Chapter 9 CONCLUSION AND RECOMMENDATIONS

In the mind of most people the word "conclusion" probably evokes images of closure and finality. Images of completion are here reinforced by the fact that this is the ninth chapter, further suggesting fulfilment after a period of gestation. But as a title to the last chapter of this study, the term "conclusion" pretends too much. Although this chapter aims at drawing together some lines from various parts of the study and proposes a recommended model for improvement, it does not provide any final answers or last words. On the contrary, the subject matter of this study awaits future correction, amendment and, possibly, completion. If the figure nine has any significance, it denotes a new beginning, a process of birth and growth.

9.1 International human rights law as back-up

Although this study concerns itself with the realisation of human rights by means of institutions between governments, it has been emphasised that sight should not be lost of the fact that these human rights must ultimately be guaranteed by specific governments within particular states. To answer questions about the realisation of human rights, by whatever means, one has to look at the domestic law of and position within particular states. Only there is the impact of international law made visible. In fact, if rights were fully realised within every single state, international human rights law would have been redundant. International human rights law should therefore be understood as a back-up system based on the premise that states violate the human rights of their nationals.

This study has only to a limited extent attempted to analyse domestic African legal systems in the light of the impact of the UN, OAU and sub-regional bodies. Future research focusing on the impact of international human rights norms in the legal system of particular African countries should be undertaken. A databank about the domestic impact of international human rights law should be compiled and kept up to date. Such a databank may include information about the incorporation of international norms into local legislation, interpretative use of these norms by courts, as well as follow-up to resolutions, comments and decisions by international supervisory bodies. Although it should focus on African human rights instruments, the potential contribution of global instruments must also be kept in mind.

9.2 Human rights law as a limited tool of evolutionary revolution

The study has shown that the inclusion of formal human rights guarantees in Constitutions, the ratification of international legal instruments and the creation of judicial structures will not solve Africa's problems or bring human rights violations to an end. Law has a limited role in addressing underlying problems such as prejudice, ignorance, illiteracy, disease, poverty and irresponsible leadership. But law can be used as a tool of social engineering. The use of the law as an instrument in political landscaping in South Africa is a recent African example. The explosion in international human rights law after the Second World War has also revolutionised international

law and the way the international community perceives itself. Through a process stretching over fifty years, since the adoption of the Universal Declaration, the idea of international supervision has become firmly entrenched in international law.

As African states became integrated into the international community, they have also accepted this form of inspection. The precise impact of international human rights is mostly difficult and sometimes impossible to gauge. But all states are on a road of no return: They accept that the human rights realisation of individuals is a collective concern of humankind. This has forced most governments to accept, at the very least, the wisdom of employing the rhetoric of human rights in international affairs. To a smaller or larger degree all states belong to the "party of humanity", bound together by those quintessential values common to all humanity. The international project to realise the human rights of all is one part of the quest by the party of humanity to attain self-fulfilment.

9.3 Global, regional and sub-regional standard setting: From a quantitative to a qualitative approach

The starting point for the project to realise human rights universally has been the search for agreement on what the international community would be prepared to accept as core values and norms. Since the adoption of the Universal Declaration of Human Rights in 1948, there has been a proliferation of human rights instruments at the global level. This standard setting has mainly taken place under the auspices of the UN and its specialised agencies. As these documents are generally adopted by consensus, they represent what is acceptable to most states. A number of these documents, for example the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child, today enjoy almost universal ratification.

Many Africans and African states have at first been negative towards international law, following the collaboration of international law in their subjugation to slavery and colonialism. However, most African states joined the United Nations soon after independence. As their numbers increased, these states increasingly contested the space previously monopolised by their colonisers.

They succeeded in changing the agenda and tone of debate, particularly within the UN General Assembly. International law became a tool in the hands of the newly independent African states at the UN. In these and other international fora African states have highlighted concerns such as self-determination, decolonisation, apartheid and underdevelopment. This culminated in the adoption of declarations and treaties that addressed these issues.

Most African states became parties to most of these human rights treaties. In fact, the percentage of African states that have ratified the major human rights instruments is higher than the global percentage, except in respect of the Convention Against Torture. One reason for the high rate of ratification is the weak implementation mechanisms provided for in these instruments. Another is the possibility of entering reservations upon ratification, an option exercised by a number of African states in respect of each of these treaties.

Regional human rights law making largely followed the example provided by the UN. It started in Europe, and was succeeded by similar developments in the Americas, and later in Africa. Standard setting at the regional level usually has the advantage that more cohesion exists between states at that level, giving regional instruments a more specific content or "regional flavour". A tendency has developed for African countries to convert global instruments into African equivalents. This started in 1969, when the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa was adopted to complement the UN Convention Relating to the Status of Refugees of 1951. The regional instrument was explicitly adopted as a "supplement" to the global counterpart. The OAU instrument adapted the definition of the term "refugee" to suit African realities and further contextualised the UN Convention in an African setting.

African conceptions of a collective community in which people not only have rights as individuals but also as members of groups with duties to one another were included in the African Charter on Human and Peoples' Rights of 1981. The Charter is the African embodiment of two international conventions, the CCPR and CESCR. This pattern of "regional conversion" of norms globally elaborated accelerated in the 1990s. The African Charter on the Rights and Welfare of the Child was adopted in 1990, following closely in the footsteps of its global forerunner, the Convention on the Rights of the Child, of 1989. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (adopted under UN supervision in 1990) was

also transposed to an African setting in 1991, when the OAU member states agreed on the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa. A process for the adoption of a women's charter or protocol to the African Charter on women's rights, which could lead to a regional manifestation of CEDAW, is under way.

African states have subscribed in equally great numbers to some, but not all of these regional instruments. Ten years after its adoption, the African Charter enjoys near-continental support, with only Ethiopian and Eritrean ratifications outstanding. In respect of the conventions on refugees and children, the number of ratification of the global instruments exceed the number for the regional equivalents. In fact, the African Charter on the Rights and Welfare of the Child still awaits nine ratifications before it will enter into force. It has been ratified by only six OAU member states. This stands in clear contrast to the fact that only one African state, Somalia, has not ratified the UN Convention on the Rights of the Child.

The four most prominent sub-regional organisations in Africa are of a relatively recent origin. The first of those discussed in this study, ECOWAS, was founded in 1975. In the context of its foundation, this organisation did not include human rights concerns as part of its declaration of principles. When the ECOWAS Treaty was amended in 1993, human rights became a declared principle of the organisation. The same is the case for two other regional bodies created in 1993, SADC and COMESA. This illustrates the extent to which human rights have gained importance and momentum in the years between the 1970s and the 1990s. Today, these sub-regional institutions have already committed themselves in principle to the furtherance of the rights set out in the Charter. Developments in Southern Africa give cause for hope that human rights issues may receive a more prominent place on sub-regional agendas.

Although the elaboration of standards is a necessary first step, the emphasis should in future fall on quality rather than quantity. More does not necessarily mean better. Energy and resources should be devoted to making the standards that are already in place more effective, rather than to elaborate more standards. A proliferation may easily lead to duplication, causing waste of efforts, energy and resources. The rhetoric or rights which goes hand in hand with a quantitative approach should

be replaced by a qualitative approach which focuses more on what ratification means domestically to the national population.

The proposal for a women's charter or protocol to the African Charter is a case in point. It has been argued that the rights of women may be realised by invocation and implementation of the African Charter. To date no complaint on the basis of a violation of women's rights has been decided by the Commission. Priority should now be given to explore the potential of this existing avenue. Another charter or protocol to the Charter may later supplement it. The process of elaboration of the African Charter on the Rights and Welfare of the Child in recent years has shown that merely elaborating yet another regional human rights document may make very little difference.

The fleeting incorporation of human rights in the treaties establishing sub-regional economic structures has been noted elsewhere in this study. If these regionalised arrangements are to serve as the points of departure of eventual unity in Africa, it is important that they become premised on adherence to human rights. These organisations are preoccupied with economic matters. Only a concerted effort to raise human rights awareness within these institutions will affect their priorities. Not only NGOs, but also the African Commission itself should lobby these institutions to secure the inclusion of human rights in the legal basis of these arrangements.

While human rights norms have been over elaborated at the global and regional levels, these standards still have to manifest themselves in the sub-regional settings. A principled commitment should be spelt out in these treaties, including a clear human rights basis and the competence of individuals to bring complaints, without which any human rights system remains staid and powerless. It is possible that different sub-regional bodies may adopt their own human rights charters. But in my view it would be preferable if they all accede to the African Charter. This will avoid duplications and a confusing and centrifugal multiplication of human rights regimes across the continent. The Charter is the "only show in town", and should be strengthened by greater reliance. Creating the possibility of accession to the African Charter by regional bodies will necessitate amendments to the Charter. This may be used as an opportunity to regionalise the supervisory mechanisms as well, by creating sub-regional structures of the Commission.

9.4 From human rights rhetoric to remedies: Making human rights rights matter

The focus in the 1990s increasingly fell on the implementation of human rights norms. There is general agreement that the treaties have reached a level of saturation. What matters now is making these treaties matter.

9.4.1 Promotion

The weakest form of implementation is promotional in nature, and may extend to technical assistance, informal programmes, assistance with training and advice about law reform.

In Africa, with its low levels of literacy, rudimentary structures, deficient training, limited resources and educational backlogs, this function takes on great importance. Under the UN numerous programmes have been launched globally, but also particularly in Africa. Activities of the ILO provide good examples of meaningful incorporation of international standards through technical assistance and informal pressure on governments.

Unfortunately, mainly due to lack in resources, the OAU has not been playing any significant role in this respect. The Charter actually reiterates the importance of the Commission's promotional function. Indeed, in the first years of the Commission's activities this role seemed like a shield behind which the Commission tried to hide its general inaction. By its very nature promotion is something very difficult to monitor. Today it has become quite clear that the Commission has had very limited success in raising continental human rights consciousness about human rights and the African Charter.

The Commission should not purport to take the task of promotion on its shoulders alone, but should be co-ordinating efforts by NGOs in states parties. In this way, NGOs would increasingly become partners. Commissioners may be used as experts in missions of technical assistance, as well as in training civil servants, lawyers and judges. In other words, its promotional mandate should more and more be geared towards realisation as well: not only *ad hoc* appearances, and

speeches to select audiences, but also high profile liaison with media, and technical assistance. These functions may especially follow after a state visit or thematic rapporteur identified certain areas of concern. Such an approach will underscore the constructive nature of the Commission's involvement in the domestic affairs of states.

Serious attempts should also be made to have the Charter and information on the Charter translated into African languages. The Commission should adopt the tenets of the plain legal language movement, providing reader-friendly versions of documents and information. Again, the co-operation of NGOs will be indispensable in this regard.

A public relations and media liaison officer for the Commission should be appointed. This person must be responsible for improving the profile of the Commission. Thus far, activities of the Commission have not been given much exposure in Africa or abroad. This should be corrected, as the mobilisation of shame depends on exposure by the media. Human rights issues have to be highlighted in the collective consciousness of Africans, but also of the international community.

9.4.2 State reporting

Most international human rights regimes accept state reporting as a system which provides states with an opportunity of going through a process of introspection, and then holding up their efforts to international inspection. All six major UN human rights treaties incorporate country reporting as part of their supervision. In three of them, this is the only form of supervision. Following these models, the African Charter also provides for periodic state reporting.

At both the global and regional levels this has largely been a failure as far as African states are concerned. The most crucial problem is that states simply ignore their obligations to report. The response of the UN treaty monitoring bodies and the Commission has been disappointing. While there are a few exception, illustrating how state reporting may be used effectively, the majority of states have not taken this obligation seriously. If the most visible obligation is neglected with such disdain, one can only imagine what states do about their obligations that lie less in the eye. As long as the major problem of lack of follow-up is not resolved, these problems will persist. Problems of

inadequate reporting and follow-up are of a general nature, but are exacerbated in the African context.

Periodic state reporting under the African Charter should be abolished. Reports by only 17 of the 51 states parties have been examined in the first ten years of the Charter's existence. This means that only slightly less than one third of the states parties have complied with this basic obligation. At present, every state party (except the two that ratified the Charter since 1995) has at least two reports overdue, with the majority having five reports overdue. This shows just how dismally this system has failed. The small light of hope provided by the recent reports of Mauritius and Zimbabwe should not deflect attention away from these undeniable facts. The inspection has been rather ineffective, especially due to a lack of follow-up.

Almost all African states have obligations to report to international treaty bodies in terms of CCPR, CESCR, CEDAW and CRC, in any event. Preparing these reports will still give states an opportunity for introspection and for inspection by the international community. This will also mean that unnecessary duplication will be undone,[1] something more pronounced as a problem in Africa, due to the lack of resources and infrastructure as well as competing priorities. Rather than requiring periodic reports on a regular basis, the Commission should function on a basis of special thematic and special country rapporteurs. These rapporteurs should undertake on-site visits with the consent of states. If consent cannot be ensured, reports should be compiled from evidence heard outside the country.

9.4.3 Inter-state complaints

Like the UN and other regional human rights treaties, the African Charter also provides for inter-state complaints. With the exception of the European system, this mechanism has played no role in the realisation of human rights. To date, no state party to the African Charter has lodged a formal inter-state complaint under the Charter. Inter-state complaints should be retained, as it may still be

[1] Many of the guidelines for country reporting under the African Charter at present require states to report on aspects set out in CESCR, CEDAW and CERD.

of significance as a political tool under the right circumstances. This procedure is unlikely ever to be crucial to the general quest to realise individual rights.

9.4.4 Individual complaints

The European was the first international system to provide for individual petitions. Today this is regarded as the model of effective implementation, and is included in many subsequent treaties such as CERD, the CCPR and CAT, and is envisaged for CESCR. In all three these UN treaties the states parties may choose to accept the right of individual petition or not. While a larger percentage of states in Africa than states in other regions of the world has generally ratified UN treaties, a smaller percentage of African states has accepted the right of individual petition. This places an insurmountable hurdle in the way of prospective petitioners. In such cases, the ineffective state reporting procedure remains the only process through which state compliance is monitored. One explanation for the discrepancy between formal adherence and meaningful implementation may be found in the drafting phase of these treaties. Exclusion from meaningful participation in the process of deliberation preceding adoption of a treaty may leave many African states alienated. African states often do not have the resources to ensure their participation in the deliberating phase. This eventually confronts excluded states with a given, rather than incorporating their views and concerns in a process of rethinking and reworking concepts to make international human rights law truly universal. Future processes of elaboration and drafting human rights instruments must be inclusive of African contributions.

The African Commission may receive individual complaints against any state party. One of the problems during the first few years of the Commission's activities has been the confidential nature of its protective activities. The only record about communications was a list of numbers issued after the Commission's private sessions. This list was later included in the Annual Activity Report authorised by the Assembly. Criticism was increasingly expressed that the Commission was in fact doing nothing about the communications they had received, or about anything concerning human rights on the continent, for that matter. The cloak of secrecy was lifted in 1994, when the Seventh Annual Activity Report contained more details about the communications decided by the Commission. From this information it transpired that the Commission had not decided a single case finally on the merits during the preceding seven years. In a sense the worst fears of the critics

have been shown to be founded. Viewed from the perspective of the early Commission, the veil of secrecy was a blessing in disguise, as it kept at least the more naïve observers optimistic about the Commission. This illustrates the way in which the Commission perceived its role in the early years: It moved cautiously, was not risking to upset the apple cart, and emphasised consensus-seeking and compromise. It should be added that a few cases had been resolved amicably, resulting in persons being freed or in a redress of the violation.

Since these hesitant beginnings, the number of cases finalised by the Commission steadily increased. By the end of its 21st session (in April 1997) the Commission had made final rulings in 74 cases. Thirteen of the finalised cases were declared admissible. In all these cases the Commission found violations of provisions of the Charter. However, communications were directed at only 22 of the states parties, excluding states such as the CAR, Congo, Libya, Mauritania and Somalia. This number accounts for less than half the states parties to the Charter and stands as testimony to the fact that the Charter has not permeated the fabric of African society.

A recurring item on the Commission's agenda had been the development of an early warning system or "immediate response" unit or procedure to react with urgency to cases of gross or massive violations of human rights. At present, the Commission is mandated to "draw the attention of the Assembly" to such cases.[2] The Assembly "may then request the Commission to undertake an in-depth study of these cases and make a factual report".[3] It is not entirely clear whether the procedure has been followed so far. The Commission made findings of massive or gross human rights violations in four cases, in respect of Chad, Malawi, Rwanda and Zaïre. It is not clear if the Assembly's attention was only drawn to the existence of these violations when it had to authorise the Annual Activity Report, in which these decisions are contained. What is sure, is that the Assembly has not taken any action or recommended any in-depth studies in any of these instances.

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2 Art 58(1) of the Charter.

3 Art 58(2) of the Charter.

9.4.5 Investigation

The form of supervision which impacts most directly on a government, is an on-site visit by the supervisory body. This may take the form of a special country rapporteur or a thematic rapporteur. This process is the inverse of the state reporting system, where the state sends a representative to some remote corner of the world, far removed from the possibility of embarrassment locally. A state's consent is usually required for such a visit. In the absence of consent, a country report may be compiled on the basis of evidence heard of witnesses who leave their country to testify in another, or by international observers. Most states have accepted the political prudence of not refusing visits. Under the UN framework, these studies and reports are initiated under the umbrella of the Human Rights Commission, its sub-committee and working groups

One of the most promising developments of the African Commission has been the appointment of Special Rapporteurs and country visits. A Special Rapporteur on extra-judicial killings and one on prisons and conditions of detention in Africa have been established.

Personal and practical problems have unfortunately hampered the setting up of especially the rapporteur on extra-judicial killings. Although the rapporteur's mandate is broad, the most immediate situation to be tackled by the rapporteur was the situation in Rwanda and its aftermath. This could have been a first and long-awaited contribution from the OAU framework, and especially the Commission, redeeming the OAU and its institutions that remained passive in the face of those massive killings. Commissioner Dankwa was appointed as Special Rapporteur on prisons and conditions of detention in Africa. He has already undertaken a visit to a state party, Zimbabwe, and submitted a report to the Commission. This report was also included in the Commission's Tenth Annual Activity Report.

Country visits by the Commission have had mixed success. Visits have been undertaken to Togo, Senegal, Mauritania, Sudan and Nigeria. The Commission refers to these visits as "missions of good offices" and "fact-finding and investigation missions". A decision is made to visit a country if a number of complaints have been received against that government and the Commission is of the opinion that it needs clarification in its efforts to resolve the dispute amicably. The one big

drawback of this *modus operandi* is that there is big delay between the lodging of the communication and the eventual visit. The consent of states is required. In a previous instance concerning the government of Zaïre (as it was called then) this consent could not be obtained and the visit never took place. Also, these communications have, at least so far, not resulted in findings by the Commission. All that happens is that a report is compiled and attached to the Annual Activity Report presented to the Assembly. It is not discussed; and no action is taken. It is merely taken note of by reason of its inclusion in the Activity Report.

9.5 The African Commission: Hope for the ten-year-old?

As I write this last chapter, preparations start in Banjul for the Commission's tenth birthday party in November 1997. Some questions arise. For example: Should Africans take to the streets in celebration of this event? Or should we wait in apprehension at the sick bed of this ten-year –old whose condition fluctuates between illness and recovery? Is there hope for the weak ten-year-old?

To answer the question, one should be reminded of the fact that the African human rights system is still in its infancy. Comparison with comparable human rights institutions at the same stage of development reveals that the African system has in fact shown remarkable progress. Today it is generally accepted that the European system provides the best example of effective supra-national human rights realisation. But few would have predicted that after the Convention had been in force for ten years. The Convention turned out to be a "sleeping beauty", who awoke after a lengthy repose to become a model to be admired and followed. Her sleeping years reflect the degree of resistance to the creation of powerful institutions initially in a free and democratic Europe, even after these states have experienced the traumas of the Second World War. In other words, opposition to the establishment of an effective human rights system is by no means unique to Africa. Viewed comparatively, the infant African Commission has grown into maturity not out of keeping with its years. A proposal gaining ground today is the extension of the family, to provide the youngster with a sister who will grow to be (even) stronger than him.

Sexist metaphors aside, the proposal is that a Court of Human and Peoples' Rights should be established to supplement the Commission.

9.6 Towards judicialising human rights protection in Africa

Even before the OAU was established, calls for the creation of an African Court on Human and Peoples' Rights have been forthcoming. However, the creation of human rights institutions did not feature on the OAU's agenda during the 1960s and 1970s. In 1981, when the African Charter was adopted, the idea of a court received scant attention. As waves of democratisation swept across Africa in the 1990s, arguments favouring a continental human rights court surfaced again in discussions about the improvement of the African human rights system. Where inter-governmental involvement (especially by the UN) prompted the OAU to adopt the African Charter, non-governmental organisations have been more pivotal in promoting the idea of a court. Particularly the International Commission of Jurists played an important role. It did not only highlight the issue of the Court, but also mobilised African NGOs by providing them with a forum at workshops prior to the Commission's sessions.

Pressure by NGOs and more favourable circumstances occasioned by democratic elections all over Africa caused the OAU Assembly to make the establishment of a court one of its institutional concerns in 1994. A series of meetings of government experts and the Council of Ministers was subsequently held, resulting in the present draft Protocol, the "Nouakchott Protocol".

The three main problems that have been experienced in relation to the protective mandate of the Commission are as follows:

- Its findings are recommendatory in nature and do not bind governments.
- It is unable to order effective remedies and to follow up findings.
- Its activities lack publicity and visibility due to the fact that communications are considered during private sessions.

These problems will to a large extent be solved if a court is created. By their very nature, judicial pronouncements carry more weight and are binding on governments. Courts may order remedies. Court proceedings are further also open to the public.

General agreement exists that an African Court on Human and Peoples' Rights will be established through an optional protocol amending the African Charter. States parties to the Charter that choose to accept the jurisdiction of the Court will do so by ratifying the Protocol. The Charter framework will be left intact, both in terms of its substance and its supervisory body. The new institution will be superimposed on the existing structure in respect of those states ratifying the Protocol. The Court will have a contentious and advisory jurisdiction. In principle, only the Commission and states parties may refer cases to the Court, although individuals may approach the Court directly in cases of urgency or massive or serious human rights violations.

Disagreement still exists about a number of issues, including the following:

- Some states want a large number of states, in some instances up to two-thirds of the OAU membership, to ratify the Protocol before it can enter into force. Other states and most NGOs favour a requirement of 9 or 11 ratifying states. Fifteen, the number set in the latest draft, represents a compromise between these two extremes.

- Some states and NGOs want individuals to have direct access to the Court under all circumstances. Other states want only the Commission and states parties to be able to approach the Court. Again, the position in the latest draft Protocol is a compromise in terms of which direct access is allowed under specified exceptional circumstances. However, the right to approach the Court directly is only possible for individuals complaining against states that have made a specific declaration to allow for that possibility.

- According to the latest draft, the OAU Assembly elects judges. Some states and NGOs prefer only states that have ratified the Protocol to elect the judges.

The principle that the Protocol should be based on consensus has already detracted significantly from earlier drafts. This is illustrated clearly with reference to the required number of ratifications. Although by far the majority of states present in Cape Town and Nouakchott preferred eleven as the required number, the opposition of a handful of states caused the number to be increased to 15. The same happened in respect of direct access by individuals.

Other factors that have impeded progress are:

- A lack of consistency in state representation, leading to confusion and re-opening of debates.
- A lack of involvement by some states. This may partially be due to a lack of resources. For example, states from Southern Africa attended the Cape Town discussions in large numbers, but were largely absent in Nouakchott.

At this stage of elaborating a draft Protocol, the principle of agreement by consensus should not be applied. A court with the best chances of providing for effective human rights protection, and of making a difference in Africa, must be set in place. It is not essential or even desirable that all African states should immediately accept its jurisdiction. The **integrity** of the new system should not be sacrificed in pursuit of the ideal of **universality**.

States that are opposed to accepting the jurisdiction of an effective Court should not be given an opportunity to erode the foundations on which the new structure is to be built. The obvious option for such states is not to ratify. Bending backwards to accommodate everyone may result in a weak and impassive Court, whose jurisdiction is in any case not accepted by all. The major detractors may be the very states that will not accept the jurisdiction of the Court, even in a weakened form. The process should not be dictated by those states that manipulate the principle of consensus seeking to weaken the end-result, and are the ones least likely to ratify. It should be kept in mind that all OAU member states form part of these deliberations. This effectively means that a non-state party to the Charter (such as Ethiopia) may be erecting obstacles in the way of states that have for many years been parties to the Charter and now want to improve the effectiveness of the system.

Participation of states is important, as in the case with standard setting at the global level. The mere fact that a state is part of the continent does not mean that it will feel included in the process. States, the OAU, and international donors must facilitate this as a very high priority.

9.7 Recommended model

A three-tiered model for improved implementation of human rights at the supra-national sphere in Africa is proposed. For the interim, the system should consist of the African Court on Human and Peoples' Rights, the African Commission on Human and Peoples' Rights, and sub-regional human rights commissions functioning under the auspices of various sub-regional inter-governmental organisations in Africa.

9.7.1 African Court on Human Peoples' Rights

The Court should as soon as possible be established by way of a Protocol additional to the African Charter. Ideally, the following features will be included in the Protocol:

- No more than eleven ratifications should be required for its entry into force.
- Acceptance by states of the right of individuals to approach the Court directly under exceptional circumstances should be included as a necessary consequence of ratification.
- Judges should be elected by states parties to the Protocol, and not by states parties to the Charter or members of the OAU.
- Judges should be allowed to hear all cases, including those involving states of which they are nationals. *Ad hoc* judges should be appointed if there is no judge on the bench who is a national of a state involved in the matter before the Court.
- The seat of the Court should not be fixed in the Protocol. Once the requisite number of states have ratified the Protocol, it should be esatblished immediately. The seat should not be in Addis Ababa or in Banjul. It should be located in an accessible place with a developed infrastructure, and should be in a country that has (or will be likely to) ratify the Protocol. Should South Africa be one of the first fifteen states to ratify the Protocol, Cape Town is recommended here as the most suitable location for the seat of the Court.

- Whatever the seat of the Court will be, serious consideration should be given to centralising the seats of the Commission and the Court. This issue should preferably be resolved in conjunction with the finalisation of the seat of the Court.

In addition, the allocation of resources to get the Court started should be a matter of priority. Foreign funding and sponsorship should be accepted and even illicited, as long as no strings are attached. The experience of the Commission has shown that foreign funding may be used without bowing or conceding to foreign agendas. Indeed, this must not be used as an excuse not to establish the Court in the near future. An Investigation Unit, a Witness Protection Unit and a Research and Publicity Unit should be established.

- The Investigation Unit will be responsible to undertake fact-finding when the Court has granted direct access. These cases are likely to require an immediate response. The Court will only be able to play a role if it has the capacity to react immediately and establish the facts of the matter.

- The Witness Protection Unit should be responsible for securing the safety of witnesses who appear before the Court. This function should extend to the time prior to the hearing of the case, if the need arises. A repetition of experiences in Latin America, where witnesses were killed, should be pre-empted and avoided.

- The Research and Publicity Unit should be responsible for providing research assistance to judges. It must keep a record of cases and ensure dissemination of information about the Court's activities. But most importantly, it must keep a databank of government reactions to decisions of the Court. Without such a capacity, follow-up of the Court's decisions by the Council of Ministers would be impossible.

These aspects may still be placed on the agenda for inclusion in the Protocol. But even if they are not included in the Protocol as such, these units may be established in terms of the Rules of procedure as "staff of the registry according to Rules of procedure".[4]

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4 Art 23(1) of the Nouakchott Protocol.

9.7.2 African Commission on Human and Peoples' Rights

The Commission should be retained, but with an amended mandate. These amendments should be introduced in terms of amendments to the Charter, preferably simultaneously with the adoption of the Protocol.

As before, the Commission should be structured to ensure that the promotion of human rights is given priority. But rather than viewing this function as implying lectures and conferences, the Commission should be co-ordinating and strengthening ground-level efforts by NGOs around Africa, and should give technical assistance in the form of training and advice especially to governments and civil servants. The model for the Commission should be the numerous technical assistance projects especially by the International Labour Organisation, one of the UN's specialised agencies. The profile of the Commission must be enlarged by capturing and involving the all the different branches of the media. To this end, a media officer should be appointed immediately. The use of modern technology will go a long way towards improving dissemination of the Charter and the Commission's work globally. It is imperative that the Commission is connected to the Internet and makes available an updated databank through that medium. At present, the Annual Activity Reports of the Commission are distributed very selectively, sparsely and often very long after the Assembly has adopted the report.

The system of periodic country reporting should be abolished. Instead, the Commission should send missions to states parties to investigate allegations of violations. These visits may follow from individual complaints, as is presently the case. In their present form, the visits are also directed at resolving underlying causes, and aims at constructive dialogue with the state concerned. Visits should generally take place with the consent of the state, but should also be undertaken without that consent. In such cases evidence will have to be collected or heard outside the country. Again, the Commission will have to rely on NGOs to succeed. The model for these activities should be the Inter-American Commission, especially in its early phase of development.

The Commission should extend and consolidate its use of Special Rapporteurs. Two Special Rapporteurs, one on extra-judicial killings and the other on prisons and conditions of detention in Africa are already in place. Their activities should be extended. One further rapporteur, on

women, should be established. This rapporteur should be involved in law reform of areas that affect women, on the basis of CEDAW, rather than devoting time on the elaboration of a further Protocol to the Charter. The Commission should also appoint country rapporteurs to observe the situation in problem spots on a continuous basis. Countries that could be targeted are those where the military has taken over power (for example Nigeria and Sierra Leone), those in phases of transition (such as the Democratic Republic of Congo) and those in which protracted conflict situations impact on human rights (as in Sudan). In this respect, the model of the Commission should be the UN Human Rights Commission and the progressive system of supervision followed by the European Committee on Torture.

It is likely that the importance of the Commission's protective function will diminish. In fact, the Commission should increasingly be "de-judicialised". The appointment of non-lawyers to the Commission is one way of attenuating the legal focus of the Commission. It will act mainly as a filter to ensure that cases devoid of merit do not reach the Court. Once it finds a matter admissible, the Commission should not investigate the matter in detail, but should draw a report on the basis of the evidence on the file at that stage. It has already been suggested that the Commission should refer all such cases to the Court. This will ensure that the merits of the cases are not traversed in detail twice. As there will clearly be a need for co-ordination and good communication between the Court and Commission, the possibility of shifting the seat of the Commission to the same place as the Court should receive serious consideration.

9.7.3 Sub-regional human rights commissions

The possibility of such a centralised human rights structure enhances the need for a regional supplement in the African human rights system.

In this model, the sub-regional organisations must accede to the African Charter. This will require an amendment to the Charter, in terms of which not only OAU member states, but also African regional organisations may adhere to the Charter.[5] It may also require amendments to the treaties

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5 See art 63(1) of the Charter.

of the regional organisations to enable them to accede to international human rights treaties.[6] Within the ambit of each of these institutions, a sub-regional human rights commission should be established. Where such a sub-commission exists, individual complaints should be directed to them. The sub-regional body then decides on the admissibility, undertakes preliminary fact-finding and draws up a report. The sub-regional commissions may then refer cases to the Court. The Commission is eliminated to ensure that unnecessary duplication and delays do not occur. Where no sub-regional commission exists, the Commission retains its protective role.

Sub-commission reports about individual complaints are submitted on a regular basis to the applicable sub-regional body, and to the OAU Assembly or the OAU Council of Ministers. The sub-regional institution body will be responsible for compliance and will monitor the follow-up to reports, while the OAU will monitor decisions of the Court. The sub-commission in other words functions under the two institutions at two levels, under the same Charter. Its initial reports are to the sub-regional structure, where pressure, and mobilisation of shame is more immediate. But they will still report to the OAU, providing a forum for consistency and additional political pressure.

Eventually, the borders between African sub-regional organisations will fall away, making room for the African Economic Community. The sub-regional human rights commissions may then be retained. They will then serve a geographical role, being closer to the people in certain regions. Politically they will report to the one institution, the AEC Assembly, which will the take place of the OAU Assembly. They will then become sub-structures of one single structure, the African Commission. In this way the development towards greater African unity will also be institutionally realised in the African human rights system.

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6 See the opinion of the Court of Justice of the European Communities that the accession of the EC to the European Convention would require an amendment to the EC Treaty.

9.8 Co-ordination

One of the most important aspects, in which the OAU may play a role, is improved co-operation and co-ordination of various efforts in the field of human rights in Africa. These efforts should be made at different levels.

Better co-operation and co-ordination should be established between the African system and the UN Centre for Human Rights, other UN bodies and other regional human rights institutions. At the Charter's tenth anniversary, the then UN High Commissioner for Human Rights, Ayala Lasso, remarked that the future of the African human rights system depended on a dynamic and reinforced relationship between the OAU and the UN Centre for Human Rights.[7]

A lack of co-ordination has also characterised efforts towards human rights realisation under the auspices of the OAU. Human rights cover a wide area, and issues interconnect. Little effort has gone into co-ordinating efforts of the African Commission, the Commission for Conflict Management, Prevention and Resolution, the Bureau for Refugees and other OAU bodies. A starting point suggested is the development of a mechanism under the Chairmanship of the OAU Secretary General or the Chairman of the Council of Ministers to "map out strategies for the co-ordination of these activities".[8]

9.9 Democratisation, open windows and reform

In the end, all concrete steps towards the improvement of the Commission and the establishment of the Court depend on the mother body, the OAU. The OAU Assembly has built up a reputation for disregard of human rights. Recently, however, there have been signs that the OAU is changing. The present Secretary-General is carving a role for progress. The move to investigate the establishment of the Court, and the concern raised about the coup that took place in Sierra Leone

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7 Quoted in (1996) 6 *African Human Rights Newsletter* at 5.

8 Kumado (1996) 6 *African Human Rights Newsletter* at 7.

give some indication of a change of heart. It seems unthinkable that the Assembly will again remain silent in the face of the killing of a former Secretary-General.[9]

It is at the political level that shame must be mobilised. States are not likely to respond unless they are pressed to do so. They will not be shamed into changing their behaviour on the basis of a few unreported remarks by some committee member in Geneva, New York or Banjul, located in remote or far-off places. State reporting (while it is still in place), other forms of reporting on the basis of investigation, and findings of violation depend on political muscle for their effective implementation. Reform of the Assembly is therefore also a priority. As a starting point the Mechanism for Conflict Prevention, Management and Resolution should be accorded an important role. Human rights concerns should be integrated into its activities, following the example of the Organisation for Security and Co-operation in Europe.

The democratisation of Africa has opened a window to allow a fresh breeze into dictatorial and autocratic regimes. But it seems increasingly likely that wind has not blown the dust from all the corners. What is observed increasingly, is the appearance of change and democratisation. States have undergone a rhetorical conversion, meaning that they are convinced that they should appear democratic, and that they should use the language of human rights. This leaves the danger that states may use human rights to keep up appearances, creating virtual democracies with virtual human rights regimes. This leads back to the central theme of this study, namely that appearances are not enough. Having democracy in name means very little if it does not change the lives of people. Similarly, a virtual African human rights system may be in place, as was the case in the first few years, or the window may be opened wide enough to force a fresh breeze to blow in the true realisation of human rights. Not only governments, but also NGOs, academics, other members and institutions of civil society, and inter-governmental institutions should devote their energy to ensure that this ideal is attained.

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9 As was the case in the 1970s when Diallo Telli, formerly Secretary-General of the OAU, died in detention in Guinea (see Amnesty International (1993) at 2).