courts breed acrimony. This is not correct: "The existence of courts are not impediments to the amicable settlement of disputes. ... The cases that usually come to court are those that have defied settlement".[179] These "pathological cases" cannot conceivably be settled by friendly settlement. Courts do not cause disputes, but deal with them when friendly settlement has failed.

---

177 Ebo (1979) 76 *Vierteljahresberichte* 139 at 142, 146.

178 Bondzie-Simpson (1988) 31 *Howard Law Jnl* 643 at 663.

179 Bondzie-Simpson (1988) 31 *Howard Law Jnl* 643 at 663.

Further, the argument pertaining to traditional Africa is largely **inapplicable** to modern African states.[180] The argument that traditional Africa preferred reconciliatory resolution of disputes, while logical and conceptually attractive, does not take the reality of present-day African society sufficiently into account.[181] With the nation-state replacing the tribal unit, several factors, such as increasing urbanisation, acculturation and population concentration (to name but a few) have contributed to the disintegration of traditional authorities. Impersonal states have replaced relations of kinship. In principle, each independent state created a formal judicial system, consisting of courts at various levels. In most cases the traditional court structures were also incorporated and integrated into this new system. Rules of evidence based on common or civil law were incorporated. Codes of civil and criminal procedure, based on the examples of colonial examples, were introduced and retained after independence.

One of the members of the African Commission, commissioner Umozurike, considered this argument. He concluded that "with Courts working in the national system, there is no basis for concluding that they would not, as in Europe and America, work at the inter-African level".[182] In other words, the details of the application of law in pre-colonial Africa are largely irrelevant, as the states themselves have created a network of courts in every African state. Idealistic postulates are an invocation of bygone eras. They have been supplanted by new structures. Even where customary law is still applied, these customary law courts form part of a state-instituted structure

---

180 The powerful rhetorical line of questioning by Bondzie-Simpson ((1988) 31 *Howard Law Jnl* 643 at 663) merits full quotation (albeit only in a footnote): "What did the framers want to suggest? That traditional African states had no courts? If so, they were wrong. That litigation was alien to traditional Africa? If so, they are wrong. That courts engender violations of human rights and that in the absence of courts these violations are eschewed, or better redressed? If so, then again, they are wrong." See also Tigere (1994) 339 *JAL* 64 at 66, who referred to the drafters' preference for "a romanticized traditional African dispute resolution mechanism".

181 Adopting a law and literature approach, one may also point to the extent to which the concept of a "trial" has been highlighted in prose works and dramas written in independent Africa. I mention five titles in which the "reality" of court structures feature to varying degrees: Ancholonu (1985) *The Trial of the Beautiful Ones*, Ben Abdallah (1987) *The Trial of Mallam Ilya and other Plays*, Mazrui (1971) *The Trial of Christopher Okigbo*, Samkange (1966) *On Trial for my Country* and Wa Thiong'o & Mugo (1976) *The Trial of Dedan Kimathi*.

182 In Theoderopoulos (ed) (1992) at 111.

of courts. The right of appeal to ordinary courts also exists, and even modern "traditional" court procedure has been affected by the formal "Western" systems.

The notion of "law" and legal mechanisms have changed, because African **society** has been affected irreparably by the processes of industrialisation and urbanisation. This had a tragic effect on social structures, which have become fragmented. The very building blocks of traditional law, and the traditional ways of resolving disputes, came increasingly under pressure from these forces. Sock reasons that traditional ways of resolving disputes are now "less practical and indeed retrogressive as societies are relatively larger and the state is becoming more and more impersonal".[183]

Post-colonial Africa

The argument that courts are not of great importance in the domestic systems of post-colonial states suffers from the weakness that the argument relates to the **national**, rather than the **international** sphere. Even if the arguments raised remain persuasive as far as **domestic application** of law generally, or of domestic realisation of a Bills of Rights are concerned, they can only to a limited extent inform a debate on the suitability of regional or **international courts** in Africa. In other words, to some extent arguments relating to national systems are inapplicable in debates about international institutions, such as the African Court on Human Rights.

In so far as non-judicial institutions for the realisation of human rights have developed in African domestic legal systems, the successes and permeation of these had been minimal. In some respects they have been proven to be **ineffective**, and in others to be mere **window-dressing** or attempts at white-washing dismal human rights records.

- Experience has shown that these institutions are often **not very effective** in redressing human rights violations and that they do not improve the position of the have-nots and the disempowered. It is exactly their lack of power which makes victims of violations approach courts in the first place. In their evaluation of the various ombudsman institutions in Africa, commentators and participants in the process have highlighted that an ombudsman "has no

183 (1994) 2 *African Topics* 9.

coercive power and his recommendations can be ignored and are often ignored by stubborn Ministers" and that no "follow-up" procedure exists.[184]

- One may rightly be cynical towards attempts to deflect constitutional issues from the courts to informal processes such as mediation. A national human rights commission funded by a government always runs the risk of being **co-opted** in order to provide a repressive state with a more concerned face. Nigeria ombudsman-type Public Complaints Commissioners were supposed to be responsible for investigating complaints against officials of government and of government agencies. They did not function very effectively, as it was impossible to ensure respect for human rights on such a vast geographical scale.[185] In 1996 it was replaced by the Human Rights Commission.[186] This body does not have an adjudicative mandate. Individual complaints are directed to it and are investigated. Recommendations arising from these investigations are made to government and have at least in one case led to a change in the law. The Commission also has a promotional role. The Chairman of the Commission has emphasised the role of the Commission as an alternative to the judicial process.[187] Going to court, in his words, takes years.[188] The informality of the Commission enhances its role as facilitator, geared towards dialogue and compromise. While having such a commission is probably better than not having it, the Commission remains utterly vulnerable to government manipulation.[189] For funding, it depends on the government's goodwill. Its recommendations are not made public, and need not be taken seriously by government. As the Commission is unlikely to function effectively, one of the very causes for its establishment, the fact that the

---

184 Chigwedere in Kasuto & Wehmhörner (eds) (1996) at 203.

185 Address by Judge Nwokedi, Chairman of the Nigerian Human Rights Commission, 16 January 1997 at the African Institute, Pretoria.

186 By decree, and was inaugurated on 16 June 1996.

187 Address by Judge Nwokedi, 16 January 1997 at the Africa Institute, Pretoria, South Africa.

188 *Ibid.*

189 The danger of accepting any commission rather than no commission at all is that such an institution may be used to legitimate a regime without any serious commitment to human rights.

Public Complaints Commission was ineffective, will remain unsolved. This lends weight to suspicion about the establishment of the Human Rights Commission.[190]

In other instances the **non-judicial foundation of institutions have changed** to ensure more effective compliance. In Uganda, for example, a Human Rights Commission was established in 1995.[191] Its mandate illustrates how this institution, which started off as a medium for mediation, may exercise adjudicatory functions. The Ugandan Constitution provides that if the Commission is satisfied that a right has been infringed, it may order release, payment of compensation or other remedies. The Commission also has the power to "commit" persons for contempt of its orders. An appeal against such a decision may be directed to the High Court.[192] These powers establish the Human Rights Commission as an "alternative court", rather than as a body mandated only to promote human rights and to investigate violations.

ii International adjudication

The argument about informal methods of resolving disputes is based on domestic legal systems, and the application of "law" in these settings. It has been shown that much of the substance of this argument is invalid. But more importantly, arguments pertaining to domestic legal settings are not necessarily applicable to international adjudication. One cannot leap with one bound from an argument relevant to domestic settings into the international arena. Sock made this mistake by equating the domestic and international levels when he argued that because formal courts have been established at the national level, "there is no reason to presume that a supra-national court will not function effectively".[193] The mere fact that domestic courts function successfully does not mean that they will succeed on the international plane. Similarly, the mere fact that alternative dispute

---

190 Criticism on this ground is not restricted to Nigeria. See eg Amnesty International (1997) (at 2): "Rather than create an independent police complaints body, the Zambian authorities have formed a human rights commission whose members are ultimately appointed by government authorities and so cannot be viewed as entirely independent".

191 See (1996) 40 *JAL* 119.

192 *Ibid.*

193 (1994) 2 *African Topics* 9 at 10.

mechanisms are preferred in a domestic jurisdiction does not lead to the only conclusion that states will also prefer such mechanisms in international dispute resolution. In addition, numerous examples and precedents indicate a **preference for adjudication** as a method of resolving international disputes in Africa:

- The **acceptance** by African states of the **ICJ jurisdiction** has been an important feature of international law after 1966. African unease about the domination of Western jurisprudence was replaced with an active exploitation of the system in cases such as the frontier dispute between Burkina Faso and Mali,[194] and the territorial dispute between Libya and Chad.[195]

- A number of **regional courts** have been established under regional arrangements and still are in existence in Africa.[196]

- The **practice of the African Commission** has also indicated a predilection for a more accusatorial, adjudicating function.[197]

- The tendency of African states to enter reservations to the competence of the ICJ to hear disputes without the consent of both parties (as exemplified in CERD) has **changed for the better** with regard to later treaties (such as CAT), where such consent is not required.[198]

- A later human rights instrument, the **African Charter on the Rights and Welfare of the Child**, also challenges the assumption that conciliatory methods are preferable in Africa. In contrast to the CRC, its African equivalent provides for individual complaints by way of a litigation-based approach. As Van Bueren shows, this mechanism was rejected at the universal level because "it would harm the co-operation essential for implementing the rights of the child

---

194 1986 ICJ Reports 554.

195 See (1995) ILR 1.

196 See ch 4.3 above.

197 See eg Communication 71/92 (*Rencontre Africaine pour la Defense des Droits de l'Homme v Zambia*), where a delegation of the Zambian government appeared and presented information at the Commission's 18th session. The complainant then appeared and presented a reply to the government's arguments.

198 See ch 2.4.1.3 above.

and ... the economic, social and cultural rights in the Convention would be unsuitable for litigation".[199]

iii Conclusion

Adjudication has two distinct advantages over more informal ways of resolving disputes: **coercion** and **publicity**. The more informal methods depart from the premise that conflict really is a result of a failure of communication or of a misunderstanding.[200] Interests can be reconciled because the differences do not represent antagonism. It is contended here that the modern African state, like all modern nation-states, antagonises its citizens, requiring adjudicative methods to redress violations of human rights. One of the dangers inherent in the process of alternative dispute resolution mechanisms is that the more powerful party to the dispute may dominate in an informal setting. A court, on the other hand, is an instrument to level the playing fields between parties of disparate power.[201] The Critical Legal Studies criticism against informal justice is that it is an expansion of state control under the guise of reduced state coercion. This could have the effect of the state acquiring even more pervasive social control.[202] The ultimate goal of those applying the Charter should be "not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied" in it as an authoritative text, and "to interpret those values and to bring reality into accord with them".[203] If the parties are induced to settle, this duty is not discharged.

The lessons from other regional human rights systems may also be informative. The **European** system has shown that any procedure involving "rights" will sooner or later be judicialised. In 1955 only four percent of individual complaints to the European Commission were introduced through lawyers. In 1988, slightly more than half of the registered applications "came to the

---

199 (1991) 8 *International Children's Rights Monitor* 20 at 22.

200 Abel in Abel (ed) (1982) 267 at 284.

201 See, as far as women are concerned, Grillo (1991) 100 *Yale Law Jnl* 1547.

202 See Abel in Abel (ed) (1982) at 270-2279.

203 Fiss (1984) 93 *Yale Law Jnl* 1073 at 1085.

Commission through this legal channel".[204] As lawyers become aware of the potential of the Charter (also its potential financial benefits to the lawyer class), their increasing involvement will inevitably have an impact on the nature of the process. Friendly settlement had not proved to be one of the most significant features of the **Inter-American** system. This may be ascribed to "the obvious fact that the Commission could proceed in this effort only if the concerned parties wanted to resolve the problem in this manner".[205] So far African states had been reluctant to co-operate with the Commission. In the expectation of this trend persisting, it would be unwise to dovetail a system to fit informal dispute settlement principles.

To refer back to the categories of dispute settlement set out above:[206] Adjudication is essentially resorted to when the first four possibilities (negotiation, mediation, conciliation and arbitration) have failed, and serve as a last buffer against the only remaining possibility - the use, in some or other form, of force. Thus it makes much sense that the Court should not replace, but should only complement the Commission, retaining its role as conciliatory body. Such a solution leaves room for both "traditionally African" reconciliatory and judicial methods to co-exist in the African human rights system.

8.1.12 Unnecessary and costly duplication

8.1.12.1 Argument

The cost of duplication primarily impacts on the OAU, and, as a consequence, on member states, but it may also affect individuals who file complaints.

The African **Commission** has been in existence for only about ten years. Although especially its initial work may be criticised, the Commission has consistently created a greater role for itself to

---

204 Mower (1991) at 95.

205 Mower (1991) at 77.

206 The first part of par 8.1.11.1 immediately above.

meaningfully protect human rights.[207] Many of the problems experienced relate to administrative difficulties, which in turn are linked to insufficient funding.[208] As an institution of the OAU, it depends on the parent body for financial assistance.[209]

However, the **OAU** itself has also experienced financial problems. The OAU depends on financial contributions from member states for its functioning and survival. In terms of the 1992/93 budget of the OAU, the total appropriation was $27 900 894. Of this, $501 881, or 1,8%, was allocated to the African Commission. The actual expenses incurred by the Commission totalled $520 757. These figures may be placed into context if one notes that the Heads of State Summits in the corresponding period were allotted $715 000, the mission of the political department to the UN was allowed $1 162 016 and the office of the OAU Legal Adviser $266 391.[210] The Council of Ministers of the OAU adopted a "Resolution on the Problem of Arrears of Contributions" at its session held in Tunis in June 1994.[211] In this resolution it congratulated the fourteen states that have complied with their financial obligations. These states are Algeria, Botswana, Egypt, Lesotho, Madagascar, Mauritius, Mauritania, Namibia, Nigeria, Senegal, Swaziland, Tanzania, Tunisia and Zimbabwe. It further called for the implementation of sanctions against non-paying members. In 1995, the acting Secretary-General of the OAU called for the imposition of sanctions against non-paying member states.[212] He emphasised that non-payment was mainly due to a lack of political will. Some of the poorer countries, such as Lesotho, Mozambique and Uganda had by then paid, while richer countries such as Côte d'Ivoire, Kenya and Libya have been in arrears.

The lack of funding has prompted the Commission to secure financial support from governments **outside Africa**. Most prominent amongst these donors had been the Swedish and Danish governments and the European Union. INGOs based outside Africa have also supported the

---

207 See ch 3.1 above.

208 See views of almost all commissioners in interviews (1996) (Oct - Dec) *AFLAQ*.

209 See art 41 of the African Charter: The OAU "shall bear the costs of the staff and services".

210 Information gleaned from OAU budgets available in IDOC, Banjul.

211 Resolution CM/Res 1514 (LX).

212 Anonymous "OAU Call for Sanctions on Members in Arrears" (15 January 1995) *The Guardian* (Tanzania) 6.

Commission. This includes the African Society for International and Comparative Law and the Raoul Wallenberg Institute in Lund, Sweden.

Given that the Commission is establishing itself as a credible instrument in Africa, the available resources should rather be spent to **strengthen the existing Commission**. Creating another instrument, such as the proposed Court, essentially aimed at duplicating work already done by the Commission, not only seems superfluous, but will undermine both institutions, because the little available funding will have to be divided between the two of them.

While Odinkalu made it clear that he does not object to an African human rights court in principle, he raised certain "fiscal" and "institutional" issues as a main concern. Already the Commission has to do fund-raising to operate effectively. Donors from outside Africa facilitate a substantial part of the work of the Commission. The possibility of the Commission's impartiality being compromised has already been canvassed. Commissioners are alert to the fact that strings should not be attached that would detract from the objectives of the Commission. In contrast, a court, with its capacity to give final and binding judgments, should not be in a position where it could be held at ransom by donor-powers. Even the creation of a perception in this regard could detract from the Court's symbolical and operational role. Odinkalu asks : "What kind of court relies on donor money for its work?"[213] Similar concerns were raised by commissioner Kisanga, remarking that it would be "disastrous" for a court to "solicit money to conduct its business", as it is "not in keeping with the standing of a court".[214]

The legal costs of **individual complainants** may also be considerable. Costs are incurred at the domestic level. The practice has also developed that individuals may be represented by a lawyer at the Commission hearing. This may also be costly. In the exceptional case of an individual being allowed to approach the Court directly, the use of a lawyer seems likely. Although the draft Protocol provides for legal aid, it is not certain under which circumstances it will be provided.[215] In

---

213 (1994) 2 *African Topics* 11.

214 Interview in (1996) (Oct - Dec) *AFLAQ* at 32. See also Peter (1993) 1 *East African Jnl of Peace & Human Rights* 117 at 133: "Justice funded by foreigners is no justice at all".

215 See ch 7.2 above.

any event, a lawyer will probably be engaged not only for the Court hearing, but also in preparing and filing the complaint.

8.1.12.2 Evaluation

There is substance to the concern that the **OAU** may **not** be able to **secure sufficient funding** to make the Court work. Africa lies wrecked with institutions that seemed like lofty ideals at their conception, but never materialised. An example in the field of dispute settlement is the Commission on Mediation, Conciliation and Arbitration. It was instituted in 1963, furnished with competencies by way of a Protocol adopted in 1964, and 21 members were elected. Still, the Commission never really functioned.[216] Not only is money wasted and energy spent, but a spirit of cynicism is inculcated. Only if sufficient political will is present will the Court be financed adequately. Political will may be generated by highlighting to states what the long-term benefits of a Human Rights Court may be. Sock responded to the concern raised by pointing out that "any financial investment by African states in the protection of human and peoples' rights through an independent regional court will undoubtedly contribute significantly in the long term to peace and stability - a *sine qua non* for national and regional development".[217]

It has been argued that the Court "must be run and funded by Africans themselves"[218] before it can become truly African. Without doubt, this is the ideal. But given the extent of the financial crisis in the member states of the OAU, and the moral duty on the international community to support such institutions, **financial support from non-African sources** should not be rejected out of hand.[219] Experience in relation to the African Commission suggests that foreign aid is indispensible and need not imply that "strings are attached", or that sponsoring states necessarily insist on

---

216 See Kodjo (1989) *RUDH* 29 at 33.

217 (1994) 2 *African Topics* 9 at 10.

218 Peter (1993) 1 *East African Jnl of Peace & Human Rights* 117 at 133.

219 See eg the *Vienna Declaration and Programme of Action* at par 9: "The World Conference on Human Rights reaffirms that least developed countries committed to the process of democratization and economic reforms, many of which are in Africa, should be supported by the international community in order to succeed in their transition to democracy and economic development."

furthering their own agendas. Foreign-funded justice will definitely be better than no justice at all, provided that the Court remains vigilant and keeps strivings to develop a truly African jurisprudence.

As far as cost to **individual complainants** is concerned, two counter-arguments may be raised. Firstly, lawyers are not indispensable. The Court and Commission consist mainly of lawyers. Both institutions are established for the very purpose of promoting and protecting the rights set out in the African Charter. Ideally, therefore, the realisation of human rights should not depend on the presence or absence of counsel. The Protocol also provides for free legal representatives to be appointed "if the interest of justice so require".[220] Moreover, the cost to individual complainants should not be invoked by states to justify their opposition to the Protocol, as the cost to individuals has no bearing on the obligation of states under the Protocol.[221]

A question must be put to what extent **principled commitment** should from the outset be compromised by **pragmatic considerations**. In this regard, one is also reminded of the fact that financial constraints can very easily become a facile shield behind which governments could try to hide their lack of political will.[222]

---

220 See ch 7.1.11 above.

221 Although states may have to secure legal aid at the domestic level, to ensure that the system may be utilised effectively.

222 See eg the conclusion of the "second and third" report of Zimbabwe to the African Commission in terms of art 62 of the African Charter, which reads as follows: "The problem which is hindering the promotion and protection of the rights and freedoms guaranteed in the present charter is not from interference by the Executive or the Legislature but shortages of judicial officers and court rooms due to financial constraints" (at 61 of the typed report). But, on executive and legislative interference, see ch 3.4.4 above.

8.1.13 Increased delays to realise rights

8.1.13.1 Argument

One of the notorious features of both African domestic judicial systems and international human rights regimes is the delay involved in finalising cases. Delays in redressing human rights violations under the African Charter are occasioned by various factors, which include the following:

- As has been highlighted before, domestic judicial systems in many African countries do not function effectively. To raise a matter before local courts, even at first instance, may be a **laborious affair**. Court rolls are clogged, insufficiently staffed officials are overworked and corruption runs rife.

- After the first local court's finding, the requirement of international human rights law to **exhaust domestic remedies** comes into play. This entails an appeal to a higher domestic court. Not only are additional costs incurred, but more delays are inevitable.

- Once domestic remedies have been exhausted, the aggrieved individual must, as a rule, approach the **Commission**. The Commission first investigates the issue of admissibility. This usually requires a few years, if the previous experience of the Commission is considered. If the complaint is found to be admissible, the Commission proceeds to consider the merits. States and the individual concerned are nowadays invited to attend. This may occasion further delays. In other instances, a decision on the merits is postponed until a visit to the country has been undertaken. Past experience also illustrates sufficiently that this can take years, as the consent of the state has to be acquired and the logistical arrangements have to be made.

- The limited time available to the Commission and the lack of supporting staff at the **secretariat** to assist in processing complaints also contribute significantly to delays.

In terms of the Protocol the Court becomes the final hurdle. Only in exceptional circumstances may the Commission be by-passed. The Court will in all likelihood need quite a lengthy period to prepare itself for cases. Facts have to be established by more formal means than in the

Commission's *modus operandi*. Being a judicial body, its consideration of the facts and the law, as well as preparation of judgments will require time. The fact that the Court has to reconsider the issue of admissibility not only means that this aspect is considered twice, but also that further delay is implicit in the process.

8.1.13.2 Evaluation

The accessibility of the African human rights system is seriously undermined by these delays. Aggrieved individuals are likely to be intimidated by these prospects, causing them to refrain from initiating any process at all. Again, this likelihood must not undermine the establishment of the Court, but should be addressed in setting up its structure and in regulating its functioning.

8.2 Some alternatives to the Court as proposed

Many of the arguments raised against a proposed Court (in the form suggested in the Protocol) already imply alternatives. Some of these alternatives will now be discussed. They range from radically-transformative suggestions, which will be discussed first, to institutionally conservative proposals. The less radical proposals are to a varying degree compatible with the suggested Protocol, in that the "alternative" may also be seen as a suggestion supplementary to the African Court on Human Rights, or as a suggestion that may run parallel to or in conjunction with the implementation of the proposed Protocol.

8.2.1 Geo-political transformation as prerequisite to address Africa's malaise

8.2.1.1 Argument

Underlying this alternative is the notion that the present configuration of nation-states in Africa does not provide a context within which human rights may be realised. Traditional conceptions of state sovereignty allow little room for the domestic application of international human rights

norms. These conceptions serve as justification for the insulation of states from political pressure about their violation of human rights and for refuting claims of greater autonomy by groups within states. Two ways of redressing this legacy may be followed. One would be to instil a **new approach in states** towards the importance of human rights. The international community has already taken numerous steps to realise this goal, as exemplified in various international human rights instruments and supervising mechanisms. However, these efforts have not caused a significant shift in the attitudes of most African states. The other way would be a new approach to the very **concept of the state as geo-political entity** and the limits of its sovereignty. In the light of the failure of the first course, such geo-political reform would seem to be an inevitable part of any process of long-term improvement of Africa's human rights record.

Geo-political transformation can take one of two main forms, leading either to **greater African unity** or to the **dissolution of existing states** into smaller units. Both these movements entail a loss of state sovereignty. In its extreme form it would, in the one instance, lead to a **Pan-African government**, and in the other, to **secession of a group** or groups within and a dissolution of existing states.[223]

It is proposed here that Pan-Africanism and secession need not be regarded as irreconcilable extremes. Instead, a synthesis between centrifugal and centripetal forces may be mediated, in terms of which greater fission and fusion take place simultaneously.[224] Both these forces are already present in Africa, as these two processes have evolved simultaneously. On the one hand, regional organisations have mushroomed all over Africa, epitomising the formation of wider fora for inter-state co-operation.[225] The Lagos Plan of Action and the adoption of the Abuja Treaty seek to pull these regional arrangements together economically and, ultimately, also politically. The

---

223 See eg Soyinka (1996), writing about the enforced nationhood not only of Nigeria, but also of states like Sudan and Rwanda: "Neither the tenacity of state repression nor the longevity of an illusion is adequate to guarantee an eternity to nationhood whose foundations are unsound" (at 143).

224 For example, self-government could be extended to Hutu and Tutsi communities in Burundi and Rwanda, while at the same time dissolving the boundaries of these two states, so that they join eg the Democratic Republic of the Congo or Tanzania in a political and economic federation.

225 See ch 4.3 above on these regional arrangements.

post-independence phase of African history, on the other hand, is characterised by attempts of various groups to gain self-determination.

A radical geo-political transformation obviously requires a **demystification of existing frontiers**. This can be done quite easily with reference to the historical process through which states have been established in Africa. It is commonly accepted that modern Africa is an artificial creation of colonialism, formalised mainly in 1885, at the Berlin Conference. The borders are the function of mountain ranges and rivers, of longitudes and latitudes, and do not take account of pre-existing traditional patterns of living together. Davidson called the nation-state, imposed by colonialism, the "Black man's burden".[226]

The **adverse consequences** of this forced forming of nation states have been manifold. Frontiers were created without regard to the wishes of inhabitants. In this process of fomenting new states, traditional channels of authority were replaced by highly centralised bureaucracies. A "plethora of minuscule states"[227] has been created, many of which are not viable entities. Of the 53 states in Africa today, ten have populations of a million or less, 14 are landlocked and 13 have a land surface of less than 50 000 square kilometres.[228] This placed constraints on the new states to develop economies of scale. In a survey published in 1985, Asiwaju contends that partitioned ethnic groups live on both sides of no less than 103 inter-African frontiers.[229] It is no wonder that individual states (and the OAU, collectively) focused on stabilising national statehood and on preventing boundary disputes. These two focal points of the OAU are inter-related and may be explained within the context of the OAU's founding:[230] The one seeks to prevent secession by

---

226 Davidson (1992).

227 Adedeji (1994) 5 *Jnl of Democracy* 119 at 125.

228 *Ibid.*

229 In Asiwaju (ed) (1985) at 256 -258.

230 At the time the first wave of independence broke over Africa, Nkrumah was the most articulate proponent of Pan-Africanist institution building. He was the first African leader to take steps towards the realisation of Pan-Africanism. After Ghana had become independent (in 1957), he was instrumental in the creation of two supra-national unions: the Ghana-Guinea Union (in 1958) and the Ghana-Guinea-Mali Union. He regarded these efforts as a first step towards a "Union of African States". Nkrumah also organised the Conference of Independent African States and the All-African Peoples Conference (1958, Ghana). At these

Footnotes continued on next page.

internal groups; the other to prevent annexation or interference by external forces or states, acting on real or purported ethnic claims.

In the second half of the 1960s the movement lost its momentum. Several factors contributed to its demise. Once the OAU had been formed, it became the major instrument to channel collective African ideals. The idea of which the time had come, was decolonisation. This emphasised the role of liberation movements at the national levels. Newly-independent states concentrated their energy on the encouragement of national integration. The struggle left entities that were not nations, but "the shells of territorial independence in which the kernel of national identity had been planted by the independence movements". Independence was guarded jealously: A viable nation-state had to be built. When Nkrumah was overthrown in Ghana, pan-Africanism was robbed of one of its most eloquent advocates. Gradually, as the 1960s turned into the 1970s, the process of decolonisation was completed. The last pangs were accelerated by the overthrow of the fascist regime in Portugal in 1974. Gradually, greater focus was placed on the development of individual states and the continent as a whole. The first regional grouping to attain such goals, ECOWAS, was established in 1975 as the first serious attempt at economic co-operation and integration in the West-African sub-region, cutting across divisions of language, history and existing affiliations and institutions. Other arrangements followed when SADDC was created in April 1980, and the Preferential Trade Agreement was agreed upon in 1981.

---

conferences the formation of a common market for the continent was advocated. As for political unity and integration, Nkrumah was an unrelenting activist. Not all the states favoured this course, though. States formed two groups on the basis of economic and political differences. The "Casablanca Group", of which Ghana became part, was politically progressive or reactionary, and favoured socialist and centralised economies. The "Monrovia Group", on the other hand, was politically more moderate (or "conservative") and favoured capitalist economic models. The establishment of the OAU was only possible as a compromise between these two groups. Other leaders were more moderate than Nkrumah. Speaking in 1966, Nyerere showed an awareness of the dilemma inherent in trying to reconcile African consciousness and loyalty with loyalty to and development of the newly found nations.[230] However, he encouraged states to deliberately work towards economic integration. This will eventually lead to questions about political integration. "When that point comes", he continued, "we shall either have to stand still, and thus damage our real hopes for Africa, or we shall have to take the plunge into a merger of our international sovereignty"((1967) at 7).

In recent times criticism has been expressed about the historical choice of African leaders who emerged after independence to accept, without question, the inherited colonial frontiers. Adedeji, for example, regards this as "a fateful error".[231] He continues: "Had newly independent Africa's founding fathers had the vision and the resolve to redesign the continent's economic and political layout, Africa today would have between 12 and 20 viable and credible nation-states".[232] Mutua proposes the disassembling and reconfiguring of African states that will entail "a new cartography".[233] He suggests a model for discussion in which Africa is reconstituted in fourteen larger entities. Pre-colonial entities would be able to exercise their right to self-determination within these greater configurations.

These two movements should be moulded into one, in a process of greater devolution of power to local levels, simultaneous with the fusion of greater geographical units, and eventual African unity.

8.2.1.2 Evaluation

Not everyone accords the same weight to the geo-political dimension. Gutto, for instance, stated that he does not "in the main" agree with views that focus on boundaries as one of the main causes of human rights violations in Africa.[234] He also commented that all borders, and not only African ones, are in a sense "arbitrary". Rather than redesigning frontiers, the challenge is "how to mould working democracies in societies that have a diversity of cultures".[235] Such views take the present reality as a given. One may add that the creation of an African Court on Human Rights does not necessarily exclude geo-political transformation, but may in fact be instrumental in this process. It would be foolish to divert attention away from the establishment of new institutions when it is unlikely that geo-political transformation will occur in the near future.[236]

---

231 (1994) 5 *Jnl of Democracy* 119 at 125.

232 *Ibid.*

233 (1995) 16 *Michigan Jnl of Intl Law* 1113 at 1118.

234 (1996) 113 *SALJ* 314 at 320. In his view causes of internal conflicts are eg unequal development of regions and political repression directed at regions of a country rather than "arbitrary colonial borders".

235 *Ibid.*

236 See eg Herbst (1989) 43 *International Organization* 673 at 692.

8.2.2 Local institutions as priority

8.2.2.1 Argument

This alternative is premised on the assumption that much of what went wrong in African governance was due to a **top-down style of government**. A supra-national court would be just another centralised organ over which ordinary people will have very little control and in which their participation will be minimal. The contention is that the focus on judicial structures, especially at the inter-state level, is too broad. Rather than seeking solutions at this level, they should be sought at **localised levels**, through **mass participation**.[237] Olowu wrote that "what will get Africa out of her present food and fiscal crises is not the clamping down of more governmental controls, but the release of the people's organisational genius at solving their community problems".[238]

A democratic state structure is more likely to be responsive to popular demands. But democracy has many forms. Without a vibrant civil society supporting democracy, human rights will not become engrained in any society. Development strategies in Africa had been top-down, negating popular participation in economic and political decisions. Government was perceived to be in opposition to the masses. This led to alienation between the citizen and the state, and eroded the fabric of society. Civil society and its institutions, such as NGOs, a free press and trade unions, lay dormant. On their part, governments have done very little to reinforce democracy by setting up structures which may help cultivate a culture of human rights among government officials and ordinary people.[239]

This was not always the case. Mass participation was, arguably, the preferred model of governance employed in **pre-colonial Africa**. As Davidson points out, "mass participation" was

---

237 On grass roots empowerment as a path to democracy, and the role of NGOs rather than states and state institutions to transform society, see Ndegwa (1996) 114 - 117.

238 Quoted in Davidson (1992) at 314.

239 In this respect South Africa differs, as the final Constitution provides for institutions to strengthen democracy. There are other institutions as well, such as an independent police complaints investigation mechanism.

"at the heart of all those African societies which had proved stable and progressive before the destructive impact of the overseas slave trade and colonial dispossession had made itself felt".[240] If the restoration of democracy does not restore links with and draw inspiration from the African past, these democratic structures will be meaningless. An ensuing system of government need not take the form of one of the extremes in which Africa had been caught - a "strong", centralised dictatorship or a "weak", decentralised state riven by clientelism. A true democracy would be one in which mass participation and institutions of civil society are cultivated to found a stable and "strong" state.

A supra-national institution is by its very nature far removed from the ordinary citizen. Realisation of rights is **inevitably postponed** or distanced in time and space. Emphasising the local dimension of human rights protection is therefore of greater importance. A continental court clearly only has a limited role in the day to day reality of Africans, which ultimately depends on the degree of domestication of the international human rights regime. Important questions that arise in this context are:

- Does the **national Constitution** provide for an enforceable Bill of Rights?
- As far as the African Charter is concerned: Is it **incorporated** into domestic law, and may it be invoked before national courts?[241]

The answers to these questions, rather than those related to the establishment and functioning of a supra-national court, are what matter to *people*. Creating recourse to a supra-national court only detracts attention from more relevant as well as more pressing local concerns and strategies.

In his critique of the dominant discourses on human rights, Shivji criticises the view that human rights are primarily legal in nature.[242] Following the Hohnfeldian model, the dominant discourse postulates duties as correlatives to rights. These rights are "granted" by states - the very states are

---

240 Davidson (1992) at 295.

241 See ch 3.4 above.

242 He argues that the "whole debate that has taken place in the social sciences about inter-disciplinary approaches ... has by-passed the discourse on human rights" ((1989) at 50) and that "so-called human rights activity in Africa has been largely dominated by lawyers" (at 61).

later required ("have the duty") to redress violations of these rights through their domestic legal systems.[243] Shivji's radical rethinking regards human rights as a sociological and economic phenomenon. The African concept of human rights is tied to the struggle against imperialism and foreign oppression. But to him, the correlative of "right" is not "duty", but the existence of "privilege".[244] Human rights then becomes a **means of struggle defined by the presence of power and privilege**. Enforcement of these rights does not depend on the courts or other state organs, but should be ensured by the "people". Ultimately the "people" may use force in their struggle for self-determination and to secure their rights. Although not spelling it out, Shivji thus emphasises non-judicial means of realising rights.

8.2.2.2 Evaluation

Neither the Court, nor involvement of the masses should be held out as a panacea to secure the realisation of human rights in Africa. In the light of recent history, popular participation is a romanticised notion. Reality is different, as exemplified by the struggle against and subsequent replacement of Portuguese colonial rule. In Angola, Mozambique and Guinea-Bissau the vastly stronger colonial power was eventually defeated through *participação popular*. A handful of revolutionaries set the process in motion. But their defeat was always imminent without moral and physical support by the masses. These conditions were met, the MPLA, FRELIMO and PAIGC became mass movements, and eventually replaced the colonial governments in Angola, Mozambique and Guinea-Bissau respectively. But the principle of popular participation could not save these movements from failing as governments. Once in government, strong centralised policies were adopted to control citizens inhabiting vast areas. At the end of the wars of liberation, social and economic problems abounded. Efforts to address these issues were deflected to cater for military struggles against internal factions (UNITA in Angola and RENAMO in Mozambique) with external support (South Africa, the USA).[245]

---

243 For Shivji's critique of Hohnfeldian models, see (1989) at 20 - 23

244 Shivji (1989) at 71.

245 To a large extent foreign involvement has clouded the issue so much that it makes assessment of the performance of these governments difficult.

On the other hand, localising the struggle to realise rights makes **economic sense**. The scarce availability of resources in Africa requires that they be directed at these **local institutions**, rather than building **remote watch towers**. The most important institutions of this nature are NGOs. The lives of people in African countries will be affected infinitely more by their interaction with local courts and local NGOs than with any supra-national structure.[246]

This alternative emphasises the supplementary nature of supra-national human rights institutions, and the primacy of national bodies created to reinforce human rights and democracy.

8.2.3 No institutional reform without fundamental restructuring of the Charter

8.2.3.1 Argument

Some critics have argued that the deficiencies in the Charter are implanted so deeply that any institutional reform would be worthless.[247] In other words, the system suffers from a terminal illness which no medication can undo.

It may certainly be argued that even a very progressive Court will not be able to amend the following **substantive aspects** of the Charter without violating its clear meaning:

- Broad discretionary powers are granted to legislatures to erode rights in terms of **"claw-back" clauses**. This is particularly true with respect to the right to liberty and security of the person,[248] but extends to various other rights.[249] Chanda warned that "a state may conceivably

---

246 See also the arguments on institutional obstacles at ch 8.1.5.

247 See eg Chanda (1989-92) 21-24 *Zambia Law Jnl* 1 at 23-24: "It is my considered view that in light of some of the flaws I have discussed above, the African Charter is unlikely to have a significant impact on the protection of human rights in Africa"; and Nwankwo (1993) 4 *Jnl of Democracy* 50.

248 Art 6 of the Charter: "No one may be deprived of his freedom except for reasons and conditions previously laid down by law".

249 See also arts 8, 9(2), 10(1), 11, 12(1)13(1).

violate its citizen's right to liberty and yet be in compliance with the African Charter provided it does it under the colour of law",[250] and concluded that the African Charter "cannot furnish even a *scintilla* of external constraint upon a government's power to enact laws contrary to the spirit of the rights guaranteed".[251] The very essence of a regional human rights system is the embodiment of certain standards with which domestic law has to comply. If ratifying a regional convention only confirms the present legal position in a country, then such a ratification becomes nugatory. Claw-back clauses do exactly that: The national law, the system to be judged by international norms, is **elevated to become the norm itself**. It may be argued that a supra-national court will make very little difference if its hands are tied to go beyond local law. Appeal to a higher judicial institution is likely to be meaningless and will only frustrate those who use the process.

- Some of the most basic internationally recognised **rights are omitted** from the Charter. This includes the right to privacy,[252] the right to marry,[253] not to be subjected to forced labour,[254] and the right of nationals not to be expelled from their country.[255]

- The right to a **fair trial** is protected only to a very limited extent.[256] A detained person is not protected as far as the grounds or term of detention is concerned and no mention is made of bail. There is no provision that information must be provided to the arrested or detained person, for example about the grounds for detention or arrest, and what his or her rights are. There is no guarantee of a public trial. The right to remain silent, and not to be forced to make admissions or confessions, and the privilege against self-incrimination are also not stated.

---

250 (1989 92) 21 - 24 *Zambia Law Jnl* 1 at 20.

251 At 21.

252 See eg art 8(1) of the European Convention. For the implications of this omission for AIDS sufferers, see Hunt (1991) at 22.

253 See eg art 21 of the European Convention.

254 See eg art 4(2) of the European Convention.

255 See eg art 3(1) of Protocol No 4 to the European Convention.

256 Arts 6 and 7 of the Charter.

- Particularly **vulnerable groups**, such as women, children and the disabled, are inadequately protected.[257]

- The argument about inadequate protection also applies to **gays and lesbians**. The Charter does not include sexual orientation as a prohibited ground of discrimination. A communication contending that the criminalisation of consensual, private sexual intercourse between two males amounts to a violation of the Charter, was withdrawn before the Commission could make a finding.[258] Although not recorded in the reasons for the Commission's finding, Ankumah quotes the rapporteur as stating the following: "Because of the deleterious nature of homosexuality, the Commission seizes the opportunity to make a pronouncement on it. Although homosexuality and lesbianism are gaining recognition in certain parts of the world, this is not the case in Africa. Homosexuality offends the African sense of dignity and morality and is inconsistent with positive African values (...)".[259] Not clarifying the source of her insight into these private proceedings, she adds that at least one other commissioner "expressed solidarity with the view".[260] "One was left with the impression that ... the Commission would have dismissed the case ...", she concludes.[261]

  In the communication, the complainant argued that the views of the Human Rights Committee in the recent case of *Toonen v Australia*[262] should be followed.[263] The view of the HRC was that similar legislation in Tasmania violated the right to privacy under the CCPR.[264] However, the Charter does not contain an equivalent right. The "inspiration" that has to be drawn from international law is not a mandatory obligation to follow international trends. In his opening address at the 17th session, the chairman, commissioner Nguema, proposed the restoration of

---

257 See art 18 and discussion in ch 3.6 and 3.8 above.

258 Communication 136/94 (*Curson v Zimbabwe*).

259 Ankumah (1996) at 174. Even if the statement would have been the view of the Commission, it clearly is an *obiter* dictum and does not constitute *ratio decidendi*.

260 Ankumah (1996) at 174.

261 *Ibid.*

262 Decision 488/1992.

263 In terms of art 60 of the Charter the Commission "shall draw inspiration from" international human rights law.

264 Art 17(1): "No one shall be subjected to arbitrary or unlawful interference with his privacy ...".

democracy as Africa's salvation. But he warned against incorporating the Western concept thereof, which excludes the elderly and includes protection of the rights of homosexuals.[265] This approach has been confirmed in informal interviews with various other commissioners. In the absence of any explicit provision in the Charter guaranteeing privacy or non-discrimination on the basis of sexual orientation, it seems unlikely that either the Commission or the proposed Court will rule against the criminalisation of consensual homosexual intercourse.[266]

- The **absence of a derogation clause** has also been interpreted by some commentators as a free hand at derogating during states of emergency.[267] This argument is, again, based on the existence of "claw-back" clauses. If a right only exists to the extent protected in domestic law, any derogation in terms of domestic law may be justified in terms of the "claw-back" clauses. Take article 10 as an example: It guarantees freedom of association to anyone "provided he abides by the law". If the national law allows for the derogation of this right when the public safety dictates that a state of emergency should be called, its suspension will be in accordance with the Charter.

- **Duties** are placed on individuals, for example, not to compromise state security, and to preserve national independence and territorial integrity.[268] Commenting on these duties, Ben Salem observed as follows: "We must seriously reflect on the question of revising the African Charter. It is doubtful whether it is necessary to keep in the text of the Charter such heavy duties towards individuals".[269] Duties are also seen as a dangerous tool in the hands of repressive governments. Kunig referred to the "danger that states could try to use duties to derogate certain human rights...".[270] Mutua argued that the concept of duties is given a static

---

265 Address on 13 March 1995.

266 The outspoken rejection of homosexuality in some African states (particularly Zimbabwe), and the statutory position in most African countries (prescribing consensual homosexual intercourse) will no doubt also influence any decision.

267 See Oraá (1992) at 209, who explains the omission of a derogation clause with reference to the fact that the Charter includes rights from all three "generations", making it difficult to decide which rights can be derogable, and which rights not.

268 See art 29 of the Charter.

269 (1994) 8 *Interights Bulletin* 55 at 56 (Ben Salem then was Vice-Chairman of the Commission).

270 Kunig (1985) 59 at 63.

content in the Charter. The preservation of the state is the aim of the inclusion of the concept of "duties", as it requires "the domination and subjugation of the individual to the authoritarian state".[271]

A proposed Court will have to co-exist, in some way or another, with the African Commission. The continued existence of the Commission brings into the spotlight certain problematic Charter provisions, associated with the Commission's functioning. The following **procedural provisions** contribute to the inherently defective nature of the Charter:

- The Commission **cannot act independently** in a situation of gross violation of human rights. It first has to secure a mandate from the Assembly of Heads of State and Government.[272] This establishes the Commission as "a sub-committee of the Assembly with no independent authority of its own".[273] The decision whether to take any action or whether to publish the Commission's report lies with the heads of government, giving them the final say in their own cases. This state of affairs contravenes the principle that no one should be a judge in his or her own case, which is one of the pillars of natural justice.[274]

- **Secrecy** characterises the process, based mainly on the Commission's interpretation of article 59(1). This narrow interpretation has been criticised, but even in a broader interpretation much room will be left for confidentiality.

- The Charter is **silent about remedies**, leaving it to the outcome of the process of consideration by a political body. Rembe found the right to petition without knowing what relief may be ordered, absurd and recommended that the Charter should be amended to incorporate specific remedies.[275]

---

271 (1993) 3 *Review of the African Commission* 5 at 8.

272 Art 58 of the Charter.

273 At 22. See also the interview with Commissioner Rezzag-Barra, ((1996) (Oct - Dec) *AFLAQ* at 45) who suggested that the Charter be amended in this respect.

274 This is also referred to as the *nemo iudex in sua causa* principle.

275 Rembe (1991) at 45.

- The Commission's important **promotional function is hampered** by limitations in the Charter. The commissioners only work full-time during sessions, which take place for ten days twice a year. Appraising the Commissions first ten years, Umozurike remarked in this regard: "Moving promotion into full and effective gear will require much more time, a change in the terms of service and in the involvement of the Secretariat and possibly a radical increase in the number of Commissioners".[276] Although some of these aspects are regulated by the Commission's Rules of procedure, the number of commissioners is fixed in the Charter itself.[277]

8.2.3.2 Evaluation

The points of criticisms raised above are now evaluated. A case is made out that an enlightened Court need not be paralysed by the negative features of the Charter, but may contribute meaningfully towards the realisation of rights through processes of creative interpretation.

- The reference to "law" in the **claw-back clauses** need not be read as a restrictive description of "national law", but should be given its everyday, literal interpretation. "Law" is the totality of "that which is laid down, ordained, or established".[278] As such, reference to "law" includes the norms and standards embodied in international law. Is international law not also called the "*law* of nations"? Viewed in this light, a phrase such as "conditions laid down by law" does not justify any statutory provision merely by the fact that it was passed by a parliament. The norms set out in the various international covenants and customary international law also become relevant in the inquiry. "Law", in other words, should not be understood as "statute" or "decree", but as the whole of relevant regulatory standards, rules and principles.[279] Put in another way, "law" should not be regarded as descriptive of the local legal position alone, but must be understood as a normative concept. This possible interpretation is introduced by the

---

276 (1996) 3 *African Human Rights Newsletter* 8.

277 Art 31 of the Charter.

278 *Black's Law Dictionary* (4th ed) at 1028.

279 See, in this regard, Bentham (1948) at 330: "What is a law? ... The subject of these questions, it is to be observed, is the *logical*, the ideal, the *intellectual* whole, not the *physical* one: the *law*, and not the *statute*."

fact that law in the concrete sense (legislation, "lex" or "loi") and law in the abstract ("ius", or "droit") are all encompassed in the term "law".[280] Van Bueren referred to this interpretation in relation to the expression "as prescribed by law" in the African Children's Charter: "... the reference to law incorporates general international legal principles affecting a child's freedom of expression as are found in article 19 of the International Covenant on Civil and Political Rights".[281] Domestic courts have given precedents of interpretations which restrict the extent of "claw-back" allowed by the Charter.[282]

- It is conceded that not **every conceivable right** can be protected in every human rights instrument. The omission of the stated rights is not fundamental. It may be argued that the right to marry would be superfluous in a society dominated by the family. Another response is

---

280 Most European languages know this distinction, as illustrated with reference to the Latin and French. See also "Gesetz" and "Recht" in German, and "legge" and "diritto" in Italian.

281 (1991) 8 *International Children's Rights Monitor* 20 at 22. See also the remarks made by the South African government when acceding to the Charter. States may not enter reservations when ratifying or acceding to the Charter. In the case of South Africa, a *note verbale* was entered to accompany the instrument of accession. Parliament agreed to South Africa's adherence to the Charter, but decided that the instrument of accession should be accompanied by a declaration. This declaration contains South Africa's view that consultation should take place between states parties to the Charter on a number of issues. These include "possible measures to strengthen the enforcement mechanisms of the Charter", and, importantly, "*criteria for the restriction of rights and freedoms recognised and guaranteed in the Charter*" (my emphasis) and bringing the Charter into line with the UN's resolutions "regarding the characterisation of Zionism". In its recommendation the Senate added that the government should expedite the adoption of the concept Protocol on the establishment of an African Court on Human Rights. (See (7 June 1996) *Hansard* col 2645 - 2653 on the debate in the National Assembly, and (18 June 1996) *Hansard* col 2535 - 2536 and (21 June 1996) *Hansard* col 2842 (proposal in Senate).)

282 See the discussion of the Benin Constitutional Court's application of the Charter in ch 3.4.5.2 above. See also *Mtikila v Attorney General*, Civil case 5 of 1993, High Court of Tanzania (Dodoma), judgment of 27 October 1994, in which the term "subject to the laws of the land" in the Tanzanian Political Parties Act had to be construed. The Court remarked that the term implies that "those laws must be lawful laws" (at 33 of typed record). The Court continued: "A law which seeks to make the exercise of those rights subject to the permission of another person cannot be consistent with the express provisions of the Constitution for it makes the exercise illusory".

that the Charter contains rights[283] that are not included in other international human rights instruments.

- In terms of its mandate to issue general comments, the resolution of the Commission on "fair trial" has gone a long way to **clarify and supplement** the aspects mentioned.[284]

- As far as **children and women** are concerned, it has been argued that the Charter actually incorporates the provisions of international instruments in the form of CEDAW, and possibly also of CRC.[285] A separate African Charter on the Rights and Welfare of the Child was adopted in 1990. Recently, the process towards the adoption of a Protocol on Women's Rights has also shown considerable progress.

- The internationalisation of the right to equality on the basis of **sexual orientation** is still in a rudimentary phase of development.[286] This right cannot be viewed divorced from societal views and tolerances. It arguably is not one of the burning human rights issues in Africa today.[287]

- **Derogations** are not explicitly allowed for in the Charter. The fear expressed above is based on the argument that claw-back clauses may also introduce and justify derogations. But only a

---

283 Such as the right to development (art 22 of the Charter).

284 See ch 3.2.2 above.

285 See ch 3.8 above.

286 See eg Sanders (1996) 18 *HRQ* 67. But see also, for a regional jurisprudence involving decriminalisation of consensual homosexual conduct, see eg *Norris v Ireland* Series A 142, judgment of 26 October 1988, *Dungeon v UK* Series A 45, judgment of 22 October 1981 and *Modinos v Turkey* Series A 259, judgment of 22 April 1993.

287 Sanders (1996) 18 *HRQ* 67 at 71 cites some 45 jurisdictions in which adult homosexual activity has been decriminalised since 1961. None of these are African. (But see the recently decided case *S v Kampher*, decided by the South African High Court (Cape Provincial Division), *per* Farlam J, Ngcobo J agreeing, case 232/97, in which the common law offence of sodomy was decriminalised in one of South Africa's provines. The case is as yet unreported, but see web site http://www.qrd. org/qrd/world/legal/state-v-gordon.kumpher) When ECOSOC considered the accreditation of the International Lesbian and Gay Association ("ILGA") in 1993 no African states voted in favour. Some abstained, while two (Swaziland and Togo) opposed accreditation. None of the NGOs that have been accorded observer satus with the African Commission include the promotion of equality on the basis of sexual orientation as one of their main objectives.

number of rights in the Charter contain "claw-back" clauses. One possible conclusion is that **all other rights** may **not** be derogated from.[288] In any event, a rigid rule that all rights may be derogated from is certainly unacceptable because "it would lead to a wide disregard for human rights in the Continent".[289] It will be left to the Court to mediate a balance in the light of international law and the demands of the continent.

- It is not clear what it means that the Charter provides for the duty of "every individual", for example, to "to serve his national community" or "to preserve and strengthen positive African values".[290] Mutua initially criticised the inclusion of these "duties",[291] but later argued for the reconceptualisation of the idea.[292] He emphasised the importance of the rural, non-western component of African society in the African human rights tradition. Understood within this context, duties change from being a tool in the hand of an oppressive government, to being a link to a pre-colonial past. Africa stands at the edge of the abyss mainly because its cultural identity was destroyed by the artificial borders of the colonial state and the accompanying "social and political transformation from self-governing ethno-cultural units to the multi-lingual, multi-cultural modern state".[293]

  The solution lies in a radically different concept of the state, based on models from the pre-colonial past. What this entails is not specified. However, Mutua concedes that it would be impossible to "recapture and re-institute pre-colonial forms of social and political organization".[294] Pre-colonial Africa was based on values such as commitment, solidarity, respect and responsibility. The concept of duties should be **embedded in this cultural**

---

288 Significantly, the right to equal protection (arts 2 and 3 of the Charter) and to dignity and the prohibition of cruel and inhuman treatment and punishment (art 5) are free from internal modification or limitation, and should therefore, in this argument, also remain free from derogation.

289 Oraá (1992) at 210.

290 Arts 29(2) and 29(7) of the Charter.

291 See par 8.2.3 above.

292 (1995) 35 *Virginia Jnl of Intl Law* 339.

293 Mutua (1995) 35 *Virginia Jnl of Intl Law* 339 at 367.

294 *Ibid.*

framework. This could provide "an excellent point of departure in the reconstruction of a new ethos and the restoration of confidence in the continent's cultural identity".[295]

As far as realising these rights is concerned, he remarks that in pre-colonial Africa the resolution "of a claim was not necessary directed at satisfying or remedying an individual wrong", but rather an "opportunity for society to contemplate the complex web of individual and community duties and rights to seek a balance between the competing claims of the individual and society".[296] Judicialised resolution of conflict seems incompatible with this process of "contemplation" and "balancing" by "society". Mutua underlines the inappropriateness of the "sacrilization of the individual and the supremacy of the jurisprudence of individual rights" [297] in African settings.

- As for the **procedural provisions** connected to the functioning of the Commission, it has been argued that the Commission's mandate is potentially very wide, and many problems in the Commission's early functioning have been caused by a narrow interpretation of these provisions. More pervasive problems facing the Commission are the **lack of financial support** by the OAU, culminating in **inadequate staffing and equipment**, the general characteristics of individuals nominated and elected by states,[298] an unenterprising and stagnant **secretariat**, and a remote and institutionally unstable **location**.

---

295 (1995) 35 *Virginia Jnl of Intl Law* 339 at 380.

296 (1995) 35 *Virginia Jnl of Intl Law* 339 at 344-345.

297 (1995) 35 *Virginia Jnl of Intl Law* 339 at 341.

298 States have tended to nominate persons linked closely to government: see Table C in ch 3 above.

8.2.4 A single African human rights Court replacing the Commission

8.2.4.1 Argument

Another possibility is that the Commission would be submerged in a **newly-created judicial institution**, leading to a **single human rights institution in the form of a Court**. Rather than *supplementing* the Court, as suggested in the Protocol, in this model the Court would *substitute* the Commission. If this alternative is adopted, the Court on Human Rights will screen complaints for admissibility, and will thereafter itself consider the merits of admissible communications. It will also perform the other functions which previously formed part of the Commission's mandate. This proposal is similar to the model contained in Protocol no 11 to the European Convention.[299] When (or, if) Protocol no 11 turns into force, there will be only one institutional mechanism directed at the realisation of rights under the European Convention.

One of the first commentators to argue for the absorption of the African Commission into a to-be-established African Court of Human Rights, was **Gye-Wado**.[300] Writing in 1991, his support for a single, judicial institution flows from pragmatic considerations: " ... given the poor financial resource base, it becomes imperative that there is rationalisation for optimum result. It is suggested that the Commission should be transformed into a court with adequate powers of enforcement".[301]

In a letter written to the OAU legal officer after the International Commission of Jurists workshop at Addis Ababa, where the creation of an African Court on Human Rights was discussed, **Karel Vasak** expressed disappointment about the proposals (for supplementing the Commission's protective mandate) adopted at the workshop.[302] In his view, the two-tier system of a court and

---

299 See ch 5.1 above.

300 (1991) 11 *Nigerian Forum* 194.

301 (1991) 11 *Nigerian Forum* 194 at 202.

302 This letter (dated 13 December 1993) was made available to me from the Commission's Documentation Centre, at the Commission's Secretariat, Banjul. The workshop took place from 28 to 30 November 1993.

commission generally agreed upon at the workshop does not reflect an original spirit of invention, as it merely re-enacts what the Europeans decided on around 1948. He reiterated his support for a single permanent Court as **replacement** of the existing Commission. Arguments (sometimes reformulated and expanded)[303] supporting his views, are as follows:

- First of all, he observed that one easily loses sight of the fact that, between the Commission and the Court, it is the Commission that protects states against the risk of being condemned by a court's binding decision. The Commission is essentially an **obstructive mechanism**, reducing and controlling individual complaints. By retaining the Commission, an obstacle is unnecessarily built into the reformed system.

- A two-levelled system entails **double examination, double fees, double preparation**, and two separate findings by two organs inevitably in conflict with one another. Inter-personal concerns such as a perceived or real difference in status (between judges and "commissioners") and the public role of judges are bound to be as important in Africa as they have proved to be in other systems.

- A particularly negative consequence of the two-fold examination process is the **delay** caused thereby. In Europe, Vasak writes, the time-lapse between the violation and the eventual Court decision may be between seven and nine years: some two years to exhaust domestic remedies and some five years before the European Court of Human Rights will render a decision. Vasak rightly hints at the very real possibility that at least the exhaustion of local remedies in Africa will be of even lengthier duration. He continues: "There will be enough time to die in a dictatorial state, and the dictator-state can, in the meantime, repeat the same violation of human rights with impunity".[304] Such a lengthy system will no doubt be a blessing to African lawyers, but "definitely not a means of protecting the rights of Africans".[305] The clear implication is that a one-tier system will be able to dispose of cases more efficiently and with less delay.

---

303 And translated from the French.

304 *Ibid.*

305 *Ibid.*

Vasak also addressed himself to two arguments raised against his proposal by discussants at the Addis Ababa meeting of NGOs:

- The first argument raised there was that the proposal of a single court would lead to an amendment to the African Charter "as such" (as it was adopted in 1981). Counteracting this objection, Vasak referred to examples of competence of international organs being transferred to other organs without that being earmarked "amendments".[306]

- The second argument raised was that it would be impossible to confide to a single institution functions which are very diverse. The functions to be fulfilled under the Charter include judging individual and inter-state complaints, examining state reports, as well as consultative and promotional functions. Vasak's response is based on an institution widely known in Africa, the French-modelled *Conseil d'Etat*. The *Conseil* fulfils a multiplicity of functions at the domestic level of various countries. The African Court on Human Rights could similarly fulfil numerous functions pertaining to human rights, he argues. For these purposes, the Court may be divided into different chambers. Judges could be members of different chambers, and could undertake different functions. The intrinsic unity of the overall ideal (the protection of rights as set out in the Charter) will, Vasak argued, continuously bind the chambers and functions together.

8.2.4.2 Evaluation

i Particulars of Vasak's proposal

The French example referred to by Vasak, the *Conseil d'Etat* (translated as "Supreme Administrative Court"), is indeed entrusted with a variety of functions.[307] It has an advisory

---

306 In his letter to the Commission Vasak gave the example of the competences of the European Union in the social and cultural fields which have been transferred to the Council of Europe, without any question about amendment to either the Council Statute (of 1949) or the Agreement of Paris (of 1954), which created the European Union.

307 See Dadomo & Farron (1996) at 93-95, for an overview of its functions.

function, in terms of which it gives opinions on legislative and administrative matters. As a judicial organ, it may function as a court of first instance, as a court of appeal, and as Court of Cessation.[308] As court of first instance, it may review the legality of administrative actions, decisions of administrative organs, pronounce on disputes concerning the election of members of the National Assembly and disputes involving civil servants appointed by decree. The *Conseil d'Etat* may hear various appeals, and may quash the decisions of lower administrative courts due to procedural irregularity or misinterpretation of the law.

Even though Vasak is correct that the *Conseil* has a variety of functions, the reference thereto seems inappropriate in light of the following:

- The *Conseil d'Etat* has a limited area of operation, being concerned only with the legality of administrative actions and decisions. It does not in any way deal with the constitutionality of legislation. As indicated elsewhere in this study, this function falls to the *Conseil Constitutionnel*. The variety of functions listed above is deceptive, as they all relate to the administrative sphere.

- The *Conseil d'Etat* is a huge institution, comprised of about 300 members, divided into six sections (chambers). These sections are divided again into *sous-sections* (sub-chambers).[309] Resources will not be available to establish a pan-African Court of this magnitude.

- The analogy with the *Conseil d'Etat* is also dangerous, as it is a highly politicised body. As an institution it is closely linked to political players. In name, the Prime Minister presides over the Council. In practice, the Council's Vice-President presides. He or she is appointed by the cabinet.

Vasak's letter is dated 13 December 1993. The intervening years may not have altered the substance of his argument, but the criticism of unoriginality can now be levelled against his

---

308 "Cassation" is derived from "casser" which in this context means "quash", and differs from "appeal" in that a court of cessation does not deal with the facts, but considers if the law has been properly applied (see Dadoma and Farron (1996) at 83).

309 Dadoma and Farron (1996) at 90-91.

proposal. The reforms in the European system are directed at creating a single structure. Following the provisions of Protocol no 11 to the European Convention will be an act of slavishly following European trends (when they have not even taken firm root in European soil yet). Blindly following European models should be avoided. It has been argued that the European system was receptive of a single judicial-driven system only because it had undergone a gradual process of growth.

ii Need for a non-judicial body for the protection of human rights in Africa

The particularity of the African situation dictates that a **non-judicial institution should be retained**, at least in the short term. In each of the following respects, the African situation is different from the European position:

- One of the most important differences between Europe and Africa as far as human rights protection is concerned, is the reality that Africa experiences violations on a much grander scale. Like in the Americas, a two-tier system seems called for, with a quick-reacting Commission able to take urgent and often preventative action. By their very nature courts principally focus on and adjudicate individual cases. In contemporary Europe, where **massive or systematic violations** are rare exceptions, a pre-existing common culture is strengthened and developed through individual applications of the Convention. The non-judicial approach of a commission is more appropriate to react to and redress massive human rights violations.

- The African Charter not only allows for individual, but also for **collective rights**. This has repeatedly been identified as a feature which distinguishes it from other regional human rights documents. To give meaning to this beyond a mere formulation, these collective rights must be realised collectively. The system of enforcement has to cater not only for the realisation of individual rights. A two-tier system would seem to fit best in the Charter scheme: a Commission with its focus on collective rights and a Court with its focus on individual cases or disputes.

- Low levels of literacy and legal consciousness make the **promotion** of human rights of primary importance in Africa.[310] Promotion should not be relegated to one among many functions, or an aim obscured by more immediate concerns relating to protection. A judicial institution is not a particularly apt instrument for mass dissemination of information and raising of awareness.

Furthermore, there may be good reasons why a matter should be taken up confidentially with a government. Although a single judicial institution may, as in the case of the new European Court, leave room for the amicable settlement of disputes, this function is likely to become eroded within the framework of a single judicial structure.

Still, the proposal for a single Court has definite merit. The co-existence of a Court and Commission is likely to give rise to duplication and subsequent delays, especially as the workload increases. Creating a single Court from the outset also has the advantage of leading to a simplified system and not one that may give rise to confusion among ordinary Africans.

8.2.5 Establishing an African Court of Justice with a mandate which is wider than human rights

8.2.5.1 Evaluation

This alternative is similar to the previous in that it also proposes a single pan-African judicial institution. But this proposal differs from the one in paragraph 8.2.4 in the nature of the single Court's mandate. In Vasak's proposal, the Court remains a Court **of human rights**. Creating one Court, an African Court of Justice, on the other hand, means that there will be a single Court whose **mandate includes, but is not restricted to human rights**.

---

310 Interview with the Secretary to the Commission, Baricako, on 26 May 1995, at the Commission's Secretariat in Banjul.

i *Extension of mandate of African Court of Justice*

One possibility is to extend the mandate of a Court which has already been included in the Treaty establishing the AEC, the African Court of Justice, to include human rights matters. Chris Maina **Peter** was one of the first commentators to relate the developments under the treaty establishing the African Economic Community ("AEC") to proposals for reform of the African Charter system.[311]

A brief background to this Court is now provided.[312] In 1991,[313] the Treaty establishing the AEC was adopted by OAU member states, meeting in Abuja, Nigeria.[314] The objectives of the AEC may be derived from article 4(1) of the Treaty. Article 4(1)(a) states the overarching goal of promoting "economic, social and cultural development and the integration of African economies in order to increase economic self-reliance and promote endogenous and self-sustained development". The underlying aim is not unity for unity's sake, but the creation of a continental framework for development's sake. The **Preamble** of the Abuja Treaty refers to the "need to share, in an equitable and just manner, the advantages of co-operation among Member States in order to

---

311 (1993) 1 *East African Journal of Peace & Human Rights* 117. See, for a less clearly articulated but earlier formulation of this proposition, Gye-Wado "African Human Rights Institutions and Enforcement Processes" (1991) 11 *Nigerian Forum* 227 at 233: "It is suggested that an African Court of Human Rights be established, given the fact that there is going to be established an African Court of Justice. In fact both could be harmonised so as to cut cost, since both are organs of OAU. The transformation of the Commission would benefit from the mandatory jurisdiction of the African Court of Justice".

312 See, in general, Thompson (1993) 5 *RADIC* 743.

313 After ten years of mainly focusing on political issues, the OAU turned its attention to economic matters by adopting the "African Declaration on Co-operation, Development and Economic Independence" at the 1973 session of the Assembly of Heads of State and Government. A number of discussions and declarations followed, culminating in the "Monrovia Declaration on Commitment of Heads of State and Government of the OAU on the Guidelines and Measures for National and Collective Self-reliance in Economic and Social Development for the Establishment of a New Economic Order in Africa". Following the Monrovia session, an extraordinary session took place in Lagos, on 28 and 29 April 1980. There the "Lagos Plan of Action" and Final Act of Lagos were adopted. The Secretary-General of the OAU, writing in an OAU publication, regards that as the moment when "Africa took cognisance of the need to take its destiny into its own hands and make a radical departure from the earlier development strategies which perpetuated and strengthened the external orientation and dependence of African economies". It contained the principle that an African Economic Community ("AEC") will be established.

314 See text at (1991) 30 *ILM* 1241.

promote a balanced economic development in all parts of the Continent". The adoption of this document marks a shifting of the OAU's priorities away from political concerns to finding solutions to economic problems.

The ultimate aim of the Treaty is to oversee the gradual establishment of an African Common Market, a Pan-African Economic and Monetary Union, a single African Central Bank and a single African currency. The project to establish the Community is realistically seen as a protracted process.[315] It is envisaged that it will be done gradually, in six stages spanning some 34 years. The first step is to strengthen regional economic communities and to found such communities where they had not existed before. These regional economic communities will become the building blocks of the AEC. The establishment of the AEC is the final objective towards which the activities of the regional economic communities are geared.

As existing sub-regional structures will serve as the building blocks of the AEC, they have to be strengthened first. In the final phase, these existing structures, as well as the OAU, will dissolve into the new Pan-African body. The AEC will eventually consist of an Assembly (of heads of State and Government), the Council of Ministers, the Pan-African Parliament, a General Secretariat, specialised commissions and a Court of Justice.[316] In conformity with article 101 of the AEC Treaty, the Treaty turns into force when two-thirds of the OAU member states have ratified it. This happened in April 1994, when the number of ratifications reached 35.[317] Leaders from twenty-eight African states attended the inaugural meeting of the AEC on 3 June 1997 in Harare.[318]

The role of the **African Court of Justice** will be to ensure that Community law is adhered to, and will decide disputes about the interpretation and application of the Treaty.[319] Only a member state or the Assembly may bring actions on the basis of the violation of the Treaty.[320] Decisions of the

---

315 See art 6 of the Abuja Treaty on the modalities of establishing the AEC.

316 See art 7 of the Abuja Treaty.

317 Press communiqué quoted by Niyozima (1994) 6 *ASICL Proc* 182 at 188 (n 7).

318 It was held simultaneously with the 33rd OAU summit; see "Solving Africa's debt" (5 June 1997) *Sowetan* 10.

319 See art 18(2) of the Abuja Treaty.

320 See art 18(3)(a) of the Abuja Treaty.

Court are binding on member states and organs of the Community. The Court's composition, statute and Rules of procedure will be settled by way of a Protocol.[321] The Court may also give advisory opinions at the request of the Assembly or the Council.[322] In principle, disputes between states "shall be amicably settled through direct agreement of the parties to the dispute".[323] Should this fail, any of the disputing parties may refer the dispute to the Court of Justice. This has to be done within twelve months of failure of the settlement. However, the Court's jurisdiction may be considerably enlarged in that the Assembly may confer jurisdiction on the Court to hear any other dispute.[324] The decisions of the Court are final, in that no appeals are possible. The Court's decisions bind the states parties and organs of the AEC. Specific reference is made to the fact that the Court operates independently from states parties and institutional organs.[325]

Among the basic principles enunciated in the Abuja Treaty are "peaceful settlement of disputes" and "recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights".[326] Although not clearly included as part of the provisions on which the Court can adjudicate, **human rights form an implicit part of the Court's mandate**.[327]

Considering the deliberations surrounding the preparation of the African Charter, Peter found the omission of a court to secure enforcement of its provisions regrettable. He argued that a separate court dealing with human rights made sense in the mid to late 1970s "because of the notorious excesses of African Governments at the time".[328] However, in the context of the 1990s, he regarded "a regional court exclusively concerned with human rights" as "inadequate".[329] What was needed,

---

321 Art 20 of the Abuja Treaty.

322 Art 18(3)(b) of the Abuja Treaty.

323 Art 87(1) of the Treaty.

324 Art 18(4) of the Abuja Treaty.

325 Art 18(5) of the Abuja Treaty.

326 Art 3 of the Abuja Treaty.

327 The Court is mandated to decide disputes brought "on grounds of violation of the provisions of this Treaty" (art 18(3)(a)).

328 (1993) 1 *East African Jnl of Peace & Human Rights* 117 at 122.

329 *Ibid.*

he argued, is a court "that will oversee not only human rights questions, but also tackle the various other problems facing the African continent".[330] He called for a mandate that extends beyond that of other regional courts, basing his call on the peculiarity and more intricate nature of African problems. The issues which he argued an overarching court should include in its jurisdiction, are:[331]

- the protection of human and peoples' rights;
- the settlement of border disputes;
- combating mercenaries; and
- protection of the environment.[332]

The first and last aspects clearly fall within the ambit of a proposed African Court on Human Rights, contained in the proposed Protocol to the African Charter. The individual and peoples' rights to be protected are the very rights the African Court on Human Rights would address. One of the rights specified in the African Charter is the "right to a general satisfactory environment favourable to their development".[333] Although the formulation is not very detailed, the human rights court could give it more specific content, drawing inspiration from international instruments. If two separate courts are established, it would appear that both could be approached as far as environmental matters are concerned. The AEC Treaty deals in some detail with the environment and makes specific reference to hazardous waste.[334] At this juncture one should recall the Bamako Convention, an OAU treaty barring the import into Africa of hazardous wastes.[335] A dispute settlement mechanism is provided for in this Convention as well. An *ad hoc* organ may be

---

330 *Ibid.*

331 (1993) 1 *East African Jnl of Peace & Human Rights* 117 at 123 - 130.

332 The control of hazardous waste, which is the main concern of the Bamako Convention, already falls within the ambit of the proposed African Court of Justice. Peter ((1993) 1 *East African Jnl of Peace & Human Rights* 117 at 130) found that the AEC Treaty forms a "solid basis for the protection of the environment". His argument for the extension of the jurisdiction of the ACJ does therefore not include the control of hazardous waste, as this aspect is already included in the AEC Treaty.

333 Art 24 of the Charter.

334 Arts 58 and 50 of the Treaty.

335 See ch 3.7.2 above.

established by the Conference for this purpose, or parties may refer the matter to the International Court of Justice.[336]

Cheyne highlighted the "two groups of provisions"[337] relevant to the environment. Finding the AEC Treaty vague in dealing with the subject, with "little by way of legally enforceable provisions",[338] she suggests that the more detailed Charter provisions may become an indirect method of incorporating environmental protection. As far as border disputes and mercenarism are concerned, the African Court of Justice may have a role to play, in so far as these aspects are covered by the AEC Treaty.

ii Bula-Bula's proposal for a single court with different chambers

Writing soon thereafter, Bula-Bula also expressed his preference for a single African Court of Justice.[339] This, he argued, would complement the project of pan-Africanism, as a single judicial organ will bind together different institutions and focal points by adjudicating upon political (the OAU), economical (the AEC) and judicial (human and peoples' rights) matters.[340]

As far as the organisation of the proposed system is concerned, he emphasised the fact that a pan-African Court will not totally usurp the role of regional courts established under regional conventions. One possibility could be that the ACJ serves as a court of appeal from the regional courts.[341] As for the possible multiplication of courts, he asked the following question: Is the number of conflicts and differences in Africa considerable enough to justify the existence of numerous tribunals, each with a specialised, technical competence? Finding the number of cases submitted for arbitration and to the ICJ quite limited, he concluded that there is no need for a multiplicity of judicial bodies.

---

336 Art 20 of the Bamako Convention.

337 Cheyne (1994) 6 *ASICL Proc* 135 at 142.

338 Cheyne (1994) 6 *ASICL Proc* 135 at 143.

339 (1994) 6 *ASICL Proc* 21.

340 (1994) 6 *ASICL Proc* 21 at 42.

341 *Ibid.*

Bula-Bula also argued that a conflict concerning violations of human and peoples' rights is completely different from a border dispute between two states. But it does not follow, from that fact alone, that two or more different judicial organs should exist side by side.[342] The material jurisdiction of such a court would include diverse issues, ranging from human and peoples' rights, economic integration and territorial sovereignty, to the law of the sea and the law pertaining to international organisations. To accommodate this concern, Bula-Bula sought a midway between absolute judicial unity and judicial plurality. His proposal is for a single court organised into different sections and chambers, each dealing with a different aspect of the Court's material jurisdiction.[343] Although there will be a division of work, there will be only one, permanent institution, guaranteeing jurisprudential continuity.[344] To foster the ideal of African unity, he proposed that the number of judges should be equal to an absolute majority in the OAU (27 out of 53). This would ensure a kind of quorum at the level of the Court.[345]

iii Other comments

Other commentators and role players have also, though less elaborately, considered the possibility of a single rather than multiple African courts:

- At the Commission's 15th session, taking place immediately after the 6th NGO workshop, the item "Establishment of an African Human Rights Court" was on the agenda of its open session. During the discussion of that agenda point, commissioner **Umozurike** was the first to draw attention to the Court of Justice provided for under the African Economic Treaty. However, he also raised the question whether a two-court system would be appropriate.

---

342 (1994) 6 *ASICL Proc* 21 at 43.

343 "Les inconvénients éventuels du monopole juridictionnel seraient palliés par l'existence de ces formations internes" (at 43). ("The potential inconveniences of having a single judicial system will be prevented by the existence of these internal divisions" (my translation).)

344 (1994) 6 *ASICL Proc* at 43.

345 (1994) 6 *ASICL Proc* at 44.

- Financial considerations underlie **Gye-Wado's** proposition that the proposed African Human Rights Court and the to-be-established African Court of Justice "could be harmonised".[346] He also refers to the fact that both tribunals will be organs of the OAU.

346 (1991) 11 *Nigerian Forum* 227 at 233.

TABLE P: STATUS OF RATIFICATION OF THE TREATY ESTABLISHING THE AFRICAN ECONOMIC COMMUNITY AS AT 31 MARCH 1997

Country	Signed	Ratified
Algeria	03/06/91	21/06/95
Angola	03/06/91	11/04/92
Benin	27/02/92	
Botswana	03/06/91	27/06/96
Burkina Faso	03/06/91	19/05/92
Burundi	03/06/91	05/08/92
Cameroon	03/06/91	20/12/95
Cape Verde	03/06/91	12/04/93
Central African Republic	03/06/91	18/06/93
Chad	03/06/91	26/06/93
Comoros	03/06/91	06/06/94
Congo	03/06/91	
Côte d'Ivoire	03/06/91	22/02/93
Djibouti	03/06/91	
Egypt	03/06/91	18/12/92
Equatorial Guinea	03/06/91	
Eritrea		
Ethiopia	03/06/91	05/11/92
Gabon	03/06/91	
Gambia	03/06/91	20/04/93
Ghana	03/06/91	25/09/91
Guinea	03/06/91	17/07/92
Guinea-Bissau	03/06/91	24/06/92
Kenya	03/06/91	18/06/93
Lesotho	03/06/91	
Liberia	03/06/91	23/06/93

Country	Signed	Ratified
Libya	03/06/91	02/11/92
Madagascar	03/06/91	
Malawi	03/06/91	26/06/93
Mali	03/06/91	13/11/92
Mauritania	03/06/91	
Mauritius	03/06/91	14/02/92
Mozambique	03/06/91	14/05/92
Namibia	03/06/91	28/06/92
Niger	03/06/91	22/06/92
Nigeria	03/06/91	31/12/91
Rwanda	03/06/91	01/10/93
Sahrawi Arab Democratic Rep	03/06/91	25/08/92
São Tomé e Príncipe	03/06/91	02/06/93
Senegal	03/06/91	26/02/92
Seychelles	03/06/91	11/10/91
Sierra Leone	03/06/91	15/03/94
Somalia	03/06/91	
South Africa		
Sudan	03/06/91	08/02/93
Swaziland	29/06/92	
Tanzania	03/06/91	10/01/92
Togo	03/06/91	
Tunisia	03/06/91	03/05/94
Uganda	03/06/91	31/12/91
Zaïre	03/06/91	19/06/93
Zambia	03/06/91	26/10/92
Zimbabwe	03/06/91	06/11/91

8.2.5.2 Evaluation

i The African Court of Justice as a human rights court

The proposal for one court with jurisdiction on all matters of supra-national interest in Africa cannot be dismissed out of hand:

- In the first place, the principle of one rather than two courts certainly has considerable merit because of its **simplicity**. Africa lies mined with elaborate institutions, still dormant after an illustrious inception. Not only will potential failure of the institution be avoided, but a clear and uncomplicated model will be easier to understand, to promote, and more likely to become a symbol of African **unity** and judicial authority.

- Simplicity also makes financial sense, as it will certainly be **less expensive** to establish and maintain one, rather than two inter-African courts.

- Furthermore, one institution, the **African Court of Justice, has already been instituted in principle** by the Treaty establishing the AEC. This Treaty has turned into force and the AEC was inaugurated in 1997. This Court has been accepted in principle by the states parties. Its jurisdiction merely has to be extended. In other words, the argument is that in this way, a human rights Court will come into existence **sooner and easier**.

- The European experience may also be instructive. Although two courts have been created at the inter-European level, the jurisdictions of these two courts have increasingly overlapped. As human rights has become a concern of relevance within European community law, a degree of **duplication** has come about, and is likely to increase in future. For example, it is, as Clapham put it, "quite feasible that the operation of a Community provision at the national level could be challenged in Strasbourg for compliance with the Convention".[347]

- With the wisdom of hindsight, one **single European judicial institution would have made more sense**. The fact that two courts exist in Europe today is due to historical evolution and does not necessarily support an argument for the establishment of two structures in Africa. In this regard, one may take note of a proposal by a judge who served on both of the European supra-national courts that the two courts should merge into one.[348] Although this suggestion did not receive much support when it was expressed and does not form the basis of any current

---

347 (1991) at 52.

348 Sørensen (1971) *European YB* at 16 - 17.

proposals for reform, the fact that two independent, functional institutions had at that stage already come into existence in Europe should not be underestimated. It could well be that the proposal was regarded as a threat to vested interests. In this respect, the African reality is different, as no all-African Court has as yet been established. African developments should follow a unique course, but must be informed by European experiences in this regard.

On the other hand, counter-arguments also have much strength:

- One of the main arguments for a separate human rights court is that human rights is a pressing **priority** and should not be included as only part of the African Court of Justice's mandate. The danger will always lurk that a single court will regard its jurisdiction related to the main aim of the AEC, namely economic matters, as more important. Human rights may too easily become relegated to a peripheral concern.

- Although the Treaty establishing the AEC provides for a judicial institution, that Court's jurisdiction is very limited. Importantly, it does not allow for an explicit human rights mandate, nor does it give individuals the right to approach the Court, even indirectly. This means that the **treaty will require amendment or the adoption of a Protocol**. The desired changes will require much the same process as the one already under way to elaborate and adopt a Protocol to the African Charter. Recent experience has shown that agreement is reached only with time and difficulty. In the light of these factors, the argument for a swift and easy alternative seems to fall away.

- An important draw-back faced by the African Court of Justice and reason why it will be an inappropriate institution to deal with human rights complaints, is its **state-centred character**. Individuals do not have direct access to the Court. Neither is there any "commission" which may investigate or refer cases to the Court. Cheyne observed that, compared to the European Court of Justice, its African counterpart "is unlikely to be highly productive".[349]

- The European experience indicates that unnecessary duplication and jurisdictional confusion need not be major concerns and reveals the **possibility for the co-existence of two regional**

---

349 *Ibid.*

courts in the same regional unit. The main foci of the two courts are clearly different. The Court of Human Rights hears all admissible complaints about violations of the European Convention by states parties and is concerned with the protection of rights. Of overriding importance to the Court of Justice is the furthering of the objectives of the Community. National legislation is judged by the Court of Human Rights for compliance with the European Convention. The Court of Justice does not consider the "compatibility with the European Convention of national legislation which ... falls within the jurisdiction of the national legislator".[350] It may, however, express itself on national legislation operating *in the field of Community law*.

- Given clear mandates and jurisdictional spheres, **two judicial institutions may co-exit in Africa**, as they have in Europe. Positive, pre-emptive steps may be taken to ensure the harmonious development of the two systems, as any watertight separation of human rights from economic development is bound to be blurred in future. Good communication and exchange of documentation between the two institutions seem essential. Provision is already made in the Draft Protocol for the African Human Rights Court to offer advisory opinions to the AEC institutions.[351] This practice could lead to the integration of human rights into the AEC.

- In Europe, the functional areas of the two courts have remained distinct from one another. While it is true that administrative actions taken at the national level to implement Community provisions may be reviewed by both courts, human rights are always interpreted in the light of the *demands presented by European integration*: "The protection of such rights, whilst inspired by the constitutional traditions common to the Member States must be ensured within the framework of the structure and objectives of the Community".[352] Even when the Court

---

350 *Cinéthèque SA v Fédération Nationale des Cinémas Français* [1985] ECR 2605 par 25.

351 Art 4 see ch 7.2 above.

352 *Internationale Handelsgesellschaft* [1970] ECR 1125 at 1134. For a view that some human rights take precedence over Community law, see Dauses (1985) 10 *EurLRev* 398.

found common principles and traditions, it has, with one exception,[353] not provided clear protection to an individual by incorporating a particular right explicitly.[354] In practice, Community provisions at the local level have not been challenged for compliance with the Convention very often. One of the reasons must be that Community law does not, at least at first glance, present clear violations of the European Convention. In a recent case[355] the European Human Rights Commission held that it could not expect national institutions to review decision of the European Court of Justice to ensure their compliance with the European Convention. The most obvious explanation for the refusal of the Commission of Human Rights to entertain such complaints is that the Community is not a party to the Convention.[356]

It is difficult to draw a balance sheet of the advantages and disadvantages of two separate institutions, but in my view the disadvantages outweigh the advantages. One factor not investigated here is the likelihood of success of the project to create a pan-African economic community. Factors such as the rivalry of superpowers in Africa (especially as more strategically important commodities such as oil and minerals are exploited on the continent) and the vested interests of the ruling élites suggest bleak future prospects. Consequently, this alternative should not be used to discourage attempts to establish an African Court of Human Rights.

ii Bula-Bula's model

Bula-Bula's model suffers from certain inherent deficiencies. Focusing on the whole of international law, he loses sight of the true nature and potential impact of human rights litigation. By looking at the number of states that have accepted the jurisdiction of the ICJ and that have consented to arbitration on international law issues, he concludes that the number of cases is not sufficient to justify the creation of more than one tribunal. Complaints about the violation of

---

353 *R v Kent Kirk* 1984 Common Market Reports 522, in which the ban on retroactive penal measures explicitly took "its place among the general principles of law whose observance is ensured by the Court of Justice" (at par 21/22).

354 Clapham (1991) at 50-51.

355 *M v Federal Republic of Germany* 13258/87, decision of 9 February 1990.

356 See eg *Re the European School in Brussels: D v Belgium and the European Communities* [1986] Common Market Law Reports 57.

human and peoples' rights differ in one crucial respect - individuals have standing to bring cases against states. Indeed, it is argued here that a system which does not include individual petition as a real possibility is doomed for failure. It is anticipated that an African human rights Court would evolve in a way similar to the European Court of Human Rights. Financially, Bula-Bula's proposal is no real improvement on a multiple-court system. Because his scheme is seen as a pan-Africanist "impetus", it is important that the number of judges is 27. This would not be a great saving compared to the proposal of the ACJ and the African Human Rights Court combined.

8.2.6 Multiple, sub-regional human rights courts

8.2.6.1 Argument

Rooted in the fear that diversity will unleash centrifugal forces which might destabilise a centralised Court,[357] and in the inefficiency of the Commission, is the idea of regionalising enforcement under the African Charter. Arguments about possible sub-regional human rights courts and sub-regional human rights commissions are here treated separately.[358] The argument is that sub-regional inter-governmental institutions may be more effective, because they bind together states with much in common, including trade and other economic links. Moral authority depends largely on these factors, which are more developed on the sub-regional than on the continental plane.

Courts with sub-regional jurisdiction are not unknown in African legal history. As has been observed, the East African Court of Appeal and West African Court of Appeal were established by, and, in the case of the former, also survived, colonialism.[359] Most of the present regional organisations in Africa (such as ECOWAS, SADC, COMESA and The Maghreb Arab Union)

---

357 See par 8.1.4 above.

358 See par 8.2.7 immediately following this par.

359 See ch 4.2 above.

include a tribunal as one of their institutions.[360] Although these courts do not concentrate on human rights, they provide a precedent for a regionalised approach to African problems.

Even in the absence of a regional human rights charter, a common jurisprudence may evolve if the states of that particular region all have Bills of Rights and enough common ground exist between them to make shared approaches to shared problems possible. Evidence of such an evolution is presented by states in **Southern Africa**.[361] Although no sub-regional tribunal has been established, Southern African judicial practice has been instrumental in the development of a regional human rights jurisprudence.[362] In numerous judgments, judges in one country have referred to and sometimes applied decisions in neighbouring states. This process has been facilitated by the common issues faced by these states, by a common historical[363] and legal background,[364] the fact that all countries not only have Bills of Rights, but also the similarity of their provisions, by an

---

360 See ch 4.3 above.

361 The contention is not that the states in this region necessarily protect human rights effectively (for criticism of the human rights record of SADC countries, see Amnesty International (1997)). See also Benedek in Thoedoropoulos (ed) (1992) at 28.

362 "Southern Africa", as used here, primarily denotes a geographical area, comprising Angola, Botswana, Lesotho, Malawi, Mozambique, Namibia, South Africa, Swaziland, Zambia and Zimbabwe. The other two SADC member states, Mauritius and Tanzania, are also referred to. I use Southern Africa not as an argument that regional (legal) coherence does not exist in other parts of Africa, but because this is the system best known to me and on which most information is accessible to me. In any event, it merely illustrates a general point about *possibilities*.

363 Like all of Africa, these countries have suffered under colonialism. But in Southern Africa colonialism took a singular form, as initial trading contacts were followed by substantive settling of Dutch, English, Portuguese and Germans communities. The presence of the non-indigenous groups lasted longer than in the most of Africa. Colonialism lasted longest in this region, and led to the severest national liberation campaigns, including armed struggle. Angola and Mozambique gained independence in 1975. Zimbabwe became independent only in 1980. Namibia came even later, in 1990. Finally, a democratic government was installed in South Africa in 1994.

364 See the quote from *S v Williams* 1995 (3) SA 632 (CC) at par 31: "The decisions of the Supreme Courts of Namibia and of Zimbabwe are of special significance. Not only are these countries geographic neighbours, but South Africa shares with them the same English colonial experience which has had a deep influence on our law; we of course also share the Roman-Dutch legal tradition".

exchange of judicial officers,[365] by geographic proximity and linguistic homogeneity[366] and by the existence of common law report series.[367] The Southern African region shows a remarkable degree of coherence, underscored in recent times by them becoming supra-nationally linked by common membership of SADC,[368] and of the Commonwealth. Similar issues faced by the judiciary in these countries are, for example, the constitutionality of corporal punishment,[369] the death penalty,[370] the prohibition of alien husbands from residing in the country of their wives' citizenship[371] and

---

365 The regional exchange of judicial officers is exemplified in the person of judge Mohammed, who was Chief Justice of Namibia and judge (and later Deputy President) of the South African Constitutional Court, before becoming that country's Chief Justice. Further examples are the previous Chief Justice of Zimbabwe, Dumbutshena, who acted as judge in the Namibian Supreme Court (see introductory pages of SA Law Reports 1994 2 to 1996 4). Since the latter part of 1994 judge Mtambanengwe has been seconded from the Zimbabwean to the Namibian High Court (see eg his judgment in *Kauesa v Minister of Home Affairs* 1996 4 SA 965 (NmS)).

366 All these countries, except Angola and Mozambique, have English as an official language. After its admission to the Commonwealth, English should gain ground in Mozambique. Angola is also reportedly considering to join the Commonwealth.

367 For example, the South African Law Reports series includes cases from Namibia and Zimbabwe, the South African Constitutional Law Reports series includes cases from Namibia, Swaziland and Zimbabwe. In one of the latest issues of the Butterworths Constitutional Law Reports series (1997 8) cases from Lesotho have also been included. Previously, cases from eg Namibia, Zimbabwe and Botswana are also included in the BCLR series.

368 A political arrangement may provide the required forum to raise non-compliance by a state. Close links, especially economically, may serve as means of censuring a state that does not conform with regional requirements. An attempt has been made to include a Human Rights Charter into the SADC Treaty, and to establish a regional human rights court. This has, so far, not reaped any fruits. Not only governments, but also civil society in the neighbouring states, may contribute in the process of effecting changing attitudes. (See Gebhardt (21 - 27 February 1997) *Mail & Guardian* at B1, on the actions of trade unions in South Africa in connection with the denial of trade union rights in Swaziland.)

369 See eg the references to the Namibian case *Ex parte Attorney-General, Namibia: In re Corporal Punishment* (1991 3 SA 76 (NmS)) and the Zimbabwean cases *S v Ncube* 1988 2 SA 702 (ZS) and *S v A Juvenile* 1990 4 SA 151 (ZS) by Langa J in the South African case *S v Williams* 1995 3 SA 632 (CC) (in particular at par 31).

370 See the reference to *Mbushuu v The Republic* (Tanzania Court of Appeal, Criminal Appeal 142 of 1994, 30 January 1995) in *S v Makwanyane* 1995 3 SA 391 (CC) at paras 114-115.

371 See *Dow v Attorney-General* [1992] LRC (Const) 623 (Botswana CA), followed in *Rattigan v Chief Immigration Officer, Zimbabwe* 1995 2 SA 182 (ZS). See also *Salem v Immigration Officer* [1994] 1 LRC

Footnotes continued on next page.

balancing vested property rights with programmes of land reform and redistribution.[372] Other common issues are the quest for an appropriate approach to constitutional interpretation of a new Bill of Rights,[373] to claims for equality on the basis of sex and gender,[374] to limitations to freedom of expression,[375] and to the limitation of rights in general.[376]

(Const) 355; 1995 4 SA 280; 1995 1 BCLR 78 (ZS). An earlier case dealing with this issue is the UN Human Rights Committee decision in *Aumeeruddy-Cziffra v Mauritius* (1981) 62 ILR 255. The question arises whether this island state is or may become part of a Southern African human rights vanguard. In terms of its human rights record, it may fit, but cultural differences may inhibit such a development. From a legal point of view, Mauritius is also a mixed or hybrid system.

372 See the thoughtful discussion by Roux (1996) 8 *RADIC* 755, in which reference is made to cases on this issue in the following SADC member states: Botswana, Namibia, South Africa, Tanzania, Zambia, Zimbabwe (see especially n44 at 762). The author could, no doubt, also have included case-law from Mauritius (see ch 4.5.2 of this study).

373 See, for example, the impact of the *Unity Dow* judgment.

374 The Namibian High Court, in *S v D* 1992 1 SA 513 (Nm), introduced the difference between substantive (*de facto*) and formal (*de iure*) equality. In the course of appeal proceedings, the Court considered whether the existence and application of the "cautionary rule" in cases involving sexual assault violated the equality principle. The Namibian Constitution guarantees that no person "may be discriminated against on the grounds of sex ...". On a formal level, Frank J accepted that the rule is applied equally to men and women who were victims of sexual assault. *De facto*, however, the overwhelming majority of complainants (up to 95% in the judge's experience) are female. This meant that the rule operated as a tool of discrimination against women. As the judge disposed of the case without basing his decision on this aspect, his remarks in this regard are *obiter dicta*. This is underlined when he concluded that the rule is "probably" contrary to article 10 of the Constitution. In *Longwe v Intercontinetal Hotels* [1993] 4 LRC 221 (Zambia) sex discrimination took the form of refusing women who were not accompanied by men, entrance to a bar of the Intercontinental Hotel in Lusaka. The conduct was found to be inconsistent with fundamental rights guaranteed by the Constitution. The *Unity Dow* judgment and others duscussed above on the discriminatory nature of citizenship provisions may also be invoked here. See further *Student Representative Council, Molepolole College of Education v Attorney General of Botswana*, Civil Appeal 13 of 1994, judgment delivered on 31 January 1995 (discussed in ch 3.4.5 above) and *Mfolo v Minister of Education, Bophuthatswana* 1992 3 SA 181 (B), dealing with discrimination on the basis of pregnancy.

375 The Supreme Court of Zimbabwe addressed the constitutionality of a statutory provision prohibiting public processions without obtaining a prior permit in *In re Munhemeso* 1995 1 SA 551 (ZS). The Zimbabwean Court made no reference to a Ghanaian precedent, *National Patriotic Party v Inspector General of Police*, Supreme Court, Suit 3/93, judgment of 30 November 1993. (The Zimbabwean judgment was delivered on 13 January 1994.) It did, however, as far as its approach to interpretation was concerned, refer to the

Footnotes continued on next page.

For the following reasons sub-regional human rights courts are more likely to succeed than courts with a continental scope:

- It is founded on existing ties, based on shared regional problems, a shared political history and a common tradition, culture and language, making implementation and **monitoring** of court decisions more effective.
- A sub-regional court is less likely to be perceived as an alien structure, as it will be geographically and psychologically **closer** to the people in the sub-region. In this respect, it resembles traditional African ways of resolving disputes more than an all-African Court would.
- Judges from the sub-region are likely to be more **sensitive to sub-regional concerns**. States would therefore be more likely to surrender political sovereignty to an institution in which they have greater confidence.
- There is bound to be less administrative and practical problems, such as translation, allowing a more efficient system to **evolve more rapidly**.

Botswana Court of Appeal judgment in the *Dow* case. The similarity of constitutional provisions in Botswana and Zimbabwe prompted the Zimbabwean Supreme Court to approve and apply a decision of the Botswana High Court of Appeal in *In re Munhemeso*. Gubbay CJ remarked as follows: "In *Dow v Attorney-General* [1992] LRC (Const) 623 (CA, Botswana) Amissah JP considered the identically worded s 3 of the Constitution of Botswana. He viewed it, most aptly, as 'the key or umbrella provision' in the Declaration of Rights under which all rights and freedoms must be subsumed; and went on to point out that it encapsulates the sum total of the individual's rights and freedoms in general terms, which may be expanded upon in the expository, elaborating and limiting sections ensuing in the Declaration of Rights. This analysis of the scope and impact of s 3 is particularly apposite to that of s 11 in the Constitution of Zimbabwe, and I respectfully associate myself with it". Conceding that there may be numerous reasons why no reference was made to the earlier in the later case (difficulties related to access, non-publication of law reports, the short time span between the two judgments, for example), it exemplifies an unexplored opportunity to seek common answers to common problems.

376 See eg Langa J's invocation of the Tanzanian Court of Appeal's judgment in *DPP v Pete* [1991] LRC (Const) 553 (Tanz CA) in *S v Makwanyane* 1995 3 SA 391 (CC) at par 224: "the rights and duties of the individual are limited by the rights and duties of society".

- The **expenses** involved will be less than for creating an African Court, as the number of judges could be reduced and the cost of travelling and communications (for example) would be less.

- Given the more limited scale, it is more likely that a **majority** (or all) of the states would participate in the activities of the institution, or accept its jurisdiction if acceptance is made optional. An inevitable compromise in establishing an institution with continent-wide jurisdiction, is that only a small number of states will (at least, initially) accept the Court's jurisdiction.

8.2.6.2 Evaluation

Sub-regional courts on human rights make sense as a **temporary arrangement**. If a human rights court were to evolve under the SADC or any other sub-regional umbrella, it should later dissolve into the African Court on Human Rights. In other words, the development of regional human rights courts need not be regarded as undermining the establishment of a pan-African Court, but rather as supporting it. If a regional jurisprudence is already in place in Southern (or other regions in) Africa, it need not be cultivated into an independent and self-sufficient system as such. Rather, it should form one of the building blocks of a truly African human rights system.

A few problems with this alternative, even as a temporary measure, should be raised:

- The creation of sub-regional courts *now* is likely to be viewed as **obstacles to the establishment** of an African Court. Sub-regional courts with a specific human rights mandate are likely to develop "a life of their own". If the African Court on Human Rights eventually starts functioning, these institutions may have become well established, and may resist their own disintegration.

- The argument above is based largely on patterns **within one region** only. Similar judicial coherence does not necessarily exist under the other sub-regional arrangements. Many of the centrifugal forces present at the continental scale also affect the different regions. The member states of ECOWAS, for example, are not homogeneous as far as languages or legal systems are concerned. There is no guarantee that these institutions will take steps to erect new structures. If some sub-regional systems evolve very differently from others, a fragmented

position will come about, which may complicate future efforts towards reaching integration and creating common standards.

Given these problematic aspects and the need for effective judicial decisions to underscore the seriousness of states about the human rights in sub-regional context, institutions already created by the different sub-regional organisations should rather be granted jurisdiction on the African Charter *as part of their jurisdiction*. This approach does not allow for the creation of new institutions, which will (hopefully) have to be abolished within a few years and may resist relinquishing their new-found jurisdiction. This will serve the dual purpose of effective implementation in the interim, while supporting the eventual establishment of an African Court.

8.2.7 Multiple, sub-regional human rights commissions

8.2.7.1 Argument

As in the case of the argument for regional human rights courts, the alternative of establishing sub-regional commissions for human rights tries to side-step the problem of the Commission's inefficiency, and seeks to build a model on the ties which already bind countries within sub-regional units on the African continent. The Commission itself has hinted at the usefulness of supplementing its work by the creation of regionalised commissions. At its 4th session it adopted a resolution calling on states parties not only to establish committees on human and peoples' rights in their own countries, but also at the regional and sub-regional levels. This would be done to "ensure an effective respect for and as wide a promotion as possible of Human Rights".[377]

Heyns[378] elaborated upon the merits of a regionalised human rights commission or regional chambers of the African Commission. He forwarded three main advantages of such commissions above the African Commission:

---

377 Annex VIII to the Second Annual Activity Report.

378 (1994) at 8.

- One of the priorities in Africa is to respond to **emergency situations**. A centralised commission is, by its very nature, slow to be activated. Irregular, burdensome and non-existent travel routes between many African states increase this lack of mobility. On the other hand, physical proximity and an awareness of current regional concerns will enhance the immediacy of a response.

- The diversity of African legal systems and legal languages has been highlighted.[379] Commissioners representing a **more or less homogenous region** stand a better chance of acting effectively on short notice. Language and lack of insights or knowledge of a system may easily become barriers that will inhibit swift responses.

- **Effective enforcement** of obligations under the Charter ultimately depends on the economic, cultural and diplomatic pressures brought to bear on a recalcitrant government. The "stronger these ties ... the higher the chances of successful enforcement of Commission ... decisions".[380] Few meaningful pan-African ties exist in these fields. At least the likelihood of greater success exists at the regional level, where such ties have already developed.

Heyns stressed the supplementary nature of these commissions, stating that regionalised commissions should be placed "under the umbrella" of a single African Court of Human Rights. In his view this will "symbolise and emphasise the essential unity of Africa as a continent".[381] The appropriate mechanism might either be "sub-regional human rights commissions for North, East, Central, West and Southern Africa"[382] or "sub-regional chambers of the present Commission".[383]

8.2.7.2 Evaluation

The argument advanced postulates two advantages to be derived from regionalising the African Commission. On the one hand, region-specific bodies will be able to **function more efficiently**

---

379 See par 8.1.4 above.

380 Heyns (1994) at 8.

381 Heyns (1994) at 9.

382 Heyns (1994) at 8.

383 Heyns (1994) at 9.

(especially by swift and incisive fact-finding, especially in situations of serious or massive violations). On the other hand, the implementation of non-binding recommendations (in the form of reports) will be more **effectively implemented**. While the first leg, in my view, begs little argument, the second is more problematic. It is accepted that strong regional pressure is based on strong regional ties. But the fact that the Commission is divided into regional chambers *of the African Commission* will not necessarily mean that the sub-regional body's recommendation will have more force. The political body to which the regional sub-commission reports, remains the OAU, and not a regional economic or political organisation. Economic, social, cultural, diplomatic and political ties are not cohesive on the inter-continental scale. Even if a decision is taken by the OAU to implement measures (economic sanctions, for example), those states linked most closely to the target state would in any event be those most likely to be most instrumental in their implementation. The fact that regional chambers exist will make little difference to the ultimate political means of persuasion. Their main contribution will be that a reliable and timely assessment of the crisis or violation will be provided.

The creation, as such, of different commissions within the five regions suggested will also not necessarily strengthen implementation. An alternative route would be to **link such regional commissions directly to the regional bodies** already in existence. These inter-governmental institutions will serve as fora in which the reports by or recommendations of the commissions may be discussed, providing a platform for effective implementation. SADC, ECOWAS and COMESA, for example, should each be encouraged and lobbied to either accede to the African Charter or to adopt a regional human rights instrument. Implementation of these standards could then be secured through regional human rights commissions. In this way the functional and "enforcement" advantages will be realised. Each sub-regional commission becomes **part of the institutional framework** of the regional organisation under whose authority it functions. It will be easier to undertake fact-finding missions within the region. Reports about non-compliance will be considered by the parent body. Within this context, implementation of recommendations will be improved.

If the African Charter is a common denominator, all these bodies could eventually be linked together through their capacity to refer cases to the African Court of Human Rights. As the various regional organisations move towards closer regional integration in the form of a single

African Economic Community, the functioning of these commissions may also be co-ordinated gradually. The different commissions may be amalgamated into a single institution, once greater regional integration has been attained.

A problem which may at that stage arise is whether possible regional human rights instruments would then have to fall away, making place for the African Charter, or whether they may be retained. Although it may be argued that the African Court on Human Rights is likely to have jurisdiction over the application of all African human rights instruments, including regional human rights documents, it is undesirable that the Court should develop different (and differing) jurisprudences. This makes it more desirable that regions accede to the Charter *now*, and start developing precedents around it, rather than sowing the seeds of confusion and difference by creating their own human rights instruments as interim measures.

The creation of sub-regional quasi-judicial bodies for the promotion and protection of human rights is an attractive option as an interim measure. Even if these bodies exist under the "umbrella" of the different regional organisations, they must still be linked by common adherence to the African Charter and through their co-operation with the African Commission. Their role is supplementary and temporary, and the idea is that they will fall away when greater unity and closer links on a continental scale have been attained.

8.2.8 Reducing the Commission's mandate to provide exclusively for promotion

8.2.8.1 Argument

The possibility of converting the Commission into an institution solely responsible for promotion, should be regarded as supplementing arguments for the creation of a single body to ensure better protection under the Charter. Logic dictates that people should be aware of their rights in order to be able to invoke and enforce them. In Africa, this means that the Commission had to concentrate

on the dissemination of information about human rights in its founding years.[384] Although the Commission was also entrusted with protective functions, its promotional function was emphasised. Such a commission could reconsider the system of state reporting, and could adopt innovative ways of investigation. It could also serve to co-ordinate the efforts of NGOs.

8.2.8.2 Evaluation

The Commission has accomplished much in relation to its promotional function.[385] However, the human rights permeation of the African continent is still a long way off. Concerted efforts should be made to have an effect on the reality of ignorance and unconcern. The possibility of entrusting the Commission with a sole promotional function may rather be effectively integrated with an argument for the establishment of regionalised commissions. The greater uniformity of language and culture in a sub-region will streamline campaigns to educate and inform. It should also be made a priority that the Commission become connected to the Internet and create its own web site. This will position the Commission for the dissemination of information in an age increasingly centred around digital information.

8.2.9 Improving and strengthening the Commission as first priority

8.2.9.1 Argument

Most participants to the debate accept the desirability of improving and strengthening the Commission. This supports the near unanimity about the co-existence of the Commission and a proposed Court, and about the failings of the Commission. Many of the problems of the Commission relate to a lack of resources. For instance, the Commission requires many more legally qualified personnel, staff and funding for the Information and Documentation Centre,

---

384 See, in general on human rights education in Africa, Seck (1990) 11 *HRLJ* 283.

385 But see also the criticism expressed in ch 3.3.5 above.

equipment such as computers, fax machines and funding to undertake promotional functions and missions to states parties. While these concerns are generally shared, some commentators insist that the improvement of the Commission is the **primary and overriding priority**. Odinkula seems to warn against creating new institutions before finding out why "the existing and past institutions have failed".[386]

8.2.9.2 Evaluation

Arguments for the strengthening of the Commission must certainly be taken very seriously. After a slow and rather inauspicious start, the Commission has settled itself as an important human rights instrument in Africa.[387] Further advances have mainly been inhibited by institutional and financial problems.

The establishment of the Court will not make the Commission redundant. In fact, it will require a functional and effective Commission to set most of its processes in motion. It is important that the system as a whole should be reformed.[388] The establishment of the Court provides the opportunity of reviewing the Commission's mandate.[389] Rather than leading to neglect, this process could streamline the Commission and bring its needs into the spotlight.

---

386 (1994) 2 *African Topics* 11.

387 See ch 3.3.1 above.

388 See eg OAU Assembly resolution AHG/Res 230 (XXX) which requested the OAU Secretary-General to convene a meeting of experts not only to "ponder" the establishment of an African Court of Human Rights, but also "means to enhance the efficiency of the Commission".

389 The OAU Assembly decision to have the idea of a Court on Human Rights investigated went hand in hand with an investigation to improve the Commission (see the discussion at the government experts meeting at Cape Town, where the delegates proposed improvements to the present functioning of the Commission (at paras 13 and 14 of the report, OAU/LEG/EXP/AFC/HPR/ RPT/(I) Rev.I)

8.2.10 Postponing the establishment of a Court

8.2.10.1 Argument

This argument is closely linked to the argument that priority should be given to strengthening the African Commission. Writing about the Commission, Ankumah underlines its potential. She distinguishes two groups with regard to the establishment of an African Court on Human Rights: those who want it established **immediately**, and those opting for a more **gradual approach**. Although she does not want to be seen "as opposing the establishment of a court",[390] she seems to favour the more gradual phasing in of a Court. She is of the opinion that a court would suffer from the same institutional draw-backs, such as a lack of funding, as the Commission. After a tentative start, the Commission has been improving its work and image.[391] The increase in focus is attributable to the participation of and the attention by African states, African NGOs and INGOs.[392] Her fear is that the establishment of a court would **deflect this attention** to the new institution, to the detriment of the Commission.[393] A similar sentiment was expressed by commissioner Ndiyae when the Commission publicly discussed the establishment of a court at its 15th session.[394] He proposed that an open-ended working group be formed. This group should consider all the issues and come up with a proposal in ten to twenty years time. There is no need to rush or hurry, he remarked, as the current system still has to grow to maturity.

8.2.10.2 Evaluation

Delaying the adoption of the Protocol establishing an African Human Rights Court will not solve the ills of the Commission. As has been stressed time and again, the two institutions will co-exist. Resources cannot be used for the Court, to the exclusion of the Commission, as the Court depends

---

390 (1996) at 197.

391 See ch 3.3.1 above.

392 Ankumah (1996) at 197.

393 *Ibid.*

on the Commission for its functioning. In the interest of the system, both institutions have to be developed simultaneously.

If the argument boils down to the sentiment that "Africa is not ready yet" for a Court, possible answers are as follows:

- Ratification of the Protocol is **optional**. Only states that consider themselves "ready" will voluntarily accept the jurisdiction of the Court. States that feel constrained not to ratify (for the time being), will be free to do so (and will do so anyway, without any encouragement).

- Even if the Protocol is adopted at the next OAU Assembly meeting (probably in July 1998), the first judgment of the Court will still be a distinct future event. It may **require years before the Protocol enters into force**. Thereafter, the putting into place of the Court will require quite some time. Those fearing that the Court will appear all of a sudden, may be reassured. Although the train of events leading to its establishment may be set into motion soon, delay will be an **inevitable** characteristic of its establishment. This will give African states time to "mature" into stable democracies and the Commission to consolidate its role.

An ideal environment will probably not exist in Africa for a very considerable period of time. The "window of opportunity" created by the wave of democratisation in Africa presents as good a context to establish the Court as can be expected.[395] If the arrival of more ideal circumstances are awaited, **postponement could all too easily become abandonment**.

---

394 Unofficial transcript of debates during the 15th session.

395 See ch 6.1.4 above.