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REALISATION OF HUMAN RIGHTS IN AFRICA THROUGH INTER-GOVERNMENTAL INSTITUTIONS

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SUMMARY

Violations and infringements of human rights have characterised African history more than their protection and promotion. This study is premised on the assumption that one of the preconditions for an African Renaissance is that the human rights records of African states must improve. Although the realisation of human rights primarily depends on domestic (national) systems and procedures, international (supra-national) institutions have an increasingly important role to play. This is where the focus of this study falls.

International law and the activities of inter-governmental institutions play an increasingly important role in the world today. After the Second World War the internationalisation of human rights has become an accepted fact. The impact of inter-governmental institutions on human rights in Africa at three levels is discussed. At the global level, the activities of the United Nations and its specialised agencies are surveyed. At the regional level, the role of human rights instruments and institutions under the Organisation of African Unity is analysed. At the sub-regional level, the role of some of the major sub-regional institutions in Africa is placed in the spotlight. The aim of this study is to investigate the extent to which human rights have been realised in Africa through these institutions, and to examine possible ways of improving the present system of human rights protection.

After gaining independence African states became part of the global community by obtaining membership of the UN. Most African states have ratified the major UN human rights treaties. The principle became established that the internal affairs of one state may be scrutinised by the international community, as far as human rights is concerned. The UN system does not provide for effective implementation, but serves as a force to pull and push states towards acceptance of human rights norms. African states have generally been reluctant to ratify optional provisions to UN treaties allowing for individual petition, thereby restricting the impact of UN human rights law to a minimum.

After the OAU initially largely ignored human rights, the African Charter was adopted under its auspices in 1981. A non-judicial institution, the African Commission on Human and Peoples` Rights, was established to supervise implementation of the Charter. In November 1997 the

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Commission celebrates its tenth anniversary. By gradually extending its role, the Commission has in these ten years developed from a timid and almost invisible lap dog to an institution that matters. The role of other African human rights treaties is also examined.

Sub-regional institutions have been established in Africa as economic pendants to the OAU. Although the furthering of human rights is nowadays accepted in principle as an aim by these institutions, implementation mechanisms and the right of individual petition do not exist. These bodies have a much bigger role to play in the realisation of human rights on the continent. This could be done by their accession to the African Charter and by establishing regional sub-commissions on human rights to redress some of the problems faced by the African Commission.

The improvement of African human rights systems has for a number of years been the subject of discussion. Already in 1961 the desirability of a human rights Court for Africa was highlighted. This idea lay dormant for many years, but was resurrected in the context of greater democratisation in African systems of governance during the 1990s. In 1994 the OAU Assembly called a meeting of government experts to consider the establishment of a human rights Court. Various discussions resulted in a draft Protocol, which is still in the process of being finalised. A critical analysis of the provisions of the draft Protocol is provided.

Arguments in favour of and against the establishment of the Court and alternative models to the proposed Court are examined. In conclusion, a three tier system of human rights realisation in Africa is proposed. This model supports the retention of the Commission, but with an amended mandate, the establishment of a Court of Human and Peoples` Rights, and the creation of sub-regional human rights commissions under the auspices of existing sub-regional institutions.

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OPSOMMING

Menseregteskendings en -vergrype, eerder as die bevordering en beskerming van menseregte, kenmerk Afrika se geskiedenis. Hierdie studie gaan van die verondertselling uit dat die verbetering van die menseregterekord van Afrikastate `n voorvereiste is vir `n Afrika Renaissance. Alhoewel die verwerkliking van menseregte uiteindelik afhang van plaaslike (nasionale) stelsels en prosedures, het internasionale (supra-nasionale) instellings ook `n rol om te speel. Dit is op hierdie instellings wat die studie fokus.

Internasionale reg en die aktiwiteite van tussen-staatlike instellings speel vandag `n al belangriker rol in die wêreld. Na afloop van die Tweede Wêreldoorlog het die internasionalisering van menseregte `n voldonge feit geword. Die impak van tussen-staatlike instellings op menseregte in Afrika op drie vlakke word toegelig. `n Oorsig word gegee oor die aktiwiteite van die Verenigde Nasies op die universele (globale) vlak. Die menseregte-instrumente en instellings van die Organisasie van Afrika Eenheid word op die regionale vlak onder die loep geneem. Vervolgens word van die vernaamste sub-regionale strukture in Afrika ondersoek. Die doel van die studie is om die mate waartoe menseregte deur hierdie instellings in Afrika verweselik is, te skets, en om moontlike verbeterings aan die huidige stelsel te ondersoek.

Na onafhanklikheid het Afrikastate gou deel geword van die internasionale gemeenskap, deur van die VN lid te word. Die meeste Afrikastate het die vernaamste VN-menseregteverdrae geratifiseer. Die beginsel is ingeburger dat die interne aangeleenthede van een staat, vir sover dit menseregte aangaan, deur die internasionale gemeenskap gefynkam kan word. Die VN-stelsel maak nie vir effektiewe afdwinging voorsiening nie, maar dien as `n trek- en drukkrag om state tot die aanvaarding van menseregtenorme te bring. Afrikastate was oor die algemeen traag om opsionele bepalings tot verdrae te aanvaar in terme waarvan individue die reg het om klagtes teen state te bring. Sodoende is die invloed van die VN menseregte stelsel tot `n minimum beperk.

Nadat menseregte die OAE aanvanklik koudgelaat het, is die Afrika Handves van Mense- en Volkereregte in 1981 onder die vaandel van dié organisaie aangeneem. `n Nie-judisiële instelling, die Afrika Kommissie van Mense- en Volkereregte, is in die lewe geroep om oor die Handves se implementering toesig te hou. Die Kommissie vier sy tiende verjaardag in November 1997. Deur

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sy rol stelselmatig uit te brei, het die Kommissie in die tien jaar ontwikkel van `n gedienstige en bykans onsigbare skoothondjie tot `n instelling wat `n verskil maak. Die rol en potensiaal van ander Afrika menseregte verdrae word ook ondersoek.

Sub-regionale instellings is in Afrika opgerig as ekonomiese teenhangers van die OAE. Alhoewel hierdie liggame vandag die bevordering van menseregte in beginsel aanvaar, bestaan afdwingingsmeganismes en die reg tot individuele petisie glad nie. Hierdie liggame kan `n groter rol speel in die verwesenliking van menseregte in die verskillende streke van Afrika. Hulle kan tot die Afrika Handves toetree en sub-regionale kommissies op die been bring om verskeie van die probleme wat die Kommissie aan bande gelê het, te oorbrug.

Die verbetering van die Afrika menseregte sisteem is al vir `n paar jaar die onderwerp van bespreking. Reeds in 1961 is die wens uitgespreek dat `n menseregtehof in Afrika opgerig moet word. Die idee het vir baie jare dormant gelê, maar het herrys as deel van die groter demokratisering in Afrika tydens die negentigerjare. In 1994 het die OAE leiersberaad `n vergadering van regeringsdeskundiges belê om die oprigting van `n hof te oorweeg. Verskeie besprekings het uitgeloop op `n ontwerp Protokol wat tans in `n proses van afhandeling is. Die Protokol word krities ontleed.

Argumente ten gunste van en teen `n geregtelike instelling, en alternatiewe tot die voorgesteld Hof, word ondersoek. Ten slotte word `n drievlakkige stelsel voorgestel. Hierdie model steun die behoud van die Afrika Kommissie, maar met `n gewysigde mandaat, die oprigting van `n Hof van Mense- en Volkereregte, en die skepping van sub-regionale menseregte kommissies onder die vaandel van bestaande sub-regionale instellings.

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ABBREVIATIONS AND ACRONYMS

ACJ	:	African Court of Justice
AEC	:	African Economic Community
AFLAQ	:	African Legal Aid Quarterly
AfrJIL	:	African Journal of International Law
AJIL	:	American Journal of International Law
All ER	:	All England Law Reports
ANC	:	African National Congress
ANPACAN	:	African Network for the Protection against Child Abuse and Neglect
ASICL Proc	:	African Society for International and Comparative Law Proceedings of Annual Conference
AZAPO	:	Azanian Peoples` Congress of South Africa
AYBIL	:	African Yearbook of International Law
BCLR	:	Butterworths Constitutional Law Reports
BYIL	:	British Yearbook of International Law
CAR	:	Central African Republic
CAT	:	Convention against Torture
CBO	:	Community-based Organisation
CCPR	:	International Covenant on Civil and Political Rights
CCW	:	Convention on Certain Conventional Weapons
CEDAW	:	Convention on the Elimination of All Forms of Discrimination against Women
CEPGL	:	Economic Community of the Countries of the Great Lakes
CERD	:	International Convention on the Elimination of All Forms of Racial Discrimination
CESCR	:	International Covenant on Economic, Social and Cultural Rights
CHOGM	:	Commonwealth Heads of Government Meeting
CHRLD	:	Commonwealth Human Rights Law Digest
CILSA	:	Comparative and International Law Journal of Southern Africa
CMCA	:	Commission of Mediation, Conciliation and Arbitration

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COMESA	:	Common Market of Eastern and Southern African States
Comp	:	Comparative
CRC	:	Convention on the Rights of the Child
CSCE	:	Conference on Security and Co-operation in Europe
EA	:	East African Law Reports
EC	:	European Community
ECA	:	UN Economic Commission for Africa
ECOMOG	:	ECOWAS Military Observer Group
ECOSOC	:	UN Economic and Social Council
ECOWAS	:	Economic Community of West African States
ECPT	:	European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment
ECR	:	European Court Reports
ed(s)	:	editor(s)
EEC	:	European Economic Community
EU	:	European Union
FAO	:	UN Food and Agricultural Organisation
HR	:	Human Rights
HRC	:	UN Human Rights Committee
HRLJ	:	Human Rights Law Journal
HRQ	:	Human Rights Quarterly
ICJ Review	:	Review of the International Commission of Jurists
ICJ	:	International Court of Justice
ICLQ	:	International and Comparative Law Quarterly
ILC	:	International Law Commission
ILM	:	International Legal Materials
ILO	:	International Labour Organisation
ILR	:	International Law Reports
INGO	:	International Non-Governmental Organisation
Intl	:	International
JAL	:	Journal of African Law
Jnl	:	Journal

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LRC (Const)	:	Commonwealth Law Reports (Constitutional and Administrative Law Reports)
LRC	:	Commonwealth Law Reports (consolidated since 1993)
MCPMR	:	Mechanism for Conflict Prevention, Management and Resolution
MINURSO	:	UN Mission for the Referendum in Western Sahara
MLR	:	Malawi Law Reports
NGO(s)	:	Non-governmental Organisation(s)
NPFL	:	National Patriotic Front of Liberia
NQHR	:	Netherlands Quarterly of Human Rights
NR	:	Namibian Reports
NTVM	:	Nederlands Tijdschrift voor de Mensenrechten
OAS	:	Organisation of American States
OAU	:	Organisation of African Unity
OIC	:	Organisation of the Islamic Conference
OPDS	:	Organ on Politics, Defence and Security (of SADC)
OPI	:	First Optional Protocol (to CCPR)
OPII	:	Second Optional Protocol (to CCPR)
OSCE	:	Organisation for Security and Co-operation in Europe
PCIJ	:	Permanent Court of International Justice
PTA	:	Preferential Trade Area of Eastern and Southern African States
RADIC	:	Revue Africaine de Droit International et Comparé (African Journal of International and Comparative Law)
RUDH	:	Revue Universelle des Droits de l`Homme
SA	:	South African Law Reports
SACLR	:	South African Constitutional Law Reports
SACR	:	South African Criminal Law Reports
SACU	:	Southern African Customs Union
SADC	:	Southern African Development Community
SADCC	:	Southern African Development Co-ordination Conference
SADR	:	Saharawi Arab Democratic Republic
SAHRINGON	:	Southern African Human Rights NGO Network
SAJHR	:	South African Journal of Human Rights

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SALJ	:	South African Law Journal
SAYBIL	:	South African Yearbook of International Law
UN	:	United Nations
UNAMIR	:	UN Assistance Mission for Rwanda
UNASOG	:	UN Aouzou Strip Observer Group
UNAVEM	:	UN Angola Verification Mission
UNDP	:	UN Development Programme
UNESCO	:	UN Educational, Scientific and Cultural Organisation
UNHRC	:	UN Human Rights Commission
UNICEF	:	UN Children`s Fund
UNITA	:	Union for the Total Independence of Angola
UNITAF	:	UN Task Force
UNOMIL	:	UN Observer Mission in Liberia
UNOMOZ	:	UN Operation in Mozambique
UNOSOM	:	UN Observer Mission in Somalia
UNTAG	:	UN Transitional Assistance Group
WEO	:	Western and Other States
WHO	:	World Health Organisation
WLR	:	Weekly Law Reports
YB	:	Yearbook
ZäoRV	:	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZLR	:	Zimbabwean Law Reports

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Chapter 1 INTRODUCTION

1.1 Aim of the study

1.2 Conceptual clarification

- 1.2.1 "... realisation ..."
- 1.2.2 "... of human rights ..."
- 1.2.3 "... in Africa ..."
- 1.2.4 "... inter-governmental ..."
- 1.2.5 "... institutions."

1.3 Importance of this topic

- 1.3.1 Analysis and praxis
- 1.3.2 The judicial dimension
- 1.3.3 The African context

1.4 Work already done in this field

1.5 *Modus operandi* and research methodology

1.6 Overview of chapters

1.7 Difficulties and limitations of this study

- 1.7.1 Study not comprehensive of African experience
- 1.7.2 Inaccessibility of sources
- 1.7.3 Not comprehensive catalogue of violations
- 1.7.4 Focus on secondary and tertiary mechanisms
- 1.7.5 The limits of assessing realisation
- 1.7.6 Emphasis on judicial dimension
- 1.7.7 The inevitability of time frames

As the turn of the century (and millennium) approaches, Africa stands poised between the extremities of **despair and hope**. In the last decade of this century, the butchers who hacked helpless victims to death on the killing fields of Rwanda have etched despair onto the face of the continent. The inability of the government of Rwanda, the international community and common humanity to protect the lives of the innocent has reinforced images of Africa as a savage mystery,

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and an impenetrable heart of darkness.[1] Nigeria so nearly progressed towards participatory democracy before the process was reversed and military-style government was reinstated. In fact, deflated expectations have characterised developments in Nigeria since independence, starting with the bloody Biafran war in the early 1960s.

Hope, on the other hand, has become symbolised by Nelson Mandela's long walk to freedom, and millions of South Africans' long wait to cast their first votes in the democratic elections of 1994. The 1990s were ushered in by other promising images from the continent: the rising sun unfolding on the independence flag of Namibia; a triumphant Chiluba and a defeat-conceding Kaunda after the Zambian elections; masses taking to the streets of Cotonou, forcing a national conference in Benin; the post-independence wars and eventual Peace Accord, followed by elections in Mozambique, two rounds of elections since 1992 in Ghana ; a peace accord between warring factions in Angola; and most recently the relatively peaceful overthrow of Mobutu Sese Seko in Zaïre.

But images of hope fade fast. Experience has shown how tenuous the establishment of democracy is. And human rights only stand a chance if hope is kept alive. Optimism should not be based on a dream that the future will be different: It is important to link the hopes of the future to positive aspects from the African past. In other words, the African greatness of bygone eras should be linked to attempts at renewal and restoration. Carthage, that city-state in Northern Africa that challenged the greatness of the Roman Empire and under Hannibal came within a hair's breadth of sacking Rome is an example of this past. Cato the Censor, who became a Roman commissioner to Carthage, was so impressed by the danger posed to Rome by this city that he ended each of his speeches to the Senate with the phrase: "Carthage must be destroyed".[2] This indeed happened with the Roman victory in 202 BC. This, and other forms of greatness need to be restored as part of the African renaissance, and must be extended to the realisation of human rights to Africans by

---

1 In the imagery of Conrad (1994), who portrays the journey of Marlow into the former Zaïre as a penetration "deeper and deeper into the heart of darkness" (at 50), faced with the suspicion of the men encountered "not being human" (at 51).

2 "Carthago delenda est" (see Harvey (1940) at 94).

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African governments.[3] This will not be achieved overnight, but by rebuilding and building stone by stone. This study aims to be a stone in this process of building and rebuilding.

Violations of human rights under colonial rule in Africa did not end with the African independence of the late 1950s and 1960s. One, rather belated, response to these violations was the adoption of an inter-African human rights instrument, the African Charter on Human and Peoples' Rights, in 1981. The Charter created the African Commission on Human and Peoples' Rights. By November 1997, the Commission has already celebrated ten years of existence, underlining that the Charter system has become part of the recent African reality. It is on this reality that a future of improved human rights realisation in Africa should be built. This study takes the optimistic view that progress is possible. It also accepts as premise that the improvement of the human rights records of African states is a prerequisite for converting the ideal of an African renewal into reality.[4] It further underscores the necessity of common African approaches to common African problems. Rather than relying on answers from other regions of the world or attempting to work out problems in isolation from other states, African solutions should be sought.

As an introduction to the study, this chapter sets out the aim and my understanding of the terminology used in the title. It also provides a background to the motivation behind undertaking the research. Moreover, the limitations of the study are spelt out.

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3 See the description of Carthage by Virgil: "and now they were climbing the hill that looms large over the city and looks down on the confronting towers. Aneas marvels at the massive buildings, mere huts once; marvels at the gates, the din and paved high roads. Laws and magistrates they ordain, and a holy senate" (*Aeneid* book I at 420 - 429). Not everyone agrees about the nature of the society in Carthage, as the following description shows: "The Carthaginians were hardly an attractive people. They did not have it in them to be the standard-bearers of a higher civilization. Selfish, parasitic, money-grubbing, corrupt and,when it cost them nothing, oppressive ..." (Caven (1980) at 293, commenting on the same period in Carthaginian history)).

4 African leaders such as South African President Mandela, Vice-President Mbeki, and Ugandan President Museveni have over the last few years articulated the ideal of an African Renaissance from various platforms.

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1.1 Aim of the study

The aim of this study, which is entitled "The realisation of human rights in Africa through inter-governmental institutions", is twofold:

- It investigates the ways in and extent to which human rights have been and are realised in Africa through international law. Although the focus ultimately falls on what happens in individual countries, the role and contribution of instruments, institutions and structures created **between governments** at the **supra-national** level are analysed. Inter-governmental structures providing protection at three levels are discussed. These levels are:

- the global level, under the auspices of the United Nations ("UN");

- the regional level, under the auspices of the Organisation of African Unity ("OAU"); and

- the sub-regional level, mainly under the auspices of various African sub-regional organisations.

  The approach in each instance is largely descriptive of the legal framework, although criticism is also voiced.

- It further investigates ways of **improving** the realisation of human rights through inter-governmental co-operation. Comparisons are drawn with other regional human rights systems. Arising from these comparisons, the possibility of creating a supra-national African human rights court is canvassed in more detail. The events leading to the proposed African Court on Human and Peoples' Rights are discussed, the draft Protocol that is in the process of being considered within the OAU is analysed, and arguments for and against the establishment of such a pan-African Court are evaluated. Alternative ways to realise human rights through supra-national institutions in Africa are also considered. The approach to the Protocol starts off descriptively, but becomes reformative as it extends to evaluation and the consideration of alternatives.

It must be emphasised from the outset that the legal protection of human rights should not be viewed in isolation from non-legal (or extra-legal) factors. Although the focus here is on legal

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instruments and institutions, the contention is not that human rights or their realisation is the exclusive domain of legal institutions or lawyers. This study deals with one form of response to human rights violations in Africa, and one strategy to improve Africa's human rights record. Even if the inter-relationship of non-legal factors with the aspects covered in this study is not spelt out, the observations made and conclusions reached in this study retain their inter-dependence and interaction with the political, social, economic, demographic and geographic contexts.

1.2 Conceptual clarification

The title introduces five concepts that need to be discussed and delineated for the purpose of this study. These terms are "realisation", "human rights", "Africa", "inter-governmental" and "institutions".

1.2.1 "... realisation ..."

Different concepts are used in the literature to convey the process of converting paper or formal human rights guarantees into practical realities, to make human rights more meaningful, and to bring the vague concepts associated with human rights to life. Terms that have been used include the following:[5]

- "observance" of rights;[6]
- "translation into reality";[7]
- rights are "in fact enjoyed";[8]
- "enforcement" of rights;[9]

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5 What follows, are examples of how these terms are used, rather than in any way providing a representative sample.

6 See eg Chenge in Peter and Juma (eds) (1996) at 7: "... the international community has every right to be concerned about the observance of these rights ...".

7 See eg Bernhardt in Bernhardt and Jolowicz (eds) (1985) at 145; Kisanga in Peter and Juma (eds) (1996) at 32.

8 See eg Kisanga in Peter and Juma (eds) (1996) at 32.

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- "application";[10]
- "implementation";[11]
- "operationalisation";[12]
- "realisation";[13]
- "protection";[14]
- "respect";[15]
- "promotion";[16]
- "give effect to";[17]
- "fulfilment";[18] and
- "guarantee".[19]

Of these terms, the three most frequently used probably are "enforcement", "implementation" and "realisation". The question is which one of these terms best expresses all the nuances contained in

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9 See eg Peter in Peter and Juma (eds) (1996) at 52: The title of his contribution is "Enforcement of Fundamental Rights and Freedoms in Tanzania: Matching Theory and Practice".

10 See eg Forsythe (1991) at 107: "The application of the American Convention ... covers only about a decade."

11 See eg Opsahl (1989) 10 *HRLJ*, Peter in Peter and Juma (eds) (1996) at 69.

12 See eg Peter in Peter and Juma (eds) (1996) at 69: "the operationalisation of the constitutional guarantees to fundamental rights".

13 See eg Peter in Peter and Juma (eds) (1996) at 70.

14 See eg Forsythe (1991) at 77, referring to "short-term protection". See, however, at 57: "By *protection*, I refer to implementation and enforcement action". See also his distinction between direct and indirect protection, at 59. Shue ((1980) at 52) distinguished three levels of state obligations in relation to socio-economic rights. At the primary level, states must "respect" the resources owned by the individual. On the secondary level, states must "protect" the rights of the individual. At the tertiary level, there is a duty to "promote and fulfil" these rights. Shue referred to the duties to "avoid depriving", to "protect from depriving" and to "aid the deprived". See also De Vos (1997) 13 *SAJHR* 67.

15 See eg s 7 of the final South African Constitution.

16 See eg s 7 of the final South African Constitution.

17 See eg art 62 of the African Charter: Each State Party must report on measures "taken with a view to giving effect to the rights".

18 See eg s 7 of the South African Constitution.

19 See eg Donnelly (1993) at 20.

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the different ways of ensuring compliance with human rights on the supra-national plane. To answer this question, another must first be answered: What are the nuances of "enforcement", "implementation" or "realisation" of human rights provided for in international instruments? Compliance with international human rights norms may be brought about mainly through relatively **confrontational** or relatively **non-confrontational** methods.

Confrontational methods of **monitoring** state performance may take the following basic forms:[20]

- The harshest measures that human rights monitoring bodies undertake are **investigations** of the human rights position within states. Such fact-finding may be undertaken in two **forms**, either by a Special Rapporteur or working group. The **mandate** of the fact-finding body may be to investigate a particular aspect or theme, which affects more than one state, such as extra-judicial killings, or to investigate the situation in a specific country, for example in Rwanda. In other words, fact-finding may be undertaken as **thematic** or as **country studies**.

- The **consideration of complaints by quasi-judicial or judicial bodies**. Complaint procedures are either based on **treaty** provisions in a multilateral treaty or on a **resolution**[21] by an inter-governmental body. Communications in terms of treaties may be submitted by individuals against states (**individual communications**), or by one state against another (**inter-state communications**).

Non-confrontational or **co-operative** methods of implementation, which emphasise consensus and consultation, include the following:

- The **examination of country reports** that are submitted by states in terms of treaty obligations by treaty monitoring bodies.

- The use of **good offices** to resolve a human rights problem is akin to fact-finding, but takes a more informal and *ad hoc* form and usually takes place behind closed doors.

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20 See ch 2 below, where the detailed functioning of international instruments is discussed.

21 For example Res 1503, in terms of which communications may be directed to the UN Human Rights Commission: see ch 2.3.1 below.

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- **Technical assistance** may be granted to states and **consultative status to non-governmental organisations ("NGOs")**. Technical assistance is often directed at **education and dissemination** of information on human rights and the creation of a human rights culture. Other means may also be used to ensure **awareness** about rights. Another aspect of inter-state co-operation to ensure rights is the process of initiating, discussing and elaborating new human rights standards in declarations and treaties. **Standard setting** in the form of a treaty is a prerequisite for the confrontational methods of monitoring the human rights performance of states.

If these methods have failed to ensure compliance, and a state persists with serious human rights violations, the **international organisations as such** may take confrontational or **coercive** measures. Such measures may take the following forms:

- **resolutions** may be adopted which criticise the state and expose it to international "mobilised shame",
- **international sanctions** (of a specified or general nature) such as economic, diplomatic, sport and cultural sanctions or boycotts may be instituted against the offending state,
- the recalcitrant state's membership may be temporarily **suspended,** or
- in its most extreme form, that state may suffer **expulsion** from the organisation.

At the **global** level, **state reporting** is the method most frequently used. It was introduced by the International Labour Organisation ("ILO")[22] and today forms the single pillar of implementation under the Covenant on Economic, Social and Cultural Rights ("CESCR"),[23] the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW") and the Convention on the Rights of the Child ("CRC"). The other three major international instruments (the Covenant on Civil and Political Rights ("CCPR"), the Convention on the Elimination of All Forms of Racial

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22 See ch 2.5.1 below for a more comprehensive discussion of the ILO.

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Discrimination ("CERD") and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment ("CAT")) also provide for compulsory state reporting, but in addition also give states parties a choice of opting into **individual and inter-state complaint** systems. The CAT goes the furthest by allowing for a "confidential inquiry"[24] into allegations of torture. Such an inquiry may include visits to the state party concerned, but only with the consent of the state.[25]

State reporting, communications, fact-finding and good offices are also used at the **regional level**.

- States parties to the oldest system, created by the **European Convention** on Human Rights and Freedoms (the "European Convention"),[26] automatically accept inter-state complaints. The acceptance of individual complaints was made optional, but is today generally accepted as a political prerequisite for membership of the Council of Europe. State reporting obligations were introduced in Europe in 1965, when the European Social Charter entered into force. Only recently, in 1989, was the first compulsory acceptance of on-site investigations incorporated into the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("ECPT").[27] As a political body, the Committee of Ministers of the Council of Europe uses its good offices to ensure compliance.

- The **Inter-American** system provides all individuals in ratifying states with the competence to bring complaints, allows for optional inter-state complaints under the American Convention on Human Rights, and obliges states to submit periodic reports in terms of the Additional Protocol to the American Convention in the area of Economic, Social and Cultural Rights.[28] The Inter-American Commission on Human Rights has interpreted its mandate to prepare studies and reports widely, to include on-site investigations.[29]

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23 Full references to the CESCR and the other human rights instruments mentioned in this par are given in ch 2.4 below.

24 Art 20(2) of CAT.

25 Art 20(3) of CAT.

26 See ch 5.1 for full reference and background.

27 State parties to the Convention "shall permit visits ... to any place within its jurisdiction where persons are deprived of their liberty by a public authority" (art 2).

28 Of 1988, also known as the "Protocol of San Salvador". On the Inter-American system, see ch 5.2 below.

29 See art 41(c) of the American Convention.

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- The most recent regional human rights instrument, the **African Charter** on Human and Peoples' Rights,[30] is the only one to provide for individual and inter-state "communications", as well as reporting obligations, all as a necessary consequence of ratification. Of late, the African Commission on Human and Peoples' Rights has started interpreting its mandate to include visits to states parties.[31] Using the good offices of commissioners, the Commission also tries to reach friendly settlements.

International institutions responsible to oversee compliance take a variety of forms. The **extent of judicialisation** of these institutions presents an axis along which differences may be measured. "Enforcement" mechanisms may be judicial (in the form of courts), quasi-judicial (such as commissions or committees) or political (in the form of regional organs such as ministerial committees or councils).

At the international level the **International Court of Justice** ("ICJ") has, to a limited extent, involved itself in human rights issues.[32] The **European and Inter-American Courts of Human Rights** are judicial institutions implementing human rights at the regional level. International human rights treaties usually create specific bodies to implement the provisions of the various human rights instruments. These monitoring bodies consist of independent experts and may be characterised as **quasi-judicial** institutions: They issue "comments" and "views", but not binding judgments. The UN Human Rights Commission, on which members represent their respective states, is closer to a **political** mechanism. Each of the three existing regional systems has a commission, which may be categorised as quasi-judicial. The role of the Council of Ministers in the European system provides an example of politicised enforcement.

Against this background, one may return to the question posed initially: Which one of the three terms from the list most frequently used in this context (enforcement, implementation or realisation) best fits all these forms of converting human rights promises into meaningful guarantees?

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30 On the African system, see ch 3 below.

31 See ch 3.3 below.

32 See ch 2.2.4 below.

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1.2.1.1 Enforcement

"Enforcement" is derived from the verb "to enforce", which is defined as "to strengthen physically or morally".[33] Emphasising the "physical" dimension, Forsythe conceived of "enforcement" as "the issuing of a command linked to the threat of application of sanctions".[34] "Enforcement" then becomes the "authoritative application of human rights".[35] At the UN level, he identified the Security Council and the ICJ as agencies involved with enforcement, as they may make law or issue binding judgments.

Derrida emphasised the "moral" dimension when he contrasted the term "applicability" of law (from the French "appliquer la loi") with "enforceability". "Application", in his view, loses "this direct or literal allusion to the force that comes from within to remind us that law is always an authorized force, a force that justifies itself or is justified in applying itself ...".[36] The word "enforceability" reminds us that the concepts of law and justice (and justice through law) by their very nature imply the application of force. He adds: "There are, to be sure, laws that are not enforced, but there is no law without enforceability".[37]

The term may however also be used in a wider sense, "comprising all measures intended and proper to induce respect for human rights".[38] Some problems associated with the use of the term "enforcement" to refer to all these aspects are:

- One problematic aspect of the use of the term "enforcement" is that it encapsulates in itself the concept of "force". It conjures up images of combat, of attack and defence. Numerous writers have taken this imagery to heart on the subject.[39]

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33 *The Shorter Oxford English Dictionary* (1973).

34 Forsythe (1991) at 57.

35 *Ibid.*

36 Derrida in Cornell (1992) at 5.

37 Derrida in Cornell (1992) at 6.

38 As used by Bernhardt in Bernhardt and Jolowicz (1985) at 145.

39 See eg Amoah, who describes the African Charter as a "weapon" ((1992) 4 *RADIC* 226).

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- In international law the term is also closely associated with the competence of the Security Council to undertake "enforcement measures" for the maintenance of international peace in terms of Chapter VII of the UN Charter.

- The nature of "solidarity rights" is not correctly characterised as "enforcement". This set of rights incorporate most of the non-confrontational and co-operative nuances. Roberto Unger, in his re-conceptualisation of rights, distinguishes between market rights, immunity rights, destabilisation rights and solidarity rights. Of the last category, he admits that they may not be enforceable, as they "give legal form to social relations of reliance and trust".[40] But he then explains that in his system of rights not everything need be either enforceable or be relegated to the status of natural rights or meaningless gestures: "The rights that governmental or other institutions may not enforce, remain a public declaration of a public vision, extending, qualifying, and clarifying the ideals embodied in other, enforceable parts of the system of rights."[41]

Consequently, this term is not appropriate for the purposes of this study, as it excludes the more non-confrontational and co-operative nuances mentioned above.

1.2.1.2 Implementation

To "implement" is to "fulfil", or to "complete",[42] making it a much broader term than "enforcement". Opsahl expressed a preference for the use of "implementation" as a broad term, referring to "all measures which aim at putting the substantive norms of human rights into operation".[43] One of the reasons for this preference is that it is more neutral than terms such as "enforcement", "guarantee" and "protection" of human rights".[44] Forsythe used the term in a similar sense when he described the UN's primary goal in the human rights field as "long-term

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40 Unger (1987) at 536.

41 Unger (1987) at 539.

42 *The Shorter Oxford English Dictionary* (1973).

43 (1989) 10 *HRLJ* 13 at 14.

44 *Ibid.*

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implementation". Under "implementation" he includes "passing nonbinding resolutions about specific problems or states".[45] Urging a state to take certain measures is not only promotional, but is protection "in the realm of implementation",[46] as it constitutes an effort to exert political pressure on the target-state. The distinction between "enforcement" and "implementation" becomes one between command and diplomacy.[47] Once this definition is accepted, it is clear that implementation is too restrictive as a term, as it is closely **linked to protection**. "Implementation" leaves little room for the nuance of **standard setting**.[48]

Like "enforcement", "implementation" is not a broad enough term, as it suggests measures stronger than standard setting, education and dissemination. Both terms leave insufficient room for promotional activities as part of efforts to bridge the divide between formal adherence and concrete steps taken.

1.2.1.3 Realisation

The dictionary definition of the word "realisation"[49] addresses the principal concern raised above. It stems from the verb "realise": "to make real", "to convert into reality", or "to have actual experience of".[50] Realising rights may take the form of commands ("enforcement"), or may include measures for direct and indirect protection ("implementation"). Furthermore, the term leaves room

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45 Forsythe (1991) at 57.

46 *Ibid.*

47 See Forsythe (1991) at 77.

48 It is sometimes argued that the elaboration of human rights in different treaties and other instruments has reached saturation. The focus globally should not be on "more rights", but on ensuring that those already codified, are complied with. In response to such sentiments, one may argue that the articulation and elaboration of human rights should not be regarded as something separate from implementation. Rather, they are both part of a seamless web. Identification and invocation of rights is foundational to effective implementation.

49 *The Shorter Oxford English Dictionary* (1973).

50 A question arises: To "realise" or to "realize"? According to most dictionaries both terms may be used. My preference for the first possibility is based on considerations of standardised "UK" rather than "US" English (see the Preamble to the European Social Charter: "further realisation of human rights").

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for promotional activities, such as standard setting and education. It is consequently wide enough and best suited to cover all the nuances set out above.

"Realisation" is also a term widely used. Two of the founding documents of the UN refer to this term: The **UN Charter** provides a role to the General Assembly to assist "in the realization of human rights",[51] and the **Universal Declaration of Human Rights** uses the term in its Preamble and as part of its provisions.[52] In the list of responsibilities given to the UN High Commissioner for Human Rights, he or she is empowered to "play an active role ... in meeting the challenges of the full realization of all human rights..."[53] It is also often invoked in the context of "progressive realisation" of socio-economic rights.[54] One of the most recently drafted UN human rights treaties, the Convention on the Rights of the Child ("CRC"), uses "realisation" as an overarching term, as illustrated in phrases such as "more conducive to the realisation of the rights of the child"[55] and "achieving the realisation of the obligations undertaken in the present Convention".[56]

It must be obvious that there is **no consistency** in the use of terminology in this field. Even if a preference for one term ("realisation") is expressed here, it will (and can) not be used exclusively or prescriptively. As indicated above, each of the terms denotes a difference of nuance. Many participants in the human rights discourse use terms interchangeably.[57] "Realisation" is used

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51 Art 13(1)(b) of the UN Charter.

52 In the Preamble, it refers to the "full realization" of the pledge to achieve the promotion of human rights, and in art 28 to the entitlement everyone has to a social and international order in which the rights in the declaration "can be fully realized".

53 UN GA Res 48/148(4) (1994), par 4 (f).

54 See eg art 2 of CESCR and eg Part I of the European Social Charter, which refers to the aim of effectively realising rights and principles.

55 Art 41 of the CRC.

56 Art 43(1) of the CRC.

57 See eg Peter in Peter and Juma (1996) at 69 - 70: "a law that does not have a mechanism for *implementation* is not worth the paper it is written on ... there were several hindrances to the *realisation* of the rights ... no mechanisms were provided for its *enforcement* ..." (my emphasis). See also Van Boven in Eide and Hagtvet (1992) at 37: "Human rights have to be *implemented* first and foremost at national and local levels. The primary responsibility of states to *realize* human rights is towards the persons who live under the jurisdiction of these states" (my emphasis).

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precisely because it comes closest to conveying what is contained in all the other terms, and serves as an **umbrella term** in this study.

1.2.2 "... of *human rights* ..."

The concept human rights, as understood for the purpose of this study, is primarily concerned with the **relationship between the individual and the state**. States are a given in Africa today, as is their impact on the lives of their citizens. Human rights is defined here as a concept that can be employed in any context where the individual (or groups of individuals) is the potential victim of externalised authority.[58] "Human rights", as used here, is a consequence of and tied to the forming of nation-states on the Western model. In this model, the individual inevitably is the "ultimate repository" of human rights in idealised liberal democracies, where protection takes the form of individual human rights in a "bill of rights" which may be invoked against the executive or will of the majority (the "group").[59]

The debate about the universality of human rights is, in my view, at least as far as traditional Africa is concerned, best understood when couched in terms of enforcement or realisation. The main problem with the debate is the imprecision of terminology. "Human rights" as concept is capable of many different interpretations. Three concepts recur: dignity, nation-state, and democracy. For some human rights is a concept inherent in mankind.[60] For others it carries a very circumscribed meaning - claims enforceable against a government, which is a product of the

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58 In the way defined by Howard (1991) 11 *Jnl of Contemporary African Affairs* 1: "These rights are claims against the state that do not depend on duties to it, although they do depend on duties to other citizens (eg, not to commit crimes). They are also rights that the individual can claim against the society as a whole". She makes it clear that these are aspects not necessarily realised, as all humans "ought to be entitled" to these rights merely by virtue of being human beings.

59 See Legesse in Thompson (ed) (1980) at 124.

60 See eg the communitarian approach, in terms of which membership of the "group" is the source or guarantee of dignity. There is no need to protect individual rights within the group. As Howard shows, this is based on a utopian view ((1991) 11 *Jnl of Contemporary African Affairs* 1 at 2).

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formation of a nation-state.[61] The view is adopted here that a distinction should be drawn between **substance and form**. Societies in different phases of development, in different cultures and hemispheres all subscribed to the **substantive notion of human dignity**. The very idea of a community undeniably presupposes tolerance and co-existence. This very fact made it possible for almost all the states of the world today to subscribe to the Universal Declaration of Human Rights and the CRC. A measure of cultural specificity does not in my view detract substantially from this universality. But divergence is the name of the game when one considers the **different forms in which human rights are to be realised**. Using rights as trumps that may be invoked against authority in the form of the state is and has not been accepted universally as the only way of realising rights.

The modern form of human rights protection developed after the Enlightenment and with the establishment of nation-states.[62] In statist societies notions based on human dignity came to be regarded as private, individual, autonomous "claims of the individual against society and the state".[63] Not only a developed state structure, but also a democratic social order is an assumption or prerequisite for the effective implementation of the Western concept of human rights. This stems from the principle that human rights protect individuals. Society is not regarded as a family unit, "but as something unavoidable which can easily abuse the power conferred on it".[64] In ideal liberal democratic state is the crystallisation of society and embodies the will of the people through majority rule. The concept "human rights" only enters the picture with the arrival of repressive state machinery. Westernisation, modernisation, urbanisation, development and exploitation have and are in the process of uprooting Africa's deep ties with tradition. Contemporary African states have greatly contributed to the severance of the individual from the closed, supportive community. The individual has almost no choice but to stand up against perceived and real oppression by the state and its pervasive bureaucracy.[65]

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61 See eg Donnelly (1982) 76 *American Political Science Review* 303.

62 See eg Motala (1989) 12 *Hastings Intl and Comp Law Review* 373 at 374 - 375.

63 Howard in An-Na'im (ed) (1992) at 82.

64 Pannikar (1982) 120 *Diogenes* 75.

65 Donnelly (1982) *American Political Science Review* 303 at 312 observed in this regard: "Society, which once protected [the individual's] dignity and provided him with an important place in the world, now

Footnotes continued on next page.

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Traditional Africa did not view "human rights" as claims enforceable by individuals against the group. This was occasioned mainly by and coincided with a lack of comprehensive state structures and conceptions of the "state" in traditional Africa.[66] Considering the sociology of traditional Africa, most writers identify the individual's absorption into the group as one of the overriding characteristics of those societies. Kéba M'Baye, the "father" of the African Charter, describes how the individual in Africa, "completely taken over by the archetype of the totem, the common ancestor or the protective genius, merges into the group".[67] Being both socialist and humanistic, traditional Africa "could not fail to have particular respect for man and for all that attaches to him, including his rights".[68] This human-centredness is echoed in to name but three contemporaneous

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appears, in the form of the modern state, the modern economy, and the modern city, as an alien power that assaults his dignity and that of his family".

66 The assumption is often made that traditional African societies lack both state structures and democracy. From this assumption it would follow that human rights cannot be meaningfully enforced in these societies. This is however only partly correct and does not present a true reflection of the diverse forms of governance in traditional Africa. For most Africans in traditional societies the notion of the state or central authority did not exist. The unit in which people lived was based on kinship and close ties. Society was run on the basis of consensus. The human worth, dignity and survival of all was the concern of all. When conflict arose, it was a communal concern. A tribunal consisting of elders of the community sought to redress the imbalance caused within their group. In resolving these conflicts, members of the group certainly had "rights", for example the right to compensation, the right to dignity, the right to life. But these are, from a contemporary Western perspective, subjective rights, and not "human rights" protecting the individual from state repression. But a rigid distinction between statist and non-statist societies does not take into account the different levels of statism in traditional Africa. Pre-colonial African political organisations can roughly be divided into centralised and decentralised "nations" (Elias (1956) at 11). It is generally accepted that the centralised form was the exception. The dominant model may have been the tribe and the inability to air claims against the community. The Bamileke people of western Cameroon is one group that had a coherent and efficient system of centralised government. Three levels existed: the family, the district or quarter and the central level of authority. The administration of justice resembled the three-level division. At the first level, the head of the family was responsible to settle conflicts. At the second, the head of the quarter "had to assure the respect of the social order, rights and individual liberties" (Temgoua (1994) at 7). The supreme judicial authority was vested in the Fo, who could overturn decisions of the quarter head that "infringed on the rights of a villager" (Temgoua (1994) at 8).

67 Vasak (ed) (1982) vol 2 at 589.

68 M'Baye in Vasak (ed) (1982) vol 2 at 589.

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examples, the Woloff saying "Nit moodi garab u nit",[69] the Dinka term "cieng"[70] and the concept "ubuntu"[71].

But this does not deny the existence of **human dignity** in these societies. Numerous writers have identified a long list of "human rights" in traditional Africa. In his discussion of "rights and freedoms" in traditional Africa M'Baye refers to the right to life, to work and to education. Especially the right to work and to education is tied to membership of the community.[72] Work is both a right and a duty in societies structured along socialist lines. Education is a communal function that is not institutionalised. Freedom of expression, of association, of movement and religious freedom also existed in traditional Africa, M'Baye argues. Wiredu concedes that it may be misleading to assess principles without having regard to practice.[73] Basing himself on "empirical confirmation", he illuminates divergent Akan practice with reference to "a premeditated abrogation" (the ritual killing of a tribe member to accompany the deceased chief) and "a situational diminution of a human right" (the circumscribed freedom of expression of minors).[74] Slavery, a caste system, human sacrifice and the killing of baby twins were identified as examples of "institutionalized derogations from human rights"[75] in African societies. Dignity is not a claim against society, Howard continues, but is "something granted at birth ... as a concomitant of one's particular ascribed status ... and is earned during the life of an adult ... who accepts normative constraints on his or her particular behaviour".[76] As a general observation, one may contrast the position of children and the elderly in modern constitutional states with similar groups in traditional African societies. The phenomena of neglected street children and forgotten elders did not occur in

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69 Translated as "man is man's own cure"; reference was often made to this by Senegalese leader and deputy to the French Parliament Leopold Senghor.

70 Meaning "respect for self and others, loyalty and piety, compassion and generosity, and unity and harmony": Deng in An-Na'im and Deng (eds) (1990) at 266.

71 "Ubuntu" may be equated with "humaneness" and "human dignity", see the "post-amble" to the Constitution of the Republic of South Africa 200 of 1993 and *S v Makwanyane* 1995 6 BCLR 665 eg at paras 237, 241 (*per* Madala J), 311, 313 (*per* Mokgoro J) and 374 (*per* Sachs J).

72 See, in general, his contribution in Vasak and Alston (eds) (1982) at 583 – 601.

73 Wiredu in An-Na'im and Deng (eds) (1990) at 257.

74 Wiredu in An-Na'im and Deng (eds) (1990) at 258 - 259.

75 Eze (1984) at 12 - 13.

76 An-Na'im (ed) (1992) at 83.

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societies where the dignity and harmonious co-existence of all members of the group were paramount.

Human rights, as understood in this study, thus only follows the formation of states. Because state formation in this sense came about through colonialism, human rights also became relevant only after colonialism - not as a product of colonialism as such, but as an **inevitable adjunct** to the introduction of repressive, alienating state machinery created and nurtured in its aftermath.

1.2.3 " ... in *Africa* ..."

To use the concept "Africa" in this context is at once too wide and too narrow, too general and too specific.

Using the concept "Africa" is like trying to paint minute details using broad strokes across a canvass. Any invocation of an African identity is over-generalised and stereotypical. "African law", for example, is a phrase used at one's peril, as it presupposes some underlying similarity in the legal systems on a continent of some 600 million people.[77] African states differ in obvious ways as far as human rights are concerned:

- The **status of ratification** of documents, and protocols thereto, differs from country to country. One state (such as Namibia) may have ratified all the major human rights instruments, while another state (such as Djibouti) may have ratified very few of these instruments.[78]
- If more than one state had ratified an instrument, the **status** which that international instrument has **in domestic law** may differ. This status is to a large extent based on theories that are remnants of colonial legal legacies, referred to as dualist and monist theories.[79]
- **Socio-economic conditions** and levels of **development** vary greatly across the continent.

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77 Since 1965 Africa has had the highest population growth in the world (see Africa Institute of South Africa (1995) at 16).

78 See Table B in ch 2.

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- Political systems and **levels of democratisation** differ. Even in countries where elections have been held since 1991, the levels of liberty and democratic participation differ significantly.

- Cultures differ. In some instances **cultural practices**, which are widely condemned in human rights circles, such as female circumcision, are rife.

- In some countries the internal **legal system is not functioning**, and is sometimes almost non-existent, making **judicial independence** an illusion.

- The impact of **colonial control** is another cause for variance, being still reflected in different legal systems and language policies.

- As for **religion**, Christianity and Islam are two dominant religions that took a foothold in various African regions, while traditional religions also continue to play an important role in African spiritual life.

- **Ethnic diversity** is another factor that creates diversity, not only within but also between states.

- **Membership** of international or **regional organisations** varies.[80]

If the concept "Africa" is used uncritically, its focus is too specific and narrow, in that it suggests that there is a peculiarly African way of realising rights through supra-national institutions that differs fundamentally from the realising of rights in other regions and in the global context. The implied invitation to enter into the debate about the universality or particularity of human rights is not taken up here. However, in analysing the African system of protection, specific African instruments (such as those on refugees and dealing with children) will be juxtaposed with their international equivalents.

An effort will be made here to account for and to overcome this paradox. On the one hand, the study deals with specific countries, with measures taken in particular jurisdictions, and reporting

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79 See ch 3.4 below.

80 See ch 5.4 below, on African membership of eg the Arab League and the Organisation of Islamic States.

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obligations by individual states. These specific experiences will be extrapolated to observations about Africa as a whole. On the other hand, while the discussion remains rooted in African soil, taking account of realities here, notice is also taken of other regional systems and international trends. The ultimate aim is to investigate ways of securing the fullest possible realisation of rights in Africa.

1.2.4 "... inter-governmental ..."

An individual's human rights may be realised by institutions which have been put in place at four levels: **domestically** (at the national level), **sub-regionally** (on the "sub-continental" scale), **regionally** (in the "continental" sphere), and **globally** (at the universal level).

As a pebble is thrown into tranquil waters, it unsettles the undisturbed surface. At the point of impact the reaction is at its most violent and visible. From there, outwardly, circles form concentrically. The violation and redress of individual rights form a similar pattern. The effect of a violation is felt first and foremost where it occurs, in the state itself (at the national level). The next two potential rings of protection are slightly more remote, and lie at the sub-regional and regional levels. At the outer circle, potentially encompassing all regions and localities, one finds the global system of human rights protection. The outer circles may, ultimately, all be traced back and are linked to the initial "point of impact", because it is specific human rights which give rise to their creation, and it is at the elimination of these violations that the human rights machinery in its various forms is aimed.

At the inner circle, the national level, a **single government** is primarily responsible to protect the human rights of persons within the national jurisdiction. All the other circles of protection are formed through co-operation between **more than one government**, and together constitute the **international human rights system**. **This study focuses on inter-governmental activities and is thus restricted to the international level**. Human rights protection through national institutions as such is not discussed, but will be referred to in so far as it impacts on inter-governmental human rights institutions.

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Although the international human rights system is predominantly made up of inter-governmental institutions, non-governmental institutions also play a role of increasing importance. NGOs are important role players in the regional and global human rights systems.[81] Some **international NGOs** ("INGOs"), such as "Article 19", Amnesty International, the Danish Centre for Human Rights, Human Rights Watch/ Africa Watch, Interights,[82] the International Commission of Jurists and International PEN are active on a global scale, and have also been involved in the African context. Other INGOs only operate on a regional or sub-regional level. African INGOs, which have been accredited by the African Commission, include the Southern African Research and Documentation Centre, the African Centre for Democracy and Human Rights and the African Association of International Law. A sub-regional INGO, the Southern African Human Rights NGO Network ("SAHRINGON") has recently been formed in Southern Africa.[83] The contribution of INGOs as such is not discussed here, but reference to some of their activities will inform the issues addressed by this study.[84]

The concept "inter-governmental" refers to the international sphere, and of necessity implies a distinction between the **national and international spheres** in relation to the realisation of human rights.

1.2.4.1 National level

Every person lives in an immediate legal environment, that of his or her own state. In an ideal world, all the rights of that person would be secured by the legal system, which impacts on his or her life. The ideal legal position would be one in which legislation, common law and courts provide for the fullest possible realisation of all rights. If isolated violations occur, courts or other institutions would offer redress. Redress may be secured through legal, quasi-legal or non-legal means.

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81 See eg Otto (1996) 18 *HRQ* 107 and Sanders (1996) 18 *HRQ* 67.

82 The International Centre for the Legal Protection of Human Rights, based in London.

83 See ch 4.3.2 below.

84 For a single example, see the role of the International Commission of Jurists in the drafting of the Protocol establishing the African Court on Human and Peoples' Rights in ch 7.1.

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Even if one does not live in an ideal state, the domestic **legal system** still provides the parameters in which one lives one's life. Human rights standards may be incorporated into domestic law through many possible avenues. Administrative law, labour law, criminal justice, civil procedure, a government's socio-economic programmes or priorities may all embody these principles. They may also be formally included in the Constitution. Such formal adherence to human rights is usually emphasised in human rights discourse. This emphasis easily leads to the danger of negating realities by focusing on formalities. If an individual's rights are not realised through national law, domestic mechanisms should be in place to redress the situation. These mechanisms will usually consist of **courts**, either in the form of the ordinary courts, or a specialised constitutional court.

In addition to the judicial enforcement of rights, **quasi-judicial** possibilities may also exist. This could take the form of a commission, which investigates complaints of human rights violations and endeavours to reach friendly settlements between parties. It may also be an institution that has a more specific mandate, for instance an ombudsman, which investigates complaints of abusive or corrupt exercises of governmental authority.[85]

Non-judicial means of ensuring that human rights are protected in a state include public criticism through a free press and mobilising pressure through agents of civil society, such as NGOs and community based organisations ("CBOs").

Neither the international community, nor international human rights norms stand isolated from these domestic processes. In an ideal state, national and supra-national human rights protection will overlap completely. In fact, the extent to which international norms are integrated into domestic law, to a large extent determines how comprehensively rights are realised in that state.

1.2.4.2 International level

Having elaborated upon the importance and immediacy of the national legal system in ensuring human rights to individuals, it must be stressed that this study focuses on the international (or

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[85] A commission may also have the specific mandate attributed here to ombudsman institutions.

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supra-national) level. The innermost circle of this level is the sub-regional, the middle ring is the regional, and the outer circle the global. These supra-national systems contain minimum standards that all member states undertake to embody domestically. Some of them also provide a forum where nationals of these states may seek redress if their own domestic legal system has not provided them with a remedy.

Two bodies are mainly responsible for human rights standards and their implementation on a **global scale**. They are the ILO and the UN. The Constitution of the ILO dates back to 1919, when it formed part of the Treaty of Versailles. It introduced reporting by states on their obligations in terms of labour conventions and the examination of complaints by states. The UN was formed in 1945, after the Second World War. Its founding Charter elevated respect of human rights to one of the organisation's principles.[86] Starting with the Convention on the Prevention and Punishment of the Crime of Genocide,[87] a plethora of human rights instruments have been adopted under UN auspices.[88]

Despite the extensive provision for human rights under the ILO and the UN, experience has shown that **regional systems** of human rights realisation are more effective than systems with a universal scope. Shared cultural, legal, political and intellectual traditions are more likely to serve as a basis for particularised and effective human rights protection in the regional context. Shame and pressure are also mobilised more effectively in respect of those states that are in constant contact and are forced to co-operate with one another. It was at the regional level, in Europe, that the first system allowing for effective individual complaints against governments was introduced. This system has become the model of human rights realisation worldwide. In the Americas, the Inter-American Commission evolved and the Inter-American Court was established. An African system has been the latest addition. In other regions, such as the Arab and Asian worlds, similar trends are noted.[89]

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86 See eg art 1(3), as well as arts 13(1)(b), 55(1), 62(2) and 68.

87 Adopted by the General Assembly on 9 December 1948, a day before it adopted the Universal Declaration of Human Rights.

88 For a chronology of events, and texts of these instruments, see United Nations (1995).

89 See ch 5 on these regional systems.

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1.2.4.3 Three competences, three levels

Governmental authority is usually portrayed as being channelled through **legislative, judicial and executive** branches of competence. Ideally, these three branches co-exist in the **domestic** sphere. There usually is a **lawmaker** to enact human rights legislation when needed. Furthermore, there usually is a **judiciary** (courts) to assist in interpretation and application of human rights law. Lastly, there usually is an **executive** (with a police force, prisons and armed forces) to ensure immediate compliance with the provisions of the law, including human rights law.

Law making also takes place at the regional level, in the form of human rights standard setting. Examples of regional standards are the European and Inter-American Conventions, and the African Charter. However, standard setting at the **global level is much more elaborate**, as the multiplicity of human rights instruments that have been adopted since 1948 demonstrates.

Some judicial institutions (such as the European and Inter-American Courts of Human Rights) for the application and interpretation of human rights exist at the regional level. **No permanent human rights court** has thus far been created at the global level.[90]

Effective execution of court (or other) orders (or "enforcement" of human rights standards) is lacking at both the regional and global levels. There is no regional or global police force, or prison or "army" to ensure compliance. For this reason, states use indirect means to ensure adherence to human rights standards adopted by inter-governmental arrangements. These measures usually amount to pressure by cutting diplomatic, trade, sport and other ties with the recalcitrant state. Because these ties are stronger in a regional context, such sanctions are bound to be more effective when they are imposed by states in the same region as the target state. For this reason, regional institutions provide greater potential for eventual compliance. Sub-regional institutions should, by the same token, provide even stronger enforcement.

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90 But see ch 2.6.3 below on steps taken towards the establishment of a permanent International Criminal Court.

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1.2.5 "... institutions."

The term "institution" is used in two senses in the title and further on in this study. In one sense, it refers to "an establishment, organisation or association, instituted for the promotion of some object, especially one of public utility".[91] Examples are churches, universities and charitable **organisations** such as the MOTHS[92] and Black Sash (in South Africa). In another sense, the term "institution" is used to refer to something much narrower. In this respect, an "institution" is an organ or body which is caused to come or is brought into existence, or which is set up.[93] Examples are **commissions, courts and committees**. As used in its first (macro) sense, "institutions" (or organisations) at the supra-national level include the **UN**, the **OAU**, and various other sub-regional organisations in Africa. Used in its second (micro) sense, "institutions" (or mechanisms) at the supra-national level include the various UN **treaty bodies**, the African **Commission** on Human and Peoples' Rights, **courts** provided for under regional treaties, and a possible African Court on Human and Peoples' Rights. In other words, the "inter-governmental institutions" of the title not only refers to organisations (or "macro-institutions"), such as the UN and the OAU, but also to mechanisms (or "micro-institutions") created within the ambit of those organisations.

This differentiation overlaps to a large extent with the distinction between the "parent" bodies (macro-institutions), such as the UN, the OAU or the Council of Europe, and the human rights agencies or bodies (micro-institutions), such as the UN Human Rights Committee, the African Commission and the European Commission and Court of Human Rights.[94] In each instance, the "parent" organisation has a broad mandate, which **includes human rights** matters as only one of its different objectives. The "human rights agencies or bodies", on the other hand, have a restricted mandate which relates **exclusively** to human rights issues.

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91 *The Shorter Oxford English Dictionary* (1973).

92 Organisation of War veterans: Memorable Order of the Tin Hats.

93 See the use of the verb "institute" in eg *Webster's Third New Dictionary* (1961).

94 But not totally: Some sub-regional organisations in Africa include human rights as part of their general mandate, but no specific agency or body has been created with an exclusive human rights mandate.

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1.3 Importance of this topic

The following aspects will be highlighted here: the concern of this study with reality, rather than with abstract concepts and theory; its emphasis on the judicial dimension of realising rights; and the pressing relevance of contextualising such a study in Africa.

1.3.1 Analysis and praxis

One of the perennial debates in academic and scientific circles is that between **theory and practice**, between analysis and praxis. This tension is omnipresent in human affairs, from religious teaching[95] to the teaching of law. A nagging concern to observers of the human rights scene has been the inability of supra-national measures to secure observance of human rights.[96] In few areas of law has the said and done become as removed from one another as in this one. A few examples are given:

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95 See eg Qur'an 61:2 and 3: "Oh, believers, why do you preach what you do not practice; it is most hateful to Allah that you preach what you are not practising" and eg James 1: 23-25: "Anyone who listens to the word but does not do what it says is like a man who looks at his face in a mirror and, after looking at himself, goes away and immediately forgets what he looks like. But the man who looks intently into the perfect law that gives freedom, and continues to do this, not forgetting what he has heard, but doing it - he will be blessed in what he does".

96 This does not imply that the same tension is not present within the domestic legal systems and their efforts to protect human rights. A single, but telling, example from a domestic system is the following: During argument before the South African Constitutional Court about the constitutionality of corporal punishment for juveniles, the state conceded that such punishment in the case of adults would be unconstitutional. The court formally declared juvenile whipping unconstitutional in 1995. On 4 August 1996 a newspaper report described how a court of elders in Hammanskraal, near Pretoria, found guilty an alleged thief and how punishment of ten cuts with a home-made sjambok was meted out before a crowd of onlookers: see Khupiso "The Law unto themselves" (4 August 1996) *Sunday Times* 25. A less subtle example is provided by Rwanda when the ethnic violence ripped that society apart. The Rwandese Constitution, then in force, guaranteed all the basic "public liberties", including equality of all citizens (art 16), liberty of association (art 19), and the right to privacy and to an inviolable domicile (art 22).

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- Declarations and treaties on equal rights for women and on the right to development for the downtrodden starkly contrast with the realities of women's subordination and deeply embedded patterns of underdevelopment.

- The ratification by Sudan of ILO Convention 100 concerning Equal Remuneration for Men and Women Workers for Work of Equal Value means little in a society where female education and participation in the formal employment sector is very low. The fact that Sudan has ratified the Slavery Convention[97] also means nothing to the Dinka children and women held by Rizeigat families in the north.[98]

- Conditions of drought and poverty in countries such as Ethiopia, Mali and Somalia have made the "full realization" of socio-economic rights a very distant ideal in those states, despite their ratification of the CESCR.[99]

- Burundi and Rwanda, sites of ethnic strife and bloodshed, have both ratified the CERD, in terms of which states undertake to "prohibit and bring to an end ... racial discrimination by any person, group or organization".[100]

- The reality of the denial of basic civil and political rights in Zaïre[101] also contrasts sharply with the lofty provisions of the CCPR, which were (and still are) binding on that state.

Human rights protection at the international level in its modern guise is a reaction against the atrocities of the Second World War. Its founding document is the Universal Declaration of Human Rights, adopted by the UN General Assembly in 1948. The declaration was regarded as non-

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97 UN Treaty Series vol 212 at 17, entered into force 7 July 1995.

98 See Mahmud and Baldo (1987).

99 See eg the obligation on states in art 2(1) of CESCR.

100 Art 2(1)(d) of CERD. "Racial discrimination" is defined as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights ..." (art 1(1) of CERD).

101 Now, the Democratic Republic of Congo. In this study, which in most respects sets out the position as at 31 March 1997, reference to the name of the state then (Zaïre) is retained.

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binding, as creating a framework for more effective and binding measures to come. These instruments were slow in materialising. Only in 1966 was consensus reached on the provisions of the CCPR and the CESCR. Only in 1976 was it possible to move from the declaratory and elaborating phase to a **phase of implementation, enforcement and realisation**. In that year, the required number of states had ratified the conventions, allowing them to start operating in respect of states parties. The CERD followed a similar route. It entered into force in 1969. The procedure allowing for individual petition only came into effect much later, in 1982, when the required number of states (only ten) had permitted it officially.[102]

Today there is a widespread sense of **disillusionment**, cynicism and disappointment about the process of converting the noble-sounding ideals expressed in these various documents into reality. Writing at the end of the 1980s, Elias observed that the "expression of the universal aspirations"[103] could hardly be bettered. But he continued: "What is urgently needed now is the establishment of international machinery and techniques for the implementation of human rights".[104] Awareness of these deficiencies has made enforcement a focal point, and has also **inspired reforms**. Attempts at improving implementation of human rights through supra-national mechanisms were high on the agenda of the Vienna Programme of Action.[105] Recent attempts include the adding of a Protocol to CEDAW, giving states an option to accept individual complaints against them.[106] A Protocol to CESCR is also being considered, in terms of which individual complaints may be directed to the Committee on Economic, Social and Cultural Rights.[107]

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102 See Forsythe (1991) at 81 (n 10).

103 (1988) at 216.

104 *Ibid.* In this respect, the UN High Commissioner for Human Rights made the following remarks to UN workers in 1995: "In general, I believe that we all agree that there is no shortage of international human rights standards. Nor, unfortunately, is there a shortage of situations demanding an improvement of respect for human rights. Our basic challenge is to implement human rights standards and make human rights meaningful in people's lives" (UN doc E/CN.4/1996/50/Add.1).

105 See par E of the Vienna Declaration and Programme of Action, UN doc A/CONF.157/23.

106 See eg Steiner and Alston (1996) at 560.

107 The CESCR Committee has submitted draft proposals to ECOSOC for an optional protocol to the Covenant on Economic, Social and Cultural Rights to provide for the consideration of communications by individuals (E/C.12/1996/CPR.2/Add.1 of November 1996). See also (1996) 10 *Interights Bulletin* at 160. On the violations approach to socio-economic rights, see Chapman (1995) 23 *The ICJ Review* 55.

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The same movement from elaboration to implementation also characterises the regional human rights systems. In the European system, for example, it took many years before states accepted individual complaints. Today, new members join the Council of Europe on the understanding that they will accept this competence. In terms of the ECPT, the treaty body undertakes visits to states without their consent.

This study is an attempt to concretise the often abstracted discussion on supra-national human rights in Africa. This is of particular importance because African leaders often employ the rhetoric of adherence, without heeding the practical consequences.

1.3.2 The judicial dimension

The movement toward emphasis on implementation coincides with the institutional progress of judicial mechanisms worldwide. This is true of **regional** human rights protection, in terms of which the European **Court** and Inter-American **Court** have been established.

A tendency to judicialise the resolution of international conflict is underscored by the dispute settlement procedures recently allowed for under the UN Convention on the Law of the Sea. This convention, which entered into force in 1994, provides for non-permanent methods (including arbitration), and permanent judicial structures.[108] The latter is comprised of the **International Tribunal for the Law of the Sea** and a separate Sea-Bed Disputes Chamber. Another example of this trend is the reaction of the international community to the atrocities in former Yugoslavia and Rwanda. What happened was a clear contravention of international human rights law and humanitarian law. Without a mechanism to ensure compliance, the perpetrators would get away with impunity. In reaction to the atrocities in Bosnia and Herzegovina, the Security Council established an *ad hoc* **criminal tribunal**. The same happened in Rwanda.[109] This development exemplifies the international community's commitment to ensure that the perpetrators do not get away with impunity, and strengthens efforts towards establishing a permanent international

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108 See Rosenne (1995) 89 *AJIL* 806.

109 For more on this tribunal, see ch 2.7.3 below.

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criminal tribunal. The intensified calls for a permanent international penal tribunal is confirmation of the perception that human rights can be secured at the supra-national level by a judicial organ.

The **role of courts or judicial institutions in the realisation of human rights** will receive special attention in this study. One should bear in mind that international, especially regional, courts are of relatively recent origin. As other methods of ensuring compliance with human rights at the supra-national level are found wanting, increased recourse may be had to judicial institutions. The International Courts Project, launched as part of the UN Decade of International Law (1990 - 1999), is an attempt at co-ordinating efforts in this direction. The aim of the project is "to contribute to the progressive development of international adjudication in the 21st Century by researching, drafting ... new conventions, statutes and model codes ... which will improve and create new international courts and arbitral tribunals".[110]

This focus on courts implies that **judicial decisions** are accentuated. As far as the UN is concerned, a number of judgments by the ICJ are analysed. At the regional level the "quasi-decisions" of the African Commission, and some decisions of the European and Inter-American Courts are discussed. Decisions given by sub-regional judicial institutions are of relevance, while the domestic incorporation of the African Charter is discussed with reference to judicial pronouncements.

1.3.3 The African context

Human rights realisation through supra-national institutions serves as a "last resort" when national legal systems do not provide redress. The need for such a system is all the more pronounced in Africa, compared to Europe, and partially, to the Americas, and is occasioned by some of the following factors:

- Domestic judicial systems in most African countries are weak, understaffed, institutionally underdeveloped and sometimes non-existent.

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110 Janis (1992) at 1.

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- Courts often lack independence and impartiality in their functioning.
- Legal norms, or the idea of "the rule of law" has permeated inadequately into traditional African society.
- Access to courts is difficult for the many people who still live in rural areas, and do not speak or write the national language.

1.4 Work already done in this field

As for the **UN** and its role in realising rights in African countries, attention in publications on the UN is sometimes devoted to regional groupings, but not to Africa specifically.[111] Despite its promising title,[112] a work by Elias deals with human rights in international law generally, without investigating the specific implications for or implementation in Africa. Recently, some contributions highlighting international human rights realisation have appeared in the *Interights Bulletin*[113] and were expressed at the yearly meeting of the African Society of International and Comparative Law.[114]

Being regarded as almost a non-issue, the human rights record of the **OAU** was not the topic of discussion in the founding years of that organisation. When the African Charter was adopted in 1981, academic writing concentrated on its provisions, their peculiar "African" characteristics and sometimes speculated about their potential application. Publications tended to discuss provisions of the Charter in the abstract, without linking them to the surrounding context. Much emphasis

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111 See eg Bayefsky in Henkin and Hargrove (eds) (1994) and the voluminous compilation about international protection of children by Verhellen (ed) (1996), which contains 4 contributions of an African nature out of a total of 68. More signs of neglect or disregard for Africa in this field is found in the recent publication of Conforti and Francioni (eds) (1997), dealing with the enforcement of international human rights in domestic courts. States from all continents except Africa are included.

112 (1988), the work is entitled *Africa and the Development of International Law*.

113 See eg Odinkalu *et al* (1994) 8 *Interights Bulletin* 67.

114 See the record of proceedings eg (1990) 2 *ASICL Proc*, (1991) 3 *ASICL Proc*, (1992) 4 *ASICL Proc*.

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was also placed on the status of ratification by the OAU member states. Before the Charter entered into force this tendency could be explained. But the trend continued after the African Commission was inaugurated in 1987. The lack of focus on the actual functioning of the system may be explained with reference to the regime of secrecy. This factor impeded academic analysis, especially of the role played by the African Commission. Examples[115] of this earlier trend are found in the writing of Ndiaye,[116] Balanda,[117] Okere,[118] Gittleman,[119] Kannyo,[120] Eze,[121] Benedek,[122] Mbaya,[123] and Gye-Wado.[124]

Notwithstanding these drawbacks, a sizeable literature on the actual performance of the Commission gradually developed, as some commentators endeavoured to emphasise the practical realities of the Charter system. An example is Gutto's *Human and Peoples' Rights for the Oppressed*.[125] A first attempt at analysing the state reporting system under the Charter was undertaken in 1992.[126] This was followed by a work by Astrid Danielsen, *The State Reporting Procedure under the African Charter,*[127] the first detailed analysis of the work of the Commission in this field.[128] Wider access to the reports and the Commission's debates considering these reports has subsequently been facilitated. In 1995 the Danish Centre for Human Rights started publishing

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115 No attempt is made to provide an exhaustive list of publications. The aim here is merely to illustrate tendencies.

116 In Vasak (1982) at 1.

117 In Ginther and Benedek (eds) (1983) at 134.

118 (1984) 6 *HRQ* 141.

119 In Welch and Meltzer (1984) at 152.

120 In Welch and Meltzer (1984) at 125.

121 (1984).

122 In Kunig *et al* (1985) 59.

123 In Bernhardt and Jolowicz (1985) at 77.

124 (1991) 11 *Nigerian Forum* 194.

125 (1993).

126 By Gaer (1992) 10 *NQHR* 29.

127 She was sent to the Secretariat as an intern by the Danish Centre for Human Rights. It was published in 1994 by that Centre.

128 She was able to undertake this project as she had personal experience of the system, and had free access to the materials at the Secretariat.

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transcripts of the examination of the state reports, with copies of the reports annexed.[129] An earlier useful source on the evolution of the African Commission's practice is the session-by-session reports in the *Netherlands Quarterly of Human Rights*, reported by Benedek,[130] Danielsen,[131] Malmström[132] and Oberleitner.[133] In their academic and scholarly contributions some commissioners have also provided important information on and insights into the realities of the Commission's work.[134]

The clearest indication of a paradigm shift away from abstract speculation to reporting of actual activities undertaken by the Commission is Ankumah's work, *The African Commission on Human and Peoples' Rights*, published in 1996. This work does not deal with the potential and possibilities of the Charter, but concerns itself with the concrete ways in which communications have been handled by the Secretariat and the Commission, with the Commission's decisions on "receivability", admissibility, and with the merits of many of these communications.[135] Lindholt's *Questioning the Universality of Human Rights: The African Charter on Human and Peoples' Rights in Botswana, Malawi and Mozambique*[136] seeks to gauge the impact of the Charter in the domestic law of the three named countries, but this contribution remains speculative. When decided cases were referred to, they were from the European and the Inter-American systems and not from Africa.[137]

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129 Under the editorship of Astrid Danielsen and Julia Harrington. The publication of these transcripts followed a decision by the Commission to authorise their publication in October 1994, at the 16th session.

130 See eg (1994) 12 *NQHR* 85 and (1994) 12 *NQHR* 469.

131 See (1995) 13 *NQHR* 80.

132 See (1996) 14 *NQHR* 92

133 See (1995) 13 *NQHR* 476.

134 See eg Dankwa (1990) 2 *ASICL Proc* 29; Umozurike (1992). Others have tended to be rather academic or theoretical, see eg Nguema (1992) 2 *Review of the African Commission on Human and Peoples' Rights* 86.

135 See also Murray (1997) 46 *ICLQ* 412, who analysed the Annual Activity Reports in relation to procedure and decisions on admissibility, procedure on the merits, interim measures, decisions on the merits and follow-up measures.

136 Published in 1997.

137 See also the earlier but less elaborate contribution by Neff (1984) 33 *ICLQ* 331.

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When proposals for an **African Human Rights Court** have been raised with new vigour in the 1990s, they were accepted almost without reservation. Academics and commentators, it seems, did not want to be seen to oppose the idea. Their silence may also be due to a fear that they may oppose one of the only attempts at improving the African human rights system. Some authors later examined various aspects of the Court's establishment,[138] and a detailed analysis of the Protocol followed.[139]

Little attention has been directed to the potential role of human rights within **sub-regional** arrangements in Africa. Mvungi's examination of the role of constitutional issues in the process of regional integration in Southern Africa (under SADC), tentatively deals with related matters.[140]

1.5 Modus operandi *and research methodology*

The approach adopted in this study is both **descriptive and prescriptive**. The description of the international human rights system is inevitably influenced by the focus on African aspects. For example, when the ICJ, the UN Human Rights Commission and the International Tribunal for ex-Yugoslavia are discussed, matters of interest from an African perspective are identified and emphasised. The prescriptive aspect, intent on devising strategies for improved realisation of human rights, is premised on the assumption that institutional arrangements have a role to play in such a project. The institutional dimension includes structures created by the international community, the regional arrangements and sub-regional inter-governmental institutions.

The following sources were consulted and avenues were explored:

- An initial **literature search** was made. The major books and journal articles on human rights in Africa, both in English and French, were consulted.

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138 See eg Peter (1993) 1 *East Africa Jnl of Peace and Human Rights* 117, Heyns (1994), Sock (1994) 2 *African Topics* 9.

139 Naldi and Magliveras (1996) 8 *RADIC* 944.

140 See Mvungi (1994).

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- In 1995, I went on an **overland tour** of twenty African countries (Zimbabwe, Zambia, Malawi, Tanzania, Kenya, Uganda, Zaïre, CAR, Cameroon, Nigeria, Togo, Benin, Ghana, Côte d'Ivoire, Mali, Senegal, Gambia, Mauritania, Morocco and Egypt). In most of these, I visited a law faculty, the highest court, its registry or library, human rights NGOs and government officials. I was granted access to sources and conducted interviews with people at these institutions.

- Other **African countries visited**, on various other occasions, are Namibia, Botswana, Lesotho, Swaziland, Mozambique and Angola.

- On two occasions (in 1994 and 1995), I **visited the African Commission's Secretariat** in Banjul.

- I **attended the 16th session of the African Commission,** held in Banjul, the Gambia. At that session, held in October/November 1994, the country reports of Benin, Cape Verde, and the second report of Gambia were examined.

- I consulted with **officials of the South African government** (Department of Foreign Affairs) on the draft Protocol adopted at Cape Town and obtained documentation from them on the subsequent process.

- As for modern technology, the **Internet** has also proved a valuable source. This was not so much the case on Africa as such,[141] but certainly on the involvement of the international community in Africa.

1.6 Overview of chapters

The study is presented in the form of eight chapters, following this first one:

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141 Although there are exceptions, such as the information available on Zambia: See web site of Zambia Legal Information Institute http://lii.zamnet.zm:8000/.

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- **Chapter 2** investigates the realisation of rights in Africa in terms of international treaties and declarations under UN and ILO auspices. The focus is on the contribution of this system to the realities in Africa. Africa's contribution to the global framework and the global system's contribution to Africa will be juxtaposed.

- **Chapter 3** deals with regional human rights protection in Africa under the auspices of the OAU. The potential and realised role of the African Commission on Human and Peoples' Rights under the African Charter of Human and Peoples' Rights is investigated. Reference is also made to other regional human rights instruments, such as the OAU Refugee Convention and the African Charter on the Rights and Welfare of the Child.

- In **Chapter 4** sub-regional arrangements in Africa are reviewed. Their past, present and future role in human rights protection is discussed.

- Human rights regimes created by inter-governmental institutional co-operation in Europe, the Americas and in other regions are sketched in **Chapter 5**. Emphasis falls on the institutional arrangements adopted under each system, and the relevance for Africa is investigated.

- In the next three chapters the focus falls on the recent development towards the establishment of a supra-national judicial mechanism in Africa: **Chapter 6** traces the historical background to the proposed Protocol to establish a Human Rights Court for Africa and investigates arguments advanced in favour of such a mechanism. This Protocol forms the basis of discussion and analysis in **Chapter 7**. In **Chapter 8** arguments against the creation of a court along the lines suggested in the Protocol are raised and analysed. Alternative solutions are also suggested and discussed.

- A conclusion on ways to improve human rights realisation at the all-African level is embodied in **Chapter 9**.

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1.7 Difficulties and limitations of this study

1.7.1 Study not comprehensive of African experience

The difficulties inherent in the facile generalised reference to "Africa" are not overlooked. The study is directed towards a view of the main currents running through and characteristics identifiable in Africa. In a thesis such as this one it would be impossible to account for all the nuances of difference. A country-by-country report on issues pertaining to human rights can account for individual differences.[142] The study will refer to individual examples, but does not endeavour to give an overview of the state of human rights in each and every country. The same applies to the views of academics, judgments by courts, journals consulted, interviews conducted and countries visited - these sources had to be selected, sometimes in a haphazard way. This study accepts the premise that conclusions and generalisations can, in any event, never be based on a totality of comprehensive or representative data.

1.7.2 Inaccessibility of sources

One of the major factors impeding free choice of sources in this particular instance, had been their non-existence in written form, their scarcity and inaccessibility.

As for the UN, it is difficult to find access to the most **recent information**. Modern technology has only been partially helpful in bridging these obstacles.

Numerous articles have been written about the **African Charter**, but little detail has been given about its practical functioning. For information about the actual functioning of the African

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142 For such country by country reports, see eg the annual reports by Amnesty International, the *Country Reports on Human Rights Practices for 1992* by the United States Department of State, submitted to the US Senate and the US House of Representatives (1993), Donnelly and Howard (1987) (presenting case discussions of 19 countries) and Baehr *et al* (eds) (1995).

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Commission, one has to rely on the Commission's Secretariat. The Secretariat's location is not favourable to a free exchange of information. Banjul, on the extreme western corner of the continent, is difficult to visit, and communication links are neither technologically advanced nor very reliable. For the first few years of its operation, the Secretariat had also been extremely uncooperative. Such an attitude tied in well with the paralysing interpretation of the Charter's confidentiality provisions by the Commission. Publications, such as the Commission's *Review*, were published irregularly and were poorly distributed. Much the same may be observed about the Commission's reports and communiqués. Fortunately, of late, both the issue of confidentiality and the attitude of the Secretariat have changed favourably.

Finding decisions by **local African courts** involving supra-national human rights has been an arduous task. Very few law reports series are published in African countries. Where such series are in fact published, they are invariably not kept up to date. One has to rely on personal contacts, even if one is a lawyer practising in that country. The foreigner has to rely on the kindness of personnel in the office of the court registrars.

Few publishing houses exist across Africa. South Africa, Egypt, Nigeria and Senegal are noted exceptions. Even where they exist, law books are rarely published. This is both cause and effect of a strong reliance on the legal system and legal sources of ex-colonial masters. In most of francophone Africa, for example, law students rely exclusively on texts written by French lawyers about French constitutional law or Napoleonic private law codes, for consumption primarily in France. Very much the same position persists in most of anglophone Africa, with exceptions in South Africa, Zimbabwe and Nigeria. For insights on African applications and implications, the student has to rely on class notes, presented by lecturers. This ties in with the "oral tradition" which has been celebrated in Africa as source of wisdom and knowledge in all fields of human endeavour. Like the student, the researcher in Africa has to rely to a great extent on the oral dimension, also in respect of human rights law. Interviews, impressions and perceptions become the building blocks of a research project.

New technological advances present Africa with the opportunity to undo backlogs, and to come into step with more advanced societies by leap-frogging over years of building up libraries.

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1.7.3 No catalogue of violations provided

Human rights violations occur in states, also in African states. Because governments infringe upon the rights of their nationals and other persons within the state, the concern of this study is with violations in the domestic jurisdiction of states. But the study does **not** seek to provide a **comprehensive catalogue** of the numerous violations that have in the past occurred and are still today occurring in African states. The reason lies in the limitations imposed by the topic (which concerns itself primarily with **international mechanisms and their role** in domestic situations), and not in the callous disregard of the importance and seriousness of these violations. Likewise, a study with a focus as the present can never stand alone, or claim to provide a comprehensive view.

1.7.4 Focus on secondary and tertiary mechanisms

To the ordinary person, the domestic legal system and its ability or inability to ensure the realisation of human rights is all that matters. However, the focus here is not on domestic mechanisms to realise human rights, but on secondary (sub-regional and regional) and tertiary (global) mechanisms to address these violations. Since the establishment of these secondary and tertiary systems is motivated by the desire to improve the human rights of all individuals globally **within their respective states,** international (or supra-national) human rights systems are supplementary to domestic legal protection, and do not denigrate their role or importance.

1.7.5 The limits of assessing realisation

The phrase "realising human rights" implies continuous assessment. If rights are realised, this fact should be observable in the "real world". This, in turn, requires a gauging mechanism, to measure degrees of realisation. Without such a matrix, all talk will take place in a vacuum. A major problem in the human rights discourse is the lack of such a model. Reasons for this absence are the following:

- There is little agreement on the model state in which rights are in fact "realised". Any assessment process is in need of an idealised image which would serve as the accepted ideal.

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- Once a model had been chosen, specific and detailed indicators would have to be selected. Differences are bound to derail agreement about such indicators.
- Even if a model and indicators could be agreed upon, the method of arriving at any conclusion would present difficulties. Violation of human rights standards is difficult to quantify. Elements of subjectivity will enter the equation. For the assessment of socio-economic rights, but also civil and political rights (such as the right to legal representation, or to an interpreter), extensive empirical data would be required. This may not only pose pragmatic concerns (how is this to be done?), but also principled objections (should valuable resources be directed at assessing aspects that are hardly provided in the first place?).

This difficulty explains why the human rights discourse is often only too content to concentrate on formal mechanisms, on the mere fact of ratification, or on descriptions of the provisions of Constitutions or treaties. Although attempts are made to concentrate on the *de facto* situation pertaining to human rights in Africa, the study will inevitably get bogged down in the *de iure* position.

1.7.6 Emphasis on legal dimension

The concept "human rights" embodies many dimensions that are not legal. It has a very important social dimension, as it clearly affects the way people live their lives. This makes human rights a topic of interest to most social sciences. It has a moral-philosophical dimension, and is also of concern to theology. Viewed by the political scientist, it becomes an important component of the structure of government. Lawyers run the risk of abstracting legal rights from their social, structural, moral and human context. Focusing on cases brought to and decided by judicial institutions may easily give a distorted view.

The legal aspect is almost inevitably highlighted on the supra-national plane, as this level of human rights protection is politico-legal in nature. Supra-national regimes are established and adhered to at the political level through governmental agreement. There is no concrete environment in which supra-national norms exist. Supervisory bodies are mostly *ad hoc* treaty-based artefacts, kept alive only within the treaty framework. These quasi-judicial or judicial institutions have to ensure

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state compliance. Ultimately, effective action lies in the field of political decision making. Of these two dimensions, this study will emphasise the "legal", without negating the importance of the "political". Where possible, links will be made to the society involved. This will not be overstated, so as not to sidetrack too far away from the central concern of this study - the realisation of human rights in Africa through inter-governmental institutions.

As the focus falls on the **actual realisation** of human rights through legal means, the study also takes in a "positivistic" stance. For example, an investigation is made about the way in which rights have been given content in concrete cases, rather than developing a theoretical discourse about all possible interpretations of those rights.

1.7.7 The inevitability of time frames

As is the case with the proverbial "buck", the author of a research study "has to stop somewhere". An artificial cut-off mark has to be imposed on the material. This date is March/April 1997. Although this is the cut-off mark, an effort was made to keep information as updated as possible, with the result that there is no exact, single and consistent cut-off date:

- Data on the status of ratification of international human rights and other instruments and on obligations in terms of these obligations are, as far as possible, provided as at 31 March 1997.

- Information about the functioning of the African Commission is based on the First to the Tenth Annual Activity Reports of the Commission. This spans the first ten years since the African Charter entered into force, and the first 21 ordinary sessions of the Commission (1986 to April 1997).[143]

- Developments about the establishment of an African Court on Human and Peoples' Rights include the Protocol adopted at Nouakchott (in April 1997),[144] and the subsequent OAU

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143 The Tenth Annual Activity Report was adopted by the OAU Assembly in July 1997, and covers the activities of the Commission up to its 21st session, held 15 - 24 April 1997.

144 For a background and discussion, see ch 7 below.

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Council of Ministers meeting and Assembly of Heads of State and Government summit (June - July 1997).

Even so, the study will inevitably become outdated soon. Obviously, the status of ratifications may change, democratic governments may be toppled by military force, and the Commission may decide many new communications. A new Protocol on the establishment of the Court is also likely to be adopted by a meeting due to take place in December 1997. But one need not despair at these thoughts: This study is a **work in progress**, embedded in the much greater, and more fluctuating context of the project to realise human rights in Africa, which is itself very much a work in progress.

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Chapter 2 THE CONTRIBUTION OF THE UNITED NATIONS TOWARDS THE REALISATION OF HUMAN RIGHTS IN AFRICA

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When dealing with the application of international standards in a regional setting, one may be tempted to re-open the debate between the universality and culturally-determined specificity of human rights.[1] This is not the aim here. Instead, the assumption is made that human rights are inalienable to humankind. The 1993 World Conference on Human Rights adopts a similar reaffirmation in the Vienna Declaration and Programme of Action, in which all states declare their commitment "to fulfil their obligations to promote universal respect for" internationally-accepted human rights. It continues as follows: "The universal nature of these rights and freedoms is beyond question".[2] It also states unequivocally that all human rights are "universal, indivisible and interdependent and interrelated".[3] Simultaneously, though, "the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind".[4] The existence of such regional and local particularities does not detract from efforts to seek consensus about standards globally, and from attempts at ensuring their realisation. It seems to be axiomatic that the closest conformity with specific concerns can be reached at the local or domestic level. But this does not exclude consensus-seeking at regional and universal levels. However, it follows that the consensus will become narrower as the extent of participation and globalisation increases. For this reason, the international human rights regime allows for reservations and for implementation predominantly through non-judicial means. The role of the international human rights regime in Africa will now be investigated.

2.1 Africa in international law: an introduction

2.1.1 Before the UN (- 1945)

International human rights law is of relatively recent origin. Its evolution and functioning forms part of the development of international law in general. Africa's role in international law is

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1 See, on this debate generally, An-Na'im(ed) (1991), Pannikar (1982) 120 *Diogenes* 75, and Pollis and Schwab (eds) (1980). For arguments on contemporary Africa, see Howard (1986) ch 2.

2 Art 1 of the Vienna Declaration.

3 Art 5 of the Vienna Declaration.

4 Art 5 of the Vienna Declaration.

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therefore placed under a brief spotlight, before the focus turns to international human rights instruments more specifically.[5]

The first contact of Africans with Europeans resulted from curiosity fuelled by the scientific advances of the Enlightenment and civilizing mission of Christianity. This represented a movement of explorers and missionaries **into Africa** from especially the sixteenth century. When industrialisation began taking off in Europe during the eighteenth century, the movement turned in the other direction, with the capture and **export of Africans from Africa** as slaves to the "new world". At this stage little interest was paid to the African interior. Foreign powers established a more or less informal presence, directed at the export of slaves. Only with the British occupation of Egypt and the expansionist stance of Leopold II of Belgium in relation to the Congo did the need arise to effectively partition the African continent into colonies under the sphere of European influence. A conference was organised in Berlin, lasting from late 1884 to 1885. At this conference the borders of the African continent were to a large extent demarcated. This introduced the phase of colonialism, which mainly represented a movement of **natural resources from Africa** to the newly industrialised Europe. To some extent the movement also went the other way, with African markets serving as a dumping ground of surplus products.[6]

From the outset, traditional African states were disregarded as equal subjects in the ensuing law relating to international law.[7] Africa developed mistrust of international law, as it supported first slavery, and then colonialism. The predecessor to the UN, the **League of Nations**, in 1936 created a perception of contempt for black race in the Italo-Abyssinian War.[8] The military invasion and colonisation of Ethiopia, a sovereign member state of the League, by Italy, another member of the League, epitomises Western misuse of international law in relation to Africa. In Umozurike's view, certain states failed to regard Ethiopia as a sovereign state "because it was African".[9] He regards the failure of the League members to prevent Italy's aggression by sanctions as "reminders

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5 There is no need to traverse this topic, as it has been dealt with comprehensively by competent writers such as Umozurike (1979) and Elias (1988).

6 On the economics of colonialism, see Rodney (1989).

7 For a comprehensive overview of this development, see Umozurike (1979).

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

9 Umozurike (1979) at 66.

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of the bad faith and double standards that existed and still persist in the international community when vital African interests are concerned".[10]

In the period after the First World War **resistance against colonialism** gained momentum. It took the form of African-nationalism within numerous African states and the pan-Africanist movement outside Africa. The insistence on self-determination and decolonisation became stronger and stronger, culminating in the independence of Ghana in 1957, followed by a series of former French colonies in 1960. Today the process of decolonisation is complete.[11] But in some instances the shadow of colonialism has been cast over the present.[12]

2.1.2 Under the UN (1945 -)

When the UN was founded after the Second World War in 1945, only four independent African states became members: Egypt, the Union of South Africa, Liberia and Ethiopia.[13] Three of these states voted in favour of the UN General Assembly resolution containing the Universal Declaration

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10 Umozurike (1979) at 78.

11 With the possible exception of the Western Sahara, see par 2.2.5 (c) below.

12 For example, the explanation for the human suffering caused by the killing of Hutus and Tutsis in 1994 may, to a large extent, be traced back to colonialism. The original inhabitants of Rwanda were the Twa. They were hunters and gatherers. The Hutus, who were peasants, became the first group of "settlers". Around 1400 pastoralist Tutsi immigrated from the north to settle there. Political functions became divided between the Hutu and Tutsi, and was greatly localised. Reyntjens explains how this precarious balance was unsettled by the Belgian policy of "indirect rule" ((1987) 25/26 *Jnl of Legal Pluralism and Unofficial Law* 70). Because the Tutsi tribe was considered to be of "Hamite" origin, and was "more intelligent, more active, more capable of understanding progress" the Belgians started reserving political office for the Tutsi (Reyntjens (1987) 25/26 *Jnl of Legal Pluralism and Unofficial Law* 70 at 80, quoting bishop Classe). Disallowing the Hutus access to political power exacerbated ethnic opposition and division. Through central Tutsi control, the traditional institutions were also transformed, disturbing "the equilibria of protection and allegiance that had made this supremacy bearable" (Reyntjens (1987) 25/26 *Jnl of Legal Pluralism and Unofficial Law* 70 at 80).

13 On 24 October, 7, 12 and 13 November 1945 respectively.

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of Human Rights in 1948. The Union of South Africa was one of eight states abstaining.[14] In retrospect, the claim to universality inherent in the "Universal Declaration" is undermined by the **absence of** any significant **African participation** in the initial process of deliberation.[15] Non-Western views were largely unrepresented, because the "third world" countries represented were mainly Latin American states "whose dominant worldview was European".[16] The Universal Declaration has been described as an attempt "to universalize civil and political rights accepted or aspired to in Western liberal democracies".[17]

One of the first steps undertaken by most of the newly independent African states was to become members of the UN.[18] Today all the states enjoy membership of the UN. In the period leading up

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14 GA Resolution 217 (III), adopted on 10 December 1948 by a vote of 48 to 0, with Byelorussia, Czechoslovakia, Poland, Saudi Arabia, South Africa, the Soviet Union, the Ukraine and Yugoslavia abstaining. See also Farer (1987) 9 *HRQ* 550 at 557.

15 See Eide *et al* (1992) at 11. From Africa, only Egypt participated in its drafting. See also Legesse in Thompson (ed) (1980): "If Africans were the sole authors of the Universal Declaration of Human Rights, they might have ranked the rights of communities above those of individuals, and they might have used a cultural idiom fundamentally different from the language in which the ideas are now formulated" (at 129). This claim is partly confirmed by the subsequent inclusion of both "rights" and "duties", as well as the concept of "peoples' rights" in the African Charter. But in an important respect the African Charter refutes the claim made by Legesse, as it keeps to the notion that individuals are entitled to certain rights against their governments, rather than ranking the rights of communities above those of individuals.

16 Mutua (1996) 36 *Virginia Jnl of Intl Law* 589 at 605.

17 Mutua (1996) 36 *Virginia Jnl of Intl Law* 589 at 606.

18 The sequence was as follows (date of UN membership, date of independence in brackets):

Libyan Arab Jamahiriya	14 December 1955 (24 December 1951)
Morocco	12 November 1956 (2 March 1956)
Tunisia	12 November 1956 (20 March 1956)
Sudan	4 December 1956 (1 January 1956)
Ghana	8 March 1957 (6 March 1957)
Guinea	12 December 1958 (2 November 1958)
Benin	20 September 1960 (1 August 1960)
Burkina Faso	20 September 1960 (5 August 1960)
Cameroon	20 September 1960 (1 January 1960)
CAR	20 September 1960 (13 August 1960)
Chad	20 September 1960 (11 August 1960)

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Congo	20 September 1960 (15 August 1960)
Côte d'Ivoire	20 September 1960 (11 August 1960)
Gabon	20 September 1960 (17 August 1960)
Madagascar	20 September 1960 (26 June 1960)
Niger	20 September 1960 (3 August 1960)
Somalia	20 September 1960 (1 July 1960)
Togo	20 September 1960 (27 April 1960)
Zaïre	20 September 1960 (30 June 1960)
Mali	28 September 1960 (20 June 1960)
Senegal	28 September 1960 (20 June 1960)
Nigeria	7 October 1960 (1 October 1960)
Sierra Leone	27 September 1961 (27 April 1961)
Mauritania	27 October 1961 (28 November 1960)
Tanzania	14 December 1961 (9 December 1961)
Burundi	18 September 1962 (1 July 1962)
Rwanda	18 September 1962 (1 July 1962)
Algeria	8 October 1962 (1 July 1962)
Uganda	25 October 1962 (9 October 1962)
Kenya	16 December 1963 (12 December 1963)
Malawi	1 December 1964 (6 July 1964)
Zambia	1 December 1964 (24 October 1964)
Gambia	21 September 1965 (18 February 1965)
Botswana	17 October 1966 (30 September 1966)
Lesotho	17 October 1966 (4 October 1966)
Mauritius	24 April 1968 (12 March 1968)
Swaziland	24 September 1968 (6 September 1968)
Equatorial Guinea	12 November 1968 (12 October 1968)
Guinea-Bissau	17 September 1974 (10 September 1974)
Cape Verde	16 September 1975 (5 July 1975)
Mozambique	16 September 1975 (25 June 1975)
São Tomé e Príncipe	16 September 1975 (12 July 1975)
Comoros	12 November 1975 (6 July 1975)
Seychelles	21 September 1976 (29 June 1976)
Angola	1 December 1976 (11 November 1975)
Djibouti	20 September 1977 (27 June 1977)
Zimbabwe	25 August 1980 (18 April 1980)
Namibia	23 April 1990 (21 March 1990)

Footnotes continued on next page.

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to independence, international law became an instrument through which ideals of decolonisation and independence were fulfilled. This continued even after the majority of states became independent in the 1960s, in order to rid Africa of all remaining remnants of colonialism. The legitimacy of the UN was enhanced further by its assistance in the anti-apartheid and decolonisation campaigns in Africa. The three clearest instances are Rhodesia/Zimbabwe, South West Africa/Namibia and South Africa. Ian Smith's Unilateral Declaration of Independence in Rhodesia on 11 November 1965 was considered to be a threat to peace, and mandatory economic sanctions were imposed.[19] A mandatory ban on arms traffic to South Africa was followed by more comprehensive sanctions.[20] Although the effect of these measures became visible only on the longer term, the eventual independence of Zimbabwe and Namibia and the dismantling of apartheid in South Africa stand as evidence of the UN's constructive involvement in anti-colonialist efforts in Africa.

One of the beacons of Africa's participatory role in international affairs, is the adoption of the International Convention on the Elimination of Racial Discrimination ("CERD"). Africans celebrated its adoption in 1965 as the General Assembly's "finest hour".[21] Issues of relevance and concern for African states started to appear increasingly in discussions and resolutions of the General Assembly from the early 1960s.

Selection processes for the various UN bodies nowadays have to comply strictly with the principle of regional representation. A recent example is provided by the selection of members to the Commission on the Limits of the Continental Shelf, established under the UN Convention on the Law of the Sea. For such purposes, UN members are divided into five groups, the African, Asian,

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Eritrea 28 May 1993 (23 May 1993)

Africa Institute (1992) *Africa at a Glance.* This is a total of 53 states. The total excludes the Saharawi Arab Democratic Republic ("SADR"), declared independent unilaterally on 27 February 1976, but not admitted as a UN member (See ch 2.4 below).

19 See Forsythe (1991) at 70, 76.

20 *Ibid.*

21 Schwelb (1966) 15 *ICLQ* 996.

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Eastern European, Latin American and Caribbean and "Western and Other" state groups.[22] State parties to UNCLOS decided on an *ad hoc* allocation, in terms of which each state group would be entitled to at least three Committee members. In the election five members each were elected from Asian, African and the "Western and Other" state groups.

2.2 UN Charter bodies and human rights

The UN Charter includes the achievement of international co-operation in "promoting and encouraging respect for human rights and for fundamental freedoms" among its purposes.[23] One of the architects of the human rights provisions in the UN Charter, especially in the Preamble thereto, was the South African Jan Smuts.[24] It is remarkably ironic that South Africa became the first state to be condemmned for human rights violations. Ironically, South African attempts to hide behind the shield of the "domestic jurisdiction" clause necessitated stronger action. The atrocities of apartheid had the positive effect of shattering the shield of the "domestic affairs" clause, setting a precedent for stronger UN action in this field. It also spurred into motion, after inactivity in the first years, the 1503 procedure.

Some institutions, which have been established in terms of the UN Charter, commonly referred to as UN Charter bodies, involve themselves to varying degrees with human rights issues:

- The **General Assembly** may discuss any matter within the ambit of UN Charter and may adopt recommendations to member states pertaining to such matters.[25] Over the years, these discussions and recommendations have also covered human rights matters. The Charter and treaty bodies also report back to the General Assembly.

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22 See ch 2.4 below.

23 Art 1(3) of the UN Charter. See also arts 55 and 56 of the Charter.

24 See Heyns (1995) 7 *RADIC* 329.

25 Art 10 of the UN Charter.

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- Although the **Security Council** does not have an explicit mandate to involve itself in human rights matters, its mandate of maintaining "international peace and security"[26] has been extended to include human rights related issues.

- Likewise, the UN's principal judicial organ, the **International Court of Justice** ("ICJ") involved itself to a limited extent in human rights matters.

- One of the central institutions created by the Charter is the **Economic and Social Council** ("ECOSOC").[27] It consists of representatives from 54 UN member states[28] and may make recommendations to the UN General Assembly on a wide range of topics, including human rights matters.[29] ECOSOC was instructed to set up commissions to further the promotion of human rights.[30] These commissions include the **UN Human Rights Commission**, the **Sub-Commission on Prevention of Discrimination and Protection of Minorities**, the Commission on the Status of Women and the recently instituted High Commissioner of Human Rights.

These bodies are now discussed with reference to their particular relevance for Africa.

2.2.1 The General Assembly

The main contribution of the General Assembly to human rights lies in the field of standard setting.[31] General Assembly debates and discussions have over the years resulted in numerous resolutions, declarations and binding treaties (or "conventions").[32] The first of these was the

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26 Art 24(1) of the UN Charter.

27 See ch X of the UN Charter.

28 Art 61(1) of the UN Charter.

29 In terms of art 62(2) of the Charter.

30 Art 68 of the Charter.

31 On the involvement of the General Assembly in the field of human rights, see in general Cassese in Alston (ed) (1992) and Quinn in Alston (ed) (1992).

32 General Assembly resolutions are generally only recommendatory, but may become binding if they are proof of pertinent contemporary international community standards (see *South West Africa Cases (Second Phase)* 1966 ICJ Reports 6 at 50 – 51).

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adoption of the landmark Universal Declaration in 1948. The following resolutions adopted by the General Assembly over the last decade serve as examples of the sustained significance of the Assembly's role:

- In 1990, the Assembly adopted the resolution deciding to convene a World Conference on Human Rights.
- In 1993, it established the post of UN High Commissioner for Human Rights.
- In 1994, it resolved to proclaim the UN Decade of Human Rights Education.[33]

But the role of the General Assembly extends much further. It not only plays a legislative role, but also serves as a forum for various other human rights activities. For example, it receives annual reports from the numerous human rights treaty bodies, from thematic and country rapporteurs and from the High Commissioner for Human Rights.[34]

African scepticism towards the UN changed in the 1960s, due mainly to the role the newly independent African states started playing in the UN General Assembly, where the Afro-Asian block forms a majority. African states used the Assembly as a forum to address the issues of self-determination, decolonisation and anti-racism. The adoption by the General Assembly, in 1960, of the Declaration on the Granting of Independence to Colonial Countries accentuated the right to self-determination of peoples in the colonial sphere.[35] Although the African states had not been involved significantly in the initial proposals for the incorporation of this right in the two Covenants of 1966, their support ensured its eventual inclusion in these treaties.[36] To some extent, African states have been instrumental in the adoption of the first binding treaty adopted by the UN in 1965, the Convention on the Elimination of All Forms of Racial Discrimination. African

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33 For a full list of resolutions dealing with human rights matters, see United Nations (1995).

34 See Quinn in Alston (ed) (1992).

35 See Cassese in Cassese (ed) (1979) at 141.

36 See art 1 of the CESCR and CCPR; Cassese in Cassese (ed) (1979) at 140 - 143, and Nowak (1993) at 9 - 11.

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opposition against South Africa's racial policies largely motivated the adoption of the Convention on the Suppression and Punishment of the Crime of Apartheid.[37]

Especially the South African minority government became a frequent target, leading to the first significant encroachment on state sovereignty by the UN.[38] The reliance of the South African government on the principle of non-interference in domestic affairs was rejected by the Assembly. In this way, ironically, the South Africa precedent has paved the way for more effective human rights scrutiny by the Assembly in later years.[39]

However, the majority of African states have not been equally prepared for inspection and criticism of African internal affairs. One recent example is given: After the execution by Nigeria of Ken Saro-Wiwa and eight other Ogoni activists in 1995, the matter was raised in the General Assembly.[40] The Assembly adopted a resolution on the general situation of human rights in Nigeria, in which the arbitrary executions were condemned and concern was expressed about the human rights situation in Nigeria.[41] But the Assembly stopped short of recommending economic measures against that state. Especially African states were responsible for toning down the operative sections of this resolution in order to counter a perceived trend of resolutions critical of African states.[42]

2.2.2 The Security Council and peacekeeping in Africa

The Security Council functions as the only body in the UN that can take executive decisions. It can, in addition, "call on" member states to carry out the decisions. At present, the Security

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37 See Cassese in Alston (ed) (1992) at 39 – 40.

38 See Stultz (1991) 13 *HRQ* 1.

39 The new doctrine was consolidated in 1974, when the Assembly "intervened" in the case of Chile (see Cassese in Alston (ed) (1992) at 43).

40 The Security Council would not consider the matter (see Marks in Tessitore and Woolfson (eds) (1996) at 203).

41 Resolution A/Res/50/199.

42 See Marks in Tessitore and Woolfson (eds) (1996) at 203.

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Council consists of fifteen members.[43] Of these, five are permanent members. They are the USA, Britain, France, the USSR and China (all victors of the Second World War). The ten non-permanent members are elected by the General Assembly for two-year terms. Three African states were represented in 1996: Botswana, Egypt and Guinea-Bissau. Kenya replaced Botswana in February 1997. The Security Council meets on a continuous basis, usually in New York. A peculiar feature of their operations is the veto power of the permanent five members. If one of these states opposes a course of action, the Council remains powerless to act.

The Security Council is empowered to take "measures not involving the use of force" when a "threat to the peace" exists.[44] This power was used for the first time in 1968 when mandatory sanctions were imposed on the then Southern Rhodesia.[45] South Africa became the next target, when the Security Council imposed a mandatory arms embargo against that country in 1977.[46] These two instances were ground-breaking in that they were "self-evidently based upon *internal situations*" and served as precedents for sanctions increasingly imposed by the Security Council in the post-Cold War era.[47]

In the build-up towards the fiftieth of the UN in 1995, its institutions and functioning was scrutinised. A number of voices called for an end to the way in which the five permanent members dominated the Security Council and, in effect, the United Nations as a whole. Questions that arose were:[48]

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43 On its composition see web page http://www.un.org/Overview/Organs/sc.html.

44 See arts 39 and 41 of the UN Charter.

45 Resolution 232 (1966), SCOR *Resolutions and Decisions* at 7, adopted by 11 votes to 0, with 4 members abstaining.

46 Resolution 418 (1977), SCOR *Resolutions and Decisions* at 5, adopted unanimously. See Benneh (1993) 5 *ASICL Proc* 241 at 243. In 1985 the Security Council adopted a further resolution, calling for the following comprehensive measures against South Africa: (a) suspension of investments; (b) prohibition of the sale of Krugerrands; (c) restrictions of sport and cultural relations; (d) suspension of guaranteed export loans; (e) prohibition of new nuclear contracts; and (f) prohibition of the sale of computers that may be used by the army or police.

47 See Benneh (1993) 5 *ASICL Proc* 241 at 243, emphasis in original.

48 See eg Koechler in Barnaby (ed) (1991) at 238, Caron (1993) at 87 *AJIL* 552 and Hüfnerk (ed) (1995).

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- Why should the victors of the Second World War still be in a dominant position in international affairs?
- Do the mechanisms in the Security Council reflect the democratic ideals of the organisation?
- Is the collective authority as exercised by the Security Council legitimate?

Possible ways of addressing the problem were identified: the veto system must be reformed, either through its abolition[49] or extension; the membership of the Council may be increased; and the influence of the General Assembly in the work of the Security Council can be enhanced. Whatever form the eventual reform will take, it has been accepted for some time that at least two African regional powers (Egypt and Nigeria)[50] should be allowed a more significant say if the Security Council is made more representative. Since its return as an esteemed member of the international community, South Africa has positioned itself as a third major African regional power.

The tension between African interests and the veto came to a head when Boutros-Ghali (an Egyptian) came up for election to a second term as Secretary-General in 1996.[51] All the permanent members of the Security Council, except the USA, supported him in the initial round. The three African countries that served as temporary members expressed their support for Boutros-Ghali. Despite this unanimity, the USA persisted in vetoing the candidature. In terms of UN practice, it has become accepted that the Secretary-General serves for two consecutive terms. It was generally agreed, also by the USA, that another candidate from Africa should be elected in Boutros-Ghali's place. With the election of Kofi Annan, a career diplomat of Ghanaian origin and previously under-Secretary-General for peacekeeping, the first sub-Saharan African was elevated to the highest position in the UN.[52]

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49 South African President Mandela has expressed his preference for its abolition: see "Scrap UN Veto - Mandela" (29 March 1997) *Pretoria News* at 4.

50 See Whittaker (1995) at 18.

51 Goshko "Boutros-Ghali won't go quietly" (22 - 28 November 1996) *Mail and Guardian*.

52 See Goshko "Soft-spoken man who gets things done" (20 - 23 December 1996) *Mail and Guardian* 18.

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The UN Charter does not specifically provide for peacekeeping. Such operations are justified under the general rubric of its stated purpose to "maintain peace and security".[53] The UN's involvement in this regard may take different forms. On the one end of the scale lies monitoring, with minimal UN involvement. On the other end lies peace-enforcement, with the UN becoming actively involved in the conflict.[54] The middle ground is made up of numerous forms of peace-keeping, ranging from technical and humanitarian assistance, to overseeing cease-fires.

The UN's peace-keeping operations started off as "simply observation and interposition missions".[55] The peace-keeping mission to Congo ("ONUC") in 1960 was the first UN operation of its kind. Initially welcomed by most African States, ONUC came to be regarded as "an imperialistic instrument to subvert African independence".[56] This mission was a precursor to the UN's increasing involvement in internal conflicts, as opposed to inter-state wars. UNTAG, the UN mission to Namibia, marked the advent of more active UN participation in multi-disciplinary peace building, rather than attaining military objectives as part of peace-keeping. The UN missions became involved in the protection of human rights, humanitarian relief and election supervision. More importantly, also for the purpose of this study, this marks a shift away from the conference room to the reality of the situation itself.[57] This approach was also used to good effect in Mozambique, and with limited success in Angola and Rwanda.

After the end of the Cold War the link between peace-keeping and human rights was increasingly highlighted. In 1995, the then UN Secretary-General wrote that "any process whose goal is one of peace-keeping must take into account the human rights situation and aim to ensure the promotion and protection of those rights".[58] By that time, at least seven UN operations worldwide included an

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53 UN Charter art 1(1).

54 This is justified in terms of Chapter VI of the UN Charter.

55 Boutros Boutros-Ghali "Introduction" in *The UN and Human Rights 1945-1995* (1995) at 112.

56 Jonah in El-Ayouty (ed) (1994) 1 at 4.

57 See Brody (1994) 53 *ICJ Review* 1 at 1-2. In his view, the appointment of the UNHCHR as the first human rights "executive" is another signal of this shift in emphasis.

58 Boutros Boutros-Ghali (1995) at 113.

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essential human rights component.[59] Some of the recent instances of UN peace-keeping in Africa will now be discussed in roughly chronological order of their establishment. The relevance to the realisation of human rights will also be considered.[60]

2.2.2.1 Namibia

The UN Security Council approved the establishment of the United Nations Transitional Assistance Group ("UNTAG") in 1978.[61] Its main function was to implement the provisions of Security Council Resolution 435, calling for free elections as the only way of resolving the dispute in Namibia. Martti Athisaari was appointed as the Secretary-General's special representative. More than 8 000 UN personnel were deployed. UNTAG oversaw the transition and elections, which culminated in Namibia becoming an independent state on 21 March 1990. The Namibian experience, in which the UN successfully acted as "midwife" in the birth process of a new state, indicated a new direction of involvement for the UN. In essence, it was a decolonisation operation, but it extended to a wide range of aspects to become "a highly successful process of peace-keeping, constitution making, and election (management)".[62]

2.2.2.2 Angola

When the warring parties drew up a peace accord in 1988, the UN became involved to oversee the withdrawal of Cuban troops.[63] The Security Council decided to send a mission, called the United Nations Angola Verification Mission ("UNAVEM") to perform this function. The UN remained involved thereafter. UNAVEM II, which followed the first mission, was involved in the subsequent election process, securing its fairness. Under the UN's monitoring eye the election took place in

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59 Boutros-Ghali (1995) at 113 cites UNTAG (Namibia), ONUSAL (El Salvador), UNTAC (Cambodia), ONUMOZ (Mozambique), UNPROFOR and UNCRO (former Yugoslavia) and MINUGUA (Guatemala).

60 On the Security Council's general involvement in human rights, see Bailey (1994).

61 Whittaker (1995) at 204 - 213.

62 Andemichael in El-Ayouty (ed) (1994) 119 at 123.

63 For a discussion of UNAVEM I and II see Sinjela *et al* (1994) 2 *AYBIL* 181 at 195.

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September 1992, and was certified as free and fair by the Secretary-General's special representative. The incumbent (Eduardo Dos Santos) secured almost 50% of the vote in the presidential elections, followed by 40% by Jonas Savimbi (the leader of National Union for the Total Independence of Angola ("UNITA")).[64] In the election for seats in the legislature, the MPLA obtained 129, followed by the 70 of UNITA. UNITA made allegations of fraud, contesting the finding that the elections were free and fair, and returned to hostilities.

After a protracted process to restore peace, the parties agreed on the Lusaka Protocol, which they signed on 20 November 1994. Pursuant hereto, the UN Security Council decided to set up a peace-keeping force to oversee the process of restoring peace and national reconciliation in Angola. In terms of its resolution, UNAVEM III was set up. About 7200 military and 500 civilian personnel were deployed. One of the main functions of UNAVEM III, and the Secretary-General's special representative, was the implementation of the principles of national reconciliation. The "special status" accorded to UNITA leader Jonas Savimbi took a long time to be resolved. A Summit of the SADC Organ on Politics, Defence and Security called on Savimbi to fulfil his commitments under the Lusaka Protocol.[65]

The main aim of the Lusaka Protocol is to bring about a government of national unity. But concern for human rights is stipulated in the Protocol as being integral to the process of national reconciliation. In terms of Annex 6, I. 4 (b) "national reconciliation" implies "respect for the rules of the constitutional state, the basic human rights and civil liberties, as defined by the prevailing national legislation and by the various international legal instruments to which Angola adheres ...". This emphasis was incorporated into UNAVEM III's mandate. According to the empowering resolution, the Security Council "expresses satisfaction that the Secretary-General intends to include human rights experts in the political component of UNAVEM III, to observe the implementation of the provisions in the Protocol relating to national reconciliation".[66]

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64 The acronym "UNITA" refers to the Portuguese version of the organisation's name, "União Nacional para a Independência Total de Angola".

65 See Communiqué of Summit, issued on 2 October 1996.

66 SC Resolution 976 (1995).

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A Human Rights Unit was established soon after the adoption of the resolution. The Unit consists of a chief and deputy, as well as ten experts deployed in different provinces. The European Union supports six of these experts. The main functions[67] of the Unit are sensitisation,[68] education,[69] assistance,[70] protection[71] and co-operation towards legal reform.[72]

Other UN agencies also contributed to the UN's efforts in Angola. The effects of the prolonged civil war left many Angolans in need of humanitarian assistance. The UN Humanitarian Assistance Co-ordination Unit was established in 1993 to co-ordinate these efforts. This involved providing in the socio-economic needs of people. In this regard, the UN's World Food Programme ("WFP") distributed relief assistance to about 3.5 million war-affected people in 1993-94.

The UN contributed significantly to the creation of a Government of Unity and National Reconciliation ("GUNR"). Despite the fact that its members were sworn in on 11 April 1997, the situation in Angola has not stabilised completely.[73]

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67 The discussion that follows is based on information contained in (1996) UNAVEM Report on the Human Rights Situation, (1996) UNAVEM III General Overview of the Activities of UNAVEM III in Human Rights, and interviews with members of the UN Human Rights Unit, December 1996, Luanda.

68 To change the national ethos on human rights a National Seminar on Human Rights was held in the National Assembly. Representatives of the state and of UNITA were present. The proceedings were televised live on television. The national seminar was followed by three regional seminars. At the end of each of these seminars pamphlets on human rights were distributed during a cultural event, incorporating traditional "African" practices of song and dance. The ten officers are responsible for creating an awareness of rights among the people in the various areas.

69 More formal human rights education is undertaken by presenting lectures to school children, and members of the police and prison services.

70 This function developed pragmatically. A major problem identified is the disintegration of the judicial system. Without a functioning legal system, violations of human rights cannot be redressed. The court system has to be rehabilitated. Without courts able to redress wrongs, knowledge and consciousness of rights will be to little avail. Assistance to reunify dispersed families was also rendered.

71 Individuals can complain to the Human Rights Unit. On 31 October 1995 54 complaints had been received. Most of these complaints related to the right to life and to liberty.

72 Apart from its principally political mission, UNAVEM also assists in the improvement of the judicial system. This entails, amongst others, legislative reform of the penal system.

73 (1997) *Africa Research Bulletin* at 12639.

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2.2.2.3 *Mozambique*

Independence in Mozambique was followed by a protracted civil war involving government forces ("FRELIMO"), and rebels ("RENAMO").

After the parties had signed a peace agreement in Rome on 4 October 1992, the UN became involved in securing implementation.[74] A UN force, the United Nations Operation in Mozambique ("ONUMOZ") was established on 16 December 1992. By early 1995 its mandate expired. The intervening period saw ONUMOZ contributing in various respects:

- Forces were demobilised.
- Multi-party elections were held.[75] The dates of the voting were extended to allow RENAMO members to vote, following RENAMO's last minute decision to participate in the elections. The Secretary-General and President of the Security Council used their good offices to attain this positive result.
- Vast areas were de-mined.

The contribution of the UN in Mozambique is reminiscent of its success in Namibia. In both cases, its participation ended a cycle of violence, spared loss of human life, and helped to establish viable state institutions. If human rights realisation starts with hope, a first step towards this goal was taken under UNUMOZ.

2.2.2.4 *Somalia*

After Said Barré was ousted in 1991, a severe civil war erupted in Somalia. The UN sent an observer mission, the United Nations Observer Mission in Somalia ("UNOSOM"). After

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74 See, on the process of UN involvement, Sinjela (1996) 4 *AYBIL* 285 at 310 - 317.

75 The Secretary-General appointed judges to the international Mozambique Electoral Tribunal in 1994 (see Sinjela (1995) 3 *AYBIL* 285 at 310).

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conditions necessitated becoming actively involved to provide a secure environment for humanitarian relief, the mission was strengthened and converted into the United Nations Task Force ("UNITAF"). This clearly changed the role into peace-enforcement. UNOSOM II was later established to assist in the process of reconciliation.[76] Inter-clan fighting persisted. UN peace-keepers had been threatened and even attacked. This force was a failure, and withdrew in 1995. The Somali experience shows that the UN is powerless in situations where infrastructures have broken down, and where parties actively oppose its actions.

2.2.2.5 Liberia

In Liberia, for the first time, the UN co-ordinated its efforts with that of a regional force already involved in a conflict.[77] A number of West African states, under the auspices of ECOWAS, established the West Africa Military Observer Group ("ECOMOG"). In 1993 the UN established the UN Observer Mission in Liberia ("UNOMIL") to work with ECOMOG towards the implementation of the Cotonou Peace Agreement signed between the Liberian parties in July 1993.[78] Initially, the parties failed to abide by the agreement between them. The mandate of UNOMIL was extended time and again. By 1995 the parties had installed the Council of State and had re-established a cease-fire which appeared to be holding. After a bloody relapse into violence in April 1996, a democratic election was eventually held in July 1997. One of the ex-war lords, Charles Taylor, won the Presidential election when he secured more than 75 per cent of the vote.[79]

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76 See Sinjela (1995) 3 *AYBIL* 363 - 368

77 See also ch 4.3.1 below.

78 For background information see Ouguergouz (1994) 2 *AYBIL* 210 and Sinjela (1995) 3 *AYBIL* 285 at 299 - 300. See, for more detail, ch 4.3.1 below.

79 See Ankomah "At Last, Liberia has a President" (1997) Sept *New African* at 14 - 15.

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2.2.2.6 *Rwanda*

Even prior to the violence erupting in April 1994, the UN was involved in Rwanda. Its involvement took the form of the UN Assistance Mission for Rwanda ("UNAMIR").[80] Its function was to oversee a cease-fire agreement between the interim government of Rwanda and the Rwanda Patriotic Front. UNAMIR was woefully inadequate to prevent ethnic violence, or to intervene. In fact, its size was reduced.

The UN's main contribution was made after the event, with the establishment of the International Tribunal for Rwanda. This followed the request by the Security Council in 1994 that the Secretary-General should establish an impartial Commission of Experts to investigate violations of human rights committed after 6 April 1994.[81]

Independent from UNAMIR, the UN also launched a human rights operation. A few human rights observers were deployed in August 1994, and grew to some 90 observers by January 1996.[82]

Their mandate included the following:[83]

- **Investigation** into the human rights violations that occurred between April and July 1994. In this respect, it assisted the work of the International Tribunal for Rwanda. It also provided assistance to the Commission of Experts. In addition, the data gathered by the human rights mission serve as a source of information to the Special Rapporteur on Rwanda, Réné Degni-Sègui, and thematic rapporteurs concerned with the situation in Rwanda.

- The human rights mission also aims to establish and develop a **human rights culture** in Rwanda.

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80 See Sinjela (1995) 3 *AYBIL* 285 at 318 - 362, and Mubiala (1995) 3 *AYBIL* 277.

81 Resolution 935 (1994).

82 See Mubiala (1995) 3 *AYBIL* 277 at 281.

83 *Ibid.*

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- To attain these objectives, observers give "**technical assistance**", which consists of educational programmes and improvement of infrastructure. By rebuilding faith in the rule of law and human rights, a recurrence of the tragic events may be prevented.

UN involvement in Rwanda has undergone a shift in approach. Initially, military objectives such as peace-keeping and cease-fires were aimed at. This was replaced by longer-lasting, prospective objectives, such as peace-building and promotion of human rights. This illustrates a general shift in the UN away form "peace-keeping" to a "field approach", which entails continuous involvement at grassroots-level.

2.2.2.7 Western Sahara

A broader context to the United Nations Mission for the Referendum in Western Sahara ("MINURSO") will be given below.[84] The aim of MINURSO is to assist in holding a referendum in which the inhabitants of the Western Sahara can choose between independence and Moroccan rule. Its main activity has been to identify and register potential voters. Various factors of a technical and political nature have caused delay. The mandate of MINURSO has been extended time and again. The referendum, initially planned for 1992, has not taken place yet.[85]

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84 See par (c)(ii) below, and Sinjela (1995) 3 *AYBIL* 285 at 369 - 375.

85 In April 1997, James Baker, newly appointed head of the UN mission, undertook an evaluation mission to the area. He cautioned that a final decision about the fate of the former Spanish colony is still far off ((1997) 34 *Africa Research Bulletin* at 12635.

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2.2.3 Africa and the ICJ

2.2.3.1 General

The International Court of Justice ("ICJ") is established in the UN Charter as one of the UN's principal organs.[86] It was established in 1946 to replace the Permanent Court of International Justice ("PCIJ"). Potentially, human rights may be realised in the exercise of the Court's competence to resolve inter-state disputes (its contentious jurisdiction) and to render advisory opinions (its advisory jurisdiction).

Initially African states viewed the ICJ with suspicion. After independence, a conciliatory mechanism for the resolution of inter-African disputes was put in place. Diplomatic means were preferred to judicial means of resolving disputes. This preference was explained with reference to a historically founded claim that the traditional way of settling differences was characterised by conciliation and consultation. While such claims may be made for a variety of reasons, they frequently conceal a jealous protection of state sovereignty.[87] The general sentiment that the ICJ was conservative and espoused a Eurocentric philosophy was exacerbated by the Court's 1966 judgment in the South West Africa case.[88] The effect of the 1971 judgment on South West Africa did much to turn the tide.

Africa's enhanced role in the mainstream of international affairs, its increased self-confidence and faith in and contribution to international law, is reflected in the acceptance of the ICJ's jurisdiction by African states.[89] In the period 1947 to 1979 a total of 46 cases were dealt with by the ICJ. African states were involved in only four of these, or 9% of the total number of cases. In the term 1980 to 1993 20 cases were placed on the ICJ's roll. The percentage of cases in which African

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86 Art 92 of the Charter.

87 Mubiala (1995) 3 *AYBIL* 173 at 175.

88 *South West Africa Case, Second Phase* 1966 ICJ Reports 6.

89 Data extracted from ICJ Yearbooks.

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states were involved, rose to 40% (8 out of 20). Since 1993, at least two more cases were placed on the Court's roll.[90]

This trend towards greater participation is also evident from the profile of judges appointed to the ICJ. Fifteen judges serve on the Court. On 31 July 1993 three judges were from African states. They were M Bedjaoui (Algeria, whose term expired on 5 February 1997), R Ranjeva (Madagascar, whose term expires on 5 February 2000) and B A Ajibola (Nigeria; his term has expired on 5 February 1994). Judge Koroka from Sierra Leone was subsequently elected in the place of judge Ajibola and judge Bedjaoui was re-elected. In recent times, African judges therefore consistently make up 20% of the Court's membership. In the preceding years (1946 to 1993), a total of seven African judges had been chosen. Expressed as a percentage, that represented 12% (7 of 59) of all the judges selected in that period. Although this percentage has increased in recent times, there still is a discrepancy between African membership of the UN (which stands at 28,8%, or 53 out of 185) and African representation on the ICJ.

In 1979, an African jurist, TO Elias (from Nigeria), was the first African to be elected as Vice-President of the ICJ.[91] He served as the first African President thereafter, from 1982 to 1985. Judge Kéba M'Baye (from Senegal) was the next African Vice-President, serving in that capacity between 1988 and 1991. The term of the next African to hold the position of President, judge Bedjaoui, expired early in 1997.

The role of the ICJ in the realisation of human rights in Africa will now be investigated in respect of its contentious and advisory jurisdiction.

2.2.3.2 Contentious jurisdiction

The ICJ has not been created as a human rights court. The absence of the possibility of recourse to the Court by individuals and NGOs underlines the emphasis on inter-state relations, rather than on

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90 See cases xiii and xiv discussed in par (b) below.

91 *ICJ Yearbook 1992-1993* 9 - 13, where a list of current and previous members of the ICJ appears.

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individual redress. However, many of the judgments handed down in the exercise of its contentious jurisdiction had and still have human rights implications. Writing about human rights in the international Court in 1991, Schwebel[92] highlighted eight cases decided by the Permanent Court of International Justice, and thirteen judgments by the ICJ. Schwebel concluded that the ICJ has been an instrumental force in the **progressive development of international human rights law**. As for cases involving African states, he referred to **advisory opinions** in only two instances, the South West African/Namibia cases and the Western Sahara case. To investigate the validity for Africa specifically of Schwebel's general statement, the role of the ICJ in the development of African human rights law is now investigated with reference to **each of its fourteen judgments in contentious cases** involving African states:

i *Protection of French Nationals and Protected Persons in Egypt (France v Egypt)*[93]

France approached the Court to protect some of its nationals in Egypt who had been affected by measures adopted by the Egyptian government in relation to their property and persons. After these proceedings had been instituted, Egypt desisted from effecting the measures. The case was withdrawn from the Court's list, illustrating the deterrent effect of a potential judicial resolution of a dispute.

ii *South West Africa (Ethiopia v South Africa; Liberia v South Africa)*[94]

As Dugard pointed out, Ethiopia and Liberia brought proceedings before the ICJ primarily to have the world Court declare that the policy of apartheid applied in Namibia had violated the mandate in terms of which South Africa administered that country since 1920.[95] It is not coincidental that these two states approached the Court. They were the two African states that had never been colonised, giving them the "moral standing" to institute these proceedings. In its first judgment on the issue, the Court narrowly rejected South Africa's preliminary objection about the jurisdiction of

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92 Schwebel (1991) 24 *Vanderbilt Jnl of Transnational Law* 945.

93 1950 ICJ Reports 59.

94 *South West Africa Case, Preliminary Objections* 1962 ICJ Reports 319; *South West Africa Case*, Second Phase 1966 ICJ Reports 6.

95 (1996) 8 *RADIC* 549 at 549-550.

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the Court.[96] Four years later, in 1966, the Court held that the applicants had not established any legal right or interest in the resolution of the dispute.[97] The Court's judgment, finding that they lacked "judicial" standing to bring the case, meant that the Court did not have to address the merits of the claim.[98] Especially the ICJ's reluctance to condemn apartheid as a violation of the mandate and "thereby to advance the liberation of South West Africa/Namibia", was criticised.[99] The other ground for criticism was the implication that a narrow concept of state sovereignty prevailed above broader considerations of the advancement of human rights. The effect of this judgment was ameliorated by an advisory opinion given by the Court five years later.[100]

iii *Northern Cameroons (Cameroons v United Kingdom)*[101]

On popular demand a plebiscite was held to determine whether part of Cameroon should be incorporated into Nigeria. The result was that the Northern Cameroons were attached to Nigeria. The UN General Assembly adopted a resolution accepting the outcome of the popular vote. Cameroon approached the Court, arguing that Nigeria had violated its trustee agreement. The ICJ decided that it could not adjudicate on the merits of the claim, as it could not overturn the de facto position, recognised by the General Assembly.

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96 *South West Africa* 1962 ICJ Reports 319, with a margin of eight votes to seven.

97 *South West Africa, Second Phase* 1966 ICJ Reports 6 at 51. The Court regarded their claim as an *actio popularis*. The applicants lacked standing because this action was "not known to international law as it" then stood and was not imported into the body of international law by "general principles of law" (at 47).

98 *South West Africa, Second Phase* 1966 ICJ Reports 6.

99 See Dugard (1996) 8 *RADIC* at 549 at 551.

100 See the excerpt from the judgment revealing a very legal positivistic approach: 1966 Reports 6 at 34 (at par 49): "Throughout this case it has been suggested, directly, that humanitarian considerations are sufficient in themselves to generate legal rights and obligations, and that the Court can and should proceed accordingly. The Court does not think so. It is a court of law, and can take account of moral principles only in so far as these are given a sufficient expression in legal form. Law exists, it is said, to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline. Otherwise, it is not a legal service that would be rendered."

101 1963 ICJ Reports 15.

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iv *Continental Shelf (Tunisia v Libyan Arab Jamahiriya)*[102]

A dispute arose concerning what part of the continental shelf appertained to which state. The Court decided the issue with reference to principles of equity and proportionality. Malta's attempt to intervene was rejected.

v *Continental Shelf (Libyan Arab Jamahiriya v Malta)*[103]

Subsequently, a case was submitted to the ICJ related to the delimitation of areas of the continental shelf appertaining to Libya and Malta. Adopting a number of equitable principles, the Court delimited the areas in the light of the relevant circumstances.[104]

vi *Frontier Dispute (Burkina Faso v Mali)*[105]

This case concerned the disputed ownership of the "Agacher Strip", situated on the border between Burkina Faso and Mali.[106] The area was disputed ever since the countries attained independence in 1960. The conflict intensified when armed conflict broke out in 1974. Mediation under OAU auspices did not succeed, and the two parties consented to the Court's jurisdiction. Before the Court could decide on the merits of the case, renewed hostilities broke out. Both parties applied to the Court to give a ruling on provisional measures. The Court ordered that the parties must observe the cease-fire, and that they must agree on the terms of withdrawal within twenty days.[107] In the case of failure by the parties to reach an agreement, the Court would make its own order determining the terms of withdrawal. The parties complied with the order and devised their own terms. According to Akande this case illustrates "the positive and influential role the International Court can play in the settlement of disputes directly threatening the peace".[108] As for the

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102 1979 ICJ Reports 3, 1980 ICJ Reports 70, 1981 ICJ Reports 3, 1982 ICJ Reports 18.

103 1982 ICJ Reports 554, 1983 ICJ Reports 3, 1985 ICJ Reports 13.

104 See, generally, Singh (1989) at 418.

105 *Frontier Dispute Case (Burkina Faso/Mali)* 1986 ICJ Reports 554.

106 For some background, see Akanda (1996) 8 *RADIC* 592 at 607-608.

107 *Frontier Dispute Case (Burkina Faso/Mali) Provisional Measures*, Order dated 10 January 1986, 1986 ICJ Reports 3.

108 Akande (1996) 8 *RADIC* 592 at 608.

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provisional matters, the Court's order facilitated an almost immediate and stable resolution of the conflict. As for the decision on the merits, the Court "settled decisively a dispute that had twice resulted in armed conflict between the parties".[109] As far as the merits of the case are concerned, the principle of *uti possidetis* (respect for and upholding of colonial borders) was affirmed.[110]

vii *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia v Libyan Arab Jamahiryia)*[111]

Tunisia approached the Court in connection with the judgment given in the case concerning the continental shelf. It contended that the Court had to determine more precisely the most westerly point of the Gulf of Gabes. The Court found that such a need had not been shown to exist.

viii *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)*[112]

Judgment in this matter was given on 12 November 1991. In terms of an agreement between France and Portugal, the maritime border between Senegal and Guinea-Bissau was established in 1960. A dispute arose about delimitation. At first the parties negotiated. An Arbitration Agreement was then entered into, in terms of which an Arbitration Tribunal was established. The

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109 *Ibid.*

110 Both parties complied with the judgment. The implication of the ICJ judgment was to strengthen the sovereignty of the independent African states by judicially fixing the colonial frontiers. The Court observed that the "maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice"(1986 ICJ Reports 554 at 564). State sovereignty was further enhanced by the court's restrictive interpretation of the principle of "self-determination of peoples". The concept "peoples" was linked to those inhabiting the territory of a legitimately recognised state: "The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, has induced African states judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples" (1986 ICJ Reports 554 at 567).

111 1985 ICJ Reports 192. See also "UN: Secretary-General's Report concerning the Agreement on the Implementation of the ICJ Judgment concerning the Territorial Dispute between Chad and Libya" (1994) 6 *RADIC* 521 at 522.

112 See (1992) 31 *ILM* 32.

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tribunal made an arbitral award in 1989. For reasons not discussed here, Guinea-Bissau argued that the award should be declared inexistant, or null and void. The ICJ, with a 12 to 3 vote, found that the award was valid and binding.

ix *Territorial Dispute (Libyan Arab Jamahiriya v Chad)*[113]

Judgment in this matter was given on 3 February 1994. The Court effectively found that the disputed "Aouzou Strip" was part of Chad. The aftermath of the ICJ's decision show the extent to which the states accepted the Court's settlement of the dispute.[114] Both governments pledged to abide by the judgment in letters addressed to the Secretary-General of the UN.[115] It is encouraging to note that the **humanity of the ordinary persons** affected by the Court's resolution of the dispute is not negated. The UN reconnaissance team expressed its concern about the welfare of about 4 000 inhabitants of the Strip, who were dependent on Libyan support to make a living. The Secretary-General sketched the following solution: "In consultation with the Department of Humanitarian Affairs, it is envisaged that a representative of the UN Development Programme could assist the team in the potential humanitarian dimension of the situation".[116]

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113 See (1995) 100 *ILR* 1.

114 Akande regards this case as a demonstration that the ICJ "does have a role to play in the maintenance of peace" ((1996) 8 *RADIC* 592 at 609). Remarkable in this instance, in my view, are two facts: the disputed area was very substantial, and Libya had been occupying the area for more than twenty years. Despite these factors, Libya complied with the judgment.

115 "UN: Secretary-General's Report concerning the Agreement on the Implementation of the ICJ Judgment concerning the Territorial Dispute between Chad and Libya"(1994) *RADIC* 521. The Secretary-General's report details that "an agreement was signed on 4 April 1994 at Surt, Libyan Arab Jamahiriya, establishing the practical modalities for the implementation of the ICJ Judgment". Article 1 provides for the withdrawal of the Libyan administration. Other aspects dealt with are removal of mines, crossing points for persons and property, and demarcation of the boundary. A UN Reconnaissance Team was sent to ascertain whether it would be possible to deploy UN observers to oversee an orderly withdrawal. Following their positive finding, the UN Aouzou Strip Observer Group ("UNASOG") was established and deployed.

116 "UN: Secretary-General's Report concerning the Agreement on the Implementation of the ICJ Judgment concerning the Territorial Dispute between Chad and Libya" 6 *RADIC* (1994) 521 524.

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x *Maritime Delimitation between Guinea-Bissau and Senegal (Guinea-Bissau v Senegal)*

The case was instituted by Guinea-Bissau in respect of the Court's previous judgment on the issue. When the parties reached agreement, Guinea-Bissau withdrew the case.[117]

xi *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Dispute at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)*

The case is still pending.

xii *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Dispute at Lockerbie (Libyan Arab Jamahiriya v United States of America)*

The case is still pending.

xiii *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v Nigeria)*[118]

In 1994 Cameroon instituted proceedings against Nigeria in respect of the Bakassi peninsula, an area presumed to contain rich oil reserves. Aggression which led to the killing of people on the peninsula has prompted a request for provisional measures. In terms thereof the parties should ensure "that no action of any kind, and particularly no action by their armed forces, is taken"[119] which may prejudice vested rights or aggravate the dispute. The case on the merits is still pending.

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117 See web page http://www.law.cornell.edu/icj/reports/report96.htm.

118 See "African Legal Materials" (1996) 8 *RADIC* 671 for the order on provisional measures, dated 15 March 1966.

119 At 681 (par 1 of the court's judgment).

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xiv *Botswana/Namibia* [120]

On 29 May 1996 the governments of Botswana and Namibia notified the registrar of the ICJ that they are submitting a dispute for the Court's determination.[121] The Court is requested to determine the boundary between Botswana and Namibia around the Kasikili (or Sedudu) island and the legal status of that island. In terms of the special agreement between the parties, the Court's finding will be final and binding, and the parties undertake to carry out the Court's judgment.[122] The case on the merits is still pending. This dispute is ostensibly concerned with a worthless island in the Chobe river, but its resolution may have a profound influence on access to water resources.[123]

2.2.3.3 Advisory jurisdiction

As far as advisory opinions are concerned, it is important to note that only public international organisations may approach the Court for advisory opinions. Many of these opinions have had a direct or more indirect impact on Africa. As far as human rights are concerned, three issues stand out, and are now discusssed.

i *Peacekeeping in Congo*

In the advisory opinion on Certain Expenses of the UN[124] the Court decided that expenses incurred as a result of operations in Congo (and the Middle East) were "expenses of the organisation". In effect, this decision gave retrospective validity to the operations in the Congo, the first time the UN endeavoured to undertake such operations. This established the legal basis of the operation, and enabled similar steps in the future.

ii *Western Sahara*

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120 For a discussion, see Maluwa (1993) 5 *RADIC* 113.

121 See "Botswana and Namibia Bring a Case before the Court" (1996) 8 *RADIC* 749.

122 *Ibid.*

123 Rake "Water Wars" (April 1997) *New African* 15.

124 1962 ICJ Reports 151.

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The UN General Assembly referred the following two questions to the Court for its determination:

- When the Spanish colonised the Western Sahara (Rio de Oro and Sakiet el Hamra), was the territory *terra nullius*?
- If not, what are the respective legal claims of Mauritania and Morocco to the territory?

Finding that the territory was not *terra nullius* at the time of initial occupation, the Court proceeded to the second question. The historical claims of Moroccan and Mauritanian sultans and emirs as a basis on which the Saharan tribes owe them sovereign allegiance, were rejected by the ICJ.[125] In its judgment, the Court referred to the right of the population of the territory to "determine their future political status by their own freely expressed will".[126] The right to self-determination was given strong impetus by the finding of the Court. The ICJ expressed its approval of the application of the "principle of self-determination through the free and genuine expression of the will of the peoples of the Territory".[127] Immediately after the ICJ decision, the Moroccan king, Hassan II, raised a civil army and undertook the "Green March". The ensuing events resulted in Spain's capitulation, and led to a division of the Western Sahara between Morocco and Mauritania,[128] and is causally linked to Morocco's withdrawal from the OAU in 1984.[129]

Its 1975 advisory opinion, which affirmed the right of the Saharawi people to decide on their own future through a referendum, forms the basis of the present position in the Western Sahara. In 1994, the UN deployed the MINURSO (the UN Mission for the Referendum in Western Sahara).

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125 *Advisory Opinion on Western Sahara* 1975 ICJ Reports: Although the Court found that the "Western Sahara" was not *terra nullius* at the time of colonisation, and that both Morocco and Mauritania had shown "legal ties of allegiance", neither of the two proved a tie to "territorial sovereignty". See Amankwah (1981) 14 *CILSA* 34.

126 1975 ICJ Reports 12 at 36.

127 1975 ICJ Reports 12 at 68.

128 See Naldi (1989) at 47.

129 Abedajo "Referendum dilemma for the Children of the Clouds" *Africa Today* (1996) 32 at 33.

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iii South West Africa/Namibia

Advisory opinions on the international status of South West Africa[130] and related issues[131] were issued by the Court. Following the 1966 ICJ judgment, the UN General Assembly decided that South Africa's mandate over South West Africa had been terminated. In terms of a resultant Security Council resolution South Africa's continued presence in the territory was declared illegal.[132] States were obliged to refrain from recognising the illegal presence of South Africa. Despite these resolutions, South Africa continued its mandate. The Security Council requested an advisory opinion from the ICJ on South Africa's continued presence. The Court, in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*,[133] confirmed the stance of the General Assembly and the Security Council.

The thrust of South Africa's objection against the General Assembly resolution was that a detailed factual investigation should have preceded any finding that South Africa was not fulfilling its obligations. The Court observed that it was common cause that the policy of South Africa in the territory was to "achieve the complete separation of races and ethnic groups in separate areas within the Territory".[134] No factual investigation was required. The Court then found: "To establish..., and to enforce distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental rights is a flagrant violation of the purposes and principles of the Charter".[135]

Schwelb elaborated on the significance of this decision for international human rights law.[136] It marks the clearest indication to that date that the UN Charter as such imposes legal obligations in the field of human rights on its members. In the absence of the numerous human rights treaties to which many states are parties today, seeking the basis for such an obligation in the UN Charter

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130 1950 ICJ Reports 128.

131 See 1955 ICJ Reports 67 and 1956 ICJ Reports 23.

132 Resolution 276 (1970).

133 1971 ICJ Reports 16.

134 1971 ICJ Reports 16 at 58.

135 1971 ICJ Reports 16 at 56-57.

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was significant. Extrapolating the judgment, it means that policies entailing apartheid, discrimination or segregation as such are violating the UN Charter, wherever they are implemented. This laid the foundation for stronger steps against South Africa itself, even if it had not ratified any other international human rights treaty.[137] On a more universal scope, it edged away at the sacrosanct principle that internal or domestic affairs are beyond the scope of international concern.

2.2.3.4 Conclusion

Through its interpretation (and acceptance) of these claims the Court gained legitimacy in Africa. Again, ironically, as the Court clearly recognised the sovereignty of the African states, they became more prepared to submit to the jurisdiction of the Court to resolve disputes affecting their sovereignty. Numerous other decisions indicate what the importance to human rights realisation in Africa of an international tribunal had been and can be.

But the role of the ICJ in relation to human rights realisation will remain limited. The ICJ provides a forum to states for the resolution of dispute between them. Although its jurisdiction may potentially be extended to the violation of human rights by another state, experience has learnt that states are reluctant to initiate such action. States are more likely to approach the Court in matters of political prestige and in cases involving territorial disputes. Only by allowing for individual complaints to the ICJ, will this trend be changed. As this possibility seems improbable, the ICJ is likely to remain a static and state-centred institution. The human rights impact of ICJ decisions is incidental or coincidental. Its limited impact accentuates the need for the existence of other international bodies to further the global human rights project.

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136 Schwelb (1972) 66 *AJIL* 337 at 348-349.

137 As the case was, South Africa abstained in the 1948 vote on the Universal Declaration.

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2.2.4 The UN Human Rights Commission

One of the first actions undertaken by ECOSOC was to set up the Human Rights Commission, as mandated by article 68 of the UN Charter.[138] The main accomplishment of the UN Human Rights Commission ("UNHRC") is the elaboration and near-universal acceptance of the three major international human rights instruments: the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights ("CCPR") (1966) and the International Covenant on Economic, Social and Cultural Rights ("CESCR") (1966).[139] The Commission was also instrumental in the process of drafting other human rights instruments, such as the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD").

The UNHRC does not consist of independent experts, but is made up of 54 "instructed governmental representatives".[140] The political bias of representatives is more likely to arise in such circumstances.

While the UNHRC initially worked primarily towards human rights promotion, it is now involved in efforts to deal with human rights violations. Its approach started off as **country-oriented**, with the appointment of *ad hoc* rapporteurs, called "Special Rapporteurs". In the 1980s it broadened its approach to make provision for **thematic rapporteurs**, such as the Special Rapporteurs on religious intolerance and mercenarism. An ever-expanding network of working groups and rapporteurs serves as the vehicle in the process of human rights realisation.[141] Many of these are involved with Africa. At the UNHRC's 1996 session, for example, Special Rapporteurs on Equatorial-Guinea,[142] Burundi,[143] Rwanda[144] and Zaïre[145] reported; an independent expert on

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138 In terms of this article, ECOSOC "shall set up commissions in economic and social fields and for the promotion of human rights...". This was done in respect of the UNHRC in 1946.

139 Sometimes referred to as the international Bill of Rights.

140 Boekle (1995) 13 *NQHR* 367 at 368.

141 See Buergenthal (1995) at 81.

142 See report of Special Rapporteur in E/CN.4/1996/67/Add 1.

143 See UN document E/CN.4/1996/15, and web site http://www. law.uc.edu:81/dynaweb/ecn.4_96/0007n.

144 See UN document E/CN.4/1996/7.

145 See UN document E/CN.4/1996/66, and web site http://www.law.uc.edu:81/dynaweb/ecn4_96/0006r.

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Somalia gave feed-back,[146] and the work of the Special Rapporteurs on Extra-Judicial, Summary and Arbitrary Executions, as well as the Special rapporteur on Torture, touched on numerous African cases.[147] In the 1990s, the Commission started to emphasise a field approach, in trying to help restore faith in and rebuilt state institutions.[148]

At the Commission's 1997 session, the mandate of the Special Rapporteur for Rwanda, René Degni-Ségui, was discontinued. This resulted from concerted efforts by the Rwandan government to have his mandate terminated.[149]

As far as human rights violations are concerned, two different routes may be used to approach the UNHRC:

2.2.4.1 "1235 Procedure"

Despite the fact that large numbers of communications requesting UN intervention in human rights matters have been received annually, the UNHRC decided in 1947 that it had no power to act on the basis of such complaints.[150] This position was changed in 1967, when ECOSOC decided on resolution 1235, which permits the Commission to examine gross human rights violations.[151] The role which the situation in South Africa played in the adoption of this resolution is immediately apparent from its wording, in terms of which the Commission and its sub-commission is empowered to "examine information relevant to gross violations of human rights and fundamental freedoms, as exemplified by the policy of *apartheid* as practised in the Republic of South Africa".[152]

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146 See the report E/CN.4/1996/14.

147 See the report on Togo, E/CN.4/1996/89, on web site http://www.law.uc.edu:81/dynaweb/ecn.4_96/0007n.

148 See Mubiala (1995) 3 *AYBIL* 277.

149 See "A Confrontational UN Commission on Human Rights" (1997) 7 *Libertas* (newsletter of the International Centre for Human Rights and Democratic Development) at 8.

150 See Buergenthal (1995) at 87.

151 Adopted on 6 June 1967.

152 Quoted in Buergenthal (1995) at 89, emphasis in original.

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The 1235 procedure does not require the initiative of an individual complainant. The procedure is **public and non-confidential**. In terms of the 1235 procedure, the Commission has been conducting country-based investigations of gross human rights violations. Boekle tabulates 37 instances in which the UNHRC adopted 1235 procedure measures between 1967 and 1995.[153] Of the total, 14 involve African countries. The first three, predating 1980, relate to situations of racial discrimination, colonial oppression and denial of self-determination. South Africa is not only the first African country to be investigated, but triggered the whole procedure into motion. South Africa remained on the agenda from 1967 to 1995. An *ad hoc* Working Group on Southern Africa was also established by the UNHRC. The other two pre-1980 investigations also targeted countries in Southern Africa that still suffered under colonialism or its aftermath - Rhodesia and the Portuguese colonies Angola and Mozambique. The mandate of the *ad hoc* Working Group on Southern Africa included the monitoring of the situation in Rhodesia and the Portuguese colonies.

The next African situation to be investigated was that in the Western Sahara, in 1980. This issue remains on the UNHRC's agenda. Equatorial Guinea has been a focus of attention since 1980, as well. An expert-investigation was conducted in both 1980 and 1984, followed by a report from the UN Secretary-General (1983 - 1984). A Special Rapporteur for that country was appointed in 1993. Severe atrocities and human rights violations in the Central African Republic and Uganda during the early 1980s caused the UNHRC to place these two countries on its agenda. No measures were however taken in any of these instances.

The situations in seven African states have been investigated since then. These countries are Sudan, Togo, Zaïre (all three for the first time on the agenda in 1993), Burundi, Angola (both since 1994), Rwanda (since 1995) and Nigeria (since the Commission's 53rd session, held in April 1997).[154] Two different types of measures have been employed in these cases. On the one hand, a

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153 (1995) 13 *NQHR* 367 at 378. The analysis that follows is based on Table 2, "Country-specific CHR resolutions and monitoring measures under the 1235 Procedure, 1967 - 1995".

154 See (June-July 1997) 18 *African Topics* 32. In the vote on the appointment of a Special Rapporteur on Nigeria, only two African states were amongst the 28 members in favour of the appointment. These states were South Africa and Uganda. Ten African states abstained, while three more or less neighbouring states (Benin, Gabon and Zaïre) joined China, Cuba and Indonesia in voting against it.

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report by the UN Secretary-General was compiled and presented. On the other hand, Special Rapporteurs were appointed.[155]

2.2.4.2 "1503 Procedure"

The other possibility is the 1503 procedure, established through ECOSOC Resolution 1503.[156] An **individual complaining of the violation of his or her rights** sets this process in motion. The Commission may act by conducting a thorough study or by appointing an *ad hoc* committee to investigate.

Two factors minimise the role of the UNHRC in this regard. Firstly, the procedure is couched in **secrecy**. Only the names of the relevant countries are announced after deliberations, without any details. Secondly, the procedure comes into play only after **domestic remedies** had been exhausted and procedures prescribed in international or regional instruments available to the individual, had been followed. However, the major strength of the procedure is that all member states of the UN are subject to scrutiny by the Commission, notwithstanding the fact that they may not have ratified any international human rights instruments.[157]

This procedure found application in a number of dictatorships in Africa, such as CAR, Equatorial Guinea and Uganda.[158] In 1996 the African "situations" on the "black list" were Chad, Mali and Sierra Leone.[159] General criticism about the lack of publicity also applied in these instances. The Commission went the furthest in a case concerning Malawi.

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155 In three of the cases.

156 Adopted on 27 May 1970.

157 See eg Kokott (1996) 8 *RADIC* 347 at 375.

158 (1980) 24 *ICJ Review* 34.

159 See Marks in Tessitore and Woolfson (eds) (1996) at 208.

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2.2.5 The Sub-Commission on Prevention of Discrimination and Protection of Minorities

The Sub-Commission is a subordinate body of the Human Rights Commission and ECOSOC.[160] It consists of 26 experts elected by the Human Rights Commission. It provides analysis and advice to the Human Rights Commission. Initially, it was involved primarily in standard setting in the fields of discrimination and minority protection. After the adoption of the Universal Declaration, its mandate was extended to provide for undertaking of studies and making of recommendations to the UNHRC. A number of working groups have been established. Except for the working groups discussed below, the one on Communications and the other on the Rights of Indigenous Populations, should also be mentioned.

In the field of prevention of discrimination, numerous studies concerning South Africa were prepared. Recommendations which were implemented include the listing of organisations who dealt with the "colonial and racist regime" in South Africa.[161]

2.2.6 Working Groups of the Commission and Sub-Commission

2.2.6.1 The Working Group on Contemporary Forms of Slavery

In 1975 the UN Sub-Commission established a semi-permanent working group, called the Working Group on Slavery. Its function was to monitor "developments in the field of slavery and the slave trade in all their practices and manifestations".[162] From 1988, it has been known as the Working Group on Contemporary Forms of Slavery, conveying that the traditional understanding of slavery has been broadened. The working group consists of five experts chosen from the membership of

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160 See, in general, Eide in Alston (ed) (1992) 211.

161 Eide in Alston (ed) (1992) 211 at 218 - 219.

162 Eide in Alston (ed) (1992) 211 at 232.

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the Sub-Commission. These experts meet annually for one week in Geneva to consider contemporary forms of slavery.

One African country that has featured consistently on the agenda of the working group is Mauritania.[163] Under pressure from the NGO Anti-Slavery International a UN delegation was sent to Mauritania. It subsequently made recommendations on the eradication of slavery, but they have not been implemented.

2.2.6.2 The Working Group on Arbitrary Detention

Two communications considered against African governments during 1994 illustrate the functioning and potential effect of this working group. Two citizens of Zaïre addressed a communication to the Working Group, concerning their detention without trial due to opposition against the Mobutu regime.[164] The communication was forwarded to the government. After 90 days had expired, no response was received. The Working group was left with no option but to proceed on the available information. After investigating the facts, the Working Group found that the detention was arbitrary, in contravention of articles 19 and 20 of the Universal Declaration and of articles 19 and 22 of the CCPR. It then requested the government of Zaïre to "take the necessary steps to remedy the situation in order to bring it into conformity with" the principles and provisions of the Universal Declaration and the CCPR.[165]

In a decision taken in September 1994, the Working Group found that two senior members of the South African National Congress ("ANC") had been arbitrarily detained prior to the formation of the "popular Government".[166] This constitutes a violation of the Universal Declaration and the CCPR. The Working Group requested the new government to "take note of this decision" and to

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163 See "Slavery in Mauritania" (1997) 7 *African HR Newsletter* at 7.

164 See Decision 4/1994 (Zaïre), UN document E/CN.4/1995/31/Add.1 at 59 - 60.

165 Par 9 of Decision 4/1994 (Zaïre), adopted on 18 May 1994.

166 Decision no 15/1994 (South Africa), UN document E/CN.4/1995/31/Add. 2 at 14 - 15.

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"take such appropriate steps as it considers necessary to remedy the situation in order to bring it into conformity" with the provisions of the above-mentioned human rights instruments.[167]

2.3 *UN human rights treaty bodies*

In the near half-century since the adoption of the Universal Declaration **six major human rights treaties** have been adopted under the auspices of the UN. The first, adopted in 1965, was the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD").[168] Soon thereafter, in 1966, it was followed by the International Covenant on Civil and Political Rights ("CCPR")[169] and the International Covenant on Economic, Social and Cultural Rights ("CESCR").[170] The international human rights regime was further supplemented by the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW") (adopted in 1979),[171] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") (of 1984),[172] and, most recently, in 1989, by the Convention on the Rights of the Child ("CRC").[173] Each of these treaties, with the exception of the CESCR,[174] has established a treaty monitoring body in the form of a supervisory quasi-judicial institution, called a "committee".

These six treaties are by no means the only human rights instruments adopted under UN auspices. **Other human rights treaties** include the following: The Convention on the Suppression and Punishment of the Crime of Apartheid,[175] the Convention on the Prevention and Punishment of the

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167 Par 8 of Decision 15/1994, adopted on 28 September 1994.

168 UN Treaty Series vol 660 at 195, adopted on 21 December 1965, entered into force on 4 January 1969.

169 UN Treaty Series vol 999 at 171, adopted on 16 December 1966, entered into force on 23 March 1976.

170 UN Treaty Series vol 993 at 3, adopted on 16 December 1966, entered into force on 3 January 1976.

171 UN GA Res 34/180, UN doc A/34/46, adopted on 18 December 1979, entered into force on 3 September 1981.

172 UN GA Res 39/46, UN doc A/39/51, adopted on 10 December 1984, entered into force on 26 June 1987.

173 UN GA Res 44/25, adopted on 20 November 1989, entered into force on 2 September 1990.

174 See par 2.4.3 below.

175 UN Treaty Series vol 1015 at 243, adopted on 30 November 1973, entered into force on 18 July 1976.

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Crime of Genocide,[176] the Convention on the Political Rights of Women,[177] the Convention on the Nationality of Married Women,[178] the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages,[179] the Convention relating to the Status of Refugees[180] and the Protocol relating to the Status of Refugees.[181]

The **adherence of African states** to the six major and the other mentioned human rights instruments is set out in Table B below. To form a better impression of Africa's formal adherence to these instruments, in comparison with that of other continents or regions of the world, one must keep in mind that African states constitute nearly a quarter of the total number of states in the world. A total of 191 states in the world have ratified one or more of the international human rights instruments in Table B below.[182] The 54 African states represent 23% of that total number of states parties.[183] When ratifications by region is considered, the division of UN members into five regional units, as grouped together mainly for lobbying and electoral purposes, is adopted in this study. The five regions are the African, Asian, Eastern European, Latin American and Caribbean,

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176 UN Treaty Series vol 78 at 277, adopted on 9 December 1948, entered into force on 12 January 1951.

177 UN Treaty Series vol 193 at 135, adopted 20 December 1952, entered into force on 7 July 1954.

178 UN Treaty Series vol 309 at 65, adopted on 20 February 1957, entered into force on 11 August 1958.

179 UN Treaty Series vol 521 at 231, adopted on 10 December 1962, entered into force on 9 December 1964.

180 UN Treaty Series vol 189 at 137, adopted on 28 July 1951, entered into force on 22 April 1954.

181 UN Treaty Series vol 606 at 267, adopted on 31 January 1967, entered into force on 4 October 1967.

182 This is based on data collected by Marie (1996) 17 *HRLJ* 61. The total number includes both Morocco and the Saharawi Democratic Republic, bringing the possible number of African ratifications to 54.

183 The total number of African "states", 54, includes both Morocco and the Saharawi Arab Democratic Republic ("SADR").The OAU membership currently numbers 53. This excludes Morocco, who withdrew from the OAU when the SADR was admitted and took its seat at the OAU Assembly of Heads of State and Government in 1984. After the OAU had recognised the Saharawi Democratic Republic, Morocco withdrew as a member of the OAU. Morocco remains a member of the UN, though, while the Saharawi Democratic Republic has not been recognised as a UN member state. See Naldi (1989) at 49, also on the UN General Assembly's "low key" approach to this issue. The question of the statehood of the SADR is not canvassed here. Naldi argues that the four requirements of a permanent population, a defined territory, a stable and effective government and capacity to enter into international relations, are met (see Naldi (1989) at 62). The SADR was established by a unilateral declaration of independence by the Polisario Front on 27 February 1976.

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and the "Western and Other" ("WEO") units. While the first four geographical groupings are more or less self-explanatory, the last is quite a diverse conglomerate of nations.[184]

Before the African role and contribution under each of the monitoring bodies is considered, some observations are made about the **treaty system in general**. Examination of state reports by treaty bodies is the main supervisory mechanism provided for under these treaties. In the light of the experience provided by almost thirty years of state reporting, one is forced to conclude that the system has not been very successful. Bayefsky listed the number of state reports due under the five major treaties at the end of 1992.[185] The total number of reports due in terms of CERD, stood at 336 (or 88% of the states parties). In the case of CEDAW, the number of reports due (112) exceeded the number already considered (92). More than 50% of the states parties to CESCR also had overdue reports under that treaty. The global trend to neglect reporting obligations is accentuated in respect of Africa. Of the "top ten" countries in Bayefsky's analysis (with the highest number of overdue reports) eight, Guinea, Uganda, Gabon, Liberia, Togo, Zaïre, Gambia and Cape Verde, were from Africa.[186]

2.3.1 The Committee on the Elimination of Racial Discrimination

2.3.1.1 Background

The first comprehensive and binding multilateral treaty concluded under UN auspices was the CERD. It was adopted on 21 December 1965.[187] Its adoption was preceded by a declaration on the

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184 The full list of WEO states is provided by Bayefsky in Henkin and Hargrove (eds) (1994) at 269 (n 43): They are Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Netherlands, New Zealand, Norway, Portugal, San Marino, Spain, Sweden, Turkey and the United Kingdom. The USA is considered to be a member of this group only for electoral purposes. Israel not a member of any regional group of the UN.

185 See data in Tables A, D E, gathered by Bayefsky in Henkin and Hargrove (eds) (1994) at 286 - 289.

186 Guyana and El Salvador were the non-African states on the list.

187 See general discussion by Partsch in Alston (ed) (1992) at 339.

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same subject in 1963.[188] African states took the initiative on both occasions.[189] CERD was ratified by a sufficient number of states in just over three years. Of the 27 states that had ratified the instrument when it entered into force in January 1969, a majority (19) were from the "third world".[190]

A CERD Committee is instituted in terms of the treaty.[191] This Committee consists of eighteen independent experts, nominated and elected by member states.[192] The main functions of the Committee are four-fold:[193]

- It considers and evaluate "progress **reports**" presented to it by states parties within a year of ratification, and thereafter, every two years.[194]
- It considers **inter-state complaints**.[195] However, no formal inter-state complaint have as yet been submitted to the Committee.
- In the case of states that have accepted the Committee's jurisdiction to do so, it examines **communications submitted to it by individuals** or groups.[196]
- From 1993 the Committee has adopted an *ad hoc* procedure in which it takes the initiative to **investigate** the situation in states on the basis of actual or potential circumstances.[197]

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188 The Declaration on the Elimination of All Forms of Racial Discrimination, adopted by the General Assembly by resolution 1904 (IVIII) on 20 November 1963.

189 (1966) 15 *ICLQ* 996 at 998.

190 Partsch in Alston (ed) (1992) 339 at 339.

191 Art 8 of CERD.

192 Art 8 of CERD.

193 The CERD Committee also adopts resolutions: See eg UN doc CERD/C/49/MISC.2/ Rev 3/1996 on Burundi.

194 Art 9 of CERD.

195 Arts 11 - 13 of CERD.

196 Art 14 of CERD.

197 See O'Flaherty (1996) at 103. By the end of 1995, this procedure has been invoked in respect of eleven countries. Three of these eleven are African states: Algeria, Burundi and Rwanda.

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2.3.1.2 Composition

Committee members are elected by states parties for terms of four years.[198] In the establishment of the Committee, three factors should be given consideration: "equitable geographical distribution", representation of "different forms of civilization" and representation of "the principal legal systems".[199] After the election in 1990, the 18-member Committee consisted of the following three members from African states: Mahmoud Aboul-Nasr (Egypt); Hamzat Ahmadu (Nigeria); Lamptey (Ghana). West Europe had five members on the Committee, Eastern Europe had three, Latin America four and the Asian region three. In 1996, Abdoul-Nasr and Ahmadu still served on the Committee, but Lamptey was replaced by Andrew Chigovera (Zimbabwe).[200]

2.3.1.3 Ratifications and reservations

At the time the Convention started operating, a substantial percentage of ratifying states was from Africa. After an initial rush to ratify, only one African state has been added to the list since 1990, when Malawi acceded to CERD on 11 June 1996. It should be added, though, that South Africa signed it on 30 October 1994. By 31 March 1997, 43 African states had acceded to or ratified the Convention, while two states have only signed it.[201] This means that 81% of all OAU member states have ratified CERD, a percentage surpassed by this group of states only in relation to the conventions on women, children and refugees. The total number of ratifications at that stage was 148, or 77% of all potential ratifying states. The likelihood of an African state having ratified CERD is thus greater than the chance of states around the globe to have done so.

Some fifty countries wold-wide have entered **reservations or made declarations** on accession or ratification, including six African states (Egypt, Libya, Madagascar, Morocco, Mozambique and

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198 Art 8(2) and 8(5) of CERD.

199 Art 8(1) of CERD.

200 See O'Flaherty (1996) at 88 (n 11).

201 See list of ratifying states at website www.un.org/Depts/Treaty/final/ts2/newfiles/.

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Rwanda).[202] Where some of the other states raised concerns about **substantive** provisions of the Convention, the six African states raised a **procedural** objection. They all declared themselves not to be bound by article 22 of the Convention, in terms of which disputes between parties not settled by negotiation, shall be referred to the ICJ "at the request of any of the parties to the dispute". This represents a departure of the normal procedure in relation to the ICJ, which as a rule requires consent by both parties. The six states mentioned above (as well as others, such as the USA) declared that the consent of all the parties in each individual case will still be required before it submits to the jurisdiction of the ICJ.

Individual complaints may be entertained by the Committee in respect of those states that had made a **declaration in terms of article 14** of the Convention. As at 31 March 1997, 24 such declarations had been made.[203] Two of these declarations came from African states: Algeria and Senegal. Expressed as a percentage, it represents 5% of the total number of African ratifying states. Of the other global regions, only Asia has a lower rate (4%). In contrast, ten out of the 19 states (or 53%) that had ratified CEDR in Western Europe also allow for individual petition. As

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2.3.1.4 *State reporting*

As of January 1994, 33 African states had two or more reports due.[204] At that stage, one state (Sierra Leone), had ten reports outstanding. Two other states, Liberia and Swaziland, had nine reports due. A combined total of not less than 238 reminders have been sent to these three states, without eliciting any response.

2.3.1.5 *Individual communications*

The CERD Committee examines communications in respect of those states that have made a declaration in terms of article 14. As yet, the Committee has only heard a "handful of individual petitions".[205] No complaints have apparently emanated from the two African states referred to above.

2.3.1.6 *Realisation*

Discrimination based on ethnic difference is not unknown in Africa. Despite the initial enthusiasm on the part of African countries about CERD and ratification by most, it has not become a vehicle for the elimination of racial discrimination in Africa. As far as "racial discrimination" could be equated with "apartheid", all African states unified in condemnation. The unequivocal African support in the drafting and adoption phases may be ascribed to the common ideal to eradicate systematic racial discrimination from the continent. This also explains the inclusion of the "duty" on states to "condemn racial segregation and *apartheid*",[206] a duty most OAU member states fulfilled with vigour. But African states, perhaps blinded by the scale and extent of racial discrimination in South Africa, did not take CERD seriously as far as their domestic systems were concerned. Few states complied with their primary "visible" duty under the Convention, to submit

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204 See table in Hatchard (1994) 38 *JAL* 61 at 62 - 63.

205 Buergenthal (1995) at 66. This followed after the Committee gave its first opinion on 10 August 1988 in the case *Yilmaz-Dogan v The Netherlands* ((1991) 12 *HRLJ* 302).

206 Art 3 of CERD.

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state reports. In the light of the non-compliance with this obligation, it remains an open question to what extent states comply with other, "unsupervised"[207] duties, such as the duty to encourage "integrationalist multiracial organizations".[208] Because so few African states have allowed individuals to lodge complaints with the Committee, this avenue never became a viable route of redressing racial discrimination.[209]

2.3.2 The Human Rights Committee

2.3.2.1 Background

The International Covenant on Civil and Political Rights ("CCPR") was adopted by the UN General Assembly in 1966, and entered into force on 23 March 1976. The enforcement body established under this treaty is the Human Rights Committee ("HRC").[210] The Committee has three main functions:

- In the case of all states parties, it **considers periodic reports** submitted by them.[211]
- In respect of those states that have made declarations under article 41 of the Covenant, the Committee **considers inter-state communications**.
- Thirdly, it **considers communications submitted by individuals** from states that have accepted the first Optional Protocol to the Covenant.[212]

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207 That is, not dependent on state reports.

208 Art 2(1)(e) of CERD.

209 For an example of a South African court finding interpretative guidance in CERD, see *Ex parte Gauteng Legislature* 1996 3 SA 163 (CC), par 71 (n 53) and par 82.

210 Not to be confused with the Human Rights Commission (for which the acronym "UNHRC" is used in this study), see par 2.3.1 above.

211 In terms of art 40 of CCPR.

212 This Protocol ("OPI") entered into force on 23 March 1976, simultaneously with the CCPR. The Preamble of the Optional Protocol states that it is aimed at further achieving the purpose of the CCPR and at improving implementation thereof. Art 1 provides that states parties to the Protocol recognise the

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The HRC has an extended mandate in respect of states that have ratified the Second Optional Protocol to the CCPR. This Protocol ("OPII") aims at the abolition of the death penalty in ratifying states.[213] All states parties to the second Optional Protocol must report to the HRC on measures which they have adopted to give effect to the provisions of this Protocol.[214] In respect of states parties that have accepted the HRC's competence to consider inter-state and individual communications, other states and individuals may base communications against ratifying states on the provisions of OPII.[215]

2.3.2.2 Composition

The HRC is composed of eighteen members who are elected by the states parties to the CCPR for renewable terms of four years.[216] They serve in their personal capacity. Since its inception, African states have been underrepresented.[217]

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competence of the HRC "to receive and consider communications from individuals subject to its jurisdiction".

213 Art 1 of OPII provides that no person "shall be executed" in a ratifying state, and that states parties "shall take all necessary measures to abolish the death penalty within its jurisdiction".

214 Art 4 of OPII.

215 See arts 4 and 5 of OPII. However, a state may make a statement to the contrary at the moment of ratification or accession.

216 Arts 28(1) and 32(1) of the CCPR.

217 Of the eighteen members elected in 1993-1994, three of the members were African, one each from Egypt, Mauritius and Senegal (UN docs A/48/40, A/49/40). Of the three women members of the HRC, none was from an African state. From 1977 to 1993, eight Africans were part of the group of 48 people who had served on the HRC (See Nowak (1993) at 914 - 915. The states represented were Egypt, Kenya, Mauritius, Rwanda, Senegal and Tunisia. The last two countries had members serving on the Committee twice. From 1 January 1995 to 31 December 1996 only two Africans served on the Committee. They are El Shafei (Egypt) and Lallah (Mauritius). (The member from Senegal (Ndiaye) retired, and was not replaced by an African: see Nowak (1995) 377 at 378.) Africa's clear underrepresentation is to an extent palliated by the fact that El Shafei served as the body's Vice-Chairperson for two successive terms.

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2.3.2.3 *Ratification, reservations and derogations*

On 31 March 1997 41 African states (including Morocco) had ratified the **CCPR**.[218] Of the 41, 24 had accepted individual petition under the Optional Protocol to that Covenant. They are: Algeria, Angola, Benin, Cameroon, Central African Republic, Chad, Congo, Equatorial Guinea, Gambia, Guinea, Libyan Arab Jamahiriya, Madagascar, Malawi, Mauritius, Namibia, Niger, Senegal, Seychelles, Sierra Leone, Somalia, Togo, Uganda, Zaïre and Zambia. The global number of ratifications of the CCPR on the same date was 136, or 71% of the total number of potential ratifying states.[219] For the African states, the average was 76% (41 out of a possible 54).[220]

Of the 25 states worldwide that ratified the **Second Optional Protocol** to the Covenant, only three were African.[221] Of the three, two states (Namibia and Mozambique) are from Southern Africa.[222] The third is Mauritius.[223]

Six African countries entered **reservations** when they ratified or acceded to the CCPR. This is a small proportion of the total number of 52 states that entered reservations, undertakings and declarations. The reservations of African states are also not very detailed or comprehensive, when compared to, for example, the five reservations, five undertakings and three declarations made by the USA on accession.[224] The ratifications by African states may be grouped as follows:

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218 See Table B below.

219 That is, 136 of the total of 191.

220 Or 77%, calculating 41 as a percentage of the 53 UN African members.

221 See Table B below.

222 See ch 3.2.2(c) below. Botswana has not ratified OP II. But see *S v Ntesang* 1995 4 BCLR 426 (Botswana), in which the death penalty was found not to violate the Botswana Constitution, where the Court of Appeal observed as follows (*per* Aguda JA, at 435G – H: "I … express the hope that before long the matter will engage the attention of that arm of the Government which has responsibility of effecting changes to the statutes for its consideration and changes which it may consider necessary to further establish the claim of this country as one of the great liberal democracies of the world".

223 Mauritius is also a member of SADC.

224 See information contained at web site http://www.un.org/Depts /Treaty/funal/newfiles /frontboo/ tocgen.html

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- Guinea and Libya raised concerns of an excessively political nature in their reservations. Guinea objected that article 48(1) is contrary to the democratisation of international relations. Libya clarified that acceptance of the treaty obligations did not imply acceptance of the Israeli state. Congo and the Gambia raised substantive conflicts between domestic law and provisions of CCPR. Article 11 of the CCPR stipulates that no one "shall be imprisoned merely on the ground of inability to fulfil a contractual obligation". Congo's reservation left its private law intact in so far as it allows for civil imprisonment.[225] The Gambia reserved the right of its nationals to invoke the right to free legal assistance "where the interests of justice so require"[226] only when charged with a capital offence. Egypt made a declaration intent on infusing the interpretation of the CCPR with the spirit of Shari'ah: It accepted the CCPR, but "taking into consideration the provisions of the Islamic Shari'ah and the fact that it does not conflict with the text ...".

- Algeria made a number of, what it termed "interpretative declarations". The reference in article 1 to "Non-Self-Governing and Trust Territories" prompted Algeria to state that article 1 cannot in any way imply the impairment of the right to self-determination. Article 22, dealing with freedom of association, does not impair the right to organise, but makes "law the framework for action by the State". The last reference is to the position of women. Article 23(4) requires states parties to ensure equality of spouses in marriage. The declaration that this provision shall in no way impair on the "essential foundations of the Algerian legal system" in relation to entering into marriage, the situation during marriage and the dissolution of the marriage, is very drastic.

Mainly West European states raised **objections** against certain reservations. A number of objections were also directed against the reservations entered by the USA. No African state raised any objection against any of the reservations or declarations.

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225 Belgium entered an objection to this reservation. On the basis of an analysis of the Congolese law, Belgium observed that the reservation was unnecessary and should not be regarded as setting a precedent. In terms of the Congolese law imprisonment will only follow if a creditor is due more than 20 000 CFA, and in bad faith became insolvent. Imprisonment can only be imposed for those between 18 and 60 years old. See SA case *Coetzee v Government of RSA* 1995 6 SACLR (CC).

226 Art 14(3)(d) of the ICCPR.

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As was stated, the CCPR also provides for the **optional acceptance of inter-state complaints**.[227] By the end of 1996, a total of 45 states globally had accepted the competence of the Human Rights Committee to consider communications of this nature. Six African states (Algeria, Congo, Gambia, Senegal, Tunisia and Zimbabwe) have accepted this optional provision.

Article 4(3) allows states parties to notify other parties of **temporary derogations** from the Convention. Only two states parties from the African continent have as yet provided such information.[228] They are Algeria and Sudan. In the case of Sudan, the continuous conflict between the north and south provide the explanation for the state of emergency.

2.3.2.4 Reporting obligations

The primary overseeable duty of ratifying states is to present an initial report (within two years of ratification) and periodic reports (every five years thereafter). Initial reporting is required by article 40 of CCRP; periodic reporting was introduced by the Committee.[229] The non-compliance of states has become a major obstacle to the effective functioning of the system. On 4 November 1994 23 African states had one or more reports outstanding. Of these, the following eleven have not submitted their initial or any subsequent reports:[230]

Angola	(report due 9 April 1993)
Benin	(report due 11 June 1993)
Ethiopia	(report due 10 September 1994)
Equatorial Guinea	(report due 24 December 1988)
Gabon	(report due 20 April 1984)
Côte d'Ivoire	(report due 25 June 1993)

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227 In terms of art 41 of the CCPR.

228 Information contained in web site http:/www.un.org/Depts/Treaty/final/ts2/newfiles/frontboo /tocgen.html.

229 See Nowak (1993) 14 *HRLJ* 9.

230 At the end of the Committee's 52nd session, see UN document CCPR/C/104 at 5 - 8.

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Mozambique	(report due 20 October 1994)
Nigeria	(report due 28 October 1994)
Seychelles	(report due 4 August 1993)
Somalia	(report due 23 April 1991)
Zimbabwe	(report due 12 August 1992)

The initial reports of 22 of the ratifying states worldwide were outstanding at that stage. In other words, Africa made up 50% of those not complying with the initial obligation to report. This compares very unfavourably with the percentage of African states parties. The five reports longest overdue were from Gabon, Equatorial Guinea, Somalia, Haiti and Zimbabwe.

An analysis of some of reports examined by the HRC since 1992 reveals that timely submission of reports is not a goal in itself, and guarantees very little. One state, **Burundi**, had submitted its periodic report on time.[231] The report was considered in 1992. The delegation at that stage supplemented the report with more updated information. The HRC expressed its concern about the lack of protection of minorities, ethnic dominance of one ethnic group of the armed forces, the declaration of and power to declare states of emergency, detentions, and the lack of investigation of past atrocities. Not long after the report was considered, renewed ethnic violence broke out in Burundi. In 1994, the HRC requested the Burundi government to submit a report about the local human rights conditions. This request was made in terms of the obligation of states to submit reports "whenever the Committee so requests".[232] Although the report lacked information on the situation in Burundi, the Committee used all information at its disposal to examine the situation. By that time, the violence had abated. The HRC repeated, mostly in more detail, the observations and recommendations contained in its previous comments.[233] The Committee emphasised that these human rights violations must be addressed within the greater framework of working towards national reconciliation.

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231 See UN document CCPR/C/79/Add 9 (1992).

232 Art 40(1) of CCPR.

233 See HRC report CCPR/C/79/Add 41 (1994).

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Not only were reports submitted late, but they mostly suffered from a lack of detail as well.[234] Where detail of legislative provisions and administrative regulations were provided, there was a lack of information on the "implementation of the Convention in practice"[235] and on the difficulties experienced in securing enjoyment of the rights in the Convention.[236] Also disappointing is the fact that many of the reports were not the first to be presented by the state and to be considered by the Committee. Despite previous advice, states have still not followed the guidelines for reporting and have not complied with the spirit required for meaningful reporting. However, in the case of Morocco, the problematic aspects of the report were corrected by frank answers, admitting to some difficulties in implementing the Covenant.[237]

As some states have submitted previous reports, the extent of progress between the two reports could be gauged.[238] Two states in particular have been praised for progress in a number of respects. After the consideration of its last report, the HRC observed with approval that **Senegal** has taken the following steps:[239]

- The State Security Court was abolished.
- The position of Mediator was created.
- A new, improved Electoral Code was adopted.
- Certain provisions of the CCPR were applied by domestic courts for the first time.

Although Tunisia had generally seen a deterioration of human rights, certain reforms had also been implemented. This included new provisions in the Penal Code, which provide for heavy sanctions in respect of violence against women, and changes to the Personal Status Code liberalising women's access to child custody and divorce.[240]

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234 The report of Niger was desribed as "extremely succinct" (CCPR/C/79/Add 17 (1993)) and that of Cameroon as "summary and rather theoretical" (CCPR/C/79/Add 33 (1994)).

235 See eg the Moroccan report (CCPR/C/79/Add 44 (1994)) and the report submitted by Senegal, described by the HRC as lacking in attention to actual implementation (CCPR/C/79/Add 10 (1992).

236 See eg HRC report on Egypt's report (CCPR/C/79/Add 23 (1993)).

237 See CCPR/C/79/Add 44 (1994) at par A.

238 This is indeed regarded as the method by which follow-up would be effected.

239 See CCPR/C/79/ Add 10 (1992) at par 3.

240 See CCPR/C/97/Add 43 (1994).

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After analysing most of the reports submitted by African states, the following recurring aspects which impede the realisation of the CCPR in the continent may be identified:

- the imposition and application of the death penalty;
- extra-judicial executions by security forces;
- discrimination against women;
- provision for states of emergency, and derogation of rights during emergencies;[241]
- non-notification of the Secretary-General of declaration of state of emergency;
- provision for preventative detention, and the conditions of detention;
- violations of freedom of expression and association; and
- persistent problems related to ethnicity.[242]

But there is also a ray of hope. Most of these reports were submitted by states which have recently held multi-party elections and are progressing on the road to democracy.[243] It is significant that these states have submitted themselves to international scrutiny. Viewed in the context of democratisation, the reporting obligation takes on new meaning, and becomes a vehicle for establishing and guarding over democratic institutions.

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241 See, in particular, the concerns raised by the HRC on the extension of the state of emergency in Egypt since 1981: CCPR/C/97/Add 23 (1993) at par 12.

242 This was clearly the root cause of the upheaval in Burundi. In other states, too, this is often the "Achilles heel" in human rights realisation. See the problems related to the Casamance region in Senegal (HRC report CCPR/C/97/Add 10 (1992)), the Tuareg in northern Niger (HRC report CCPR/C/97/Add 7 (1993)), the position of the Berbers in Algeria (CCPR/C/97/Add 1 (1992) and the English-speaking north-west of Cameroon (CCPR/C/97/Add 33(1994)).

243 This is of particular relevance in the case of Algeria (see CCPR/C/97/Add 1 (1992)), Niger (see CCPR/C/97/Add 17 (1993)), Tanzania (see CCPR/C/97/Add 12 (1992)) and Togo (see CCPR/C/97/Add 36 (1994)).

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2.3.2.5 *Individual complaints under the first Optional Protocol*

As at 31 March 1997, 24 African states have become party to the first Optional Protocol.[244] Malawi and Sierra Leone, who acceded to the Protocol in 1996, have most recently become parties. At the same time, the African states parties to the CCPR numbered 41. This means that almost half (45%) of African states are party to both the Covenant and its optional complaints procedure. The percentage globally is 47%. While the African percentage for **ratification of the CCPR** exceeds the global percentage (77% in Africa, as against 71% globally), the **order is reversed** when it comes to **accepting individual complaints** (45% in Africa, as against 47% globally). One explanation could be that the commitment in Africa is easily secured at the more rhetorical level. Mechanisms that could publicly embarrass states are less easily accepted. Peter[245] expressed the opinion that "most states, and in particular those from the developing world, have constantly avoided signing or ratifying the Optional Protocol" because it is an "enforcement mechanism".

At the end of each session the HRC publishes views and decisions. Views are "contestations", while decisions are irrevocable. An analysis will now be made of the views and decisions issued from the 4th session, held in 1979, to the end of 1994, to establish to what extent individuals in African states have utilised the Optional Protocol procedure. The 4th session is the starting point, as the Committee issued views for the first time at the end of this session, when it began "consideration of communications in accordance with the Protocol".[246] The Committee's first view was issued on 15 August 1979, in response to a communication registered on 15 February 1977. **From 1976 to 1 June 1993** the HRC issued a total of 291 final views and findings on admissibility.[247] At that stage, **less than 5% (16)** of these were issued in respect of African states.[248]

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244 See Table B below.

245 Peter in Peter and Juma (1996) 52 at 54.

246 See par 147, UN document A/32/40, 37/40.

247 Nowak (1993) gives a list of these views and findings in an addendum. Although the last case mentioned was registered as 491, the smaller total (291) represents the number of cases in which views were expressed or findings were made.

248 Communications 16/1977 (against Zaïre), 35/1978 (against Mauritius), 49/1979 (against Madagascar), 90/1981 (against Zaïre), 115/1982 (against Madagascar), 124/1982 (against Zaïre), 132/1982 (against

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The first view adopted in relation to an African state was in a case from Mauritius.[249] **By the end of 1994**, the HRC had found a total of **21 violations** against African states. Zaïre accounted for almost half of these communications, nine cases from that state having served before the HRC. The other states complained against were Madagascar (four cases), Equatorial Guinea (two cases), Zambia (two cases), Cameroon, CAR, Libya, Mauritius and Senegal (on one occasion each).

The views expressed on the merits of communications from Africans against African governments[250] are as follows:[251]

1979 : 0 (total 1)[252]

1980 : 0 (total 5)[253]

1981 : 1 (total 12) Mauritius[254]

1982 : 0 (total 14)[255]

1983 : 3 (total 17) Madagascar;[256] Zaïre (2)[257]

1984 : 1 (total 7) Zaïre[258]

Madagascar), 138/1983 (Zaïre), 155/1983 (Madagascar), 157/1983 (Zaïre), 194/1985 (Zaïre), 241/1987 (Zaïre), 242/1987 (Zaïre), 354/1989 (Mauritius), 457/1991 (Libya) and 463/1991 (Zaïre).

249 Communication 35/78 (*Aumeerudy-Cziffra and 19 Others v Mauritius*). Mauritius became the second African state to accede to or ratify the Optional Protocol by acceding in 1973 (after Madagascar ratified it in 1971).

250 Since states undertake to "respect and to ensure to all individuals within its territory and subject to its jurisdiction" the rights set out in the CCPR (art 2(1) of the CCPR), citizens of African countries are sometimes complainants in cases against non-African governments, especially in Europe (see ch 5.1 above).

251 In each year, the number of complaints against African governments is provided, followed by the total number of complaints in that year against all ratifying states. The name(s) of the African state(s) against which complaints have been directed is (are) furnished as well.

252 See UN doc A/34/40

253 See UN doc A/35/40.

254 See UN doc A/36/40 Communication 35/1978 (*Aumeeruddy-Cziffra and others v Mauritius)*, (1981) 2 *HRLJ* 139.

255 UN doc A/37/40.

256 UN doc A/38/40. Communication 49/1079 (*Marais v Madagascar*), (1983) 4 *HRLJ* 204.

257 UN doc A/38/40. Communication 16/1997 (*Mbenge v Zaïre*), (1983) 4 *HRLJ* 185 and Communication 901/1981 (*Mabanga ex - Philibert v Zaïre*), (1983) 4 *HRLJ* 195.

258 UN doc A/39/40. Communication 124/1982 (*Muteba v Zaïre*), (1984) 5 *HRLJ* 215.

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1985 : 2 (total 12) Madagascar (2)[259]

1986 : 2 (total 4) Zaïre (2)[260]

1987 : 1 (total 5) Madagascar[261]

1988 : 1 (total 8) Zaïre[262]

1989 : 0 (total 10)[263]

1990 : 2 (total 13) Zaïre (2)[264]

1991 : 0 (total 6)[265]

1992 : 0 (total 18)[266]

1993 : 2 (total 23) Zambia (2)[267]

1994 : 7 (total 32)[268] Cameroon;[269] Central African Republic;[270] Equatorial Guinea (two);[271] Libya;[272] Senegal;[273] Zaïre.[274]

The following four cases illustrate the potential role of the HRC in an African context:

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259 UN doc A/40/40. Communication 115/1982 (*Wight v Madagascar*), (1986) 7 *HRLJ* 294, and Communication 132/1982 (*Jaona v Madagascar),* (1985) 6 *HRLJ* 233.

260 UN doc A/41/40. Communication 138/1983 (*Mpandanjipa et al v Zaïre*), (1986) 7 *HRLJ* 277, and Communication 157/1983 (*Mpaka-Nsusu v Zaïre*), (1986) 7 *HRLJ* 280.

261 UN doc A/42/40. Communication 155/1983 (*Hammel v Madagascar*), (1988) 9 *HRLJ* 249.

262 UN doc A/43/40. Communication 194/1985 (*Muiyo v Zaïre*), (1990) 11 *HRLJ* 146.

263 UN doc A/44/40.

264 UN doc A/45/40. Communication 241/1987 (*Birindiwa v Zaïre*), (1993) 15 *HRLJ* 15; Communication 242/1987 (*Tshisekedi v Zaïre*), (1993) 15 *HRLJ* 15.

265 UN doc A/46/40.

266 UN doc A/47/40.

267 UN doc A/48/40. Communications 314/1988, 326/1988 *(Bwalaya v Zambia; Kalenga v Zambia*), (1995) 16 *HRLJ* 389.

268 Un doc A/49/40.

269 Communication 458/1991 (*Mukong v Cameroon*), (1995) 16 *HRLJ* 391.

270 Communication 428/1990 (*M'Boissona on behalf of Bozize v CAR*), (1995) 16 *HRLJ* 391.

271 Communication 468/1991 *(Bahamonde v Equatorial Guinea*), views of 20 October 1993, (1995) 15 *HRLJ* 26; Communication 414/1990 (*Miha v Equatorial Guinea*), (1995) 16 *HRLJ* 388.

272 Communication 440/1990 (*Youssef on behalf of Bashir El-Megreisi v Libya*), (1995) 16 *HRLJ* 392.

273 Communication 386/1989 (*Koné v Senegal*), (1995) 16 *HRLJ* 394.

274 Communication 366/1989 (*Tshiongo a Minanga v Zaïre*), (1995) 16 *HRLJ* 396.

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- The first case was decided by the HRC in 1993, following a complaint by Angel Bahamonde against **Equatorial Guinea**.[275] Bahamonde was and still is an outspoken opponent of the Equatorial regime. His allegations are as follows: Before he fled the country in 1991, he was the victim of numerous human rights violations. His passport was confiscated, he was arbitrarily detained, and his lands were expropriated. The government argued that local remedies had not been exhausted, as Bahamonde had not filed any action before local courts. The complainant gave detailed information of numerous attempts to obtain judicial redress, which have failed. His attempts were systematically blocked by the authorities and by the President himself. He added that the judiciary in the country cannot act independently as all judges and magistrates are nominated directly by the President.

  The HRC declared the communication admissible. Under the circumstances, the applicant could not be expected to exhaust local remedies. The government had asserted, but only in very general terms, that the complainant could have involved at least four laws or regulations before local tribunals. The failure of the state "to link its observations to the specific circumstances of the author's case"[276] prompted the Committee to find that the applicant had met all admissibility requirements. As to the merits, the HRC found that the complainant had been arbitrarily arrested, that his right to security of the person had been violated, that he was denied the right to leave his country, and that he was discriminated against. As an appropriate remedy the government was urged to "guarantee the security of his person, to return confiscated property to him or to grant him appropriate compensation, and that the discrimination to which he has been subjected be remedied without delay".[277] The Committee requested to receive, within 90 days, information on steps subsequently adopted by the government.

- In the second case, *Lubuto v Zambia*,[278] the HRC dealt with article 6(2) of the CCPR, which allows for the imposition of the death penalty "only for the most serious crimes". In terms of **Zambian** legislation, the imposition of the death sentence was mandatory where a firearm had

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275 Communicatin 468/1991 *(Bahamonde v Equatorial Guinea)*. See HRC's views at (1994) 15 *HRLJ* 26.

276 At par 6.1 of the HRC's views.

277 At par 11 of HRC's views.

278 Communication 390/1990, 31 October 1995, see (1996) 10 *Interights Bulletin* 28 - 29.

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been used in the course of a robbery. Capital punishment had to follow, irrespective of whether the firearm was used to injure or kill anyone. The HRC held this position to be in violation of article 6(2), as the courts could not take into account whether the use of the firearm had ensued in death or injury, or not. In Lubuto's case, gunshots were fired during the course of the robbery, but no-one was injured. The Committee regarded the commutation of Lubuto's sentence as an appropriate and effective remedy in the circumstances. The HRC also found that Lubuto was not tried without undue delay.[279] The period that had expired between his arrest and the final decision dismissing the appeal was excessive. Although the Committee took into account the difficult economic conditions faced by the Zambian government, it had to implement the minimum standards contained in the CCPR.

- In another case involving **Zambia**, the HRC in 1994 found violations of the CCPR which had been committed under the Kaunda government.[280] The case originated when Bwalya ran for a parliamentary seat in 1983, and was arrested and detained for 31 months on charges that he belonged to an organisation considered to be illegal under Zambia's (then) one-party Constitution. The HRC found a violation of article 25, which allows for free participation in the conduct of public affairs, and to "be elected at genuine periodic elections".[281] The Committee observed that "restrictions on political activity amounts to an unreasonable restriction on the right to participate in the conduct of public affairs".[282] Other rights of the author of the communication had also been violated, the Committee concluded. In a brief note, the state informed the HRC that the complainant had been released. As if to suggest that the matter should be laid to rest, the state failed to co-operate any further. However, the HRC found that the release of the complainant is not the only "remedy" appropriate in the circumstances, as it urged the state to grant compensation to Bwalya, and to ensure that similar violations do not occur in the future.[283] It also requested the state to provide it, within 90 days, with information about measures taken to address the situation.

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279 See art 14(3) (c) of CCPR.

280 Communication 314/1988 (*Bwalaya v Zambia*), views of HRC, 14 July 1993. Quoted in Steiner and Alston (1996) at 541 - 543.

281 Art 25(b) of the CCPR.

282 At par 6.6 of the Committee's views.

283 At par 8 of the HRC's views.

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2.3.2.6 *Realisation*

Against the above background the question may be asked how effective the implementation of the CCPR had been in the African context.

State reporting suffers from numerous draw-backs. As was pointed out above, in the case of Burundi, subsequent events have revealed the ineffectiveness of the reporting procedure in the reality of a state caught up in cycles of ethnically-based violence. It also shows the limitations of the inherent effectiveness of the reporting system in the face of massive violations during large-scale civil disturbance. However, other cases emanating from Africa show the potential of the mechanism to strengthen democratic governance. State reporting cannot uproot repressive regimes and cannot redress massive violations. But it can bolster fledgling democracies, which already are in place, and it can improve the protection of human rights, if states are in principle committed to the advancement of human rights.

The question arises to what extent individuals have in fact benefited from the procedure provided for especially in the **first Optional Protocol**. McGoldrick, in analysing the effectiveness of the Optional Protocol for individuals, compiled two lists of states: one of those that usually co-operate and comply and one of those who do not. This list of states identified as willing to co-operate with the Committee and abide by its final views includes Canada, a number of West European states and Jamaica. Only one African state, Mauritius, is included. The *Mauritian Women Case* in fact provides, in his view, "the clearest example of a State party taking measures in consequence of the HRC's final views".[284] The Mauritius legislature amended two pieces of legislation found by the HRC to be discriminatory against women. The HRC decision was also cited with approval by the Zimbabwean Supreme Court when it considered a similar issue.[285]

However, without doubt, most African states do not comply with the views issued by the HRC. In the case of *Marais v Madagascar*, for example, the state did not adhere to the Committee's statement that it would "welcome a decision by the State party to release Mr Marais, prior to

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284 McGoldrick (1991) at 203 par 4.132.

285 See *Rattigan v Chief Immigration Officer, Zimbabwe* 1995 2 SA 182 (ZSC) at 189-190.

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completion of his sentence, in response to his petition for clemency". Marais was only released after he had completed his sentence.[286] The decision in *Mpandanjila et al v Zaïre* was not only rejected by the Zairian government, but also resulted in retaliatory measures by the government. In response to the HRC's views, the authors of the communication were arbitrarily detained and subjected to internal banishment and inhuman treatment. In a subsequent communication, two of them complained to the HRC. In that decision, *Birindiwa and Tshisekedi v Zaïre,*[287] the government was again found to be in violation of the CCPR.

Inevitable **time delays** cause the Committee's views to have little impact. For example, views were adopted in two cases against Zambia in July 1993.[288] Both communications related to restraint of free political activity and delay in giving reasons for arrest. The circumstances in both had a close link to the one-party system prevailing at the time. Although numerous violations were found and compensation was ordered, some five years have already lapsed by then. The intervening years saw the one-party system dismantled. It fell to the new, democratically-elected government to redress the wrongs of the past.

Even in respect of the African states that have ratified the Optional Protocol to the CCPR, **few communications** have been brought against African states. By the end of 1992, when 17 African states have accepted the Committee's competence to receive individual communications, eight of these states had not been the subject of any such complaints. These states were Algeria, Angola, Benin, Congo, Gambia, Niger, Seychelles and Somalia.[289] It appears from the data above that the next two years did not see a change in the situation. A small number of complaints originated in most of the other state. Despite its meagre contribution of cases, Odinkalu *et al* concluded that the views adopted on African communications significantly enriched the jurisprudence of the Committee.[290] The likelihood of a communication emanating from Africa being declared

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286 See McGoldric (1991) at 223 (n325).

287 Communication 241/1987 and 242/1987, views of 2 November 1989 (See Nowak (1993) 14 *HRLJ* 9 at 15).

288 Communication 314/88 (*Bwalaya v Zambia*) and Communication 326/88 (*Kalenga v Zambia*).

289 See Bayefsky in Henkin and Hargrove (eds) (1994) at 292: Table J.

290 Odinkalu, Tadessey and Lumumba (1994) 8 *Interights Bulletin* 67.

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admissible, is greater than those emanating from any other region.[291] When communications were in fact considered on the merits, the HRC found violations in all the cases.[292]

It is clear from the above that **arbitrary detention** is an endemic problem in Africa. In each of the seven 1994 cases cited above, the Committee found a violation of article 9 of the CCPR. The wording of article 9(1) embodies the crucial concerns of many Africans: "Everyone has the rights to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law". In all seven cases a violation of article 9 was found, exposing the government as repressive and intolerant of any form of dissent. These specific violations were embedded in the denial of democratic rights to the population generally.

The cases brought and findings reached by the HRC reinforce the **interdependence of the rights** in the CCPR and those in the CESCR. The socio-economic implications of detention have been raised on numerous occasions. In *Mukongo v Cameroon*,[293] for example, the Cameroon government argued that harsh prison conditions were a result of the persistent underdevelopment of that country. The HRC referred to the UN Standard Minimum Rules for the Treatment of Prisoners and held that those minimum requirements had to met by all states, regardless of possible "economic justifications".[294] Two other cases, *M'Boissona v CAR*[295] and *Koné v Senegal*[296] are examples of the Committee's approach to delay awaiting trial. Securing expeditious trials, as required by the HRC, will only be attained through resource allocation.

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291 Based on figures as from February 1993, see Bayefsky in Henkin and Hargrove (eds) (1994) at 294, Table M. Of the African communications, 82% were declared admissible, as against 50% from Eastern Europe, 71% from Latin America and 32% from the WEO states.

292 See Bayefsky in Henkin and Hargrove (eds) (1994) at 294, Table M. The African percentage (100%) should be contrasted with the 30% violations found in respect of communications from WEO states.

293 Communication 458/1991.

294 See par 9.3 of the HRC's views.

295 Communication 428/1990. The Committee also noted the extremely poor prison conditions in this case, and found a violation of art 7. Redress of such conditions will clearly have "economic" implications.

296 Communication 386/1989.

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The more **indirect influence** of the CCPR is more difficult to gauge. It has come to be accepted as one of the primary international human rights instruments, and has served as role model for human rights standard setting in the domestic sphere. Another indirect form of influence is judicial reliance on CCPR provisions as interpretative guides.[297]

2.3.3 The Committee on Economic, Social and Cultural Rights

2.3.3.1 Background to and functions of the Committee

The International Covenant on Economic, Social and Cultural Rights ("CESCR") is one of the two human rights treaties that converted the lofty declarations of the Universal Declaration into binding state obligations. In its attempt to realise social justice, the document covers a wide range of rights - from education, employment and the family, to minority languages and cultures. It was adopted in 1966, but entered into force only in 1976. Supervision of the treaty is exclusively by means of state reporting. A supervisory body, the Committee on Economic, Social and Cultural Rights (the "CESCR Committee"), is responsible for the examination of state reports. This Committee, created by ECOSOC in 1986, replaced the previous "moribund working group of government representatives".[298]

2.3.3.2 Composition

The eighteen members of the CESCR Committee are elected by all members of ECOSOC.[299] In the process of electing members, "due consideration" is to be given to "equitable geographical

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297 See eg *Nyambirai v National Social Security Authority* 1996 1 SA 636 (ZS) at 647I, *Ex parte Gauteng Legislature* 1995 3 SA 165 (CC) at par 71, *S v Makwanyane* 1995 3 SA 391 (CC) at paras 63 – 67 and *S v Williams* 1995 3 SA 632 (CC) at paras 21 (n 24) and 26.

298 Forsythe (1992) at 68.

299 See Alston in Alston (ed) (1992) 473 at 488.

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distribution and to the representation of different forms of social and legal systems".[300] This was interpreted as allowing each of the five regional grouping three members to the Committee, with the additional three being divided between Latin America, Africa and the WEO states.[301]

2.3.3.3 Ratification, reservation and derogation

Oloka-Onyango analysed the state of African ratification of the CESCR.[302] As of 15 July 1995, over 30% of African states had not ratified the instrument. Using the analogy of the Convention on the Rights of the Child, he argued that universal African ratification of the CESCR is the "necessary first step for all African states which claim to uphold the ideals contained in the instrument".[303] Serious observance will only follow once a "bench-mark from which standards in the area can be critically and universally assessed", is in place.[304] Oloka-Onyango singled out Ghana as a state that purports to be a proponent of the need to address socio-economic inequalities at the international level and domestically. Notwithstanding, Ghana has not ratified the CESCR, revealing an unwillingness to hold steps taken in this regard up to international scrutiny.

By 31 March 1997, the same number of African UN member states (41) has ratified the CCPR and the CESCR.[305] Forty of these states ratified both the covenants. Only one state, Guinea-Bissau, has ratified the CCPR, but not the CESCR. Conversely, Mozambique has ratified the CESCR, but not the CCPR. This corresponds with a global trend, as 135 states globally have ratified the CESCR, and 136 the CCPR.[306]

Nine African states made **reservations** when accepting their obligations in terms of the treaty. The Covenant obliges states parties to respect the liberty of parents to choose schools, other than public

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300 ESC Res 1985/17, par b, quoted by Alston in Alston (ed) (1992) 473 at 487.

301 See Alston in Alston (ed) (1992) 473 at 488.

302 (1995) 26 *California West Intl Law Jnl* 1.

303 (1995) 26 *California West Intl Law Jnl* 1 at 16.

304 (1995) 26 *California West Intl Law Jnl* 1 at 15.

305 See Table B below.

306 See Table B below.

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schools, for the education of their children "in conformity with their own convictions".[307] In this respect, Algeria, Congo and Rwanda raised objections. Congo, for example, declared that the article does not give parents the right to establish private schools contrary to the monopoly of the State in the nationalisation of education. Algeria, Guinea and Libya made reservations of a political nature similar to those entered in relation to the CCPR.[308] Egypt made a declaration of a religious nature, similar to the one entered in relation to the CCPR. Reservations made by Kenya, Madagascar and Zambia are indicative of an honest appraisal of the implications of the obligations under the Covenant. The duty on states to ensure paid leave or adequate social security to women before and after childbirth is guaranteed.[309] Kenya reserved its adherence to this obligation, observing that it cannot be realised at present. Both Madagascar and Zambia declared that the right to free primary education for all cannot be realised at present.[310]

2.3.3.4 Reporting obligations

As is the case under other treaties, African states have been reluctant to meet their obligation to report.[311] One factor of particular importance in Africa is that governments "do not have appropriate data of good quality for this type of analysis".[312] An optional Protocol to CESCR that will allow for individual complaints is now being considered. This will convert the approach from monitoring of "progressive realisation" to a "violations"-based approach. As far as Africa is concerned, this approach is preferable in the light of the fact that "a violations approach does not necessarily require access to extensive statistical data.[313]

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307 Art 13(3) of the Covenant.

308 See par 2.4.2 (c) above.

309 Art 10(2) of the Covenant.

310 Art 13(2)(a) of the Covenant.

311 See in general on reporting Craven (1995).

312 Chapman (1995) 55 *ICJ Review* 23 at 28.

313 Chapman (1995) 55 *ICJ Review* 23 at 31.

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2.3.3.5 Realisation

Continent-wide conditions of poverty, illiteracy and general underdevelopment testify to the failure of African states to secure viable socio-economic environments to their nationals. Ratifying the CESCR might have a gravitational pull-power, but as yet its promise lies unfulfilled. Reporting obligations were insufficient in securing improved realisation of these rights. On the short term and in isolated cases, at least, the gravest breaches of socio-economic rights may be redressed by adopting a violations-based approach.

2.3.4 The Committee on the Elimination of Discrimination against Women

2.3.4.1 Background

Numerous human rights instruments have been adopted to deal with aspects of the precarious position of women around the globe. The most comprehensive of these is the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW"). Others include the Convention on the Political Rights of Women,[314] the ILO Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value and the Convention on Consent to Marriage[315], Minimum Age for Marriage and Registration of Marriages and the Convention on the Nationality of Married Women.[316]

A number of African states have become party to some of these instruments. On 31 March 1997, the number of states that have ratified each of these was as follows:[317]

- CEDAW: 45 states
- Convention on the Political Rights of Women: 29 states:[318]

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314 UN Treaty Series vol 193 at 135, adopted on 20 December 1952, entered into force on 7 July 1954.

315 ILO Convention no 100, UN Treaty Series vol 165 at 303, adopted on 29 June 1951, entered into force on 23 May 1953. Also see par 2.5.1 below.

316 UN Treaty Series vol 309 at 65, adopted on 20 February 1957, entered into force on 11 August 1958.

317 See Table B below.

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- Consent, Minimum Marriage Age Convention: 9 states
- Nationality of Married Women Convention: 12 states

The African Charter incorporates these rights by reference: African states shall ensure the "elimination of every discrimination against women and so ensure the protection of the woman and child as stipulated in international declarations and conventions".[319] This means that, notwithstanding the fact that a state might not have ratified a specific convention, those provisions become binding on that state by virtue of the state's ratification of the African Charter. As far as international commitment is concerned, one should distinguish between African states that have a primary commitment to women's rights, and those who have a derivative obligation. In relation to CEDAW the difference would be that realisation is the responsibility of different institutions. For states incurring their commitments via the African Charter, the African Commission is the enforcement mechanism; for the states that have ratified the conventions themselves, realisation is the responsibility of the Committee.

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318 Even some of those states that have ratified entered restricting reservations. See web site http://www.un.org/Depts/Treaty/bible/Part_1_E/XVI_/XVI_1.html: Lesotho: "Article III is accepted subject to reservation, pending notification of withdrawal in any case, sofar as it relates to: Matters regulated by Basotho Law and Custom". Swaziland: "(a) Article III of the Convention shall have no application as regards remuneration for women in certain posts in the Civil Service of the Kingdom of Swaziland. (b) The Convention shall have no application to matters which are regulated by Swaziland Law and Custom in accordance with Section 62 (2) of the Constitution of the Kingdom of Swaziland. [(a) The office of Nggwenyama; (b) the office of Ndlovukazi (the Queen Mother); (c) the authorization of a person to perform the functions of Regent for the purposes of section 30 of this Constitution; (d) the appointment, revocation of appointment and suspension of Chiefs; (e) the composition of the Swazi National Council, the appointment and revocation of appointment of members of the Council, and the procedure of the Council, (f) the Ncwala; (g) the Libutfo (regimental) system.]" Sierra Leone and Mauritius do not consider themselves bound by article III in so far as that article applies to recruitment to and conditions of service in the Armed Forces or to jury service.

319 Art 18(3) of the Charter.

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2.3.4.2 *Composition and functions*

The Committee on the Elimination of Discrimination against Women ("the CEDAW Committee") is made up of 23 independent experts, elected by the states parties to CEDAW.[320] They meet yearly to consider state reports submitted in terms of CEDAW.[321] The CEDAW Committee may "make suggestions and general recommendations based on the examination of reports and information received from the States Parties".[322] These suggestions and recommendations are contained in the Committee's annual report to the General Assembly.[323]

At present, six of the 23 Committee members are from African states.[324] They are all female and are more or less representative of the African continent, although Southern and Central Africa are underrepresented. The African members are: Abaka (Ghana), Aouij (Tunisia), Bare (Zimbabwe), Ouedraogo (Burkina Faso), Sinegiorgis (Ethiopia) and Tallawy (Egypt). The terms of four members expire in 1998, and that of the other two (the members from Burkina Faso and Ethiopia) expire in the year 2000.

Byrnes has described the performance of African experts as "varied": "some have been among the most active members of the Committee, while others have been relatively passive".[325] He also noted that "rigorous scrutiny of developing countries appears to have been tempered by the perception of the difficulties they face in the promotion of the equality for women".[326]

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320 Art 17 of CEDAW.

321 Art 20 of CEDAW.

322 Art 21(1) of CEDAW.

323 This report is submitted through ECOSOC: see art 21(1) of CEDAW.

324 See Web site gopher://gopher.un.org: 70/00/ga/CEDAW/REP.

325 Byrnes (1989) 14 *Yale Jnl of Intl Law* 1 at 11.

326 *Ibid.*

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2.3.4.3 *Ratifications and reservations*

As at **31 December 1995**, CEDAW had been **ratified** by 43 African states.[327] Half of the ten non-ratifying states were Arabic countries.[328] Apart from these five states, another two of the non-ratifies were states within the Islamic sphere of influence.[329] Botswana, Sao Tome e Principe and Swaziland accounted for the other three. By **31 March 1997**, two of these states, Algeria and Botswana, have joined the 43, pushing the number of African ratifying states to 45. This represents 85% of all OAU member states. The global ratification percentage then stood at 83%.

States may enter **reservations** when ratifying or acceding to CEDAW. The general rule that reservations may not be incompatible with the object and purpose of a treaty,[330] is spelt out in the Convention.[331] Eight African states ratified CEDAW with reservations.

- **Algeria and Ethiopia** both declared themselves not bound by article 29(1). That provision creates the possibility of doing away with the requirement of mutual consent of states parties in order to seize the ICJ.

- Two African states, **Libya and Malawi**, made general reservations.[332] Libya made it clear that the principle of equality may not be invoked in contradiction of Shari'ah. Malawi entered a reservation to the effect that traditional customary practice rather than CEDAW is to be upheld in cases of conflict.

- Article 11 of CEDAW deals with equality in the field of employment. A number of states parties made reservations about the full realisation of the rights contained in this article. The

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327 See Table B below.

328 They are Algeria, Djibouti, Mauritania, Somalia and Sudan (see Table B). They are all members of the Arab League (see ch 5.4 below).

329 They are Niger and Mozambique, both members of the Organisation of Islamic Conference (see ch 5.4 below).

330 Art 19 of the 1969 Vienna Convention on the Law of Treaties.

331 Art 28(2) of CEDAW.

332 See web site http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_8.html.

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"most blunt" of these reservations came from **Mauritius**,[333] who declared itself not bound by articles 11(1)(b)[334] and 11(1)(d), which guarantees equal remuneration for work of equal value. Lijnzaad has described the terms of these reservations as "highly questionable".[335]

- Further reservations were entered by **Algeria, Egypt and Lesotho**. These are of a more limited nature and refer to particular aspects. The Algerian reservation requires that the Convention may not contradict provisions of the Algerian Family Code in respect of rights in marriage. The Egyptian reservation also invokes the Shari'ah and may be subjected to criticisms similar to those raised in respect of Libya.[336] Lesotho made a reservation which probably best illustrates the possibility of a tolerable reservation.[337] Its reservation excludes a particular aspect of Lesotho society from the reach of the general principle of gender equality. This aspect is succession to the throne and to traditional chieftainships, which is regarded as the prerogative of men. Without agreeing to the principle,[338] it seems to be very different from being wholesale negating of treaty obligations.

Seven states **objected** formally to reservations entered by states parties. All of them objected to Libya's reservation. In my view the reservations entered by both Libya and Malawi are too vague and general. If a state wants to make a reservation, it must at least be precise about what aspect it reserves.[339] All-inclusive reservations, like those of Libya and Malawi, dilute all the rights in CEDAW. They reduce the state's obligation to existing local law, either in the form of Shari'ah or traditional law. This is clearly incompatible with the principal objective of the Convention, which

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333 As Lijnzaad (1995) observed (at 314).

334 This sub-article grants women equality in employment opportunity.

335 Lijnzaad (1995) at 314.

336 On the question of Shari'ah and CEDAW reservations, see also Byrnes (1989) *Yale Jnl of Intl* Law 1 at 52 - 55. On conflicts between the Islamic religion and the implications of ratifying CEDAW, see Sullivan (1988) 82 *AJIL* 487 at 514 - 517.

337 For a more general discussion of the significance of CEDAW for women in Lesotho, see Mamashela (1993) 5 *ASICL Proc* 153.

338 The importance of female inclusion in African public spheres is discussed in ch 3 below.

339 See Lijnzaad (1995) at 305, pointing out that the Malawian reservation encompasses all spheres of society.

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is to eliminate all forms of discrimination against women.[340] These reservations subject international human rights law to internal law. This conflicts with the Vienna Convention on the Law of Treaties, which provides that local legislation may not be invoked as a ground to dilute treaty obligations.[341]

2.3.4.4 Reporting

State compliance with reporting obligations is analysed and presented schematically in Table B.[342] Viewed within a global perspective, African states have been quicker to ratify, but slower to report than states in the other regions.

2.3.4.5 Realisation

The limitations of the human rights institutions and instruments have been highlighted. Sexual inequality is reinforced by custom and culture in most of Africa.

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340 See Preamble and art 2 of CEDAW.

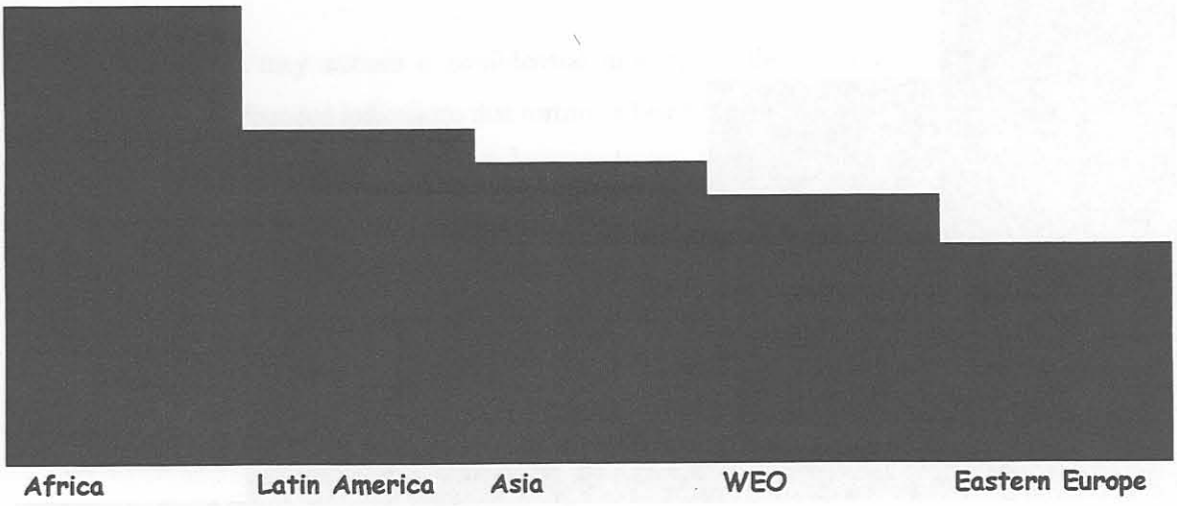
341 Art 27 of the Vienna Convention on the Law of Treaties.

342 Below.

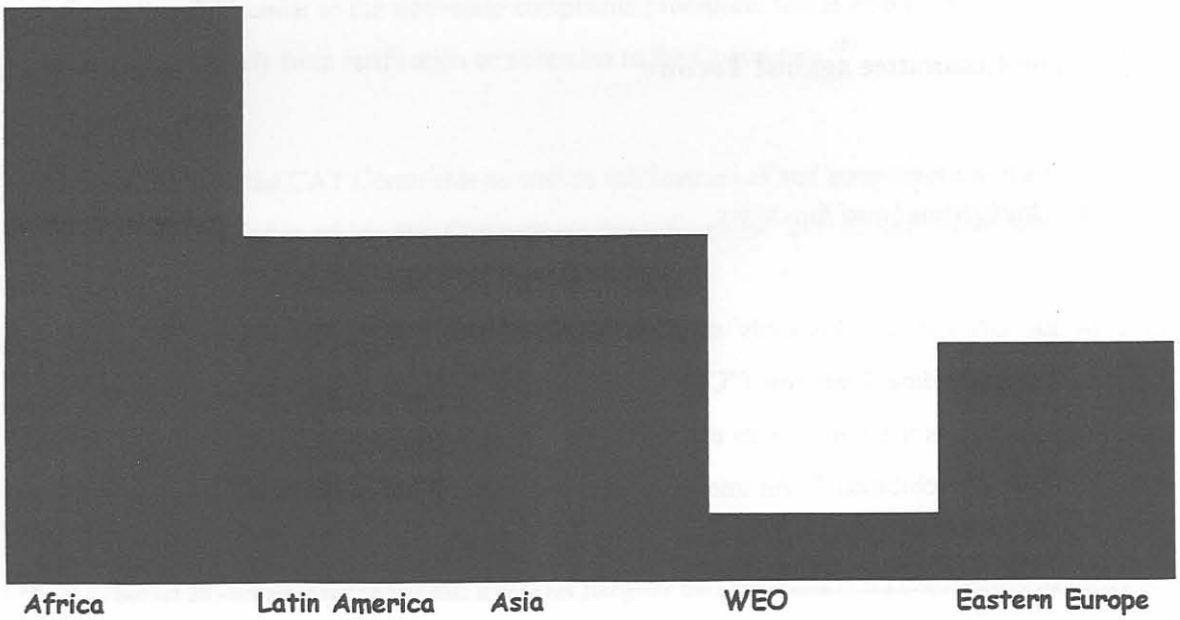
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TABLE A: CEDAW: RATIFICATIONS AND STATE REPORTING BY REGION[343]

(1) Ratification of CEDAW on 31 March 1997

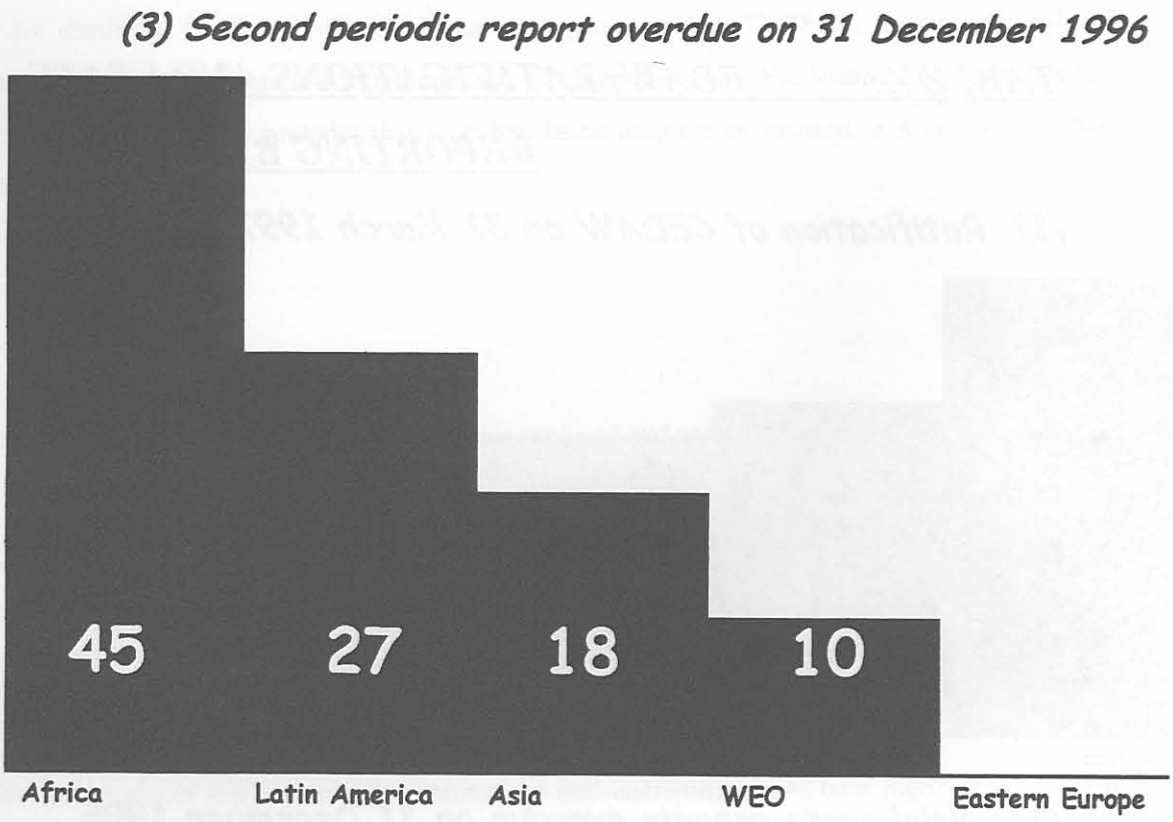


(2) Initial state reports overdue on 31 December 1996



343 Graphs show percentages of total of cases for all regions together. Source: CEDAW/C/1997/2; data at gopher://gopher.un.org:70/00/ga/cedaw/1997/C-1997-2).

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2.3.5 The Committee against Torture

2.3.5.1 Background and functions

In 1984 the UN General Assembly adopted the Convention against Torture and other Cruel, Inhuman and Degrading Treatment ("CAT").[344] Taking as its starting point that international law outlaws the practices mentioned in its title, the main aim of the Convention is to provide measures to strengthen this prohibition.[345] An international supervising body, the Committee against Torture ("CAT Committee"), is established to implement the provisions of CAT.[346]

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344 Adopted on 10 December 1984, GA Res 39/46, entered into force on 26 June 1987, after ratification by twenty states (art 27).

345 Burger and Danelius (1988) at 1.

346 Arts 17 and 18 of the Convention.

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Four functions are accorded to this Committee:

- It considers **state reports**, which states parties have to submit within one year of ratification or accession, and again every four years thereafter.[347] After considering these reports, the Committee may issue comments on a particular report, and may include general comments about the reports in its annual report to the states parties and the UN General Assembly.[348]

- The Committee may initiate a **confidential inquiry** on the basis of reliable information revealing "well-founded indications that torture is being systematically practised in the territory of a State party".[349] Once a finding has been made, it is kept confidential and transmitted to the state party. The finding may later be included in the Committee's annual report. Unless a state party makes a specific declaration to exclude this competence,[350] it follows automatically from accession or ratification.

- **Complaints by one state party against another** may be directed to and may be considered by the Committee. This procedure is optional.[351]

- **Complaints by or on behalf of individuals** may be directed to and may be considered by the Committee.[352] Similar to the inter-state complaints procedure, this is also a procedure that does not follow directly from ratification or accession to the Convention.[353]

The composition of the CAT Committee as well as ratifications of and reservations to the CAT will now be discussed, after which the Committee's four functions will be elaborated upon in the African context.

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347 Art 19.

348 Art 19(5), read with art 24 of CAT.

349 Art 20(1).

350 See art 28 - a state may "declare that it does not recognize the competence of the Committee provided for in Article 20".

351 Art 21 of CAT.

352 Art 22 of CAT.

353 An art 22 *declaration* is therefore similar in effect to Optional Protocol I to the CCPR.

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2.3.5.2 *Composition*

The states parties to CAT elect ten experts as Committee members for renewable terms of four years.[354] Those elected perform their functions in their personal capacities.[355]

The first CAT Committee was elected in 1987. Of the ten members, one (or 10% of the membership) was from an African state. This was Alexis Mouelle, from Cameroon.[356] At that stage, 27 states had ratified CAT. Of these, 4 (or 7 % of the ratifying states) were African.[357] Before the meeting an informal agreement had been worked out by the states parties. In terms thereof, two members would be from Africa, one from Asia, two from Eastern Europe, two from Latin America and three from the WEO states. The end-result did not reflect this informal agreement, as the WEO states were "overrepresented" in relation to the agreement, with four representatives and Africa "underrepresented", with only one. The African states, and the Philippines, expressed their concern about this departure from the informal agreement.[358] However, at 7% of the ratifying states, and 10% of the Committee membership, Africa had in fact been overrepresented on the Committee.[359]

2.3.5.3 *Ratification, reservations and derogations*

Nineteen African states have **by 1 January 1996** ratified the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.[360] By **31 March 1997**, four more African states (Côte d'Ivoire, Malawi and Zaïre in 1996, and Kenya on 21 February 1997) have ratified

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354 Art 17(1) and 17(5) of CAT.

355 Art 17(1) of CAT.

356 See Burgers and Danelius (1988) at 111.

357 These four states were Egypt, Senegal, Cameroon and Togo (see Burgers and Danelius (1988) at 109).

358 See Burgers and Danelius (1988) at 111.

359 In 1992 - 1993 two Africans served on the Committee: Moulle and El Ibrashi from Egypt, whose term expired at the end of 1995 (Annex II to UN doc A/48/44, Supplement no 44).

360 See Table in Heyns (1996) at 3 - 4.

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CAT, bringing the African total to **23**. This is proportionately less than the global average: 53% of states worldwide have ratified,[361] and only 43 % of African states have done the same.[362]

A similar tendency as in the case on the CCPR and its Optional Covenant is noted. The African percentage drops strikingly when the percentage of states that have made **declarations in terms of articles 21 and 22 of CAT**, is compared with the number of states that have ratified the Convention. A declaration in terms of article 21 allows the CAT Committee to consider inter-state complaints, and one made in terms of article 22 allows individuals to complain to the Committee. By 31 March 1997, four African states have made declarations, all four of them in terms of both articles. The four states are Algeria, Senegal, Togo and Tunisia. This means that 13% of the African states parties to CAT have accepted the Committee's broader competence, as opposed to 36% of all the states parties to CAT taken together.[363] It also means that only 8% of all African members of the UN can be investigated effectively for compliance with obligations undertaken under the CAT.

Only one African state entered a **reservation** when it ratified CAT. Morocco excluded the competence of the CAT Committee in terms of article 20(1) of CAT.[364] This is disappointing, as article 20(1) provides one of the most significant mechanisms for preventative and proactive implementation of CAT. It provides the Committee with the power to "invite" a state party to "co-operate in the examination" of reliable information about systematic practices of torture received by the CAT Committee in respect of that state. The "invitation" need not entail a visit to the state party, as visits are dependent on state consent.[365] By excluding the competence of the Committee *ab initio*, Morocco has given a very clear indication of its reluctance to subject its penitentiary system to international scrutiny. This conclusion is consistent with Morocco's non-acceptance of the CAT Committee's optional competencies.

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361 102 of the total of 191 states.

362 23 of the 53 African UN member states.

363 The total number of states parties to CAT that have made declarations is 37 (see web site referred to in Table II). Expressed as a percentage, this is 36 %.

364 See web site http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_9.html.

365 See art 20(3) of CAT.

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2.3.5.4 *Reporting obligations*

States have a regular reporting duty. They must report on measures taken to give effect to the treaty within one year of ratifying it. Thereafter, states must report every four years.[366] As is the case with reporting to other treaty bodies, many states lag behind in their duty.[367] The general problem of duplication of information contained in different reports is accentuated by the high degree of overlap between CAT and CCPR. This factor may impact significantly in states that already find it difficult to comply with reporting obligations. Institutional and financial constraints accentuate these difficulties in most African countries.

The Committee considered the state report of Libya in November 1991.[368] It referred the report back for supplementary information on the way in which the CAT was implemented in Libya. In November 1992, the Committee examined the additional report. Although the report, and the answers of the Libyan representative, gave details about the Libyan legal system and its formal conformity with the Convention, the report still lacked information about the practical application of the instrument.[369]

2.3.5.5 *Confidential inquiry*

Article 20 of CAT provides for a procedural innovation as far as treaty bodies are concerned.[370] When the CAT Committee receives "reliable information which appears to contain well-founded indications that torture is being systematically practised in the territory of a State Party",[371] the Committee may investigate and report on the matter. If the information meets the threshold-test

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366 As required by art 19(1) of CAT.

367 See Bayefsky in Henkin and Hargrove (eds) (1994) 229 at 287 (Table C).

368 See paras 181 - 207 of Report of the Committee against Torture, UN doc A/48/44.

369 The Committee concluded as follows: "The Committee also stated that it was awaiting with impatience the second periodic report ... due in June 1994, and that it would be grateful if that report would describe the application of the Convention article by article" (par 205 of UN doc A/48/44).

370 See Burger and Danelius (1988) at 160.

371 Art 20(1) of CAT.

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contained in the wording of article 20(1), it must refer the matter to the state to seek its input and co-operation. It may obtain information from other sources (including NGOs) in its inquiry. A visit to the state concerned may only take place with the state's consent.[372] Once the inquiry is completed, its results are communicated to the state party. The state may then comment. Thereafter, the CAT Committee may publish the summarised report in its annual report. The Committee embarked on its first investigation of this kind at its fourth session.[373] Not much data is available yet on how this procedure functions in practice. The procedure in terms of article 20 is binding on all ratifying states, unless they opt out explicitly, as Morocco has done. By the end of March 1997, seven other ratifying states have also denied the CAT Committee its powers under article 20.[374]

2.3.5.6 Individual complaints

By the end of its seventh session, the CAT Committee had adopted decisions on only seven cases. In each instance, the communication was rejected on admissibility grounds.[375] Two cases involving African citizens, one against an African and one against a non-African state, are now discussed:

In the first instance a complaint against Tunisia was submitted to the Committee against Torture in 1994[376] in respect of the arrest and death in detention of a Tunisian student, Faïsal Barakat. On the facts presented to the Committee, including medical reports, a case of torture seemed to have been established. The application was, however, declared inadmissible. The Committee had to interpret article 22(1) of the Convention, stipulating that states parties may recognise the Committee's competence to receive communications "from or on behalf of individuals". This article should be read with rule 107(1)(b) of the Committee's Rules of procedure. This rule provides that the communication must be submitted by:

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372 See art 20(3) of CAT.

373 See Byrnes in Alston (ed) (1992) at 532.

374 See web page http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_9.html.

375 Byrnes in Alston (ed) (1992) at 539.

376 *Faïsal Bakarat and family v Tunisia*, Communication 14/ 1994, UN Doc. A/ 50/ 44 at 70 (1995).

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- "the individual himself"; or
- "by his relatives or designated representative"; or
- "by others on behalf of an alleged victim when it appears that the victim is unable to submit the communication himself, and the author of the communication justifies his acting on the victim's behalf".

The third category was at issue in this communication. The victim was dead and therefore obviously unable to complain personally. Provided that he "justifies" his acting on the deceased's behalf, the author would be allowed to bring the communication. The author in this case is a political refugee, residing in France, but he did not establish that he was duly authorised by the deceased's family to submit the communication. The Committee arguably accepted the allegations that the victim's and author's family are threatened by the Tunisian government, as it requested the government to ensure that no harm is done to them. Given this context, it seems overly restrictive and technical for the Committee to have accepted the government's contention that the author had not been "duly authorised by the family". Having declared the communication inadmissible, the Committee left the door open for a subsequent communication properly establishing standing on behalf of the victim.

The subject matter of *Mutombo v Switzerland*[377] was torture and consistent mass violations of human rights in Zaïre. Mutombo, a Zairian citizen, was involved in activities opposed to the Mobutu regime in Zaïre. He was subsequently detained and allegedly exposed to torture. When he was released, he fled the country, and eventually ended up in Switzerland. His entry into Switzerland was illegal. Consequently, he applied for refugee status. His application was rejected, and appeal to the Commission of Appeal in Refugee Matters was unsuccessful and he faced expulsion. The CAT Committee concluded that his expulsion would constitute a violation of article 3[378] of CAT.[379] As Zaïre is not a party to CAT, Mutombo would no longer be under CAT's legal protection from expulsion. The Committee concluded that Switzerland was under an

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377 Communication 13/1993 (*Mutombo v Switzerland*), views adopted on 27 April 1994.

378 Article 3(1) reads: "No State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to tortune".

379 At par 9.7 of its views.

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obligation not to expel him to Zaïre, or to a country where he would face a real risk of being expelled to Zaïre.[380]

2.3.5.7 Realisation

The most promising aspect of implementation under CAT, the article 20 investigation, has not taken off yet. It is encouraging, though, that only one of the African states has declared its unwillingness to recognise this competence of the CAT Committee. Of the total number of parties (102), eight (or7 %) have made declarations excluding the Committee's competence under article 20,[381] compared with a single African state (or 4% of African states). In the absence of an effectively functional judicial system, CAT provides important redress possibilities in individual cases. Few cases have been filed with the Committee, though. In time, this avenue may become better known and may be more effectively utilised. At the moment a very limited number of complaints have been brought under CAT.

2.3.6 The Committee on the Rights of the Child

2.3.6.1 Background and functions

One of the most recent conventions adopted under the auspices of the UN is the Convention on the Rights of the Child ("CRC").[382] This followed the submission by the Polish government of a draft on the rights of the child in 1979, the International Year of the Child. A decision was taken by the General Assembly to set up a working group. The final version of the Convention was adopted in November 1989. In record time the required twenty states ratified, causing the Convention to enter into force in September 1990, less than a year after its adoption.

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380 At par 10 of its views.

381 See art 28 of the CAT, which earmarks such a declaration as a reservation.

382 For a background, see Leblanc (1995).

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African involvement in the drafting process was limited. Only three African states participated for at least five of the nine years that the working group took to draft a final proposal.[383] This is the lowest percentage of all the continents, contrasting sharply with West European (61%) and even Latin American (29%) participation over a similar period.[384] However, by 1989 nine African states have been participating in the activities of the working group.[385]

The Committee on the Rights of the Child is the enforcement mechanism under this Convention. Individual communications are not provided for. Self-Reporting by states parties is the main method of ensuring compliance with the provisions of the Convention.

2.3.6.2 Composition

The Committee consists of ten members with recognised competence in the field of children's rights. They are elected by states parties, and serve in their personal capacity.[386] Members are elected for a term of four years, but they may be re-elected.[387] The Committee met for the first time in 1991, after its ten members had been elected.

In electing members to the Committee, states parties' consideration should be given to "equitable geographical distribution, as well as to the principal legal systems".[388] After the first election in January 1997, three of the ten members of the Committee were from African states: Burkina Faso (Akila Belembaogo), Egypt (Hoda Badran) and Zimbabwe (Swithun Mombeshora).[389] The terms of two of these members (from Egypt and Zimbabwe) expired on 28 February 1997. Mrs Belembaogo's term expires on 28 February 1998.[390]

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383 See Table in LeBlanc (1995) at 30.

384 *Ibid.*

385 See Table in LeBlanc (1995) at 48.

386 See art 43(2) of the Convention.

387 Art 43(b).

388 Art 43(2).

389 The first two are women.

390 UN document CRC/C/50 at Annex II.

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This means that 30% of the membership of the Committee was African, a figure that deviates slightly from the African percentage of the total number of states parties (which stood at 37%). The West European region was "overrepresented". LeBlanc justifies this overriding of strict geographical considerations with reference to the fact that "states in that region were the most active and constructive"[391] in drafting the Convention. They also carry "the heaviest financial burdens" in supporting the UN.[392]

2.3.6.3 Ratifications and reservations

Despite the insignificant part played by African personalities in the ten years of debate and discussion preceding the Convention's adoption, it has been ratified by a significant number of states on the continent. After about two years, on 31 December 1992, 39 out of a possible 52 states in Africa (75%) had already ratified the Convention.[393] Of all the regions in the world,[394] only Latin America and Western Europe had higher ratification rates.[395] The African ratification percentage was also higher than the global average of 70%.[396]

Of the 39 African states parties to the Convention at the end of 1992, six states have entered **reservations**.[397] With the exception of Latin America, this is the lowest regional reservation percentage globally. Even so, of the ten states whose reservations were objected to, two were African.[398] Only European countries had at that stage raised objections against reservations to the Convention by other states parties.[399]

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391 (1995) at 210.

392 *Ibid.*

393 See Table in LeBlanc (1995) at 48.

394 LeBlanc uses eight regions: Africa, Asia and Pacific, East Europe, West Europe, Latin America, Middle East, North America and Carribean and others (1995) at 48.

395 At 90 and 80% respectively, see LeBlanc (1995) at 48.

396 LeBlanc (1995) at 48.

397 See Table in LeBlanc (1995) at 53.

398 See Table in LeBlanc (1995) at 56.

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As at 31 January 1997, 189 states were **party to the Convention**, including 52 African states.[400] Only one state on the continent, Somalia, has neither signed nor ratified the Convention. The CRC became the first human rights instrument that Djibouti ratified. This trend has manifested itself globally, culminating in near-universal ratification of the CRC. Simultaneously, however, the number of states entering reservations and making declarations has increased to 58. Ten African states entered reservations or declarations. These relate to the Islamic religion,[401] the age of majority,[402] religion and traditional values,[403] the provisions of national legislation,[404] the state's inability to ensure free primary education,[405] and to children seeking refugee status.[406]

Objections to reservations or declarations were raised by eleven states. At the end of 1992 only European states parties had raised objections. Objections were made against the reservations and declarations entered by Botswana, Djibouti and Tunisia.[407]

2.3.6.4 Reporting obligation

On 30 June 1995 a total of 86 reports under the Convention were overdue.[408] It should be noted that of the three African states parties represented on the Committee on the Rights of the Child, two (Burkina Faso and Egypt) complied with their obligations to report.

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399 *Ibid.*

400 See website http://www.un.org/Depts/Treaty/final/t52/newfiles/part-600/iv-600/iv-11.html.

401 Reservation by Algeria, Egypt, Mauritania and Morocco.

402 Reservation by Botswana (Denmark objected against it).

403 Reservation by Djibouti.

404 Reservations by Mali and Tunisia.

405 Declaration by Swaziland.

406 Reservation by Mauritius.

407 See web site http://www.un.org/Depts/Treaty/final/t52/newfiles/part-600/iv-600/iv-11.html.

408 See UN document HRI/MC/1995/3 at 3-9. The following African states parties had one report overdue: Algeria, Angola, Benin, Burundi, Cameroon, Cape Verde, CAR, Chad, Côte d'Ivoire, Djibouti, Equatorial Guinea, Ethiopia, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Libya, Malawi, Mali, Mauritania, Mauritius, Niger, Nigeria, São Tome and Principe, Seychelles, Sierra Leone, Togo, Uganda, Tanzania, Zaïre, Zambia, Zimbabwe.

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At the Committee's 16th session (January 1997) the number of initial reports overdue by African states was 18 (from a total of 52). Forty-two states had their second periodic report overdue, of which 18 were African. Of the 51 states that owed their third periodic reports, 19 were African. Fourth periodic reports were outstanding in respect of 43 states, including 8 from Africa. Although African states have a high rate of overdue reports, non-reporting or late submission of reports is by no means exclusive to one continent.[409]

From its first to its 12th session, the Committee examined nine reports from African states.[410] They were from Egypt,[411] Sudan (both at the 3rd session),[412] Rwanda (at the 4th),[413] Namibia (at the 5th),[414] Burkina Faso (at the 6th),[415] Madagascar (at the 7th),[416] Tunisia (at the 9th session),[417] Senegal (at the 10th session)[418] and Zimbabwe (at the 12th session).[419] It is interesting to note that, in contrast to most other treaty bodies, the Committee on the Rights of the Child has expressed appreciation for various aspects of the reports submitted to it by African countries. Almost all these reports culminated in a frank and constructive dialogue, according to the Committee. A self-

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409 Analysis of UN document (EDAW/C/1997/2 at web site gopher: // gopher.un.org: 70/oo/gu/cedaw/1997/C-1997-2.

410 From a total of 56 reports: See web site www.umn.edu/human/crc/CRC-MORE/. At the 13th session another seven reports were examined. Of these, four were from African states. Country reports of Nigeria (CRC/C/8/Add 26), Mauritania (CRC/C/3/Add 36), Morocco (CRC/C/28/Add 1), and Ethiopia (CRC/C/8/Add 27) were considered.

411 See UN documant CRC/C/15/Add 5 (1993), also at web site www.umn.edu/humanrts /crc /EGYPT.htm.

412 For Sudan's report, see also the 4th session, where the examination was finalised in the light of further information provided by the state (see CRC/C/15/Add .6 (1993) and CRC/C/15/Add 10 (1993)).

413 See CRC/C/15/Add 12 (1993). The Committee adopted only "preliminary observations", as it suggested that a new report should be submitted. This was not forthcoming.

414 See CRC/C/15/Add 14 (1994). The Committee expressed its appreciation for a detailed and comprehensive report, for its self-critical approach and for frank and constructive dialogue with the state party.

415 See CRC/C/15/Add 19 (1994). The Committee's report is reprinted in (1994) 38 *JAL* 197, where the Burkinabe report is described as "one of the few African reports" to have been submitted to the Committee.

416 See CRC/C/15/Add 26 (1994).

417 See CRC/C/15/Add 11 Annex 2 (1995) and CRC/C/15/Add 39 (1995).

418 See CRC/C/15/Add 44 (1995).

419 See CRC/C/15/Add 55 (1995).

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critical and open attitude was also identified in the reports of and interactions with the delegates from Burkina Faso, Madagascar, Namibia and Zimbabwe.

In general, governments co-operated with the Committee by drafting adequate reports, by sending high profile delegations, and by answering queries. Madagascar presents an example. It ratified the Convention on 19 December 1990, and submitted its first periodic report on 20 July 1993.[420] The 65-page report is an excellent example of serious compliance with reporting obligations. Richness of detail and the inclusion of statistical data (on the percentage of children attending school, and on technical education) make examination of the report meaningful. State compliance is not taken as a *fait accompli*, but is sometimes criticised in the country report.[421] One problematic aspect in terms of preparation of reports, is the provision of statistics on the realisation of especially socio-economic rights of children. The Committee requested that such information be included in subsequent reports.[422]

This does not mean that the Committee did not identify areas in which the protection granted by states fell short of the guarantees in the CRC. Some of these areas are:

- Discrimination against girls is rife in most states. This is especially the case when cultural practices indigenous to parts of Africa, such as female genital mutilation, conflict with the provisions of the CRC. Other forms of discrimination and violation of the dignity of the girl-child is the practice of forced marriage, the incidence of domestic violence[423] and sexual exploitation.[424] In some states, patterns of disparity in access to education have been criticised.[425]

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420 See UN document CRC/C/8/Add.5, dated 13 September 1993.

421 Eg par 79: "The provisions are not always observed by those required to apply them" (on problems with the implementation of civil registration of births) and par 309: "provisions on sexual abuse and exploitation are not always effectively applied".

422 See eg the Egyptian report, and the Committee's comments.

423 See the Committee's evaluation of the report by Burkina Faso (at paras 8 and 14) and that of Sudan (at par 13 of the Committee's concluding observations).

424 See eg the Committee's views in respect of the Malagassy report (at par 15).

425 See the Committee's comments on the Egyptian report (at par 6).

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- Education has been targeted as a cause for concern. The absence of compulsory and free education at the primary level,[426] the quality of education,[427] and the high drop out rate before pupils finish primary school,[428] have been brought to the attention of states.

- Socio-economic issues, such as birth rates, heath and welfare have been raised consistently.

- A recurring concern has also been the position of working children. In many instances this amounts to child labour.[429] The Committee drew the attention of states to the ILO convention on minimum age requirements for employment.[430]

- The position of the juvenile offender has also illicited comments from the Committee.[431]

2.3.6.5 Realisation

The report of Sudan illustrates the limitations of the reporting procedure. The Committee could express an opinion on the extent to which legislative provisions conflict with the CRC. But a treaty body is powerless to address more comprehensive considerations at the socio-political and economic terrain. Sudan's children suffer due to the protracted civil war between the south and the north. They suffer from the effects of desertification, drought and famine. They suffer as an indirect consequence of structural adjustment measures and because the state cannot provide adequate infrastructural support. It matters little, viewed against this background, whether the Committee has identified punishment by way of flogging or forced labour as violations of the CRC.

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426 See the Committee's views on the report of Senegal (at par 14).

427 See the Committee's concluding observations in respect of Egypt's report (at par 10).

428 See eg the Madagascar report, and the Committee's concluding observations (at par 13).

429 See the refererence to "forced labour and slavery" in the Committee's concluding observations on the Sudanese report (at par 12).

430 See eg comments on the report of Zimbabwe, par 32.

431 See eg paras 11 and 20 of the Committee's observations on the otherwise almost uncritisised Namibian report.

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The system of state reporting is based on a continuation of dialogue between the ratifying state and the treaty monitoring body. Issues that are raised are to be addressed again in subsequent reports.[432] As the African reports thus far examined have been first reports, observations on follow-up are still impossible.

2.4 Africa, the International Labour Organisation and other UN specialised agencies, funds and programmes

2.4.1 International Labour Organisation

The International Labour Organisation ("ILO") is a tripartite organisation which brings together representatives of governments, employers and workers.[433] It was established in 1919,[434] in the aftermath of the First World War, and became a UN specialised agency many years later,[435] in the aftermath of the Second World War. The organisation concerns itself with the world of work, but it has introduced human rights into labour practices and social policy. Standard setting through the adoption of conventions and resolutions in these areas has been one of the ILO's major functions. But, more significantly, it has developed the "most comprehensive international system for examining the implementation of international human rights standards".[436] Implemenation takes various forms:[437]

- States must submit an **annual report** on the fulfilment of its obligations under all the conventions it has ratified. This report is examined by a Committee of Experts.

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432 See the Committee's view on web site www.umn.edu/human/crc/CRC-PROC.htm.

433 On the ILO generally, see eg Valticos in Vasak (ed) (1982).

434 Through the Treaty of Versailles.

435 In 1945, when the UN was founded.

436 Swepston in Hannum (1992) at 115.

437 For a discussion, see Leary in Alston (ed) (1992) at 580 - 618 and Swepston in Hannum (ed) (1992) at 99.

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- A special procedure is provided for **complaints concerning freedom of association** in the context of trade union activities. These complaints are examined by the Freedom of Association Committee of the Governing Body.
- A state party may also complain that **another state** is not complying with its obligations. The ILO Governing Body may appoint a Commission of Inquiry to investigate the complaint.
- Personal **visits** (or "direct contacts") by ILO officials may be undertaken to ILO member states to assist them in meeting their obligations under the different conventions.

The administrative and secretarial support and activist role of the ILO Secretariat (the International Labour Office) have been important factors in realising ILO standards. In Africa, the ILO programme consists of a field structure comprising a network of twelve area offices, five multi-disciplinary advisory teams ("MDTs") and a regional office in Abidjan.[438] This network aims at implementing a policy of active partnership by focusing on African priorities such as poverty reduction and its interrelationship with employment, protection of workers' health and safety at work, and promotion of social dialogue.[439]

All 53 OAU independent states in Africa are today members of the ILO. Two states, Liberia and South Africa, joined from the outset in 1919. South Africa's membership was discontinued in 1966, but it resumed its place again in 1994. Most of these states joined the ILO soon after independence, mostly in the 1960s.[440] However, a few states, in particular Botswana[441] and the Gambia,[442] only joined the organisation many years after obtaining independence.

Many of the African states have ratified a great number of the ILO Conventions. States that exceeded fifty ratifications on 31 March 1997 are Algeria (with 53), Djibouti (with 62), Egypt

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438 See eg *ILO Africa* (1996), a newsletter of the Africa Regional Office of the ILO.

439 *Ibid.*

440 See Schedule in ILO (1997).

441 Joined in 1978. By the end of 1996 Botswana had only ratified two conventions. In the course of 1997 (up to the end of July), this number grew to nine.

442 Joined in 1995, and has by 31 March 1997 not ratified any conventions.

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(60), Guinea (56), and Tunisia (56).[443] States that have, by 31 March 1997, ratified a small number of conventions include Botswana (two), Eritrea (none), the Gambia (none) and Zimbabwe (nine). While the length of the period of membership influenced the rate of ratification, the type of economic system (socialist, as in Guinea, or capitalist, as in Botswana) also played a role.

Five of the major ILO conventions are now discussed in more detail:

- The **Convention concerning Forced Labour**[444] was adopted to "suppress the use of forced labour in all its forms".[445] Among all the ILO instruments dealing with human rights, this Convention is still most widely accepted, particularly by African member states.[446] By 31 March 1997, 41 African countries had ratified this Convention.[447] The application of this Convention has been commented on extensively by the Committee of Experts. Implementation problems involve mainly two aspects: compulsory labour for the purpose of production, and as a means of political coercion or as punishment.[448]

- The **Convention concerning Freedom of Association and Protection of the Right to Organise**[449] provides that workers and employers may join organisations of their own choosing without prior authorisation.[450] By 31 March 1997, 35 of the 118 ratifications worldwide had been made by African states. The African rate of ratification is comparable to the average for the membership as a whole. Recent ratifications (in 1995 and 1996) came from Mozambique, Namibia and South Africa.

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443 This is out of a potential total of 180 (see Convention no 180, adopted at the ILO 85th session in 1996). Of all the member states globally, Spain had ratified the most conventions (125).

444 No 29, *ILO Conventions and Recommendations vol 1* (1997) at 143, entered into force on 1 May 1932.

445 Art 1(1) of the Convention.

446 ILO (1983) at par 55.

447 ILO *List of Ratifications by Convention and by Country* (1997). They are: Algeria, Angola, Benin, Burkina Faso, Burundi, Cameroon, Cape Verde, CAR, Chad, Comoros, Congo, Côte d'Ivoire, Djibouti, Egypt, Gabon, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Libya, Madagascar, Mali, Mauritania, Mauritius, Morocco, Niger, Nigeria, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, Sudan, Swaziland, Tanzania, Togo, Tunisia, Uganda, Zaïre and Zambia.

448 ILO (1983) at par 57.

449 No 87, *ILO Conventions and Recommendations vol 1* (1997) at 527, entered into force on 4 June 1950.

450 See art 2 of the Convention.

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- The **Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value** [451] obliges states to adopt measures to ensure that women are paid equally to men for work of equal value. African states account for a high percentage of the global ratification of this convention.[452]

- States that ratify the **Convention concerning the Minimum Age for Admission to Employment**[453] undertake to raise the minimum age of admission into employment progressively. However, states are also required to fix a minimum age "for the time being".[454] By 31 March 1997, only ten African states had ratified this Convention.[455] This is in keeping with global trends, as the total number of ratifications of this instrument is also much lower than for the three previous instruments, and stood at fifty.

- The **Convention concerning Minimum Standards of Social Security**[456] has been ratified by a relatively small number of African states: only five out of a total of 39 ratifying states are African. These countries are Libya, Mauritius, Niger, Senegal and Zaïre.[457]

Through standard setting and examination of country reports the ILO has charted the development of labour law and labour relations in Africa. But as far as human rights are concerned, its main contribution lies in the technical assistance by undertaking activities such as capacity-building, training and education on the promotion of equality in the workplace, enterprise creation, entrepreneurship development and strengthening of workers' organisations.[458]

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451 No 100, *ILO Conventions and Recommendations* (1997) at 649, entered into force on 23 May 1953.

452 By 31 March 1997, 36 of the 126 ratifying states were African.

453 No 138, *ILO Conventions and Resolutions vol 2* (1997) at 525, entered into force on 19 June 1976.

454 See art 2(1) of the Convention.

455 These states are, with the minimum age set by each state in brackets: Algeria (16), Equatorial Guinea (14), Kenya (16), Libya (15), Mauritius (15), Niger (14), Rwanda (14), Togo (14), Tunisia (16) and Zambia (15).

456 No 102, *ILO Conventions and Resolutions vol 2* (1997) at 9, entered into force on 27 April 1955.

457 See ILO *List of Ratifications by Convention and Country* (1997). It is interesting to note that the Convention was not ratified by countries while under socialist or Marxist rule.

458 See eg ILO (1996).

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2.4.2 Other UN specialised agencies, funds and programmes

Other UN specialised agencies, funds and programmes play an important role in Africa. Apart from those referred to briefly below, the contribution in the field of socio-economic rights of the UN Food and Agricultural Organisation ("FAO") and the World Health Organisation ("WHO") should also be mentioned.[459]

2.4.2.1 Economic Commission for Africa

The UN Economic Commission for Africa ("ECA") was founded in 1958 by a resolution of ECOSOC. Its purpose is to initiate and take measures to facilitate economic development in Africa.[460] Most African states are ECA members. Its mandate extended to political issues. ECA was instrumental in efforts to establish the African Economic Community ("AEC").

2.4.2.2 UN Development Programme

The aim of the UN Development Programme ("UNDP") is to foster growth and improve living standards of people around the globe. "Technical assistance" is the main means of support. The UNDP has been very active in numerous African states. In 1994/1995 emergency relief operations were conducted in Angola, Liberia, Mozambique, Rwanda and Zaïre.[461] Since 1996, there has been a tendency to work more towards the enhancement of good governance.

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459 For a general overview see United Nations (1995).

460 For a history of the involvement of the ECA in Africa, see D'Sa (1983) 27 *JAL* 4.

461 *Africa South of the Sahara: 1997* at 78

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2.4.2.3 *UN Centre for Human Rights*

The UN Centre for Human Rights provides an advisory service about human rights matters. Technical assistance may be requested on issues such as the support of democratic governance, strengthening of local institutions, and domestic legal reform. The full potential of this resource has not been tapped by African governments. A problematic aspect that arises in this context is the manipulation of state resources by corrupt officials or by an authoritarian government. It is unlikely that assistance will be requested by such a government. Especially in Africa, such assistance should be channelled through organs of civil society, rather than governments.

2.4.2.4 *UN Educational, Scientific and Cultural Organisation*

The UN Educational, Scientific and Cultural Organisation ("UNESCO") was established "to contribute to peace and security ... in order to further universal respect for justice, the rule of law and for human rights and fundamental freedoms".[462] It has taken a leading role in creating a global human rights culture through the dissemination of information of human rights.[463] UNESCO has also undertaken research and education in the field of human rights. However, UNESCO's role should be enhanced in Africa and its activities and the promotional mandate of the African Commission should be co-ordinated.

Conventions have also been adopted under UNESCO auspices. An important example is the UNESCO Convention against Discrimination in Education.[464] By 31 March 1997, this Convention had been ratified by 18 African states. The total number of ratifications stood at 84.

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462 Art 1 of the UNESCO Constitution.

463 A complaints procedure may also be used by individuals and NGOs: see Marks in Hannum (ed) (1992) at 86.

464 UN Treaty Series vol 429 at 93, entered into force on 22 May 1962.

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2.4.2.5 World Bank

The World Bank's role in human rights issues is not always acknowledged. The World Bank is independent, but part of the United Nations. It is bound by the UN Charter and should promote human rights as one of the main purposes of international co-operation.[465] Though it is a bank, it is also a development agency.[466] So far, human rights issues have been insufficiently linked to the World Bank policies.[467]

2.5 Africa and the international protection of refugees

By 31 March 1997, 47 states in Africa have ratified or acceded to the UN Convention relating to the Status of Refugees.[468] The most recent entries on the list are Namibia and South Africa.[469] Of all international human rights instruments, only the Convention on the Rights of the Child enjoys broader African ratification. Three of the six states that have not yet ratified the refugee convention are island states. They are Cape Verde, the Comoros and Mauritius.[470] The other three non-ratifying states in the region are Eritrea, Libya and Swaziland.

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465 As required by art 56 of the UN Charter, see also Tomasevski in Nowak and Swinehart (eds) (1989) at 75 - 102.

466 Tomasevski in Nowak and Swinehart (eds) (1989) at 100.

467 See Moller (1997) 25 *NQHR* 21, who suggests the following (at 35) test: "Is there an efficient bureaucracy capable of making national decisions on the uses of Bank funds, acting through clearly formulated and transparent processes, which is supported by a government established through a well-defined open process of public choice ?"

468 See Table B below.

469 They ratified the Convention on 17 February 1995 and 12 January 1996 respectively.

470 The fact that they are island-states are probably significant in that their geographic location have in the past caused these states to be left largely unaffected by flows of refugees. It further reflects an "island" mentality, in terms of which these states are reluctant to open up their borders (and legal systems) for the potential impact of "continentals".

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This Convention was adopted under the auspices of the UN in 1951, and turned into force in 1954.[471] The socio-political context of its adoption explains many of this Convention's features. The early 1950s were the aftermath of the Second World War, and the beginning of the "Cold War". The main contributors to the preceding deliberations were West European powers. Their main concerns were related to experiences drawn from the World War (such as Jews fleeing Nazi persecution) and from a new problem: ideologically-based defections from the "East" to the "West".

Three important limitations of the Convention relate to these factors. Firstly, the **basis** on which someone could qualify for refugee status was limited to a "**well-founded fear of being persecuted** for reasons of race, religion, nationality, membership of a particular social group or political opinion".[472] This factor relates mainly to a subjective requirement, "fear", that has to be assessed for its "well-foundedness" in each individual case. Apart from the individualistic focus, the listed grounds are also very restrictive and do not take into account other factors (such as natural disasters or internal wars) which may be just as instrumental in persons becoming refugees. Secondly, a **temporal limit** was also provided for in the Convention. The "fear" had to be "as a result of events occurring before 1 January 1951".[473] This cut-off date underlines the close link to the preceding war, and its effects. The third limitation, of a **geographical** nature, was included as an option which states could adopt at ratification (or accession). By making a declaration, states could specify that the "events" referred to above shall be understood to mean "events occurring in Europe".[474] Few states have made such a declaration.[475]

In the light of the above, there should be little cause for surprise in the assertion that African states saw the Convention as a "European instrument".[476] The perception of exclusion was exacerbated in the 1960s, when it became clear that refugee problems in Africa continued and, most often, started

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471 For the Convention text, see eg Patel and Watters (1994) at 231.

472 Art 1(A)(2) of the Convention.

473 Art 1(A)(2) of the Convention.

474 Art 1 (B)(1) of the Convention.

475 Weis (1970) 3 *Revue des Droits de l'Homme* 449.

476 Weis (1970) 3 *Revue des Droits de l'Homme* 449 at 452.

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well after 1951. These problems arose on a massive scale, and were caused by internal conflicts. Early examples were the many refugees fleeing conditions in the Congo (Zaïre)[477] and Nigeria.

Due in main to African criticism and efforts to adopt an African convention separate from the UN Convention, a brief Protocol to the 1951 Convention was adopted in 1966, and entered into force in 1967.[478] The Protocol dispensed with the temporal and geographic limitations in the 1951 Convention. In the Preamble, "consideration" is given to the fact that "refugee situations have arisen since the Convention was adopted". From 1967, then, the Convention applied equally to all who qualified for refugee status. However, the definition of "refugee" was left intact. African states actively supported the adoption of the Protocol. After its adoption, African efforts to elaborate a separate UN instrument dealing with refugees were channelled into adopting a complementary regional instrument,[479] with the result that the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa was adopted in 1969.[480]

2.6 Africa and aspects of humanitarian law

2.6.1 Africa and international humanitarian instruments

As of 1 January 1996, the Geneva Convention relative to the protection of civilian persons in time of war enjoyed almost universal ratification globally and in Africa. Fifty-two African states have ratified, leaving only Eritrea still to become a party.[481] In line with global trends, fewer African states ratified the two protocols to the Convention. Protocol I, relating to the protection of victims of international armed conflicts, was at that stage ratified by 45 states in Africa; Protocol II, relating to the protection of victims of non-international armed conflicts, by 41. Again, the only

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477 Now, the Democratic Republic of the Congo.

478 See Patel and Watters (1994) at 243.

479 Weis (1970) 3 *Revue des Droits de l'Homme* 449 at 453. See ch 3 below.

480 See ch 3.5 below.

481 See Marie (1996) 17 *HRLJ* 61 for data about ratification of this instrument and others discussed in this paragraph.

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procedure allowing for concrete implementation received proportionally less support in Africa: only eight African states made declarations in terms of article 90 of Protocol I, recognising the competence of the international fact-finding Commission. Seventeen % (or 8 out of 47)[482] of the declarations made in terms of article 90 was made by African states, while 31% of the total ratification of Protocol I was by states in the same continent.

The establishment of the international penal tribunal in Rwanda (and in the former Yugoslavia) mark important extensions of international humanitarian law into the domestic sphere, by applying international norms to internal conflicts.[483] Of relevance, particularly in this context, is the Convention on the Prevention and Punishment of the Crime of Genocide. By 31 March 1997, it has been ratified by 25 African states, including Burundi, Rwanda and Zaïre.[484]

The total ban of anti-personnel mines has been placed on the international agenda of concern only relatively recently, although mines have killed and devestated the lives of many Africans in countries across the continent.[485] Canada hosted a conference on this issue in October 1996.[486] A general commitment was expressed to draft a legally binding international agreement to ban anti-perrsonnel mines. A follow-up meeting is planned for December 1997, again in Ottawa, Canada. On 10 December 1996 the UN General Assembly adopted a resolution on the banning of landmines.[487] Twenty-five African states were co-sponsors of the resolution, and 45 voted for its adoption.[488] This was followed in February 1997 by the meeting of more than 450 participants at the fourth NGO Conference on Landmines, held in Maputo.[489] Surprisingly few African states

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482 The eight African states that have made declarations are Algeria, Cape Verde, Guinea, Madagascar, Namibia, Rwanda, Seychelles and Togo.

483 See the thoughtful discussion by Merton (1995) 89 *AJIL* 554.

484 See Table B below.

485 See, on the impact of mines in Africa, (April - May 1997) *African Topics*. Countries affected most severely include Angola, Egypt, Eritrea, Ethiopia, Libya, Mozambique, Sudan, Somalia and Zimbabwe.

486 See Carstairs "The Ottawa Process - A Challenge to the Status Quo" (April - May 1997) *African Topics* at 20.

487 Resolution A 51/45 S.

488 See table in (1997) (April - May) *African Topics* at 17.

489 See "The World Demands a Ban on Landmines" (1997) (April - May) *African Topics* at 3.

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(only 8)[490] have become party to the most relevant instrument in this regard adopted under UN auspices, the Convention on the Use of Certain Conventional Weapons which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects.[491]

2.6.2 Africa and merceneries

Although mercenarism has existed from time immemorial, it only became an issue in humanitarian and international law in this century. During the 16th century, for example, the use of mercenaries was the unquestioned norm.[492] In the comprehensive codification of humanitarian law of the 1907 Hague Convention the recruitment of mercenaries was prohibited. Recruitment was regarded as active support for a belligerent, and therefore contravened the principle of neutrality. That the prohibition gave expression to the principle of neutrality, and did not condemn the practice of using mercenaries itself, is reflected in the fact that no other provisions on this topic were included.

When the UN was formed in 1945, the single provision in the Hague Convention was still the only reference to mercenarism in international law. The UN Charter went no further than stating the general principle that states should refrain from the use of force against "the territorial integrity or political independence"[493] of another state. Viewed against the background of the realities of the Second World War and the ideological conflicts flaring up immediately thereafter, mercenaries hardly merited any attention.[494]

The independence of states previously under colonial rule coincided with an increase in and a different attitude towards the use of mercenaries. It became a locus of concern especially in Africa. Concern was first raised about the situation in Congo in the early 1960s. During the civil war, the Katangese secessionist forces of Moise Tshombe were assisted by mercenaries from

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490 These states are Benin, Djibouti, Mauritius, Niger, South Africa, Togo, Tunisia and Uganda: see (April - May 1997) *African Topics* at 17.

491 Entered into force 2 December 1983 (see Kalshoven (1987) at 23).

492 Botha (1993) 15 *Strategic Review of Southern Africa* 75 at 78.

493 Art 2(4) of the UN Charter.

494 Taulbee (1985) 15 *California Western Intl Law Jnl* 339 at 345.

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Europe and South Africa.[495] Subsequently, the government of Mobutu Sese Seko also employed foreign soldiers. Other African examples over the last few decades are Nigeria, Angola, the *coup d'état* by the Frenchman Bob Denard in the Comoros, and the attempted *coup* in the Seychelles by mercenaries under the leadership of Mike Hoare.[496]

Gradually, mercenarism became an issue raised in international political fora. At the regional level, first the OAU Council of Ministers and later the Assembly of Heads of State and Government denounced these activities. At the global level, the UN General Assembly followed in 1968 with resolution 2465, termed "Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples", which declared the use of mercenaries against national liberation movements in colonial territories to be a criminal act. This is evidence of how an African concern was given global recognition.

On the legal plane Africa also played a leading role. The first treaty dealing specifically with mercenaries - the OAU Convention on the Elimination of Mercenarism in Africa[497]- was adopted under the auspices of the OAU in 1977. After the required number of states ratified the Convention in 1985, it turned into force.[498] It defines a mercenary as a non-national of the state against whom he is employed. This includes a person who "links himself willingly" to groups or organisations aiming to overthrow or undermine another state, or aiming to obstruct the activities of any liberation movement recognised by the OAU.

The African initiative impacted in two major ways on international law:

- The first is the inclusion of an article dealing with mercenaries in the 1977 Geneva Protocol I Additional to the Geneva Convention of 1949. In terms thereof, a mercenary "shall not have

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495 Mourning (1981/2) 22 *Virginia Jnl of Intl Law* 589 at 599, and sources quoted in n 56 and 57.

496 On their prosecution in South Africa for contraventions of the Civil Aviation Act, see *S v Hoare* 1982 4 SA 865 (N).

497 Text of substantive provisions reproduced in (1981/2) 22 *Virginia Jnl of Intl Law* 613 - 618, and the International Convention Against the Activities of Mercenaries at 619 - 625.

498 Naldi (1989) gives a list of states parties in 1989 (at 40 (n 20)).

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the right to be a combatant or a prisoner of war".[499] The article is a product of compromise, not going as far as the OAU Convention had already gone or the insistence of African states required.

- Secondly, a movement for an international convention on the recruitment, use, financing and training of mercenaries was launched at the UN. In 1979, the UN General Assembly adopted a resolution dealing with the "use of mercenaries as a means to violate human rights and to impede the exercise of the right of peoples to self-determination". An *ad hoc* committee for the drafting of an international convention was established. After years of debate, the General Assembly adopted the Convention Against the Recruitment, Use, Financing and Training of Mercenaries.

The highlighting of mercenarism internationally is an African achievement. It shows the increasing prominence of Africa in the UN. But, with Taulbee, one has to question the substantive impact of these provisions. Viewed globally, mercenaries have played a very limited role in modern warfare and conflict. The African response can be explained primarily with reference to the fact that the mercenary has become "the symbol of racism and neo-colonialism within the Afro-Asian bloc",[500] because the recurring scenario was one of "white soldiers of fortune fighting black natives".[501] Given the repeated involvement of South African mercenaries in African conflicts,[502] the cohesiveness in Africa's approach becomes all the more understandable. One must also not lose sight of the context - the sovereignty of the newly independent Africa states was easily threatened, especially in the absence of a loyal citizenry and a loyal and well-trained armed force. In this

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499 Art 47(1) of Geneva Protocol I.

500 Taulbee (1985) 15 *California West Intl Law Jnl* 339 at 342.

501 *Ibid.*

502 In the 1990s the private South African firm Executive Outcomes played a prominent role in eg Angola and Sierra Leone. In both these instances they were on the payroll of the government in the countries concerned. Newly elected president of Sierra Leone, Ahmed Tejan Kabbah, relied on the presence of Executive Outcomes to keep rebel forces at bay and ensure stability. In 1996 Executive Outcomes was paid $1.2 million per month, making up a considerable percentage of state expenditure. ("Kabbah strikes back" (1996) *Nov/Dec Africa Today* 43-44.)

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respect, then, the outlawing of mercenaries had little to do with the protection of human rights, but was intertwined with a movement to consolidate power in the hands of African rulers.

The 1990s saw the emergence of a corporate army, Executive Outcomes. It played an active role in numerous African conflicts, especially in Angola and Sierra Leone. Obvious concerns have been raised: Leaders with little popular support may remain in power despite national disintegration (also of the military forces), only because they control state finances. In the process, democracy may be thwarted, and national resources become directed at the survival of a leader rather than the improvement of citizens' quality of life. On the other hand, Executive Outcomes has served as a "private Pan-African peace-keeping force of a kind which the international community has long promised, but failed to deliver".[503] In both Angola and Sierra Leone its intervention has contributed to an eventual peace-process. The absence of any meaningful role played by the OAU or the UN created the room for the involvement of Executive Outcomes in internal African conflicts.

2.6.3 The international criminal tribunal for Rwanda

2.6.3.1 International efforts at preventing impunity

One of the unfortunate, yet inevitable, consequences of large-scale internal and international conflict is gross human rights violations. Such violations may be redressed either at the domestic or the international level. In both cases certain problems arise. A quick and effective domestic response is often difficult due to the collapse of the state apparatus, including the prosecutorial services and the courts. More often, such a response is out of the question because the new ruler, who commands the organs of state, came to power through the very process of human rights violations that has to be redressed. An international response is hampered by the lack of any permanent supra-national tribunal with appropriate jurisdiction. A further impairment is the lack of consensus on the content of crimes regarded as "gross violations of human rights" and which

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503 Pech and Beresford "Africa's new-look dogs of war" (24-30 January 1997) *Mail and Guardian* 24.

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should be punishable internationally. The leading international conventions on humanitarian law also do not provide for any form of international enforcement or implementation.[504]

A distinction has to be drawn between the enforcement of international human rights law and international humanitarian law. International human rights law has emphasised state responsibility. Investigations are directed at answering the question whether states have been in breach of their treaty obligations or of customary international law. Breaches of international humanitarian law entail individual criminal liability. These norms are contravened by individuals and not in the first place by governments. When steps are not taken to redress the violation of any of these norms, it results in impunity of those responsible for the violations. As Bassiouni indicates,[505] international human rights standards evolve through phases. Standards are enunciated first, before they could become prescriptive norms. This may be followed by provision for enforcement by means of administrative and civil modalities. The most advanced, the most controversial and least realised, is the application of penal modalities.

The international community has as yet not accepted the jurisdiction of a permanent penal tribunal. After the First World War steps were taken in this direction. The Treaty of Versailles[506] provided for the establishment of an *ad hoc* tribunal to prosecute Kaiser Wilhelm II. However, he was granted refuge in the Netherlands and was never prosecuted.[507] The German Supreme Court prosecuted a limited number of war criminals. The vulgar and crude forms of human rights abuses perpetrated by Nazi Germany spurred the international community into action. The London Agreement[508] provided for an international tribunal in which the victors would sit in judgment of the defeated. The International Military Tribunals at Nuremberg and Tokyo were established. The

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504 See eg the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (of 12 August 1949), art 146: The responsibility is placed on each state party to "undertake to enact any legislation necessary to provide effective penal sanctions" of grave breaches of the Convention. These persons should be brought to trial within that state regardless of their nationality.

505 Bassiouni in Henkin and Hargrove (eds) (1994) 347 at 348.

506 Art 227 of the Treaty.

507 See Bassiouni in Henkin and Hargrove (eds) (1994) 347 at 357.

508 Of 8 August 1945.

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Allies also enacted a law, making it possible to set up the International Military Tribunal for the Far East.

After Nuremberg, the UN's International Law Commission ("ILC") has been involved in drafting a codification of international crimes and a statute for an international penal tribunal.[509] Universal political commitment was always unlikely in the era of the Cold War, especially after the Korean conflict of the 1950s. The late 1980s saw some resurgence of interest in an international court, particularly in relation to drug offences. The end of the Cold War towards the end of the 1980s, followed by the violence in the former Yugoslavia, assured its place on the international agenda once again. In 1989 Trinidad and Tobago reintroduced the idea in the UN General Assembly.[510] The ILC adopted a Draft Statute for an International Criminal Court. In 1994 the General Assembly established an *ad hoc* committee to work on the issue,[511] and in 1995 it established a preparatory committee to study the ILC draft.[512] The USA, UK, India and China have insisted on further discussions before calling for a conference of plenipotentiaries. The basis for discussion is the Draft Statute for an International Criminal Court, adopted by the ILC in 1994.[513]

One of the main reasons why states object to such a tribunal is that they fear their sovereignty will be infringed.[514] At least two responses are possible to answer such a contention: Acceptance of the Court's jurisdiction may be made optional. A second, more principled response is that "human rights law should supersede the notion of state sovereignty".[515]

In 1992 the UN established a commission of experts to investigate and report on violations of international humanitarian law in the former Yugoslavia.[516] Following a finding of numerous gross violations, the Security Council adopted Resolution 808 (1993). It called for the establishment of

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509 See Bassiouni in Henkin and Hargrove (eds) (1994) 347 at 359-363.

510 See ICC Fact Sheet at web site http: // www.igc.apc.org/icc/factsheet.html.

511 GA Res 53, UN GAOR, 49th Sess, UN Doc A/RES/49153 (1994).

512 GA Res 46, UN GAOR, 50th Sess, UN Doc A/RES/50146 (1995).

513 See Crawford (1995) 89 *AJIL* 404.

514 See eg Dumas (1990) 13 *Hastings Intl and Comp L Rev* 585 at 593.

515 *Ibid.*

516 SC Resolution 780 (1992).

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an *ad hoc* war crimes tribunal for the former Yugoslavia and requested the Secretary-General to submit a comprehensive report within sixty days. A statute for the international tribunal was attached to his report. In 1993 the Security Council established the *ad hoc* International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia.[517]

This tribunal was established as a subsidiary organ of the Security Council. As such, the Yugoslav Tribunal has a much broader international character than the Nuremburg Tribunal. The basis for its establishment is not clear, as such a competence is not specifically mentioned in the UN Charter. It could probably be justified in terms of article 41 of the Charter. Other options were to establish a treaty or to base it on a General Assembly resolution. The former would have been time-consuming and would have left the possibility open that one of the major state players would not become party to such a treaty. The latter was also not feasible, as General Assembly recommendations are only of a recommendatory nature.

The first accused to be brought to trial before this tribunal was Dusko Tadíc. The tribunal was soon faced with a challenge to the lawfulness of the establishment of the tribunal by the Security Council. The Appeals Chamber upheld the tribunal's jurisdiction in a judgment of October 1995.[518]

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517 A detailed analysis of the tribunal for the former Yugoslavia is not provided here. For a historical background and overview of the relevant Statute consult O'Brien (1993) 87 *AJIL* 639.

518 See Aldrich (1996) 90 *AJIL* 64. The judgment is reprinted in (1996) 36 *ILM* 32.

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2.6.3.2 *Efforts to prevent impunity after the massacres in Rwanda*

i *International Criminal Tribunal for Rwanda*

Africa has not been spared gross human rights violations. Impunity of violations on a grand scale by Bokassa in the CAR and Amin in Uganda have been identified as causally related to the adoption of the African Charter in 1981.[519] But these violations did not spurn the UN or individual international powers into action.

The end of the Cold War, intensified media coverage, and the link to the conflict in Europe brought Rwanda into the international spotlight. The proximity of the conflict in the former Yugoslavia caused Europe, and later the international community, to take measures to end the violence. Once the conflict had abated, an international tribunal was established to ensure that the worst perpetrators were brought to justice. As these events were followed by what happened in Rwanda, the international community followed the precedent of establishing a tribunal. It remains an open question whether the response to Rwanda would have been different if the recent precedent had not existed. Akhavan worded African scepticism in this regard: " ... had the sequence of events between the Yugoslav and the Rwanda conflicts been different, it is by no means certain that a tribunal for Rwanda would have been established".[520] Another explanation for the establishment of the Tribunal is Western feelings of guilt. After the death of 36 American soldiers in Somalia, the US was reluctant to become involved. France also chose not to engage militarily even in the face of mass killing. Giving support to the Tribunal was one way to "assuage guilt feelings".[521]

It was also a matter of some debate whether to establish a separate tribunal for Rwanda, or to extend the jurisdiction of the *ad hoc* tribunal already created. The prosecutor of the tribunal for the former Yugoslavia, for one, held the firm view that the latter course should be followed.[522]

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519 See ch 6.1 above.

520 (1996) 90 *AJIL* 501.

521 Forsythe (1997) 15 *NQHR* 5 at 13.

522 See the interview with judge Goldstone in (1996) 2 *Human Rights Brief* (web site http: // www.sray.wcl.american.edu/pub/journals/hrb/pronk.htm).

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Judge Goldstone feared a difference in procedures and standards if two tribunals were created. He further argued that setting up another tribunal would lead to expensive duplication and delays.

However, on 8 November 1994 the UN Security Council decided to establish an *ad hoc* international tribunal for Rwanda, "for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law".[523] The decision to establish the tribunal followed the appointment of[524] and report by the Commission of Experts on Rwanda. It found violations of international humanitarian law. The special Rapporteur for Rwanda of the UN Commission on Human Rights also reported to the Security Council about violations.[525] The Security Council decision pertinently refers to the "request of the Government of Rwanda",[526] making it clear that the co-operation and consent of Rwanda had been obtained.[527] The preamble to the resolution mentions the need for "international co-operation to strengthen the courts and judicial system of Rwanda, having regard in particular to the necessity for those courts to deal with large numbers of suspects".[528] This emphasises the supplementary role of the UN tribunal. In some sense, the establishment of the Security Council Tribunal weakened the authority of the Rwandese courts. The situation in Rwanda is different from that in the ex-Yugoslavia. In Rwanda a new government has taken over power. This government is intent on prosecuting perpetrators and on preventing impunity.

The personal jurisdiction of the tribunal covers everyone responsible for the relevant crimes committed in Rwanda, and Rwandan citizens responsible for relevant crimes in neighbouring

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523 Resolution 955 (1994) (Adopted by 13 in favour, 1 against (Rwanda), 1 abstention (China), reprinted in (1994) 33 *ILM* 1600. See Akhavan (1996) 90 *AJIL* 501. Rwanda voted against, due to the fact that the Tribunal was not given the power to impose the death penalty. The Statute of the Tribunal was attached to the resolution.

524 In terms of Security Council Resolution 935 (1994).

525 See S/1994/1157, annex I and annex II.

526 Resolution 955 (1994) at 2.

527 The Rwandese Government did not agree with the lack of capital punishment and the temporal cut-off limits, prompting it to vote against the Security Council resolution.

528 *Ibid.*

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states.[529] A temporal limitation was fixed - only actions committed between 1 January and 31 December 1994 are covered.[530] Substantially, the tribunal is allowed to hear crimes of genocide[531] (including attempts at "direct and public incitement" to and complicity in genocide), crimes against humanity[532] (including torture, rape and "other inhumane acts") and violations of article 3 common to the Geneva Conventions of 1949, and of Additional Protocol II of 1977, thereto.[533] The penal jurisdiction is limited to the imposition of imprisonment.[534]

The tribunal was established in Arusha, Tanzania.[535] It consists of eleven judges, presided over by judge Laity Kama from Senegal.[536] Two trial chambers of three judges are composed, after election by the General Assembly. These judges are the President, Vice-President Ostrovsky (Russia), and judges Aspegren (Sweden), Khan (Bangladesh), Pillay (South Africa) and Sekule (Tanzania). Five judges serve in the Appeal Chamber.[537] From the Court's inception to 30 September 1996, judge Goldstone served as prosecutor.[538] He was replaced by justice Arbour (Canada). The languages used are French and English.[539] The UN General Assembly appropriated $32.6 million for the 1996-97 fiscal year to enable the tribunal to be set up and function.[540]

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529 Arts 1 and 7 of the Statute of the International Tribunal for Rwanda (hereafter "the Statute").

530 *Ibid.*

531 Art 2 of the Statute.

532 Art 3 of the Statute.

533 Art 4 of the Statute.

534 Art 23 of the Statute. Punishment must be served in Rwanda or any other state that declared itself willing (Act 26 of the Statute).

535 In terms of Security Council Resolution 977 (1995).

536 "Rwanda Genocide Accused Pleads not Guilty" (30 May 1996) *The Star* at 4.

537 Art 11 of the Statute. The Rwanda Tribunal shares these five judges with the International Criminal Tribunal for the Former Yugoslavia. They are judges Cassese (Italy, who serves as President), Karibi-Whyte (Nigeria), Li (China), Vohrah (Malaysia) and Stephan (Australia).

538 See United Nations (1997) *International Criminal Tribunal for Rwanda* (Fact Sheet).

539 Art 31 of the Statute.

540 See Tittemore (1996) 4 *Human Rights Brief* 4 at 5.

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The rights of accused persons,[541] as accepted in international law, are guaranteed by the Statute. This includes equality before the law[542] and the presumption of innocence.[543] Further, an accused is to be tried "without due delay",[544] and shall have adequate time and facilities to prepare a defence.[545] The free assistance of an interpreter is guaranteed.[546] If the accused does not have sufficient means to pay for legal assistance, it will be provided free of charge.[547]

The international tribunal does not have exclusive jurisdiction over offences committed in relation to the genocide in Rwanda. Its jurisdiction is concurrent with "national courts" (not only in Rwanda).[548] However, it has primacy over the "national tribunals of all states".[549] The rule of *non bis in idem*[550] applies strictly when a person has already been tried by the international tribunal. Under exceptional circumstances someone tried by a national court may be tried again by the international tribunal.[551]

As of November 1996, 21 suspects have been indicted by the tribunal. Fourteen of them were in custody.[552] From the outset, the tribunal suffered from a lack of human and material resources and a lack of co-operation by states harbouring suspects.[553] The progress of trials was also hampered

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541 It extends to the pre-trial phase: Once taken into custody, the arrested person must be informed immediately of the charge against him (Art 19(2) of the Statute).

542 Art 20(1) of the Statute.

543 Art 20(3) of the Statute.

544 Art 20(4)(c) of the Statute.

545 Art 20(4)(b) of the Statute.

546 Art 20(4)(f) of the Statute.

547 Art 20(4)(d) of the Statute.

548 Art 8(1) of the Statute.

549 Art 8(2) of the Statute.

550 One may not be tried twice for the same offence.

551 If an act of genocide, etcetera, had been characterised as an ordinary crime, or if national court proceedings were not impartial or independent, or the accused was not prosecuted diligently (Art 9(2) of the Statute).

552 Tittemore (1996) 4 *Human Rights Brief* at 5. McGreal (14 - 30 February 1997) *Mail and Guardian* 15 refers to thirteen indicted accused in custody.

553 *Ibid*. See also Sapru 91997) 32 *Texas Intl Law Jnl*, who contends that the defiance of Kenya and Burundi was in part due to the arguable illegality of the process in which the Tribunal was established.

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by chaotic management, unqualified staff and indifference at UN headquarters.[554] A further factor contributing to delays and inefficiency is the division of functions between the prosecutor (in The Hague), the investigators (in Rwanda), the tribunal itself (in Tanzania), and the UN headquarters (in New York).[555] Future inhibiting factors were non-extradition of suspects from other states and the killing of witnesses by returning Hutus in Rwanda. This identified another target for criticism, the inefficiency of the tribunal's witness protection scheme, being located in Arusha, rather than in Rwanda itself.[556]

On 30 May 1996 the first accused, Akayesu, appeared in the Arusha tribunal and pleaded not guilty to charges of genocide and crimes against humanity.[557] The second accused Rutaganda, an agricultural engineer, pleaded not guilty on eight counts. An adjournment until 3 October 1996 was ordered, as the defence requested time to gather evidence in Rwanda. Rutaganda's indictment refers to his shareholding in Rwanda's *Radio Television Libre des Milles Collines*, which broadcast propaganda inciting racial hatred.[558]

ii *The role of domestic courts*

The Rwandan courts took action as well. Trials of some 70,000 to 90,000 suspects detained in Rwandese prisons started only in late 1996.[559] The first two accused were convicted of genocide and rape, and were sentenced to death in January 1997 by a court sitting in Kibungu.[560] These two sentenced persons were described as "an erstwhile hospital worker" and "an ex local administrator", suggesting that they were not cardinal role players in the genocide. One of the discrepancies resulting from the dual system of imposing penal sanctions is that the international

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554 McGreal (14 - 30 February 1997) *Mail and Guardian* 15.

555 *Ibid.*

556 (March/ April 1997) *Africa Today* 21 at 22.

557 "Rwanda genocide accused pleads not guilty" (31 May 1996) *The Star* at 4.

558 *Ibid.*

559 The number of suspects who are reportedly detained awaiting trial differs. Morris, justice advisor to Rwandan President Bizimunga, set the number at 90,000 (Goodman, "Justice Drowns In Political Quagmire" (31 January - 6 February 1997) *Mail and Guardian* at 24).

560 "Twee Hutu's Kry Doodstraf" (5 January 1997) *Rapport* at 4.

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tribunal hears the most serious cases, but the national courts impose more severe forms of punishment.[561] Taken together, the jurisprudence of these two tribunals belie the principle that all similarly situated accused or convicted persons should be treated alike.

Specialised chambers with exclusive jurisdiction over four categories of offences committed between 1 October 1990 and 31 December 1994, were created.[562] These tribunals consist of career or auxiliary magistrates. A special tribunal for juveniles is also instituted. The four categories of offences are as follows:[563]

- The planners, organisers and leaders of the genocide or of the commission of crimes against humanity fall into category 1. These accused are liable to the death penalty.
- Those not in leadership positions, but who caused, or contributed to, or conspired in the death of victims, fall into category 2. For persons in this category the maximum sentence is life imprisonment.
- Those who committed or participated in serious assaults comprise category 3. The normal parameters of domestic sentencing apply.
- Category 4 provides for offences against property. After conviction for a category 4 offence the convicted person and the victims must, through amicable settlement, agree on an amount of "civil damages". Failing such an agreement, the rules pertaining to criminal and civil actions will be applied.

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561 In terms of a Rwandan "genocide law", perpetrators are divided into four categories. The most culpable perpetrators (eg political and military leaders) fall into the first. Conviction of those in this category may be followed by a death sentence (by firing squad). The second category is for other offences leading to death. Imprisonment of more than seven years may be imposed. Due to overcrowding of prisons, it is unlikely that those convicted for categories three and four offences (lesser offences, eg assault and looting) will serve prison sentences (see Goodman (31 January - 6 February 1997) *Mail and Guardian* at 24).

562 See Organic Law 08/96 of 30 August 1996, on the organisation of prosecutions offences constituting the crime of genocide or crimes against humanity committed since 1 October 1990. (An English version is reprinted in *Rwanda Reconciliation* (1996) 6 at 15 - 22.)

563 Arts 2 and 14 of Organic Law 8/96.

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Any person accused before the Rwandan courts may admit and confess to the alleged offences.[564] A confession may be accepted or rejected by the Public Prosecution department. To be accepted, a confession has to comply with the following requirements:[565]

- A detailed description of the offences committed, must be given. The date, time, scene of the act and names of victims and witnesses (if known), must be included.
- Information about accomplices, conspirators and all other information useful to the prosecution must be provided.
- The person must apologise for the offences that he or she had committed.
- The person must also offer to plead guilty at subsequent court proceedings.

From the last requirement, it follows that a confession does not exempt anyone from prosecution, conviction and punishment under the criminal justice system. A confession allows an accused person to go through a different procedure, the "Confession and Guilty Plea Procedure". The court will ensure that the guilty plea had been done voluntarily, and with full appreciation of all the relevant circumstances.[566] If this is established, the person is found guilty and is sentenced. The confession is a mitigating factor and leads to an automatic reduction of sentence in two categories, category 2 and 3. A distinction is further drawn between confession and guilty plea prior to prosecution, and confession and guilty plea after prosecution has commenced. Category 2 offenders who confess before prosecution have their sentences reduced to between 7 and 11 years; those confessing after prosecution started, qualify for a reduction of sentence to between 12 and 15 years.[567]

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564 See Chapter III of Organic Law 8/96.

565 Art 6 of Organic Law 8/96.

566 Art 10 of Organic Law 8/96.

567 See art 15 of Organic Law 8/96. Sentence for category 3 offences are reduced to a third and half of the ordinary sentences respectively.

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The process is not only directed at sentencing accused persons to death and to imprisonment, but also provides for payment of damages. Not only those in category 4, but all other convicted persons are jointly and severally liable for damages caused in the perpetration of their crimes.[568] The procedural rights of accused persons are not as comprehensively protected as those of persons accused before the international tribunal at Arusha. The right to counsel is not guaranteed, for example. Provision is made for the right to appeal.[569] An appeal has to be filed within fifteen days. The state may also appeal against acquittals. If an appeal court overturns an initial acquittal, the decision may be reviewed by the Court of Cessation.

Questions may be raised about the suitability of any criminal justice system to redress problems related to conflicts that still lie latent in the society in which they had been committed. National reconciliation must be one of the priorities of any post-traumatised society. In South Africa, for example, a different route has been followed with the creation of the Truth and Reconciliation Commission. In this model, full disclosure of specific offences (of a "political nature") may result in amnesty. Such a person is never prosecuted for that offence. The question arises whether judicial means are best suited to end a cycle of ethnic violence.

Criticism followed the sentence of the first two accused found guilty: They appeared without legal representation.[570] Following this criticism, the Rwandese government made an international appeal for finances to secure legal aid to the reported 90,000 genocide suspects.[571] One of those convicted, Bizimana, criticised the brevity of his trial and the open partisanship of spectators.[572] The process also focuses on "justice" at the expense of longer term considerations of "reconciliation". Another problem that hampered the prosecution of major offenders has been the unwillingness of other states to extradite suspects to Rwanda.[573]

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568 Art 30 of Organic Law 8/96. See also this article on the position of other category offences.

569 On appeals, see arts 24 - 26 of Organic Law 8/96.

570 "Legal Aid Sought for Genocide Suspects" (12 January 1997) *The Sunday Independent* at 2.

571 *Ibid*.

572 McGreal, "Inside Rwanda's Death Row " (31 January - 6 February 1997) *Mail and Guardian* at 15.

573 See eg "Grand Jury Refuses Extradition of Presumed Criminal" (1996) 4 *Messenger IUHR* at 1.

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2.6.3.3 Possibility of a permanent international court with penal jurisdiction

The *ad hoc* character of the tribunals established for the former Yugoslavia and Rwanda caused concern to commentators and governments.[574] A permanent court would alleviate the problem of delay and cost in establishing numerous *ad hoc* tribunals. The establishment of a tribunal in response to a particular conflict creates the impression that it is "in a sense part of the conflict".[575] It may also divert attention away from resolving the conflict to punishing wrongdoers. Furthermore, the principle of legality will be served if a permanent court with a legal basis with an international penal jurisdiction is created.[576] However, a permanent court may make it more difficult to negotiate peace at a political level.[577]

This criticism notwithstanding, it is quite possible that the two initiatives could lead to the establishment of a permanent international criminal Court. The fact that two separate institutions were created reflect opposition against a subtle process of establishing a single criminal tribunal of extended jurisdiction. The ILC remains seized with the matter, and much will depend on the outcome of the two *ad hoc* tribunals functioning at the moment. In particular, the role of the tribunals to halt and effectively redress systematic, widespread and flagrant violations of international humanitarian law, will be assessed before a permanent criminal tribunal will be established.

The establishment of a permanent Criminal Court will, at the very least, be a significant symbolic gesture against impunity for gross violations of human rights by individuals. However, from an African perspective, a number of concerns may be raised. Such a court may be geographically and psychologically far removed from the continent. The Rwandan precedent has already shown that an international Court inevitably faces certain technical and pragmatic difficulties. It also remains uncertain whether African conflicts will receive priority if weighed against conflicts and violations in other regions of the world.

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574 See Crawford (1995) 89 *AJIL* 404 at 415.

575 *Ibid*.

576 Crawford (1995) 89 *AJIL* 404 at 416.

577 See, on this cautionary line, Forsythe (1997) 15 *NQHR* 5.

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Another possibility is to extend the jurisdiction of the *African Court on Human Peoples' Rights*, hopefully soon to be established under the auspices of the OAU. In terms of the Protocol which forms the basis of current discussions,[578] the Court's jurisdiction will only cover the African Charter on Human and Peoples' Rights and other African human rights instruments. Serious consideration should be given to extend this jurisdiction to include penal jurisdiction for specified crimes, such as genocide and crimes against humanity.[579] This will mean that the Protocol will have to provide for a prosecutor, a factor that will lead to re-negotiation and cost implications. The advantages are that this process may be quicker, that the alienating effect of an international tribunal will be reduced, and that the status of the African Court on Human and Peoples' Rights will be enhanced. Other possibilities include the creation of a separate, but permanent African penal Court, or the inclusion of penal matters under the jurisdiction of the African Court of Justice, to be established as an organ of the African Economic Community.

Notwithstanding any future actions undertaken by the international community, the killing of almost a million Rwandese between April and June 1994 will stand as testimony to the UN's failure to play a meaningful preventative role. This has been ascribed to the marginal political and economic concern of Rwanda to the major powers.[580] Even an international court will punish *ex post facto*. Only an extremely effective court will serve as a deterrent to future perpetrators. Its establishment will stand as testimony not only to the fact that humanity has a conscience, but also a memory.

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578 See ch 7 below.

579 See ch 6.1.1 below, about an attempt to have such a provision included in the African Charter initially, in 1980. At the NGO meeting before the 21st sitting of the Commission, a resolution was adopted which called on African governments to give jurisdiction to the proposed Court "in all matters including genocide, crimes against humanity and war crimes" ((1997) 7 *African HR Newsletter* at 7).

580 See "The International Community Failed to Stop or Stem the Genocide" (1996) May/June *Africa Today* 30.

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TABLE B: SELECTED UNITED NATIONS HUMAN RIGHTS TREATIES IN AFRICA AS AT 31 MARCH 1997

Compiled from the United Nations Treaty Database: Web Page

http://www.un.org/Depts/Treaty/final/ts2/newfiles/frontboo/tocgen.html

	CESR	CCPR	OP I	OP II	CERD	Apart-heid Conven-tion	Geno-cide Conven-tion	CRC	CEDAW	Conven-tion on Political Rights of Women	Conven-tion on the Nation-ality of Women	Conven-tion on Consent to Marriage	CAT	Refugee Conven-tion	1967 Proto-col
Algeria	X	a X	X		b X	X	X	X	X				c X	X	X
Angola	X	X	X					X	X	X				X	X
Benin	X	X	X		s	X		X	X			X	X	X	X
Botswana					X			X	X					X	X
Burkina Faso					X	X	X	X	X			X		X	X
Burundi	X	X			X	X	X	X	X	X			X	X	X
Cameroon	X	X	X		X	X		X	X				X	X	X
Cape Verde	X	X			X	X		X	X				X		X
Central African Republic	X	X	X		X	X		X	X	X				X	X
Chad	X	X	X		X	X		X	X				X	X	X
Comoros								X	X						X
Congo	X	a X	X		X	X		X	X	X				X	X
Côte d'Ivoire	X	X			X		X	X	X	X		X	X	X	X
Djibouti								X						X	X
Egypt	X	X			X	X	X	X	X	X			X	X	X
Equatorial Guinea	X	X	X					X	X					X	X
Eritrea								X	X						
Ethiopia	X	X			X	X	X	X	X	X			X	X	X
Gabon	X	X			X	X	X	X	X	X			s	X	X
Gambia	X	a X	X		X	X	X	X	X				s	X	X
Ghana					X	X	X	X	X	X	X			X	X
Guinea	X	X	X		X	X		X	X	X	s	X	X	X	X
Guinea-Bissau	X							X	X					X	X
Kenya	X	X				s		X	X				X	X	X
Lesotho	X	X			X	X	X	X	X	X	X			X	X
Liberia	s	s			X	X	X	X	X	s				X	X

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	CESR	CCPR	OP I	OP II	CERD	Apart-heid Conven-tion	Geno-cide Conven-tion	CRC	CEDAW	Conven-tion on Political Rights of Women	Conven-tion on the Nation-ality of Women	Conven-tion on Consent to Marriage	CAT	Refugee Conven-tion	1967 Proto-col
Libyan Arab Jamahiriya	X	X	X		X	X	X	X	X	X	X		X		
Madagascar	X	X	X		X	X		X	X	X				X	
Malawi	X	X	X		X			X	X	X	X		X	X	X
Mali	X	X			X	X	X	X	X	X	X	X		X	X
Mauritania					X	X		X		X				X	X
Mauritius	X	X	X		X			X	X	X	X		X		
Morocco	X	X			X		X	X	X	X			X	X	X
Mozambique		X		X	X	X	X	X						X	X
Namibia	X	X	X	X	X	X	X	X	X				X	X	
Niger	X	X	X		X	X		X		X		X		X	X
Nigeria	X	X			X	X		X	X	X			s	X	X
Rwanda	X	X			X	X	X	X	X					X	X
São Tomé e Príncipe	s	s				X		X	s					X	X
Senegal	X	a X	X		b X	X	X	X	X	X			c X	X	X
Seychelles	X	X	X	X	X	X	X	X	X				X	X	X
Sierra Leone	X	X	X		X			X	X	X	X		s	X	X
Somalia	X	X	X		X	X							X	X	X
South Africa	s	s			s			X	X	s	s	X	s	X	X
Sudan	X	X			X	X		X					s	X	X
Swaziland					X			X		X	X				X
Togo	X	X	X		X	X	X	X	X				c X	X	X
Tunisia	X	a X			X	X	X	X	X	X	X	X	c X	X	X
Uganda	X	X	X		X	X	X	X	X	X	X		X	X	X
United Republic of Tanzania	X	X			X	X	X	X	X	X	X			X	X
Zaïre	X	X	X		X	X	X	X	X	X			X	X	X
Zambia	X	X	X		X	X		X	X	X	X			X	X
Zimbabwe	X	a X			X	X	X	X	X	X		X		X	X
TOTAL NUMBER OF AFRICAN STATES PARTIES	**41**	**41**	**24**	**3**	**43**	**38**	**25**	**52**	**45**	**29**	**12**	**9**	**23**	**47**	**47**
PERCENTAGE OF AFRICAN STATES (53)	***77%***	***77%***	***42%***	***6%***	***81%***	***72%***	***47%***	***98%***	***85%***	***55%***	***23%***	***17%***	***43%***	***87%***	***87%***

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	CESR	CCPR	OP I	OP II	CERD	Apart-heid Conven-tion	Geno-cide Conven-tion	CRC	CEDAW	Conven-tion on Political Rights of Women	Conven-tion on the Nation-ality of Women	Conven-tion on Consent to Marriage	CAT	Refugee Conven-tion	1967 Proto-col
SIGNATURES NOT FOLLOWED BY RATIFICATION	*3*	*3*	*0*	*0*	*2*	*1*	*0*	*0*	*1*	*2*	*2*	*0*	*6*	*0*	*0*
TOTAL STATES PARTIES GLOBALLY	**135**	**136**	**90**	**29**	**148**	**100**	**123**	**190**	**157**	**109**	**66**	**47**	**102**	**128**	**128**
AFRICAN PERCENTAGE OF GLOBAL RATIFICATION	*30%*	*30%*	*27%*	*10%*	*29%*	*38%*	*20%*	*27%*	*29%*	*27%*	*18%*	*19%*	*23%*	*37%*	*37%*

X Ratification, accession, approval, notification or succession, acceptance or definitive signature.

s Signature not yet followed by ratification.

[a] Declaration recognizing the competence of the Human Rights Committee under article 41 of the International Covenant on Civil and Political Rights.

[b] Declaration recognizing the competence of the Committee on the Elimination of Racial Discrimination under article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination.

[c] Declarations recognizing the competence of the Committee against Torture under articles 21 and 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

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As was stated, the CCPR also provides for the **optional acceptance of inter-state complaints**.[227] By the end of 1996, a total of 45 states globally had accepted the competence of the Human Rights Committee to consider communications of this nature. Six African states (Algeria, Congo, Gambia, Senegal, Tunisia and Zimbabwe) have accepted this optional provision.

Article 4(3) allows states parties to notify other parties of **temporary derogations** from the Convention. Only two states parties from the African continent have as yet provided such information.[228] They are Algeria and Sudan. In the case of Sudan, the continuous conflict between the north and south provide the explanation for the state of emergency.

2.3.2.4 Reporting obligations

The primary overseeable duty of ratifying states is to present an initial report (within two years of ratification) and periodic reports (every five years thereafter). Initial reporting is required by article 40 of CCRP; periodic reporting was introduced by the Committee.[229] The non-compliance of states has become a major obstacle to the effective functioning of the system. On 4 November 1994 23 African states had one or more reports outstanding. Of these, the following eleven have not submitted their initial or any subsequent reports:[230]

Angola	(report due 9 April 1993)
Benin	(report due 11 June 1993)
Ethiopia	(report due 10 September 1994)
Equatorial Guinea	(report due 24 December 1988)
Gabon	(report due 20 April 1984)
Côte d'Ivoire	(report due 25 June 1993)

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227 In terms of art 41 of the CCPR.

228 Information contained in web site http:/www.un.org/Depts/Treaty/final/ts2/newfiles/frontboo /tocgen.html.

229 See Nowak (1993) 14 *HRLJ* 9.

230 At the end of the Committee's 52nd session, see UN document CCPR/C/104 at 5 - 8.

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Mozambique	(report due 20 October 1994)
Nigeria	(report due 28 October 1994)
Seychelles	(report due 4 August 1993)
Somalia	(report due 23 April 1991)
Zimbabwe	(report due 12 August 1992)

The initial reports of 22 of the ratifying states worldwide were outstanding at that stage. In other words, Africa made up 50% of those not complying with the initial obligation to report. This compares very unfavourably with the percentage of African states parties. The five reports longest overdue were from Gabon, Equatorial Guinea, Somalia, Haiti and Zimbabwe.

An analysis of some of reports examined by the HRC since 1992 reveals that timely submission of reports is not a goal in itself, and guarantees very little. One state, **Burundi**, had submitted its periodic report on time.[231] The report was considered in 1992. The delegation at that stage supplemented the report with more updated information. The HRC expressed its concern about the lack of protection of minorities, ethnic dominance of one ethnic group of the armed forces, the declaration of and power to declare states of emergency, detentions, and the lack of investigation of past atrocities. Not long after the report was considered, renewed ethnic violence broke out in Burundi. In 1994, the HRC requested the Burundi government to submit a report about the local human rights conditions. This request was made in terms of the obligation of states to submit reports "whenever the Committee so requests".[232] Although the report lacked information on the situation in Burundi, the Committee used all information at its disposal to examine the situation. By that time, the violence had abated. The HRC repeated, mostly in more detail, the observations and recommendations contained in its previous comments.[233] The Committee emphasised that these human rights violations must be addressed within the greater framework of working towards national reconciliation.

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231 See UN document CCPR/C/79/Add 9 (1992).

232 Art 40(1) of CCPR.

233 See HRC report CCPR/C/79/Add 41 (1994).

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Not only were reports submitted late, but they mostly suffered from a lack of detail as well.[234] Where detail of legislative provisions and administrative regulations were provided, there was a lack of information on the "implementation of the Convention in practice"[235] and on the difficulties experienced in securing enjoyment of the rights in the Convention.[236] Also disappointing is the fact that many of the reports were not the first to be presented by the state and to be considered by the Committee. Despite previous advice, states have still not followed the guidelines for reporting and have not complied with the spirit required for meaningful reporting. However, in the case of Morocco, the problematic aspects of the report were corrected by frank answers, admitting to some difficulties in implementing the Covenant.[237]

As some states have submitted previous reports, the extent of progress between the two reports could be gauged.[238] Two states in particular have been praised for progress in a number of respects. After the consideration of its last report, the HRC observed with approval that **Senegal** has taken the following steps:[239]

- The State Security Court was abolished.
- The position of Mediator was created.
- A new, improved Electoral Code was adopted.
- Certain provisions of the CCPR were applied by domestic courts for the first time.

Although Tunisia had generally seen a deterioration of human rights, certain reforms had also been implemented. This included new provisions in the Penal Code, which provide for heavy sanctions in respect of violence against women, and changes to the Personal Status Code liberalising women's access to child custody and divorce.[240]

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234 The report of Niger was desribed as "extremely succinct" (CCPR/C/79/Add 17 (1993)) and that of Cameroon as "summary and rather theoretical" (CCPR/C/79/Add 33 (1994)).

235 See eg the Moroccan report (CCPR/C/79/Add 44 (1994)) and the report submitted by Senegal, described by the HRC as lacking in attention to actual implementation (CCPR/C/79/Add 10 (1992).

236 See eg HRC report on Egypt's report (CCPR/C/79/Add 23 (1993)).

237 See CCPR/C/79/Add 44 (1994) at par A.

238 This is indeed regarded as the method by which follow-up would be effected.

239 See CCPR/C/79/ Add 10 (1992) at par 3.

240 See CCPR/C/97/Add 43 (1994).

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After analysing most of the reports submitted by African states, the following recurring aspects which impede the realisation of the CCPR in the continent may be identified:

- the imposition and application of the death penalty;
- extra-judicial executions by security forces;
- discrimination against women;
- provision for states of emergency, and derogation of rights during emergencies;[241]
- non-notification of the Secretary-General of declaration of state of emergency;
- provision for preventative detention, and the conditions of detention;
- violations of freedom of expression and association; and
- persistent problems related to ethnicity.[242]

But there is also a ray of hope. Most of these reports were submitted by states which have recently held multi-party elections and are progressing on the road to democracy.[243] It is significant that these states have submitted themselves to international scrutiny. Viewed in the context of democratisation, the reporting obligation takes on new meaning, and becomes a vehicle for establishing and guarding over democratic institutions.

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241 See, in particular, the concerns raised by the HRC on the extension of the state of emergency in Egypt since 1981: CCPR/C/97/Add 23 (1993) at par 12.

242 This was clearly the root cause of the upheaval in Burundi. In other states, too, this is often the "Achilles heel" in human rights realisation. See the problems related to the Casamance region in Senegal (HRC report CCPR/C/97/Add 10 (1992)), the Tuareg in northern Niger (HRC report CCPR/C/97/Add 7 (1993)), the position of the Berbers in Algeria (CCPR/C/97/Add 1 (1992) and the English-speaking north-west of Cameroon (CCPR/C/97/Add 33(1994)).

243 This is of particular relevance in the case of Algeria (see CCPR/C/97/Add 1 (1992)), Niger (see CCPR/C/97/Add 17 (1993)), Tanzania (see CCPR/C/97/Add 12 (1992)) and Togo (see CCPR/C/97/Add 36 (1994)).

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2.3.2.5 *Individual complaints under the first Optional Protocol*

As at 31 March 1997, 24 African states have become party to the first Optional Protocol.[244] Malawi and Sierra Leone, who acceded to the Protocol in 1996, have most recently become parties. At the same time, the African states parties to the CCPR numbered 41. This means that almost half (45%) of African states are party to both the Covenant and its optional complaints procedure. The percentage globally is 47%. While the African percentage for **ratification of the CCPR** exceeds the global percentage (77% in Africa, as against 71% globally), the **order is reversed** when it comes to **accepting individual complaints** (45% in Africa, as against 47% globally). One explanation could be that the commitment in Africa is easily secured at the more rhetorical level. Mechanisms that could publicly embarrass states are less easily accepted. Peter[245] expressed the opinion that "most states, and in particular those from the developing world, have constantly avoided signing or ratifying the Optional Protocol" because it is an "enforcement mechanism".

At the end of each session the HRC publishes views and decisions. Views are "contestations", while decisions are irrevocable. An analysis will now be made of the views and decisions issued from the 4th session, held in 1979, to the end of 1994, to establish to what extent individuals in African states have utilised the Optional Protocol procedure. The 4th session is the starting point, as the Committee issued views for the first time at the end of this session, when it began "consideration of communications in accordance with the Protocol".[246] The Committee's first view was issued on 15 August 1979, in response to a communication registered on 15 February 1977. **From 1976 to 1 June 1993** the HRC issued a total of 291 final views and findings on admissibility.[247] At that stage, **less than 5% (16)** of these were issued in respect of African states.[248]

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244 See Table B below.

245 Peter in Peter and Juma (1996) 52 at 54.

246 See par 147, UN document A/32/40, 37/40.

247 Nowak (1993) gives a list of these views and findings in an addendum. Although the last case mentioned was registered as 491, the smaller total (291) represents the number of cases in which views were expressed or findings were made.

248 Communications 16/1977 (against Zaïre), 35/1978 (against Mauritius), 49/1979 (against Madagascar), 90/1981 (against Zaïre), 115/1982 (against Madagascar), 124/1982 (against Zaïre), 132/1982 (against

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The first view adopted in relation to an African state was in a case from Mauritius.[249] **By the end of 1994**, the HRC had found a total of **21 violations** against African states. Zaïre accounted for almost half of these communications, nine cases from that state having served before the HRC. The other states complained against were Madagascar (four cases), Equatorial Guinea (two cases), Zambia (two cases), Cameroon, CAR, Libya, Mauritius and Senegal (on one occasion each).

The views expressed on the merits of communications from Africans against African governments[250] are as follows:[251]

1979 : 0 (total 1)[252]

1980 : 0 (total 5)[253]

1981 : 1 (total 12) Mauritius[254]

1982 : 0 (total 14)[255]

1983 : 3 (total 17) Madagascar;[256] Zaïre (2)[257]

1984 : 1 (total 7) Zaïre[258]

Madagascar), 138/1983 (Zaïre), 155/1983 (Madagascar), 157/1983 (Zaïre), 194/1985 (Zaïre), 241/1987 (Zaïre), 242/1987 (Zaïre), 354/1989 (Mauritius), 457/1991 (Libya) and 463/1991 (Zaïre).

249 Communication 35/78 (*Aumeerudy-Cziffra and 19 Others v Mauritius*). Mauritius became the second African state to accede to or ratify the Optional Protocol by acceding in 1973 (after Madagascar ratified it in 1971).

250 Since states undertake to "respect and to ensure to all individuals within its territory and subject to its jurisdiction" the rights set out in the CCPR (art 2(1) of the CCPR), citizens of African countries are sometimes complainants in cases against non-African governments, especially in Europe (see ch 5.1 above).

251 In each year, the number of complaints against African governments is provided, followed by the total number of complaints in that year against all ratifying states. The name(s) of the African state(s) against which complaints have been directed is (are) furnished as well.

252 See UN doc A/34/40

253 See UN doc A/35/40.

254 See UN doc A/36/40 Communication 35/1978 (*Aumeeruddy-Cziffra and others v Mauritius)*, (1981) 2 *HRLJ* 139.

255 UN doc A/37/40.

256 UN doc A/38/40. Communication 49/1079 (*Marais v Madagascar*), (1983) 4 *HRLJ* 204.

257 UN doc A/38/40. Communication 16/1997 (*Mbenge v Zaïre*), (1983) 4 *HRLJ* 185 and Communication 901/1981 (*Mabanga ex - Philibert v Zaïre*), (1983) 4 *HRLJ* 195.

258 UN doc A/39/40. Communication 124/1982 (*Muteba v Zaïre*), (1984) 5 *HRLJ* 215.

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1985 : 2 (total 12) Madagascar (2)[259]

1986 : 2 (total 4) Zaïre (2)[260]

1987 : 1 (total 5) Madagascar[261]

1988 : 1 (total 8) Zaïre[262]

1989 : 0 (total 10)[263]

1990 : 2 (total 13) Zaïre (2)[264]

1991 : 0 (total 6)[265]

1992 : 0 (total 18)[266]

1993 : 2 (total 23) Zambia (2)[267]

1994 : 7 (total 32)[268] Cameroon;[269] Central African Republic;[270] Equatorial Guinea (two);[271] Libya;[272] Senegal;[273] Zaïre.[274]

The following four cases illustrate the potential role of the HRC in an African context:

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259 UN doc A/40/40. Communication 115/1982 (*Wight v Madagascar*), (1986) 7 *HRLJ* 294, and Communication 132/1982 (*Jaona v Madagascar),* (1985) 6 *HRLJ* 233.

260 UN doc A/41/40. Communication 138/1983 (*Mpandanjipa et al v Zaïre*), (1986) 7 *HRLJ* 277, and Communication 157/1983 (*Mpaka-Nsusu v Zaïre*), (1986) 7 *HRLJ* 280.

261 UN doc A/42/40. Communication 155/1983 (*Hammel v Madagascar*), (1988) 9 *HRLJ* 249.

262 UN doc A/43/40. Communication 194/1985 (*Muiyo v Zaïre*), (1990) 11 *HRLJ* 146.

263 UN doc A/44/40.

264 UN doc A/45/40. Communication 241/1987 (*Birindiwa v Zaïre*), (1993) 15 *HRLJ* 15; Communication 242/1987 (*Tshisekedi v Zaïre*), (1993) 15 *HRLJ* 15.

265 UN doc A/46/40.

266 UN doc A/47/40.

267 UN doc A/48/40. Communications 314/1988, 326/1988 *(Bwalaya v Zambia; Kalenga v Zambia*), (1995) 16 *HRLJ* 389.

268 Un doc A/49/40.

269 Communication 458/1991 (*Mukong v Cameroon*), (1995) 16 *HRLJ* 391.

270 Communication 428/1990 (*M'Boissona on behalf of Bozize v CAR*), (1995) 16 *HRLJ* 391.

271 Communication 468/1991 *(Bahamonde v Equatorial Guinea*), views of 20 October 1993, (1995) 15 *HRLJ* 26; Communication 414/1990 (*Miha v Equatorial Guinea*), (1995) 16 *HRLJ* 388.

272 Communication 440/1990 (*Youssef on behalf of Bashir El-Megreisi v Libya*), (1995) 16 *HRLJ* 392.

273 Communication 386/1989 (*Koné v Senegal*), (1995) 16 *HRLJ* 394.

274 Communication 366/1989 (*Tshiongo a Minanga v Zaïre*), (1995) 16 *HRLJ* 396.

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- The first case was decided by the HRC in 1993, following a complaint by Angel Bahamonde against **Equatorial Guinea**.[275] Bahamonde was and still is an outspoken opponent of the Equatorial regime. His allegations are as follows: Before he fled the country in 1991, he was the victim of numerous human rights violations. His passport was confiscated, he was arbitrarily detained, and his lands were expropriated. The government argued that local remedies had not been exhausted, as Bahamonde had not filed any action before local courts. The complainant gave detailed information of numerous attempts to obtain judicial redress, which have failed. His attempts were systematically blocked by the authorities and by the President himself. He added that the judiciary in the country cannot act independently as all judges and magistrates are nominated directly by the President.

  The HRC declared the communication admissible. Under the circumstances, the applicant could not be expected to exhaust local remedies. The government had asserted, but only in very general terms, that the complainant could have involved at least four laws or regulations before local tribunals. The failure of the state "to link its observations to the specific circumstances of the author's case"[276] prompted the Committee to find that the applicant had met all admissibility requirements. As to the merits, the HRC found that the complainant had been arbitrarily arrested, that his right to security of the person had been violated, that he was denied the right to leave his country, and that he was discriminated against. As an appropriate remedy the government was urged to "guarantee the security of his person, to return confiscated property to him or to grant him appropriate compensation, and that the discrimination to which he has been subjected be remedied without delay".[277] The Committee requested to receive, within 90 days, information on steps subsequently adopted by the government.

- In the second case, *Lubuto v Zambia*,[278] the HRC dealt with article 6(2) of the CCPR, which allows for the imposition of the death penalty "only for the most serious crimes". In terms of **Zambian** legislation, the imposition of the death sentence was mandatory where a firearm had

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275 Communicatin 468/1991 *(Bahamonde v Equatorial Guinea)*. See HRC's views at (1994) 15 *HRLJ* 26.

276 At par 6.1 of the HRC's views.

277 At par 11 of HRC's views.

278 Communication 390/1990, 31 October 1995, see (1996) 10 *Interights Bulletin* 28 - 29.

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been used in the course of a robbery. Capital punishment had to follow, irrespective of whether the firearm was used to injure or kill anyone. The HRC held this position to be in violation of article 6(2), as the courts could not take into account whether the use of the firearm had ensued in death or injury, or not. In Lubuto's case, gunshots were fired during the course of the robbery, but no-one was injured. The Committee regarded the commutation of Lubuto's sentence as an appropriate and effective remedy in the circumstances. The HRC also found that Lubuto was not tried without undue delay.[279] The period that had expired between his arrest and the final decision dismissing the appeal was excessive. Although the Committee took into account the difficult economic conditions faced by the Zambian government, it had to implement the minimum standards contained in the CCPR.

- In another case involving **Zambia**, the HRC in 1994 found violations of the CCPR which had been committed under the Kaunda government.[280] The case originated when Bwalya ran for a parliamentary seat in 1983, and was arrested and detained for 31 months on charges that he belonged to an organisation considered to be illegal under Zambia's (then) one-party Constitution. The HRC found a violation of article 25, which allows for free participation in the conduct of public affairs, and to "be elected at genuine periodic elections".[281] The Committee observed that "restrictions on political activity amounts to an unreasonable restriction on the right to participate in the conduct of public affairs".[282] Other rights of the author of the communication had also been violated, the Committee concluded. In a brief note, the state informed the HRC that the complainant had been released. As if to suggest that the matter should be laid to rest, the state failed to co-operate any further. However, the HRC found that the release of the complainant is not the only "remedy" appropriate in the circumstances, as it urged the state to grant compensation to Bwalya, and to ensure that similar violations do not occur in the future.[283] It also requested the state to provide it, within 90 days, with information about measures taken to address the situation.

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279 See art 14(3) (c) of CCPR.

280 Communication 314/1988 (*Bwalaya v Zambia*), views of HRC, 14 July 1993. Quoted in Steiner and Alston (1996) at 541 - 543.

281 Art 25(b) of the CCPR.

282 At par 6.6 of the Committee's views.

283 At par 8 of the HRC's views.

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2.3.2.6 *Realisation*

Against the above background the question may be asked how effective the implementation of the CCPR had been in the African context.

State reporting suffers from numerous draw-backs. As was pointed out above, in the case of Burundi, subsequent events have revealed the ineffectiveness of the reporting procedure in the reality of a state caught up in cycles of ethnically-based violence. It also shows the limitations of the inherent effectiveness of the reporting system in the face of massive violations during large-scale civil disturbance. However, other cases emanating from Africa show the potential of the mechanism to strengthen democratic governance. State reporting cannot uproot repressive regimes and cannot redress massive violations. But it can bolster fledgling democracies, which already are in place, and it can improve the protection of human rights, if states are in principle committed to the advancement of human rights.

The question arises to what extent individuals have in fact benefited from the procedure provided for especially in the **first Optional Protocol**. McGoldrick, in analysing the effectiveness of the Optional Protocol for individuals, compiled two lists of states: one of those that usually co-operate and comply and one of those who do not. This list of states identified as willing to co-operate with the Committee and abide by its final views includes Canada, a number of West European states and Jamaica. Only one African state, Mauritius, is included. The *Mauritian Women Case* in fact provides, in his view, "the clearest example of a State party taking measures in consequence of the HRC's final views".[284] The Mauritius legislature amended two pieces of legislation found by the HRC to be discriminatory against women. The HRC decision was also cited with approval by the Zimbabwean Supreme Court when it considered a similar issue.[285]

However, without doubt, most African states do not comply with the views issued by the HRC. In the case of *Marais v Madagascar*, for example, the state did not adhere to the Committee's statement that it would "welcome a decision by the State party to release Mr Marais, prior to

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284 McGoldrick (1991) at 203 par 4.132.

285 See *Rattigan v Chief Immigration Officer, Zimbabwe* 1995 2 SA 182 (ZSC) at 189-190.

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completion of his sentence, in response to his petition for clemency". Marais was only released after he had completed his sentence.[286] The decision in *Mpandanjila et al v Zaïre* was not only rejected by the Zairian government, but also resulted in retaliatory measures by the government. In response to the HRC's views, the authors of the communication were arbitrarily detained and subjected to internal banishment and inhuman treatment. In a subsequent communication, two of them complained to the HRC. In that decision, *Birindiwa and Tshisekedi v Zaïre,*[287] the government was again found to be in violation of the CCPR.

Inevitable **time delays** cause the Committee's views to have little impact. For example, views were adopted in two cases against Zambia in July 1993.[288] Both communications related to restraint of free political activity and delay in giving reasons for arrest. The circumstances in both had a close link to the one-party system prevailing at the time. Although numerous violations were found and compensation was ordered, some five years have already lapsed by then. The intervening years saw the one-party system dismantled. It fell to the new, democratically-elected government to redress the wrongs of the past.

Even in respect of the African states that have ratified the Optional Protocol to the CCPR, **few communications** have been brought against African states. By the end of 1992, when 17 African states have accepted the Committee's competence to receive individual communications, eight of these states had not been the subject of any such complaints. These states were Algeria, Angola, Benin, Congo, Gambia, Niger, Seychelles and Somalia.[289] It appears from the data above that the next two years did not see a change in the situation. A small number of complaints originated in most of the other state. Despite its meagre contribution of cases, Odinkalu *et al* concluded that the views adopted on African communications significantly enriched the jurisprudence of the Committee.[290] The likelihood of a communication emanating from Africa being declared

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286 See McGoldric (1991) at 223 (n325).

287 Communication 241/1987 and 242/1987, views of 2 November 1989 (See Nowak (1993) 14 *HRLJ* 9 at 15).

288 Communication 314/88 (*Bwalaya v Zambia*) and Communication 326/88 (*Kalenga v Zambia*).

289 See Bayefsky in Henkin and Hargrove (eds) (1994) at 292: Table J.

290 Odinkalu, Tadessey and Lumumba (1994) 8 *Interights Bulletin* 67.

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admissible, is greater than those emanating from any other region.[291] When communications were in fact considered on the merits, the HRC found violations in all the cases.[292]

It is clear from the above that **arbitrary detention** is an endemic problem in Africa. In each of the seven 1994 cases cited above, the Committee found a violation of article 9 of the CCPR. The wording of article 9(1) embodies the crucial concerns of many Africans: "Everyone has the rights to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law". In all seven cases a violation of article 9 was found, exposing the government as repressive and intolerant of any form of dissent. These specific violations were embedded in the denial of democratic rights to the population generally.

The cases brought and findings reached by the HRC reinforce the **interdependence of the rights** in the CCPR and those in the CESCR. The socio-economic implications of detention have been raised on numerous occasions. In *Mukongo v Cameroon*,[293] for example, the Cameroon government argued that harsh prison conditions were a result of the persistent underdevelopment of that country. The HRC referred to the UN Standard Minimum Rules for the Treatment of Prisoners and held that those minimum requirements had to met by all states, regardless of possible "economic justifications".[294] Two other cases, *M'Boissona v CAR*[295] and *Koné v Senegal*[296] are examples of the Committee's approach to delay awaiting trial. Securing expeditious trials, as required by the HRC, will only be attained through resource allocation.

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291 Based on figures as from February 1993, see Bayefsky in Henkin and Hargrove (eds) (1994) at 294, Table M. Of the African communications, 82% were declared admissible, as against 50% from Eastern Europe, 71% from Latin America and 32% from the WEO states.

292 See Bayefsky in Henkin and Hargrove (eds) (1994) at 294, Table M. The African percentage (100%) should be contrasted with the 30% violations found in respect of communications from WEO states.

293 Communication 458/1991.

294 See par 9.3 of the HRC's views.

295 Communication 428/1990. The Committee also noted the extremely poor prison conditions in this case, and found a violation of art 7. Redress of such conditions will clearly have "economic" implications.

296 Communication 386/1989.

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The more **indirect influence** of the CCPR is more difficult to gauge. It has come to be accepted as one of the primary international human rights instruments, and has served as role model for human rights standard setting in the domestic sphere. Another indirect form of influence is judicial reliance on CCPR provisions as interpretative guides.[297]

2.3.3 The Committee on Economic, Social and Cultural Rights

2.3.3.1 Background to and functions of the Committee

The International Covenant on Economic, Social and Cultural Rights ("CESCR") is one of the two human rights treaties that converted the lofty declarations of the Universal Declaration into binding state obligations. In its attempt to realise social justice, the document covers a wide range of rights - from education, employment and the family, to minority languages and cultures. It was adopted in 1966, but entered into force only in 1976. Supervision of the treaty is exclusively by means of state reporting. A supervisory body, the Committee on Economic, Social and Cultural Rights (the "CESCR Committee"), is responsible for the examination of state reports. This Committee, created by ECOSOC in 1986, replaced the previous "moribund working group of government representatives".[298]

2.3.3.2 Composition

The eighteen members of the CESCR Committee are elected by all members of ECOSOC.[299] In the process of electing members, "due consideration" is to be given to "equitable geographical

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297 See eg *Nyambirai v National Social Security Authority* 1996 1 SA 636 (ZS) at 647I, *Ex parte Gauteng Legislature* 1995 3 SA 165 (CC) at par 71, *S v Makwanyane* 1995 3 SA 391 (CC) at paras 63 – 67 and *S v Williams* 1995 3 SA 632 (CC) at paras 21 (n 24) and 26.

298 Forsythe (1992) at 68.

299 See Alston in Alston (ed) (1992) 473 at 488.

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distribution and to the representation of different forms of social and legal systems".[300] This was interpreted as allowing each of the five regional grouping three members to the Committee, with the additional three being divided between Latin America, Africa and the WEO states.[301]

2.3.3.3 Ratification, reservation and derogation

Oloka-Onyango analysed the state of African ratification of the CESCR.[302] As of 15 July 1995, over 30% of African states had not ratified the instrument. Using the analogy of the Convention on the Rights of the Child, he argued that universal African ratification of the CESCR is the "necessary first step for all African states which claim to uphold the ideals contained in the instrument".[303] Serious observance will only follow once a "bench-mark from which standards in the area can be critically and universally assessed", is in place.[304] Oloka-Onyango singled out Ghana as a state that purports to be a proponent of the need to address socio-economic inequalities at the international level and domestically. Notwithstanding, Ghana has not ratified the CESCR, revealing an unwillingness to hold steps taken in this regard up to international scrutiny.

By 31 March 1997, the same number of African UN member states (41) has ratified the CCPR and the CESCR.[305] Forty of these states ratified both the covenants. Only one state, Guinea-Bissau, has ratified the CCPR, but not the CESCR. Conversely, Mozambique has ratified the CESCR, but not the CCPR. This corresponds with a global trend, as 135 states globally have ratified the CESCR, and 136 the CCPR.[306]

Nine African states made **reservations** when accepting their obligations in terms of the treaty. The Covenant obliges states parties to respect the liberty of parents to choose schools, other than public

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300 ESC Res 1985/17, par b, quoted by Alston in Alston (ed) (1992) 473 at 487.

301 See Alston in Alston (ed) (1992) 473 at 488.

302 (1995) 26 *California West Intl Law Jnl* 1.

303 (1995) 26 *California West Intl Law Jnl* 1 at 16.

304 (1995) 26 *California West Intl Law Jnl* 1 at 15.

305 See Table B below.

306 See Table B below.

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schools, for the education of their children "in conformity with their own convictions".[307] In this respect, Algeria, Congo and Rwanda raised objections. Congo, for example, declared that the article does not give parents the right to establish private schools contrary to the monopoly of the State in the nationalisation of education. Algeria, Guinea and Libya made reservations of a political nature similar to those entered in relation to the CCPR.[308] Egypt made a declaration of a religious nature, similar to the one entered in relation to the CCPR. Reservations made by Kenya, Madagascar and Zambia are indicative of an honest appraisal of the implications of the obligations under the Covenant. The duty on states to ensure paid leave or adequate social security to women before and after childbirth is guaranteed.[309] Kenya reserved its adherence to this obligation, observing that it cannot be realised at present. Both Madagascar and Zambia declared that the right to free primary education for all cannot be realised at present.[310]

2.3.3.4 Reporting obligations

As is the case under other treaties, African states have been reluctant to meet their obligation to report.[311] One factor of particular importance in Africa is that governments "do not have appropriate data of good quality for this type of analysis".[312] An optional Protocol to CESCR that will allow for individual complaints is now being considered. This will convert the approach from monitoring of "progressive realisation" to a "violations"-based approach. As far as Africa is concerned, this approach is preferable in the light of the fact that "a violations approach does not necessarily require access to extensive statistical data.[313]

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307 Art 13(3) of the Covenant.

308 See par 2.4.2 (c) above.

309 Art 10(2) of the Covenant.

310 Art 13(2)(a) of the Covenant.

311 See in general on reporting Craven (1995).

312 Chapman (1995) 55 *ICJ Review* 23 at 28.

313 Chapman (1995) 55 *ICJ Review* 23 at 31.

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2.3.3.5 Realisation

Continent-wide conditions of poverty, illiteracy and general underdevelopment testify to the failure of African states to secure viable socio-economic environments to their nationals. Ratifying the CESCR might have a gravitational pull-power, but as yet its promise lies unfulfilled. Reporting obligations were insufficient in securing improved realisation of these rights. On the short term and in isolated cases, at least, the gravest breaches of socio-economic rights may be redressed by adopting a violations-based approach.

2.3.4 The Committee on the Elimination of Discrimination against Women

2.3.4.1 Background

Numerous human rights instruments have been adopted to deal with aspects of the precarious position of women around the globe. The most comprehensive of these is the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW"). Others include the Convention on the Political Rights of Women,[314] the ILO Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value and the Convention on Consent to Marriage[315], Minimum Age for Marriage and Registration of Marriages and the Convention on the Nationality of Married Women.[316]

A number of African states have become party to some of these instruments. On 31 March 1997, the number of states that have ratified each of these was as follows:[317]

- CEDAW: 45 states
- Convention on the Political Rights of Women: 29 states:[318]

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314 UN Treaty Series vol 193 at 135, adopted on 20 December 1952, entered into force on 7 July 1954.

315 ILO Convention no 100, UN Treaty Series vol 165 at 303, adopted on 29 June 1951, entered into force on 23 May 1953. Also see par 2.5.1 below.

316 UN Treaty Series vol 309 at 65, adopted on 20 February 1957, entered into force on 11 August 1958.

317 See Table B below.

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- Consent, Minimum Marriage Age Convention: 9 states
- Nationality of Married Women Convention: 12 states

The African Charter incorporates these rights by reference: African states shall ensure the "elimination of every discrimination against women and so ensure the protection of the woman and child as stipulated in international declarations and conventions".[319] This means that, notwithstanding the fact that a state might not have ratified a specific convention, those provisions become binding on that state by virtue of the state's ratification of the African Charter. As far as international commitment is concerned, one should distinguish between African states that have a primary commitment to women's rights, and those who have a derivative obligation. In relation to CEDAW the difference would be that realisation is the responsibility of different institutions. For states incurring their commitments via the African Charter, the African Commission is the enforcement mechanism; for the states that have ratified the conventions themselves, realisation is the responsibility of the Committee.

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318 Even some of those states that have ratified entered restricting reservations. See web site http://www.un.org/Depts/Treaty/bible/Part_1_E/XVI_/XVI_1.html: Lesotho: "Article III is accepted subject to reservation, pending notification of withdrawal in any case, sofar as it relates to: Matters regulated by Basotho Law and Custom". Swaziland: "(a) Article III of the Convention shall have no application as regards remuneration for women in certain posts in the Civil Service of the Kingdom of Swaziland. (b) The Convention shall have no application to matters which are regulated by Swaziland Law and Custom in accordance with Section 62 (2) of the Constitution of the Kingdom of Swaziland. [(a) The office of Nggwenyama; (b) the office of Ndlovukazi (the Queen Mother); (c) the authorization of a person to perform the functions of Regent for the purposes of section 30 of this Constitution; (d) the appointment, revocation of appointment and suspension of Chiefs; (e) the composition of the Swazi National Council, the appointment and revocation of appointment of members of the Council, and the procedure of the Council, (f) the Ncwala; (g) the Libutfo (regimental) system.]" Sierra Leone and Mauritius do not consider themselves bound by article III in so far as that article applies to recruitment to and conditions of service in the Armed Forces or to jury service.

319 Art 18(3) of the Charter.

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2.3.4.2 *Composition and functions*

The Committee on the Elimination of Discrimination against Women ("the CEDAW Committee") is made up of 23 independent experts, elected by the states parties to CEDAW.[320] They meet yearly to consider state reports submitted in terms of CEDAW.[321] The CEDAW Committee may "make suggestions and general recommendations based on the examination of reports and information received from the States Parties".[322] These suggestions and recommendations are contained in the Committee's annual report to the General Assembly.[323]

At present, six of the 23 Committee members are from African states.[324] They are all female and are more or less representative of the African continent, although Southern and Central Africa are underrepresented. The African members are: Abaka (Ghana), Aouij (Tunisia), Bare (Zimbabwe), Ouedraogo (Burkina Faso), Sinegiorgis (Ethiopia) and Tallawy (Egypt). The terms of four members expire in 1998, and that of the other two (the members from Burkina Faso and Ethiopia) expire in the year 2000.

Byrnes has described the performance of African experts as "varied": "some have been among the most active members of the Committee, while others have been relatively passive".[325] He also noted that "rigorous scrutiny of developing countries appears to have been tempered by the perception of the difficulties they face in the promotion of the equality for women".[326]

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320 Art 17 of CEDAW.

321 Art 20 of CEDAW.

322 Art 21(1) of CEDAW.

323 This report is submitted through ECOSOC: see art 21(1) of CEDAW.

324 See Web site gopher://gopher.un.org: 70/00/ga/CEDAW/REP.

325 Byrnes (1989) 14 *Yale Jnl of Intl Law* 1 at 11.

326 *Ibid.*

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2.3.4.3 *Ratifications and reservations*

As at **31 December 1995**, CEDAW had been **ratified** by 43 African states.[327] Half of the ten non-ratifying states were Arabic countries.[328] Apart from these five states, another two of the non-ratifies were states within the Islamic sphere of influence.[329] Botswana, Sao Tome e Principe and Swaziland accounted for the other three. By **31 March 1997**, two of these states, Algeria and Botswana, have joined the 43, pushing the number of African ratifying states to 45. This represents 85% of all OAU member states. The global ratification percentage then stood at 83%.

States may enter **reservations** when ratifying or acceding to CEDAW. The general rule that reservations may not be incompatible with the object and purpose of a treaty,[330] is spelt out in the Convention.[331] Eight African states ratified CEDAW with reservations.

- **Algeria and Ethiopia** both declared themselves not bound by article 29(1). That provision creates the possibility of doing away with the requirement of mutual consent of states parties in order to seize the ICJ.

- Two African states, **Libya and Malawi**, made general reservations.[332] Libya made it clear that the principle of equality may not be invoked in contradiction of Shari'ah. Malawi entered a reservation to the effect that traditional customary practice rather than CEDAW is to be upheld in cases of conflict.

- Article 11 of CEDAW deals with equality in the field of employment. A number of states parties made reservations about the full realisation of the rights contained in this article. The

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327 See Table B below.

328 They are Algeria, Djibouti, Mauritania, Somalia and Sudan (see Table B). They are all members of the Arab League (see ch 5.4 below).

329 They are Niger and Mozambique, both members of the Organisation of Islamic Conference (see ch 5.4 below).

330 Art 19 of the 1969 Vienna Convention on the Law of Treaties.

331 Art 28(2) of CEDAW.

332 See web site http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_8.html.

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"most blunt" of these reservations came from **Mauritius**,[333] who declared itself not bound by articles 11(1)(b)[334] and 11(1)(d), which guarantees equal remuneration for work of equal value. Lijnzaad has described the terms of these reservations as "highly questionable".[335]

- Further reservations were entered by **Algeria, Egypt and Lesotho**. These are of a more limited nature and refer to particular aspects. The Algerian reservation requires that the Convention may not contradict provisions of the Algerian Family Code in respect of rights in marriage. The Egyptian reservation also invokes the Shari'ah and may be subjected to criticisms similar to those raised in respect of Libya.[336] Lesotho made a reservation which probably best illustrates the possibility of a tolerable reservation.[337] Its reservation excludes a particular aspect of Lesotho society from the reach of the general principle of gender equality. This aspect is succession to the throne and to traditional chieftainships, which is regarded as the prerogative of men. Without agreeing to the principle,[338] it seems to be very different from being wholesale negating of treaty obligations.

Seven states **objected** formally to reservations entered by states parties. All of them objected to Libya's reservation. In my view the reservations entered by both Libya and Malawi are too vague and general. If a state wants to make a reservation, it must at least be precise about what aspect it reserves.[339] All-inclusive reservations, like those of Libya and Malawi, dilute all the rights in CEDAW. They reduce the state's obligation to existing local law, either in the form of Shari'ah or traditional law. This is clearly incompatible with the principal objective of the Convention, which

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333 As Lijnzaad (1995) observed (at 314).

334 This sub-article grants women equality in employment opportunity.

335 Lijnzaad (1995) at 314.

336 On the question of Shari'ah and CEDAW reservations, see also Byrnes (1989) *Yale Jnl of Intl* Law 1 at 52 - 55. On conflicts between the Islamic religion and the implications of ratifying CEDAW, see Sullivan (1988) 82 *AJIL* 487 at 514 - 517.

337 For a more general discussion of the significance of CEDAW for women in Lesotho, see Mamashela (1993) 5 *ASICL Proc* 153.

338 The importance of female inclusion in African public spheres is discussed in ch 3 below.

339 See Lijnzaad (1995) at 305, pointing out that the Malawian reservation encompasses all spheres of society.

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is to eliminate all forms of discrimination against women.[340] These reservations subject international human rights law to internal law. This conflicts with the Vienna Convention on the Law of Treaties, which provides that local legislation may not be invoked as a ground to dilute treaty obligations.[341]

2.3.4.4 Reporting

State compliance with reporting obligations is analysed and presented schematically in Table B.[342] Viewed within a global perspective, African states have been quicker to ratify, but slower to report than states in the other regions.

2.3.4.5 Realisation

The limitations of the human rights institutions and instruments have been highlighted. Sexual inequality is reinforced by custom and culture in most of Africa.

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340 See Preamble and art 2 of CEDAW.

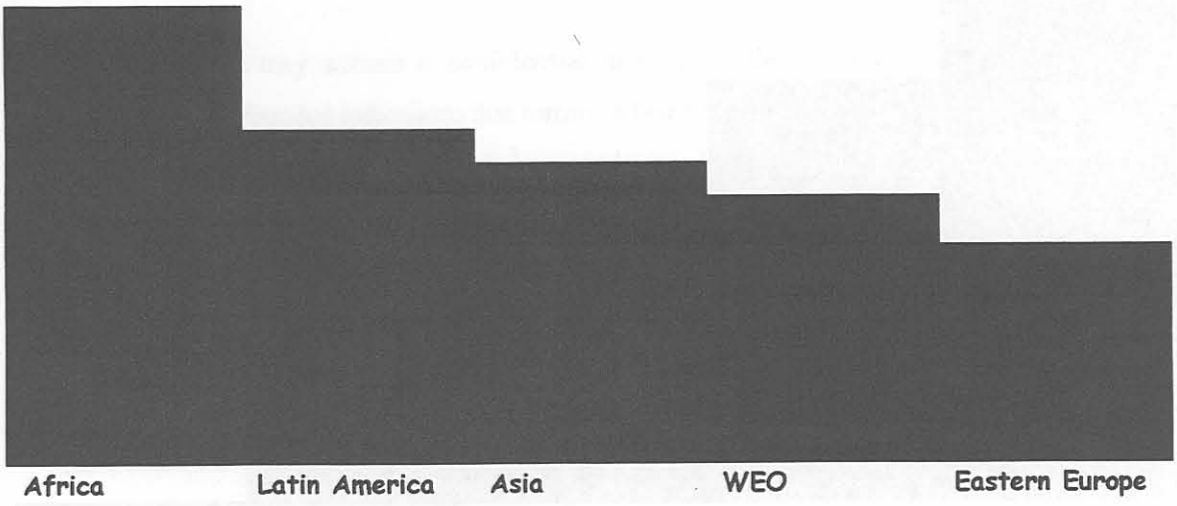
341 Art 27 of the Vienna Convention on the Law of Treaties.

342 Below.

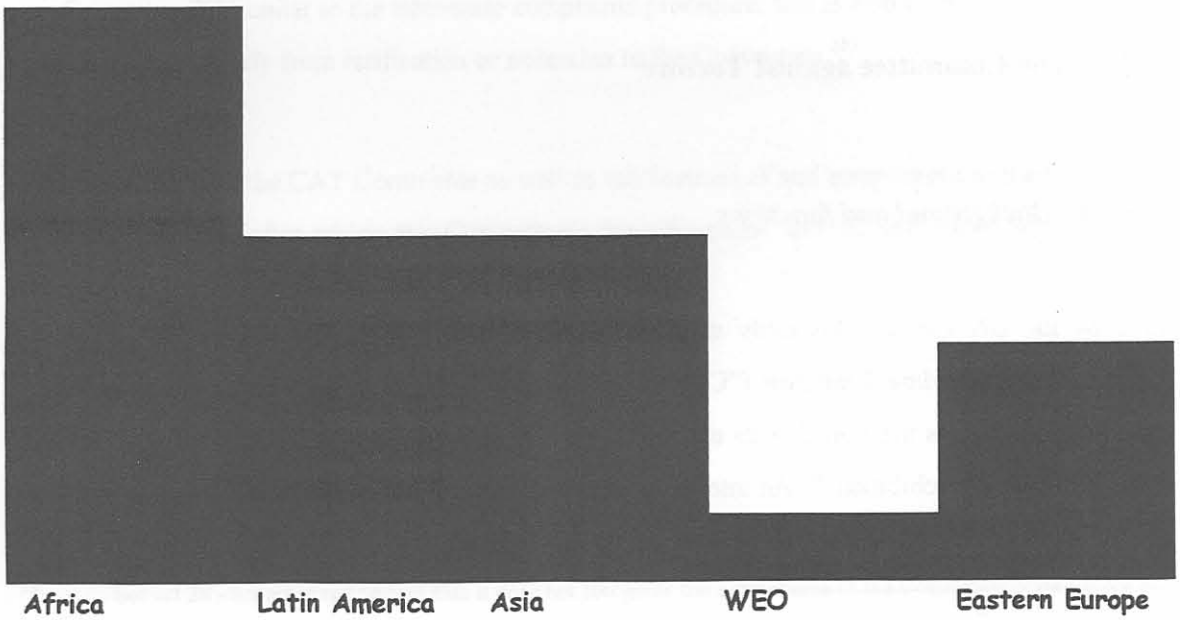
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TABLE A: CEDAW: RATIFICATIONS AND STATE REPORTING BY REGION[343]

(1) Ratification of CEDAW on 31 March 1997

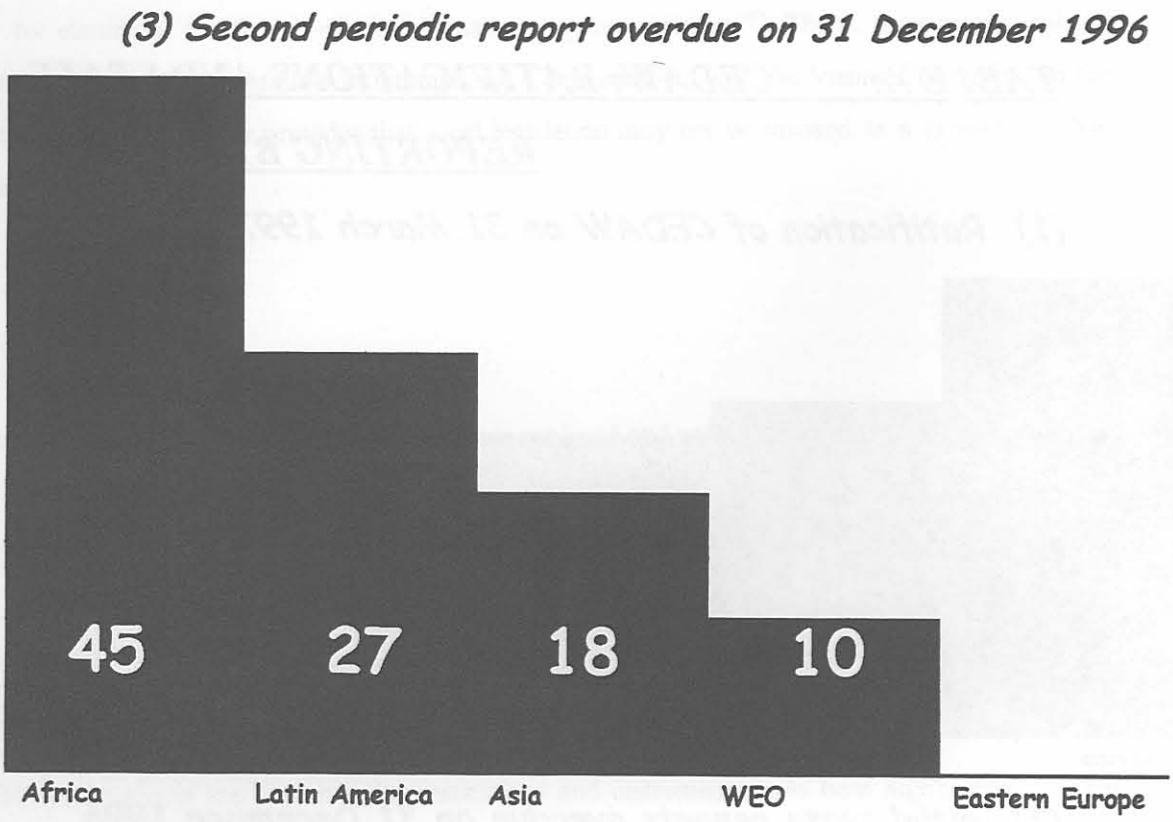


(2) Initial state reports overdue on 31 December 1996



343 Graphs show percentages of total of cases for all regions together. Source: CEDAW/C/1997/2; data at gopher://gopher.un.org:70/00/ga/cedaw/1997/C-1997-2).

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2.3.5 The Committee against Torture

2.3.5.1 Background and functions

In 1984 the UN General Assembly adopted the Convention against Torture and other Cruel, Inhuman and Degrading Treatment ("CAT").[344] Taking as its starting point that international law outlaws the practices mentioned in its title, the main aim of the Convention is to provide measures to strengthen this prohibition.[345] An international supervising body, the Committee against Torture ("CAT Committee"), is established to implement the provisions of CAT.[346]

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344 Adopted on 10 December 1984, GA Res 39/46, entered into force on 26 June 1987, after ratification by twenty states (art 27).

345 Burger and Danelius (1988) at 1.

346 Arts 17 and 18 of the Convention.

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Four functions are accorded to this Committee:

- It considers **state reports**, which states parties have to submit within one year of ratification or accession, and again every four years thereafter.[347] After considering these reports, the Committee may issue comments on a particular report, and may include general comments about the reports in its annual report to the states parties and the UN General Assembly.[348]

- The Committee may initiate a **confidential inquiry** on the basis of reliable information revealing "well-founded indications that torture is being systematically practised in the territory of a State party".[349] Once a finding has been made, it is kept confidential and transmitted to the state party. The finding may later be included in the Committee's annual report. Unless a state party makes a specific declaration to exclude this competence,[350] it follows automatically from accession or ratification.

- **Complaints by one state party against another** may be directed to and may be considered by the Committee. This procedure is optional.[351]

- **Complaints by or on behalf of individuals** may be directed to and may be considered by the Committee.[352] Similar to the inter-state complaints procedure, this is also a procedure that does not follow directly from ratification or accession to the Convention.[353]

The composition of the CAT Committee as well as ratifications of and reservations to the CAT will now be discussed, after which the Committee's four functions will be elaborated upon in the African context.

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347 Art 19.

348 Art 19(5), read with art 24 of CAT.

349 Art 20(1).

350 See art 28 - a state may "declare that it does not recognize the competence of the Committee provided for in Article 20".

351 Art 21 of CAT.

352 Art 22 of CAT.

353 An art 22 *declaration* is therefore similar in effect to Optional Protocol I to the CCPR.

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2.3.5.2 *Composition*

The states parties to CAT elect ten experts as Committee members for renewable terms of four years.[354] Those elected perform their functions in their personal capacities.[355]

The first CAT Committee was elected in 1987. Of the ten members, one (or 10% of the membership) was from an African state. This was Alexis Mouelle, from Cameroon.[356] At that stage, 27 states had ratified CAT. Of these, 4 (or 7 % of the ratifying states) were African.[357] Before the meeting an informal agreement had been worked out by the states parties. In terms thereof, two members would be from Africa, one from Asia, two from Eastern Europe, two from Latin America and three from the WEO states. The end-result did not reflect this informal agreement, as the WEO states were "overrepresented" in relation to the agreement, with four representatives and Africa "underrepresented", with only one. The African states, and the Philippines, expressed their concern about this departure from the informal agreement.[358] However, at 7% of the ratifying states, and 10% of the Committee membership, Africa had in fact been overrepresented on the Committee.[359]

2.3.5.3 *Ratification, reservations and derogations*

Nineteen African states have **by 1 January 1996** ratified the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.[360] By **31 March 1997**, four more African states (Côte d'Ivoire, Malawi and Zaïre in 1996, and Kenya on 21 February 1997) have ratified

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354 Art 17(1) and 17(5) of CAT.

355 Art 17(1) of CAT.

356 See Burgers and Danelius (1988) at 111.

357 These four states were Egypt, Senegal, Cameroon and Togo (see Burgers and Danelius (1988) at 109).

358 See Burgers and Danelius (1988) at 111.

359 In 1992 - 1993 two Africans served on the Committee: Moulle and El Ibrashi from Egypt, whose term expired at the end of 1995 (Annex II to UN doc A/48/44, Supplement no 44).

360 See Table in Heyns (1996) at 3 - 4.

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CAT, bringing the African total to **23**. This is proportionately less than the global average: 53% of states worldwide have ratified,[361] and only 43 % of African states have done the same.[362]

A similar tendency as in the case on the CCPR and its Optional Covenant is noted. The African percentage drops strikingly when the percentage of states that have made **declarations in terms of articles 21 and 22 of CAT**, is compared with the number of states that have ratified the Convention. A declaration in terms of article 21 allows the CAT Committee to consider inter-state complaints, and one made in terms of article 22 allows individuals to complain to the Committee. By 31 March 1997, four African states have made declarations, all four of them in terms of both articles. The four states are Algeria, Senegal, Togo and Tunisia. This means that 13% of the African states parties to CAT have accepted the Committee's broader competence, as opposed to 36% of all the states parties to CAT taken together.[363] It also means that only 8% of all African members of the UN can be investigated effectively for compliance with obligations undertaken under the CAT.

Only one African state entered a **reservation** when it ratified CAT. Morocco excluded the competence of the CAT Committee in terms of article 20(1) of CAT.[364] This is disappointing, as article 20(1) provides one of the most significant mechanisms for preventative and proactive implementation of CAT. It provides the Committee with the power to "invite" a state party to "co-operate in the examination" of reliable information about systematic practices of torture received by the CAT Committee in respect of that state. The "invitation" need not entail a visit to the state party, as visits are dependent on state consent.[365] By excluding the competence of the Committee *ab initio*, Morocco has given a very clear indication of its reluctance to subject its penitentiary system to international scrutiny. This conclusion is consistent with Morocco's non-acceptance of the CAT Committee's optional competencies.

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361 102 of the total of 191 states.

362 23 of the 53 African UN member states.

363 The total number of states parties to CAT that have made declarations is 37 (see web site referred to in Table II). Expressed as a percentage, this is 36 %.

364 See web site http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_9.html.

365 See art 20(3) of CAT.

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2.3.5.4 *Reporting obligations*

States have a regular reporting duty. They must report on measures taken to give effect to the treaty within one year of ratifying it. Thereafter, states must report every four years.[366] As is the case with reporting to other treaty bodies, many states lag behind in their duty.[367] The general problem of duplication of information contained in different reports is accentuated by the high degree of overlap between CAT and CCPR. This factor may impact significantly in states that already find it difficult to comply with reporting obligations. Institutional and financial constraints accentuate these difficulties in most African countries.

The Committee considered the state report of Libya in November 1991.[368] It referred the report back for supplementary information on the way in which the CAT was implemented in Libya. In November 1992, the Committee examined the additional report. Although the report, and the answers of the Libyan representative, gave details about the Libyan legal system and its formal conformity with the Convention, the report still lacked information about the practical application of the instrument.[369]

2.3.5.5 *Confidential inquiry*

Article 20 of CAT provides for a procedural innovation as far as treaty bodies are concerned.[370] When the CAT Committee receives "reliable information which appears to contain well-founded indications that torture is being systematically practised in the territory of a State Party",[371] the Committee may investigate and report on the matter. If the information meets the threshold-test

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366 As required by art 19(1) of CAT.

367 See Bayefsky in Henkin and Hargrove (eds) (1994) 229 at 287 (Table C).

368 See paras 181 - 207 of Report of the Committee against Torture, UN doc A/48/44.

369 The Committee concluded as follows: "The Committee also stated that it was awaiting with impatience the second periodic report ... due in June 1994, and that it would be grateful if that report would describe the application of the Convention article by article" (par 205 of UN doc A/48/44).

370 See Burger and Danelius (1988) at 160.

371 Art 20(1) of CAT.

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contained in the wording of article 20(1), it must refer the matter to the state to seek its input and co-operation. It may obtain information from other sources (including NGOs) in its inquiry. A visit to the state concerned may only take place with the state's consent.[372] Once the inquiry is completed, its results are communicated to the state party. The state may then comment. Thereafter, the CAT Committee may publish the summarised report in its annual report. The Committee embarked on its first investigation of this kind at its fourth session.[373] Not much data is available yet on how this procedure functions in practice. The procedure in terms of article 20 is binding on all ratifying states, unless they opt out explicitly, as Morocco has done. By the end of March 1997, seven other ratifying states have also denied the CAT Committee its powers under article 20.[374]

2.3.5.6 Individual complaints

By the end of its seventh session, the CAT Committee had adopted decisions on only seven cases. In each instance, the communication was rejected on admissibility grounds.[375] Two cases involving African citizens, one against an African and one against a non-African state, are now discussed:

In the first instance a complaint against Tunisia was submitted to the Committee against Torture in 1994[376] in respect of the arrest and death in detention of a Tunisian student, Faïsal Barakat. On the facts presented to the Committee, including medical reports, a case of torture seemed to have been established. The application was, however, declared inadmissible. The Committee had to interpret article 22(1) of the Convention, stipulating that states parties may recognise the Committee's competence to receive communications "from or on behalf of individuals". This article should be read with rule 107(1)(b) of the Committee's Rules of procedure. This rule provides that the communication must be submitted by:

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372 See art 20(3) of CAT.

373 See Byrnes in Alston (ed) (1992) at 532.

374 See web page http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_9.html.

375 Byrnes in Alston (ed) (1992) at 539.

376 *Faïsal Bakarat and family v Tunisia*, Communication 14/ 1994, UN Doc. A/ 50/ 44 at 70 (1995).

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- "the individual himself"; or
- "by his relatives or designated representative"; or
- "by others on behalf of an alleged victim when it appears that the victim is unable to submit the communication himself, and the author of the communication justifies his acting on the victim's behalf".

The third category was at issue in this communication. The victim was dead and therefore obviously unable to complain personally. Provided that he "justifies" his acting on the deceased's behalf, the author would be allowed to bring the communication. The author in this case is a political refugee, residing in France, but he did not establish that he was duly authorised by the deceased's family to submit the communication. The Committee arguably accepted the allegations that the victim's and author's family are threatened by the Tunisian government, as it requested the government to ensure that no harm is done to them. Given this context, it seems overly restrictive and technical for the Committee to have accepted the government's contention that the author had not been "duly authorised by the family". Having declared the communication inadmissible, the Committee left the door open for a subsequent communication properly establishing standing on behalf of the victim.

The subject matter of *Mutombo v Switzerland*[377] was torture and consistent mass violations of human rights in Zaïre. Mutombo, a Zairian citizen, was involved in activities opposed to the Mobutu regime in Zaïre. He was subsequently detained and allegedly exposed to torture. When he was released, he fled the country, and eventually ended up in Switzerland. His entry into Switzerland was illegal. Consequently, he applied for refugee status. His application was rejected, and appeal to the Commission of Appeal in Refugee Matters was unsuccessful and he faced expulsion. The CAT Committee concluded that his expulsion would constitute a violation of article 3[378] of CAT.[379] As Zaïre is not a party to CAT, Mutombo would no longer be under CAT's legal protection from expulsion. The Committee concluded that Switzerland was under an

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377 Communication 13/1993 (*Mutombo v Switzerland*), views adopted on 27 April 1994.

378 Article 3(1) reads: "No State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to tortune".

379 At par 9.7 of its views.

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obligation not to expel him to Zaïre, or to a country where he would face a real risk of being expelled to Zaïre.[380]

2.3.5.7 Realisation

The most promising aspect of implementation under CAT, the article 20 investigation, has not taken off yet. It is encouraging, though, that only one of the African states has declared its unwillingness to recognise this competence of the CAT Committee. Of the total number of parties (102), eight (or7 %) have made declarations excluding the Committee's competence under article 20,[381] compared with a single African state (or 4% of African states). In the absence of an effectively functional judicial system, CAT provides important redress possibilities in individual cases. Few cases have been filed with the Committee, though. In time, this avenue may become better known and may be more effectively utilised. At the moment a very limited number of complaints have been brought under CAT.

2.3.6 The Committee on the Rights of the Child

2.3.6.1 Background and functions

One of the most recent conventions adopted under the auspices of the UN is the Convention on the Rights of the Child ("CRC").[382] This followed the submission by the Polish government of a draft on the rights of the child in 1979, the International Year of the Child. A decision was taken by the General Assembly to set up a working group. The final version of the Convention was adopted in November 1989. In record time the required twenty states ratified, causing the Convention to enter into force in September 1990, less than a year after its adoption.

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380 At par 10 of its views.

381 See art 28 of the CAT, which earmarks such a declaration as a reservation.

382 For a background, see Leblanc (1995).

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African involvement in the drafting process was limited. Only three African states participated for at least five of the nine years that the working group took to draft a final proposal.[383] This is the lowest percentage of all the continents, contrasting sharply with West European (61%) and even Latin American (29%) participation over a similar period.[384] However, by 1989 nine African states have been participating in the activities of the working group.[385]

The Committee on the Rights of the Child is the enforcement mechanism under this Convention. Individual communications are not provided for. Self-Reporting by states parties is the main method of ensuring compliance with the provisions of the Convention.

2.3.6.2 Composition

The Committee consists of ten members with recognised competence in the field of children's rights. They are elected by states parties, and serve in their personal capacity.[386] Members are elected for a term of four years, but they may be re-elected.[387] The Committee met for the first time in 1991, after its ten members had been elected.

In electing members to the Committee, states parties' consideration should be given to "equitable geographical distribution, as well as to the principal legal systems".[388] After the first election in January 1997, three of the ten members of the Committee were from African states: Burkina Faso (Akila Belembaogo), Egypt (Hoda Badran) and Zimbabwe (Swithun Mombeshora).[389] The terms of two of these members (from Egypt and Zimbabwe) expired on 28 February 1997. Mrs Belembaogo's term expires on 28 February 1998.[390]

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383 See Table in LeBlanc (1995) at 30.

384 *Ibid.*

385 See Table in LeBlanc (1995) at 48.

386 See art 43(2) of the Convention.

387 Art 43(b).

388 Art 43(2).

389 The first two are women.

390 UN document CRC/C/50 at Annex II.

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This means that 30% of the membership of the Committee was African, a figure that deviates slightly from the African percentage of the total number of states parties (which stood at 37%). The West European region was "overrepresented". LeBlanc justifies this overriding of strict geographical considerations with reference to the fact that "states in that region were the most active and constructive"[391] in drafting the Convention. They also carry "the heaviest financial burdens" in supporting the UN.[392]

2.3.6.3 Ratifications and reservations

Despite the insignificant part played by African personalities in the ten years of debate and discussion preceding the Convention's adoption, it has been ratified by a significant number of states on the continent. After about two years, on 31 December 1992, 39 out of a possible 52 states in Africa (75%) had already ratified the Convention.[393] Of all the regions in the world,[394] only Latin America and Western Europe had higher ratification rates.[395] The African ratification percentage was also higher than the global average of 70%.[396]

Of the 39 African states parties to the Convention at the end of 1992, six states have entered **reservations**.[397] With the exception of Latin America, this is the lowest regional reservation percentage globally. Even so, of the ten states whose reservations were objected to, two were African.[398] Only European countries had at that stage raised objections against reservations to the Convention by other states parties.[399]

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391 (1995) at 210.

392 *Ibid.*

393 See Table in LeBlanc (1995) at 48.

394 LeBlanc uses eight regions: Africa, Asia and Pacific, East Europe, West Europe, Latin America, Middle East, North America and Carribean and others (1995) at 48.

395 At 90 and 80% respectively, see LeBlanc (1995) at 48.

396 LeBlanc (1995) at 48.

397 See Table in LeBlanc (1995) at 53.

398 See Table in LeBlanc (1995) at 56.

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As at 31 January 1997, 189 states were **party to the Convention**, including 52 African states.[400] Only one state on the continent, Somalia, has neither signed nor ratified the Convention. The CRC became the first human rights instrument that Djibouti ratified. This trend has manifested itself globally, culminating in near-universal ratification of the CRC. Simultaneously, however, the number of states entering reservations and making declarations has increased to 58. Ten African states entered reservations or declarations. These relate to the Islamic religion,[401] the age of majority,[402] religion and traditional values,[403] the provisions of national legislation,[404] the state's inability to ensure free primary education,[405] and to children seeking refugee status.[406]

Objections to reservations or declarations were raised by eleven states. At the end of 1992 only European states parties had raised objections. Objections were made against the reservations and declarations entered by Botswana, Djibouti and Tunisia.[407]

2.3.6.4 Reporting obligation

On 30 June 1995 a total of 86 reports under the Convention were overdue.[408] It should be noted that of the three African states parties represented on the Committee on the Rights of the Child, two (Burkina Faso and Egypt) complied with their obligations to report.

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399 *Ibid.*

400 See website http://www.un.org/Depts/Treaty/final/t52/newfiles/part-600/iv-600/iv-11.html.

401 Reservation by Algeria, Egypt, Mauritania and Morocco.

402 Reservation by Botswana (Denmark objected against it).

403 Reservation by Djibouti.

404 Reservations by Mali and Tunisia.

405 Declaration by Swaziland.

406 Reservation by Mauritius.

407 See web site http://www.un.org/Depts/Treaty/final/t52/newfiles/part-600/iv-600/iv-11.html.

408 See UN document HRI/MC/1995/3 at 3-9. The following African states parties had one report overdue: Algeria, Angola, Benin, Burundi, Cameroon, Cape Verde, CAR, Chad, Côte d'Ivoire, Djibouti, Equatorial Guinea, Ethiopia, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Libya, Malawi, Mali, Mauritania, Mauritius, Niger, Nigeria, São Tome and Principe, Seychelles, Sierra Leone, Togo, Uganda, Tanzania, Zaïre, Zambia, Zimbabwe.

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At the Committee's 16th session (January 1997) the number of initial reports overdue by African states was 18 (from a total of 52). Forty-two states had their second periodic report overdue, of which 18 were African. Of the 51 states that owed their third periodic reports, 19 were African. Fourth periodic reports were outstanding in respect of 43 states, including 8 from Africa. Although African states have a high rate of overdue reports, non-reporting or late submission of reports is by no means exclusive to one continent.[409]

From its first to its 12th session, the Committee examined nine reports from African states.[410] They were from Egypt,[411] Sudan (both at the 3rd session),[412] Rwanda (at the 4th),[413] Namibia (at the 5th),[414] Burkina Faso (at the 6th),[415] Madagascar (at the 7th),[416] Tunisia (at the 9th session),[417] Senegal (at the 10th session)[418] and Zimbabwe (at the 12th session).[419] It is interesting to note that, in contrast to most other treaty bodies, the Committee on the Rights of the Child has expressed appreciation for various aspects of the reports submitted to it by African countries. Almost all these reports culminated in a frank and constructive dialogue, according to the Committee. A self-

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409 Analysis of UN document (EDAW/C/1997/2 at web site gopher: // gopher.un.org: 70/oo/gu/cedaw/1997/C-1997-2.

410 From a total of 56 reports: See web site www.umn.edu/human/crc/CRC-MORE/. At the 13th session another seven reports were examined. Of these, four were from African states. Country reports of Nigeria (CRC/C/8/Add 26), Mauritania (CRC/C/3/Add 36), Morocco (CRC/C/28/Add 1), and Ethiopia (CRC/C/8/Add 27) were considered.

411 See UN documant CRC/C/15/Add 5 (1993), also at web site www.umn.edu/humanrts /crc /EGYPT.htm.

412 For Sudan's report, see also the 4th session, where the examination was finalised in the light of further information provided by the state (see CRC/C/15/Add .6 (1993) and CRC/C/15/Add 10 (1993)).

413 See CRC/C/15/Add 12 (1993). The Committee adopted only "preliminary observations", as it suggested that a new report should be submitted. This was not forthcoming.

414 See CRC/C/15/Add 14 (1994). The Committee expressed its appreciation for a detailed and comprehensive report, for its self-critical approach and for frank and constructive dialogue with the state party.

415 See CRC/C/15/Add 19 (1994). The Committee's report is reprinted in (1994) 38 *JAL* 197, where the Burkinabe report is described as "one of the few African reports" to have been submitted to the Committee.

416 See CRC/C/15/Add 26 (1994).

417 See CRC/C/15/Add 11 Annex 2 (1995) and CRC/C/15/Add 39 (1995).

418 See CRC/C/15/Add 44 (1995).

419 See CRC/C/15/Add 55 (1995).

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critical and open attitude was also identified in the reports of and interactions with the delegates from Burkina Faso, Madagascar, Namibia and Zimbabwe.

In general, governments co-operated with the Committee by drafting adequate reports, by sending high profile delegations, and by answering queries. Madagascar presents an example. It ratified the Convention on 19 December 1990, and submitted its first periodic report on 20 July 1993.[420] The 65-page report is an excellent example of serious compliance with reporting obligations. Richness of detail and the inclusion of statistical data (on the percentage of children attending school, and on technical education) make examination of the report meaningful. State compliance is not taken as a *fait accompli*, but is sometimes criticised in the country report.[421] One problematic aspect in terms of preparation of reports, is the provision of statistics on the realisation of especially socio-economic rights of children. The Committee requested that such information be included in subsequent reports.[422]

This does not mean that the Committee did not identify areas in which the protection granted by states fell short of the guarantees in the CRC. Some of these areas are:

- Discrimination against girls is rife in most states. This is especially the case when cultural practices indigenous to parts of Africa, such as female genital mutilation, conflict with the provisions of the CRC. Other forms of discrimination and violation of the dignity of the girl-child is the practice of forced marriage, the incidence of domestic violence[423] and sexual exploitation.[424] In some states, patterns of disparity in access to education have been criticised.[425]

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420 See UN document CRC/C/8/Add.5, dated 13 September 1993.

421 Eg par 79: "The provisions are not always observed by those required to apply them" (on problems with the implementation of civil registration of births) and par 309: "provisions on sexual abuse and exploitation are not always effectively applied".

422 See eg the Egyptian report, and the Committee's comments.

423 See the Committee's evaluation of the report by Burkina Faso (at paras 8 and 14) and that of Sudan (at par 13 of the Committee's concluding observations).

424 See eg the Committee's views in respect of the Malagassy report (at par 15).

425 See the Committee's comments on the Egyptian report (at par 6).

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- Education has been targeted as a cause for concern. The absence of compulsory and free education at the primary level,[426] the quality of education,[427] and the high drop out rate before pupils finish primary school,[428] have been brought to the attention of states.

- Socio-economic issues, such as birth rates, heath and welfare have been raised consistently.

- A recurring concern has also been the position of working children. In many instances this amounts to child labour.[429] The Committee drew the attention of states to the ILO convention on minimum age requirements for employment.[430]

- The position of the juvenile offender has also illicited comments from the Committee.[431]

2.3.6.5 Realisation

The report of Sudan illustrates the limitations of the reporting procedure. The Committee could express an opinion on the extent to which legislative provisions conflict with the CRC. But a treaty body is powerless to address more comprehensive considerations at the socio-political and economic terrain. Sudan's children suffer due to the protracted civil war between the south and the north. They suffer from the effects of desertification, drought and famine. They suffer as an indirect consequence of structural adjustment measures and because the state cannot provide adequate infrastructural support. It matters little, viewed against this background, whether the Committee has identified punishment by way of flogging or forced labour as violations of the CRC.

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426 See the Committee's views on the report of Senegal (at par 14).

427 See the Committee's concluding observations in respect of Egypt's report (at par 10).

428 See eg the Madagascar report, and the Committee's concluding observations (at par 13).

429 See the refererence to "forced labour and slavery" in the Committee's concluding observations on the Sudanese report (at par 12).

430 See eg comments on the report of Zimbabwe, par 32.

431 See eg paras 11 and 20 of the Committee's observations on the otherwise almost uncritisised Namibian report.

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The system of state reporting is based on a continuation of dialogue between the ratifying state and the treaty monitoring body. Issues that are raised are to be addressed again in subsequent reports.[432] As the African reports thus far examined have been first reports, observations on follow-up are still impossible.

2.4 Africa, the International Labour Organisation and other UN specialised agencies, funds and programmes

2.4.1 International Labour Organisation

The International Labour Organisation ("ILO") is a tripartite organisation which brings together representatives of governments, employers and workers.[433] It was established in 1919,[434] in the aftermath of the First World War, and became a UN specialised agency many years later,[435] in the aftermath of the Second World War. The organisation concerns itself with the world of work, but it has introduced human rights into labour practices and social policy. Standard setting through the adoption of conventions and resolutions in these areas has been one of the ILO's major functions. But, more significantly, it has developed the "most comprehensive international system for examining the implementation of international human rights standards".[436] Implemenation takes various forms:[437]

- States must submit an **annual report** on the fulfilment of its obligations under all the conventions it has ratified. This report is examined by a Committee of Experts.

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432 See the Committee's view on web site www.umn.edu/human/crc/CRC-PROC.htm.

433 On the ILO generally, see eg Valticos in Vasak (ed) (1982).

434 Through the Treaty of Versailles.

435 In 1945, when the UN was founded.

436 Swepston in Hannum (1992) at 115.

437 For a discussion, see Leary in Alston (ed) (1992) at 580 - 618 and Swepston in Hannum (ed) (1992) at 99.

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- A special procedure is provided for **complaints concerning freedom of association** in the context of trade union activities. These complaints are examined by the Freedom of Association Committee of the Governing Body.
- A state party may also complain that **another state** is not complying with its obligations. The ILO Governing Body may appoint a Commission of Inquiry to investigate the complaint.
- Personal **visits** (or "direct contacts") by ILO officials may be undertaken to ILO member states to assist them in meeting their obligations under the different conventions.

The administrative and secretarial support and activist role of the ILO Secretariat (the International Labour Office) have been important factors in realising ILO standards. In Africa, the ILO programme consists of a field structure comprising a network of twelve area offices, five multi-disciplinary advisory teams ("MDTs") and a regional office in Abidjan.[438] This network aims at implementing a policy of active partnership by focusing on African priorities such as poverty reduction and its interrelationship with employment, protection of workers' health and safety at work, and promotion of social dialogue.[439]

All 53 OAU independent states in Africa are today members of the ILO. Two states, Liberia and South Africa, joined from the outset in 1919. South Africa's membership was discontinued in 1966, but it resumed its place again in 1994. Most of these states joined the ILO soon after independence, mostly in the 1960s.[440] However, a few states, in particular Botswana[441] and the Gambia,[442] only joined the organisation many years after obtaining independence.

Many of the African states have ratified a great number of the ILO Conventions. States that exceeded fifty ratifications on 31 March 1997 are Algeria (with 53), Djibouti (with 62), Egypt

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438 See eg *ILO Africa* (1996), a newsletter of the Africa Regional Office of the ILO.

439 *Ibid.*

440 See Schedule in ILO (1997).

441 Joined in 1978. By the end of 1996 Botswana had only ratified two conventions. In the course of 1997 (up to the end of July), this number grew to nine.

442 Joined in 1995, and has by 31 March 1997 not ratified any conventions.

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(60), Guinea (56), and Tunisia (56).[443] States that have, by 31 March 1997, ratified a small number of conventions include Botswana (two), Eritrea (none), the Gambia (none) and Zimbabwe (nine). While the length of the period of membership influenced the rate of ratification, the type of economic system (socialist, as in Guinea, or capitalist, as in Botswana) also played a role.

Five of the major ILO conventions are now discussed in more detail:

- The **Convention concerning Forced Labour**[444] was adopted to "suppress the use of forced labour in all its forms".[445] Among all the ILO instruments dealing with human rights, this Convention is still most widely accepted, particularly by African member states.[446] By 31 March 1997, 41 African countries had ratified this Convention.[447] The application of this Convention has been commented on extensively by the Committee of Experts. Implementation problems involve mainly two aspects: compulsory labour for the purpose of production, and as a means of political coercion or as punishment.[448]

- The **Convention concerning Freedom of Association and Protection of the Right to Organise**[449] provides that workers and employers may join organisations of their own choosing without prior authorisation.[450] By 31 March 1997, 35 of the 118 ratifications worldwide had been made by African states. The African rate of ratification is comparable to the average for the membership as a whole. Recent ratifications (in 1995 and 1996) came from Mozambique, Namibia and South Africa.

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443 This is out of a potential total of 180 (see Convention no 180, adopted at the ILO 85th session in 1996). Of all the member states globally, Spain had ratified the most conventions (125).

444 No 29, *ILO Conventions and Recommendations vol 1* (1997) at 143, entered into force on 1 May 1932.

445 Art 1(1) of the Convention.

446 ILO (1983) at par 55.

447 ILO *List of Ratifications by Convention and by Country* (1997). They are: Algeria, Angola, Benin, Burkina Faso, Burundi, Cameroon, Cape Verde, CAR, Chad, Comoros, Congo, Côte d'Ivoire, Djibouti, Egypt, Gabon, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Libya, Madagascar, Mali, Mauritania, Mauritius, Morocco, Niger, Nigeria, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, Sudan, Swaziland, Tanzania, Togo, Tunisia, Uganda, Zaïre and Zambia.

448 ILO (1983) at par 57.

449 No 87, *ILO Conventions and Recommendations vol 1* (1997) at 527, entered into force on 4 June 1950.

450 See art 2 of the Convention.

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- The **Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value** [451] obliges states to adopt measures to ensure that women are paid equally to men for work of equal value. African states account for a high percentage of the global ratification of this convention.[452]

- States that ratify the **Convention concerning the Minimum Age for Admission to Employment**[453] undertake to raise the minimum age of admission into employment progressively. However, states are also required to fix a minimum age "for the time being".[454] By 31 March 1997, only ten African states had ratified this Convention.[455] This is in keeping with global trends, as the total number of ratifications of this instrument is also much lower than for the three previous instruments, and stood at fifty.

- The **Convention concerning Minimum Standards of Social Security**[456] has been ratified by a relatively small number of African states: only five out of a total of 39 ratifying states are African. These countries are Libya, Mauritius, Niger, Senegal and Zaïre.[457]

Through standard setting and examination of country reports the ILO has charted the development of labour law and labour relations in Africa. But as far as human rights are concerned, its main contribution lies in the technical assistance by undertaking activities such as capacity-building, training and education on the promotion of equality in the workplace, enterprise creation, entrepreneurship development and strengthening of workers' organisations.[458]

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451 No 100, *ILO Conventions and Recommendations* (1997) at 649, entered into force on 23 May 1953.

452 By 31 March 1997, 36 of the 126 ratifying states were African.

453 No 138, *ILO Conventions and Resolutions vol 2* (1997) at 525, entered into force on 19 June 1976.

454 See art 2(1) of the Convention.

455 These states are, with the minimum age set by each state in brackets: Algeria (16), Equatorial Guinea (14), Kenya (16), Libya (15), Mauritius (15), Niger (14), Rwanda (14), Togo (14), Tunisia (16) and Zambia (15).

456 No 102, *ILO Conventions and Resolutions vol 2* (1997) at 9, entered into force on 27 April 1955.

457 See ILO *List of Ratifications by Convention and Country* (1997). It is interesting to note that the Convention was not ratified by countries while under socialist or Marxist rule.

458 See eg ILO (1996).

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2.4.2 Other UN specialised agencies, funds and programmes

Other UN specialised agencies, funds and programmes play an important role in Africa. Apart from those referred to briefly below, the contribution in the field of socio-economic rights of the UN Food and Agricultural Organisation ("FAO") and the World Health Organisation ("WHO") should also be mentioned.[459]

2.4.2.1 Economic Commission for Africa

The UN Economic Commission for Africa ("ECA") was founded in 1958 by a resolution of ECOSOC. Its purpose is to initiate and take measures to facilitate economic development in Africa.[460] Most African states are ECA members. Its mandate extended to political issues. ECA was instrumental in efforts to establish the African Economic Community ("AEC").

2.4.2.2 UN Development Programme

The aim of the UN Development Programme ("UNDP") is to foster growth and improve living standards of people around the globe. "Technical assistance" is the main means of support. The UNDP has been very active in numerous African states. In 1994/1995 emergency relief operations were conducted in Angola, Liberia, Mozambique, Rwanda and Zaïre.[461] Since 1996, there has been a tendency to work more towards the enhancement of good governance.

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459 For a general overview see United Nations (1995).

460 For a history of the involvement of the ECA in Africa, see D'Sa (1983) 27 *JAL* 4.

461 *Africa South of the Sahara: 1997* at 78

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2.4.2.3 *UN Centre for Human Rights*

The UN Centre for Human Rights provides an advisory service about human rights matters. Technical assistance may be requested on issues such as the support of democratic governance, strengthening of local institutions, and domestic legal reform. The full potential of this resource has not been tapped by African governments. A problematic aspect that arises in this context is the manipulation of state resources by corrupt officials or by an authoritarian government. It is unlikely that assistance will be requested by such a government. Especially in Africa, such assistance should be channelled through organs of civil society, rather than governments.

2.4.2.4 *UN Educational, Scientific and Cultural Organisation*

The UN Educational, Scientific and Cultural Organisation ("UNESCO") was established "to contribute to peace and security ... in order to further universal respect for justice, the rule of law and for human rights and fundamental freedoms".[462] It has taken a leading role in creating a global human rights culture through the dissemination of information of human rights.[463] UNESCO has also undertaken research and education in the field of human rights. However, UNESCO's role should be enhanced in Africa and its activities and the promotional mandate of the African Commission should be co-ordinated.

Conventions have also been adopted under UNESCO auspices. An important example is the UNESCO Convention against Discrimination in Education.[464] By 31 March 1997, this Convention had been ratified by 18 African states. The total number of ratifications stood at 84.

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462 Art 1 of the UNESCO Constitution.

463 A complaints procedure may also be used by individuals and NGOs: see Marks in Hannum (ed) (1992) at 86.

464 UN Treaty Series vol 429 at 93, entered into force on 22 May 1962.

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2.4.2.5 World Bank

The World Bank's role in human rights issues is not always acknowledged. The World Bank is independent, but part of the United Nations. It is bound by the UN Charter and should promote human rights as one of the main purposes of international co-operation.[465] Though it is a bank, it is also a development agency.[466] So far, human rights issues have been insufficiently linked to the World Bank policies.[467]

2.5 Africa and the international protection of refugees

By 31 March 1997, 47 states in Africa have ratified or acceded to the UN Convention relating to the Status of Refugees.[468] The most recent entries on the list are Namibia and South Africa.[469] Of all international human rights instruments, only the Convention on the Rights of the Child enjoys broader African ratification. Three of the six states that have not yet ratified the refugee convention are island states. They are Cape Verde, the Comoros and Mauritius.[470] The other three non-ratifying states in the region are Eritrea, Libya and Swaziland.

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465 As required by art 56 of the UN Charter, see also Tomasevski in Nowak and Swinehart (eds) (1989) at 75 - 102.

466 Tomasevski in Nowak and Swinehart (eds) (1989) at 100.

467 See Moller (1997) 25 *NQHR* 21, who suggests the following (at 35) test: "Is there an efficient bureaucracy capable of making national decisions on the uses of Bank funds, acting through clearly formulated and transparent processes, which is supported by a government established through a well-defined open process of public choice ?"

468 See Table B below.

469 They ratified the Convention on 17 February 1995 and 12 January 1996 respectively.

470 The fact that they are island-states are probably significant in that their geographic location have in the past caused these states to be left largely unaffected by flows of refugees. It further reflects an "island" mentality, in terms of which these states are reluctant to open up their borders (and legal systems) for the potential impact of "continentals".

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This Convention was adopted under the auspices of the UN in 1951, and turned into force in 1954.[471] The socio-political context of its adoption explains many of this Convention's features. The early 1950s were the aftermath of the Second World War, and the beginning of the "Cold War". The main contributors to the preceding deliberations were West European powers. Their main concerns were related to experiences drawn from the World War (such as Jews fleeing Nazi persecution) and from a new problem: ideologically-based defections from the "East" to the "West".

Three important limitations of the Convention relate to these factors. Firstly, the **basis** on which someone could qualify for refugee status was limited to a "**well-founded fear of being persecuted** for reasons of race, religion, nationality, membership of a particular social group or political opinion".[472] This factor relates mainly to a subjective requirement, "fear", that has to be assessed for its "well-foundedness" in each individual case. Apart from the individualistic focus, the listed grounds are also very restrictive and do not take into account other factors (such as natural disasters or internal wars) which may be just as instrumental in persons becoming refugees. Secondly, a **temporal limit** was also provided for in the Convention. The "fear" had to be "as a result of events occurring before 1 January 1951".[473] This cut-off date underlines the close link to the preceding war, and its effects. The third limitation, of a **geographical** nature, was included as an option which states could adopt at ratification (or accession). By making a declaration, states could specify that the "events" referred to above shall be understood to mean "events occurring in Europe".[474] Few states have made such a declaration.[475]

In the light of the above, there should be little cause for surprise in the assertion that African states saw the Convention as a "European instrument".[476] The perception of exclusion was exacerbated in the 1960s, when it became clear that refugee problems in Africa continued and, most often, started

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471 For the Convention text, see eg Patel and Watters (1994) at 231.

472 Art 1(A)(2) of the Convention.

473 Art 1(A)(2) of the Convention.

474 Art 1 (B)(1) of the Convention.

475 Weis (1970) 3 *Revue des Droits de l'Homme* 449.

476 Weis (1970) 3 *Revue des Droits de l'Homme* 449 at 452.

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well after 1951. These problems arose on a massive scale, and were caused by internal conflicts. Early examples were the many refugees fleeing conditions in the Congo (Zaïre)[477] and Nigeria.

Due in main to African criticism and efforts to adopt an African convention separate from the UN Convention, a brief Protocol to the 1951 Convention was adopted in 1966, and entered into force in 1967.[478] The Protocol dispensed with the temporal and geographic limitations in the 1951 Convention. In the Preamble, "consideration" is given to the fact that "refugee situations have arisen since the Convention was adopted". From 1967, then, the Convention applied equally to all who qualified for refugee status. However, the definition of "refugee" was left intact. African states actively supported the adoption of the Protocol. After its adoption, African efforts to elaborate a separate UN instrument dealing with refugees were channelled into adopting a complementary regional instrument,[479] with the result that the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa was adopted in 1969.[480]

2.6 Africa and aspects of humanitarian law

2.6.1 Africa and international humanitarian instruments

As of 1 January 1996, the Geneva Convention relative to the protection of civilian persons in time of war enjoyed almost universal ratification globally and in Africa. Fifty-two African states have ratified, leaving only Eritrea still to become a party.[481] In line with global trends, fewer African states ratified the two protocols to the Convention. Protocol I, relating to the protection of victims of international armed conflicts, was at that stage ratified by 45 states in Africa; Protocol II, relating to the protection of victims of non-international armed conflicts, by 41. Again, the only

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477 Now, the Democratic Republic of the Congo.

478 See Patel and Watters (1994) at 243.

479 Weis (1970) 3 *Revue des Droits de l'Homme* 449 at 453. See ch 3 below.

480 See ch 3.5 below.

481 See Marie (1996) 17 *HRLJ* 61 for data about ratification of this instrument and others discussed in this paragraph.

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procedure allowing for concrete implementation received proportionally less support in Africa: only eight African states made declarations in terms of article 90 of Protocol I, recognising the competence of the international fact-finding Commission. Seventeen % (or 8 out of 47)[482] of the declarations made in terms of article 90 was made by African states, while 31% of the total ratification of Protocol I was by states in the same continent.

The establishment of the international penal tribunal in Rwanda (and in the former Yugoslavia) mark important extensions of international humanitarian law into the domestic sphere, by applying international norms to internal conflicts.[483] Of relevance, particularly in this context, is the Convention on the Prevention and Punishment of the Crime of Genocide. By 31 March 1997, it has been ratified by 25 African states, including Burundi, Rwanda and Zaïre.[484]

The total ban of anti-personnel mines has been placed on the international agenda of concern only relatively recently, although mines have killed and devestated the lives of many Africans in countries across the continent.[485] Canada hosted a conference on this issue in October 1996.[486] A general commitment was expressed to draft a legally binding international agreement to ban anti-perrsonnel mines. A follow-up meeting is planned for December 1997, again in Ottawa, Canada. On 10 December 1996 the UN General Assembly adopted a resolution on the banning of landmines.[487] Twenty-five African states were co-sponsors of the resolution, and 45 voted for its adoption.[488] This was followed in February 1997 by the meeting of more than 450 participants at the fourth NGO Conference on Landmines, held in Maputo.[489] Surprisingly few African states

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482 The eight African states that have made declarations are Algeria, Cape Verde, Guinea, Madagascar, Namibia, Rwanda, Seychelles and Togo.

483 See the thoughtful discussion by Merton (1995) 89 *AJIL* 554.

484 See Table B below.

485 See, on the impact of mines in Africa, (April - May 1997) *African Topics*. Countries affected most severely include Angola, Egypt, Eritrea, Ethiopia, Libya, Mozambique, Sudan, Somalia and Zimbabwe.

486 See Carstairs "The Ottawa Process - A Challenge to the Status Quo" (April - May 1997) *African Topics* at 20.

487 Resolution A 51/45 S.

488 See table in (1997) (April - May) *African Topics* at 17.

489 See "The World Demands a Ban on Landmines" (1997) (April - May) *African Topics* at 3.

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(only 8)[490] have become party to the most relevant instrument in this regard adopted under UN auspices, the Convention on the Use of Certain Conventional Weapons which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects.[491]

2.6.2 Africa and merceneries

Although mercenarism has existed from time immemorial, it only became an issue in humanitarian and international law in this century. During the 16th century, for example, the use of mercenaries was the unquestioned norm.[492] In the comprehensive codification of humanitarian law of the 1907 Hague Convention the recruitment of mercenaries was prohibited. Recruitment was regarded as active support for a belligerent, and therefore contravened the principle of neutrality. That the prohibition gave expression to the principle of neutrality, and did not condemn the practice of using mercenaries itself, is reflected in the fact that no other provisions on this topic were included.

When the UN was formed in 1945, the single provision in the Hague Convention was still the only reference to mercenarism in international law. The UN Charter went no further than stating the general principle that states should refrain from the use of force against "the territorial integrity or political independence"[493] of another state. Viewed against the background of the realities of the Second World War and the ideological conflicts flaring up immediately thereafter, mercenaries hardly merited any attention.[494]

The independence of states previously under colonial rule coincided with an increase in and a different attitude towards the use of mercenaries. It became a locus of concern especially in Africa. Concern was first raised about the situation in Congo in the early 1960s. During the civil war, the Katangese secessionist forces of Moise Tshombe were assisted by mercenaries from

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490 These states are Benin, Djibouti, Mauritius, Niger, South Africa, Togo, Tunisia and Uganda: see (April - May 1997) *African Topics* at 17.

491 Entered into force 2 December 1983 (see Kalshoven (1987) at 23).

492 Botha (1993) 15 *Strategic Review of Southern Africa* 75 at 78.

493 Art 2(4) of the UN Charter.

494 Taulbee (1985) 15 *California Western Intl Law Jnl* 339 at 345.

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Europe and South Africa.[495] Subsequently, the government of Mobutu Sese Seko also employed foreign soldiers. Other African examples over the last few decades are Nigeria, Angola, the *coup d'état* by the Frenchman Bob Denard in the Comoros, and the attempted *coup* in the Seychelles by mercenaries under the leadership of Mike Hoare.[496]

Gradually, mercenarism became an issue raised in international political fora. At the regional level, first the OAU Council of Ministers and later the Assembly of Heads of State and Government denounced these activities. At the global level, the UN General Assembly followed in 1968 with resolution 2465, termed "Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples", which declared the use of mercenaries against national liberation movements in colonial territories to be a criminal act. This is evidence of how an African concern was given global recognition.

On the legal plane Africa also played a leading role. The first treaty dealing specifically with mercenaries - the OAU Convention on the Elimination of Mercenarism in Africa[497]- was adopted under the auspices of the OAU in 1977. After the required number of states ratified the Convention in 1985, it turned into force.[498] It defines a mercenary as a non-national of the state against whom he is employed. This includes a person who "links himself willingly" to groups or organisations aiming to overthrow or undermine another state, or aiming to obstruct the activities of any liberation movement recognised by the OAU.

The African initiative impacted in two major ways on international law:

- The first is the inclusion of an article dealing with mercenaries in the 1977 Geneva Protocol I Additional to the Geneva Convention of 1949. In terms thereof, a mercenary "shall not have

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495 Mourning (1981/2) 22 *Virginia Jnl of Intl Law* 589 at 599, and sources quoted in n 56 and 57.

496 On their prosecution in South Africa for contraventions of the Civil Aviation Act, see *S v Hoare* 1982 4 SA 865 (N).

497 Text of substantive provisions reproduced in (1981/2) 22 *Virginia Jnl of Intl Law* 613 - 618, and the International Convention Against the Activities of Mercenaries at 619 - 625.

498 Naldi (1989) gives a list of states parties in 1989 (at 40 (n 20)).

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the right to be a combatant or a prisoner of war".[499] The article is a product of compromise, not going as far as the OAU Convention had already gone or the insistence of African states required.

- Secondly, a movement for an international convention on the recruitment, use, financing and training of mercenaries was launched at the UN. In 1979, the UN General Assembly adopted a resolution dealing with the "use of mercenaries as a means to violate human rights and to impede the exercise of the right of peoples to self-determination". An *ad hoc* committee for the drafting of an international convention was established. After years of debate, the General Assembly adopted the Convention Against the Recruitment, Use, Financing and Training of Mercenaries.

The highlighting of mercenarism internationally is an African achievement. It shows the increasing prominence of Africa in the UN. But, with Taulbee, one has to question the substantive impact of these provisions. Viewed globally, mercenaries have played a very limited role in modern warfare and conflict. The African response can be explained primarily with reference to the fact that the mercenary has become "the symbol of racism and neo-colonialism within the Afro-Asian bloc",[500] because the recurring scenario was one of "white soldiers of fortune fighting black natives".[501] Given the repeated involvement of South African mercenaries in African conflicts,[502] the cohesiveness in Africa's approach becomes all the more understandable. One must also not lose sight of the context - the sovereignty of the newly independent Africa states was easily threatened, especially in the absence of a loyal citizenry and a loyal and well-trained armed force. In this

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499 Art 47(1) of Geneva Protocol I.

500 Taulbee (1985) 15 *California West Intl Law Jnl* 339 at 342.

501 *Ibid.*

502 In the 1990s the private South African firm Executive Outcomes played a prominent role in eg Angola and Sierra Leone. In both these instances they were on the payroll of the government in the countries concerned. Newly elected president of Sierra Leone, Ahmed Tejan Kabbah, relied on the presence of Executive Outcomes to keep rebel forces at bay and ensure stability. In 1996 Executive Outcomes was paid $1.2 million per month, making up a considerable percentage of state expenditure. ("Kabbah strikes back" (1996) *Nov/Dec Africa Today* 43-44.)

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respect, then, the outlawing of mercenaries had little to do with the protection of human rights, but was intertwined with a movement to consolidate power in the hands of African rulers.

The 1990s saw the emergence of a corporate army, Executive Outcomes. It played an active role in numerous African conflicts, especially in Angola and Sierra Leone. Obvious concerns have been raised: Leaders with little popular support may remain in power despite national disintegration (also of the military forces), only because they control state finances. In the process, democracy may be thwarted, and national resources become directed at the survival of a leader rather than the improvement of citizens' quality of life. On the other hand, Executive Outcomes has served as a "private Pan-African peace-keeping force of a kind which the international community has long promised, but failed to deliver".[503] In both Angola and Sierra Leone its intervention has contributed to an eventual peace-process. The absence of any meaningful role played by the OAU or the UN created the room for the involvement of Executive Outcomes in internal African conflicts.

2.6.3 The international criminal tribunal for Rwanda

2.6.3.1 International efforts at preventing impunity

One of the unfortunate, yet inevitable, consequences of large-scale internal and international conflict is gross human rights violations. Such violations may be redressed either at the domestic or the international level. In both cases certain problems arise. A quick and effective domestic response is often difficult due to the collapse of the state apparatus, including the prosecutorial services and the courts. More often, such a response is out of the question because the new ruler, who commands the organs of state, came to power through the very process of human rights violations that has to be redressed. An international response is hampered by the lack of any permanent supra-national tribunal with appropriate jurisdiction. A further impairment is the lack of consensus on the content of crimes regarded as "gross violations of human rights" and which

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503 Pech and Beresford "Africa's new-look dogs of war" (24-30 January 1997) *Mail and Guardian* 24.

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should be punishable internationally. The leading international conventions on humanitarian law also do not provide for any form of international enforcement or implementation.[504]

A distinction has to be drawn between the enforcement of international human rights law and international humanitarian law. International human rights law has emphasised state responsibility. Investigations are directed at answering the question whether states have been in breach of their treaty obligations or of customary international law. Breaches of international humanitarian law entail individual criminal liability. These norms are contravened by individuals and not in the first place by governments. When steps are not taken to redress the violation of any of these norms, it results in impunity of those responsible for the violations. As Bassiouni indicates,[505] international human rights standards evolve through phases. Standards are enunciated first, before they could become prescriptive norms. This may be followed by provision for enforcement by means of administrative and civil modalities. The most advanced, the most controversial and least realised, is the application of penal modalities.

The international community has as yet not accepted the jurisdiction of a permanent penal tribunal. After the First World War steps were taken in this direction. The Treaty of Versailles[506] provided for the establishment of an *ad hoc* tribunal to prosecute Kaiser Wilhelm II. However, he was granted refuge in the Netherlands and was never prosecuted.[507] The German Supreme Court prosecuted a limited number of war criminals. The vulgar and crude forms of human rights abuses perpetrated by Nazi Germany spurred the international community into action. The London Agreement[508] provided for an international tribunal in which the victors would sit in judgment of the defeated. The International Military Tribunals at Nuremberg and Tokyo were established. The

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504 See eg the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (of 12 August 1949), art 146: The responsibility is placed on each state party to "undertake to enact any legislation necessary to provide effective penal sanctions" of grave breaches of the Convention. These persons should be brought to trial within that state regardless of their nationality.

505 Bassiouni in Henkin and Hargrove (eds) (1994) 347 at 348.

506 Art 227 of the Treaty.

507 See Bassiouni in Henkin and Hargrove (eds) (1994) 347 at 357.

508 Of 8 August 1945.

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Allies also enacted a law, making it possible to set up the International Military Tribunal for the Far East.

After Nuremberg, the UN's International Law Commission ("ILC") has been involved in drafting a codification of international crimes and a statute for an international penal tribunal.[509] Universal political commitment was always unlikely in the era of the Cold War, especially after the Korean conflict of the 1950s. The late 1980s saw some resurgence of interest in an international court, particularly in relation to drug offences. The end of the Cold War towards the end of the 1980s, followed by the violence in the former Yugoslavia, assured its place on the international agenda once again. In 1989 Trinidad and Tobago reintroduced the idea in the UN General Assembly.[510] The ILC adopted a Draft Statute for an International Criminal Court. In 1994 the General Assembly established an *ad hoc* committee to work on the issue,[511] and in 1995 it established a preparatory committee to study the ILC draft.[512] The USA, UK, India and China have insisted on further discussions before calling for a conference of plenipotentiaries. The basis for discussion is the Draft Statute for an International Criminal Court, adopted by the ILC in 1994.[513]

One of the main reasons why states object to such a tribunal is that they fear their sovereignty will be infringed.[514] At least two responses are possible to answer such a contention: Acceptance of the Court's jurisdiction may be made optional. A second, more principled response is that "human rights law should supersede the notion of state sovereignty".[515]

In 1992 the UN established a commission of experts to investigate and report on violations of international humanitarian law in the former Yugoslavia.[516] Following a finding of numerous gross violations, the Security Council adopted Resolution 808 (1993). It called for the establishment of

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509 See Bassiouni in Henkin and Hargrove (eds) (1994) 347 at 359-363.

510 See ICC Fact Sheet at web site http: // www.igc.apc.org/icc/factsheet.html.

511 GA Res 53, UN GAOR, 49th Sess, UN Doc A/RES/49153 (1994).

512 GA Res 46, UN GAOR, 50th Sess, UN Doc A/RES/50146 (1995).

513 See Crawford (1995) 89 *AJIL* 404.

514 See eg Dumas (1990) 13 *Hastings Intl and Comp L Rev* 585 at 593.

515 *Ibid.*

516 SC Resolution 780 (1992).

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an *ad hoc* war crimes tribunal for the former Yugoslavia and requested the Secretary-General to submit a comprehensive report within sixty days. A statute for the international tribunal was attached to his report. In 1993 the Security Council established the *ad hoc* International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia.[517]

This tribunal was established as a subsidiary organ of the Security Council. As such, the Yugoslav Tribunal has a much broader international character than the Nuremburg Tribunal. The basis for its establishment is not clear, as such a competence is not specifically mentioned in the UN Charter. It could probably be justified in terms of article 41 of the Charter. Other options were to establish a treaty or to base it on a General Assembly resolution. The former would have been time-consuming and would have left the possibility open that one of the major state players would not become party to such a treaty. The latter was also not feasible, as General Assembly recommendations are only of a recommendatory nature.

The first accused to be brought to trial before this tribunal was Dusko Tadíc. The tribunal was soon faced with a challenge to the lawfulness of the establishment of the tribunal by the Security Council. The Appeals Chamber upheld the tribunal's jurisdiction in a judgment of October 1995.[518]

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517 A detailed analysis of the tribunal for the former Yugoslavia is not provided here. For a historical background and overview of the relevant Statute consult O'Brien (1993) 87 *AJIL* 639.

518 See Aldrich (1996) 90 *AJIL* 64. The judgment is reprinted in (1996) 36 *ILM* 32.

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2.6.3.2 *Efforts to prevent impunity after the massacres in Rwanda*

i *International Criminal Tribunal for Rwanda*

Africa has not been spared gross human rights violations. Impunity of violations on a grand scale by Bokassa in the CAR and Amin in Uganda have been identified as causally related to the adoption of the African Charter in 1981.[519] But these violations did not spurn the UN or individual international powers into action.

The end of the Cold War, intensified media coverage, and the link to the conflict in Europe brought Rwanda into the international spotlight. The proximity of the conflict in the former Yugoslavia caused Europe, and later the international community, to take measures to end the violence. Once the conflict had abated, an international tribunal was established to ensure that the worst perpetrators were brought to justice. As these events were followed by what happened in Rwanda, the international community followed the precedent of establishing a tribunal. It remains an open question whether the response to Rwanda would have been different if the recent precedent had not existed. Akhavan worded African scepticism in this regard: " ... had the sequence of events between the Yugoslav and the Rwanda conflicts been different, it is by no means certain that a tribunal for Rwanda would have been established".[520] Another explanation for the establishment of the Tribunal is Western feelings of guilt. After the death of 36 American soldiers in Somalia, the US was reluctant to become involved. France also chose not to engage militarily even in the face of mass killing. Giving support to the Tribunal was one way to "assuage guilt feelings".[521]

It was also a matter of some debate whether to establish a separate tribunal for Rwanda, or to extend the jurisdiction of the *ad hoc* tribunal already created. The prosecutor of the tribunal for the former Yugoslavia, for one, held the firm view that the latter course should be followed.[522]

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519 See ch 6.1 above.

520 (1996) 90 *AJIL* 501.

521 Forsythe (1997) 15 *NQHR* 5 at 13.

522 See the interview with judge Goldstone in (1996) 2 *Human Rights Brief* (web site http: // www.sray.wcl.american.edu/pub/journals/hrb/pronk.htm).

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Judge Goldstone feared a difference in procedures and standards if two tribunals were created. He further argued that setting up another tribunal would lead to expensive duplication and delays.

However, on 8 November 1994 the UN Security Council decided to establish an *ad hoc* international tribunal for Rwanda, "for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law".[523] The decision to establish the tribunal followed the appointment of[524] and report by the Commission of Experts on Rwanda. It found violations of international humanitarian law. The special Rapporteur for Rwanda of the UN Commission on Human Rights also reported to the Security Council about violations.[525] The Security Council decision pertinently refers to the "request of the Government of Rwanda",[526] making it clear that the co-operation and consent of Rwanda had been obtained.[527] The preamble to the resolution mentions the need for "international co-operation to strengthen the courts and judicial system of Rwanda, having regard in particular to the necessity for those courts to deal with large numbers of suspects".[528] This emphasises the supplementary role of the UN tribunal. In some sense, the establishment of the Security Council Tribunal weakened the authority of the Rwandese courts. The situation in Rwanda is different from that in the ex-Yugoslavia. In Rwanda a new government has taken over power. This government is intent on prosecuting perpetrators and on preventing impunity.

The personal jurisdiction of the tribunal covers everyone responsible for the relevant crimes committed in Rwanda, and Rwandan citizens responsible for relevant crimes in neighbouring

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523 Resolution 955 (1994) (Adopted by 13 in favour, 1 against (Rwanda), 1 abstention (China), reprinted in (1994) 33 *ILM* 1600. See Akhavan (1996) 90 *AJIL* 501. Rwanda voted against, due to the fact that the Tribunal was not given the power to impose the death penalty. The Statute of the Tribunal was attached to the resolution.

524 In terms of Security Council Resolution 935 (1994).

525 See S/1994/1157, annex I and annex II.

526 Resolution 955 (1994) at 2.

527 The Rwandese Government did not agree with the lack of capital punishment and the temporal cut-off limits, prompting it to vote against the Security Council resolution.

528 *Ibid.*

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states.[529] A temporal limitation was fixed - only actions committed between 1 January and 31 December 1994 are covered.[530] Substantially, the tribunal is allowed to hear crimes of genocide[531] (including attempts at "direct and public incitement" to and complicity in genocide), crimes against humanity[532] (including torture, rape and "other inhumane acts") and violations of article 3 common to the Geneva Conventions of 1949, and of Additional Protocol II of 1977, thereto.[533] The penal jurisdiction is limited to the imposition of imprisonment.[534]

The tribunal was established in Arusha, Tanzania.[535] It consists of eleven judges, presided over by judge Laity Kama from Senegal.[536] Two trial chambers of three judges are composed, after election by the General Assembly. These judges are the President, Vice-President Ostrovsky (Russia), and judges Aspegren (Sweden), Khan (Bangladesh), Pillay (South Africa) and Sekule (Tanzania). Five judges serve in the Appeal Chamber.[537] From the Court's inception to 30 September 1996, judge Goldstone served as prosecutor.[538] He was replaced by justice Arbour (Canada). The languages used are French and English.[539] The UN General Assembly appropriated $32.6 million for the 1996-97 fiscal year to enable the tribunal to be set up and function.[540]

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529 Arts 1 and 7 of the Statute of the International Tribunal for Rwanda (hereafter "the Statute").

530 *Ibid.*

531 Art 2 of the Statute.

532 Art 3 of the Statute.

533 Art 4 of the Statute.

534 Art 23 of the Statute. Punishment must be served in Rwanda or any other state that declared itself willing (Act 26 of the Statute).

535 In terms of Security Council Resolution 977 (1995).

536 "Rwanda Genocide Accused Pleads not Guilty" (30 May 1996) *The Star* at 4.

537 Art 11 of the Statute. The Rwanda Tribunal shares these five judges with the International Criminal Tribunal for the Former Yugoslavia. They are judges Cassese (Italy, who serves as President), Karibi-Whyte (Nigeria), Li (China), Vohrah (Malaysia) and Stephan (Australia).

538 See United Nations (1997) *International Criminal Tribunal for Rwanda* (Fact Sheet).

539 Art 31 of the Statute.

540 See Tittemore (1996) 4 *Human Rights Brief* 4 at 5.

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The rights of accused persons,[541] as accepted in international law, are guaranteed by the Statute. This includes equality before the law[542] and the presumption of innocence.[543] Further, an accused is to be tried "without due delay",[544] and shall have adequate time and facilities to prepare a defence.[545] The free assistance of an interpreter is guaranteed.[546] If the accused does not have sufficient means to pay for legal assistance, it will be provided free of charge.[547]

The international tribunal does not have exclusive jurisdiction over offences committed in relation to the genocide in Rwanda. Its jurisdiction is concurrent with "national courts" (not only in Rwanda).[548] However, it has primacy over the "national tribunals of all states".[549] The rule of *non bis in idem*[550] applies strictly when a person has already been tried by the international tribunal. Under exceptional circumstances someone tried by a national court may be tried again by the international tribunal.[551]

As of November 1996, 21 suspects have been indicted by the tribunal. Fourteen of them were in custody.[552] From the outset, the tribunal suffered from a lack of human and material resources and a lack of co-operation by states harbouring suspects.[553] The progress of trials was also hampered

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541 It extends to the pre-trial phase: Once taken into custody, the arrested person must be informed immediately of the charge against him (Art 19(2) of the Statute).

542 Art 20(1) of the Statute.

543 Art 20(3) of the Statute.

544 Art 20(4)(c) of the Statute.

545 Art 20(4)(b) of the Statute.

546 Art 20(4)(f) of the Statute.

547 Art 20(4)(d) of the Statute.

548 Art 8(1) of the Statute.

549 Art 8(2) of the Statute.

550 One may not be tried twice for the same offence.

551 If an act of genocide, etcetera, had been characterised as an ordinary crime, or if national court proceedings were not impartial or independent, or the accused was not prosecuted diligently (Art 9(2) of the Statute).

552 Tittemore (1996) 4 *Human Rights Brief* at 5. McGreal (14 - 30 February 1997) *Mail and Guardian* 15 refers to thirteen indicted accused in custody.

553 *Ibid*. See also Sapru 91997) 32 *Texas Intl Law Jnl*, who contends that the defiance of Kenya and Burundi was in part due to the arguable illegality of the process in which the Tribunal was established.

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by chaotic management, unqualified staff and indifference at UN headquarters.[554] A further factor contributing to delays and inefficiency is the division of functions between the prosecutor (in The Hague), the investigators (in Rwanda), the tribunal itself (in Tanzania), and the UN headquarters (in New York).[555] Future inhibiting factors were non-extradition of suspects from other states and the killing of witnesses by returning Hutus in Rwanda. This identified another target for criticism, the inefficiency of the tribunal's witness protection scheme, being located in Arusha, rather than in Rwanda itself.[556]

On 30 May 1996 the first accused, Akayesu, appeared in the Arusha tribunal and pleaded not guilty to charges of genocide and crimes against humanity.[557] The second accused Rutaganda, an agricultural engineer, pleaded not guilty on eight counts. An adjournment until 3 October 1996 was ordered, as the defence requested time to gather evidence in Rwanda. Rutaganda's indictment refers to his shareholding in Rwanda's *Radio Television Libre des Milles Collines*, which broadcast propaganda inciting racial hatred.[558]

ii *The role of domestic courts*

The Rwandan courts took action as well. Trials of some 70,000 to 90,000 suspects detained in Rwandese prisons started only in late 1996.[559] The first two accused were convicted of genocide and rape, and were sentenced to death in January 1997 by a court sitting in Kibungu.[560] These two sentenced persons were described as "an erstwhile hospital worker" and "an ex local administrator", suggesting that they were not cardinal role players in the genocide. One of the discrepancies resulting from the dual system of imposing penal sanctions is that the international

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554 McGreal (14 - 30 February 1997) *Mail and Guardian* 15.

555 *Ibid.*

556 (March/ April 1997) *Africa Today* 21 at 22.

557 "Rwanda genocide accused pleads not guilty" (31 May 1996) *The Star* at 4.

558 *Ibid.*

559 The number of suspects who are reportedly detained awaiting trial differs. Morris, justice advisor to Rwandan President Bizimunga, set the number at 90,000 (Goodman, "Justice Drowns In Political Quagmire" (31 January - 6 February 1997) *Mail and Guardian* at 24).

560 "Twee Hutu's Kry Doodstraf" (5 January 1997) *Rapport* at 4.

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tribunal hears the most serious cases, but the national courts impose more severe forms of punishment.[561] Taken together, the jurisprudence of these two tribunals belie the principle that all similarly situated accused or convicted persons should be treated alike.

Specialised chambers with exclusive jurisdiction over four categories of offences committed between 1 October 1990 and 31 December 1994, were created.[562] These tribunals consist of career or auxiliary magistrates. A special tribunal for juveniles is also instituted. The four categories of offences are as follows:[563]

- The planners, organisers and leaders of the genocide or of the commission of crimes against humanity fall into category 1. These accused are liable to the death penalty.
- Those not in leadership positions, but who caused, or contributed to, or conspired in the death of victims, fall into category 2. For persons in this category the maximum sentence is life imprisonment.
- Those who committed or participated in serious assaults comprise category 3. The normal parameters of domestic sentencing apply.
- Category 4 provides for offences against property. After conviction for a category 4 offence the convicted person and the victims must, through amicable settlement, agree on an amount of "civil damages". Failing such an agreement, the rules pertaining to criminal and civil actions will be applied.

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561 In terms of a Rwandan "genocide law", perpetrators are divided into four categories. The most culpable perpetrators (eg political and military leaders) fall into the first. Conviction of those in this category may be followed by a death sentence (by firing squad). The second category is for other offences leading to death. Imprisonment of more than seven years may be imposed. Due to overcrowding of prisons, it is unlikely that those convicted for categories three and four offences (lesser offences, eg assault and looting) will serve prison sentences (see Goodman (31 January - 6 February 1997) *Mail and Guardian* at 24).

562 See Organic Law 08/96 of 30 August 1996, on the organisation of prosecutions offences constituting the crime of genocide or crimes against humanity committed since 1 October 1990. (An English version is reprinted in *Rwanda Reconciliation* (1996) 6 at 15 - 22.)

563 Arts 2 and 14 of Organic Law 8/96.

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Any person accused before the Rwandan courts may admit and confess to the alleged offences.[564] A confession may be accepted or rejected by the Public Prosecution department. To be accepted, a confession has to comply with the following requirements:[565]

- A detailed description of the offences committed, must be given. The date, time, scene of the act and names of victims and witnesses (if known), must be included.
- Information about accomplices, conspirators and all other information useful to the prosecution must be provided.
- The person must apologise for the offences that he or she had committed.
- The person must also offer to plead guilty at subsequent court proceedings.

From the last requirement, it follows that a confession does not exempt anyone from prosecution, conviction and punishment under the criminal justice system. A confession allows an accused person to go through a different procedure, the "Confession and Guilty Plea Procedure". The court will ensure that the guilty plea had been done voluntarily, and with full appreciation of all the relevant circumstances.[566] If this is established, the person is found guilty and is sentenced. The confession is a mitigating factor and leads to an automatic reduction of sentence in two categories, category 2 and 3. A distinction is further drawn between confession and guilty plea prior to prosecution, and confession and guilty plea after prosecution has commenced. Category 2 offenders who confess before prosecution have their sentences reduced to between 7 and 11 years; those confessing after prosecution started, qualify for a reduction of sentence to between 12 and 15 years.[567]

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564 See Chapter III of Organic Law 8/96.

565 Art 6 of Organic Law 8/96.

566 Art 10 of Organic Law 8/96.

567 See art 15 of Organic Law 8/96. Sentence for category 3 offences are reduced to a third and half of the ordinary sentences respectively.

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The process is not only directed at sentencing accused persons to death and to imprisonment, but also provides for payment of damages. Not only those in category 4, but all other convicted persons are jointly and severally liable for damages caused in the perpetration of their crimes.[568] The procedural rights of accused persons are not as comprehensively protected as those of persons accused before the international tribunal at Arusha. The right to counsel is not guaranteed, for example. Provision is made for the right to appeal.[569] An appeal has to be filed within fifteen days. The state may also appeal against acquittals. If an appeal court overturns an initial acquittal, the decision may be reviewed by the Court of Cessation.

Questions may be raised about the suitability of any criminal justice system to redress problems related to conflicts that still lie latent in the society in which they had been committed. National reconciliation must be one of the priorities of any post-traumatised society. In South Africa, for example, a different route has been followed with the creation of the Truth and Reconciliation Commission. In this model, full disclosure of specific offences (of a "political nature") may result in amnesty. Such a person is never prosecuted for that offence. The question arises whether judicial means are best suited to end a cycle of ethnic violence.

Criticism followed the sentence of the first two accused found guilty: They appeared without legal representation.[570] Following this criticism, the Rwandese government made an international appeal for finances to secure legal aid to the reported 90,000 genocide suspects.[571] One of those convicted, Bizimana, criticised the brevity of his trial and the open partisanship of spectators.[572] The process also focuses on "justice" at the expense of longer term considerations of "reconciliation". Another problem that hampered the prosecution of major offenders has been the unwillingness of other states to extradite suspects to Rwanda.[573]

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568 Art 30 of Organic Law 8/96. See also this article on the position of other category offences.

569 On appeals, see arts 24 - 26 of Organic Law 8/96.

570 "Legal Aid Sought for Genocide Suspects" (12 January 1997) *The Sunday Independent* at 2.

571 *Ibid*.

572 McGreal, "Inside Rwanda's Death Row " (31 January - 6 February 1997) *Mail and Guardian* at 15.

573 See eg "Grand Jury Refuses Extradition of Presumed Criminal" (1996) 4 *Messenger IUHR* at 1.

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2.6.3.3 Possibility of a permanent international court with penal jurisdiction

The *ad hoc* character of the tribunals established for the former Yugoslavia and Rwanda caused concern to commentators and governments.[574] A permanent court would alleviate the problem of delay and cost in establishing numerous *ad hoc* tribunals. The establishment of a tribunal in response to a particular conflict creates the impression that it is "in a sense part of the conflict".[575] It may also divert attention away from resolving the conflict to punishing wrongdoers. Furthermore, the principle of legality will be served if a permanent court with a legal basis with an international penal jurisdiction is created.[576] However, a permanent court may make it more difficult to negotiate peace at a political level.[577]

This criticism notwithstanding, it is quite possible that the two initiatives could lead to the establishment of a permanent international criminal Court. The fact that two separate institutions were created reflect opposition against a subtle process of establishing a single criminal tribunal of extended jurisdiction. The ILC remains seized with the matter, and much will depend on the outcome of the two *ad hoc* tribunals functioning at the moment. In particular, the role of the tribunals to halt and effectively redress systematic, widespread and flagrant violations of international humanitarian law, will be assessed before a permanent criminal tribunal will be established.

The establishment of a permanent Criminal Court will, at the very least, be a significant symbolic gesture against impunity for gross violations of human rights by individuals. However, from an African perspective, a number of concerns may be raised. Such a court may be geographically and psychologically far removed from the continent. The Rwandan precedent has already shown that an international Court inevitably faces certain technical and pragmatic difficulties. It also remains uncertain whether African conflicts will receive priority if weighed against conflicts and violations in other regions of the world.

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574 See Crawford (1995) 89 *AJIL* 404 at 415.

575 *Ibid*.

576 Crawford (1995) 89 *AJIL* 404 at 416.

577 See, on this cautionary line, Forsythe (1997) 15 *NQHR* 5.

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Another possibility is to extend the jurisdiction of the *African Court on Human Peoples' Rights*, hopefully soon to be established under the auspices of the OAU. In terms of the Protocol which forms the basis of current discussions,[578] the Court's jurisdiction will only cover the African Charter on Human and Peoples' Rights and other African human rights instruments. Serious consideration should be given to extend this jurisdiction to include penal jurisdiction for specified crimes, such as genocide and crimes against humanity.[579] This will mean that the Protocol will have to provide for a prosecutor, a factor that will lead to re-negotiation and cost implications. The advantages are that this process may be quicker, that the alienating effect of an international tribunal will be reduced, and that the status of the African Court on Human and Peoples' Rights will be enhanced. Other possibilities include the creation of a separate, but permanent African penal Court, or the inclusion of penal matters under the jurisdiction of the African Court of Justice, to be established as an organ of the African Economic Community.

Notwithstanding any future actions undertaken by the international community, the killing of almost a million Rwandese between April and June 1994 will stand as testimony to the UN's failure to play a meaningful preventative role. This has been ascribed to the marginal political and economic concern of Rwanda to the major powers.[580] Even an international court will punish *ex post facto*. Only an extremely effective court will serve as a deterrent to future perpetrators. Its establishment will stand as testimony not only to the fact that humanity has a conscience, but also a memory.

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578 See ch 7 below.

579 See ch 6.1.1 below, about an attempt to have such a provision included in the African Charter initially, in 1980. At the NGO meeting before the 21st sitting of the Commission, a resolution was adopted which called on African governments to give jurisdiction to the proposed Court "in all matters including genocide, crimes against humanity and war crimes" ((1997) 7 *African HR Newsletter* at 7).

580 See "The International Community Failed to Stop or Stem the Genocide" (1996) May/June *Africa Today* 30.

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TABLE B: SELECTED UNITED NATIONS HUMAN RIGHTS TREATIES IN AFRICA AS AT 31 MARCH 1997

Compiled from the United Nations Treaty Database: Web Page

http://www.un.org/Depts/Treaty/final/ts2/newfiles/frontboo/tocgen.html

	CESR	CCPR	OP I	OP II	CERD	Apart-heid Conven-tion	Geno-cide Conven-tion	CRC	CEDAW	Conven-tion on Political Rights of Women	Conven-tion on the Nation-ality of Women	Conven-tion on Consent to Marriage	CAT	Refugee Conven-tion	1967 Proto-col
Algeria	X	a X	X		b X	X	X	X	X				c X	X	X
Angola	X	X	X					X	X	X				X	X
Benin	X	X	X		s	X		X	X			X	X	X	X
Botswana					X			X	X					X	X
Burkina Faso					X	X	X	X	X			X		X	X
Burundi	X	X			X	X	X	X	X	X			X	X	X
Cameroon	X	X	X		X	X		X	X				X	X	X
Cape Verde	X	X			X	X		X	X				X		X
Central African Republic	X	X	X		X	X		X	X	X				X	X
Chad	X	X	X		X	X		X	X				X	X	X
Comoros								X	X						X
Congo	X	a X	X		X	X		X	X	X				X	X
Côte d'Ivoire	X	X			X		X	X	X	X		X	X	X	X
Djibouti								X						X	X
Egypt	X	X			X	X	X	X	X	X			X	X	X
Equatorial Guinea	X	X	X					X	X					X	X
Eritrea								X	X						
Ethiopia	X	X			X	X	X	X	X	X			X	X	X
Gabon	X	X			X	X	X	X	X	X			s	X	X
Gambia	X	a X	X		X	X	X	X	X				s	X	X
Ghana					X	X	X	X	X	X	X			X	X
Guinea	X	X	X		X	X		X	X	X	s	X	X	X	X
Guinea-Bissau	X							X	X					X	X
Kenya	X	X				s		X	X				X	X	X
Lesotho	X	X			X	X	X	X	X	X	X			X	X
Liberia	s	s			X	X	X	X	X	s				X	X

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	CESR	CCPR	OP I	OP II	CERD	Apart-heid Conven-tion	Geno-cide Conven-tion	CRC	CEDAW	Conven-tion on Political Rights of Women	Conven-tion on the Nation-ality of Women	Conven-tion on Consent to Marriage	CAT	Refugee Conven-tion	1967 Proto-col
Libyan Arab Jamahiriya	X	X	X		X	X	X	X	X	X	X		X		
Madagascar	X	X	X		X	X		X	X	X				X	
Malawi	X	X	X		X			X	X	X	X		X	X	X
Mali	X	X			X	X	X	X	X	X	X	X		X	X
Mauritania					X	X		X		X				X	X
Mauritius	X	X	X		X			X	X	X	X		X		
Morocco	X	X			X		X	X	X	X			X	X	X
Mozambique		X		X	X	X	X	X						X	X
Namibia	X	X	X	X	X	X	X	X	X				X	X	
Niger	X	X	X		X	X		X		X		X		X	X
Nigeria	X	X			X	X		X	X	X			s	X	X
Rwanda	X	X			X	X	X	X	X					X	X
São Tomé e Príncipe	s	s				X		X	s					X	X
Senegal	X	a X	X		b X	X	X	X	X	X			c X	X	X
Seychelles	X	X	X	X	X	X	X	X	X				X	X	X
Sierra Leone	X	X	X		X			X	X	X	X		s	X	X
Somalia	X	X	X		X	X							X	X	X
South Africa	s	s			s			X	X	s	s	X	s	X	X
Sudan	X	X			X	X		X					s	X	X
Swaziland					X			X		X	X				X
Togo	X	X	X		X	X	X	X	X				c X	X	X
Tunisia	X	a X			X	X	X	X	X	X	X	X	c X	X	X
Uganda	X	X	X		X	X	X	X	X	X	X		X	X	X
United Republic of Tanzania	X	X			X	X	X	X	X	X	X			X	X
Zaïre	X	X	X		X	X	X	X	X	X			X	X	X
Zambia	X	X	X		X	X		X	X	X	X			X	X
Zimbabwe	X	a X			X	X	X	X	X	X		X		X	X
TOTAL NUMBER OF AFRICAN STATES PARTIES	**41**	**41**	**24**	**3**	**43**	**38**	**25**	**52**	**45**	**29**	**12**	**9**	**23**	**47**	**47**
PERCENTAGE OF AFRICAN STATES (53)	***77%***	***77%***	***42%***	***6%***	***81%***	***72%***	***47%***	***98%***	***85%***	***55%***	***23%***	***17%***	***43%***	***87%***	***87%***

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	CESR	CCPR	OP I	OP II	CERD	Apart-heid Conven-tion	Geno-cide Conven-tion	CRC	CEDAW	Conven-tion on Political Rights of Women	Conven-tion on the Nation-ality of Women	Conven-tion on Consent to Marriage	CAT	Refugee Conven-tion	1967 Proto-col
SIGNATURES NOT FOLLOWED BY RATIFICATION	*3*	*3*	*0*	*0*	*2*	*1*	*0*	*0*	*1*	*2*	*2*	*0*	*6*	*0*	*0*
TOTAL STATES PARTIES GLOBALLY	**135**	**136**	**90**	**29**	**148**	**100**	**123**	**190**	**157**	**109**	**66**	**47**	**102**	**128**	**128**
AFRICAN PERCENTAGE OF GLOBAL RATIFICATION	*30%*	*30%*	*27%*	*10%*	*29%*	*38%*	*20%*	*27%*	*29%*	*27%*	*18%*	*19%*	*23%*	*37%*	*37%*

X Ratification, accession, approval, notification or succession, acceptance or definitive signature.

s Signature not yet followed by ratification.

[a] Declaration recognizing the competence of the Human Rights Committee under article 41 of the International Covenant on Civil and Political Rights.

[b] Declaration recognizing the competence of the Committee on the Elimination of Racial Discrimination under article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination.

[c] Declarations recognizing the competence of the Committee against Torture under articles 21 and 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

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Chapter 3 REALISING HUMAN RIGHTS UNDER THE ORGANISATION OF AFRICAN UNITY

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3.2 The African Charter on Human and Peoples' Rights

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3.1 The OAU Charter and human rights

The Charter of the Organisation of African Unity ("OAU")[1] does not explicitly include human rights as part of the OAU's mandate. In this respect, it differs from the UN Charter.[2] The OAU was established as one of the "regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action", provided for in the UN Charter.[3] The OAU must promote international co-operation, having "due regard" to human rights set out in the Universal Declaration.[4] Of the five specialist commissions established under article 20 of the Charter,[5] none was devoted to human rights.

Some of the OAU's most marked successes had been in the field of human rights, but almost exclusively involving violations by non-African states or states that are not members of the OAU.[6] Emphasis fell on the rights to independence of colonised "peoples", the right of newly independent states to non-interference, and on the unity of African states. The OAU's human rights successes relate mainly to four areas:

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1 The Charter was adopted by a conference of Heads of States and Governments in Addis Ababa on 25 May 1963. The Charter was signed by 23 states. It is reprinted in (1964) 3 *ILM* at 1116.

2 Arts 1(3) and 55(c) of the UN Charter mentions the promotion and encouragement of human rights as one of the UN's overarching purposes. As far as the specific institutions are concerned, the General Assembly must assist "in the realisation of human rights and fundamental freedoms for all" (art 13(1)(b)) and ECOSOC may "make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all" (art 62(2)) and must set up commissions for the promotion of human rights (art 68).

3 Art 52(1) of the UN Charter.

4 Art 2(1)(e) of the OAU Charter. The Preamble also recognises the Universal Declaration and UN Charter as the foundation of peaceful and positive co-operation between states.

5 Established in terms of the Charter were the Economic and Social, the Educational and Cultural, and Sanitation and Nutrition Commissions. One on Transport and Communications, and one on Jurists were added in 1964 at the first ordinary session of the OAU. The last was designed as an instrument for legal research. (See M'Baye and Ndiaye in Vasak (ed) (1982) 583 at 593.) In any event, the Commission of Jurists was disbanded after only one year (see EL-Obaid and Appiagyei-Atua (1996) 41 *McGill Law Jnl* 819 at 827 (n 33)).

6 See Umozurike in Ginther (ed) (1983) at 122.

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- The purpose of eradicating all traces of **colonialism** from Africa was identified as one of the political goals of the organisation. Decolonisation also implied the restoration of basic rights (such as the right to vote) that had been denied during colonialism. It also aimed at the removal of repressive regimes, most blatantly illustrated in the last days of Portuguese rule in Angola and Mozambique.

- **Self-determination** of African peoples enjoyed high priority, but again within the context of decolonisation.[7] In conformity with the 1964 resolution on respect for existing borders, the OAU rejected post-independence claims to self-determination in Biafra, Katanga, Southern Sudan, Shaba and Eritrea.[8] As far as the Western Sahara is concerned, the OAU admitted the Saharawi Arab Democratic Republic, causing Morocco's withdrawal from the organisation. However, the OAU did not recognise the Sahrawi people's right to self-determination.[9] Eritrea won its independence in 1991 despite the OAU's lack of support for the application of the principle of self-determination in its case.[10]

- A third human rights related area in which the OAU achieved a considerable measure of success is the collective effort to rid Africa of **apartheid** in South Africa.

- In the field of **refugees**, the OAU in 1969 adopted the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.[11]

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7 Denoted a "pigmentational self-determination" by Mazrui, quoted by Blay (1985) 29 *JAL* 147 at 157.

8 Blay (1985) 29 *JAL* 143 at 152 - 153. It should be noted that the 1994 Ethiopian Constitution has incorporated decentralisation by creating nine member states. "Nations, nationalities and peoples" within these states have the right to establish "their own States" (art 47(2) of the Constitution). At first glance this may seem to allow for the secession of groups (or "peoples") from the federal state. This is not the case, though: The new state "directly becomes a member of the Federal Democratic Republic of Ethiopia" (art 47(3)(e) of the Constitution) after complying with other requirements. For example, a two-thirds majority in the State Council and an ordinary majority in a referendum of the "nation, nationality or people" is required (art 47(3) of the Constitution). A multiplication of federal units within, rather than secession from the federal state, is envisaged.

9 Naldi (1982) 26 *JAL* 152.

10 See EL-Obaid and Appiagyei-Atua (1996) 4 *McGill Law Jnl* 819 at 844.

11 See par 3.5 below.

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Human rights abuses by independent African states involving especially their own citizens were largely overlooked by the OAU.[12] A long list of human rights abusers provide testimony to that fact. In none of the following instances has the OAU publicly criticised the ruler:[13]

- Idi Amin and Milton Obote in Uganda[14]
- Bokassa in the Central African Republic[15]
- Marcias Nguema in Equatorial Guinea
- Mobutu Sese Seko in Zaïre
- el-Nimiery and al-Bashir in Sudan
- Barré in Somalia
- Mengistu Haile Miriam in Ethiopia
- General Acheampong of Ghana
- Generals Babangida and Sanni Abacha in Nigeria
- Kamuzu Banda in Malawi
- Paul Biya in Cameroon
- Daniel arap Moi in Kenya

The adoption of the African Charter on Human and Peoples' Rights[16] on 17 June 1981 has been a significant step towards greater concern for human rights in OAU member states. The Charter entered into force in 1986. The OAU subsequently exerted pressure by adopting resolutions urging

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12 Chanda (1989-92) 21 - 24 *Zambia Law Jnl* 1 at 17 described the OAU's record in this respect as "dismal".

13 See the list provided by Chanda (1989 - 92) 21 - 24 *Zambia Law Jnl* 1 at 16. See also Umozurike (1983) 77 *AJIL* 902 at 903 and Weisfelder in Welch and Meltzer (eds) (1984) at 90. Since this study concerns itself with human rights realisation in the supra-national, rather than in the national sphere, historical details about these human rights atrocities are not provided. Listing is always treacherous, and this list does not purport to be comprehensive. Citing these examples does not imply any form of exonoration of other violators of human rights on the continent.

14 See Republic of Uganda (1994).

15 See eg Lique (1993).

16 OAU Doc CAB/LEG/67/3/Rev 5, reprinted in eg (1981) 21 *ILM* 58.

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states to ratify the Charter.[17] At the end of 1996, the Charter enjoyed near-universal ratification.[18] The OAU has adopted other resolutions of relevance, urging states to comply with the requirements of the Charter.[19] Unfortunately, the practice of the OAU has not changed sufficiently. The fact that human rights still do not enjoy significant attention is reflected most strikingly in the inadequate financial provision made towards the needs of the African Commission.

Having omitted human rights from the OAU Charter, the organisation continued to subscribe to a notion that violations occur primarily *between* states, and not *within* states. In this state-centred approach, human rights violations are addressed on the political and diplomatic level. For this reason, resolving disputes between states has since its inception been one of the OAU's priorities. Indeed, one of the four institutions provided for in the Charter is the Commission of Mediation, Conciliation and Arbitration ("CMCA").[20] The CMCA was founded to facilitate peaceful settlement of disputes between African states.[21] Just more than a year after the OAU had been founded, the Protocol of the Commission on Mediation, Conciliation and Arbitration was adopted.[22] In terms of the Protocol, the CMCA could only involve itself in conflicts between states. Gutto finds this preoccupation with inter-state disputes "quite in line with the general canons of international law as it then was".[23]

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17 See eg Resolution on the African Commission on Human and Peoples' Rights, 28th Ordinary Session of Assembly of Heads of States and Government of the OAU, 29 June - 1 July 1992, Dakar, Senegal, par D (also at Website http://heiwww.unige.ch/humanrts/africa/resafrchar28th.html).

18 See Table J below.

19 See eg the Resolution on the African Commission (adopted at the 28th session, in 1992), urging states parties to the Charter which have not submitted their initial reports to do so as soon as possible and requesting states to include human rights teaching in public education. At its 30th session (13 - 15 June 1994, Tunis, Tunisia), the Assembly adopted a resolution calling on states to take concrete measures towards the effective implementation of the Charter, calling on states to co-operate with the Special Rapporteur on extra-judicial executions, and urging all interested parties to ensure that the Commission is endowed with sufficient resources.

20 Art 7 of the OAU Charter.

21 See also art 3(4) of the OAU Charter, for the organisation's commitment to peaceful settlement of disputes by way of negotiation, mediation, conciliation or arbitration.

22 It was approved by the Assembly in Cairo, July 1964: Chanda (1989 - 92) 21 - 24 *Zambia Law Jnl* 1 at 9, Gutto (1996) 113 *SALJ* 314 at 317.

23 Gutto (1996) 113 *SALJ* 314 at 317.

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The CMCA was a complete failure. Not once did a state approach it to settle a dispute.[24] The most obvious reason for this failure is that gross violations of human rights were usually not the product of disputes between states, but rather the product of repression or strife within the borders of a single state. However, inter-state conflict has also accounted for the deprivation of basic rights of numerous Africans.[25] This does not imply that no efforts were made to settle inter-African disputes. African states devised "more flexible *ad hoc* bodies of varying sizes".[26] Kunig described some of these efforts, indicating the prospect of success when heads of state were involved.[27]

Recognising the failure of the CMCA, the OAU Assembly of Heads of State and Government adopted the Cairo Declaration, which established the Mechanism for Conflict Prevention, Management and Resolution ("MCPMR") in 1993.[28] The primary objective of the MCPMR is to anticipate and prevent conflicts between African states. Realistically, the role of the Mechanism is seen as limited. It is restricted to "civilian and military missions of observation and monitoring of limited scope and duration",[29] and will not be directed at "resource-demanding peacekeeping operations".[30] The Central Organ is composed of the members elected annually to the Bureau of the Assembly. It is not clear to what extent the Mechanism is mandated to involve itself in internal conflicts. This is of paramount importance, as these conflicts have been both more numerous and more destructive of basic human dignity on the African continent than inter-state conflicts.[31] The

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24 Chanda (1989 - 92) 21 - 24 *Zambia Law Jnl* 1 at 15.

25 Gutto (1996) 11 *SALJ* 314 mentions the disputes between Uganda and Tanzania, Algeria and Morocco, Ethiopia and Somalia, Somalia and Kenya, Chad and Libya, Senegal and Guinea, Rwanda and Burundi, Ghana and Burkina Faso, Nigeria and Cameroon, and between Burkina Faso and Mali (at 317).

26 Chanda (1989 - 92) 21 - 24 *Zambia Law Jnl* 1 at 15.

27 Kunig (1984) at 30-31.

28 See the Declaration of the Assembly of Heads of State and Government on the Establishment Within the OAU of A Mechanism for Conflict Prevention, Management and Resolution, adopted in Cairo, at the 29th ordinary session of the Assembly, 28 - 30 June 1993: AHG/Decl. (XXIX) Rev 1 (also referred to as the "Cairo Declaration").

29 Par/Art 15 of the Declaration.

30 *Ibid.*

31 Classical examples are: the Biafran war in Nigeria, the Katangese secessionist movement in Congo, the conflict between northern and southern Sudan, the struggle between the Angolan government and UNITA, and the protracted war between RENAMO and the Mozambican government.

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Cairo Declaration does not grant blanket approval of interference by the OAU in the domestic affairs of member states. On the contrary, it explicitly provides that it will "function on the basis of the consent and the co-operation of the parties to a conflict".[32]

Furthermore, it will be guided by the objectives of the OAU Charter, in particular those principles impeding scrutiny by external organs of internal affairs.[33] The only indication that pressure for internal inspection may overrule these considerations is found in the use of the word "guided" (as opposed to "will be bound") in paragraph 14. Gutto interprets the Mechanism as a breakthrough in that it provides a "clear basis for responding to both ... internal and external conflicts".[34] Support for this contention is found in the assertion that no "single factor has contributed more to the present socio-economic problems on the continent than the scourge of conflicts within and between our countries."[35]

The lack of a "clear basis" had not prevented the Central Organ from being seized with conflicts of an internal character in Rwanda, Burundi, Somalia, Liberia, Angola and Mozambique.[36] This is perhaps explained by the background which Wembou provided.[37] According to him, all the delegates present in Cairo (with the exception of the Sudanese delegation) agreed that there may be extraordinary circumstances in which the OAU will have to intervene even without first appealing to the international community.[38] Examples cited were Liberia and Somalia, where the extreme suffering and the total disregard for human rights were indicative of the disintegration of the state structure.[39]

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32 Par 14 of the Declaration.

33 In terms of par 14, non-interference in the internal affairs of member states, the respect of the sovereignty and territorial integrity of member states, and their inalienable right to independent existence.

34 (1996) 113 *SALJ* 314 at 315.

35 Par 9 of the Declaration.

36 See Gutto (1996) 113 *SALJ* 314 at 321.

37 Wembou (1993) 5 *RADIC* 725.

38 (1993) 5 *RADIC* 725 at 729.

39 *Ibid.*

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The MCPMR is a promising development. It operates from the premise that human rights and security concerns are linked, and that human rights violations by states should be and can be prevented. The Mechanism shows resemblances to the European equivalent, the Organisation for Security and Co-operation in Europe ("OSCE"),[40] which may be enhanced in the future. It has the advantage that it fits more into traditional systems of international dispute settlement than into the human rights implementation model.[41]

3.2 The African Charter on Human and Peoples' Rights

3.2.1 Introduction

Of the three major regional human rights system in the world today, the African is the most recent. The European Convention, the basis of one system, was adopted in 1950. The other system, the Inter-American, was founded in 1948,[42] although the first human rights institution only dates from 1960. The last of the three was founded in 1981 when the Assembly of Heads of State and Government of the OAU adopted the African Charter.[43] After a simple majority of OAU member states had ratified the Charter, it took effect on 21 October 1986.[44] When the tenth anniversary of that date was celebrated, only two member states had not become party to the Charter.

At 51 members, the African system has the largest number of states parties of the three regional systems. While the novelty and geographical scope of the African Charter should be celebrated, they also reflect some of the deficiencies in the functioning of the Charter system.[45] Although near-universal acceptance strengthens the moral force of the Charter, it should not be overemphasised. For example, even after ratification of the Charter in 1995, Swaziland was still ruled by a 1973

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40 See ch 5.1 below.

41 See further on this aspect Brett (1996) 18 *HRQ* 668 at 679.

42 With the adoption of the Charter of the Organisation of American States (see ch 5.2 below).

43 For a historical background, see eg Kannyo in Welch and Meltzer (eds) (1984) 128.

44 The required majority was 26 states.

45 These deficiencies are, for example, the lack of a developed regional human rights jurisprudence, inefficiency in response to continental crises, and regional predominance of the Commission.

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decree which outlawed opposition parties and trade unions in the Kingdom. Swazi trade unions organised strikes when the government refused to agree to demands for democratisation and the right to form trade unions.[46] The danger of focusing excessively on trans-continental ratification is that the perception may be created that human rights in Africa will be "realised" as soon as this goal has been attained. Ratification should not be used by repressive governments as a brush to white-wash human rights abuses or as a justification to serve as a smoke-screen to hide the reality of repression.

3.2.2 Substance clarified

The distinctive features and potential application of the African Charter have been the topic of an abundance of scholarly discussion inside and outside Africa.[47] Rather than repeating or summarising this discourse, I will look at the practice of the African Commission in giving some shape to the amorphous body of substantive provisions. The individual communications decided by the Commission on the merits of cases will be reviewed in another section of the study.[48] Here, the Commission's work in four other fields is reviewed:

- "**general comments**" about Charter provisions by adopting resolutions
- implications of **guidelines** for state reporting
- views expressed in the course of **examining state reports** presented in terms of article 62 of the Charter
- reference to the substance of a particular right in the Commission's **admissibility decisions**

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46 See Gebhardt "Union's Swazi Threat" (21- 27 February 1997) *Mail and Guardian* Bl.

47 See eg, rather randomly chosen, Eze (1984), Gittleman in Welch and Meltzer (eds) (1984) 152, Huaraka in Tom (1988) at 193 (discussing the collective concept of human rights, second and third generations of rights, especially the right to self-determination, duties and the right to life), Kunig in Kunig *et al* (1985), Mbaya (1984), M'Baye (1992), Mutua (1995) 35 *Virginia Jnl of Intl Law* 339, Ouguergouz (1993), Rembe (1985), Peter (1990) (in comparison with the Tanzanian Bill of Rights), Umozurike (1983), 77 *AJIL* 902, and Welch in El-Ayouty (ed) (1994) 53.

48 Par 3.3.3 below.

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- Although the Charter is silent on the possibility of entering **reservations** upon ratification, two states parties have "clarified" their understanding of the substance of the Charter. These reservations are also discussed.

3.2.2.1 "General comments"[49]

One of the four main functions of the Commission is to "promote" human and peoples' rights.[50] Even if no provision was included to provide in particular for the competence to issue "general comments" about the ambit of rights, such competence could have been included in the broad term "promotion". This was not necessary, because the Charter makes reference to the competence to "formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights".[51] The more general mandate of *interpreting* the Charter provisions may only be exercised at the request of states, OAU institutions, and other African organisations or NGOs recognised by the OAU.[52] Although the Commission has not adopted "general comments" about country reports or the provisions of the Charter, one may derive such "comments" from its resolutions on a number of issues:

i Fair trial

The right to have one's case heard, article 7, has been criticised as being incomplete. The very crucial pre-trial phase of the criminal procedure is also insufficiently dealt with in article 6, which provides in general terms that "no one may be arbitrarily arrested or detained". However, the arrested person or detainee may be deprived of his or her freedom in terms of reasons and conditions "previously laid down by law".[53] In an attempt to "deepen the understanding of

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49 What follow are not general comments in the same sense as those issued by some of the UN treaty bodies. The Commission has not issued general comments as such, but has adopted resolutions on aspects contained in the Charter. I have extracted "general comments" from these resolutions.

50 Art 45(1) of the Charter.

51 Art 45(1)(b) of the Charter.

52 Art 45(3) of the Charter.

53 Article 6 of the Charter, comprising a "claw-back" clause.

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substantive rights guaranteed by the Charter",[54] the Commission adopted a resolution on the "Right to Recourse Procedure and Fair Trial" at its 11th session. While the resolution restates aspects already contained in articles 6 and 7, as well as in article 3, the following had been added:

- The unequivocal point of departure is that the right to a fair trial is "essential for the protection of fundamental human rights and freedoms". This gives more importance to the right than was the case previously.

- The necessity of an effective remedy to redress violations of rights is underlined.

- As far as the pre-trial phase is concerned, the right not to be "arbitrarily" arrested or detained[55] is supplemented to include the right to be **informed promptly**, at the time of arrest, in a language he or she understands, of the **reason for the arrest and of any charges**; of the right to be **brought before a judicial officer promptly** after arrest or detention; and of the right to be **brought to trial within a reasonable time** or to be released.

- Article 7(1)(c) provides for the right to defence, including the right to be defended by counsel of one's choice. The Commission resolution clarifies that the right includes that the individual is entitled to "have adequate time and facilities" for the preparation of that defence, and should be allowed to "communicate in confidence with counsel of their choice". It further includes the right to examine, or have examined, the witnesses against him or her, and not to be prejudiced in obtaining witnesses on his or her behalf. The resolution also recommends that states parties provide the needy with legal aid.

- An aspect of a fair trial omitted from the Charter is the right to an interpreter. The resolution provides for "the free assistance of an interpreter" to persons unable to speak the language used in court.

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54 Fifth Activity Report (1991-1992) at 7.

55 As set out in art 6 of the African Charter.

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ii Freedom of association

The exercise of the right to freely associate is made conditional on the requirement that one abides by "the law".[56] The danger that governments may limit the exercise of this right and claim to be within the ambit of the African Charter is to a large extent alleviated by the adoption of the Commission's resolution on the right to the freedom of association at its 11th session. This resolution calls on governments not to "enact provisions which would limit the exercise of this Freedom".[57] More ambiguously, the regulation of the exercise of this right "should be consistent with States' obligations under the African Charter". Presumably, the obligation referred to here is to ensure the enjoyment of the rights and freedoms guaranteed in the Charter.[58]

This was the first resolution adopted by the Commission to be referred in one of its own decisions on the merits of a communication.[59] In the case referred to, Nigeria was found to be in violation of article 10 of the Charter. One of the reasons for the finding was the action by the governing authorities in that country to "enact provisions which limit the exercise of this freedom" and "are against obligations under the Charter". This is an indication that the resolutions may serve as interpretative guides to the Charter.

iii Judicial independence

Another aspect of article 7, the right to be tried "by an impartial court or tribunal", was clarified by a resolution adopted at the Commission's 19th session. The resolution incorporated practical concerns, such as appointment, posting, resources, living and working conditions, security of tenure and threats to the security of judges and magistrates.[60]

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56 Art 10(1) of the African Charter.

57 Fifth Annual Activity Report at 28.

58 See in general arts 1 and 2 of the Charter.

59 Communication 101/93 (*Civil Liberties Organisation (in respect of the Nigerian Bar Association) v Nigeria).*

60 For a full text of the resolution, see par 3.4.4(a) below.

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iv The right to vote in democratic elections

The Charter does not contain the right to vote, nor does it embody democratic concepts such as universal suffrage and credible, free and fair elections. The only relevant provision is article 13, which states that every citizen "shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law". This was the product of compromise in a political context where the one party system prevailed in numerous African states. Presumably, the requirement of "through freely chosen representatives" would have been satisfied by the existence of elections within a single party system, or from a list presented by the party in power.

A resolution adopted at the 19th session on "electoral process and participatory governance" introduces the concept of "elections". Noting with satisfaction the democratic elections in Benin, the Comoros and Sierra Leone as part of the "transition to democratic rule" in these countries, the Commission asserted that "elections are the only means by which people can elect democratically the Government of their choice in conformity with the African Charter".[61] This clearly qualifies the vague reference to "through freely chosen representatives" in article 13. The Commission further called on governments to take measures to ensure the credibility of electoral processes, emphasising the responsibility of states to provide in the material needs of electoral supervisory bodies.[62]

3.2.2.2 Implications of guidelines for state reporting

Over-elaborate as they are,[63] the guidelines for state reporting give an indication of how some rather elusive substantive Charter provisions are to be interpreted. For example, Scoble noted the complete silence of the Charter with regard to "trade unions".[64] If the right to form trade unions "are silently subsumed under freedom of association",[65] the claw-back clause embodied in article

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61 Ninth Annual Activity Report, Annex VII at 9.

62 On a view on the link between human rights and democracy in modern Africa, se Maluwa (1997) 9 *RADIC* 55.

63 See the criticism at par 3.3.4(b)(i) below.

64 Scoble in Welch and Meltzer (eds) (1984) 177 at 194.

65 *Ibid.*

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10 could easily render the right illusory. Despite this dubious basis, the Commission introduced a heading "Trade Union Rights" in the guidelines for state reporting.[66] Reporting must refer to the right "to form and join Trade Unions", of "Trade Unions to Federate", and to "function freely". States also have to report on the *de iure* or *de facto* position governing the exercise of the right to strike.[67]

3.2.2.3 Views expressed during examination of state reports

Views expressed in the course of examining state reports are no more than asides, but they may be informative of the opinions held by individual commissioners. As could be expected, these views do not provide a uniform position taken by the Commission. For this reason, no attempt will be made to describe all the views that have been expressed during the examination of state reports.

One issue, capital punishment, is briefly discussed as an example.[68] Commissioner Beye has openly and explicitly identified himself as an abolitionist. At the Commission's 12th sesssion, he raised the issue of the abolition of the death penalty in relation to the country reports of the Gambia and Senegal. In both cases a very small number of executions had taken place over an extended period (one in 30 years in the Gambia, two in 32 years in Senegal).[69] In the latter instance Commissioner Beye emphasised that he is personally opposed to the death penalty. He made it clear that the

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66 In section II, "General guidelines regarding the form and contents of reports on economic and social rights".

67 Par II 16 of the reporting guidelines.

68 This is an issue of importance. Only three African states have ratified the Second Optional Protocol to the CCPR. By 1996, four African states have abolished the death penalty through statute. They are Cape Verde, Mauritius, Mozambique and Namibia (see (1996) 40 *JAL* 119, in which the adoption of a total ban on the death penalty in 1995, in Mauritius, is discussed). The Namibian Constitution of 1990 provides one of the clearest constitutional pronouncements worldwide against capital punishment: "The right to life shall be respected and protected. No law may prescribe death as a competent sentence. No Court or Tribunal shall have the power to impose a sentence of death upon any person. No executions shall take place in Namibia" (art 6). The Gambia had previously abolished capital punishment by statute, but the present military government reinstated it in 1995. In South Africa, the Constitutional Court declared capital punishment unconstitutional: see *S v Makwanyane* 1995 3 SA 391 (CC).

69 *Examination of State Reports* vol 3 (1995) at 32 and 79.

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Charter is silent on the question and that the Commission has no recognised position on it.[70] The question put to the government representative in each case was why the death penalty is kept in place *de iure*, when it has *de facto* been abolished. A question put by commissioner Umozurike at the 16th session is also of relevance. He observed that Cape Verde was one of the few countries in Africa where capital punishment had been abolished. Remarking that there is "a discrepancy to the right to life",[71] he asked the representative whether the government would like to see this experience extended to the rest of Africa. Expressing an obviously personal opinion, the representative answered that the experience need not be "taken to sale", due to the "complexity" of the issue.[72]

3.2.2.4 Substance of right addressed in admissibility decision

Article 56 of the Charter, dealing with the requirements for admissibility, refers to "communications relating to human and peoples' rights". One of the requirements is that the communication should be "compatible ... with the ... Charter".[73] Part of the Commission's consideration in the admissibility phase is to ascertain whether a right, as contained in the Charter, is allegedly violated.

The Katanga secession case failed at this first hurdle.[74] The Katangese Peoples' Congress requested the Commission to declare the right of the Katangese "people" to complete sovereign independence, thus enabling them to secede from the state of Zaïre. Article 20(1) formed the basis of this claim. It provides that "all peoples" have the right to "self-determination".

The Commission found that the claim as such does not amount to an allegation that article 20 had been violated. It argued as follows:

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70 Examination of state reports vol 3 (1995) at 57: "La Commission n'a pas de position reconnue sur la peine de mort".

71 Public session, 25 October 1994.

72 *Ibid.*

73 Art 56(2).

74 Communication 75/92 (*Katangese Peoples' Congress v Zaïre*). One may also regard this as a decision on the *merits* of the case. The decision itself does not clarify the issue.

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- It is the Commission's obligation to uphold the territorial integrity and sovereignty of all member states of the OAU and those party to the African Charter. This includes Zaïre.

- The term "peoples" is not defined in the Charter and the Commission refrained from giving a definition.

- Self-determination can be attained in a variety of ways. Possibilities include independence, but also federalism, confederalism, local government and unitarism.

- In principle, then, nationals of a state must exercise their right to self-determination by making use of one of the available alternatives, without undermining the territorial integrity and sovereignty of the state.

- Two possible grounds that may justify a variant of self-determination which would be incompatible with the territorial integrity and sovereignty of the state are hinted at by the Commission. One ground is "concrete evidence of violations of human rights to the point that the territorial integrity (of the state) should be called to question". The other is evidence that the group of people concerned are denied the right to participate in government, as guaranteed by the Charter.[75]

The implication of the finding is that the term "peoples" is given a state-centred content. All the nationals who happen to find themselves in a particular state have to express their "right to self-determination" within the boundaries of that state. The right to self-determination then essentially operates only as against colonial and other oppressors. However, a close reading of article 20 shows that article 20(1) contains a general statement about the right of self-determination of "all peoples". Article 20(2) deals specifically with the right of "colonized and oppressed peoples". The use of two different concepts (the one general, the one specific) implies that the right in article 20(1) is available to a broader group than just those forming a state in response to colonialism. It leaves open the possibility that the right to self-determination may also be applied to "peoples in

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75 Art 13(1).

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the post-colonial context".[76] While the intention of the drafters possibly was quite different,[77] the Commission should not be trapped thereby. Also, one should note that the African Charter does not mention territorial integrity - one of the anchors of the OAU Charter. On this basis, an argument may be made that the Charter left the door open for specific claims to secession to be determined on their merits, and not to be discarded *en masse*.

Although the Commission declared the Katangese claim inadmissible, the decision implies that the right may be extended to groups within a state who are persecuted, whose rights are consistently violated and who are denied a meaningful say in government. Under the conditions mentioned these groups may qualify as "peoples" with a "right to self-determination". This right could include the right to secede from the state of which they are nationals. Ankumah advises that oppressed groups "within sovereign African states should be entitled to seek redress from the Commission".[78] In my view the balanced view of the Commission clearly provides for such a possibility. Partially, the problem with the Katangese communication was that it lacked a factual or evidentiary basis indicative of oppression or human rights abuses by the Zairian government directed at the Katangese people.

3.2.2.5 Reservations as "clarification" in respect of particular states

The Charter differs from multi-lateral treaties adopted under UN auspices in that it does not provide states with the possibility of entering reservations when they ratify the Charter. Notwithstanding, two states parties to the Charter (Egypt and Zambia) have entered declarations or reservations upon ratification.[79] The first reservation, from Zambia, is dated 10 January 1984.

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76 Blay (1985) 29 *JAL* 147 at 158. See also Blay (1985) 27 *JAL* 147 at 158 - 159, who shows that the Charter provision was adopted without amendment, despite the fact that the possibility of the relevant article being applied beyond the colonial context being raised during deliberations.

77 Ankumah (1996) at 165.

78 Ankumah (1996) at 165.

79 Information contained in letter faxed to me on 2 May 1997 by the acting head of the OAU legal division, Ben Kioko.

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Various aspects are covered, of which only one qualifies as a "reservation".[80] This deals with article 13 of the Charter.[81] The reservations entered by Egypt are of a more fundamental nature. The rights to freedom of conscience, profession and religion,[82] as well as women's right to equal treatment[83] have to be "implemented in accordance with the Islamic law".

These reservations have to comply with the applicable international standards. The primary requirement is that the reservation may not be incompatible with the object and purpose of the relevant treaty.[84] What the Egyptian reservations have in fact accomplished is to extend the claw-back clauses already restricting most rights in the Charter, to other rights. Given the extent of restriction already allowed by the Charter, further inroads into the rights have to be minimised. In the light of these factors, it is unlikely that the Egyptian reservations are in accordance with international law.

3.3 The African Commission on Human and Peoples' Rights

3.3.1 Background, mandate and functioning

Eleven Commissioners, elected by the Assembly of Heads of state and Government, serve in a part-time capacity on the Commission.[85] They are nominated by states from amongst "African personalities of the highest reputation"[86] and known for their "competence in matters of human and

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80 Other aspects include the drawing of the lot by the Secretary-General, and placing an obligation on non-ratifying states to report on difficulties causing them to delay ratification.

81 Art 13(3) "should read" as follows: "Every individual shall have the right of access to any place, service or public property intended for use by the general public".

82 Art 8 of the Charter.

83 Art 18(3) of the Charter.

84 Art 19(c) of the 1969 Vienna Convention on the Law of Treaties, which entered into force in 1980.

85 On the composition and establishment of the Commission, see Part II, ch I of the Charter.

86 Reputation lies in the eye of the beholder, obviously. The governments opt for people who have held government positions. See Table F, in which it is reflected that only one commissioner (Ondziel) is totally

Footnotes continued on next page.

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peoples' rights".[87] They serve in their personal capacities.[88] These members are elected for six-year terms, and may be re-elected indefinitely.[89] After the very first election, though, lots are drawn to decide which four members will have their terms terminated after two years, and which three at the end of four years.[90] No provision is made for geographic, legal or gender representativity in the composition of the Commission. This has led to the deplorable situation in which the Commission, at its 20th session, consisted of six members from West Africa, two each from North and Central Africa, one from East Africa and none from the whole of Southern Africa[91]. Commissioners are generally appointed at an advanced age and are often linked to government, even as diplomats serving their governments. Table C, setting out the profiles of the current Commissioners is presented to illustrate these remarks:[92]

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independent from the government. In general, too, respect in Africa is associated with age. It should be unremarkable that the average age of the present commissioners is 54.4 years.

87 Art 31 of the Charter.

88 Art 31(2) of the Charter.

89 Art 36 of the Charter. By the 21st session of the Commission four of the eleven had been serving the Commission consistently since its inception. The average number of years served by the present commissioners is 6.3.

90 See arts 36, 37 of the Charter.

91 See Table C.

92 Tables C, D and E have been compiled from data in the Commission's Annual Activity Reports, Final Communiqués and answers by commissioners to questions posed by Akumah (Oct - Dec 1996) *AFLAQ* 7.

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TABLE C: PROFILE OF MEMBERS OF THE AFRICAN COMMISSION AS AT 31 MARCH 1997

COMMISSIONER	COUNTRY (region) (individual languages spoken)	AGE (at end of 1996)	PROFESSION (at end of 1996)	YEARS SERVED AS AT 1997 OAU SUMMIT
Amega	Togo (W. Africa) (francophone)	64	Retired (formerly Minister of Foreign Affairs and President of Supreme Court)	4
Ben Salem	Tunisia (N. Africa) (arabophone; speaks French and English)	40	Ambassador (to Senegal)	5
Beye	Mali (W. Africa) (francophone)	56	UN Special Representative to Angola (formerly Minister of Foreign Affairs)	10
Dankwa	Ghana (W. Africa) (anglophone)	51	Law Professor	4
Duarte-Martins	Cape Verde (W. Africa) (lusophone; speaks French)	43	Justice of Supreme Court	4
Kisanga	Tanzania (E. Africa) (anglophone)	63	Justice of Court of Appeal	10
Nguema	Gabon (C. Africa) (francophone)	59	Law Professor	10
Ndiaye	Senegal (W. Africa) (francophone)	58	President of Constitutional Court	10
Ondziel-Gnelenga	Congo (C. Africa) (francophone)	52	Lawyer	2
Rezzag-Bara	Algeria (N. Africa) (arabophone; speaks English and French)	48	President of National Human Rights Monitoring Group in Algeria	2
Umozurike	Nigeria (W. Africa) (anglophone)	64	Law professor; member of Nigerian Human Rights Commission	8

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Table D provides a full list of people serving on the Commission in its first ten years of existence. It also appears that it is the rule, rather than the exception, for Commissioners to be re-elected after their first term. Four of the present Commissioners (Beye, Kisanga, Nguema and Ndiaye) have been serving the Commission without interruption since 1987. This factor has provided some continuity in the functioning of the Commission, but also epitomises a spirit of cautious conservatism which has inhibited innovation.

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TABLE D: PERSONS WHO SERVED AS MEMBERS OF THE AFRICAN COMMISSION : 1987-1997

COMMISSIONER	COUNTRY	FIRST ELECTED (for term)	RE-ELECTED (for term)	NEXT ELIGIBLE FOR ELECTION (if incumbent)
Amega	Togo	1993 (6 years)		1999
Beye	Mali	1987 (2 years)	1989 (6 years) 1995 (6 years)	2001
Ben Salem	Tunisia	1992 (5 years - in place of Chipoya)		1997
Buhedma	Libya	1987 (6 years) [not re-elected in 1993]		
Chipoya	Zambia	1987 (4 years)	1991 (6 years) (died in 1992)	
Dankwa	Ghana	1993 (6 years)		1999
Duarte-Martins	Cape Verde	1993 (6 years)		1999
El Sheikh (Badawi)	Egypt	1987 (2 years)	1989 (6 years) [not re-elected in 1995]	
Gabou	Congo	1987 (6 years) [not re-elected in 1993]		
Ibingira	Uganda	1987 (4 years) [resigned in 1989]		
Janneh	Gambia	1989 (6 years) [not re-elected in 1995]		
Kisanga	Tanzania	1987 (4 years)	1991 (6 years)	1997
Mokama	Botswana	1987 (6 years) [not re-elected in 1993]		
Nguema	Gabon	1987 (2 years)	1989 (6 years) 1995 (6 years)	2001
Ndiaye	Senegal	1987 (6 years)	1993 (6 years)	1999
Ondziel-Gnelenga	Congo	1995 (6 years)		2001
Rezzag-Bara	Algeria	1995 (6 years)		2001
Semenga	Gambia	1987 (2 years) [not re-elected in 1989]		
Umozurike	Nigeria	1989 (5 years - in place of Ibingira)	1991 (6 years)	1997

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The Commission's headquarters is located in Banjul, the Gambia, which also hosts its secretariat. The Commission meets twice per year, around April and November, for sessions of ten to fifteen days. A scheme setting out these sessions follows:

TABLE E: SESSIONS OF COMMISSION : 1987-1997

SESSION	PLACE	DATE	COMMISSIONERS ATTENDING	COMMISSIONERS ABSENT	STATE REPORT CONSIDERED
1st	Addis Ababa, Ethiopia	2 November 1987	Chair: Nguema Vice-Chair: El Sheikh (Badawi) Beye, Buhedma, Gabou, Ibingira, Semega, Kisanga, Mokama, Ndiaye	Chipoya (with apology)	
2nd	Dakar, Senegal	8 to 13 February 1988	Chair: Nguema Vice-Chair: El Sheikh (Badawi) Beye, Buhedma, Gabou, Chipoya, Semega, Kisanga, Mokama, Ndiaye	Ibingira (with apology)	
3rd	Libreville, Gabon	18 to 28 April 1988	Chair: Nguema Vice-Chair: El Sheikh (Badawi) Beye, Buhedma, Gabou, Chipoya, Semega, Kisanga, Mokama, Ndiaye	Ibingira	
4th	Cairo, Egypt	17 to 26 October 1988	Chair: Nguema Vice-Chair: El Sheikh (Badawi) Buhedma, Gabou, Chipoya, Ibingira, Kisanga, Mokama, Ndiaye, Semega	Beye (with apology)	
5th	Benghazi, Libya	3 to 14 April 1989	Chair: Nguema Vice-Chair: El Sheikh (Badawi) Beye, Buhedma, Chipoya, Gabou, Kisanga, Mokama, Ndiaye, Semega	Ibingira	
6th	Banjul, Gambia	23 October to 4 November 1989	Chair: Umozurike Vice-chair: Gabou Beye, Buhedma, Chipoya, El Sheikh (Badawi), Janneh, Kisanga, Mokama, Ndiaye, Nguema		
7th	Banjul, Gambia	18 to 28 April 1990	Chair: Umozurike Vice-chair: Gabou Buhedma, Chipoya, El Sheikh (Badawi), Janneh, Kisanga, Ndiaye, Nguema	Beye, Gabou, Mokama (all with apology)	
8th	Banjul, Gambia	8 to 21 October 1990	Chair: Umozurike Vice-chair: Gabou Beye, Buhedma, Chipoya, El Sheikh (Badawi), Janneh, Kisanga, Mokama, Ndiaye, Nguema		

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9th	Lagos, Nigeria	18 to 25 March 1991	Chair: Umozurike Vice-chair: Gabou Beye, Buhedma, Chipoya, El Sheikh (Badawi), Janneh, Kisanga, Mokama, Ndiaye, Nguema		Libya Rwanda Tunisia
10th	Banjul, Gambia	8 to 15 October 1991	Chair: El Sheikh (Badawi) Vice-Chair: Chipoya Beye, Buhedma, Janneh, Kisanga, Mokama, Nguema, Umozurike	Ndiaye (with apology), Gabou	
11th	Tunis, Tunisia	2 to 9 March 1992	Chair: El Sheikh (Badawi) Vice-Chair: Janneh (Chipoya died) Beye, Buhedma, Kisanga, Mokama, Ndiaye, Nguema, Umozurike	Gabou	Egypt Tanzania
12th	Banjul, Gambia	12 to 21 October 1992	Chair: El Sheikh (Badawi) Vice-Chair: Janneh Ben Salem, Beye, Buhedma, Kisanga, Ndiaye, Nguema, Umozurike	Mokama (with apology), Gabou	Gambia Senegal Zimbabwe
13th	Banjul, Gambia	29 March to 7 April 1993	Chair: El Sheikh (Badawi) Vice-Chair: Janneh Ben Salem, Beye, Buhedma, Gabou, Kisanga, Mokama, Nguema, Umozurike	Ndiaye (with apology)	Nigeria Togo
14th	Addis Ababa, Ethiopia	1 to 10 December 1993	Chair: Nguema Vice-Chair: Ben Salem Amega, Dankwa, Duarte-Martins, El Sheikh (Badawi), Janneh, Kisanga, Ndiaye, Umozurike	Beye (with apology)	Ghana
15th	Banjul, Gambia	18 to 27 April 1994	Chair: Nguema Vice-Chair: Ben Salem Dankwa, Duarte-Martins, El Sheikh (Badawi), Janneh, Kisanga, Ndiaye, Umozurike	Amega and Beye (with apology)	
16th	Banjul, Gambia	25 October to 3 November 1994	Chair: Nguema Vice-Chair: Ben Salem Dankwa, Duarte-Martins, El Sheikh (Badawi), Janneh, Kisanga, Umozurike	Amega, Beye and Ndiaye (with apology)	Benin Cape Verde Gambia II
17th	Lomé, Togo	13 to 22 March 1995	Chair: Nguema Vice-Chair: Ben Salem Amega, Dankwa, Duarte-Martins, El Sheikh (Badawi), Janneh, Kisanga, Umozurike	Beye and Ndiaye (with apology)	
18th	Praia, Cape Verde	2 to 11 October 1995	Chair: Nguema Vice-Chair: Dankwa Amega, Ben Salem, Duarte-Martins, Kisanga, Ndiaye, Ondziel-Gnelenga, Rezzag-Bara, Umozurike	Beye (with apology)	Tunisia II
19th	Ougadou-gou,	26 March to 4 April 1996	Chair: Nguema Vice-Chair: Dankwa	Amega, Ben Salem, Beye (with apology)	Algeria Mozambique

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	Burkina Faso		Duarte-Martins, Kisanga, Ndiaye, Ondziel-Gnelenga, Rezzag-Bara, Umozurike		
20th	Grand Bay, Mauritius	21 to 31 October 1996	Chair: Nguema Vice-Chair: Dankwa Amega, Ben Salem, Beye, Duarte-Martins, Kisanga, Ndiaye, Ondziel-Gnelenga, Rezzag-Bara, Umozurike		Mauritius
21st	Nouak-chott, Maurita-nia	15 to 24 April 1997	Chair: Nguema Vice-Chair: Dankwa Ben Salem, Ndiaye, Ondziel-Gnelenga, Rezzag-Bara, Umozurike	Amega, Beye, Duarte-Martins, Kisanga	Sudan Zimbabwe II + III
			EXTRAORDINARY SESSIONS		
SESSION	PLACE	DATE	COMMISSIONERS ATTENDING	COMMISSIONERS ABSENT	STATE REPORT CONSIDERED
1st	Banjul, Gambia	13 to 14 June 1989	Chair: Nguema Vice-Chair: El Sheikh (Badawi) Buhedma, Chipoya, Gabou, Kisanga, Ndiaye, Semenga	Beye, Mokama (with apology)	
2nd	Kampala, Uganda	18 to 19 December 1995	Chair: Nguema Vice-Chair: Dankwa Amega, Ben Salem, Kisanga, Ondziel-Gnelenga, Rezzag-Bara	Beye, Duarte-Martins, Ndiaye and Umozurike (with apology)	

Before focusing on the way in which the Commission has dealt with individual communications, the manner in which it has interpreted its mandate generally is scrutinised. In general the conclusion is that the Commission started off very cautiously, but gradually established itself as an institution of some importance. Its later initiatives stand in contrast to the initial approach, which is exemplified in the following excerpt from its First Annual Activity Report: "It felt that the magnitude and complex nature of the tasks it had to carry out demanded that it should stand on a solid foundation *so as to make slow but sure lasting progress*".[93] It is argued that the Commission gradually extended its role beyond the likely intention of the drafters by its activities in the following nine areas:

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93 At par 15 of the report, my emphasis.

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3.3.1.1 Competence to deal with individual complaints

The Charter is very vague about the protective mandate of the Commission. Article 58 seems to suggest a very limited role for the Commission, in terms of which it may deal only with cases that reveal a series of serious or massive violations. The only thing the Commission is explicitly mandated to do, is to draw the attention of the OAU Assembly to these cases. The Assembly may then instruct the Commission to undertake an investigation and draw up a report. Article 58 "would appear to suggest that not only does the Commission have no jurisdiction in separate individual cases unless they are of an urgent nature, it also has no formal power to take the initiative itsef".[94] These constraints notwithstanding, from its 3rd session the Commission entertained individual complaints that were not revealing series of violations.[95] This approach ensured a much more significant role to the Commission than would have been the case if the restrictive wording of the Charter had been followed literally.

3.3.1.2 Competence to consider state reports

The Charter places states under an obligation to submit two-yearly reports on measures adopted to give effect to the Charter, but it is silent on the applicable organ that would have to consider these reports.[96] As Welch[97] pointed out, the drafters of the Charter must have been aware of the two models for the examination of state reports: either by a body of independent experts (such as the UN Human Rights Committee), or by government representatives (as is the case in the UN Human Rights Commission). I agree with his tentative conclusion that the matter was left "deliberately vague"[98] in the Charter so as not to jeopardise ratification. This means that, potentially, the Charter could have been interpreted to entail scrutiny of state reports by the Assembly of Heads of

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94 Murray (1997) 46 *ICLQ* 412 at 413.

95 See the Commission's Second Annual Activity Report, at IV, where the particulars of 38 communications received by the Commission are listed. This approach was mandated by the Rules of Procedure adopted at the Commission's 2nd ordinary session (see ch XVII of the original Rules of procedure).

96 Art 62 of the Charter.

97 (1995) at 153.

98 (1995) at 154.

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State and Government, the Council of Ministers, by a sub-committee of any of these bodies, by the OAU secretariat, or by the African Commission.

However, at its 3rd session the Commission adopted a resolution, requesting the Assembly to entrust it with the task of examining submitted state reports.[99] This is hardly surprising, as the process of reporting would be meaningless without a reviewing procedure. The alternatives available to the Commission as reviewing body made little sense. This was also the basis of the Commission's decision, as it considered "that it is difficult to see which other organ of the OAU could accomplish this work", and that the Commission "is the only appropriate organ of the OAU capable not only of studying the said periodic reports, but also of making pertinent observations to State Parties".[100] At its subsequent ordinary session, the Assembly entrusted the Commission with the task of considering state reports.[101]

3.3.1.3 Admissibility requirements

The Charter sets a number of requirements to which communications should conform before the Commission may consider them.[102] Admissibility requirements are also stipulated in the European Convention and the American Convention.[103] The Charter is in essence a restatement of provisions of the other two systems, except for the addition of the requirement that communications may not be "written in disparaging or insulting language" against a state or its institutions.[104] The Commission has to date not used this potentially restricting formulation as an obstacle to inhibit

99 See First Annual Activity Report at 28.

100 First Activity Report Annex IX at 28.

101 See Second Activity Report at par 20.

102 Art 56 of the Charter.

103 See arts 26, 27 and 46 of the respective instruments.

104 Art 56(3) of the Charter.

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access.[105] As far as the other prerequisites are concerned, the Commission has adopted an approach which circumvented the domestic remedies requirement in appropriate instances.[106]

3.3.1.4 Rigid secrecy watered down

Article 59 of the Charter has been cited by the Commission from the outset as an imperative to total secrecy about its most controversial role, that of protection. Article 59(1) states that "all measures taken within the provisions of the present chapter shall remain confidential until such time as the Assembly of Heads of State and Government shall decide otherwise". In an unfortunate interpretation, the Commission took "all measures taken" not to refer to specific steps taken against or recommendations made to offending states, but as the whole process of consideration of individual complaints. Consequently, only scant information was provided about protective functions in the annual reports.[107] The details of communications were "in accordance with article 59", "contained in a *confidential* annex".[108] The reference to article 59 is to the stipulation that the "measures" must remain confidential until the Assembly decides otherwise. Not surprisingly, the Assembly took no initiative to make this information public. In this stifled interpretation, the activities of the Commission remained obscured from public view and scrutiny, undermining not only the Commission's credibility, but also seriously impairing dissemination about the Charter and its role. It was not even known *whether* violations had been found in respect of *any* state whatsoever.[109] Secrecy cultivated the general impression that the Commission was callous about human rights violations, that it did very little and that the Charter meant nothing.

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105 The underlying philosophy of the article could have been the duty of respect owed to the state-as-father: see also art 29(1) of the Charter, which requires respect for parents at all times.

106 See discussion in par 3.3.2(c) below.

107 Such as the number of communications received, and the number of communications "followed up" (see eg the Sixth Annual Activity Report at par 28, 29).

108 Sixth Annual Activity Report at par 29 (my emphasis).

109 See eg the Third Annual Activity Report at par 16, 17: In response to mass media reports, the Commission issued an appeal "to these" countries to take immediate remedial measures. By not mentioning any of these countries by the name, this information is virtually worthless.

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The Seventh Annual Activity Report is a stark departure from past practice on this issue. One is pleasantly taken by surprise to read the following: "In accordance with Article 59 of the African Charter, the details of (individual) communications are contained in Annex IX",[110] and to find a list of particulars about 52 communications. The omission of the single word "confidential" from the standard formulation caused a dramatic multiplication of information available about the activities of the Commission. The availability of the information has to a certain extent also exposed an inability to arrive at decisions, by the Commission's endless postponement of decisions. In only two of the 52 cases were violations of rights explicitly found. The option to keep activities secret becomes more understandable in the light of the fact that there really was nothing positive to report about: More than six years after the Commission started functioning, it had only found an explicit violation on two occasions.

The Commission has been much more open about its other activities. It has been commended for finding "defensible means for disseminating information about its work".[111] This includes the supply of minutes, press releases and communiqués. Especially the latter, issued soon after every session, became a valuable source of information about the activities of the Commission.[112] Its value was enhanced gradually by the increasing detail over the years. Unfortunately, the distribution of reports has been slow and inadequate, undermining other efforts at greater dissemination.

3.3.1.5 Findings made and remedies ordered

The Commission is not given a clear competence to order remedies for human rights violations. Fortunately, the Commission has opted for a wide interpretation of its mandate to "ensure the protection" of the rights under the Charter.[113] It has, for example, included the competence to order provisional measures in its Rules of procedure,[114] and made such an order in at least one case.[115]

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110 Par 36 of the report. No justification is presented for this departure from prior practice.

111 Dankwa (1990) 2 *ASICL Proc* 29 at 30.

112 See Rule 33 (old rules).

113 See art 45(2) of the Charter.

114 See discussion in par 3.3.7.3 below.

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Although nowhere explicitly given the competence to order compensation, the Commission has done so in a case against Cameroon.[116] In recommending that decrees be nullified, it has gone further than the European Court in this respect.[117]

3.3.1.6 Appointment of Special Rapporteurs

A first step in this direction was taken at the Commission's 15th session. The newly-elected Vice chairman, Ben Salem, was appointed as Special Rapporteur for extra-judicial executions in Africa. At the same session, he was requested to address the situation in Rwanda as a matter of urgency.[118] But nothing happened between then and the 16th session, when the Commission requested the Special Rapporteur to present a draft on the terms of reference at the 17th session. Ultimately, the Commission adopted the mandate and budget estimates for this position only at its 18th session. In the absence of the Special Rapporteur at the 19th session, the Commission could not discuss any progress in the activities of the Special Rapporteur. This bureaucratic and formalistic approach amounted to extreme procrastination in the face of a situation that required immediate responses to minimise the violation of basic human rights and untold human suffering. One of the problems was the uncertainty about medical fees and insurance of the Commissioners when travelling on duty for the Commission.[119]

Realising the **personal** effort (in terms of time and energy) and **financial** implications required to accomplish the missions of Special Rapporteurs, the Commission adopted a different approach for the appointment of future Special Rapporteurs. It agreed in principle to appoint two further Special Rapporteurs (one on prison conditions in Africa and another on the rights of women), who would exercise their mandate under the supervision of a designated commissioner. The rapporteur

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115 Communication 83/92 (*Degli v Togo*), see par 3.3.3(a) above.

116 Communication 59/91 (*Mekongo v Cameroon*).

117 See par 3.3.3.1 below.

118 Final Communiqué of the 15th session, at par 20 and Annexures VI and VII to the Commission's Tenth Activity Report.

119 See Ninth Annual Activity Report at par 29. At the 20th session, the Commission considered this Special Rapporteur's report, and decided to extend his mission until his own mandate on the Commission expires.

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would not be a commissioner, but someone selected by the Commission from the names submitted to it. Despite the preference expressed for this approach, the Commission decided to appoint Commissioner Dankwa as Special Rapporteur on prison conditions in Africa.[120] In the case of the rapporteur on the rights of women commissioners Dankwa and Duarte-Martins have been assigned as the commissioners responsible for overseeing the rapporteur's activities (when he or she is appointed). Another area in which the appointment of a Special Rapporteur was considered, is in relation to contemporary forms of slavery in Africa. This never materialised.[121] As far as financing the work of the rapporteurs is concerned, the Commission "decided to seek the support of NGOs and other institutions".[122]

The two appointed Special Rapporteurs reported at the 21st session.[123] The Commission encouraged Commissioner Ben Salem to continue with the investigative work, which aims at publicly identifying those responsible for extra-judicial executions. Commissioner Dankwa presented his first report on his visits to Zimbabwean prisons and his contact with the UN Special Rapporteur on Torture.[124] According to his report to the Commission, he plans to follow this first visit up with further country visits.[125]

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120 Final Communiqué of the 20th session at par 18.

121 Ankumah (1996) at 120.

122 Ninth Annual Activity Report at 7.

123 See final Communiqué of the 21st session.

124 The visit took place from 23 February to 3 March 1997, with the co-operation of the Zimbabwean government. Commissioner Dankwa consulted with a large number of interested parties and compiled a very comprehensive report (Annex VII to the Tenth Annual Activity Report).

125 In terms of his report (Annex VII to the Tenth Annual Activity Report), the following visits are foreseen: May - October 1997: Senegal or Mali; November 1997 - March 1998: Uganda or Mauritius; May - October 1998: Mozambique or São Tomé e Príncipe; November 1998 - January 1999: Tunisia or South Africa. While this long term planning must be welcomed, it also underscores the limited impact that these visits are likely to have in Africa as a whole.

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3.3.1.7 Actions in relation to massive and serious violations

The Commission's actions in this regard have not been restricted to findings on communications presented to it.[126] It has adopted other courses of action to deal with massive and serious violations.

It has adopted numerous resolutions on situations where there was evidence of serious and massive violations. NGOs usually played an important role in ensuring the place of these issues on the agenda. Government abuses were condemned in Rwanda,[127] Sudan,[128] Nigeria,[129] The Gambia[130] and Burundi.[131]

It has held an extraordinary session in December 1995 to discuss the human rights situation in Nigeria and Burundi. The urgency of the situation necessitated that the Commission had to meet between its then recently completed session (in October 1995) and its next scheduled ordinary session (in April 1996). Representatives of the respective governments attended. Nigeria was requested to provide details in respect of these allegations in its next periodic report. As in many other respects, one of the reasons why this remains an isolated occurrence is the inadequate funding available to the Commission.

3.3.1.8 Interpretation of substantive provisions

At its 11th session the Commission elaborated upon the rather incomplete provisions of article 7 of the Charter.[132] Article 7 does not mention the important right to be informed of the reasons for

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126 This aspect is discussed in par 3.3.3(b) below.

127 See the resolution adopted at the 16th session in the Eighth Annual Activity Report.

128 See the resolution adopted at the 17th session in the Eighth Annual Activity Report.

129 See the resolutions adopted at the 16th and 17th sessions in the Eighth Annual Activity Report.

130 See the resolutions adopted at the 16th and 17th sessions in the Eighth Annual Activity Report.

131 See the resolution adopted at the 19th session.

132 See Heinz (1994) at 63. See also the finding in Communication 64/92 (*Achuthan (on behalf of Banda) v Malawi*), where the Commission observed that one of the reasons for this requirement is "that a government should have notice of a human rights violation in order to have the opportunity to remedy such violation, before being called before an international tribunal".

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one's arrest and detention. The principle of *habeas corpus* is also not enshrined, allowing the legality of detention to be disputed in open court. Its elaboration corresponds with the general comments issued by other human rights treaty bodies.[133]

3.3.1.9 Missions to states parties

At its 19th session the Commission reiterated its decision to conduct missions to Burundi, Mauritania, Nigeria, Rwanda, Senegal and Sudan.[134] The aim of these missions is to "consider" with the states concerned communications against them that the Commission has already declared admissible. They are "missions of good offices" and are undertaken to contribute to reach amicable solutions in human rights related disputes and to bring "clarification to the Commission in its contribution to the search for an equitable solution through dialogue".[135]

Two or three commissioners were assigned to each of the states to undertake these missions. At that stage, the final dates of these missions still had to be confirmed. The missions to Senegal and Mauritania took place between the 19th and 20th sessions.[136] The delegations to Senegal[137] and Mauritania[138] presented reports at the 20th session, and recommendations were addressed to the two states.[139] The missions to Sudan[140] and Nigeria[141] took place between the 20th and 21st sessions.[142] The examination of the reports on the visits to Nigeria and Sudan was deferred to the 22nd session.

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133 See also par 3.2.2(a) above.

134 Ninth Annual Activity Report at par 20.

135 See the Annex VIII and IX, the reports of Senegal and Mauritania, contained in the Tenth Annual Activity Report

136 From 1 - 7 June and 19 - 27 June 1996 respectively.

137 Consisting of Commission Chairman Nguema and commissioner Duarte-Martins.

138 Consisting of Chairman Nguema, commissioners Ondziel-Gnelenga and Rezzag-Bara.

139 See the Final Communiqué of the 20th session at par 21.

140 Consisting of commissioners Dankwa, Kisanga and Rezzag-Bara.

141 Consisting of commissioners Dankwa and Amega.

142 From 1 - 7 December 1997 and 7 - 14 March 1997 respectively.

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The report of the mission to **Senegal** dealt exclusively with the situation in the Casamance province of that country, following a communication received by the Commission in 1992 about clashes between the Senegalese army and Casamance rebels.[143] Having analysed the present conflict in a historical context, the delegation recommended a number of steps to bring about "constructive dialogue" between the Senegalese government and the Casamance separatists.

The mission to **Mauritania** was preceded by four communications, which related to the massacre of black Mauritanians by the government, torture of black Mauritanian prisoners, and the deportation and expulsion of black Mauritanians to Senegal and Mali. The Commission representatives investigated these allegations. In their concluding remarks the commissioners deplored "all the tragic events that have occurred in Mauritania and their consequences".[144] The mission went further and analysed some of the systematic patterns of human rights violations, such as slavery and its remnants,[145] as well as the inferior position of Mauritanian women.[146]

In the case of **Sudan**, the Commission delegation[147] was given the opportunity to meet senior government officials[148] and even to visit prisons.[149] The Commission found these interviews less than helpful, and criticised government officials and even members of civil society of engaging in official propaganda. Although the Commission praised the government for allowing the mission, it

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143 See the country report, Annex VIII to the Tenth Annual Activity Report.

144 Par VI of the report, Annex IX to the Tenth Annual Activity Report.

145 Despite the fact that slavery has been abolished formally in 1981 (Ordinance 81 - 234 of 9 November 1981), many "vestiges of slavery" are still prevailing in Mauritania (see par IV of the Commission report, Annex IX to the Tenth Annual Activity Report).

146 The Commission report found the promotion of women's rights to be "deficient". One example that confirms this is the fact that there was not a single female member of the National Assembly or Senate.

147 See Report of the Mission of Promotion and Protection of Human Rights in Sudan: 1 - 7 December 1996 (Report of the Secretariat). The delegation consisted of Commissioners Dankwa, Kisanga and Rezzag-Bara, who were accompanied by the legal advisor of the Commission (Essombé Edimo Joseph).

148 Ranging from the Minister of Justice, to spokespersons of the armed forces, the Attorney-General, the Chief of Police and the Director of Prisons.

149 In relation to allegations of "ghost" prisons, the mission "noted that the place specified was empty of any building" (*sic*). This rather ambiguous sentence seems to denote that the Commission had at least visited part of the prison.

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formulated twelve recommendations as conclusions to its report. The hope is expressed that the recommendations "will be taken seriously, in the spirit of brotherhood in which they are offered". But without any mechanism to follow up these recommendations, the hope is unlikely to be fulfilled. It is unfortunate that the report was not discussed publicly during the same session in which Sudan submitted its country report. Whatever subsequently happens to the report, it stands as a serious indictment of the Sudanese government and went far beyond the government's expectation of a public relations exercise.

Three commissioners under the leadership of Commissioner Dankwa spent a week in **Nigeria**, travelling around the country and meeting with governmental officials and NGOs. A number of prominent NGOs failed to co-operate with the Commissioners. One of the reasons for their negative attitude was the inclusion of commissioner Amega in the three-member team. He had previously been a member of a UN fact-finding mission that gave its qualified support to the military regime's programme to convert itself into a civilian government.

Although there are promising signs that states are more willing to co-operate with the Commission, and that the Commission is more willing to undertake missions, details are still shrouded under a veil of secrecy. It is also regretted that reports of the missions to Sudan and Nigeria were not discussed. No further missions were proposed.

3.3.1.10 Role of NGOs

The African Charter does not provide for a role for NGOs in the Commission's functioning. In fact, the concept of a "NGO" is not mentioned at all in the Charter. Scoble explains that this silence resulted from the hostility of African governing élites towards "any social formation disrupting their conception of the natural identity of and interests of the individual and his society".[150]

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150 Scoble in Welch and Meltzer (eds) (1984) at 190.

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When the Commission adopted its Rules of procedure at its second session, two rules were included to deal with "representation" of and "consultation" with NGOs. The Commission would establish a list of NGOs, who then could send authorised observers to participate in public sessions.[151] Direct consultation (or through a committee) between the Commission and NGOs was also envisaged.[152] From its third session, the Commission awarded observer status to NGOs.[153] By the end of the seventh session, nineteen NGOs received observer status. This number has increased steadily. However, no role is provided for NGO participation in the state reporting or individual complaints procedure. The increased importance of NGOs in the activities of the Commission is attributable mainly to efforts undertaken by the International Commission of Jurists. A first three-day workshop for African and international NGOs was organised before the Commission's session in October 1991.[154] This served as a start of better relations between the Commission and NGOs, the creation of a network for NGOs, and more publicity of the Commission's activities.

These pre-session workshops have become a regular and almost indispensable part of the Charter system. By the end of the Commission's 15th session (March 1994) 131 NGOs have been granted observer status with the Commission.[155] This number has grown to 183 by the end of the 19th session.[156] When the Commission granted similar status to another 15 NGOs at its 20th session, the number approached the 200 mark,[157] which was exceeded at the 21st session when another eight NGOs were granted observer status.[158]

Despite the initial omission of their role, the importance of NGOs has been acknowledged increasingly by the Commission in later years. For example, in 1996 Commissioner Umozurike

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151 Rule 76.

152 Rule 77.

153 The first three NGOs awarded this status were Amnesty International, International Commission of Jurists and African Association of International Law.

154 On the role of the International Commission of Jurists in Africa, see the exposition by Welch (1995) at 163 - 169.

155 Seventh Activity Report.

156 Ninth Annual Activity Report at par 23.

157 Final Communiqué of the 20th session at par 6.

158 Final Communiqué of the 21st session. The total number is now 206. (Or 205, see Tenth Annual Activity Report, at par IX.)

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described the Commission's collaboration with NGOs as "indispensable" for its work, principally because NGOs are "nearer to the grassroots throughout the continent".[159] This does not represent a uniform view, as some Commissioners from time to time evince deeply harboured suspicion of NGOs and their role.

3.3.2 Individual complaints: the admissibility phase

3.3.2.1 Introduction

By the end of its 21st session the Commission had finalised and made public the results of 74 communications.[160] Of these 51 were declared inadmissible, 13 were admissible,[161] five resulted in friendly settlements[162] and five were withdrawn and closed without a finding being made.[163] The

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159 (1996) 6 *African Human Rights Newsletter* 8

160 The analysis here is based on the details of communications in the Seventh, Eighth, Ninth and Tenth Annual Activity Reports. In addition, more detailed particulars are provided in a non-official record of these communications, compiled by legal officers at the Commission and made available to me by Julia Harrington, who served at the Commission in that capacity.

161 See par 3.3.3 below.

162 Communication 11/88 (*Kalenga v Zambia*) (The author ceased to correspond with the Commission. The Commission emphasised that silence does not automatically mean withdrawal "because individuals are highly vulnerable to circumstances that might prevent them from continuing to prosecute a communication". By direct contract with the state the Commission satisfied itself that silence was the result of satisfaction, as the complainant had been released the previous year); Communication 16/88, 17/88, 18/88 (joined) (*Comité Culturel pour la Démocratie au Bénin, Badjogoume, El Hadj v Benin*) (The new government, in the Commission's view, sufficiently addressed injustices committed by the previous administration by repealing laws, releasing political prisoners and by introducing amnesty laws); Communication 44/90 (*Peoples' Democratic Organisation for Independence and Socialism v The Gambia*); Communication 67/91 (*Civil Liberties Organisation v Nigeria*) and Communication 97/93 (*Modise v Botswana*).

163 Communication 22/88 (*International PEN v Burkina Faso*), Communication 55/91 (*International PEN v Chad*), Communication 62/91 (*Committee for the Defence of Human Rights (in respect of Madike) v Nigeria*) (The Commission reiterated its concern for individuals "who are highly vulnerable to circumstances that might prevent them from continuing to prosecute a communication"), Communication 93/93 (*International PEN v Sudan*) (The decision by the Commission is couched as a finding of inadmissibility due to withdrawal), Communication 136/94 (*Curzon v Zimbabwe*).

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Commission repeatedly reiterated that it will not interpret the silence of the author to automatically indicate withdrawal of the case.[164]

164 See eg Communication 67/91 (*Civil Liberties Organisation v Nigeria*).

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TABLE F: FORTUNES OF COMMUNICATIONS SUBMITTED TO THE AFRICAN COMMISSION AS AT THE END OF THE 20TH SESSION[165]

COMMUNI-CATION	FINAL FINDING	REASON (IF INADMISSIBLE)	REMEDY (IF VIOLATION)	IN ACTIVITY REPORT	FINALISED AT SESSION	STATE INVOLVED (IF VIOLATION) (AND RESULT OF FRIENDLY SETTLEMENT)
1/88	Inadmissible	Other reason	-	7th	4th	-
2/88	Inadmissible	Non-state party	-	7th	4th	-
3/88	Inadmissible	Non-state party	-	7th	4th	-
4/88	Inadmissible	Non-state party	-	7th	4th	-
5/88	Inadmissible	Non-state party	-	7th	4th	-
6/88	Inadmissible	Non-state party	-	7th	4th	-
7/88	Inadmissible	Non-state party	-	7th	4th	-
8/88	Inadmissible	Non-state party	-	8th	4th	-
9/88	Inadmissible	Non-state party	-	7th	4th	-
10/88	Inadmissible	Non-state party	-	7th	4th	-
11/88	Friendly settlement	-	-	7th	7th	Zambia (victim released)
12/88	Inadmissible	Non-state party	-	7th	4th	-
13/88	Inadmissible	Other reason	-	7th	6th	-
14/88	Inadmissible	Non-state party	-	7th	4th	-
15/88	Inadmissible	Other reason	-	7th	6th	-
16/88 - 18/88 (joined)	Friendly settlement	-	-	8th	16th	Benin (victim released, detention laws amended)
19/88	Inadmissible	Non-state party	-	7th	6th	-

165 The table refers to "cases", rather than "communications". The total of 74 cases finalised comprises more than 74 communications. As appears from the table, in five finalised cases a number of communications were joined, usually because the subject matter was related.

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COMMUNI-CATION	FINAL FINDING	REASON (IF INADMISSIBLE)	REMEDY (IF VIOLATION)	IN ACTIVITY REPORT	FINALISED AT SESSION	STATE INVOLVED (IF VIOLATION) (AND RESULT OF FRIENDLY SETTLEMENT)
20/88	Inadmissible	Non-state party	-	7th	6th	-
21/88	Inadmissible	Non-state party	-	7th	6th	-
22/88 (withdrawn)	Closed	-	-	7th	15th	-
24 /89	Inadmissible	Non-state party	-	7th	5th	-
25/89; 47/90; 56/93; 100/93 (joined)	Massive violations	-	-	9th	18th	Zaïre
26/89	Inadmissible	Non-state party	-	7th	6th	-
27/89; 46/91; 49/91; 99/93 (joined)	Massive violations	-	-	10th	20th	
28/89	Inadmissible	Non-state party	-	7th	6th	-
29/89	Inadmissible	Non-state party	-	7th	6th	-
31/89	Inadmissible	Other reason	-	8th	17th	-
33/89	Inadmissible	Non-state party	-	7th	4th	-
35/89	Inadmissible	Other reason	-	7th	7th	-
37/89	Inadmissible	Non-state party	-	7th	5th	-
38/89	Inadmissible	Non-state party	-	7th	7th	-
39/89	Violation	-	-	10th	21st	Cameroon
41/90	Inadmissible	Non-state party	-	7th	5th	-
42/90	Inadmissible	Non-state party	-	7th	5th	-
43/90	Inadmissible	Other reason	-	7th	15th	-
44/90	Friendly settlement	-	-	10th	20th	The Gambia (Government's stated determination to review electoral law welcomed)
45/90	Inadmissible	Local remedies	-	7th	15th	-
53/90	Inadmissible	Local remedies	-	7th (also 8th)	17th	-
55/91 (withdrawn)	Closed	-	-	7th	14th	-
57/91	Inadmissible	Other reason	-	7th	13th	-

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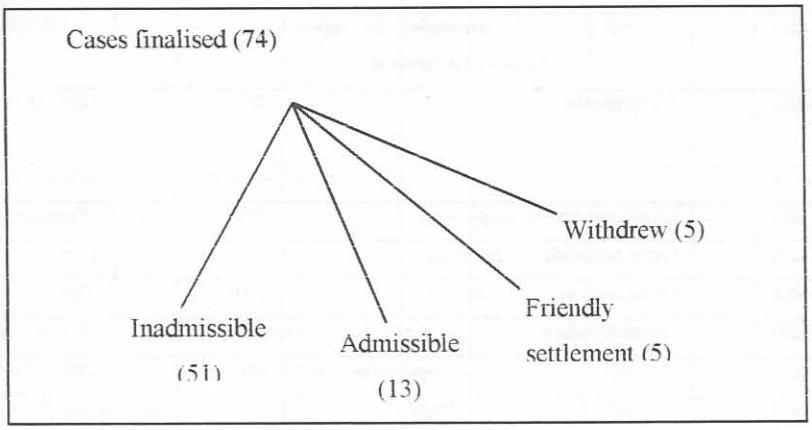
COMMUNI-CATION	FINAL FINDING	REASON (IF INADMISSIBLE)	REMEDY (IF VIOLATION)	IN ACTIVITY REPORT	FINALISED AT SESSION	STATE INVOLVED (IF VIOLATION) (AND RESULT OF FRIENDLY SETTLEMENT)
59/91	Violation	-	Reparation	8th	16th	Cameroon
60/91	Violation	-	Release recommended	8th	16th	Nigeria
62/91 (withdrawn)	Closed	-	-	8th	16th	-
63/92	Inadmissible	Other reason	-	7th	13th	-
64/92; 68/92; 78/92 (joined)	Massive violations	-	New government responsible for reparation	8th	16th	Malawi
65/92	Inadmissible	Other reason	-	10th	21st	-
66/92	Inadmissible	Local remedies	-	7th	14th	-
67/92	Friendly settlement	-	-	7th	14th	Nigeria (victims released)
69/92	Inadmissible	Other reason	-	7th	13th	-
70/92	Inadmissible	Other reason	-	9th	18th	-
71/92	Violation	-	Efforts to pursue friendly settlement continued	10th	20th	Zambia
72/92	Inadmissible	Local remedies	-	7th	12th	-
74/92	Massive violations	-	-	9th	18th	Chad
75/92	Inadmissible	Other reason	-	8th	16th	-
83/92; 88/93; 91/93 (joined)	Violations (massive violation?)	-	-	8th (also 7th)	17th	Togo (remedial steps by new government welcomed)
86/93	Inadmissible	Local remedies	-	8th	16th	-
87/93	Violations	-	Release recommended	8th	16th	Nigeria
90/93	Inadmissible	Local remedies	-	8th	16th	-
92/93	Inadmissible	Local remedies	-	8th	17th	-
93/93 (withdrawn)	Closed	-	-	7th	14th	-
97/93	Friendly settlement	-	-	10th	?	Botswana (Government urged to continue with efforts to reach friendly settlement)
101/93	Violation	-	Decree nullified	8th	17th	Nigeria

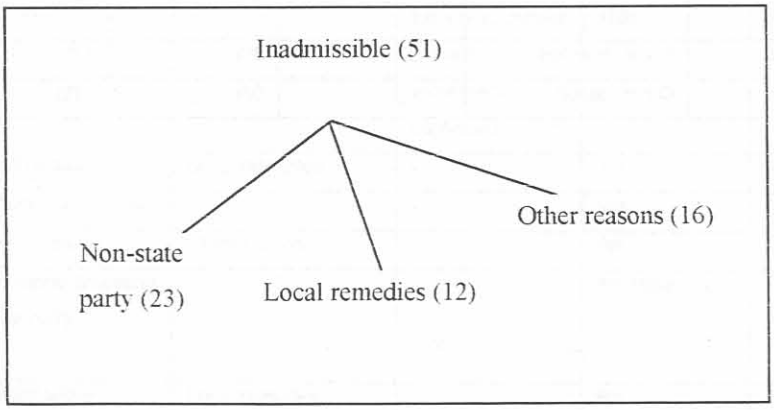
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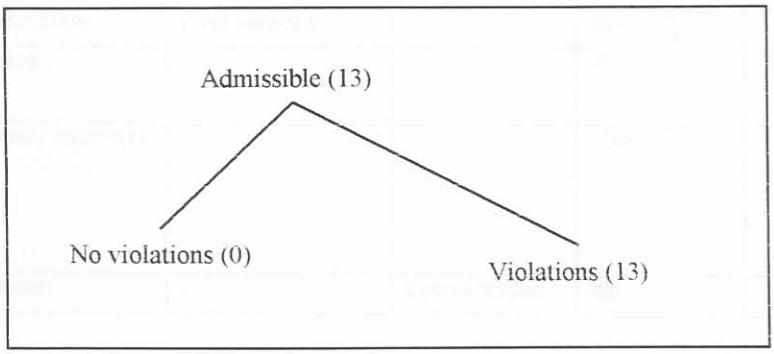
COMMUNI-CATION	FINAL FINDING	REASON (IF INADMISSIBLE)	REMEDY (IF VIOLATION)	IN ACTIVITY REPORT	FINALISED AT SESSION	STATE INVOLVED (IF VIOLATION) (AND RESULT OF FRIENDLY SETTLEMENT)
103/93	Violation	-	Government urged to repair prejudice	10th	20th	Ghana
104/94; 109 - 126/93 (joined)	Inadmissible	Other reason	-	7th	16th	-
106/93	Inadmissible	Other reason	-	7th	14th	-
107/93	Inadmissible	Local remedies	-	7th	17th	-
108/93	Inadmissible	Other reason	-	10th	20th	-
127/94	Inadmissible	Local remedies	-	8th	17th	-
129/74	Violations	-	Irregularities found	9th	17th	Nigeria
131/94	Inadmissible	Local remedies	-	7th	?	-
135/94	Inadmissible	Local remedies	-	9th	18th	-
136/94 (withdrawn)	Closed	-	-	8th	16th	-
138/94	Inadmissible	Local remedies	-	8th	17th	-
142/94	Inadmissible	Other reason	-	8th	17th	-

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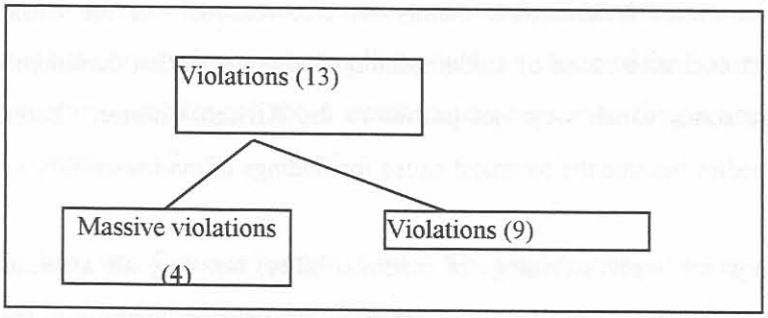
TABLE G: ANALYSIS OF COMMUNICATIONS SUBMITTED TO THE AFRICAN COMMISSION AS AT THE END OF THE 20TH SESSION







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Communications were declared **inadmissible** mainly for two reasons. In the initial phase of development, the almost exclusive cause of inadmissibility findings was that communications had been submitted against states which were not parties to the African Charter. Later, the non-exhaustion of local remedies became the foremost cause for findings of inadmissibility.

Not all of these findings are explicit findings of inadmissibility, but they all amount to such a finding. The following decision falls into the category of implicit inadmissibility findings: Communication 63/92 (*Congress for the Second Republic of Malawi v Malawi*).The communication contained information about "the general political situation in Malawi".[166] The Commission's decision was that the "information is noted and no action is necessary, accordingly the matter is closed".[167]

The criteria in article 56 are intended as a sifting mechanism, to ensure that the Commission devotes its valuable time to the consideration of substantive violations which fall within the prescribed guidelines.[168] A decision on admissibility is only warranted if an eventual finding of the Commission is a possibility. Mere letters of information should not require any decision by the Commission. Only a very literalist interpretation of the word "communication" would result in even ordinary "communications", not constituting complaints, being considered for their admissibility. To ensure consistency, clarity and reliable statistical analysis, the Commission should make explicit its finding on admissibility throughout.

The grounds on which the Commission based its findings of inadmissibility are numerous. In the overwhelming majority of cases only one ground for the finding is given. Exceptions are Communication 104/93 (*Centre for the Independence of Judges and Lawyers v Algeria*) and Communication 43/90 (*Union des Scolaires Nigeriens - Union Generale des Etudiants Nigeriens au Benin v Niger*). In the former, four grounds for the Commission's finding of inadmissibility are listed: "Thus, in this case the author is not an alleged victim, nor is the communication submitted in the name of a specific victim, nor does the complainant allege grave and massive violations. The

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166 AHG/198 (XXX) 77.

167 *Ibid.*

168 See, on these requirements generally, Gye-Wado (1991) 3 *RADIC* 742.

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information in the communication is insufficient to permit the Commission to take action". In the latter, reference is not only made to non-compliance with article 56 of the Charter and Rule 114 of the Rules of procedure, but also to "the 4 month deadline given to the parties at the Fourteenth Session of the Commission...".

The last case finalised was Communication 142/92. The total number of 68 cases finalised clearly falls short of this total (142). Some of the reasons are as follows: Some cases have not yet been finalised, or had been finalised after the Commission's 19th session. In any other instances cases were assigned registration numbers, but were subsequently not noted as communications by the Commission.

If the communications directed at non-states parties are considered "irreceivable", rather than "inadmissible", a total of 53 cases had been finalised by the Commission. The states parties against whom these communications were directed, are:[169]

Algeria	:	1
Benin	:	1
Botswana	:	2
Burkina Faso	:	1
Cameroon	:	5
Chad	:	2
Côte d'Ivoire	:	1
The Gambia	:	5
Ghana	:	2
Guinea	:	1
Kenya	:	2
Liberia	:	1
Madagascar	:	1
Malawi	:	2
Niger	:	1

169 The total adds up to 44, because one case is left out of consideration. This is Communication 104/94; 109-126/93 (joined), which was directed almost randomly at 18 different African states.

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Nigeria	:	10
Rwanda	:	1
Sudan	:	1
Tanzania	:	2
Togo	:	2
Tunisia	:	1
Zaïre[170]	:	4
Zambia	:	2
Zimbabwe	:	1

At the time the 21st session took place, there were 52 member states of the OAU. By the 15th session 49 of these states had already ratified the Charter. The exceptions were Eritrea, Ethiopia and Swaziland.[171] Communications were directed at only 22 of the states parties to the Charter. No complaints were forthcoming against states in respect of which allegations of human rights abuses are not uncommon, such as Angola, CAR, Congo, Libya, Mauritania, Somalia and Sierra Leone.[172]

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170 The wave of democratisation caused a change of leaders, and a change of the name of Zaïre to the Democratic Republic of Congo in 1997. References to "Zaïre" are retained in this study.

171 Subsequently, the number of OAU states increased to 53 when South Africa became a member. The number of Charter ratifications increased to 51 at the end of 1996, with the ratification of South Africa and Swaziland.

172 In a contribution published in 1994 Bayefsky (in Henkin and Hargrove (1994) 229 at 292) identified State parties to the Optional Protocol of the CCPR worldwide that have never been subject to communications brought for violation of CCPR provisions. The African States cited are Algeria, Angola, Benin, Congo, Guinea, Niger, Seychelles and Somalia. The recurrence of the names of Angola, Congo and Somalia is significant. One obvious explanation would be a lack of dissemination of information about the Charter and the CCPR among the population and lawyers.

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3.3.2.2 Communications directed at non-states parties[173]

The main ground on which the Commission decided not to consider communications is because the state complained against was not a state party.[174] This accounts for 23 of the 50 instances of inadmissibility. This especially occurred in the first few years. Three categories of communications fall into this category: Those against **African states** that were not party to the Charter at the time the communications were submitted (sixteen cases); those **against non-African states** (six cases - against Bahrain, Haiti, Indonesia, the USA and Yugoslavia) and those against **non-state entities** (one case against the OAU). The confusion is now something of the past, as the new rules of the Commission determine that no communications against a non-state party should be placed on the list of communications prepared by the Secretary of the Commission.[175]

One may assume that information about the Commission had not been disseminated to any meaningful extent when the Commission started operating. NGOs only became involved, and

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173 Some commentators (eg Ankumah (1996) at 56 - 60) prefers to regard the initial decisions on inadmissibility on this ground as "irreceivable". Although this is the way such complaints are handled *now* (subsequent to the amended Rules of procedure taking effect), the reported communications clearly refer to findings of "inadmissibility" and are here treated as such.

174 Communication 2/88 *(Ihebereme v USA)*; Communication 3/88 (*Centre for the Independence of Judges and Lawyers v Yugoslavia*); Communication 4/88 (*Coordinating Secretary of the Free Citizens Convention v Ghana*); Communication 5/88 (*Makoge v USA*); Communication 6/88 (*Kofi v Ghana*); Communication 7/88 (*Committee for the defence of Political Prisoners v Bahrain*); Communication 8/88 (*Buyingo v Uganda*); Communication 9/88 (*International Lawyers' Committee for Family Reunification v Ethiopia*); Communication 10/88 (*Abebe v Ethiopia*); Communication 12/88 (*El-Nekheily v OAU*); Communication 14/88 (*Sanussi v Ethiopia*); Communication 19/88 (*International PEN v Malawi, Ethiopia, Cameroon, Kenya*); Communication 20/88 (*Austrian Committee Against Torture v Morocco*); Communication 21/88 (*Centre Haitien des Libertés Publiques v Ethiopia*); Communication 24/89 (*Union National de Liberation de Cabinda v Angola*); Communication 26/89 (*Austrian Committee against Torture v Burundi*); Communication 28/89 (*Association Internationale des Juristes Democrates v Ethiopia*); Communication 29/89 (*Commission Française Justice et Paix v Ethiopia*); Communication 33/89 (*Ntaka v Lesotho*); Communication 37/90 (*Eugene v USA, Haiti*); Communication 38/90 (*Wesley Parish v Indonesia*); Communication 41/90 (*Houver v Morocco*); Communication 42/90 (*International PEN v Malawi*); Communication 51/91 (*Comité Bachelard v Morocco*).

175 Rule 102 (2) of the amended rules.

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better acquainted, with the work of the Commission in later years. These factors partially account for the fact that the USA, Yugoslavia, Bahrain, Haiti and Indonesia appear as states against which communications were directed. The Commission has also relatively recently held that a communication is not admissible against a state if the state had not ratified the Charter at the time the communication was submitted.[176] This rule applies even when the state has subsequently, and before the Commission considers the communication, ratified the Charter. In *Njoka v Kenya* the Commission on 12 October 1993 decided that the communication is inadmissible, despite the fact that Kenya ratified the Charter on 23 January 1992. As the serialised registration number indicates, the communication was received during 1991. To order re-submission of a communication under such circumstances as the commission has done seems to be unduly formalistic and cumbersome on the individual. The communication was re-submitted.[177] At its 17th session, the Commission declared it inadmissible for "vagueness".

3.3.2.3 The Commission and the exhaustion of domestic remedies

The rationale behind the requirement that domestic or local remedies have to be exhausted before an individual may proceed with a complaint against a state in a supra-national forum has been formulated as follows: "The rule requiring the exhaustion of domestic remedies as a condition for the presentation of an international claim is founded upon the principle that the responsible state must first have an opportunity to redress by its own means within the framework of its own domestic legal system the wrong alleged to be done to the individual".[178] In the African context, this ensures that the Commission will not become a "court of first instance", a function that will clearly be beyond the capacity of the Commission.[179]

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176 Communication 142/94 (*Muthuthurin Njoka v Kenya*).

177 Communications 142/92 (*Njoka v Kenya*).

178 *Interhandel* case 1959 ICJ Reports 27.

179 See Communication 74/92 (*Commission Nationale des Droits de l'Homme et des Libertés v Chad*): "Requiring the exhaustion of local remedies also ensures that the African Commission does not become a tribunal of first instance, a function that is not in its mandate and which it clearly does not have the resources to fulfil".

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Non-exhaustion of domestic remedies is the second most frequently cited ground for not considering the substance of communications directed to the Commission. This accounts for at least 13 of the 50 relevant instances.[180] This ground became the principal motivation for findings of inadmissibility in the last few years under review. From an analysis of the relative big number of cases dealing with the exhaustion of domestic remedies, the following interpretative map, as outlined by the Commission, may be drafted:

A local remedy has been defined as "any domestic legal action that may lead to the resolution of the complaints at the local or national level".[181] With this in mind, the constituent parts of article 56(5) of the Charter are now analysed:

i *Communications shall be considered if they are "sent **after exhausting** ..."*

Whether local remedies have been exhausted, is a factual question. The burden to present the court with a factual basis is that of the applicant or author. Without any information about attempts to exhaust local remedies the Commission cannot consider a communication. The applicant or author must provide some (*prima facie*) evidence of an attempt to exhaust remedies at the national level.[182] It is insufficient to argue that it is improbable that local remedies would be successful in the

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180 Communication 45/90 (*Civil Liberties Organisation v Nigeria)*; Communication 53/90 (*Capitao v Tanzania*); Communication 66/92 (*Lawyers Committee for Human Rights v Tanzania*); Communication 72/92 (*Aturu v Nigeria*); Communication 86/93 (*Ceesay v Gambia*); Communication 90/93 (*Haye v Gambia*); Communication 92/93 (*International PEN v Sudan*); Communication 97/93 (*Modise v Botswana*); Communication 107/93 (*Academic Staff of Nigerian Universities v Nigeria*); Communication 127/94 (*Dumbuya v Gambia*); Communication 131/94 (*Ousman Manjang v Gambia*); Communication 135/94 (*Kenya Human Rights Commission v Kenya*); Communication 138/94 (*International PEN (on behalf of Senn and Sangare) v Côte d'Ivoire*). (In Communication 97/93 the Commission decided to "write to the author stressing the need for exhaustion of local remedies". This decision may also be taken not to amount to a finding of inadmissibility, but as something constituting correspondence to the author that he may re-submit it).)

181 See Communication 101/93 (*Civil Liberties Organisation (in respect of Nigerian Bar Association) v Nigeria*).

182 Communications 86/93 (*Ceesay v The Gambia*) and 127/94 (*Dumbuya v The Gambia*).

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absence of any attempt to avail oneself of them.[183] These requirements are illustrated well in *International PEN v Sudan*.[184] The complaint in that case related to wrongful arrest and detention. The complainant "had taken these cases up with the government but no response had been received". Also, the government had repeatedly denied that any illegal (incommunicado) detention occurred in the state. In finding the communication inadmissible, the Commission observed that it has not been shown that an attempt had been made to have recourse to national procedures.

Domestic remedies are not exhausted if a case pertaining to the complaint is still pending before the local courts,[185] or if a court is still "seized" with the matter.[186] In *Lawyers' Committee for Human Rights v Tanzania*[187] the Commission found that the fact that bail was granted to the complainant, indicated that "the domestic legal process is responsive and actively considering the case". Domestic remedies were therefore not exhausted. This decision followed after the complainant was first detained awaiting trial (bail being denied) for two years, then released and charges against him were "struck out by the court". He was apparently re-charged and granted bail.

ii "... local remedies ..."

A "local remedy" has been defined as "any domestic legal action that may lead to the resolution of the complaints at the local or national level".[188]

The Commission has consistently interpreted "local remedies" to mean "all local remedies".[189] "Local remedies" include an appeal out of time, if that exists.[190] In the ordinary course of events, local remedies are exhausted when leave to appeal is rejected in a national court.[191]

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183 Communication 1131/94 (*Manjang v The Gambia*).

184 Communication 92/93.

185 Communications 45/90 (*Civil Liberties Organisation v Nigeria*) and 135/94 (*Kenya Human Rights Commission v Kenya*).

186 Communication 107/93 (*Academic Staff of Nigerian Universities v Nigeria*).

187 Communication 66/92.

188 See Communication 101/93 (*Civil Liberties Organisation (in respect of the Nigerian Bar Association) v Nigeria*).

189 See eg Communications 66/92 (*Lawyers' Committee for Human Rights v Tanzania*) and 101/93 (*Civil Liberties Organisation (in respect of the Nigerian Bar Association) v Nigeria*).

190 Communication 90/93 (*Haye v The Gambia*).

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iii "... , ***if any***, ..."

Remedies need only be exhausted if they are *available, possible and effective* in the domestic jurisdiction.

Five possible categories of cases in which remedies are either factually non-existent or deemed to be so, may be identified:

- If a decree or other measure has **ousted the jurisdiction of the courts**, making judicial recourse impossible, there are no local remedies which should be exhausted.[192] In other words, local remedies do not have to be exhausted when they are not available.

- If pursuing a remedy is **dependent on extra-judicial considerations**, such as a discretion or some extraordinary power granted to an executive state official, such "remedy" need not be exhausted before one may approach the Commission.[193]

- If the **nature of the relief is not possible in domestic courts**, that relief need not be sought in national courts.[194]

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191 *Ibid.*

192 A decree to the effect that no "person may commence ... an action or any legal proceeding whatsoever" relating to certain issues, was considered to "effectively remove all local remedies from national law" (Communication 101/93 (*Civil Liberties Organisation (in respect of the Nigerian Bar Association) v Nigeria).)*). See also Communication 129/94 (*Civil Liberties Organisation v Nigeria*): In the case of a decree ousting the jurisdiction of the courts and nullifying any domestic effect of the African Charter, the Commission found that "it is reasonable to presume that local remedies will not only be prolonged but are certain to yield no results".

193 An example is provided in Communication 60/91 (*Constitutional Rights Project v Nigeria*). In terms of the Robbery and Firearms Act the governor of a state could confirm or dismiss the decision of a specially established tribunal. The Commission found this "remedy" to be neither adequate nor effective. It had this to say: "The object of the remedy is to obtain a favour and not to vindicate a right. It would be improper to insist that the complainants seek remedies from sources which do not operate impartially and have no obligation to decide according to legal principles". See also 64/92 (*Achuthan (on behalf of Banda) v Malawi*) where the Commission found the communication admissible because the "available" remedy was at the complete discretion of the executive. In the light thereof, pursuing local remedies would be futile and to exhaust them would be ineffective.

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- If a **situation of serious or massive violation of human rights** exists, domestic remedies need not be exhausted. In effect, the Commission took judicial notice of the fact that remedies are ineffectual in such cases. This may be due to the seriousness of the violations, or to the great number of individuals affected by the violations.[195] By their very nature, such situations either involve numerous rights of one victim being violated, or one or more rights of a number of victims being violated. The seriousness of the situation and the large number of victims involved make the exhaustion of remedies in the local jurisdiction impracticable and unrealistic. It is presumed that the state had ample notice of violations on such a vast scale prevailing within its territory, and took no steps to remedy these violations.[196]

- Where a complainant is **detained without trial**, they have no access to remedies, as no procedure has been instituted against them.[197]

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194 Communication 75/92 (*Katangese Peoples' Congress v Zaïre*) contained a claim for secession of the Katangese people from the main territorial unit of Zaïre. As it appeared to the Commission that no (judicial) remedies are available at the national level to "express the independence of the one area from the state", making the requirement of exhaustion of local remedies redundant. See also Communication 103/93 (*Abudakar v Ghana*), where the Commission observed that unavailable local remedies need not be exhausted. In that case the complainant was residing outside the state against which the complaint was directed. Considering the nature of the complaint "it would not be logical to ask the complainant to go back to Ghana in order to seek a remedy from national legal authorities".

195 "The Commission cannot hold the requirement of exhaustion of local remedies to apply literally in cases where it is impractical or undesirable for the complainant to seize the domestic courts in the case of each individual complaint. This is the case where there are thousands of individual victims. Due to the seriousness of the human rights situation as well as the great number of people involved, such remedies as might **theoretically exist** in the domestic courts are as a **practical matter unavailable**..." (Communication 64/92 *(Achuthan (on behalf of Banda) v Malawi*), emphasis added). See also Communications 74/92 (*Commission Nationale des Droits de l'Homme et des Libertés v Chad*) and 83/92 (*Degli (on behalf of Bikagni) v Togo*). In Communication 27/89, 46/91, 49/91, 99/93 (*Organisation Mondiale Contre la Torture and three others v Rwanda*) the Commission based its finding that local remedies need not be exhausted on the "varied scope of the violations alleged" and the "large number of violations involved".

196 See Communication 74/92 (*Commission Nationale des Droits de l'Homme et des Libertés v Chad*).

197 Communication 17/88, 18/88 (joined) (*Comité Culturel pour la Démocratie au Bénin et al v Benin*).

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iv *"... unless it is obvious that this procedure is **unduly prolonged**."*

A delay of over two years in appeal procedures amounts to "undue" delay.[198] Appeals and a petition for executive clemency had been pending for twelve years in *Mekongo v Cameroon*.[199] The Commission considered the process of obtaining domestic redress to have been obviously unduly prolonged, and therefore not in need of exhaustion. If a case had been pending for three months when a related complaint was submitted to the Commission, the delay is insufficient to constitute undue delay.[200] Even if the President gave indications that any challenge would be ineffective, the complainant must still await the outcome of the local procedures.[201]

3.3.2.4 Other grounds for findings of inadmissibility

Other grounds for findings of inadmissibility put forward by the Commission are the following:

- The Commission did not receive a reply from the complainant (the information was needed to establish whether local remedies had been exhausted).[202]
- The Commission apparently did not receive a reply from the state complained against.[203]
- The communication was vague, incoherent or uncoordinated.[204]

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198 See Communication 66/92 (*Lawyers' Committee for Human Rights v Tanzania*), and the Commission's initial decision. The communication was later declared inadmissible on other grounds.

199 Communication 59/91.

200 See Communication 135/94 (*Kenya Human Rights Commission v Kenya*).

201 *Ibid.*

202 Communication 8/88 (*Buyingo v Uganda*).

203 Communication 43/90 (*Union des Scolaires Nigeriens - Union Generale des Etudiants Nigeriens au Benin v Niger*), in which the author(s) wrote to the Commission protesting against human rights violations allegedly committed by Niger. The Commission states as follows: "Considering that since the matter was referred to the Commission, no additional information has been received by the Secretariat, in spite of several reminders...". Even if this also relates to the state concerned, other factors pertaining to the communication contributed to the finding: "Considering that none of the conditions relating to form, time-limit or procedure laid down under Article 56 of the Charter and Rule 114 of the Rules of procedure has been complied with...".

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- The matter had already been examined by the UN Human Rights Commission in terms of the 1503 procedure of ECOSOC.[205]
- The matter had already been referred to another international human rights body (the UN Human Rights Committee).[206]
- Insufficient information was provided on which the Commission could evaluate an allegation of violation.[207]
- The communication did not reveal the violation of any specific right in the Charter.[208]
- The conduct complained of did not constitute a *prima facie* violation of the Charter.[209]

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204 Communication 35/89 (*Ayele v Togo*), Communication 57/91 (*Bangav v Nigeria*) ("it is not clear what the complainant is trying to say").

205 Communication 69/92 (*Amnesty International v Tunisia*). This was in terms of Rule 114 (3)(f) of the Rules of procedure of the African Commission. However this rule has been amended at the Commissions 18th session. The rules now refer directly to art 56(7) of the Charter and therefore only to cases already settled (and not merely under consideration) by another international procedure.

206 Communication 15/88 (*Mpaka-Nsuku v Zaïre*). The practice among states parties to the European Convention is that they make declarations when accepting the CCPR Optional Protocol procedure. In terms thereof, the European Commission is given primacy, as states do not accept the Optional Protocol I procedure if a communication has already been considered by the European Commission. The only African state that has made a similar declaration is Uganda: It does not accept that complaints brought under the Optional Protocol if such a complaint has already been considered by another human right procedure or one form of international settlement. This gives consideration by the African Commission primacy above the Human Rights Commission.

207 Communication 31/89 (*Baes v Zaïre*). No specific dates and incidents were alleged in Communication 104/94 - 126/94 (*Center for the Independence of Judges and Lawyers v Algeria*) and Communication 65/92 (*Ligue Camerounaise des Droits de l'Homme v Cameroon*).

208 Communication 13/88 (*Hadjali Mohamad v Algeria*): "Considering that the communication does not state the complaint directed against the State concerned or the human rights violation suffered by the author of the communication or the procedures engendered (sic) by such violations..."; Communication 63/92 (*Congress for the Second Republic of Malawi v Malawi*) (complaint too general in nature); Communication 75/92 (*Katangese People's Congress v Zaïre*) (claim to self-determination of group within a state not covered by provisions of the Charter).

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- A full contact address of the author was not given, compelling the Commission to declare it inadmissible.[210]
- The full identity of the author was not given.[211]
- The complainant used insulting language.[212]

3.3.2.5 Recommendation

The Commission's finding can only be properly analysed and evaluated if a substantial summary of the relevant facts are given. The facts given in later decisions are much more elaborate than the scant formation revealed initially. This trend should be encouraged and extended.

3.3.3 Individual complaints: decisions on merits

In the first ten years of the Charter's life (1986 - 1996) the Commission gave final decisions on the merits in 13 cases.[213] These are cases that did not involve friendly settlements. All of them ended in

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209 Communication 1/88 (*Korvah Liberia*), Communication 106/93 (*Vitine v Cameroon*), Communication 142/92 (*Njoka v Kenya.*)

210 Communication 57/91 (*Bariga v Nigeria*), Communication 70/92 (*Dioumessi, Kande, Koba v Guinea*) and Communication 108/93 (*Joana v Madagascar*). The finding on this ground in the latter case is not convincing. It seems very unlikely that "a prominent political figure" who had been a candidate for president could not be located with diligent effort.

211 Communication 70/92 (*Dioumessi, Kande, Kabe v Guinea*)

212 Communication 65/92 (*Ligue Camerounaise des Droits de l'Homme v Cameroon*).

213 These cases are Communications 25/89, 47/90, 56/91, 100/93 (joined) (*World Organisation Against Torture, Lawyers' Committee for Human Rights, Jehova Witnesses of Zaïre, Union Interafricaine des Droits de l'Homme et des Libertés v Zaïre*); Communication 27/89, 46/91, 49/91, 99/93 (joined) (*Organisation Mondiale Contre la Torture et al v Rwanda*)); Communication 39/90 (*Pagnoulle v Cameroon*)); Communication 59/91 (*Mekongo v Cameroon*); Communication 60/91 (*Constitutional Rights Project v Nigeria);* Communication 64/92, 68/92, 78/92 (joined) (*Achuthan (on behalf of Banda), Amnesty International (on behalf of Orton and Vera Chirwa), Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi*); Communication 71/92 (*Rencontre Africaine pour la Defense des Droits de l'Homme v*

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an unequivocal finding that the government concerned had violated the Charter.[214] Findings of the existence of serious or massive human rights violations have been made in four cases. In all 13 cases the governments concerned were found in violation of its obligations under the Charter. The states found in violation are Nigeria (in four cases), Cameroon (in two cases), Chad, Ghana, Malawi, Rwanda, Togo, Zaïre and Zambia (one case each). Table H sets out the 13 finalised cases:

Zambia); Communication 74/92 (*Commission Nationale des Droits de l'Homme et des Libertés v Chad*); Communication 83/92, 88/93, 91/93 (joined) (*Degli (on behalf of Bikagni), Union Interafricaine des Droits de l'Homme, Commission Internationale de Juristes v Togo*); Communication 87/93 (*Constitutional Rights Project (on behalf of Lekwot and six others) v Nigeria*); Communication 101/93 (*Civil Liberties Organisation (in respect of the Nigerian Bar Association) v Nigeria*), Communication 103/93 (*Abudakar v Ghana*) and Communication 129/94 (*Civil Liberties Organisation v Nigeria*).

214 The details of these decisions have been published in the Commission's annual activity reports. At the time of writing, the Assembly had approved publication of the first nine reports. This covers the Commission's work up to (and including) its 19th session (March 1996). The discussion here is limited to these cases. The communication involving Togo is categorised as a final decision on the merits, although the Commission's finding was that it "welcomes the continued efforts of the government to remedy such violations". The finding follows a mission to Togo in February 1995. The outcome cannot be categorised as a "friendly settlement". It is clear that certain violations were found, and that the current government was held responsible. Two explanations for the "unconfrontational" drafting of the Commission's finding are offered here: The Commission did not want to negate or discourage the efforts of the new government in changing policies and addressing the defects of the past. Also, the sitting at which the decision was reached, was held in Lomé, Togo. This fact would have highlighted the need not to antagonise the government.

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TABLE H: COMMUNICATIONS FINALLY DECIDED ON MERITS BY THE AFRICAN COMMISSION (AS AT THE END OF THE 21ST SESSION)

COMMUNI-CATION NUMBER	APPLICANT(S)	COUNTRY	RIGHTS VIOLATED	AT SES-SION	REMEDY	OBSERVATION
27/89; 46/91; 49/91; 99/93 (joined)	Organisation Mondiale Contre La Torture, ICJ and others	Rwanda	4,5,6,7,12(3) 12(4), 12(5)	20th	Urged government to adopt measures in conformity with decision	Serious or massive violations found at 20th session (art 58)
39/90	Pagnoulle	Cameroon	6, 7(1)(b), 7(1)(d), 15	21st	Recommended that victim be reinstated	
59/91	Mekongo	Cameroon	7(1)(a) 7(1)(d)	16th	Reparations, amount to be determined in legal system of Cameroon	
64/92; 68/92; 78/92	Achutan (on behalf of Banda); AI (on behalf of Orton and Vera Chirwa)	Malawi	4, 5, 6, 7(1)(a), 7(1)(c), 7(1)(d), 26	16th		At 14th session a series of serious and massive violations (art 58) was brought to Assembly's attention; which did not react; later considered by Commission as "ordinary" communication. Orton Chirwa died in prison.
60/91	Constitutional Rights Project	Nigeria	7(1)(a), 7(1)(c), 7(1)(d), 26	16th	Nigeria ordered to free complainants	Death penalty not executed
71/92	Rencontre Africaine pour la Defense des Droits de l'Homme	Zambia	2, 7(1)(a), 12(5)	20th	Efforts will be continued to reach amicable resolution	
83/92, 88/93, 91/93	Degli (on behalf of Bikagui), Union Interafricaine des Droits de l'Homme, International Commission of Jurists	Togo	4, 12(1)	17th		Delegation of Commission visited Togo; order welcomes efforts by the present government to remedy the violations (no explicit finding of violation)
87/93	Constitional Rights Project (in respect of	Nigeria	7(1)(a), 7(1)(c),	16th	Commission recommended that the	Were in fact freed

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COMMUNI-CATION NUMBER	APPLICANT(S)	COUNTRY	RIGHTS VIOLATED	AT SES-SION	REMEDY	OBSERVATION
	Lekwot and 6 others)		7(1)(d), 26		complainants be freed	
101/93	Civil Liberties Organisation (in respect of Nigerian Bar Association)	Nigeria	6, 7, 10, 26	17th	Commission ordered that the relevant decree "should be annulled"	
103/93	Abudakar	Ghana	6, 7(1)(d)	20th	Government urged to take steps "to repair the prejudice suffered"	
129/94	Civil Liberties Organisation	Nigeria	7, 26	17th	Commission found that the act of the Nigerian government to nullify the effect of Charter "constitutes a serious irregularity"	
74/92	Commission Nationale des Droits de l'Homme	Chad	1, 4, 5, 6, 9	18th		Serious or massive violations found (art 58)
25/89; 47/90; 56/92; 100/93	World Organisation Against Torture; Lawyers Committee for Human Rights *et al.*	Zaïre	4, 5, 6, 7, 8, 16, 17	19th		Decision on serious or massive violations (art 58) taken at 19th session

3.3.3.1 Modus operandi *of Commission*

i *Procedure for consideration*

The main **aim of the communication procedure** before the Commission is, in the words of the Commission itself, "to initiate a positive dialogue, resulting in an amicable solution between the complainant and the state concerned".[215] To facilitate this **dialogue**, consideration of the merits of a case preferably takes place in the presence of both sides.[216] However, if the government does not

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215 See eg Communication 25/89, 47/90, 56/91, 100/93 (joined). See also Communication 27/89, 46/90, 49/90, 99/93: "The main goal of the communications procedure before the Commission is to initiate a positive dialogue, resulting in an amicable resolution between the complainant and the state concerned, which remedies the prejudice complained of".

216 *Ibid.*

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heed notifications or respond to invitations to attend, the Commission considers the communication in the absence of a government representative.[217] This acknowledges that a prerequisite for any amicable solution is the good faith and willingness to participate in a dialogue on the part of both parties. The complaint may also be finalised in the absence of the complainant.

The Commission **decides the case on the factual basis presented to it**. A prerequisite for an amicable resolution of the conflict is the good faith of both sides involved, including the willingness to participate in a dialogue.[218] The communication must contain more than a mere allegation that a right has been infringed. Allegations of instances of torture without information about the specific acts do not enable the Commission to find a violation.[219] If the government did not respond to requests for information or for an explanation, a finding is made on the basis of the facts provided by the complainant alone. A blanket denial by the government is not deemed a sufficient factual basis for any finding.[220]

The lack of co-operation by a number of states and the desire for amicable settlements have prompted the Commission to **undertake missions to states** against which a final decision on the merits are pending. At its 16th session, the Commission decided to send a mission to Zaïre to investigate a number of communications received.[221] This visit never took place, because the government of Zaïre did not consent to the mission. Attempts to secure the state's consent resulted in excessive delay in the finalisation of these communications. The first of these joint communications is dated March 1989. A final decision was taken only in March 1996. An example of a mission which did take place is presented by the case against Togo. A final decision was reached at the 17th session (March 1995), after a mission had been undertaken to Togo in February 1995.

At its 19th session the Commission reaffirmed its decision to conduct missions to states in order to "consider" communications brought against these states which have already been declared

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217 *Ibid.*

218 See Communication 27/89, 46/90, 49/90, 99/93.

219 Communication 83/92, 88/93, 91/93, in respect of Communication 83/93.

220 The Commission's approach in respect of admissibility decisions is not as clear on this issue.

221 See Communication 25/89, 47/90, 56/91, 100/93 against Zaïre.

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admissible by the Commission.[222] Six states were targeted, although no dates had been fixed by the end of the 19th session. These states are Burundi, Mauritania, Nigeria, Rwanda, Senegal and Sudan. As Welch observed, the record was "not encouraging".[223] Three factors undermined this course from the outset: the lack of consent from the states concerned to allow the visit to take place, inaction of the OAU Chair[224] and lack of Commission resources. Especially the visit to Nigeria in early March 1997 was an encouraging sign that the tide was turning. By then, missions to Senegal, Mauritania and Sudan had already taken place.[225]

These **missions underscore the consensus-seeking nature** of the Commissions approach to human rights violations. In the case of Mauritania, for example, the Commission received four communications prior to its visit to that country. No specific findings were made about these individual violations in the course of the Commission's report. Instead, the communications served as a basis to initiate an investigation into more systematic and pervasive violations by the government of Mauritania.

A degree of **tension** exists between the Commission's efforts to reach **amicable solutions** through mediation, and its findings based on a **quasi-judicial** (or, in some respects, even fully-fledged judicial) process. The "judicial" nature of these proceedings are underscored by the fact that

- parties represented before the Commission are afforded an opportunity to address the Commission verbally and by presenting memorials,[226] and
- the Commission issues a reasoned "judgment" motivating its finding.

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222 Ninth Annual Activity Report, par 20.

223 (1995) at 160.

224 See Welch (1995) at 160, for the protracted process to send missions to Sudan and Rwanda.

225 See Tenth Annual Activity Report.

226 See eg Communication 74/92, in which a representative of a French NGO, Ms Trusses-Naprous, reiterated the information in the original communication, both verbally and by way of brief. She also contended that the human rights position has not improved since the communication was lodged.

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ii Issues of retrospectivity

Often, the Commission has been ineffective in the face of strong governmental resolve not to budge on the issue of human rights. Visits were for example not allowed. A communication could therefore take years to be brought to finality. In many instances the Commission only decided communications finally after the violating regime had been removed from office. The sad history of the Chirwas who were abducted from Zambia to Malawi in 1981 is a case in point. Their case was on the Commission's agenda since 5 March 1992, but was brought to finality only on 21 April 1994.[227] To Welch, "justice delayed was justice denied",[228] as Orton Chirwa died in prison before the Commission could dispose of the matter. The OAU Heads of State and Government did not respond to the Commission's finding of the existence of a series of massive violations, relayed to them in December 1993. Even at that stage, the progress to democracy was already under way.

The Charter does not have retroactive effect. It binds a state from the moment of formal adherence. Accordingly, the Commission held that it "cannot pronounce on the equity of court proceedings that took place before the African Charter entered into force".[229] The Charter does not render illegal what had previously been done legally.

However, a current, post-ratification violation may be informed by past events, allowing for some retrospective effect. An example is presented in the case of *Mekongo v Cameroon*,[230] where an appeal was lodged in Cameroon during 1982. The Commission found a violation of the right to be tried within a reasonable time. The time period involved had commenced before Cameroon ratified the Charter, but continued into the period after Cameroon's ratification.[231]

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227 See Communication 64/92, 68/92, 78/92 (joined) (*Achuthan (on behalf of Balanda), AI (on behalf of Orton and Vera Chirwa) v Malawi*).

228 Welch (1995) at 160.

229 See Communication 59/91 (*Mekongo v Cameroon*).

230 Communication 59/91.

231 See also Communication 97/93 (*Modise v Botswana*): "Although some of the events described in the communication took place before ratification, their effects continue to the present day. The current circumstances of the complainant is a result of a present policy decision taken by the Botswana government against him".

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iii Redress and remedies

It is difficult to discern a consistent pattern from the Commission's findings concerning remedies to or corrections of situations in which it had found a violation.

When **executive decrees** (akin to legislation at least in form) had been found to violate the Charter, the Commission in one case held that the decree should be annulled,[232] in another that its effects constitute a "serious irregularity",[233] and in two other cases decided that the complainants should be freed, without referring to the effect of the violation on the decrees.[234] The first two cases were instances of "abstract review", in that there were no directly affected individuals already suffering from a violation. In the last two cases, individuals were detained, following the exercise of powers granted by the decrees. While it is only understandable that the focus will in such cases fall on the specific individuals concerned, the Commission should also avail itself of those opportunities to spell out that the decrees should be nullified. Emphasis should fall on the fact that not only its specific application to the facts at issue, but its existence as such, violates the Charter.

When a violation of the Charter through **executive action** (by members of security forces, for example) had been found, the Commission had not given clear directives.[235] In cases where a series of massive violations had been found, the Commission is restricted to bringing this to the attention of the Assembly of Heads of State and Government. In one case, it made a formal finding of violation after the Assembly had failed to respond.[236]

Only once was **compensation** ordered. An imprisoned complainant whose appeal had been delayed for more than twelve years was found to be entitled to reparations for the prejudice he

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232 Communication 101/93 (*Civil Liberties Organisation (in respect of the Nigerian Bar Association) v Nigeria*).

233 Communication 129/94 (*Civil Liberties Organisation v Nigeria*).

234 Communication 60/91 (*Constitutional Rights Project v Nigeria)* and Communication 87/93 *(Constitutional Rights Project (In respect of Lekwot and six others) v Nigeria*).

235 See Communication 64/92, 68/92, 78/92 (joined).

236 Communication 64/92, 68/92, 78/92 (joined) against Malawi.

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suffered. The amount had to be determined by the domestic courts in accordance with the established legal principles of Cameroon.[237]

Provisional measures were ordered in *Degli v Togo*.[238] Unfortunately, the nature of these measures are not clear. The Commission's decision refers to "interim measures ... geared towards ensuring the security of Corporal ... to avoid any irreparable prejudice inflicted on the victim of the alleged violations". This is in accordance with the Rules of procedure which allows for provisional measures without implying a decision on the substance of the communication.[239] This case involved the human rights activist Ken Saro-Wiwa.[240] The interim measures were clearly not of a sufficiently specific nature, and were not complied with by the Nigerian government. At its session in October 1995 the Commission joined this case with others to be discussed with the Nigerian government during the Commission's intended visit to Nigeria. This mission only took place in 1997, long after Saro-Wiwa and eight others were convicted by a special military tribunal and executed (on 10 November 1995).

iv Follow-up

Only in **one instance** was a **clear** indication given as to follow-up of the Commission's finding. In the *Lekwot* case[241] the Commission at its 16th session found a violation of the Charter and recommended that the government should free the complainants. At its 17th session "the Commission decided to bring the file to Nigeria for a planned mission in order to make sure that the violations have been repaired".[242] This mission eventually took place in March 1997. The eventual outcome has not been published.

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237 See Communication 59/91 (*Mekongo v Cameroon*).

238 Communication 83/92.

239 See rule 109 of the original Rules of procedure, which was then in force.

240 See also Ankumah (1996) at 117 - 118.

241 Communication 87/93.

242 Eighth Annual Activity Report, Annex on Communications.

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3.3.3.2 Series of serious and massive violations

In four cases the Commission made explicit findings of serious and massive violations of human rights. In terms of article 58 of the Charter, it could draw the attention of the Assembly to these facts. However, the Commission has not developed a consistent practice, either in making an explicit finding of serious or massive violations, or in drawing the attention of the Assembly thereto.[243]

The first case is the situation of "civil war" that pertained in Chad in the early 1990s.[244] The Commission based its finding of a series of serious and massive violations on the infringement of five rights in the Charter:

- The right to life, in that the state failed to prevent assassinations or to investigate them in order to solve them.
- The prohibition against torture was infringed.
- The state failed to provide security and stability in the country.
- Numerous people were arbitrarily arrested and detained, causing a violation of article 7.
- Freedom of expression was violated when journalists were harassed and attacked.

The second case relates to the situation in the former Zaïre. In the case above, against Chad, one institution brought a cumulative complaint, alleging massive violations. In this case, four different complaints, filed by numerous different NGOs, were joined by the Commission.[245] The complaints covered a long period - the first was submitted in 1989, the second in 1990, the third in 1991, and the last in 1993. They also apparently covered a wide geographical area. It was found that an

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243 See eg Communication 83/92; 88/93; 91/93 (joined) against Togo, in which reference is made to serious or massive violation in the admissibility finding, but not in the finding on the merits.

244 Communication 74/92 (*Commission Nationale des Droits de l'Homme et des Libertés v Chad*).

245 Communication 25/89, 47/90, 56/91, 100/93 (joined) (*Free Legal Assistance Group, Lawyers' Committee for Human Rights, Jehova's Witnesses of Zaïre, Union Interafricaine des Droits de l'Homme v Zaïre*).

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extended list of rights (at least seven) had been violated. Treating these communications together as evidence of wide-spread abuse of human rights in Zaïre, the Commission, at its own initiative, concluded that a finding in terms of article 58 of the Charter was called for.

The third finding of massive violations related to complaints brought against Malawi. The cases of Aleke Banda (who had been in custody without charge "at the pleasure of the President" for over twelve years) and Vera and Orton Chirwa (who were abducted from Zambia, tried without legal representation, and detained in appalling prison conditions) led the Commission to this conclusion.[246] At its 14th session the Commission decided that the communications provided evidence of a series of massive violations of the Charter. Violations of articles 5, 6 and 7 were found. Interestingly, at its 16th session the Commission proceeded to consider the merits of the case and made a formal finding that the Charter had been violated.

The fourth case in which the Commission held that the facts constituted serious or massive violations of the African Charter related to events in Rwanda.[247] The Commission joined four communications, which made reference to the expulsion from Rwanda of Burundi nationals who had been refugees in Rwanda for many years, as well as the arbitrary arrest and extra-judicial executions of Rwandans, mostly of the Tutsi group. At its 20th session (October 1996) the Commission held that articles 4, 5, 6, 7, 12(4) and 12(5) had been violated and made a finding that the facts revealed serious or massive violations of the Charter. The Commission's finding was made after the situation had already changed dramatically.[248] This fact may explain the vague "remedy" according to which the Commission "urged" the government of Rwanda "to adopt measures in conformity with this decision".[249]

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246 Communication 64/92, 68/92, 78/92 (joined) (*Achuthan (on behalf of Banda) v Malawi*).

247 Communication 27/89, 46/90, 49/91, 99/93 (joined) (*Organisation Mondiale Contre la Torture and three others v Rwanda*).

248 The events in Rwanda occurred between 1989 and 1992.

249 *Ibid.*

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3.3.3.3 *Violations*

The substantive provisions of the Charter which have been interpreted in the Commission's findings on the merits of communications are now discussed.[250] It will become clear that the decisions relate almost exclusively to civil and political rights of individuals, rather than to socio-economic or collective rights. The rights most frequently invoked are the right to a fair trial, to be free from arbitrary detention and arrest, and from cruel and inhuman punishment.

i Article 1

Article 1 stipulates the all-encompassing obligation of states parties to "recognise the rights, duties and freedoms enshrined in this Charter" and to "adopt legislative or other measures to give effect to them". Nigeria ratified the African Charter in 1983. In terms of the African Charter (Ratification and Enforcement Act) the Charter has the force of law in Nigerian domestic law. The Political Parties (Dissolution) Decree nullified any domestic effect of the Charter. A communication directed to the Commission complained that this decree violated the Charter.[251] The Commission found that the obligation under article 1 commences at ratification. It will only cease when ratification is withdrawn through a procedure acceptable in international law. This has not been done. This means that the Charter remains in force in Nigeria.

A state's duty to "undertake measures" implies that the state must also take pre-emptive steps to prevent human rights violations. Even if state agents are not the immediate and direct cause of a violation (for example an assassination), the state has a duty to intervene in order to prevent violations (such as the assassination of specific individuals) and to investigate the incidents.[252]

A question arising in this context is whether a change in government affects a state's obligations under the Charter. This question was bound to arise in African states as the wave of democratisation swiped repressive regimes out of office, replacing them with democratically-

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250 See also the discussion by Ankumah (1996) at 111 - 177.

251 Communication 129/94 (*Civil Liberties Organisation v Nigeria*).

252 See Communication 74/92 (*Commission Nationale des Droits de l'Homme et des Libertés v Chad*).

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elected governments with a human rights consciousness and conscience. The Commission held that "international law stipulates that a government inherits the previous administration's responsibilities".[253] Therefore, the democratic government in Togo had to redress the violations caused by the previous regime.[254] Similarly, the new government in Malawi was held responsible for the reparation of human rights abuses committed by the previous government.[255] In accordance with principles of international law the change of government did not "extinguish" the claim before the Commission. The findings in the two cases differ: In the Chirwa couple case Malawi was found in violation of the Charter; in the Togolese case the Commission was satisfied "that the present administration has dealt with the issues satisfactorily".[256]

ii *Article 2*

The denial of rights to individuals on the basis of their nationality (in the particular case, Burundi nationals in Rwanda), or on the basis of their membership of a certain ethnic group (in the particular case, the Tutsi group) violates the guarantee of equality in article 2.[257]

iii *Article 4*

Article 4 guarantees respect for human life. Shootings by police officers are a clear violation of this article,[258] as is the shooting of peaceful demonstrators[259] and extra-judicial killings.[260]

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253 See Communication 83/92, 88/93, 91/93 (joined) against Togo.

254 *Ibid.*

255 The Chirwa couple case, Communication 64/92, 68/92, 78/92 (joined).

256 Eighth Annual Activity Report, Annex of Communications.

257 See Communication 27/89, 46/90, 49/90, 99/93 (joined) (*Organisation Mondiale Contre la Torture v Rwanda*).

258 See Communications 64/92, 68/92, 78/92 (joined) (*Achutan (on behalf of Banda), Amnesty International (on behalf of Orton and Vera Chirwa), Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi*).

259 See Communication 83/92, 88/93, 91/91 (joined) against Togo.

260 See Communication 27/89, 46/90, 49/90, 99/93 (joined).

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iv *Article 5*

Article 5 outlaws all forms of "torture, cruel, inhuman or degrading punishment and treatment". Orton and Vera Chirwa were sentenced to death in Banda's Malawi. Their sentences were commuted to life imprisonment. Conditions of imprisonment were the subject of two communications submitted to the Commission on their behalf.[261] Various aspects of their imprisonment contravened this article. These were:

- conditions of overcrowding;
- acts of beating and torture;
- excessive solitary confinement; and
- shackling within a cell.

In its finding the Commission went further, incorporating a socio-economic dimension into the ambit of this right. The "extremely poor quality food" and "denial of access to adequate medical care" also led to contraventions of article 5. As in many other instances, the sparseness of the Commission's reasons and the brevity of the decision make it impossible to ascertain what the conditions were that gave rise to a finding of "extremely poor" and not "adequate". This lack of a factual basis diminishes the precedent-setting impact of the finding.

v *Article 6*

Article 6 grants the right to liberty and security of the person. Arbitrary arrest and detention constitute violations of article 6.[262]

vi *Article 7*

This article is applicable to any body that can hand down decisions which may lead to imprisonment, enabling that body to impact on the liberty and security of the person.[263] Such a

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261 Communications 64/92, 68/92, 78/92 (*Achutan (on behalf of Banda), Amnesty International (on behalf of Orton and Vera Chirwa), Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi*).

262 Communications 64/92, 68/92, 78/92 (joined) (*Achutan (on behalf of Banda), Amnesty International (on behalf of Orton and Vera Chirwa, Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi*).

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body, even if it is called a "Body of Benchers", is analogous to a court and must satisfy the requirements of article 7.[264]

Article 7(1)(a) provides for "the right to appeal to competent national organs against acts of violating ... fundamental rights ...". The Nigerian Robbery and Firearms (Special Provisions) Act[265] determined that no "appeal shall lie from a decision of a tribunal constituted under this Act ...". The punishment decreed as a culmination of a carefully conducted criminal process would usually not, but may in some cases constitute an "act of violating ... fundamental rights", the Commission observed. However, a violation of article 7(1)(a) was based on the fact that the decree foreclosed any avenue of appeal to any of the "competent national organs" mentioned in article 7(1)(a).[266] A similar provision in the Civil Disturbances (Special Tribunal) Act was found in violation of article 7(1)(a).[267] The relevant section provided as follows: "The validity of any decision, sentence, judgment, ... or any order given or made, ... or anything whatsoever done under this Act shall not be inquired into in any court of law".[268] The Commission held that "to foreclose any avenue of appeal to competent national organs in criminal cases bearing such penalties clearly violates" article 7(1)(a).[269]

The ousting of the jurisdiction of the courts to adjudicate on the validity of decrees "constitutes an attack of incalculable proportions on Article 7", the Commission held.[270] It added: "An attack of this sort on the jurisdiction of the courts is especially invidious, because while it is a violation of human rights in itself, it permits other violations of rights to go unredressed".[271] A decree issued by the Nigerian authorities purported to nullify Nigeria's ratification of the Charter and recourse

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263 See the decision on Communication 101/93 *(Civil Liberties Organisation (in respect of the Nigerian Bar Association) v Nigeria*).

264 *Ibid.*

265 S 11(4) of the Act.

266 Communication 60/91 (*Constitutional Rights Project (in respect of Akamu, Adega and others) v Nigeria*).

267 Communication 87/93 (*Constitutional Rights Project (in respect of Lekwot and six others) v Nigeria*).

268 Part IV, s 8(1) of the Act.

269 Even the death penalty could be imposed by the Special Tribunal provided for in the Act.

270 See Communication 129/94 (*Civil Liberties Organisation v Nigeria*).

271 *Ibid.*

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thereto in domestic courts.[272] Finding that the authorities could only undo Nigeria's ratification by withdrawing it, the Commission ruled that "Nigeria cannot negate the effects of its ratification of the Charter through domestic action". Nigeria remains under an obligation to guarantee all the rights in the Charter (see article 1), including article 7. Section 7(1)(a) refers to "fundamental rights as recognised ... by conventions ... in force". As the Charter is a "convention" which guarantees "fundamental rights" and is "in force", the right to appeal against acts which violate the Charter is included in its ambit.

Detention based on the suspicion that "an individual may cause problems" is a violation of the right to be presumed innocent in article 7(1)(b).[273]

The right to defence in the process of having one's case heard, including the right to be defended by counsel of one's choice, is articulated in article 7(1)(c) of the Charter. Harassment and intimidation of counsel, to the extent that they withdraw from a case, constitutes a violation of an accused person's right to counsel.[274] If counsel has withdrawn and the accused is not granted the opportunity to procure the services of other counsel, the right to be defended by counsel of one's choice (which is contained in article 7(1)(c)) has also been infringed.[275] The appearance of Orton and Vera Chirwa without counsel in a case in which the death penalty was imposed, constituted a violation of the same sub-article.[276]

Article 7(1)(d) guarantees the right to be tried by "an impartial court or tribunal". A violation of this guarantee was found in provisions of the Nigerian Robbery and Firearms (Special Provisions) Act.[277] In terms of the act certain offences are tried by special tribunals, each consisting of a judge, an officer from the Armed Forces and an officer from the Police Force. The Commission found a

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272 The Political Parties (Dissolution) Decree 114 of 1993.

273 See Communication 39/90 (*Pagnoulle v Cameroon*).

274 See Communication 87/93 (*Constitutional Rights Project (in respect of Lekwot and six others) v Nigeria*).

275 *Ibid.*

276 Communications 64/92, 68/92, 78/92 (*Achutan (on behalf of Banda), Amnesty International (on behalf of Orton and Vera Chirwa), Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi*).

277 S 8(1) of the Act. See Communication 60/91 (*Constitutional Rights Project (in respect of Akamu, Adega and others) v Nigeria*).

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violation of article 7(1)(d), as an appearance of partiality has been created by the establishment of these tribunals. The perception of partiality was created because jurisdiction "has been transferred from the normal courts to a tribunal chiefly composed of persons belonging to the executive branch of government". This meant that the constitutionally cherished division of powers between the executive and the legislature had been eroded. Another factor that contributes towards an impression of impartiality is the fact that the members of the tribunal "do not necessarily possess any legal expertise". This implies that they may be seen to be influenced by extra-legal (such as overtly political) criteria. The Commission made it clear that the objective facts (that the members of the executive may also be lawyers and may in fact be favourably disposed towards individual rights) are not taken into account. Impartiality is gauged with reference to perceptions. Similarly, the Civil Disturbance (Special Tribunal) Act created a tribunal consisting of one judge and four members of the armed forces. Using the same arguments just cited, the Commission also found the relevant provisions[278] in violation of article 7(1)(d).[279]

Another Nigerian case that dealt with the impartiality of a tribunal concerned the creation of a new controlling body for the Nigerian Bar Association, called the "Body of Benchers". Of the 128 members of this body, 97 are government nominees. The Commission found a violation of article 7(1)(d).[280]

Article 7(1)(d) also stipulates the right to "be tried within a reasonable time". The complainant in *Mekongo v Cameroon*[281] instituted an appeal in 1982. After twelve years the appeal had not been heard. Finding a violation of article 7(1)(d), the Commission commented: "A judicial proceeding cannot be considered complete until all appeals have been heard. The twelve years that the complainant's appeals have been pending without result thus constitutes a violation of his right of appeal and his right to be tried within a reasonable time". In another case against Cameroon the Commission found that two years without any hearing or projected trial date constituted a violation

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278 Part II, s 2(2) of the Act.

279 See Communication 87/93 (*Constitutional Rights Project (in respect of Lekwot and six others) v Nigeria*)

280 Communication 101/93 (*Civil Liberties Organisation (in respect of the Nigerian Bar Association) v Nigeria*).

281 Communication 59/91.

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of article 7(1)(d).[282] Indefinite detention without trial simultaneously breaches the right to appeal to a competent court,[283] and the right to be tried by a competent court within a reasonable time.[284]

The principle of legality (*nullum crimen sine lege*) is introduced in article 7(2). Noting the retroactive operation of the Nigerian Legal Practitioners' Decree (issued on 18 February 1993, but deemed to come into force on 31 July 1992), the Commission found a violation of article 7(2).[285] It added the following comment about article 7(2): "This statement should be read as a general prohibition on retroactivity. All other international human rights instruments contain a prohibition on the retroactive application of laws, for the reason that citizens must at all times be fully aware of the state of the law under which they are living. To impose laws retroactively seriously endangers the rights of citizens and makes a mockery of the principle of the rule of law."

vii Article 8

Article 8 guarantees "freedom of conscience" and "the profession and free practice of religion". This right contains a claw-back clause: The exercise of the right is made subject to restrictions serving the ends of "law and order". The harassment of Jehova's Witnesses was found in violation of this freedom.[286] The claw-back clause did not play a role, "since the government has presented no evidence that the practice of their religion in any way threatens law and order".

viii Article 10

Every individual, article 10 asserts, has the right to freely associate with others, "provided that he abides by the law". The inclusion of claw-back clauses in the Charter, such as the last phrase, has been criticised.

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282 Communication 39/90 (*Pagnoulle v Cameroon*).

283 Art 7(1)(a) of the Charter.

284 Art 7(1)(d) of the Charter, see Communications 64/92, 68/92, 78/92 against Malawi above.

285 Communication 101/93 (*Civil Liberties Organisation (in respect of the Nigerian Bar Association) v Nigeria*).

286 See Communications 25/89, 47/90, 56/91, 100/93 (joined) above.

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The fear has been expressed that the term "law" would be interpreted widely to justify and excuse any action whatsoever taken by governments, as long as such action is couched in legislation or otherwise conforms with "law". Fortunately, the Commission has avoided a strictly and rigid positivistic approach in the interpretation of article 10. First, it adopted a resolution which provided that states must refrain from negating its obligations under the Charter (when adopting "laws" restricting freedom of association). Then, in Communication 101/93, it recalled its resolution in finding the Nigerian Legal Practitioners' Decree in violation of article 10.[287] In terms of the decree a new, government-controlled ruling body was created. The Commission observed that "interference with the self-governance of the Bar Association may limit or negate the reasons for which the lawyers desire in the first place to form an association".

ix Article 12

Article 12(1) provides as follows: "Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law". Actions by the security forces that caused individuals to flee the state of which they are nationals violate their freedom of residence.[288]

The expulsion of non-nationals may only take place "by virtue of a decision taken in accordance with the law".[289] The expulsion of Burundi refugees from Rwanda was found to violate this provision.[290] The Commission interpreted "in accordance with law" as including international law on this subject, which prohibits the expulsion of refugees who would be subjected to persecution in their country of nationality.[291]

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287 *Civil Liberties Organisation (in respect of the Nigerian Bar Association) v Nigeria.*

288 See Communication 83/92, 88/93, 91/93 against Togo.

289 Art 12(4) of the Charter.

290 See Communication 27/89, 46/90, 49/90, 99/93 (joined).

291 The Commission observed as follows: "This provision should be read as including a general protection of all those who are subject to persecution, that they may seek refuge in another state. Article 12(4) prohibits the arbitrary expulsion of such persons from the country of asylum."

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The expulsion of Burundi nationals from Rwanda and West Africans from Zambia was also found to be in violation of the prohibition against mass expulsions aimed at national or ethnic groups.[292]

x *Article 15*

This article, which provides for the right to work under "equitable and satisfactory conditions", has socio-economic implications. An individual was denied reinstatement in his professional capacity as magistrate. He approached the Commission, arguing that the fact that he did not benefit from amnesty provisions violated his rights under the Charter. The Commission found that the government had violated article 15 "because it had prevented [the applicant] to work in his capacity of a magistrate even though others who have been condemned under similar conditions have been reinstated".[293]

xi *Article 16*

Article 16 contains an important socio-economic right, the right to health. In terms of the article every individual must be ensured the "best attainable state of physical and mental health". State parties must take the "necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick". The Commission gave a generous interpretation to this right, holding that it places the duty on governments "to provide basic services such as safe drinking water and electricity", besides the more obvious requirement to supply adequate medicine.[294]

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292 See art 12(5) of the Charter, and Communication 27/90, 44/90, 46/90, 39/99 (joined) (in respect of Rwanda), as well as Communication 71/92 *(Rencontre Africaine pour la Defense des Droits de l'Homme v Zambia*).

293 One may argue that the finding is actually based on the applicant's right to be treated equally to those similarly situated as himself.

294 Communication 25/89, 47/90, 56/91, 100/93 see above.

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xii Article 17

The right to education is unequivocally guaranteed to every individual in article 17 of the Charter. This right is violated by the closure of universities and secondary schools.[295]

xiii Article 26

Article 26 places a duty on states parties "to guarantee the independence of the Courts" and to allow national institutions entrusted with the protection of human rights to be and to remain established. The Nigerian government enacted a clause ousting the jurisdiction of courts to entertain any question about the validity of decrees and edicts.[296] While the ouster clause was found in violation of article 7(1)(a), which guarantees an individual's right to be heard, the Commission also found a violation of article 26, which "speaks of the institutions which are essential to give meaning and content" to the right in article 7(1)(a).[297] Article 26 "clearly envisions the protection of the courts which have traditionally been the bastion of protection of the individual's rights against the abuses of State power".

3.3.4 State reporting

One of the obligations that states parties accept at ratification is to submit a two-yearly report on the legislative or other measures that they have taken with a view to giving effect to the provisions of the Charter.[298] The purpose of reporting to a treaty monitoring body is generally regarded as being twofold, here termed "introspection" and "inspection".

Reporting presents an opportunity for the state to undertake **introspection**. The African Charter, with its inclusion of socio-economic rights, the right to development and its emphasis of African culture, covers a broad range of human endeavour. Compiling information and drafting a report

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295 See Communication 25/89, 47/90, 56/91, 100/93 (joined) above.

296 See the Constitution (Suspension and Modification) Decree 1993, s 5.

297 Communication 129/94 (*Civil Liberties Organisation v Nigeria*).

298 Art 62 of the Charter.

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would necessarily require a multi-disciplinary approach and the involvement of different government departments. The involvement of high-level officials will mean that reporting coincides with a process of thoughtful inter-departmental stock-taking and soul-searching. The presumption is further that departments will keep statistical records and provide comprehensive information. A good quality report will be evidence of serious introspection.

The presentation and consideration of the report by the monitoring body presents the international community with an opportunity for **inspection** of the state's compliance with its obligations under the treaty. If careful scrutiny of the report reveals non-compliance, it will expose the state party to international shame and embarrassment. But, ideally, it is more than that: It should also be seen as an opportunity presented to a government to "learn" from independent experts about ways of improving the human rights situation in its country. Seen from this angle, inspection need not only shame, but may also lead to legal reform in prompting for necessary legal change. On the whole, the reporting process should be treated as "an opportunity rather than a chore or formality".[299]

An analysis of reporting to the African Commission indicates that these purposes are not properly served in the African context.[300]

3.3.4.1 Introspection

i Infrequent reporting

The reporting obligation has led to little introspection. The first, obvious requirement is that the process of drafting a report has to be initiated. In the case of most states that had ratified the

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299 Alston (1991) at 14.

300 The analysis is based on the *Examination of State Reports* vols 1 - 5 (published by the Danish Centre for Human Rights), covering reports examined up to the 14th session. See also Danielsen (1994) and Gear (1992) 10 *NQHR* 29. Analysis of subsequent reports has been inhibited by the lack of published information. The only data generally accessible is the meagre particulars contained in annual activity reports and final communiqués. For further details, one has to rely on word of mouth or unofficial records. These factors explain why the analysis is tilted towards the first few years of the Commission's activities in this field.

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Charter, no effort to report has been made whatsoever. By the 21st session of the Commission (more than ten years after the Charter took effect), the reports of only seventeen of the 51 states parties have been examined.[301] Four states had submitted a second report.[302] This means that 45 second reports were outstanding when the 20th session was completed.[303] No state had at that stage submitted a third, fourth or fifth report.[304]

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301 See Table I. Note that three submitted reports (those of Burkina Faso, Chad and the Seychelles) had at that stage not yet been considered by the Commission. The reports of two of the 51 states parties (South Africa and Swaziland) were not yet due at that stage, as these states had ratified the Charter less that two years previously.

302 Of these, the reports of Burkina Faso, Seychelles and Senegal have not been considered.

303 See Table I.

304 See, however, the second report of Zimbabwe, which was treated as a combination of a second and third report.

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TABLE I: REPORTING UNDER ARTICLE 62 OF THE AFRICAN CHARTER AS AT 31 MARCH 1997

Country (date of ratification)	Reports as at 31 March 1997				
	1st	2nd	3rd	4th	5th
Algeria (ratified on 1 March 1987)	submitted ("sub") and considered ("cons") (19th Session) ("19th S")	due	due	due	-
Angola (2 March 1990)	due	due	due	-	-
Benin (20 January 1986)	sub and cons (16th S)	due	due	due	due
Botswana (17 July 1986)	due	due	due	due	due
Burkina Faso (6 July 1984)	sub (not yet cons)	due	due	due	due
Burundi (28 July 1989)	due	due	due	-	-
Cameroon (20 June 1989)	due	due	due	-	-
Cape Verde (2 June 1987)	sub and cons (16th S)	due	due	due	-
Central African Republic (26 April 1986)	due	due	due	due	due
Chad (9 October 1986)	sub (to be cons: 22nd S)	due	due	due	due
Comoros (1 June 1986)	due	due	due	due	due
Congo (9 December 1982)	due	due	due	due	due
Côte d'Ivoire (6 January 1992	due	due	-	-	-
Djibouti (11 November 1991)	due	due	-	-	-

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Country (date of ratification)	Reports as at 31 March 1997				
	1st	2nd	3rd	4th	5th
Egypt (20 March 1984)	sub and cons (11th S)	due	due	due	due
Equatorial Guinea (7 April 1986)	due	due	due	due	due
Eritrea (not yet ratified)					
Ethiopia (not yet ratified)					
Gabon (20 February 1986)	due	due	due	due	due
Gambia (8 June 1983)	sub and cons (12th S)	sub and cons (16th S)	due	due	due
Ghana (24 January 1989)	sub and cons (14th S)	due	due	-	-
Guinea (16 February 1982)	due	due	due	due	due
Guinea-Bissau (4 December 1985)	due	due	due	due	due
Kenya (23 January 1992)	due	due	-	-	-
Lesotho (10 February 1992)	due	due	-	-	-
Liberia (4 August 1982)	due	due	-	-	-
Libya (19 July 1986)	sub and cons (9th S)	due	due	due	due
Madagascar (9 March 1992)	due	due	-	-	-
Malawi (17 November 1989)	due	due	due	-	-
Mali (21 December 1981)	due	due	due	due	due

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Country (date of ratification)	Reports as at 31 March 1997				
	1st	2nd	3rd	4th	5th
Mauritania (14 June 1986)	due	due	due	due	due
Mauritius (19 June 1992)	sub and cons (20th S)	due	-	-	-
Mozambique (22 February 1989)	sub and cons (19th S)	due	due	-	-
Namibia (30 July 1992)	due	due	-	-	-
Niger (15 July 1986)	due	due	due	due	due
Nigeria (22 June 1983)	sub and cons (13th S)	due	due	due	due
Rwanda (15 July 1983)	sub and cons (9th S)	due	due	due	due
Sahrawi Arab Democratic Republic (2 May 1986)	due	due	due	due	due
São Tomé e Príncipe (23 May 1986)	due	due	due	due	due
Senegal (13 August 1982)	sub and cons (12th S)	sub (not yet cons)	due	due	due
Seychelles (13 April 1992)	sub (not yet cons)	due	-	-	-
Sierra Leone (21 September 1983)	due	due	due	due	due
Somalia (31 July 1985)	due	due	due	due	due
South Africa (9 July 1996)	-	-	-	-	-
Sudan (18 February 1986)	sub and cons (21st S)	due	due	due	due
Swaziland (15 September 1995)	-	-	-	-	-
Tanzania (18 February 1984)	sub and cons (11th S)	due	due	due	due

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Country (date of ratification)	Reports as at 31 March 1997				
	1st	2nd	3rd	4th	5th
Togo (5 November 1982)	sub and cons (13th S)	due	due	due	due
Tunisia (16 March 1983)	sub and cons (9th S)	sub and cons (18th S)	due	due	due
Uganda (10 May 1986)	due	due	due	due	due
Zaïre (20 July 1987)	due	due	due	due	-
Zambia (19 January 1984)	due	due	due	due	due
Zimbabwe (30 May 1986)	sub and cons (12th S)	sub and cons (21st S))		due	due

The list of state reports considered by the Commission up to its 21st session is as follows:

9th session	Libya, Rwanda, Tunisia
10th session	none
11th session	Egypt, Tanzania
12th session	The Gambia, Senegal, Zimbabwe
13th session	Nigeria, Togo
14th session	Ghana
15th session	none
16th session	Benin, Cape Verde, Gambia II
17th session	none
18th session	Tunisia II
19th session	Algeria, Mozambique
20th session	Mauritius
21st session	Sudan, Zimbabwe (II and III combined)

Table I shows that the Commission has, since the first reports became due in October 1988, examined only 20 reports from 17 states.

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An analysis of this data[305] reveals the role that commissioners can play to raise awareness and to coax inactive governments into compliance. Eleven of the twenty state reports were considered while a commissioner from that particular state was serving on the Commission.[306]

Reasons for this lack of compliance are a general need for political will on the part of states to co-operate with the Commission or to take their obligations seriously; the burden on states who ratified various international conventions in addition to the Charter;[307] and lack of co-ordinating efforts between state departments, such as the departments of foreign affairs and of justice.[308]

ii *Contents of reports insufficient*

When reports were in fact prepared, indications are that they were not the product of serious introspection, but rather the formalistic fulfilment of what was regarded as a bureaucratic obligation. This lack of self-criticism and evaluation is exemplified in the first "report" of Nigeria, that only consisted of a few brief remarks and a photo copy of table of contents of the partially suspended Constitution.[309] The reports of Senegal and Mauritius are exceptions, in that several ministries contributed to the report, and NGOs also made an input.[310] One of the main reasons for the bad quality of reports generally is the lack of timely planning and co-ordination at the level of government departments.

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305 See also Annexure D, reflecting terms of different commissioners.

306 They are Libya (Buhedma), Egypt (El Shiekh), Tanzania (Kisanga), Gambia (Janneh), Senegal (Ndiaye), Nigeria (Umozurike), Ghana (Dankwa), Cape Verde (Duarte), Gambia II (Janneh), Tunisia II (Ben Salem) and Algeria (Rezzag-Bara). See also the comments by Commissioner Rezzag-Bara, during an interview, about his personal role in ensuring that Algeria submitted its report, shortly after he became a commissioner ((1996) (Oct - Dec) *AFLAQ* at 45).

307 See interview with Chairman Nguema in (1996) (Oct - Dec) *AFLAQ* at 9.

308 Interview with Commissioner Kisanga ((1996) (Oct - Dec) *AFLAQ* at 29).

309 See Welch (1995) at 155. In fact, the whole "report" consists of six pages. The first three pages contains a "short brief of the Nigerian Judicial system as required" (in the words of the report). The next three pages is a photocopy of the index of the Constitution, ss 1 – 144.

310 *Examination of State Reports* vol 3 (1995) at 49.

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Recently, the Commission has expressed its satisfaction with a number of reports.[311] The danger is, though, that the Commission may react positively to a rather imperfect report, just because it shines in comparison with totally inadequate precedents. It may also be blinded by the comparatively good quality of the report and lose sight of the inherently poor human rights record.[312]

3.3.4.2 Inspection

The procedure adopted by the Commission in considering those reports which are submitted, is as follows:[313]

- A member of the Commission is assigned beforehand as "Special Rapporteur".
- Questions are usually drafted by the Special Rapporteur and sent to the state some time before consideration of the report is due to take place.
- Proceedings at the examination start with the Chairman (or Special Rapporteur) explaining the purpose of the examination of state reports.
- Thereafter the state's representative introduces the report.
- This is followed by the observations and questions of the Special Rapporteur.
- Other members of the Commission then join in addressing more questions to the representative.

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311 See eg the "appreciation" for the Gambia's second report (Eighth Annual Activity Report at par 10), the "high quality" of the reports from Algeria and Mozambique presented at the 19th session (Ninth Annual Activity Report at par 12) and the "second and third" report of Zimbabwe examined at the 21st session (see the Final Communiqué of the 21st session).

312 See eg the reference to the fact that the Commission has commended Zimbabwe on "the good quality of the report" presented to the Commission's 21st session ((1997) (June - July) *African Topics* 12). By contrast, observers described the report presented by Sudan as a dismal failure.

313 This exposition is based on a perusal of the state reporting proceedings transcribed and contained in *Examination of State reports* vols 1 to 5.

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- The representative is then granted an opportunity to prepare responses.
- After the representative has answered, the commission summarises the proceedings.

A number of factors which have seriously undermined the effectiveness of the system of inspection by the Commission, often reducing it to a meaningless exercise, are now discussed:

i *Guidelines for reporting*

In October 1988, at its 4th session, the Commission adopted guidelines for state reporting.[314] Rather than propelling the reporting system into motion, these guidelines became obstacles that retarded development. Some of these deficiencies are highlighted:

- An impressionistic view immediately reveals one of the core problems: The guidelines are **excessively detailed** and **unnecessarily complex**. The guidelines run for no less than 24 pages in the Commission publication in which they first appeared.[315] Consider that the substantive provisions of the Charter, reprinted in the same publication, take up only three and a half pages! For shear length, these guidelines surpass similar prescriptions issued by international human rights treaty bodies. This creates a perception that reporting is burdensome, and it has certainly been a factor inhibiting swift compliance. This must stand as a sorry example of unrealistic optimism, so easily deflated by harsh realities. Unnecessary complexity is also introduced by distinguishing between information required for "initial" and "periodic" reports.[316] Clarity was further confounded by a letter written by the then Chairman Nguema, which set the due date of the first reports at 21 October 1989, instead of 21 October 1988.[317]
- Secondly, various features of the reporting guidelines are **confusing**. The distinction between initial and periodic reports is not followed consistently.[318] The rights in the Charter are not

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314 The full text was attached to the Second Annual Activity Report, from 45.

315 Titled *African Commission on Human and Peoples' Rights DOCUMENTATION*. It also contains the first three activity reports, and was replaced by the *Review of the African Commission*.

316 See eg guideline IV par 6, on art 29 of the Charter.

317 See two letters attached as annexes to the Second Activity Report.

318 In some respect a distinction is drawn between information required in initial and periodic reports, in other instances not.

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treated in any logical or coherent order. The Charter provisions are grouped together in subject fields, without any correlation to the structure of the Charter.

- Paradoxically, the guidelines are **too sparse in other respects**. When dealing with socio-economic rights, few details are given as to levels of realisation. The strictures created by claw-back clauses in respect of civil and political rights could have been mitigated by the guidelines.

- Another sign of **over-enthusiasm is the requirements for socio-economic reporting**, which requires elaborate statistical data.[319]

- The **guidance** sought in the guidelines used by treaty bodies established under international human rights instruments is **misguided**. On the subject of racial relations and women, guidelines adopted for the two applicable international instruments (CERD and CEDAW) are largely taken over uncritically. This has the effect of expecting reporting on issues not included in the Charter at all, and of neglecting issues of particular relevance in Africa. Elaborate as they are, the guidelines do not make mention of the practice of female circumcision, or of ethnic cleansing. This copying of existing guidelines has contributed to the fragmentary nature of the guidelines. It starts with "civil and political rights" (in I), then deals with racial discrimination (in V), the crime of apartheid (in VI) and lastly with discrimination against women (in VII).

States are, in any event, not complying with the guidelines. Even the recent Zimbabwean report, the subject of so much praise by the Commission, completely ignored these prescriptions. Instead, the report does the logical thing of following the sequence of the rights as they are set out in the Charter. One of the reasons for the negation of the guidelines may certainly be that they are not readily accessible to the drafters of state reports.

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319 See eg guideline II A par 32(j), for vagueness: "Statistical and other available data on the realization of the right to adequate food", and for difficulties to comply, II A par 37: "Statistical and other available data are requested on the realization of the right to health, in particular, statistics on infant mortality, number of doctors per inhabitant, number of hospitals and hospital beds, etc".

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ii *Confusion about initial and periodic reports*

A comparison is drawn between the first session at which the Commission considered state report (the 9th session, March 1991) and the 14th session (December 1993).[320] At the **9th session**, there was a significant amount of confusion about the distinction between **initial and periodic reports**. Although general guidelines for reporting were issued, a letter was sent to the states which apparently requested states to "establish a general framework of legal life in their own countries".[321] In subsequent reports, a detailed analysis of compliance with the Charter would be presented.

Commissioner Mubanga-Chipoya echoed a previous decision that the Commission would only go into detailed periodic reports once the Commission is assured that the country satisfies "the groundwork".[322] In this approach a certain minimum requirement ("a system that would satisfy human rights")[323] had to be established before the Commission would consider whether the provisions of the Charter were in fact implemented in a specific country. Such a prerequisite would make sense as a precondition for ratification, but not in a system where ratification is unconditional. When a state ratifies the Charter, it becomes bound by its provisions. Every state should have to account publicly for any non-compliance, especially states performing poorly.

Commissioner Badawi, emphasising that the first examination of a state report is part of a process, disagreed with commissioner the late Mubanga-Chipoya following his decease, as well as the previous decision: "We cannot say - even if we have recommended that before - we cannot say that to Egypt, for example, ... do not go into the other Articles, or do not give us extras until you fulfil certain information in your first report and we are satisfied that these points are taken care of".[324]

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320 This choice is dictated by the availability of the transcript of proceedings by the Danish Centre for Human Rights (1995), which cover the 9th to the 14th sessions.

321 Commissioner Nguema, quoted in *Examination of State Reports* vol 1 (1995) 21.

322 Examination of state reports vol 1 (1995) 16.

323 Commissioner Mubanga-Chipoya, quoted in *Examination of State Reports* vol 1 (1995) 16.

324 *Examination of State Reports* vol 1 (1995) 17.

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From the further deliberations no definite position appears to have been taken by the Commission. But it is quite clear from the content of all three the reports presented and the way in which commissioners addressed questions, that these reports were neither presented nor treated as "initial reports" in the sense suggested by commissioners Mubanga-Chipoya and Nguema. The inevitable conflation of the two types of reports is perhaps best illustrated by commissioner Nguema's reference later to the "initial periodic reports".[325]

It is suggested that the distinction sought to be drawn was not necessary, gave rise to confusion among states and commissioners, and caused considerable delay during the 9th session. At the consideration of Ghana's first report at the 14th session, these issues did not recur. Commissioner Nguema, then Chairman, called on Ghana to present their "periodic report".[326] Commissioners directed questions at various aspects of the Charter and their implementation in Ghana. However, this session illustrated the necessity of the information that the idea of an "initial" report was aiming to secure - a basic framework in which human rights protection should function. The report by Ghana was only six pages long. The Commission required a full text of the Constitution to engage in meaningful dialogue. It may be added that the Constitution had changed subsequent to the sending of the report. The fact that the report was considered without the Constitution may be attributed in part to the state party, to unclear guidelines by the Commission, and to inefficiency of the Secretariat.

iii *Waste of time on technical needle-picking and lack of decisive action*

Another issue raised but not conclusively decided during the 9th session was whether it is **obligatory that a state representative should be present** when the Commission considers a state's report. Commissioner Umozurike (at that time also Chairman) rightly pointed out that the Charter does not require the presence of a state's representative, but rather invites states to send a representative. Commissioner Badawi, referring to the "compelling logic" dictated by the "spirit and the sense of the exercise of discussing the report", expressed his opinion that the consideration of state reports "is a process which involves the presence of the state, establishing a dialogue with

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325 *Examination of State Reports* vol 1 (1995) 35.

326 *Examination of State Reports* vol 1 (1995) 15.

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the state".[327] The latter practice was followed, as the Nigerian report was not considered in the absence of a representative at that session. This debate extended itself to later sessions. At the 13th session, for example, the report of Benin was on the agenda. For the fourth time, no government representative attended, despite being "called" by the Commission. This led to a continuation of the debate whether examination may continue in the absence of a state representative.[328]

A related issue is the Commission's **decision on the suitability of the representative**(s) to be sent by states parties. The consideration of the Zimbabwean report (at the 12th session) show how a lack of any guiding decision on this question has wasted time and led to confusion. Dissatisfied with the answers by the delegation, commissioner Nguema expressed the opinion that states should be represented by someone with technical legal expertise. Commissioner Beye differed, insisting that the Commission should not prescribe to states whom they should send as representatives. If the representative is unable to answer all the questions, the government could respond at a later occasion, he argued.[329] "Let us arm ourselves with some patience in awaiting that", he concluded.[330] Commissioner Umozurike underlined the fact that no decision on the issue had ever been taken.[331] The session was closed without the Commission further considering the question.

iv *Insufficient role for NGOs*

Governments do not readily provide a critical analysis of negative aspects pertaining to human rights protection in their countries. This fact necessitates that commissioners should have access to alternative sources of information. Non-governmental organisations are the most obvious potential

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327 *Examination of State Reports* vol 1 (1995) 31.

328 *Examination of State Reports* vol 4 (1995) at 10-19.

329 *Examination of State Reports* vol 3 (1995) at 112. He used the very vague term "la prochaine fois" ("the next time"), implying that the questions need to be answered only during the examination of the next country report.

330 *Examination of State Reports* vol 33 (1995) at 111-112. The motivation for his view is the fear that states may be persuaded not to comply with their obligations to report and to send representatives if the Commission becomes too prescriptive. Considering how little attention states had given to the reporting guidelines and their reporting obligations as such, this seems a bit like a storm in a teacup.

331 *Examination of State Reports* vol 3 (1995) at 112.

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source of information against which the state report can be evaluated. Some information was provided about Tunisia, but apparently not when the reports of Rwanda and Libya were considered. From the 11th session the Commission started to refer publicly to documentation and other information presented to them by NGOs.[332] This is an area in which the Commission should have allowed for an explicit role for NGOs, not only in submitting "alternative" reports, but also in supplying information to the Commission, even during the process of examination.

v *Inadequacy and non-attendance of government representatives*[333]

Government representation has been problematic in two respects: The specific representatives were **sometimes not equipped** to deal with the relevant issues, and were **often absent** from the meeting scheduled to consider their country's report.

In its resolution authorising the publication of the Commission's Sixth Annual Report, the OAU Assembly recommended to states parties to **designate high ranking officials** "to act as focal points in the relation between the Commission and the States as such focal points would facilitate the follow-up on the Commission's recommendations and contact between states and the Commission".[334] Apart from the importance of an influential figure for effective follow-up, the ideal process of consideration itself consists of what is referred to by the Commission as "constructive dialogue". It is therefore dependent on two communicating partners who are able to enter into discussion about issues both of them are familiar with, and able to express opinions about. Clearly a synthesis of "influence" and "legal expertise" has to be sought.

Unfortunately, most frequently states designate either a high ranking (political) figure not sufficiently conversant with the legal issues, or a legal expert devoid of any potential impact in the higher echelons of government. An example of the first failing occurred when Libya sent its Ambassador to Addis Ababa to present Libya's report. Sometimes a happy medium is struck. As an example, it should be mentioned that the report of Mauritius was presented by their Minister of

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332 Welch (1995) at 156.

333 See par (iii) above.

334 Sixth Annual Activity Report at 8.

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Justice.[335] Some progress may be noted between the presentation of the first report by Zimbabwe and its subsequent report. On the first occasion, the Commission expressed its dissatisfaction with the quality of responses. At the subsequent examination, more than four years later, the government representative impressed with her ability to answer directly, and her honesty in concessions made about blemishes on the Zimbabwean human rights record.

In many other instances **no representatives attended**, further delaying consideration of the reports. Three state reports (of Cape Verde, Nigeria and Togo)[336] were not examined at the 12th session, because no representatives attended. As a consequence of this, and further delay, the report of Cape Verde was considered only at the 16th session. Similarly, the representatives of Mauritius, Mozambique and the Seychelles were absent from the 17th session, where these country reports were to be considered.[337] The report from Mozambique was considered only at the 19th session, and that on Mauritius at the 20th session.

vi *Nature of dialogue, questions and responses*

The dialogue between the commissioners and state representatives has so far tended to be **subdued and correct**. The first two representatives to appear before the Commission at its 9th session were both ambassadors. They were handled with too much deference and respect, commissioner Nguema felt. He added: "I have the feeling that the sitting was rather too diplomatic - we hear the one party and then the other and then we rise. ... I thought we should engage in a dialogue, in other words we should not treat them as diplomats but rather as technicians of law that should be able on technical issues to elicit the responses".[338] This point is obviously interrelated with the former, as such dialogue depends on a high level of legal expertise as well as information about recent developments in the domestic legal system. An example of pertinent issues raised by a commissioner which were deflected by the government delegate is the following: In examining the Zimbabwean report, commissioner Buhedma raised concern about a constitutional amendment to

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335 At the 20th session.

336 *Examination of State Reports* vol 3 (1995) at 42.

337 Eight Annual Activity report at par 10.

338 *Examination of State Reports* vol 1 (1995) at 23.

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nullify the effect of a Supreme Court judgment on the cruel treatment of convicts on death row.[339] In general terms, the representative contended that the government cannot be blamed, because "it is the issue of the legislature and it is a compromise sort of legislation".[340] The examination has gradually become more vigorous since the 11th session, but no level of consistency has been reached.[341]

The procedure which the Commission has adopted is also hardly conducive to true dialogue. A series of questions posed in quick succession by almost each of the eleven commissioners, followed by responses to some of these questions by an often bewildered representative hardly qualifies as a "dialogue". The process is more akin to a series of critical statements, followed by a statement in defence of the report. Better results would be attained if definite replies to specific questions are required. A question-answer format would probably be more time-consuming, but would leave little room for ignoring pertinent issues. In response to criticism that such a procedure would be judicial and confrontational in nature, one may reply that a frustrated dialogue is likely to end in cross-examination.

vii *Non-attendance of appointed rapporteurs*

At the 9th session two commissioners, who had to act as Special Rapporteurs, did not attend the sitting.[342] This gave rise to difficulties, because no substitute had been appointed, the state report had not been made available to all the commissioners before the session, and the state reports had not been translated into the working languages of the Commission. The task fell to commissioner Nguema, as a French speaker, to prepare two reports overnight. He raised an objection, stating that the reports would not be examined properly. He proposed that the reports be examined at the following session. The view of other commissioners, that the process could not be delayed any further, prevailed.

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339 *Examination of State Reports* vol 3 (1995) at 97.

340 *Examination of State Reports* vol 3 (1995) at 109.

341 Welch (1995) at 156.

342 Commissioner Ndiaye (the report of Tunisia) and commissioner Beye (Rwanda's report).

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The Special Rapporteur appointed to introduce questions on Zimbabwe's first report was commissioner Mokama. He could not attend the 12th session, where the report was tabled. On very short notice, commissioner Kisanga had to take over.[343]

viii Secretarial problems

One of the most nagging problems at the level of the secretariat had been the **lack of translation** of state reports. Although states also bear responsibility, the problem had been exacerbated by the secretariat. The frustration of the commissioners was articulated by commissioner Beye, when he criticised the secretary for the failure to have the report of Zimbabwe translated into French. In response, the then secretary, Mutsinzi, explained that due to financial constraints no translator had been appointed at the secretariat. Commissioner Beye retorted that the report had been at the secretariat for more than six months and that a plan could have been made.[344] Small wonder, the amended Rules of procedure of the Commission require the secretary to "endeavor to translate all reports and other documents of the Commission into the working languages".[345] The inclusion of the phrase "endeavor" suggests cognisance of the seemingly insurmountable difficulties presented by reality. No French (or Arabic) translation of the Gambian and Zimbabwean reports were available at the 12th session.[346] No English translation of reports were available in the case of Togo.[347] The distribution of reports were insufficient at the 9th session.

An unhappy example of **secretarial inefficiency** is the handling of an "updated" report presented by Zimbabwe shortly before the commission's 12th session. As its report had been received six months previously, the delegation wanted, laudably, to present an updated version. The lack of co-operation to have this report copied and distributed to the commissioners and NGOs led the Zimbabwean ambassador to conclude that it was "most unfortunate that there seems to be a total lack of communication and management skills. We do hope something can be done pretty quickly,

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343 *Examination of State Reports* vol 3 (1995) at 112.

344 *Examination of State Reports* vol 3 (1995) at 112-114.

345 Rule 80 (amended).

346 *Examination of State Reports* vol 3 (1995) at eg 18, 29, 30, 34 and 87. Commissioner Beye apologised in advance for his inability to participate in the examination of the report presented by Zimbabwe.

347 At the 13th session, see *Examination of State Reports* vol 4 (1995) at 71.

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because this is a shame on Africa and on the African race".[348] Information is often not provided in advance, or at all.

The uncertainty about the date of the Commission's sitting caused the representative of Nigeria to arrive without sufficient information at the 13th session. It is not entirely clear who or what caused the misunderstanding, but vice-chairman Janneh apologised on behalf of the Commission.[349]

ix Lack of follow-up

Follow-up is necessitated by the inability of delegates to answer some of the commissioners' questions. However, the Commission has devised no structured way of dealing with queries raised that were left unanswered or were unsatisfactorily answered. The Commission has to wait another two years (if reports are presented timely) or more before progress on certain issues may be gauged. Often government representatives make general and vague promises of answering questions in soon-to-be-presented further reports. The Gambian representative, at the 12th session, expressed the hope of answering the questions fully in the second report that would be submitted at the next session.[350]

Reporting by Zimbabwe provides more cause for optimism. At the 12th session the head of the Zimbabwean delegation remarked: "We would like to take these observations and questions with us, and hope to come back in the next session, ... and answer those observations in a proper manner in the right place".[351] When Zimbabwe's second and third reports were examined together at the 21st session, the Commission commended the government's efforts and described the report as a model.[352] The report in fact addressed many of the concerns raised at the previous occasion and thus provides an example of meaningful progress from one report to another.

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348 *Examination of State Reports* vol 3 (1995) at 88.

349 *Examination of State Reports* vol 4 (1995) at 29

350 *Examination of State Reports* vol 3 (1995) at 41.

351 *Examination of State Reports* vol 3 (1995) at 107.

352 See the report entitled "Zimbabwe's Second and Third Report in terms of Article 62 of the African Charter on Human and Peoples' Rights".

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x *Time allocated insufficient*

Compared to other international monitoring bodies, the African Commission dispenses quite briskly with reports. Initially, reports were disposed of in approximately 45 minutes.[353] One of the important ways of establishing a meaningful dialogue between the UN Human Rights Committee and state representatives is the suspension of consideration of the report after questions were raised.[354] The government representative is usually afforded a day to prepare replies.

xi *Handling of due reports submitted*

It is rather obvious that the Commission will not be able to undo the backlog if all states were to present their overdue reports simultaneously. The practice has now already developed of treating a report as covering a four year period, rather than a two year period as required by the Charter.[355]

xii *Inadequate publicity*

The consideration by the UN Human Rights Committee of the Irish report in terms of the CCPR indicates under which circumstances publicity may become a powerful factor.[356] Merely requiring the state to disseminate the report in their countries will not have much effect. The national media has to be alerted to the fact that the state report will be considered. In the Irish case, the examination was extensively reported in the national press. One newspaper sent a correspondent, and other newspapers relied on NGOs for information. At least five different prime time radio interviews dealt with the report. National television did not, however, cover the proceedings.[357]

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353 Gaer (1992) 14 *NQHR* 29.

354 See O'Flaherty (1994) 16 *HRQ* 515 at 517.

355 See the Zimbabwean report, presented at the 21st session. Zimbabwe's second report was due on 21 October 1990, its third in 1992, its fourth in 1994, and its sixth in 1996. The report examined in Nouakchott (April 1997) was regarded as the "second and third periodic reports".

356 The information here is based on O'Flaherty (1994) 16 *HRQ* 515 at 537.

357 A broader issue may come into play here: the pre-existence of a relatively free press, which is lacking in many African states that are still not pluralist and open democracies.

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xiii *Lack of general comments by Commission*

Initially the Human Rights Committee, considering reports under article 40 of the CCPR, did not adopt concluding views or general comments about state reports. In March 1992 the Human Rights Committee started to issue Agreed Final Comments at the conclusion of the consideration of every report. This comprises a "critique of the State Report and the responses of the state delegates to the scrutiny of the Committee".[358] It also contains recommendations for action by the state. The purpose of "General Comments" is "to make this experience available for the benefit of all State Parties in order to promote their further implementation of the Covenant; to draw their attention to insufficiencies disclosed by a large number of reports; to suggest improvements in the reporting procedure and to stimulate the activities of these States and international organisations in the promotion and protection of human rights".[359]

Apart from comments of a very general nature, usually in thanks and encouragement, the African Commission does not issue any comprehensive evaluation of the state reports. Comprehensive final comments could provide a basis around which publicity may be generated, and could serve as reference point in a process of follow-up.

xiv *Delay in examining reports*

At the 20th session, a number of reports had been received but had not yet been examined. One of the main reasons for delays in considering submitted reports is the non-attendance of government representatives.

3.3.4.3 Conclusion - an alternative

If the trends as identified continue, state reporting will be a waste of precious time and resources. Some possibilities for improvement of the process have explicitly, or by implication, been suggested in the critical comments above. Taking an optimistic outlook on the obligation of states

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358 O'Flaherty (1994) 16 *HRQ* 515 at 518.

359 Report of the HRC A/36/40 at 107.

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to report: If all the reports that were due at the 21st session are submitted overnight, the Commission would have around 180 reports to examine.[360] Given the limited time available and the numerous problems experienced in examining an average of less than two reports per session, this represents an impossible backlog.

A concerted effort should be made to devise a method of securing the ideals of introspection and inspection. In this regard, the comparative experience of other regional systems may be informative. Neither of the two major regional human rights systems included examination of state reports in their founding instruments.

The **European Convention** provides for "petitions" (complaints) brought by individuals and states as the means of securing compliance. With the adoption of the European Social Charter in 1961, state reporting was introduced into the European system. These reports must be presented at two-yearly intervals and are examined by a committee of independent experts. A political body, the Committee of Ministers, may make recommendations to the state party.[361] The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, adopted in 1987, does not provide for either individual/state complaints or state reporting. A European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment is established. The committee itself, and not the states parties, draws up reports with recommendations to states parties. These reports are based on visits to prisons and other institutions or places where persons are held in deprivation of their liberty by a public authority. Provision is made for periodic visits and "visits as appear ... to be required in the circumstances".[362] These visits amount to on site-inspections, and even allow the committee to interview detainees in private.[363] To palliate the broad allowance for external supervision, reports are kept confidential.[364]

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360 See Table I above.

361 Part IV (arts 21-29) of the European Social Charter.

362 Art 7 of European Torture Convention.

363 Art 8(3) of the European Torture Convention.

364 Art 11 of the European Torture Convention.

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The **Inter-American system** does not provide for reports by states. The Inter-American Commission is granted the very wide power to "prepare such studies or reports as it considers advisable in the performance of its duties".[365] Where the African Commission has to sit back and wait for states to come and show in which ways they have complied with and violated the African Charter, the Inter-American Commission has interpreted its powers broadly to give it a pro-active mission to investigate on its own initiative. These reports may be undertaken at the Commission's own initiative, or at the invitation of the particular state. Investigations may result in country reports without a visit to the state concerned if that state does not consent to such a visit.[366] If the state concerned consents to a visit, an on-site investigation is held.[367] This remains an "indirect channel of protection against abuse", although it has played a significant role in the 1970s and 1980s when military rule was prevalent in Latin America.[368]

The questioning of the institution of state reporting is not limited to the three regional human rights systems. State reporting, the main means of ensuring compliance with the CCPR, the CESCR, CEDAW, CRC and CERD, has been scrutinised critically. Welch placed state reporting in a broader perspective by referring to reporting under the Permanent Mandates Commission of the League of Nations and the ILO.[369] Tracing the history of state reporting, he concluded that a modest system of international supervision was (and will inevitably be) based on "this hardly-equal contest between international disclosure and national sovereignty".[370] Some commentators were more hopeful about the potential and realised impact of the reporting procedure.[371]

The appointment of **Special Rapporteurs** and **missions to countries** have been initiated by the African Commission. This is justified as an "appropriate method of investigation", which falls within its mandate.[372] Examples are the Special Rapporteur on extra-judicial executions in Africa

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365 Art 41(c) of the American Convention on Human Rights.

366 As in the cases of eg Cuba and Haiti, see Buergenthal (1995) at 188.

367 As in respect of the Dominican Republic, see Buergenthal (1995) at 188.

368 Vivanco in Kaysen *et al* (eds) (1994) 73 at 76.

369 See Welch (1995) at 143 - 147.

370 Welch (1995) at 143.

371 See eg O'Flaherty (1994) 16 *HRQ* 515.

372 Art 46 of the Charter.

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and on prison conditions in Africa. It is suggested that the Commission should abandon the present format of considering country reports, replacing it with selected country studies and on-site investigations on the model of the Inter-American Commission, as well as investigations and reports by Special Rapporteurs.

Even if the African Commission converted state reporting into a process where it (and NGOs) had the initiative to undertake on-site investigations and draft reports, some questions of efficacy remain. These reports are still just a means to an end, the end of preventing human rights violations and of securing compliance with human rights norms. The end is to be attained, so goes the theory, because violator-states will be exposed, shamed into embarrassment and will endeavour to avoid such unmasking and discomfort in future. However, a recent analysis of government responses paints a much less optimistic picture. According to this study by Cohen, governments have mastered a **discourse of denial**.[373] Their responses vary from outright or official denial of the facts, and euphemistic reinterpretations of the facts, to justifications and rationalisations. Responses are often combined with a counteroffensive, questioning the integrity of the reporters. In the light of these devices to absorb potential embarrassment, Cohen asks how worthwhile the investment of resources "devoted to the circuit of claims and counterclaims" are.[374] These concerns are to an extent absorbed in the reporting procedure under the European Torture Convention, in its emphasis on confidentiality of findings, communication and consultation with the state party and recommendations to the state party "with a view to suggesting ... improvements in the protection of persons deprived of liberty".[375] Obviously, this *modus operandi* presupposes serious and sustained commitment by the state party. It is doubtful whether such a mechanism would improve realisation of rights in Africa in the short term.

The **missions to states parties** has also highlighted the Commission's potential role in taking the initiative, by deciding to visit a state to investigate certain problematic aspects pertaining to human rights protection and promotion. The visit to Sudan is a good example of a critical engagement by

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373 See Cohen (1996) 18 *HRQ* 517.

374 (1996) 18 *HRQ* 517 at 543.

375 Art 10(1) of the European Torture Convention.

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the Commission. So far, this "alternative system of reporting" has suffered under a number of disadvantages:

- Adequate **financial resources** were lacking, causing delays and allowing brief visits only.[376]
- There was **no consistency** in procedure. Sometimes no report was compiled after the visit at all.
- The report is **not always coherent and clear**.[377]
- The **mandate** of the delegation is **not precise** and clarified.
- As in other areas of the Commission's work, there is a gaping **lack of publicity** and of meaningful **follow-up** strategies.

Although these missions have not been very successful, they indicate the direction of future developments in the reporting system. It is suggested that on-site investigations and subsequent reports will be a considerable improvement on the current stale and failed process of examining state reports. Even this possibility has its limitations. Ultimately, securing compliance with human rights treaties depends on an effective procedure for individual petition for human rights violations.

3.3.5 Promotional activities

Promotional functions of the Commission are more elaborately dealt with in the Charter than any of the Commission's other functions.[378] Many commentators and some of the commissioners have reiterated the importance of this function.[379] Especially in lesser developed countries conditions for human rights enforcement are not very favourable. One of the main causes for this state of affairs

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376 The mission to Sudan was made possible by the Raoul Wallenberg Institute, Sweden.

377 In the case of the report on Sudan, the English version reads as an obvious and direct translation from the French, making it sometimes difficult to follow.

378 Compare art 45(1)(a) of the Charter with other aspects of the mandate.

379 In particular, the Commission's First Annual Activity Report underlined the "particular importance of this essential mission" (at par 23).

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is the low level of literacy and education of the majority of inhabitants. The Commission can therefore not be faulted for directing most of its initial efforts at promotion. At its fourth and fifth sessions, for example, the Commission adopted resolutions on the celebration of an African Day of Human Rights, on the establishment of domestic human rights committees, on the introduction of human rights in school curricula, and recommending radio and television broadcasts of the Charter in states parties.[380]

Realising the primacy of this part of its mandate, the Commission adopted a Programme of Action for 1992-1996 which deals almost exclusively with promotional activities.[381] This was based on a draft prepared by two consultants, Wolfgang Benedek and Adama Dieng. Five aspects of the promotional programme are contained in the Programme of Action, adopted at the Commission's 11th session. When the five-year term expired (it was adopted in March 1992 and was replaced by a new Programme of Action in October 1996, at the twentieth session), the successes and failures of realising this programme should be considered.[382]

- The priority of the Commission, in terms of the Programme, was to establish an **Information and Documentation Centre** ("IDOC"), and appoint a documentalist. In 1992, the Commission set up a Documentation Centre.[383] The salary of the documentalist was paid by the UN Centre for Human Rights. The term of the documentalist expired on 30 April 1995. By the 19th session (November 1996), the Documentation Centre was still closed because there was no staff member to run it. Financing was urgently required to recruit a documentation officer.[384]

- Secondly, the Commission was to **convene seminars, workshops and training courses** on various aspects relating to the African Charter. It is quite noticeable that the list of proposed

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380 See Second Annual Activity Report, Annexes VII, VIII and IX.

381 At its second session, the Commission already drew up a "Programme of Action" (see First Annual Activity Report Annex VIII).

382 For an overview of the Mauritius Plan of Action, see Oberleitner (1997) 15 *NQHR* 218 – 221.

383 See Eighth Annual Activity Report at par 27.

384 Ninth Annual Activity Report at par 27.

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activities does not generally correspond with the list of activities that actually took place.[385] An example of a seminar on an important topic is the one on conditions of detention, which was co-organised by the Commission and "Penal Reform International" in September 1996. It took place in Kampala, Uganda. It should be noted that the African Charter does not specifically deal with the rights of prisoners. The Commission has, however, formulated minimum rules on the treatment of detainees. After the three-day seminar attended by 200 participants from 40 African states, the "Kampala Declaration" was adopted. It noted the overcrowding and insufficient basic conditions in African prisoners and recommended that the conditions of detention should not aggravate the suffering of a person already deprived of his or her liberty. It also called on states to introduce the minimum rules adopted by the UN and the African Commission into domestic legislation.[386]

- Each commissioner had to undertake **promotional activities**. The states parties were distributed among the commissioners, each being responsible for three to seven states, depending on the size of the state and other factors. According to the allocation as at January 1996, commissioner Kisanga was responsible for six states.[387] They were all more or less in the Eastern or "Horn" region. (The states are Ethiopia, Kenya, Tanzania, Somalia, Uganda and Zambia.) Commissioner Rezzag-Bara was less fortunate. The five countries assigned to him included states in Northern Africa, as well as the island states of the Comoros and Madagascar. Commissioner Blondin Beye, at that stage based in Angola as the UN Secretary-General's Special Representative, had to promote the Charter in states in West and Northern Africa. His promotional mandate excluded his country of origin (Mali) and his country of residence (Angola). The commissioner's pressing duties in Angola account for his absence at

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385 For example, contrast the list of nine seminars which the Commission decided to organise with the number which actually took place (see Ninth Annual Activity Report at par 18). In fact, in the preceding year only three seminars in which the Commission participated which it co-sponsored are mentioned in the report. Two of these are the regular NGO workshops organised by the International Commission of Jurists, which usually precede Commission sessions. These workshops can hardly be regarded as initiatives taken by the Commission.

386 See "Conditions of Detention in Africa: A Seminar" (1996) 3 *APT* (Association for the Prevention of Torture) *Journal* 11.

387 This information is contained in the Ninth Annual Activity Report, Annex VI.

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Commission sessions,[388] and would no doubt have inhibited his promotional activities so far afield.

- When commissioners do manage to undertake promotional activities, they are very limited in nature. It usually consists of flying into a capital city, and delivering a prepared lecture or speech to an invited audience. While presenting a list of activities at the Commission meeting may create a good impression in the annual report, it remains a very superficial form of disseminating information and raising awareness.[389] Analysing the Ninth Activity Report, one is struck by the vagueness surrounding promotional activities. The Chairman, it states, attended "various" seminars and symposia. He also chaired the OAU mission to monitor elections in Benin. Other than the reference to Benin, no state is specifically mentioned. As for the other commissioners, some were involved in election monitoring in the Comoros and in Tanzania. No further mention is made of visits to or activities undertaken in relation to countries allocated to them. Three seminars "co-sponsored" by the Commission are listed.[390]

- In the fourth place, the Programme called for the **publication** of information about the Commission's activities. Specific mention was made of the Commission's Annual Activity Report, summary records, the Bulletin of the Commission (at least twice yearly) and the Review of the Commission (at least twice annually).

- Promotion depends on dissemination of information. Finally, then, the programme envisioned the **translation and distribution** of public documents of the Commission, which should include summary records and state reports submitted to the Commission. A recurring problem at the sessions in which state reports were examined was the lack of translated reports, especially into French and English. At the 15th session commissioner Badawi complained quite bitterly about the neglect of Arabic - not only in translation, but also in interpretation

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388 From the 14th to the 19th sessions, see Table E above.

389 In the Second Annual Activity Report, for example, 21 promotional activities are listed. Upon closer inspection one finds that only six of the eleven Commissioners were at all involved in any activity, and that the Chairman (Nguema) accounted, at least partially, for 15 of the listed activities. Some of the activities listed are also of dubious promotional value to the Charter, such as the "20th anniversary of the Zairian Bar organised" by Commissioner Gabou (Annex V of the report).

390 This analysis is based on information presented in the Ninth Activity Report.

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during the sessions. These problems at the level of the Commission's functioning are indicative of the problems experienced in getting documents translated.

Although some commissioners have been very active in this field, the Commission has failed to implement the greater part of the Programme of Action and has failed to make any significant inroads to raise human rights awareness on the continent.[391] The **hosting of Commission sessions** by states have probably contributed much more to raise awareness about the Charter and the Commission's work in individual states. This should be encouraged, also in states where the Charter has enjoyed very limited exposure. There is no necessity in alternating commission sessions between Banjul and another state. NGOs should be involved much more in the process of conscientising the African masses. Growing awareness and participation by NGOs have been the by-product of a more effective and visible African Commission. This trend should be encouraged. If the commissioners are to retain a promotional function, it should be directed at African lawyers and judicial officials. Any discussion about promotion and information that takes place in the late twentieth century should primarily consider the potential presented by the mass media.

One of the main reasons for the many failures has been a **lack of funding**. Soon after the adoption of the Programme of Action, at its 13th session, the Commission decided to draw the attention of the OAU Assembly to the "very alarming situation ... in terms of logistics". This included a lack of staff, resources and services. Also, "no funds are allocated in the Commission's budget for promotional activities".[392] In its Ninth Activity Report the Commission had to state that due to "financial problems, facing the OAU, several projects of the Commission had to be suspended".[393] There is no mistaking the fact that financial resources are important, but there still is "room for improvement despite the lack of resources".[394]

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391 See Oberleitner (1997) 15 *NQHR* 218 at 219, who notes that this gives reason for concern, as the Mauritius Plan of Action is less specific and "ready-for-use" than its predecessor.

392 Sixth Annual Activity Report (1992-1993) at 7.

393 Ninth Annual Activity Report at 10.

394 Oberleitner (1997) 15 *NQHR* 218 at 219.

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3.3.6 Other activities

Though related to their mandate to promote human and peoples' rights, the Commission's involvement in **overseeing democratic elections** in Africa has developed as a distinct function in the 1990s. Examples are found in the decisions adopted by the Commission at the following sessions:

- At its 11th session the Commission acceded to a request by the government of Mali to send an observer mission to monitor the presidential elections that were scheduled to be held in April 1992. The Commission appointed commissioner Ndiaye as leader of this mission.[395]

- At its 19th session the Commission adopted a resolution on electoral processes in Africa, reasserting its willingness "to place at the disposal of State Parties and other institutions its expertise and that of its members in observing elections".[396]

- At its 20th session the Commission responded favourably to an invitation extended by the OAU Secretary-General to monitor elections in the Gambia and Zambia.[397]

The Chairman of the Commission, Nguema, undertook a mission to observe elections in Madagascar.[398]

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395 Fifth Annual Activity Report (1991-1992) at 6.

396 Ninth Annual Activity Report, Annex VII at 9.

397 Final Communiqué of the 20th session at par 5.

398 See Tenth Annual Activity Report, par 16.

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3.3.7 Rules of procedure[399]

3.3.7.1 Introduction

Article 42(2) of the Charter requires the Commission to formulate Rules of procedure to help it realise its main aims. This has been done with "commendable dispatch"[400] when the Commission adopted a set of rules and procedures at its second session (in February 1988).[401] The purpose of these Rules of procedures is to assist an institution to perform its functions consistently and effectively. Criticism has been levelled at various aspects of these rules. Already in 1992 amendment of the rules was mentioned.[402] Commissioner Dankwa was appointed to prepare an amended text of the Rules of procedure. Eventually in 1995, at its 18th session, the Commission adopted amended Rules of procedure.[403]

3.3.7.2 Criticism

Dankwa highlighted a number of inelegancies in the drafting of the rules. In his view this sometimes made them unintelligible, in some respects created a lack of consistency causing ambiguities, and in others it suggests imprecision and untidiness.[404]

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399 Although the Rules of procedure are integrated into other aspects which have been and will be discussed under other headings, they are treated under a separate heading here. This emphasises their importance and the necessity of further reform of the Commission's rules, especially in the light of the future establishment of an African Court on Human Rights. On the Commission's Rules of procedure after their amendment, see also Ankumah (1996) at 43 - 50.

400 Dankwa (1990) 2 *ASICL Proc* 29.

401 Contained as annexure to the First Annual Activity Report.

402 It was an item on the Agenda of the Commission's 13th session. From then, it featured continuously on the Commission's agenda (see 6th to 9th Annual Activity Reports).

403 See ACHPR/RP/XIX, adopted on 6 October 1995.

404 See Dankwa (1990) 2 *ASICL Proc* 29 at 33-34 (eg new formulations for rules 62(3), 65, 68 and 70).

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More fundamentally, he identified two instances where Charter provisions were extended by the rules. The rigidity of the confidentiality requirements suggested by article 59(c) of the Charter has been softened by Rules 33 and 40. Also, the uncircumscribed discretion of the Secretary-General to appoint the Commission's Secretary[405] has been limited by Rule 22(2). It provides that the Secretary-General must, at least, consult the Commission Chairman before making that appointment. Dankwa further recommended a substantive change of article 42(5) of the Charter by adopting as part of the rules a requirement that the Secretary-General may attend meetings of the Commission at its invitation.[406]

Odinkalu, writing a bit later, levelled a more fundamental critique, directed at eight aspects of the rules:[407]

- He recommended that the Oath of Office should be made as a "solemn commitment", rather than an "oath".[408]
- He further advised that an order of preference of commissioners should be incorporated.[409]
- As far as voting on and deciding cases are concerned, Odinkalu recommended that commissioners should not be allowed to abstain from voting on complaints before them, and that dissenting opinions should be allowed explicitly.[410]
- Many of the functions entrusted to the OAU Secretary-General should be re-assigned to the Commission's Secretary.[411]
- He recommended that non-state entities (individuals and NGOs) should be allowed to present oral argument when the Commission decides on communications.[412]

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405 See art 41 of the Charter.

406 Dankwa (1990) 2 *ASICL Proc* 29 at 31-32.

407 In 1993, see (1993) 15 *HRQ* 533.

408 Odinkalu (1993) 15 *HRQ* 533 at 534.

409 Odinkalu (1993) 15 *HRQ* 533 at 535

410 At 535-537.

411 Odinkalu (1993) 15 *HRQ* 533 at 538-540.

412 Odinkalu (1993) 15 *HRQ* 533 at 541.

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- The rules should permit the Commission to undertake on-site investigations, especially in cases of emergencies. The Commission should not be obliged to await a communication before taking provisional measures, as suggested by Rule 109.[413]

- Consequences of non-compliance by states of time limits to supply information should be stipulated clearly.[414]

- He lastly recommended more transparency. The rules should, for example, provide that the author of a communication must be informed of the final opinion of the Commission; they should enable an accredited *amicus curiae* to appear before the Commission, and more information should be made available to the public.[415]

3.3.7.3 Comparison

In October 1995 the Commission adopted a revised set of Rules of procedure. The potential for difference between the revised rules and the original version thereof (of February 1988) presents a yard stick for assessing the progress of the Commission in the interpretation of its mandate. The question also arises whether the lapse of just about eight years is reflected in a shift in focus or other significant amendments to the Rules of procedure.

i Style and construction

Improvement in style and sentence construction appear from the later version, making it more reader-friendly. The mass of information in Rule 44 (original version), containing six rather lengthy sentences, was compressed into a single paragraph. By sub-dividing the information into three paragraphs, Rule 44 in the 1995 text is much easier to read and understand. Some parts of the rules have been redrafted to express their meaning more clearly and concisely.[416]

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413 Odinkalu (1993) 15 *HRQ* 533 at 542.

414 Odinkalu (1993) 15 *HRQ* 533 at 543-544.

415 Odinkalu (1993) 15 *HRQ* 533 at 544-548.

416 For example, compare Rule 62(3) (original text) with Rule 62 (3) (amended text).

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ii Gender-sensitivity

Semantic changes in the 1995 version purport to make the rules gender-sensitive. In Rule 23, for example, the Secretary of the Commission is referred to as "he/she" or "him/her".[417] In numerous other rules, only the male pronoun is still being used.[418] This shows inconsistency and lack of precision in drafting. Although the continued use of the term "Chairman"[419] is motivated by its use in the Charter itself,[420] the rules could certainly have helped to establish a different practice.

iii A coherent role for the Secretary

A similar lack of precision is noticed with reference to the substitution of "Secretary" for "Secretary-General" in the amended rules. Many functions better suited to or actually performed by the Commission's Secretary were initially made the responsibility of the OAU Secretary-General. By conceptualising the role of the Secretary more clearly, the amended rules make much more sense. So, not longer the OAU Secretary-General, but the Secretary of the Commission now:

- informs members of the Commission when sessions start,[421]
- distributes a provisional agenda and relevant materials before each session,[422]
- informs the Commission of the non-submission of state reports[423] and performs other functions in relation to state reports,[424]
- requests and distributes information about communications received,[425] and

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417 See also Rule 44.

418 See eg Rules 224, 22(2), 47, 56(4).

419 See eg Rule 4.

420 Arts 39, 42 and 59 of the Charter.

421 Rule 5 (original and amended).

422 Rule 7(2) (original and amended).

423 Rule 84(1) (original and amended).

424 Rule 86(1) (original and amended).

425 Rule 103 and 104 (original and amended).

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- importantly, individual communications are submitted to the Secretary.[426]

In some instances the role of the Secretary-General is retained. The Commission is seized when an inter-state Communication is communicated to its Chairman, to the other states and to the Secretary-General (and not the Secretary).[427] The Secretary-General appoints the Secretary and provides the Commission with staff.[428] The Secretary-General also remains entrusted with the functions of taking "all the necessary steps for the meetings of the Commission".[429] This last function represents a serious inconsistency and should rather have been assigned to the Secretary, who is *de facto* in charge of protocol arrangements for sessions.

iv *No hierarchy*

Procedural clarification was provided by regulating the position when neither the Chairman nor the Vice-Chairman attends a session. The amended rules state that members shall, in such a situation, elect an acting Chairman.[430] In my opinion it is fortunate that the amendment does not follow Odinkalu's recommendation to assign status to Commission members.[431] This would have led to the creation of a stratified hierarchy and could have encouraged a formalistic approach.

v *Erosion of confidentiality*

The secretive nature of the activities of the Commission has been the object of some amendment. This is illustrated in the shift of focus in Rule 32. The two versions merit being quoted fully: "The sittings of the Commission ... shall be private and shall be held *in camera*" became "The sittings of the Commission ... shall be held in public unless the Commission decides otherwise or it appears from the relevant provisions of the Charter that the meeting shall be held in private". End-

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426 Rule 1 (original) and 102 (amended).

427 See new Rules 88(1), 92 and 93.

428 Rule 22 (amended)

429 See new Rule 22(4).

430 See Rule 19 (2) (amended).

431 See (1993) 15 *HRQ* 533 at 535.

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of-session Communiqués could in the past only be issued though the Secretary-General.[432] Under the new rules, the Commission itself is given this responsibility.[433] A clear distinction is drawn between public and private sessions. The secretary is now obliged to keep a permanent register of all individual communications "which shall be made public".[434] The fact that "organisations or persons capable of enlightening the Commission"[435] may participate in its deliberations is also an indication of the erosion of the confidentiality principle. Comment and observation made by the Commission are now explicitly recognised as "public documents".[436]

vi *Effect of non-compliance with time requirements*

Concerning its admissibility decisions, the period allowed to states for responding was originally left open.[437] In the amended version of the rules, a cut-off point of **three months** is set. If no response is sent within three months of notification, the Commission must decide the question without the state's response.[438] As for decisions on the merits, the 1988 rules determined that the state should respond within **four months**. [439] This period is shortened to **three months** in the 1995 amendments.[440] The practice developed by the Commission to act on the evidence before it[441] is codified in the new rules.[442]

vii *Role of individuals in deliberations of Commission*

The procedure for the consideration of communications refers only to written submissions. In practice, though, the Commission has allowed both states and individuals to present oral argument

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432 Rule 33 (original).

433 Rule 33 (amended).

434 Rule 103 (1) (amended).

435 Rule 72 (amended).

436 Rule 86 (1) (amended). Compare Rule 86 (1) (original).

437 The Commission could "fix a time limit" (rule 115(1)).

438 Rule 117 (4) (amended).

439 Rule 117 (2) (original).

440 Rule 119 (2) (amended).

441 See discussion in par 3.3.3(a) above.

442 Rule 119(4): "State parties from whom explanations are sought within specified times shall be informed that if they fail to comply with these times the Commission will act on the evidence before it".

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on the merits. Amended Rules 71 and 72 allow for this possibility. The first provides that the Commission may invite any state, and the second, any organisation or person, to participate in its deliberations. States are invited if an issue to be discussed is of "particular interest" to that state.[443] Organisations or persons will be invited if they are "capable of enlightening" the Commission.[444]

viii *Provisional measures*

In terms of its 1988 Rules of procedure, the Commission could have informed a state of provisional measures to be taken to "avoid irreparable damage".[445] This could, however, only be done once a communication had been received, and by the Commission at its sessions. Under the amended rules the Chairman may now, when the Commission is not in session, take "any necessary action on behalf of the Commission".[446] This should be done in consultation with other members, and the Chairman must report back to the next session.[447] The new rules provides a golden opportunity to take provisional measures in cases of emergency.

ix *Special Rapporteurs introduced*

The first Special Rapporteur was appointed by the Commission at its 15th session. This role is formally introduced into the amended rules.[448]

x *Commissioners' promotional role stressed*

The new Rule 87 stresses the promotional function of commissioners, requiring each of them to file a written report on these functions at each session. This is in line with evolved Commission practice.

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443 Rule 71(1) (amended).

444 Rule 72 (amended).

445 Rule 109 (original).

446 Rule 111(3) (amended).

447 *Ibid.*

448 Rule 120(3) (amended).

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3.3.7.4 Evaluation

All the instances mentioned above represent progress towards a more effective Commission and one that can better realise supra-national human rights protection. However, it could certainly have gone further:

- It could have been redrafted in much clearer and more simplified language, increasing readability, understandability and accessibility.
- It could have been consistently gender-sensitive.
- It could have been consistent in ascribing functions to the Secretary of the Commission.
- It could have spelled out that individual complainants or their representatives may present new argument at Commission deliberations.
- It should have made it clear that basic information about communications considered can be contained in end-of-session communiqués and reports. More information can still be made available to the public.

In some respects the rules merely "catch up" with amended practice. Even before the rules had been amended, individuals were represented at Commission deliberations, and a Special Rapporteur was appointed.

While most of Dankwa's recommendations were incorporated, a number of Odinkalu's were rejected. Some are mentioned here:

- The oath of office remains as it was.[449]
- Members are still allowed to abstain during voting,[450] and no provision is made for dissenting opinions.

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449 Rule 16 (amended).

450 Rule 62(2) (amended).

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- As for provisional measures, the general rule still is that the Commission acts on communications, and not to a situation as such.[451]

- The author of a communication is informed about the outcome of the admissibility decision, but not of the outcome of the consideration of the merits.[452]

3.4 Domestic application

3.4.1. Status of international law generally

Using architectural imagery as metaphor, the co-existence of international human rights norms and internal laws may be portrayed as a two-storied building. This corresponds with the distinction between international ("external") ratification (or accession) (at the "elevated" level) and constitutional ("internal") ratification (or accession) (at "ground" level). As a political act, "external" ratification is a decision impacting on international relations. Some internal action is needed to ensure that the effect of ratification is felt at ground level. Once externally ratified, two important, and related questions arise when one considers the relationship between international and domestic law:

- Are the international law norms in principle **incorporated into domestic law**, that is - may these provisions be invoked in local courts, or are they restricted to the upper floor?

- If so, what is the **hierarchy of norms**, that is - if international law and domestic law conflict, which system has precedence? As far as local law is concerned, a distinction may also have to be drawn between the Constitution, and other legislation and executive directives and actions.

In answering these two questions, a distinction is drawn between the position pertaining to **customary international law** and to **treaties**.

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451 Rule 111(1) (amended).

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A further distinction is dictated by colonial legacies, as reflected in the different theories of international law followed by states in Africa. As far as **Commonwealth Africa** is concerned, the discussion is informed by the British system. The French Constitution informs much of **civil law Africa**. The two main theories as to the relation between international and domestic law are the monist and dualist (or pluralist)[453] theories. According to the monist view "international law and state law are concomitant aspects of the one system - law in general".[454] The dualist theory regards international and domestic law as being intrinsically different in character. In this view international law and domestic law are two "entirely distinct legal systems".[455]

The focus here is on the reformed African constitutions of the 1990s. These constitutions predominantly adhere to constitutionalism, liberal pluralism and democratic governance. This context provides a much more promising environment for the meaningful implementation of supra-national norms than autocratic, single-party and military regimes of the recent African past. Together with the "Soviet block", a number of African countries earmarked international law as imperialism.[456] This statement exemplified African reluctance to having their internal laws held to international scrutiny.[457]

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452 Rule 118(1), 119(1) and 120(1) (amended).

453 "Dualist" theory is regarded as a misnomer by some, because the domestic system is usually not a single system to be juxtaposed to international law, but rather a plurality of systems co-existing domestically.

454 Starke (1989) at 71 - 72. This is also referred to as the doctrine of incorporation, in terms of which international law becomes "incorporated" into national law without any further legislative intervention.

455 Starke (1989) at 72. This is also referred to as the doctrine of transformation, in terms of which "inferior" international law has to be "transformed" to become part of national law.

456 See eg Stein (1994) 84 *AJIL* 427 at 432-433.

457 Some of the older constitutions, such as the 1969 Kenyan Constitution, the 1979 Nigerian Constitution and the 1984 Tanzanian Constitution, do not provide an explicit role to international law.

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3.4.2 Status of customary international human rights law in Africa

3.4.2.1 Incorporation

i Commonwealth Africa

"Customary law" has been instrumental in the fomenting of the English common law. In line with the approach in local law, English law has accepted customary international law as part of the developing local law. Customary international law is therefore considered to be part of domestic law in the common law tradition and will be applied by domestic courts. In Africa, a provision in the 1995 **Malawi** Constitution reflects this approach: "Customary international law ... shall have continued application".[458] According to Maluwa the implication of this article is "that where a particular international human rights norm is regarded as having matured into a rule of customary international law, such a rule must be applied by the domestic courts as part of the municipal law of the country".[459] Another example is presented by the final **South African** Constitution, which provides that customary international law binds the Republic.[460]

i Civil law Africa

Customary international law is not a notion frequently used in the constitutions of civil law states. It is more common to find general propositions such as the following from the Constitution of **Guinea**: "The Republic conforms to the rules of international law".[461] Although a formulation like this is imprecise, it is accepted that it entails incorporation of customary international law into internal law.[462] Similarly, the **Cape Verde** Constitution provides that "international law shall be an

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458 Art 211(3).

459 (1995) 3 *AYBIL* 53 at 70. He expressed some concern about the inclusion of the word "continued", as it could suggest that only those rules already in existence at a fixed time would, from then onwards, "continue" to apply.

460 Art 232 of Act 108 of 1996.

461 Art 31 of the 1958 Constitution.

462 Gonidec (1996) 8 *RADIC* 789 at 793.

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integral part of the Cape Verde judicial system, as long as it is in force in the international legal system".[463]

3.4.2.2 Hierarchy of norms

i Commonwealth Africa

In English law, courts will not apply customary international law if it is contrary to British statutes, making **domestic law the higher normative system**. In some African constitutions a similar hierarchy is spelled out. In the 1995 **Malawi** Constitution customary international law applies "unless inconsistent with this Constitution or any Act of Parliament",[464] clearly indicating that customary international law is lower in the hierarchy of legal norms that may be applied. However, the presumption of statutory interpretation that the legislature does not intend to infringe upon international law may soften the position. For example, in the case of uncertainty whether a conflict between customary international law and the Constitution exists, "an attempt should be made to reconcile the two before declaring the customary rule invalid".[465] In terms of the **South African** Constitution, customary international law is law of the Republic unless it is inconsistent with the Constitution or an act of Parliament.[466]

ii Civil law Africa

In most Civil law constitutions which give international law precedence above internal law. Constitutional reference to "international law" is generally regarded as including customary international law. As custom and customary international law play a less pronounced role in civil law systems, the status of customary international law is not regulated with any specificity in most civil law constitutions.

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463 Art 11(1) of the 1992 Constitution.

464 Art 211(3).

465 Maluwa (1995) 3 *AYBIL* 53 at 70.

466 S 232 of Act 108 of 1996.

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3.4.3 Domestic status of treaties, in particular the African Charter

The absence of a supra-national judicial organ to give final judgments on the rights and duties in the African Charter does not affect the competence of domestic courts in the various ratifying states to apply the Charter. One may actually argue that the very absence of an African Human Rights Court accentuates the responsibility of the existing African judiciary to "interpret and apply, where appropriate, the relevant principles in domestic law so as to comply with the commitments of African governments in ratifying the Charter".[467]

The question arises to what extent the African Charter is applied in different ratifying states. This leads to the further question about the status of the African Charter in the domestic or national legal constitutional framework. In the absence of any specific reference to the Charter, the status of international treaty law in the particular jurisdiction will determine the status of the African Charter.[468]

3.4.3.1 Incorporation

i Preambular incorporation

In the majority of Francophone states the preamble of the domestic Constitution proclaims a lofty commitment to human rights in various international human rights documents, including the African Charter. The Constitutions of Burkina Faso, CAR, Chad, Guinea, Mali, Mauritania, Niger, Togo and Zaïre fall into this category. The African Charter is never cited in isolation, but usually in conjunction with the Universal Declaration of Human Rights. Sometimes the preamble

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467 D'Sa in *Developing Human Rights Jurisprudence* vol 2 (1989) 101 at 116.

468 Not surprisingly, the Charter itself leaves room for both dualist and monist theories. In terms of art 1 of the Charter states parties undertake to "adopt legislative or other measures to give effect" to the rights in the Charter. The adoption of legislation would be required if a state adheres to the dualist theory, and "other measures" (such as court judgments or administrative actions) would be required to give effect to the Charter in a state which follows a monist theory (see Lindholt (1997) at 85 - 86).

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refers to the CCPR and CESCR. It is striking that all these states had been part of the French sphere of influence and have constitutions to some extent modelled on the French example.

Four states have retained reference in their preamble to the Declaration of the Rights of Man and Citizen of 1789. They are Chad, Côte d'Ivoire, Gabon and Senegal. In all four instances the Universal Declaration is also mentioned. In two of the constitutions, those of Chad and Gabon, the African Charter is added as guiding source and inspiration. Debene poses the question why these independent African states would keep alive this remnant of their colonial past.[469] Reference to the 1789 Declaration is in all cases supplemented by reference to the Universal Declaration, indicating that first generation rights (as set out in the 1789 instrument) are not discarded, but are supplemented by the second generation rights of the Universal Declaration. Reference to the African Charter complements these two categories, with its incorporation also of solidarity ("third generation") rights. Viewed in this way, the 1789 Declaration is a building block in an evolving process. But not all ex-French colonies retained this reference in their current constitutions. On the contrary, some have quite deliberately rid themselves of this signifier of a colonial past. The first state to become independent from France in Africa, Guinea, discarded the reference after its population voted against becoming a member of the French "Communauté" in the referendum of 28 September 1958.

Debene provides two possible answers to the question why certain states would have retained the colonial baggage. In the case of Chad (and of the 1989 Constitution of Niger)[470] he finds the value of the 1789 Declaration in its originating history. It was drawn up by revolutionaries who wanted to change the world, and wanted to restrict excesses and corruption by the authorities, and not by representatives of states already established.[471] The Declaration and its history became a battle cry for some in the democratic revolution in Africa which started in 1989 (incidentally, two hundred years after the declaration). The reason why Côte d'Ivoire, Gabon and Senegal have kept on proclaiming their adherence to the declaration since independence, may be diametrically opposed.

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469 (1990) *Revue Juridique Africaine* 46.

470 But this reference was not included in the Constitution approved by referendum on 26 December 1992.

471 To quote him directly : "ayant été elaborée par des hommes en lutte, par des revolutionnaires, ...et non ... par les représentants étatiques des pouvoires en place..." (at 59).

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In all three of these states an enduring commitment to "la francophonie" or "la francité" is identifiable. On a political level, preference for closer liaison with France was expressed by decisions to retain links with France, and by representation in the French Parliament.[472] Underlying the cultural substructure are reasons of a socio-economic nature, Debene argues.[473] Even if it was not explicitly stated in the Declaration, values of free enterprise and freedom of choice in the economic arena underlined its elaboration. Côte d'Ivoire has been a free-market, capitalist society all along; later Gabon also adopted this model. In the 1970s Senegal, under President Abdou Diouf, adopted a similar economic policy. It is therefore arguable that not only cultural, but also economic attachment to the French model are reflected in the continued reference to the Declaration of 1789.

What does it mean if the 1789 Declaration, or African Charter, is invoked in the Preamble?[474] As far as Francophone Africa is concerned, the answer is tied closely to constitutional developments in France. Despite the Declaration, and the inclusion of fundamental rights in the preamble to the 1958 Constitution, the *Conseil Constitutionnel* did not at first engage in judicial review on the basis of the violation of human rights. The *Conseil* declared a law unconstitutional for the first time in 1971. Only then was the principle settled that "constitutional review involves taking into consideration the 'fundamental rights' inherited from 1789 and strengthened in 1946".[475] This elevated the preambular status of human rights in the 1958 Constitution to enforceable guarantees and should serve as a valuable precedent to Francophone African countries that also have only preambular reference to human rights.[476]

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472 The example of Felix Houphouet-Boigny, and Leopold Senghor.

473 At 61.

474 On the status of fundamental rights declared in a preamble, see *Re Akoto* 1961 GLR 523 (in Ghana, the Court found that it imposes a moral obligation on the President) and *Société United Docks v Government of Mauritius* [1985] LRC (Const) 801 (where the preamble was regarded as an "enacting section" and was given effect in Mauritius).

475 Maus in Smith (ed) (1995) 142. See also Bell (1992) at 273-274.

476 This seemingly influenced the 1996 Constitution of Cameroon: The preamble commits the people to the affirmation of human rights, as set out in the Universal Declaration, the UN Charter and the African Charter. Art 65 of the Constitution determines that the preamble forms an integral part of the Constitution.

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ii *Immediate incorporation*

According to French constitutional law,[477] once a treaty has been "externally" ratified and has been published, it becomes part of internal law.[478] In other words, no legislative action is needed to lower the second storey norms to the ground floor. This approach is explicitly followed in a number of African constitutions.[479]

In some of the states with a French-based constitutional history, the lofty affirmation in the preamble is supplemented by directly incorporating the Charter (or international treaties generally) into the legal system. The **Madagascar** Constitution adopts the African Charter (and the CCPR, the CSECR and the Convention on the Rights of the Child) in the preamble, and proclaims them to be an "integral part" of its law.[480] The preamble of the Constitution of **Benin** reaffirms a commitment to the principles of participatory democracy and human rights as defined in the UN Charter, the Universal Declaration and the African Charter. But it continues, in the preamble, to add that those provisions "make up an integral part of this present Constitution and of Benin law and have a value superior to the internal law".[481] A commitment to the rights and duties in the African Charter is also explicitly proclaimed by the Constitution of **Burundi.** Article 10 of the Constitution concretises the Charter by providing that it "shall be an integral part of this

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477 Art 53 of the 1958 Constitution of France reads as follows: "[T]reaties ...may only be approved or ratified by a *loi*. They only take effect after they are ratified or approved". Art 55 determines that duly ratified or approved treaties have a higher authority than *lois*. Art 54 provides for a mechanism to determine whether there is a conflict between any part of a treaty and the Constitution. If a conflict exists, authorisation to ratify or approve the treaty may only be given after a revision of the Constitution has been undertaken. After an amendment in 1990, the question whether such a conflict exists may also be referred to the *Conseil Constitutionnel* by 60 members of the National Assembly or 60 members of the Senate (see Maus in Smith (ed) (1995) at 113).

478 This is also referred to as the "monist" theory, see par 3.4.1 above.

479 See eg art 120 of the constitution of Niger (treaties ratified have superior authority to that of legislation once ratified), and similar provisions in art 74 of the 1992 Constitution of Burundi and art 45 the 1996 Constitution of Cameroon.

480 Preamble of the 1992 Constitution.

481 Of the 1990 Benin Constitution.

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Constitution". This is also the case with Congo, where the principles proclaimed in the Charter are declared to be an integral part of the Constitution.[482]

This model may seem ideal, but it presents a very real problem: General incorporation of norms has to be followed by the **enactment of internal measures** to make the provisions of the treaty applicable, unless the provisions are "self-executing".[483] African states have not made the required enactments, restricting human rights treaties to declarations without effect, and contributing to the largely "ideological" nature of African international law.[484]

Other states with a civil law background also conform to this model. After external ratification, treaties "shall be in force in the **Cape Verde** judicial system".[485]

Some countries with a "mixed"[486] legal tradition, such as Namibia, also provide that international law "shall form part of the law of Namibia".[487]

iii Incorporation required

In Commonwealth Africa treaties do not become part of domestic law merely by virtue of their ratification. The explanation for this lies in the British constitutional context. Ratification of a treaty in which the state becomes bound on the international level ("external ratification") is a prerogative of the Crown. But it still has to be incorporated into the domestic legal system. This is in line with the system of Parliamentary sovereignty, which has been developed as a cherished bulwark against the exercise of executive prerogatives. In terms of the long-standing principle of checks and balances, and of the more recent symbolical functions of the Crown, such "external" ratification does not automatically bind internal courts: "If ... the provisions of a treaty made by

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482 Preamble of 1992 Congo Constitution.

483 See Gonidec (1996) 8 *RADIC* 789 at 794.

484 Gonidec (1993) 3 *RADIC* 243.

485 Art 11(2) of the 1992 Constitution.

486 Similar to South African law, Namibian law may be regarded as a mixture of a civil-law based system (Roman-Dutch) and English law.

487 S 144 of the 1991 Namibian Constitution.

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the Crown were to become operative within Great Britain automatically and without any specified act of incorporation, this might lead to the result that the Crown would alter the British municipal law or otherwise take some important step without consulting Parliament or obtaining Parliament's approval".[488] So, for example, British courts cannot directly apply provisions of the European Convention.

In a number of African states international law (or treaties such as the African Charter) does not become part of domestic law, unless explicitly incorporated by an act of Parliament. The Constitutions of Malawi, South Africa and Zimbabwe fall into this category. The **Malawi** Constitution of 1995 provides that agreements ratified by Parliament "shall form part of the law of the Republic if so provided for in the Act of Parliament ratifying the agreement".[489] While this formulation leaves some uncertainty about the process of international ratification, it seems clear that the municipal law cannot be altered without "the democratic participation of the legislature".[490]

According to the final Constitution of **South Africa** international agreements bind the Republic only after they have been approved by the National Assembly and the National Council of Provinces.[491] This requirement pertains to "external" ratification. A treaty only "becomes law" after it has further been enacted into national legislation. "Self-executing" provisions become law once "external" ratification has been approved by Parliament. In other words, for a convention to become applicable, an enabling domestic law has to be promulgated, unless its provisions are "self-executing". In **Zimbabwe**, the Constitution contains the general rule that no international treaty or agreement forms part of the law of Zimbabwe unless incorporated into domestic law by an act of Parliament.[492]

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488 Shearer *Starke's International Law* (1994) at 70.

489 S 211(1) of the Constitution of the Republic of Malawi.

490 Maluwa (1995) 3 *AYBIL* 53 at 74.

491 S 231 of Act 108 of 1996.

492 S 111B(1)(b) of the Constitution, as amended by Act 4 of 1993 (see (1993) 3 *Bulletin of Zimbabwean Law* at 26-27).

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Under the Constitutions of **Burundi** and **Togo** the content of treaties determine whether legislation is required to effect ratification. Treaties dealing with, amongst others, the status of persons, have to be "ratified only by virtue of a law".[493]

iv *Concept of self-execution introduced*

American jurisprudence has introduced different terminology, which may sometimes lead to conceptual confusion. Courts distinguish between "self-executing" and "non self-executing" treaties. Treaties in the first category do not require legislation to make them operational, while those in the second do. In terms of the 1996 **South African** Constitution, external ratification of human rights treaties has to be followed by the approval of the National Assembly and Council of Provinces.[494] In addition, if the provision is not "self-executing", it has to be enacted into national legislation before it becomes law.[495] If the provision is self-executing and it is not inconsistent with the Constitution or other act of Parliament, it becomes part of national law upon Parliament's approval of the external ratification.[496]

v *Mandate to apply international case-law and instruments as interpretative tools*

Many constitutions provide explicitly for the use of international law in the process of interpreting the local Constitution. Examples are found in the Constitutions of South Africa, Namibia and the Seychelles. The final South African Constitution reaffirms that, in interpreting the Bill of Rights, courts "must consider international law", and "may consider foreign law".[497] The Malawian Constitution still echoes the South African interim Constitution, where it provides that courts "shall, where applicable, have regard to current norms of public international and comparable foreign case-law".[498] The Constitution of the Seychelles is very detailed in its provision of aspects which courts may take judicial notice of in interpreting the Chapter of rights. It refers to

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493 Art 171 of the 1992 Constitution of Burundi and art 138 of the 1992 Constitution of Togo.

494 Sec 231(2) of the 1996 Constitution.

495 Sec 231(4) of the 1996 Constitution.

496 Sec 231(4) of the 1996 Constitution.

497 S 39(1) of the final South African Constitution.

498 S 11(2) of the 1994 Constitution.

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international instruments, reports and views adopted by treaty bodies, as well as decisions of regional and international institutions administering human rights provisions.[499]

vi Legislative naturalisation of treaty provisions

The surest way of giving effect to treaty provisions is to naturalise them by making them part of local laws. This makes arguments about monist and dualist theories redundant. This makes international law accessible and gives it a national colour. Questions about the enforceability of treaties then become questions common to the legal system as a whole. Both the neo-Nigerian Bills of Rights, and the Bills of Rights adopted in the 1990s, have incorporated many generally accepted human rights. This has the effect that many rights which are contained in the African Charter, are also included in African constitutions. For example, the right not to be treated inhumanely and cruelly is enshrined not only in the Charter,[500] but in most African constitutions.[501]

3.4.3.2 Hierarchy of norms

i International law (African Charter) superior to national law

In most Francophone constitutional regimes in Africa a clear distinction is drawn between the status of international law in relation to the Constitution (on the one hand), and in relation to other laws (on the other). **International law may be superior** to both the Constitution and other laws, or only to other laws and not the Constitution. In the latter case, potential conflict with the Constitution must be pre-empted and resolved before ratification is confirmed. The **Central African Republic** is an example of a country in which the Constitution has superiority over

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499 Art 48 of the 1993 Constitution.

500 Art 5 of the Charter.

501 See eg art 18 of the 1990 Constitution of Benin, s 7 of the 1966 Botswana Constitution, art 2 of the 1991 Constitution of Burkina Faso, art 20 of the 1992 Constitution of Burundi, art 26(2) of the 1972 Constitution of Cape Verde, art 3 of the 1994 Constitution of the CAR, art 11 of the 1993 Constitution of Chad and 16 of the 1992 Constitution of Congo (which represents a survey of countries starting with letters "a" to "c" only!).

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international treaties, while international law has superior authority over all other laws.[502] If there is a conflict between the Constitution and a provision of a treaty, Parliament may approve ratification only once the Constitution has been revised to bring it into line with the provision. The question whether a conflict exists is determined by the Constitutional Court. Determination of such an issue is required if the President of the Republic, the President of the National Assembly, or a third of the members of the National Assembly seizes the Constitutional Court.

The **Beninois** Constitution reaffirms its attachment to the African Charter and states that its provisions "have a value superior to the internal law".[503] But authorisation to ratify a treaty may also occur only after revision of the Constitution. This approach is modelled on the French Constitution of 1958.[504]

In another civil law country, **Cape Verde**, a similar distinction is made. International law takes precedence "over all laws and regulations below the constitutional level".[505]

Other Francophone African states proclaim the superiority of international law in more general terms, without drawing a distinction between the relative status of the Constitution and other laws. In **Tunisia**, treaties "duly ratified" have an authority superior to laws in general.[506] The Constitutions of **Chad**, **Congo**, **Mali** and **Zaïre** introduce the principle of reciprocity, in formulations such as: "Treaties ... have, as soon as they are published, a higher authority than that of law; provided that each treaty ... is approved by the other party".[507] This also reflects the French constitutional approach.[508]

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502 Art 68 of the 1995 Constitution.

503 Preamble of 1990 Constitution.

504 Art 54.

505 Art 11(4) of the Cape Verde Constitution of 1992.

506 Art 32 of the 1959 Constitution

507 Art 106 of the 1995 Constitution of Chad, art 176 of the 1992 Constitution of Congo, art 116 of the 1992 Constitution of Mali and art 109 of the 1978 Constitution of Zaïre.

508 Art 55 of the 1958 Constitution.

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ii National law superior to international law (African Charter)

The **South African** Constitution presents an example of the superior status of domestic law, not only in the form of the domestic constitution, but also other local legislation. "Self-executing" treaty provisions become part of national law once Parliament has assented to the executive's decision to ratify a human rights treaty only if these provision are *consistent with the Constitution and any other act of Parliament.*[509] These provisions are tempered by the duty placed on courts to "prefer any reasonable interpretation ... that is consistent with international law" over any alternative interpretation that is inconsistent with international law, when interpreting legislation.[510]

In terms of the **Namibian** Constitution international law applies, unless "otherwise provided by this Constitution or Act of Parliament".[511] The superiority of the Constitution is in a sense predictable, as the whole Constitution in these two countries is premised on the notion of the "supremacy of the Constitution".[512]

3.4.4 Judicial independence

3.4.4.1 Charter provisions

A prerequisite for any meaningful application of the Charter in any country is an independent and functioning judiciary in that country. This fact is acknowledged by the Charter itself: Article 7 guarantees the right to "an appeal to competent national organs against acts of violating" of human and peoples' rights. Article 26 places a duty on states parties to guarantee "the independence of

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509 Sec 231(4) of the 1996 Constitution.

510 Art 233 of Act 108 of 1996.

511 S 144 of the 1991 Constitution. See also *Kauesa v Minister of Home Affairs* 1995 1 SA 51 (NmHC) at 86J – 87A: "The specific provisions of the Constitution of Namibia, where specific and unequivocal, override provisions of international agreements which have become part of Namibian law. In [such] cases the provisions of the international agreements must *at least* be given considerable weight in interpreting and defining the scope of the provisions contained in the Namibian Constitution" (emphasis in original).

512 See s 2 of the final South African Constitution and art 1(6) of the Namibian Constitution of 1990.

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the Courts" and to establish and approve "appropriate national institutions" to promote and protect the Charter rights. The Commission has elaborated on the criteria of "independence", "competence" and "appropriateness". At its 19th session, the Commission adopted a resolution on the "respect and the strengthening of the independence of the judiciary".[513] This resolution emphasises the interconnectedness of human rights, justice, social equilibrium and economic development. The Commission called on African countries to:

- "repeal all their legislation which is inconsistent with the principle of respect of the independence of the Judiciary, especially with regard to the appointment and posting of judges;
- provide, with the assistance of the international community, the Judiciary with sufficient resources in order to enable the legal system (to) fulfil its function;
- provide judges with decent living and working conditions to enable them (to) maintain their independence and realise their full potential;
- incorporate in their legal systems universal principles establishing the independence of the Judiciary, especially with regard to security of tenure; and to
- refrain from taking any action which may threaten directly or indirectly the independence and the security of judges and magistrates."

3.4.4.2 Domestic provisions on judicial independence[514]

Independence of the judiciary, and its opposite (political manipulation of the judiciary) depend on the procedure used to **appoint** judges, the security of tenure inherent in their **terms of appointment**, the ease with which they may be **removed for office**, and less visible or more **subtle forms of interference**. An analysis of these four aspects in domestic legislation of some African states follows:

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513 Ninth Annual Activity Report, Annex VII at 5.

514 See, in general, Ankumah (1991) 3 *RADIC* at 581-588.

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i *Procedure for the appointment of judges*

The executive (usually in the form of the President) has the main role in the appointment of judges under most African constitutions. But the extent of checks and balances on the exercise of his powers differs from constitution to constitution.

The decision to appoint the **Chief Justice** is usually within the sole and **unfettered discretion** of the President.[515] In some instances the President's discretion is **circumscribed**. In Cape Verde, the President appoint the President of the Supreme Court of Justice from among the members of the Court, *after consultation with* the Superior Council of Magistrates.[516] In Ghana, the President appoints the Chief Justice acting *in consultation with* the Council of State and *with the approval of Parliament.*[517] In Uganda, the President has the power to appoint all judges, acting "on the advice of" the Judicial Service Commission ("JSC"), but also "with the approval of Parliament".[518] In Zambia all judges are appointed by the President "subject to ratification by the National Assembly".[519] It should be kept in mind that the consent required by the legislature in states dominated by one party is illusory. In some countries the negligible role of Parliament is acknowledged. In Zimbabwe, for instance, the President appoints a Chief Justice, acting on the advice of the Prime Minister. The Prime Minister, in turn, has to consult the JSC. If the proposed appointment differs with the recommendation of the JSC, "Parliament shall *be informed* before the appointment is made".[520]

As far as **other judges** are concerned, appointments are sometimes made jointly by the legislature, the executive and the judiciary or judicial commission.[521] In some other instances, judges are

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515 See eg s 61(1) of the Kenya Constitution: "The Chief Justice shall be appointed by the President".

516 Art 235(1) of the 1992 Constitution (my emphasis).

517 S 144 of the 1992 Constitution (my emphasis).

518 S 142(1) of the 1995 Constitution (my emphasis).

519 S 93 of the 1991 Constitution.

520 S 84(1) of the 1980 Constitution (my emphasis).

521 See eg the situation in Cape Verde (art 230 of Constitution Loi i/IV/1992): The Supreme Court of Justice consists of five judges. One is appointed by the President (executive), one is elected by a two-thirds majority in the National Assembly (legislative), and the other three are designated by the Superior Council of Magistrates (judicially). Other examples correspond with the French system. The constitutional Court in

Footnotes continued on next page.

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appointed by the executive, on advice of a judicial or quasi-judicial Commission.[522] This draws attention to the composition of the membership of the particular commission, in order to determine the independence which inheres in the decision to appoint.[523]

ii *Terms of appointment*

Ankumah states that almost "all African constitutions guarantee security of tenure".[524] With reference to examples from Uganda[525] and Botswana,[526] she concludes that the practice has been different. Formal guarantees do exist, though. Constitutional Court judges are appointed for a

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CAR consists of three judges named by the President (executive), three named by the National Assembly (legislative), and three elected by their peers (judiciary) (art 71 of the 1995 CAR Constitution).

522 See eg s 61(2) of the Constitution of Kenya: "The puisne judges shall be appointed by the President acting in accordance with the advice of the JSC" and s 123 of the 1993 Seychelles Constitution: "The President appoints the President and judges of the Court of Appeal" from candidates proposed by the Constitutional Appointments Authority".

523 The independence of the body is mostly compromised by executive dominance of its composition: S 68(1) of the Kenya Constitution: Chief Justice, Attorney-General, two judges designated by the President, chairman of Public Service Commission (the five members are all executive appointees); s 153 of the 1992 Ghana Constitution: 18 Members, four are judicial officers nominated by their peers, two represent the Ghana Bar Association, and the Editor of the Ghana Law Reports are independent (a total of seven), while the President appoints four non-lawyers. In terms of art 246(1) of the Cape Verde Constitution: President of Supreme Court of Justice, Superior Judicial Inspector, two citizens appointed by President of country, three citizens elected by National Assembly, two career judges elected by their peers (only four of the nine members can be said to be executive appointees). The President can also dominate the composition of the JSC in Uganda: The President appoints four of the seven members (s 146(2) of the 1995 Constitution). The Attorney-General also serves as *ex office* member (s 146(3)). The Constitutional Appointments Authority of the Seychelles consists only of three members. The President again has ultimate control. He/she appoints one member, as does the Leader of the Opposition. These two members then have to agree on a third member. If the required Consensus is not reached, they submit a list of two or three names to the President, who appoints the third member (art 140 of the 1993 Seychelles Constitution).

524 Ankumah (1991) 3 *RADIC* 5 at 586.

525 The non-renewal of the contracts of judges Udoma and Allen are also cited (at 586). In terms of s 142(3) of the 1995 Constitution judges act for a fixed period of appointment. If no period is fixed, a judge's term may be revoked by the President (acting on the advice of the JSC).

526 The contract appointment of Chief Justice Hayfron was not renewed (at 586).

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non-renewable term of nine years in many ex-French colonies,[527] and for a non-renewable term of twelve years in South Africa.[528] Until recently, Ugandan Chief Justices have not had security of tenure.[529] In practice, every regime appointed its own Chief Justice. In one case the very regime that had appointed the Chief Justice was also responsible for his execution.[530]

iii Removal from office

Two related questions arise: "*By whom* may a judge be removed ?" and "*On which grounds* may a judge be removed?". Ideally an independent review body alone should have the final say in the **dismissal of a judge**.[531] It could be in the form of the Court on which the judge sits. It may also be an *ad hoc* tribunal consisting of judges of the same Court.[532] Some countries use a judicial inquiry. The President may appoint an *ad hoc* tribunal to investigate and to make recommendations,[533] or it may be done by a permanent body, such as the Judicial Service Commission.[534] Other states require Parliament to make a recommendation to the President. The **grounds** for dismissal are usually limited to specified grounds such as incapacity,[535] gross

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527 See eg art 71 of 1995 Constitution of Chad.

528 Art 176(1) of the 1996 Constitution.

529 See Republic of Uganda (1994) at 151.

530 *Ibid.* Chief Justice Kiwanuka was abducted from his chambers and murdered in 1972 by the regime of Idi Amin, who had also appointed him.

531 Art 20 of the UN Basic Principles on the Independence of the Judiciary.

532 See eg art 71 of the CAR Constitution: The members of the Constitutional Court may only be investigated or arrested with the authorisation of the Court itself.

533 See s 144(4)(b) of the 1995 Uganda Constitution: In the case of a judge's proposed dismissal, the President must appoint a tribunal consisting of three present of retired judges of the Supreme Court or of "a court of similar jurisdiction". See also s 98 of the 1991 Zambian Constitution: The president may remove a judge only if so advised by a tribunal consisting of three members "who held or have held high judicial office",and who are appointed by the President). Such a tribunal was appointed in January 1997 by President Chiluba. The panel consisted of two supreme Court judges, judge Kapembwa (also chairman of the Zambian Anti-Corruption Commission), and judge Gardner. The third member is a non-Zambian, judge Onyolo of the Malawi Supreme Court (Kunda "Chiluba Suspends Top Judge" (24-30 January 1997) *Mail and Guardian* 15). See also s 87 of the Zimbabwe Constitution.

534 See eg s 84 of the Namibian Constitution.

535 See s 84(2) of the Namibian Constitution.

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misconduct,[536] inability to perform functions arising from physical or mental infirmity,[537] incompetence,[538] and misbehaviour.[539] In Chad, magistrates are "irremovable".[540]

It should be noted that the Kenyan decisions in *Kuria* and *Mbacha*[541] were decided in an era when judicial independence was not guaranteed in that country. An amendment to the Constitution in 1988 caused High Court judges to hold tenure "at the pleasure of the President", leaving judicial tenure totally unshielded from "the political whims of government".[542] In 1990 the position was changed, creating a tribunal charged with the discipline of judges.[543] However, the central role of the President remained, as he could appoint the tribunal and make recommendations to it about the removal of judges. This made the new procedure "immediately suspect due to the direct influence exercised by the executive".[544]

iv *Other forms of interference*

Less subtle ways of interfering with the independence of the judiciary are also possible. A well-documented example is the campaign against judge O'Linn of the Namibian High Court, while he was trying a treason case.[545] Leaders of the majority party, SWAPO, insulted and scandalised the judge, branding him as colonial, racist and disloyal. The Minister of Justice issued a statement

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536 *Ibid.*

537 See s 144(2) of the 1995 Uganda Constitution.

538 *Ibid.*

539 See s 98(2) of the 1991 Zambian Constitution. The open-endedness of a term such as this leaves room for the executive to intimidate judicial officers when no real likelihood of dismissal is present. In January 1997 Zambian President Chiluba suspended High Court judge Chanda and appointed a tribunal to probe his conduct (Kunda "Chiluba Suspends Top Judge" (24-30 January 1997) *Mail and Guardian* 15). This followed the judge's critical stance against the government's human rights record.

540 Art 98 of 1995 Constitution.

541 See par 3.4.4(c) below.

542 Kuria and Vazaues (1991) 35 *JAL* 142 at 146.

543 *Ibid.* See s 62 of the Kenyan Constitution.

544 Kuria and Vazauez (1991) 35 *JAL* 142 at 147.

545 See the case report of O'Linn J's *mero motu* consideration of his own recusal *S v Heita* 1992 3 SA 785 (NmH);1992 NR 403 (HC).

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reiterating that the independence of the judiciary was sacrosanct. He added that fair comment (in the form of dissenting opinions on terms of imprisonment imposed) should be tolerated as long as it does not amount to undue political influence on judges. The constitutional guarantees and official government stance is clearly at variance with what in fact transpired.

A more subtle method adopted is the appointment of judges in acting capacity only. Judges will be prone to tow the government line if the extension of their terms is continuously assessed. President Chiluba used a rather transparent mechanism when he doubled the salaries of supreme Court judges while they were hearing a challenge against his re-election.[546] Given this indirect pressure and the suspension of one of the judges before the case was heard, it is not surprising that the Court rejected the application that the President be subjected to a DNA test to prove his nationality, and, consequently, his eligibility to be President.[547]

3.4.4.3 Judicial restraint, executive-mindedness and judicial activism

With reference to a rag-bag of experiences in six African states, Africa's mixed record in dealing with the tensions and possibilities in respect of the judicial role is now illuminated. These states are the Gambia, Kenya, Madagascar, Malawi, Tanzania and Zimbabwe.

i The Gambia

A military coup took place in the Gambia in 1994. In November 1994 Momodou Dibba was arrested and held incommunicado.[548] His wife brought an application for his release and for an order granting him bail. The state argued and the Supreme Court found that the Economic Crimes Decree 16 ousted the jurisdiction of courts to hear the matter. Overturning the decision, the Gambian Court of Appeal remarked that the Supreme Court has original jurisdiction to hear any application. Justice Chomba, President of the Court, added: "It may also make any order, issue

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546 Kunda "Chiluba tips justice scales in his favour" (13 -19 June 1997) *Mail and Guardian* 6.

547 See "President Chiluba off the hook in paternity test" (25 - 31 July 1997) *Mail and Guardian* 13.

548 This account is based on the report by Jawo "Appeal Court Reverses Supreme Court Ruling" 23 May 1994 *Daily Observer* (Banjul, The Gambia) 1.

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any writ or give any directives for the purpose of enforcing the entrenched rights and freedoms included in sections 13 to 27 of the Constitution." [549]

ii Kenya

Some Kenyan cases exemplify a judicial tendency to abdicate from adjudicating on constitutional claims altogether. In opting for technical and formalistic reasoning, some Kenyan judges have sought to avoid judging the substance of claims brought under the Kenyan Bill of Rights. An excessively positivistic jurisprudential approach clearly facilitates such reasoning, as it presents itself as value-neutral adjudication and a mechanical search for the correct applicable "rule".

This is illustrated by two High Court decisions of the late 1980s, *Kuria v Attorney General* [550] and *Mbacha v Attorney General*.[551] The substantive issue involved in the first of these two cases was whether the right to free movement had been infringed by the government's refusal to return the applicant's passport. He was due to travel to the United States to receive a human rights award. The constitutional application was brought under section 84 of the Kenyan Constitution. Section 84(1) provides that a person who alleges a violation of a provision of the Bill of Rights may apply to the High Court for redress. The operation of the sub-section is made subject to section 84(6), which allows the Chief Justice to make Rules of procedure in relation to such applications. Sitting as a single High Court judge, Chief Justice Miller ruled that section 84 was "inoperative", as no rules had been promulgated under section 84(6). This is clearly wrong, as the wording of the sub-section ("may") is facultative rather than imperative or conditional. Apart from being an incorrect interpretation, the implication is preposterous: "With a stroke of the pen the Chief Justice decided that he held Kenyans to ransom and henceforth whether or not they enforced their fundamental rights was dependent on him".[552] There was indeed no impediment on the Chief Justice to issue such rules there and then, had he cared to.

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549 *Ibid.*

550 High Court of Kenya at Nairobi, Miscellaneous Civil Application No 550 of 1988 (See (1989) 33 *Nairobi Law Monthly*).

551 High Court of Kenya at Nairobi, Miscellaneous Civil Application No 3-6 of 1989 (See (1989) 38 *Nairobi Law Monthly*).

552 M'Inoti (1991) 34 *Nairobi Law Monthly* 17 at 23.

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The second case concerned the detention without bail of three men charged with creating a disturbance, arising from a press release signed by them. In the statement, a by-election was alleged to have been rigged. Application was made to the High Court, seeking (*inter alia*) a declaration that the applicant's conduct was justified by their right to free speech.[553] Justice Dugdale, following the decision in *Kuria*, held section 84 to be "inoperative" and dismissed the application. For two reasons the judgment is highly extraordinary. Firstly, judgment was read from a pre-typed ruling without the Court having heard any of the parties. Secondly, and probably resulting from the first: The Court seemed to have overlooked the fact that the application was not only brought under section 84, but also under section 60, which grants "unlimited original jurisdiction in all civil and criminal matters" to the High Court. By dismissing the application in its entirety, the Court has taken "the final step in abdicating from judicial power to enforce the Bill of Rights".[554]

Both cases are extraordinary in their disregard for precedent. Only a few years earlier, the then acting Chief Justice Madan faced a similar preliminary objection in *Odinga v Attorney General*.[555] Referring to authority of the Privy Council, he held that when no rules had been issued pursuant to section 84(6), the Court can be approached through any of the existing procedures.[556] Although it did not overturn the two High Court decisions referred to above, the later judgment by the Court of Appeal in *Kihoro v Attorney General*[557] showed an acceptance to find the government in violation of the Constitution. The highest Court for the first time awarded damages for the breach of constitutional rights.[558]

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553 See eg Vazquez (1990) 20 *Nairobi Law Monthly* 7 at 12.

554 M'Inoti (1991) 34 *Nairobi Law Monthly* 17 at 23

555 Miscellaneous Civil Application No 104 of 1986

556 See Gathii (1994) *Univ of Nairobi Law Jnl* 140 at 141.

557 Civil Appeal No 151 of 1988 (Judgment delivered 17 March 1993). The case was brought under section 84(2) of the Constitution.

558 Gathii (1994) *Univ of Nairobi Law Jnl* 140 at 149.

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iii *Madagascar*

In similar vein, recent developments in Madagascar may be mentioned. In terms of the Madagascar Constitution[559] a majority of the National Assembly may request the Constitutional Court to declare that the president of the state be impeached. In 1996 such a resolution was adopted by the National Assembly. The Constitutional Court formally impeached the president on 4 September 1996.[560] This marks a clear acceptance of the Constitutional Court's role in the political life of the nation. The Court based its finding on violations of the Constitution. The incumbent, having become president on 27 March 1993, did not fulfil his constitutional obligation to establish a second chamber (the senate).[561] He also obstructed the legislative process, by not rectifying some fifteen laws within the fifteen days following their adoption by the National Assembly.[562]

iv *Malawi*

An application seeking the release of a detainee was brought before ex-patriate Malawian Chief Justice Skinner in 1977.[563] In terms of the relevant statute, Law (Miscellaneous Provisions) Act[564] the High Court may "whenever its thinks fit, direct that any person ... improperly detained in .... custody .... be set at liberty". Despite this clear provision, the Court denied the application. Its finding was based on English law authority to the effect that it is not the function of a court to act as a court of appeal from a discretionary order for detention made under an act of Parliament.[565] The relevant Malawian statute permitted detention when an official had reasonable grounds to believe that the person's activities were a threat to public security.[566]

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559 S 50.

560 See Bohmer "La Constitution, Plus Efficace que les Putchs" (1996) 226 *Jeune Afrique Economique* 12.

561 *Ibid.*

562 In an advanced democracy such as the USA the procedure was used twice: in 1968, in the case of President Johnson, and in 1974, when president Nixon was removed from office.

563 *Njilu v Republic* 8 MLR 347.

564 S 16(6).

565 *R v Home Secretary, ep Lees* (1941) 1 KB 72.

566 Public Security Regulations (Laws of Malawi Cap (4:02)).

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v Tanzania

The Tanzanian courts have a mixed record. One High Court Judge, Mwalusanya J, stands out as an activist.[567] As a result of one of the boldest steps taken by him, he was seriously reprimanded by the Court of Appeal.[568] Section 4 of the Legal Aid (Criminal Proceedings) Act 21 of 1969 provides that an advocate who had appeared in a criminal case is to be remunerated between shs 120 and shs 500 in each case. After completing a case, a certain advocate (Butambala) addressed the "usual letter" to the judge, requesting payment. Mwalusanya J, outraged at the paltry sum prescribed, indicated that he intended construing the section "as modified so as to bring it into conformity with the provisions of the Bill of Right" to read that an advocate shall be "entitled to be remunerated according to the quantity and quality of the work done".[569] A hearing was fixed, at which theAttorney-General and Butambala were represented. The judge found as he indicated earlier, and ordered payment of shs 10 000 to Butambala.

An appeal against this judgment was allowed. The Court of Appeal found that the judge raised an issue at his own initiative, without a constitutional complaint being lodged by anyone. The Court (per Makame JA) expressed a reluctance to make findings of unconstitutionality where institutional or administrative avenues could be followed, stating: "We need hardly say that our Constitution is a serious and solemn document. *We think that invoking it and knocking down laws or portions of them should be reserved for appropriate and really momentous occasions. Things which can easily be taken up by administrative initiative are best pursued in that manner.* If we may be permitted to borrow and extend the term "Ambulance Lawyers" in currency in certain jurisdictions, it is not desirable to reach a situation where we have "ambulance Courts" which go round looking for situations where we can invalidate statutes. We say this deliberately and by design, and we do not think this is conservative in the negative same. We think it is responsible and responsive to the needs of our Society. There is, or should be, plenty of room for judges and magistrates to make

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567 See Coldham (1991) 35 JAL 205, who refers to his important role in the interpretation and the enforcement of the Tanzanian Bill of Rights and describes a "series of bold and controversial judgments" handed down by him.

568 See *Attorney-General v Batambala*, Criminal Appeal 37 of 1991, Court of Appeal of Tanzania at Mwanza, 14 June 1991 (unreported).

569 Quoted in *Attorney-General v Butamasala* above at 1-2 (as typed).

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positive and constructive inputs which can influence legislation in the right direction. The old practice where judges and magistrates used to construct such opinions for consideration by their own higher authorities or conferences should continue to be encouraged".[570] In an *obiter dictum*, the Court remarked that the fees provided for under Section 4 "may be grossly inadequate and out of date". It concluded with this ambiguous statement: "We think something positive must be done, unless the public philosophy is that the service advocates render under the law are intended to be taken to be akin to the classical dock briefs of some jurisdictions".[571]

Similarly, the Court of Appeal reversed the judgment by Mwalusanya J in *R v Mbushuu*.[572] Agreeing with the court *a quo* that the death penalty constitutes a *prima face* violation of constitutional rights, the Court held that the inroad is justified in terms of section 30(2) of the Constitution, which stipulates that basic human rights should not lead to the invalidation of laws that ensure "the rights and freedoms of others or the public interest".

However, on other occasions the Court of Appeal did not allow section 30(2) to be used as an instrument to condone human rights violations. The question in *Pumbun v Attorney-General*[573] was whether the requirement that one had to obtain the government's consent to sue it, was constitutional. Violations of the right to have disputes determined by a court[574] and the right to equality[575] were found. In its application of section 30(2) the Court referred with approval to Mwalusanya J's judgment in *Ng'omango v Mwanga*.[576] The Court found no justification in treating individuals on a footing unequal to the State, merely because the State is responsible for the wider interests of society.

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570 *Attorney-General v Butamsala* above at 6-7 (as typed), my emphasis.

571 At 11 (as typed).

572 [1994] 2 LRC 355.

573 Civil Appeal 32 of 1992, Court of Appeal of Tanzania at Arusha, 23 July 1993 (unreported). The judgment was delivered by Kisanga JA, member of the Africa Commission.

574 Art 13.

575 Art 6.

576 Civil case 22 of 1992, High Court at Dodoma (unreported).

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vi Zimbabwe

The activist attitude of the judiciary in Zimbabwe adopted in the late 1980s contrasts with some previous precedents.[577] The 1989 decision in *Smith v Mutasa NO*[578] has been described as the "high watermark" in the development of constitutionalism in Zimbabwe.[579] Parliament adopted a resolution that deprived the "Rhodesian" Prime Minister Ian Smith of his salary. The Supreme Court found that this deprivation violated his constitutional right to property.[580] Given the racist remarks Smith had reportedly made and the swell of popular support in favour of the deprivation, the Court's judgment was very bold. Madhuku recounted that the Speaker of the Parliament followed up the decision with a statement to the effect that Parliament will disregard the decision.[581] In an unprecedented move, the five judges involved in the finding issued a public statement. In the statement they stressed that the duty to interpret the Constitution is that of the courts, and even Parliament has to comply with such findings.[582] Eventually, Smith's salary was paid to him.[583]

In *Catholic Commission for Justice and Peace in Zimbabwe v A-G, Zimbabwe*[584] the Zimbabwe Supreme Court altered the death penalty of the applicants, who had been detained on death row, to life imprisonment. This finding was based on section 15 of the Constitution, which outlaws inhuman and degrading punishment. A delay in execution and conditions of detention on death row were held to be unconstitutional. This decision was given on 24 June 1993. Subsequent to that decision, similarly situated applicants approached the Court for a similar declaratory order.[585] The applicants in this subsequent case were sentenced to death in November 1988. After the relevant court papers were filed, but before the appeal was heard, the Constitution of Zimbabwe Amendment (No 13) Act 1993 was adopted (as "the Legislature's remarkably quick response to

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577 See eg Roux (1996) 8 *RADIC* 755 at 763, discussing the case of *Hewlett v Minister of Finance* 1982 1 SA 490 (ZSC).

578 1989 3 ZLR 183.

579 Madhuku (1996) 8 *RADIC* 932 at 933.

580 Guaranteed under s 16 of the Zimbabwe Constitution.

581 (1996) 8 *RADIC* 932.

582 Statement quoted by Madhuku (1996) 8 RADIC 932 at 933.

583 (1996) 8 *RADIC* 932 at 934.

584 1993 4 SA 239 (ZS).

585 *Nkomo v Attorney-General, Zimbabwe* 1994 3 SA 34 (ZS).

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the Supreme Court decision"[586] in the *Catholic Commission* case) and took force on 5 November 1993. In terms of this amendment, delay in the execution of a death sentence is not a contravention of article 15 of the Constitution.[587]

A preliminary issue raised by the state was that of *locus standi*: The contention by the state was that the applicants had already petitioned the President for mercy. This petition was however not yet debated or determined by cabinet. Put differently, the requirement that remedies had to be exhausted, was not met. The Court rejected this argument, finding no reason why it should not exercise its role of protecting the rights of individuals. The Court had the following to say about the amendment: " ... it cannot be said that the effect of subsection 5 is, by necessary implication, expressed to be back-dated to destroy the vital fundamental right to obtain the substitution of a sentence of life imprisonment for that of death ...".[588]

The legislature did not respond to the Supreme Court only in this one instance. The judgment in *S v A Juvenile*,[589] which outlawed juvenile corporal punishment, prompted the Constitution of Zimbabwe Amendment (no 11) Act 30 of 1990, which amended section 15 of the Constitution so as to permit corporal punishment to be imposed on male juvenile offenders.[590] The amendment also reacted to the *obiter dicta* regarding corporal punishment in schools[591], by clarifying that moderate

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586 (1993) 3 *Bulletin of Zimbabwean Law* 27.

587 The amendment went further by inserting subs 15(6), which states that contraventions of s 15(1) will not entitle a person to a stay, alteration or remission of sentence (see (1993) 3 *Bulletin of Zimbabwean Law* 27).

588 Per Gubbay CJ, at 41J-42A, Muchechetere J dissenting.

589 1990 4 SA 151 (Z). It should be added, though, that the government commuted the death sentences of all those prisoners whose cases had been finalised before the date of the decision in the *Catholic Commission* case to life imprisonment (Gubbay (1997) 19 *HRQ* 227 at 242). To a certain extent, at least, the Zimbabwean state report submitted to the Commission and examined at its 21st session is correct where is states that the "Executive did not challenge the Supreme Court order, thus accepting the independence of the judiciary in Zimbabwe" (at 61 of report, as typed). Subsequent legislative changes have reversed this decision. Given the executive domination of the legislature, this ultimately amounts to executive interference, though at a much more subtle level.

590 See (1991) 1 *Bulletin of Zimbabwean Law* 19. See also Hatchard ((1991) 35 *JAL* 198), who describes the amendment as a constitutional and penological disaster (at 202).

591 At 161E-I, per Dumbutshena CJ.

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corporal punishment may be imposed on children by their parents or by persons *in loco parentis*.[592] In other cases, the legislature acted pre-emptively. For example, the question of the constitutionality of hanging as method of executing the death penalty was raised in *S v Chitiza*. The case was not brought to finality, but the legislature intervened by (re)affirming the constitutionality of hanging as method of execution, by including section 5 in the Constitution of Zimbabwe Amendment (no 11) Act 30 of 1990.[593]

Another example is presented by the circumstances surrounding *S v Gatsi*.[594] In that case, counsel unsuccessfully argued that the delegation of legislative authority to the President in terms of specific legislation was unconstitutionally wide. In terms of the Constitution of Zimbabwe Amendment (no 12) Act 4 of 1993 it is stipulated that Parliament may delegate its legislative powers, presumably to ensure that similar arguments are discouraged in future.[595]

The Supreme Court did not hesitate to censure governmental non-compliance with its finding in *Rattigan v Chief Immigration Officer*.[596] In that case it was held that the freedom of movement of married Zimbabwean women is infringed if their alien husbands are refused permanent residence in Zimbabwe. This decision notwithstanding, the immigration officials still refused residence permits to non-Zimbabwean husbands married to Zimbabwean wives. The following observation was made in *Salem v Chief Immigration Officer*[597] about the disdainful disregard of the Court's judgment by the immigration officer: "Such an attitude by a government official is deserving of censure. It enjoins this Court, so as to ensure that such rights are given effect to, *to issue directives* to the Chief Immigration Officer, *rather than adopt the preferred expedient of merely declaring their existence under the Constitution*".[598] Again, the legislature intervened to reverse and overrule the decisions in *Rattigan* and *Salem*.[599]

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592 (1991) 1 *Bulletin of Zimbabwean Law* 19.

593 See (1991) 1 *Bulletin of Zimbabwean Law* 19.

594 1994 1 ZLR 7 (H), described in (1993) 3 *Bulletin of Zimbabwean Law* 27.

595 *Ibid.*

596 [1994] 1 LRC 343 (Zimbabwe)

597 [1994] 1 LRC 354 (Zimbabwe)

598 At 356g, my emphasis.

599 By the Constitution Amendment (no 14) Act, which amended s 22 (see Gubbay (1997) 19 *HRQ* 227 at 243).

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Lest a picture of incessant confrontation is drawn, it should be noted that the legislature has implemented at least some of the Supreme Court judgments. An example is the enactment of the Criminal Laws Amendment Act 2 of 1992. It removed from the statute book punishment with sparse diet and solitary confinement, following a decision to this effect in *S v Masitere*.[600] The implications of numerous other decisions have also been left intact.[601]

3.4.5 Application of the African Charter by domestic courts

What follows is not a comprehensive survey of the application of the Charter by domestic courts. The exposition (sometimes very brief) is based on information gathered from various sources. It covers sixteen countries, extends across sub-regions and includes the major legal systems of the continent.

3.4.5.1 Algeria

Commissioner Rezzag-Bara, from Algeria, noted that the Charter has been incorporated into Algerian law, but that he knew of no cases that have come before the Algerian courts on the basis of the African Charter.[602]

3.4.5.2 Benin

Following the adoption of a democratic constitution in 1990,[603] a Constitutional Court was established in Benin in 1991.[604] Soon thereafter, on 22 May 1991, a trade union leader seized the

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600 1990 2 ZLR 289 (SC), and see (1992) 2 *Bulletin of Zimbabwean Law* 16.

601 See the discussion by Gubbay ((1997) 19 *HRQ* 277), who concludes that "the Declaration of Rights in the Constitution of Zimbabwe has greatly enhanced the rights and freedoms of every person in Zimbabwe" (at 231).

602 Interview in (1996) (Oct - Dec) *AFLAQ* at 45.

603 The Constitution of 11 December.

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court.[605] He claimed that legislation of 26 September 1988 contravened articles 17 and 22 of the Beninois Constitution, as well as article 7(1) of the African Charter. In its very brief decision (of less than two typed pages), citing article 4(1) (a) to (c) of the African Charter, the Court found that the "Loi" conformed with the Constitution.

In a subsequent case, one Madame Bagri invoked the right to work, as guaranteed in both the Beninois Constitution and the African Charter,[606] before the Constitutional Court.[607] The Court, remarking that the complaint related to the application of rules of the "Statuts de la Fonction Publique", found that the actions taken to dismiss Mme Bagri were not unconstitutional.

The first cases in which the Constitutional Court declared government action unconstitutional, date from 1994.[608] In one case a decree by the Minister of the Interior, Security and Territorial Administration had to be scrutinised for constitutional consistency.[609] The decree declared that only one developmental association shall be registered per administrative entity. Associations that had previously existed and whose applications for registration had been refused, had to cease all activities and be liquidated.[610] In making this decree, the Court observed, the Minister had encroached upon the domain reserved to the law in terms of the Beninois Constitution and article 10 of the African Charter.[611] Article 10 of the Charter declares that "every individual shall have the right to free association provided that he abides by the law".

Commentators have speculated about the interpretation of the term "provided that he abides by the law". Some have criticised the Charter as draconian, as they regarded every legal response by a government as "law". Others have suggested that "law" should and could be interpreted

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604 Pursuant to Loi 91-009 of 4 March 1991, "Loi Organique sur la Cour Constitutionnelle".

605 Decision 002/ of 26 June 1991.

606 Specifically article 13 (2), which guarantees equal access to the public service.

607 Decision DDC-03-93.

608 Based on a personal perusal of the Court's records in Cotonou, Benin, during April 1995.

609 Decision DCC 16-94 of 27 May 1994.

610 Decree 260/ MISAT/ DC/ DAI/ SAAP of 22 November 1993.

611 The minister "a empiété sur le domain reservé a la loi par articles 25 et 98 de la Constitution et 10 de la Charte Africaine des Droits de l'Homme et des Peuples".

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restrictively, requiring an essential minimum moral content before government fiat becomes elevated to law. It is quite clear that the latter approach was adopted by President of the Court Elisabeth Pognon and her five male colleagues. The mere fact that a minister has issued a decree does not mean that the right to freely associate in article 110 of the Charter becomes impossible to invoke. According to the Beninois Constitutional Court there is "a domain reserved to law", upon which an executive may not encroach. The implications of the decision should not be overstated. It was an executive law making activity that came under scrutiny, not an ordinary law of a law making body, such as Parliament. The meaning of "law" in French constitutionalism must also be taken into account. The decision says that "loi" should be distinguished from a "arrêté".

In another case decided by the Beninois Constitutional Court in 1994, the Court heard an application to have certain appointments to the Communications Authority declared unconstitutional.[612] Interfering to a very limited extent with the executive decree, the Court referred to the African Charter as an integral part of the Constitution of 11 December 1990.[613] Article 10 of the African Charter was cited as an interpretative tool, providing confirmation of the freedom to associate set out in article 25 of the Beninois Constitution.

In 1993 four cases were heard by the Constitutional Court. In none of these reference is made to the African Charter. One finding of partial inconsistency with the Constitution was handed down. Of the 14 cases adjudicated in 1994, by way of contrast, seven contain some reference to the African Charter.[614] Findings of unconstitutionality were made in six of these instances. From this one may not only deduce a tendency towards greater judicial activism, but also a clear commitment to regional human rights realisation.

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612 Decision DCC 10-94 of 9 May 1994.

613 "partie intègrante".

614 Cases DDC 05-94 (art 13(2) of the African Charter), DDC 06-95 (art 13(2)), DDC 09-94 (art 13(2)), DDC 10-94 (art 10), DDC 11-94 (art 7), DDC 16-94 (art 10) and DDC 18-94 (art 13(2)). Based on a perusal of records in the Constitutional Court Library, Cotounou, Benin, during 1995.

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3.4.5.3 *Botswana*[615]

The question whether discrimination based on sex was unconstitutional arose in the case *Attorney-General of Botswana v Unity Dow*.[616] The lower court relied on international human rights treaties ratified by Botswana to inform its conclusion that the omission of the word "sex" from the list of prohibited grounds in the Botswana Constitution does not imply that discrimination based on sex is constitutionally tolerable. One of these instruments was the African Charter. In article 2 the Charter guarantees the enjoyment of the rights recognised therein without distinction on the basis of, amongst other factors, sex. At the Court of Appeal, the appellant raised an objection against the lower court's reliance on these international instruments. Amissah JP rejected these objections. However, the international norms were applied not as "enforceable rights", but as "an aid to the construction of an enactment" such as a "difficult provision of the Constitution".[617] In relation to the African Charter, Amissah JP made the following observations: "Botswana is a signatory to this Charter. Indeed it would appear that Botswana is one of the credible prime movers behind the promotion and supervision of the Charter".[618] The judge conceded that the Charter is not binding law "as legislation passed by its Parliament", but that domestic legislation should be interpreted so as not "to conflict with Botswana's obligations under the Charter".[619]

The facts of the case concerned the constitutionality of provisions in the Citizenship Act of 1982, in terms of which children had to adopt the nationality of their fathers. This meant that if a female Botswana citizen married a non-Botswana citizen, their children would not have Botswana nationality. It was assumed that women would "follow their husbands".[620] It was argued that this provision amounted to discrimination against women and was in conflict with article 15 of the Botswana Constitution.[621] However, the state contended that article 15 was not applicable, as it did

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615 See in general the discussion by Lindholt (1997) ch 6 and 7.

616 [1992] LRC (Const) 623.

617 *Ibid.*

618 At 656d-e.

619 At 656h-i.

620 On the investigation of the Botswana Law Reform Commission and its conclusions, see Lindholt (1997) at 199.

621 Art 15 prohibits laws which are discriminatory "either in itsef or in its effect" (art 15(1)).

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not refer to "sex" or "gender" as explicit grounds for non-discrimination. Basing itself on international law obligations of the state, including article 2 of the African Charter, a majority of the Botswana Court of Appeal found a violation of the Botswana Constitution.[622]

As a direct consequence of this decision,[623] the Botswana Parliament amended the Citizenship Act, so that the relevant section now provides that a person "shall be a citizen of Botswana ... if, at the time of his birth, his father *or mother* was a citizen of Botswana.[624] The Court of Appeal continued its progressive improvement of women's rights when it delared unconstitutional regulations which forced female students to leave college when becoming pregnant.[625] This sequence of events stands as testimony to the undeniable effect of global and regional human rights norms in a domestic legal system.

3.4.5.4 Cape Verde

For all its laudable incorporation of the Charter and the fact that it enjoys direct applicability in Cape Verde, no cases invoking the Charter as such could be cited by commissioner Duarte when questioned about the subject.[626]

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622 Art 2 of the Charter includes "sex" as one of the grounds on which the guarantees of the Charter may not be denied to any individual. The other grounds are "race, ethnic group, language, religion, political or any other opinion, national and social origin, fortune, birth or other status". The list in the Botswana Constitution is restricted to "race, tribe, place of origin, political opinions, colour or creed" (art 15(3)).

623 Although the amendment came several years after the *Unity Dow* judgment, it is clear from the memorandum accompanying the amendment that it was adopted in reaction to the judgment (Memorandum on Citizenship (Amendment) Bill no 9 1995, which quotes the *Dow* case). See Lindholt (1997) at 200. For a background of pressure on the government, see also Quansah (1995) 39 *JAL* 97 at 102.

624 Emphasis added.

625 *Student Representative Council, Molepolole College of Education v Attorney General of Botswana*, Civil Appeal 13 of 1994, judgment delivered on 31 January 1995, unreported. For a case discussion, see Quansah (1995) 39 *JAL* 97. See also Lindholt (1997) at 209.

626 Answer to a question during interview, see (1996) (Oct - Dec) *AFLAQ* at 14.

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3.4.5.5 Congo

Commissioner Ondziel-Gnelenga, herself a lawyer appearing in cases in her home country, Congo, sketched the following bleak picture: "Personally, I have invoked in some cases, certain provisions of the Charter, but this has only served as additional information to the cases in question. The judges and magistrates have not taken into account these provisions when making decisions or formulating opinions".[627]

3.4.5.6 Ghana

In an article published in 1991, the Ghanaian represented on the African Commission, professor Dankwa, made a plea for the incorporation of international human rights treaties into domestic law in Ghana.[628] He lamented the fact that none of the nine international treaties ratified by Ghana had been made part of local law. This had the effect that the provisions of these instruments could not be asserted in Ghanaian courts. He proceeded to indicate the practical implications of one of these instruments, the African Charter. He argued that PNDC Law 4 (the Preventative Custody Law, 1982) and PNDC Law 91 (*Habeas Corpus* (Amendment) Law, 1984) cannot stand in the face of article 6 of the African Charter.[629] Furthermore, he expressed his doubts whether PNDC Law 211 (The Newspaper Licensing Law) "can stand by virtue of the combined effect of Articles 9 and 7(1) of the same Charter".[630] This decree provides that anyone intent on publishing a newspaper in Ghana must first obtain a license, which may be withdrawn at the discretion of the PNDC Secretary for Information. The legislation does not provide for review of or appeal against this decision.

The Ghana Public Order Decree 1972 came under scrutiny in *New Patriotic Party v Inspector-General of Police, Accra.*[631] The measures of this Decree included giving the Minister of the

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627 Interview in (1996) (Oct - Dec) *AFLAQ* at 34.

628 Dankwa (1991) 3 *ASICL Proc* 57.

629 *Ibid.*

630 Dankwa (1991) 3 *ASICL Proc* 57 at 63.

631 (1993)1 NLPR 73, suit 3/93, 30 November 1993.

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Interior the power to prohibit the holding of public meetings or processions for a specific period in a specified area,[632] and a requirement that any meeting to celebrate a traditional custom shall be subject to prior permission.[633] The Supreme Court of Ghana found section 7 to be in violation not only of the Ghanaian Constitution,[634] but also of the African Charter.[635] The Chief Justice (Archer) added the following remarks to the leading judgment of Hayfron-Benjamin J: "Ghana is a signatory to this African Charter and Member States of the Organisation of African Unity and parties to the Charter are expected to recognise the rights, duties and freedoms enshrined in the charter and to undertake to adopt legislative and other measures to give effect to the rights and duties. I do not think the fact that Ghana has not passed specific legislation to give effect to the Charter, the Charter cannot be relied upon. On the contrary, Article 21 of our Constitution has recognised the right to assembly mentioned in Article 11 of the African Charter".[636] This does not necessarily form a pattern. In another decision handed down on the same day, *New Patriotic Party v Ghana Broadcasting Corporation*,[637] pertaining to the right to information, no reference is made to the African Charter.[638]

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632 S 7.

633 S 8.

634 S 21, which guarantees freedom of assembly including freedom to take part in processions and demonstrations.

635 S 11, dealing with freedom of assembly.

636 At 82.

637 Writ 1/93, Supreme Court, judgment of 30 November 1993, per Archer CJ, Francois J, Sekyi J, Aitkins J, Wirebu J, Bamford-Addo J and Hayfron-Benjamin J.

638 The Ghanaian Court referred to the fact that the Constitution demands that a broad and liberal spirit of a democratic and pluralist society should prevail in the country (at 11 of typed judgment). Art 21(1)(f) of their Constitution provides that all persons have the right to information, subject to such qualifications as are necessary in a democratic society. The Court chose to seek the spirit referred to in Ghana law, rather than in art 9(1) or 9(2) of the Charter. Art 9(1) of the Charter grants an unqualified right to receive information. Art 9(2) has a claw-back clause: Everyone may express their opinions "within the law". It is perhaps understandable that the Court did not seek to find the embodiment of a democratic and pluralist spirit in these two provisions of the Charter.

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Dankwa finds reason for optimism about the increased role of the Charter in the fact that a high-ranking government official, the Attorney-General, referred to a provision of the Charter during a case.[639]

3.4.5.7 Malawi

Through a process of negotiations, a new constitution was adopted in Malawi in 1994, and signed into law by the President in 1995. Not long before this, under the previous constitutional dispensation, the rare occasion of the African Charter being invoked, presented itself to the Malawi Supreme Court of Appeal. Malawi had already ratified the African Charter on 17 November 1989.[640]

In this case, *Chafukwa Chichana v The Republic*, the appellant was sentenced after a conviction for the importation and possession of seditious materials.[641] It was argued that certain of the appellant's fundamental rights, enshrined in the Universal Declaration, had been violated by the State. The Court agreed, holding that the content of the Universal Declaration had been incorporated into Malawian law by virtue of the 1966 Constitution.[642]

Counsel for the applicant further argued that the applicant's rights were also protected under the African Charter, to which Malawi was a party. No specific legislation had been passed to incorporate the Charter into domestic law. Banda CJ rejected this contention: "This Charter, in our view, must be placed on a different plane from the UN Universal Declaration of Human Rights. Whereas the latter is part of the law of Malawi the African Charter is not. Malawi may well be a signatory to the Charter but until Malawi takes legislative measures to adopt it, the Charter is not

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639 Observation made during interview, see (1996) (Oct - Dec) *AFLAQ* at 11.

640 On the potential effects of the Charter on Malawi law, see Lindholt (1997) ch 6 and ch 7.

641 Discussed by Maluwa (1995) 3 *AYBIL* 53 at 65-69.

642 The 1966 Constitution, then in force, provided in s 2(1)(iii) that the "Government and the people of Malawi shall continue to recognise the sanctity of the personal liberties enshrined in the United Nations' Universal Declaration of Human Rights...".

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part of the municipal law of Malawi and we doubt whether in the absence of any local statute incorporating its provisions the Charter would be enforceable in our Courts".[643]

Tiyanjana Maluwa agrees with this conclusion. He points out that the Court did not in any depth address the relevance of international law in protecting and interpreting human rights domestically. He suggests a different line of argument, not based on the constitutional incorporation of the Universal Declaration into Malawian law, but on it having become binding customary international law. In so far as the rights in the African Charter resemble the Universal Declaration (as binding customary international law), they may be applied by municipal courts. As Maluwa concedes, this argument remains premised and dependent on the status of the Universal Declaration - not the African Charter.[644] It appears as if a similar conclusion would have been reached under the provisions of the 1995 Constitution.[645]

3.4.5.8 Namibia

Namibia ratified the Charter on 30 July 1990, not long after its independence on 21 March 1990. The Namibian High Court in *Kauesa v Minister of Home Affairs*[646] referred to various articles of the African Charter.[647] Quoting articles 143[648] and 144[649] of the Namibian Constitution, the Court made the following general statement: "The Namibian government has, as far as can be established, formally recognised the African Charter in accordance with art 143 read with art 63(2)(d) of the Namibian Constitution. The provisions of the Charter have therefore become

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643 Cited by Maluwa (1995) 3 *AYBIL* 53 at 68.

644 See (1995) 3 *AYBIL* 53 at 68-69.

645 See s 211(1) of the 1994 Constitution.

646 1995 1 SA 51 (NmHC); [1994] 2 LRC 263 (Namibia, HC).

647 Noting that the provision for non-discrimination in the African Charter does not allow for any exception (at 86D; 302 I).

648 "All existing international agreements binding on Namibia shall remain in force, unless and until the National Assembly, acting under article 63(2)(d) hereof, otherwise decide".

649 "Unless otherwise provided by this Constitution or act of parliament, the general rules of public international law and international agreements binding on Namibia under this Constitution shall form part of the law of Namibia".

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binding on Namibia and form part of the law of Namibia in accordance with art 143, read with art 144 of the Namibian Constitution".[650] On this basis the Court rejected arguments that certain hate speech provisions and a regulation criminalising unfavourable comment about the armed forces were unconstitutional.[651]

3.4.5.9 Nigeria

It is ironic, but perhaps predictable, that the clearest illustration of the potential effect of the African Charter in domestic law is found in a military regime at a time of severe repression.[652] The country is Nigeria, and the time is the period following the nullification of the results of the elections held on 12 June 1993.[653]

Nigeria ratified the African Charter on 22 June 1983. It subsequently incorporated its content into domestic law by way of the African Charter on Human and Peoples' Right (Ratification and Enforcement) Decree, which now forms chapter 10 of volume 1 of The Laws of the Federation of Nigeria.

During the previous military regime some judges took tentative steps to ameliorate the eroding impact of military rule on fundamental rights. Eleven youths were convicted and sentenced to death by an "armed robbery tribunal" in 1988. The fundamental issue to be decided by Longe J in *Garba v Lagos State Attorney-General*[654] was whether the jurisdiction of the High Court of Lagos

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650 At 86 G - H; 303 d. In its decision reversing the court *a quo's* finding the Namibian Supreme Court did not make reference to the African Charter: *Kauesa v Minister of Home Affairs* 1996 4 SA 965 (NmSC).

651 S 11(1)(b) of the Racial Discrimination Prohobition Amendment Act and Reg 58(32) made in terms of the Police Act (RSA) 7 of 1958.

652 This fact is also reflected in the proliferation of "non-official" human rights case reports, such as those in the *Jnl of Human Rights Law and Practice.*

653 The Nigerian courts were also approached on bases other than the African Charter. In some judgments, judges showed a willingness to stand up to executive conduct, such as judge Akinsanya in *Abiola v National Electoral Commission* (1993) 1 NLPR 42, in which the High Court of Lagos State ruled that the previous president Babangida lacked the authority to annul the elections and instate an interim government.

654 Suit ID/599M/91, judgment of 31 October 1991; see Falana (1994) at 7 (of typed manuscript).

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State was ousted by section 10 (3) of the Robbery and Firearms (Special Provisions) Decree 5 of 1984, which reads as follows: "The question whether any provision of Chapter VI of the Constitution of the Federal Republic of Nigeria 1979 has been, is being or would be contravened by anything done in pursuance of this Decree shall not be inquired into in ... any Court of Law". As the applicants relied on the right to life contained in that chapter of the Constitution, the respondent argued that the Court lacked jurisdiction to hear the matter. In deciding that it had jurisdiction, the Court referred to the African Charter: "The African Charter on Human and Peoples' Rights, of which Nigeria is a signatory is now made into our law by African Charter Act 1983, cited by the learned counsel for the applicants. Even if its aspect in our Constitution is suspended or ousted by any provision of our local law, the international aspect of it cannot unilaterally be abrogated."

This approach was not adopted consistently by all Nigerian judges. In *Wanab Akanmu v Attorney-General of Lagos State*[655] the Court rejected the applicants' request for an order restraining the government from carrying out their execution pending the determination of a communication directed to the African Commission. In this instance, the Court held that Decree 5, quoted in the preceding paragraph, precluded it from considering the application. The Court rejected the contention that the African Charter was part of and enforceable in Nigerian law, remarking as follows: "As for the African Charter on Human Right (sic), this cannot override the Laws of the Land. ... The applicants are Nigerians residing in Nigeria. They were charged in Nigeria for Armed Robbery and were convicted and sentenced to death by a Competent Tribunal on the Law of the Land".[656]

In 1993 the following facts came before the High Court of Lagos State in *The Registered Trustees of the Constitutional Rights Project v President of Nigeria*:[657] Six persons had been convicted and sentenced to death by a "Disturbance Tribunal", which was set up pursuant to the Civil Disturbances (Special Tribunal) Decree 2 of 1987. The state wanted to proceed with their execution. An application had at that stage already been lodged on their behalf with the

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655 Suit M/568/91, judgment of 31 January 1992, High Court of Lagos State, unreported.

656 Quoted in Lester in *Developing Human Rights Jurisprudence* vol 4 (1992) 136 at 152.

657 Civil suit M/102/92, judgment of 5 May 1992, unreported.

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Commission.[658] In that application the contention was that the applicants had not received a fair trial, as required by the African Charter. The application before the domestic court was directed at restraining the government from carrying out the applicants' execution pending the final determination of the communication by the Commission. When the Commission finally decided the case (in October 1994, at its 16th session), it found that articles 7 and 26 of the Charter had been violated and recommended that the complainants should be freed.[659] This must stand as one of the clearest examples of how the Charter (and the Commission) has materially affected the destiny of Africans, in that the death sentences have not been enforced.[660]

In the High Court of Lagos the respondents argued that the jurisdiction of the Court to hear the application was excluded by virtue of certain decrees. Section 8 (1) of the Civil Disturbances (Special Tribunal) Decree 2 of 1987 provides: "The validity of any decision, sentence, judgment, conformation, direction, notice or order given or made as the case may be or any other thing whatsoever done under this Act shall not be inquired into in any court of law". For the avoidance of doubt Decree 55 of 1992 was also invoked in their argument. Section 3 (1) of that decree determines that no "civil proceedings shall lie or be instituted in any court or tribunal for or on account of or in respect of any act, matter or thing done or purported to be done under or pursuant to this Decree by or on behalf of the Military Government". The respondent argued that the African Charter by being incorporated into domestic law, lost its status as international law. The Court (per Onalaja J) held that the Human and Peoples' Rights (Ratification and Enforcement) Act [661]is also a "decree" for the purposes of Decree 55 of 1992, but "it is a Decree with a difference being a Decree to enable effect to be given in the Federal Republic of Nigeria to the African Charter".[662] The African Charter is a treaty which has been ratified by the Nigerian government.

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658 See Communication 87/93 (*Constitutional Rights Project (in respect of Lekwot and six others) v Nigeria*) and the discussion in par 3.3.3 above.

659 See Communication 87/93 (*Constitutional Rights Project (in respect of Lekwot and others) v Nigeria*).

660 At its 17th session the Commission decided to bring the file to Nigeria for a planned mission "in order to make sure that the violations have been repaired". This mission took place from 7 to 14 Match 1997, but the mission report has not been submitted yet (see Tenth Annual Activity Report at paras 21, 22).

661 Cap 10 of the laws of the Federation of Nigeria 1990.

662 At 40 of the typed judgment.

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Since the government is still a member of the OAU, chapter 10 of the federal laws is binding on the government. Assuming that the Human and Peoples' Rights (Ratification and Enforcement) Act is an ordinary decree, the Court is presented with a conflict between it and the ouster clauses. With reference to existing case-law, the Court applied the principle that international law obligations "prevail over the rules of domestic law when they are incompatible with the latter".[663] In the light thereof, the Court found that its jurisdiction was preserved by the African Charter, as provisions of the Charter override the ouster clauses.

The judge introduced his judgment with a statement on the significance of the decision: "This is a case of great constitutional landmark and significance not only for Nigeria but also for member states of OAU as it touches the interpretation of African Charter due to paucity of cases that involved the said charter. This case opens a novel point with its uniqueness in the approach for the enforcement of the African Charter ... with the guide to the courts of member states where there is conflict between the municipal or domestic law of the member state and the said charter... ."[664] This illustrates the leading role of the Nigerian judiciary in making the Charter guarantees effective.

In *Akinnola v General Babangida*[665] the same Court (per Hunponu-Wusu J) went a step further. The applicant in this case sought an order declaring the Newspaper Decree 43 of 1993 to be in violation of the 1979 Nigerian Constitution and contrary to the African Charter. In terms of the Newspaper Decree newspapers had to comply with new registration guidelines. The applicant argued that these guidelines infringed the applicant's freedom of expression, as guaranteed in both the 1979 Constitution and the African Charter.

Again the state party raised jurisdiction as a preliminary objection, arguing that enactments in the Constitution Suspension and Modification Act (similar to those in the *Constitutional Rights Project case supra*) ousted the jurisdiction of the courts. The Court relied on the judgment previously given by Onalaja J, extending it to apply to cases brought under the Nigerian

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663 At 44 of the typed judgment.

664 At 1 of the typed judgment.

665 Judgment reprinted in (1994) 4 *Jnl of Human Rights Law and Practice* 250.

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Constitution and the African Charter in the domestic courts: "Since the Courts have held that the African Charter is like an enactment of the Federal Government like a decree, it follows that if there is a conflict between an enactment ousting the jurisdiction of the Court and another which does not, the Court should lean more on the one that preserves the jurisdiction of the Court." The judge also referred to the proceedings of the Judicial Colloquium held in Bangalore in 1988, in which Chief Justice Helfen of Pakistan said: "The International human rights norms are in fact part of the constitutional expression of liberties guaranteed at the national level. The domestic Courts can assume the task of expanding these liberties".

Counsel for the state in *Nemi v The State*[666] argued that there was a lacuna in Nigerian law for the enforcement of the rights in the Charter. A particular enforcement procedure was enacted in the 1979 Constitution[667] to provide for a process of enforcing fundamental rights guaranteed in that Constitution. Similar provision was not made in the African Charter or the Ratification and Enforcement Act. Rejecting this argument, Bello CJ continued: "Since the Charter has become part of our domestic law, the enforcement of its provisions like all our other laws fall within the judicial powers of the courts as provided by the Constitution and all other laws relating thereto".[668]

Another case in which reference was made to the African Charter was *Agbakoba v Director State Security Services*.[669] The passport of the applicant in this case was impounded by a state security official without any reasons being given. The High Court held that a passport was the property of the government and could be withdrawn at any time. Allowing an appeal against the judgment, the Court of Appeal found that the seizure of the passport constituted a violation of the right to freedom of movement. The Court observed that the right (particularly the right not to be refused entry to or exit from one's country) was recognised in the African Charter.

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666 [1994] 1 LRC 376 (Nigeria, SC)

667 S 42 of the 1979 Constitution.

668 At 385 c-d.

669 1994 6 NWLR 475; see also [1996]1 CHRD 89.

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In two cases dealing with the occupation and closure of newspaper premises the government was found to have violated the Constitution.[670] Although the findings were not based on the African Charter, both applications made reference to the violation of rights protected in the Charter. Commissioner Umozurike, when interviewed about the domestic invocation of the Charter, referred to the "latest case *Fawehnmi v Attorney-General*" in which it was held "in an important *ratio decidendi* that the African Charter has priority over any decree by government and cannot be excluded from application by decree".[671]

3.4.5.10 Senegal

When questioned about the Charter's domestic application in Senegal, commissioner Ndiaye referred in vague terms to "a decision stating that the African Charter and international treaties have direct applicability in the courts of Senegal".[672]

3.4.5.11 South Africa

In the second judgment delivered by the South African Constitutional Court, it declared capital punishment unconstitutional.[673] In his leading judgment, Chaskalson P made foot-noted reference to the African Charter, emphasising that it prohibits the arbitrary deprivation of life.[674] O'Regan J referred to the same provision of the Charter, contrasting it with the open-ended formulation of the interim Constitution, which protected life as such.[675]

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670 *Punch Nigeria Ltd v Attorney-General* (1996) 1 CHRD 46 and *Concord Press of Nigeria Ltd v Attorney-General* (1996) 1 CHRD 47.

671 Interview reported in (1996) (Oct - Dec) *AFLAQ* at 47.

672 See (1996) (Oct - Dec) *AFLAQ* at 39.

673 *S v Makwanyane* 1995 3 SA 391 (CC).

674 At par 36, n 52.

675 At par 324, n 221.

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Langa J went a step further in *S v Williams* when he delivered the Court's judgment declaring juvenile whipping unconstitutional.[676] Article 5 of the African Charter helped him substantiate the assertion that section 11(2) of the interim Constitution corresponds with most international human rights instruments.[677] However, the judge seemed to have gone beyond referring to the Charter as an interpretative tool when he mentioned that Mozambique had abolished corporal punishment in 1989 "in accordance with the country's obligations under the African Charter…".[678]

A critical issue to be decided in *Ferreira v Levin NO*[679] was how the right to freedom in the interim Constitution had to be interpreted.[680] Relying on, amongst others, the philosophers Berlin and Kant, as well as Canadian, American and German case-law, Ackermann J opted for a broad interpretation of the right. Chaskalson P, with whom the majority agreed, adopted a narrow interpretation. Support for an interpretation limiting "freedom and security of the person" to a context relating to detention or other physical constraints was found in public international law, including the African Charter.[681] In another case, involving possession of indecent material, Mokgoro J found the African Charter clear in its provision for the right to receive information prior to transmitting it.[682]

A judge of the former Supreme Court, McLaren J, in dealing with the interpretation of the right to dignity in the interim Constitution,[683] referred to a text book which makes reference in this context to the African Charter.[684]

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676 1995 3 SA 632 (CC).

677 At par 21, n 24.

678 At par 40, n 58.

679 1996 1 SA 984 (CC).

680 S 11(1).

681 At par 170.

682 See *Case v Minister of Safety and Security* 1996 3 SA 617 (CC) at par 29, n 41, referring to art 9 of the African Charter.

683 S 10.

684 The text is Cachalia *et al Fundamental Rights in the New Constitution* (at 33-34). See also *Potgieter v Kilian* 1996 2 SA 276 (N) at 314 D-E. See further the reference to the African Charter in *Shabalala v Attorney-General, Transvaal* 1995 (SA 608 (T), where Cloete J declined to look at any foreign or international law (at 642 J).

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The relative minimal impact of the African Charter may be explained by the fact that South Africa was a non-state party until July 1996 when she acceded to the African Charter.[685] This event did not enjoy extensive media coverage. Very few South Africans would have realised that this had taken place. The minimal impact of the African Charter in South Africa since South African ratification remains disappointing. This is particularly striking in the *Certification of the Constitution of the Republic of South Africa* case,[686] where regular reference is made to other constitutions and international instruments. The African Charter is mentioned twice: once as part of some background on developments in international human rights,[687] and once to support the proposition that a right to intellectual property is rarely recognised in regional human rights conventions.[688]

In other cases, extensive reference to international law is contrasted with silence about the African Charter, its provisions and potential scope and application.[689] The Charter may have been an interpretative tool, or more, in at least some of these decisions.

3.4.5.12 Tanzania

Judicial activism and Mwalusanya J are synonymous in Tanzania. His name reappears in the Tanzanian cases in which the African Charter were referred to in case-law.[690]

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685 See eg *AZAPO v President of RSA* 1996 4 SA 671 (CC), which dealt with a constitutional challenge to the amnesty provisions in the Promotion of National Unity and Reconciliation Act, 34 of 1995.

686 See eg 1996 3 SACLR 17 (CC).

687 Par 50, n 46 of the judgment.

688 Par 75, n 67 of the judgment.

689 See eg *Brink v Kitshoff* 1996 1 SACLR 69 (CC), *Dispute Concerning Constitutionality of Certain Provisions of Gauteng Scool Education Bill* 1996 2 SACLR 117 (CC) and *AZAPO v President of RSA* 1996 4 SA 671 (CC).

690 An individual judge **can** sometimes make a difference. Mwalusanya J is the force behind a turning tide. In Australia, Murphy J started making sustained suggestions that the Australian Constitution embodies a range of "implied freedoms". See Blackshield *et al Australian Constitutional Law and Theory* (1996).

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Equality of the sexes was the issue in *Ephrahim v Pastory,*[691] a decision of the Tanzanian High Court. A woman inherited clan land from her father. In old age, the woman decided to sell the land. The willing buyer happened to be someone not belonging to the clan. A male clan member filed a suit to declare the sale void, as females do not have the power to sell clan land. The relevant codification of customary law (of the Haya group) indeed provides that clan land shall not be sold by female members of the clan. In terms of an amendment to the Tanzanian Constitution, a Bill of Rights was introduced.[692] In terms thereof a court must construe existing law "as may be necessary to bring it into conformity with" the provisions of the Bill of Rights.[693] Article 13(4) of the Bill of Rights prohibits discrimination against women. In interpreting article 13(4), the Court referred to similar provisions in the Universal Declaration of Human Rights and the CCPR, and to the fact that Tanzania ratified the Convention on the Elimination of All Forms of Discrimination against Women. Mwalusanya J continued: "That is not all. Tanzania has also ratified the African Charter on Human and Peoples' Rights which in art 18(3) prohibits discrimination based on account of sex ... The principles enunciated in the above-named documents are a standard below which any civilised nation will be ashamed to fall. It is clear ... that the customary law under discussion flies in the face of our Bill of Rights as well as the international conventions to which we are signatories".[694] As a result, he found the Haya customary rule to be inconsistent with the Bill of Rights and ordered that the Constitution should prevail.[695]

In *DPP v Pete*[696] the highest Tanzanian Court, the Court of Appeal, heard an appeal against a judgment of Mwalusanya J.[697] Sub-sections 148(4) and 148(5) of the Criminal Procedure Act 1985 were declared unconstitutional by him in the lower court. The first sub-section provided that bail had to be denied if the Director of Public Prosecutions issued a certificate to the effect that the release of a detained person would be prejudicial to the safety of the Republic. The second made it

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691 [1990] LRC (Const) 757.

692 By means of the Constitution (Consequential, Transitional and Temporal Provisions) Act (16 of 1984), which took effect in March 1988.

693 S 5(1) of Act 16 of 1984.

694 At 763 a - c.

695 At 770 c.

696 [1991] LRC (Const) 553.

697 For a case comment, see Coldham (1991) 35 *JAL* 205.

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impossible for courts to grant bail in respect of certain categories of offences, including offences for which possessing a firearm was an element. In the course of interpreting the Bill of Rights, the Court found support for its interpretation in the African Charter: "Tanzania signed the Charter on 31 May 1982 and ratified it on 18 February 1984. Since our Bill of Rights and Duties was introduced into the Constitution under the Fifth Amendment in February 1985, that is, slightly over three years after Tanzania signed the Charter, and about a year after ratification, account must be taken of the Charter in interpreting our Bill of Rights and Duties".[698] The court referred to the Preamble of the Charter and concluded: "It seems evident in our view that the Bill of Rights and Duties embodied in our Constitution is consistent with the concepts underlying the African Charter on Human and Peoples' Rights as stated in the Preamble to the Charter".[699] The Court consequently affirmed the decision of the lower court, holding that provisions of the Criminal Procedure Act violated the individual's right to personal freedom.[700]

3.4.5.13 Togo

According to commissioner Amega, the provisions of the Togolese Constitution correspond with the provisions of the Charter. He was not aware of any cases in which the Charter had been invoked by the Togolese courts.[701]

3.4.5.14 Tunisia

Interviewed in 1996, commissioner Ben Salem could not refer to any cases in which courts in Tunisia had relied on or referred to the Charter.[702]

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698 Per Nyalali CJ, Makame and Ramadhani JJA, at 565 g.

699 At 566 b.

700 At 568 e - f. The violation could also not be "saved" under s 30 or 31 in the Bill of Rights, because the provision was overbroad (at 572).

701 See (1996) (Oct - Dec) *AFLAQ* at 42.

702 Interview contained in (1996) (Oct - Dec) *AFLAQ* at 37.

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3.4.5.15 Zambia

Counsel in *Longwe v Intercontinental Hotels*[703] referred to international human rights documents, including the African Charter. The Zambian High Court (per Musumali J) made some remarks about the effect of international treaties ratified by Zambia: "It is my considered view that ratification of such documents by a nation state without reservations is a clear testimony to the willingness by that state to be bound by the provisions of such a document. Since there is that willingness, if an issue comes before this Court which would not be covered by local legislation but would be covered by such international document, I would take judicial notice of that treaty or convention in my resolution of the dispute".[704] The African Charter was cited explicitly as a treaty with such effect.[705]

3.4.5.16 Zimbabwe

Zimbabwe ratified the Charter on 30 May 1986. One finds scant reference to the African Charter in the relatively extensive human rights jurisprudence that has burgeoned in the ten years thereafter. In two cases which dealt with corporal punishment, extensive reliance was placed on international authority.[706] While the European Convention was quoted and numerous cases decided by the European Commission and Court were referred to, there is not a single reference to the African Charter in these two cases.

The African Charter was quoted as one of a number of international instruments that contain a right to freedom of movement and travel, supporting the High Court's judgment in *Chirwa v Registrar-General.*[707] In a case concerning the refusal of a licence to operate a mobile cellular telephone service, the Supreme Court ruled that such a refusal violated the applicant's freedom of

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703 [1993] 4 LRC (Const) 221.

704 At 233 c - d.

705 At 233 c.

706 *S v Ncube* 1988 2 SA 702 (ZS) (see the reference also to US courts at eg 718) and *S v A Juvenile* 1990 4 SA 151 (ZS).

707 1993 (1) ZLR 1 (H).

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expression.[708] This was guaranteed as a right in the Zimbabwean Constitution. This right is an indispensable condition for a free and democratic society, the court held, referring to its inclusion in a number of international human rights instruments. One of these references is to article 9 of the African Charter.[709]

3.4.5.17 Conclusions

- The first observation is an obvious one: The **extent to which the African Charter** has been **invoked** in a particular country **correlates with the status that the Charter** (as part of international law) enjoys in the domestic legal system.

- Clearly, the above list is not exhaustive of all judicial reliance on or interpretation of the African Charter by courts on the continent. But the survey strongly suggests that the cases in which the Charter was mentioned in domestic courts, are **few**. The survey may not be comprehensive, but provides as complete a picture as could be assembled.

- When the Charter could not be invoked as an enforceable right, it was sometimes used as **interpretative guide**. In many cases where this could be done, it was not. Particularly in the corporal punishment cases decided by Southern African courts (Namibia, South Africa and Zimbabwe), the European rather than the African system was referred to. One obvious explanation for this preference is the fact that the abstract norm of "cruel, inhuman and degrading punishment" had been given concrete content in the European jurisprudence.[710] In one instance the African Charter had not been ratified when the case was instituted or decided.[711] Using the Charter as interpretative guide is the most likely first step in extending the

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708 *Retrofit v Telecommunications Corporation* 1996 (1) SA 847 (ZS).

709 At 856 G-H.

710 See eg the remarks by Gubbay, the present Chief Justice of Zimbabwe: "... we have looked to precedential judicial decisions emanating from those jurisdictions whose reputation for human rights is highly regarded and, of course, the opinions of the European Court of Human Rights" ((1997) 19 *HRQ* 277 at 253).

711 This justifies the omission in the Namibian case *Ex parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State* 1991 3 SA 76 (Nm S).

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sphere of influence of the Charter. In this respect the Commission adopted a resolution at its 19th session, urging judges and magistrates in African states to "play a greater role in incorporating the Charter and future jurisprudence of the Commission" in their judgments.[712]

- Another reason why African courts have not relied explicitly on the Charter, even as an interpretative guide, is that local courts primarily interpret and apply local law. In many instances, the **provisions of the Charter have been incorporated into domestic law**. If these systems overlap, judicial application of national law is simultaneously also (albeit implicitly) application of the Charter. Although this may not be stated explicitly, the Charter has effectively been applied under such circumstances.

- A **growing awareness of the African Charter** has been experienced in the 1990s. This has in some instances followed the creation of new domestic institutions or the enforcement of constitutional rights, as exemplified by the case-law emanating from Benin.

- There is also some evidence of a **cumulative or domino effect**. Once a single case has been decided on the basis of the African Charter, others follow, as in the case of Nigeria.

- In some instances **one judge** remained a lone voice for some time, showing what a difference it would have made if more followed his example. Mwalusanya J of the Tanzanian High Court epitomises the singular resolve of one judge to convert the guarantees of the Bill of Rights into reality.

- The **interrelationship** between the domestic institutions and the Commission has to be kept in mind. If a domestic court can interpret and apply the Charter, the Charter itself is part of the domestic remedies to be exhausted. In such instances, the Commission acts as a "court of appeal" against the decision by the domestic court. But if the domestic courts do not have that competence, the Commission must provide an initial decision based on the African Charter. In time, it should be instructive to note the degree of difference or correlation in the application and interpretation of the Charter by national courts and the supra-national body.

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712 Ninth Annual Activity Report Annex VII at 6.

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- The frequency and innovative use of the Charter by the local judiciary is closely linked to the arguments forwarded by **legal counsel**.[713] For this reason, not only judges, but lawyers more generally, should be exposed to training programmes about the Charter. In this, NGOs and law societies in the different countries will have to play an active role.[714]

3.5 The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa

3.5.1 Background

The Heads of State and Government of the OAU in September 1969 adopted the OAU Convention Governing the Specific Problems of Refugees in Africa.[715] Both the historic framework and the convention title indicate that this regional instrument should be viewed in conjunction with and supplementary to the international convention that had been in existence since 1951.[716] As was highlighted elsewhere, Africans had good cause to regard the UN Convention Relating to the Status of Refugees as "Eurocentric".[717] The 1967 Protocol opened the initial instrument to include all persons that complied with the definition of "refugee", thereby allaying some of the African concerns. African states started facing refugee problems since the early 1960s. Before the 1967 Protocol extended the 1951 Convention, efforts were underway to conclude a distinctly African

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713 See eg the remarks by Onalaja J in *The Registered Trustees of the Constitutional Rights Project v The President of Nigeria* above, at 46 - 47 of the typed judgment: "Let me put on record that the ingenuity in the quintessence manner and dexterity of the learned counsel for the applicant/respondent has shed a new light and horizon on African Charter on Human and Peoples' Rights in African jurisprudence (sic). It has reflected the law and lawyer in the words of Dean Roscoe Pound as social engineers".

714 See also the Commission's recommendation at its 19th session in which it urged bodies in civil society "to initiate specialised and comprehensive training for judicial officers, lawyers at national and sub-regional level" (Ninth Annual Activity Report Annex VII at 7).

715 UN Treaty Series vol 1001 at 45, adopted on 10 September 1969 and entered into force on 20 June 1974.

716 And amended thereafter, see ch 2.6 above.

717 See ch 2.6 above.

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instrument. After 1967, efforts became directed at a regional supplement to the UN Convention. Thus, the OAU Convention recognises the 1951 Convention (as modified by the 1967 Protocol) as "the basis and universal instrument relating to the status of refugees".[718] The OAU Convention goes further, by adapting the universal norms and standards to deal with the challenges facing Africa.

The OAU Convention entered into force on 20 June 1974.[719] By the end of March 1997 it had been ratified by 43 OAU member states.[720] Those states that had not ratified were the Comoros, Côte d'Ivoire, Eritrea, Djibouti, Madagascar, Mauritius, Namibia, Sahrawi Arab Democratic Republic, São Tomé e Príncipe and Somalia. Of these, three are island states. Of these ten non-ratifying states, all but three (Comoros, Eritrea and Mauritius) have at least ratified the UN instruments.[721] This means that three states have adopted the international refugee regime, without supplementing it with its African complement. They are Cape Verde, Libya and Swaziland. It also means that the more universal instrument has been accepted by more states in Africa than the regional supplement. Three states (Botswana, Kenya and South Africa) ratified the OAU Convention after 1990, indicating that the instrument retains its relevance in Africa today.

3.5.2 Comparison with the UN Refugee Convention

In an attempt to understand why an "African supplement"[722] to existing international refugee law was added, one should draw a distinction between the two systems. In this way one may ascertain how this African contribution differs from its global equivalent.

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718 See Preamble of OAU Convention, par 9. See also art VIII(2): "The present Convention shall be the effective regional complement in Africa of the 1951 United Nations Convention".

719 See Patel and Watters (1994) at 245.

720 See Table J below.

721 See Table B above.

722 The OAU Refugee Convention recognises the UN Conversion and Protocol as "the basic and universal instrument" on the topic (Preamble).

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3.5.2.1 Definition of refugee

The OAU Refugee Convention largely restates the exact wording of the UN Convention, but the term "refugee" is broadened. The global instrument allows for a "well-founded fear of being prosecuted" as the only basic requirement for refugee status. The OAU Refugee Convention extends the term to include anyone who is compelled to flee a country of residence "owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin on nationality".[723] This extension was necessitated by the restrictive nature of the initial approach to refugees. "Fear of persecution" concentrated on the ideas a person holds, and not on the socio-political context itself. This has led Oloka-Onyango to conclude that "the overall ideology of those grounds ... are rooted in the philosophy that accords primacy of place to political and civil rights over economic, social, and cultural rights".[724] The broadened definition allows for many more factors to be invoked in seeking refugee status. These factors include serious natural disasters (such as famine, which has become prevalent in Africa) and need not affect the country as a whole.

The UN Convention's definition assumes individual screening of persons in order to establish whether they have a "well-founded" fear of persecution. Such a system is obviously only manageable when persons flee as individuals or in small groups. When questions about refugee status arise, not in isolated cases, but from mass migrations, the application of such a test becomes impossible. Exactly the latter type of situation prevailed and still prevails in Africa. This necessitated an approach in which cumulative and objective factors could be determinative of refugee status. Such factors are "events seriously disrupting public order" and "foreign domination".[725]

Neither the international nor the African instrument provides for internally displaced persons.

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723 Art I (2).

724 (1996) 24 *Denver Jnl of Intl Law and Policy* 349 at 364.

725 See art 1(2) of the OAU Convention.

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3.5.2.2 *Disqualification as refugee*

The grounds in the OAU Convention on which refugees lose their status as refugees ("cessation of status"), or persons who are disqualified from qualifying as refugees at all ("exclusion from status"), are again derived from the UN document. But also in this regard the OAU Refugee Conventions adds to the list. The widened scope created by the broader definition of "refugee status" is narrowed down by virtue of these additional grounds for exclusion and cessation of refugee status. Three additional categories are included in the OAU document:

- *Anyone guilty of acts contrary to the purpose and principles of the OAU.* This ground arises from the Convention's status as an instrument embedded within a particular structure, that of the OAU. Similarly, the 1951 Convention refers to acts contrary to the purpose and principles of the UN. By retaining the latter ground, the OAU Refugee Convention underlines its supplementary nature. Kimminich expressed the opinion that as long as the soul of the OAU remains within the ambit of that of the UN, the OAU Convention will remain a regional realisation of the UN Convention.[726]

- *Anyone who has seriously infringed the purposes and objectives of the OAU Refugee Convention.* Although this requirement does not appear commonly in human rights treaties, it is understandable.

- *Anyone who has committed a serious non-political crime outside his country of refuge after his admission to that country of refuge.* It is a peculiar provision. If a refugee commits a serious non-political crime inside the country of refuge after his admission to that country, he does not lose the protection of the Convention. Why should he or she lose this protection if the crime is committed outside the host country?

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726 (1970) *Verfassung und Recht in Übersee* 443 at 453.

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3.5.2.3 *Asylum*

The OAU Refugee Convention is explicit about the obligation of states to grant asylum to refugees.[727] In contrast, the UN Convention is silent on this issue. However, the duty on states is "to use their best endeavours ... to receive all refugees".[728] The way in which this duty was phrased led Weis to conclude that the requirement is recommendatory, rather than binding.[729] Also, because these endeavours must be "consistent with their laws and constitutions", states need merely comply with internal laws, whatever their content. This provision may be viewed as a precursor to the inclusion of "claw-back" clauses in the African Charter.

3.5.2.4 *Duty of refugee in host state*

The OAU Convention determines that a refugee has to conform with the law in the state of refuge. He or she must also "abstain from any subversive activities against any Member State of the OAU".[730] In this regard, states have the obligation to prohibit refugees from attacking other OAU member states through acts of armed aggression or the use of mass media. Although the basis of the prohibition of the use of force and of disseminating propaganda for war has its roots in international law, the OAU Refugee Convention is unique in placing a duty on the host state to ensure compliance.

3.5.2.5 *Duty on country of origin*

An interesting innovation in the OAU Convention is the duty which is placed on the country of origin in relation to returning refugees. States must grant full rights and privileges to returning nationals, and must refrain from any sanctions or punishment against them.[731]

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727 Art II (2).

728 Art II (1).

729 (1970) 3 *Revue des Droits de l'Homme* 449 at 457.

730 Art III (1).

731 See Weis (1970) 3 *Revue des Droits de l'Homme* 449 at 463.

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3.5.2.6 Conclusion

The OAU Convention has rightly been declared a progressive contribution to international refugee law. It presents a clear example of how a regional instrument can supplement an international regime by addressing problems specific to that region. Not only has Africa continued to experience refugee problems, but the restrictive definition of "refugee" has also made the application of the UN Convention difficult in regions other than Africa. For example, mass migrations due to political violence and instability highlighted the inadequacy of the Convention definition in Latin America. Protection was granted by the Inter-American Commission to "persons who have fled their country because their lives, safety, or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disrupted public order".[732] This broadened definition incorporates much of the African instrument, but does not grant refugee status merely because persons had to leave their country due to disturbed public order. In the Latin American context applicants have to show that, in addition, their personal security has been "threatened by generalized violence".

3.5.3 The Convention and reality

Shortly after the adoption of the OAU Convention, Weis lauded its substantive provisions, but warned that "much will depend on the implementation of the Convention's provisions".[733] Incorporation of the Convention standards into domestic legislation is the most obvious way in which these norms would be realised in individual countries. Such incorporation is essential, and can make a significant difference. This has been illustrated by Maluwa in relation to the position of refugees fleeing from Mozambique into Malawi.[734] In Malawi, ratification of the three supra-national instruments dealing with refugees in 1987 was followed by the adoption of the Malawi

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732 Annual report of Inter-American Commission 1984 - 1985. This definition was subsequently affirmed by the General Assembly of the OAS. See Arboleda (1991) 3 *IJRefLaw* 185.

733 Weis (1970) 3 *Revue des Droits de l'Homme* 449 at 464.

734 (1993) 53 *ZäoRV* 88.

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Refugee Act in April 1989. The new legislation adopted the broader definition of the OAU Convention, and guaranteed compliance with the principle of *non-refoulement*.[735]

But legislative and constitutional enactments remain formal guarantees. The fact of their guarantee need not necessarily correspond with the reality of their observance. For this reason, some observations are made about the application of refugee law in concrete situations.

3.5.3.1 Refugee status

Before anyone may be accorded protection under the OAU Refugee Convention, he or she must qualify as a "refugee". Problems arose because states refused to accord refugee status to people fleeing to their countries, who should under article 1 of the Convention have been considered to be "refugees". On some occasions, these states were not party to any of the refugee conventions. South Africa and Côte d'Ivoire[736] are examples. South Africa rejected refugees from war-torn Mozambique, even resorting to the construction of an electrified fence in its efforts to exclude them.[737] People fleeing the conditions were treated as illegal immigrants and were forcibly returned. Clearly, the principle of *non-refoulement* was not applied. Murray argued that these people qualified as refugees even under the UN Convention.[738] Such an interpretation would in her view be "clearly within the spirit of the Convention" as those caught in a "cross-fire" would "face persecution whatever they do".[739]

The practice of the South African government in relation to Mozambique (in the 1980s) may be contrasted with its treatment of people fleeing Angola in the 1970s. Those fleeing violence in the north of what was then South-West Africa were also classified as aliens, but the principle of *non-*

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735 Maluwa (1993) 53 *ZäoRV* 88 at 105, 109 - 110.

736 Côte d'Ivoire signed the OAU Refugee Convention in 1969, but never ratified it. *The African Exodus* report does not take this factor into account sufficiently (at 51).

737 Lawyers Committee for Human Rights *African Exodus* (1995) at 44: The official death toll from the fence exceeded the total number of facilities from the Berlin Wall in its 28-year existence.

738 (1986) 2 *SAJHR* 154.

739 (1986) 2 *SAJHR* 154 at 162.

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refoulement was applied.[740] Humanitarian assistance was also granted to assist them. It has been suggested that the difference in treatment in the two instances may be ascribed to the race of those involved ("Angolans" of Portuguese origin; black Mozambicans) and to the fact that those fleeing from Angola had a "homeland" to which they could be deported.

Since the end of 1995 Côte d'Ivoire placed restrictions on the recognition of refugees from Liberia.[741] In 1989 Mauritania expelled a large number of its black citizens to Senegal. Senegal has been in violation of its obligations under the OAU Convention[742] in not recognising the almost 100 000[743] persons as refugees.

3.5.3.2 Protection of refugees

States must provide a secure environment in which refugees may live a peaceful and normal life.[744] At least in the case of two states parties to the OAU Refugee Convention (Kenya and Zimbabwe) instances of state neglect of this duty have been documented.[745] Some of the rights guaranteed under the Convention and other international human rights instruments have been infringed by host-states. Examples are violation of freedom of expression (for example, in Zambia and Zimbabwe in relation to ANC "dissidents"),[746] detention (in Sudan),[747] and denial of basic socio-economic rights (in Malawi)[748]

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740 See Faris (1976) 2 *SAYIL* 176.

741 *African Exodus* (1995) at 49.

742 It ratified the convention in 1971. See the definition in art 1.

743 *African Exodus* (1995) at 54.

744 See eg Preamble of OAU Refugee Convention.

745 See *African Exodus* (1995) at 64-71; 78-80.

746 See *African Exodus* (1995) at 95-96.

747 *African Exodus* (1995) at 100.

748 *African Exodus* (1995) at 104-106.

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3.5.3.3 *Non-refoulement*

The OAU Refugee Convention clearly states that no refugee may be returned or expelled, compelling him or her to return to the country of origin.[749] However, serious incidents of refoulement occurred between Kenya and Tanzania in the 1980s,[750] and Nigeria expelled refugees from Chad in 1991 and 1992. All four these states involved had ratified the OAU Convention. The Nigerian authorities arrested Chadian refugees and deported them. On arrival, many were summarily executed for alleged involvement in anti-government guerrilla activities. These actions are shocking violations of Nigeria's obligations under the OAU Refugee Convention and the African Charter, both of which had been incorporated into Nigerian domestic law.[751]

3.6 *The African Charter on the Rights and Welfare of the Child*

The African Charter does not provide extensively for children's rights. In fact, children are only referred to on one occasion, as an afterthought, in the context of women's rights: "The State shall ensure ... the protection of the woman and the child as stipulated in international declarations and conventions".[752] These "conventions" today certainly include the Convention on the Rights of the Child,[753] therefore incorporating it into the Charter.[754] In addition, children would, as "individuals", qualify for all the rights appropriate to their position. So, for example, would an arrested child qualify for the right of an individual to "have his case heard",[755] and not to be "arbitrarily deprived

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749 See arts II (3) and V (1).

750 *African Exodus* (1995) at 83.

751 See Civil Liberties Organization (1992) *The Status of Refugee Rights in Nigeria*.

752 Art 18(3) of the African Charter.

753 The CRC was adopted in 1989, and entered into force on 2 September 1990.

754 Does this mean that even those states parties to the African Charter which have not ratified the CRC are bound by all its provisions? A similar question arises in relation to CEDAW. This issue is discussed under par 3.8 below, and the arguments are applicable in the context of children's rights as well. An important difference is that the CRC was elaborated and adopted *after* the African Charter, while CEDAW was adopted just before the African Charter. As the CRC has now been ratified by almost all African states, this issue is largely of theoretical interest only.

755 Art 7(1) of the African Charter.

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of his life".[756] At least one right granted to all "individuals", the right to education,[757] is likely to be of more benefit to children than to other members of society.

Motivation for a separate African Charter on the Rights and Welfare of the Child ("the African Children's Charter") was spelled out by Muthoga. According to him, this idea "originated from a desire to address certain peculiarly African problems".[758] To some extent the African initiative was born out of frustration with the UN process. The failures of the UN drafting process, which culminated in the adoption of the CRC in 1989, are regarded as threefold:

- Africans were underrepresented during the drafting process of the CRC.[759]
- Potentially divisive and emotive issues were omitted in the search for consensus between states from diverse backgrounds.
- Specific provisions on aspects peculiar to Africa became the victims of the overriding aim to reach a compromise, and were not sufficiently addressed in the UN instrument.

Wako emphasised the value of regional arrangements *as such* as a motivation for an African equivalent to the CRC. He referred to resolutions of the General Assembly in this regard, and concluded that "each region, with its unique culture, traditions and history, is best placed to handle and resolve its own human rights situation".[760] As an illustration, he referred to the more "sophisticated" rights in Europe (such as the right of children conceived through artificial insemination to know their origin) that need not occupy Africans.[761]

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756 Art 4 of the African Charter.

757 Art 17 of the African Charter.

758 (1992).

759 See Barsh (1989) 58 *Nordic Jnl of Intl Law* 24, describing Africa's minimal participation in the open-ended working groups leading to the adoption of the CRC. Only Algeria, Morocco, Senegal, and to some extent Egypt, participated meaningfully.

760 (1988) at 7.

761 *Ibid.*

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The first vocal opposition to the UN process (at that stage aimed against the draft UN Convention) was aired in May 1988, at a ANPACAN[762]/ UNICEF conference on "Children in Situations of Armed Conflicts in Africa". One of the objectives of the workshop was "to consider the degree of comprehensiveness of the UN Draft Convention and whether it is necessary to supplement it with an African Charter".[763] Some of the peculiarities of the African situation omitted from the Convention were identified as the following:[764]

- The situation of children living under apartheid was not addressed.
- Disadvantages influencing the female child were not sufficiently considered.
- Practices which are prevalent in African society, such as female genital mutilation and circumcision, were not mentioned explicitly.
- Problems of internal displacement arising from internal conflicts received scant attention.
- Socio-economic conditions such as illiteracy and low levels of sanitary conditions, "with all their threats to survival",[765] posed specific problems in Africa.
- "The community's inability to engage in meaningful participation in the planning and managing of basic programmes for children was not taken into account.[766]
- The African conception of the community's responsibilities and duties had been neglected.
- In Africa, the use of children as soldiers and a compulsory minimum age for military service is of great importance.
- The position of children in prison and that of expectant mothers had not been regulated.

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762 African Network for the Protection Against Child Abuse and Neglect.

763 Muhindi (mimeo) at 7. The conference also considered strategies for the implementation of the UN Convention.

764 These grounds have been forwarded by Muthoga (1992) and Wako (1988).

765 Muhindi (undated mimeo) at 8.

766 Muthoga (1992) at 4

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- The CRC negates the role of the family (also in its extended sense) in the upbringing of the child and in matters of adoption and fostering.

Pursuant to this meeting, a working group of African experts was set up by the OAU, in collaboration with the two organisations that had organised the workshop. This group, of which Lee Muthoga was the chair, produced a draft charter. The draft followed the usual route of

- draft by government experts;
- scrutiny by the Secretary-General;
- consideration by the Council of Ministers; and then
- adoption at the Assembly of Heads of States and Governments.[767]

The African Charter on the Rights and Welfare of the Child was adopted by the Assembly on 11 July 1990.[768] It is quite remarkable that the African states could reach agreement on its contents in such a short period. Africa has clearly taken the lead in becoming the first region to give the global instrument regional application. Unfortunately, some seven years thereafter, the Charter is not yet in force, as only six of the required fifteen states[769] have ratified it so far.[770] Why have *African* states not ratified the *African* instrument, while they ratified the one adopted on a global scale? One possibility is the notion that that the African equivalent was essentially only a copy of the UN instrument.[771] However, this possibility is dispelled by a comparison between the African Children's Charter and its UN equivalent:[772]

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767 On this process, also see Veerman (1992) at 271 - 273.

768 OAU Doc CAB/LEG/TSG/Rev 1. See text in (1991) 3 *RADIC* 173 and (1992) 18 *Commonwealth Law Bulletin* 1112.

769 See art 47(3) of the African Children's Charter.

770 See Table K below.

771 According to Veerman (19) the Sudanese delegate at a preparatory meeting held in April 1990 "was struck by the lack of specificity in the document and wanted guidance as to how it differed from the United Nations Convention" (at 272).

772 On this comparison, also see Arts (1992) 5 *RADIC* 1139.

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- The **primacy of the provisions of the Charter over African cultural practices** is clearly established.[773] States are required to take specific measures to "abolish customs and practices harmful to the welfare, normal growth and development" of children.[774] Relevant cultural practices specified are those prejudicial to the health or life of a child, those discriminating between children on the basis of, amongst others, sex, and those related to child marriages.[775] A number of cultural practices still prevailing in Africa are harmful to the welfare, normal growth and development of the child. Examples are female genital mutilation, dietary taboos, prohibiting certain children or categories of children from eating certain foods, and, in a very extreme form, the killing of twins or triplets. These practices are not mentioned by name, but will certainly be covered by this prohibition. This aspect should be read with the guideline that the best interests of the child "shall be the primary consideration",[776] and not merely "a primary consideration", as required by CRC.[777]

- As in the "mother" charter, the African Charter on Human and Peoples' Rights, certain **rights are also qualified** by "claw-back" clauses in the African Children's Charter. The rights affected relate to free expression of views,[778] freedom of association,[779] and of thought and religion.[780] These formulations echo the African Charter in that the rights are made subject to "such restrictions as are prescribed by law".[781] This stands in contrast to the corresponding provisions in the CRC, which may only be limited if it is necessary to do so in order to protect, for example, health, morals, public order, public safety or the rights of other individuals.[782]

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773 "Any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency be null and void" (Art 1(3) of the African Children's Charter). Contrast this with art 24(3) of the CRC, which calls for the abolition of cultural practices of a more restricted scope (those "prejudicial to the health of children").

774 Art 21(1).

775 Art 21.

776 Art 4(1) of the African Children's Charter.

777 Art 3(1) of CRC.

778 Art 7 of the African Children's Charter.

779 Art 8 of the African Children's Charter.

780 Art 9 of the African Children's Charter.

781 Art 7 of the Children's Charter.

782 Arts 13(2), 14(3) and 15(2) of the CRC.

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- The qualification of rights and freedoms generally emphasises the **supervisory role of the parents** in relation to their children. Parental guidance in the exercise of the right to freedom of thought and religion under the CRC must be "consistent with" the evolving capacities of the child, but in terms of the African Children's Charter only "due regard" to the evolving capacities and best interest of the child is required.[783]

- The protection of **children in armed conflict** is broadened under the African Children's Charter. The CRC allows children between fifteen and eighteen to be used in *direct* hostilities.[784] Under the African Children's Charter, no person under the age of eighteen years is allowed to take part directly in hostilities.[785] The CRC also permits the recruitment of youths between fifteen and eighteen years old,[786] even though states are advised to "endeavour to give priority to those who are oldest".[787] African states that ratified the African Children's Charter must refrain from recruiting any person under the age of eighteen.[788] In both these documents states are obliged to take measures to ensure the protection of children affected by armed conflict.[789] In the African context protection is explicitly extended to "internal armed conflict, tension or strife".[790]

- The consequence of defining "child" as everyone under eighteen years old, and prohibiting child marriages,[791] is that **marriages of girls (under 18) will not be allowed**.[792] Marriages

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783 Art 14 of the CRC; art 9 of African Children's Charter. See also Arts (1992) 5 *RADIC* 139 at 147 - 148.

784 Art 38(2) of the CRC.

785 Art 22(2) of the African Children's Charter.

786 Art 38(3) of the CRC.

787 *Ibid.*

788 Art 22(2) of the African Children's Charter.

789 Art 38(4) of the CRC; art 22(3) of the African Children's Charter.

790 Art 22(3) of the African Children's Charter.

791 Art 21(2) of the African Children's Charter.

792 The requirement that states must "specify the minimum age of marriage" (art 21(2)) should not be interpreted as allowing for a lower age of marriage. A different interpretation may also be attached to this ambiguous provision, but should be avoided.

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must also be registered.[793] The exception allowed under the CRC "unless majority is attained earlier",[794] is not included in the African document.

- The protection of the **child-refugee** in the two documents is similarly worded. However, the scope of the African Children's Charter is broader, as it makes the relevant provisions applicable to a much larger group by recognising "internally displaced" children as refugees.[795] The displacement need also not be of a political nature. The causes of internal dislocation may be of a political and military nature, but also include any "breakdown of economic and social order".[796] The last phrase in the article, "howsoever caused", shows that the list is in fact open-ended. No such extension of the scope of protection is found in the CRC.[797] This is very significant in the African context, as a very high percentage of African refugees are children.

- One article of the African Children's Charter is reserved for the special needs of children living under **apartheid** and of children living in states subject to military destabilisation by the apartheid regime.[798] Nothing similar is found in the CRC.

- The African Children's Charter also reiterates the emphasis on **duties** in the African Charter. Duties that fall to the parents include the duty to "ensure that domestic discipline is administered in moderation".[799] The primary duty of the child is towards his or her family and society. The list of duties set out in the African Charter is repeated in slightly adapted form.[800] Only states parties have duties in the CRC framework. States are to "respect the responsibilities, rights, and duties of parents".[801]

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793 See art 21(2) of the African Children's Charter.

794 Art 1 of the CRC.

795 Art 23(4) of the African Children's Charter.

796 *Ibid.*

797 See art 22 of the CRC.

798 Art 26 of the African Children's Charter, which illustrates the danger of over-specificity in a human rights instrument. An instrument should be sufficiently vague to remain relevant for decades or even centuries.

799 Art 20(1)(c) of the African Children's Charter.

800 Compare art 29 of the African Charter with art 31 of the African Children's Charter.

801 Art 5 of the CRC.

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- Compared with the CRC, the African Children's Charter makes more detailed provision for **dissemination of information** on the rights of the African child.[802]
- **Implementation** is much stronger in the African Children's Charter. The UN instrument creates a Committee on the Rights of the Child ("CRC Committee") and empowers this committee only to examine state reports. The African Committee of Experts on the Rights and Welfare of the Child ("African Committee") has a similar function,[803] but may also receive and consider communications from "any person, group or NGO".[804] Although these communications are to be treated "in confidence"[805] and only lead to a biannual report to the OAU Assembly,[806] this represents a significant advance on potential enforcement of children's rights. The African Committee is also granted the potentially wide-ranging and powerful mandate to "resort to any appropriate method of investigation".[807] In all these respects, the African Committee resembles the African Commission much more than the CRC Committee.
- Receiving less attention in the African Children's Charter than in the CRC, is the rights of children to benefit from **social security** and to an adequate standard of living.[808]

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802 See art 42(a) of the African Children's Charter, for the activist role envisaged for the African Committee.

803 The frequency of reporting under the African regional instrument is as follows: initially, within two years after ratification; thereafter, every three years. The term for periodic reports under the CRC is five years. When the African Children's Charter turns into force, these requirements will lead to multiple reports, submitted to two monitoring bodies. This need not be viewed in a negative light. The two reports should be co-ordinated, and information used for the one may to an extent serve as a basis for the other. Still, the view expressed by Van Bueren ((1991) 8 *International Children's Rights Monitor* 20 at 22) that shorter reporting periods lessen "the risk of losing momentum". Consider what dual ratification will require from a state: A state that has ratified both instruments simultaneously, will have to submit a periodic report after three years (under the African Children's Charter), then after five (under CRC), then again after a year (the next report under the regional Charter), then within two years (again under CRC), the next year yet again (under the African Children's Charter), and so on.

804 Art 44(1) of the African Children's Charter.

805 Art 44(2) of the African Children's Charter.

806 Art 45(2) of the African Children's Charter.

807 Art 45(1) of the African Children's Charter.

808 Arts 26 and 27 of the CRC.

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- Also omitted in the CRC, but regulated in its regional equivalent, is the treatment by penal law of **expectant mothers** and **child abduction and trafficking in children**.[809] These are aspects of the position of children that have been foregrounded in the African context.

This analysis shows that the African Children's Charter deals with various aspects identified at the outset as *lacunae* in the global instrument. Some of these, such as the provisions on apartheid and prohibition on negative cultural practices, clearly give the Charter a specifically "African" flavour. This is also, albeit sometimes to a lesser degree, true of the provisions relating to the prohibition of child marriages, the prohibition on child-soldiers involved in direct hostilities, the granting of refugee protection to internally displaced persons and the prevention of child abduction and trafficking in children. Although these provisions relate to social problems experienced globally, they are more pronounced in Africa and are regional-specific aspects in the regional equivalent of the CRC.

Two characteristics which are generally regarded as giving the African Charter its "African" character are the inclusion of "duties" and of "collective or 'peoples' rights". One of these main focal points in the "mother" Charter, the emphasis on "peoples' rights", is not respected in the African Children's Charter. The rights of the child pertain to children individually. While this may be conceptually sound, it still is surprising that this essential "African" characteristic of the African Charter has been discarded. One explanation could be that the concept of collective rights has not found favour with the later drafters. Another would be that the Charter lacks an essential African characteristic.[810]

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809 See arts 29 and 30 of the African Children's Charter respectively. See, in the South African context, President Mandelas's decision soon after taking office to release female prisoners with young children, and the subsequent constitutional challenge by male prisoners: See *Kruger v Minister of Correctional Services* 1995 2 SA 803 (T) and *Hugo v President of RSA* 1966 6 BCLR 876 (D) and *President of RSA v Hugo* 1997 6 BCLR 708 (CC).

810 Yet another interpretation is that extending collective rights such as the right to self-determination or to a satisfactory environment would not have made sense in this context. Children's rights are, in any event, treated as communal (see eg the emphasis on the family in art 18 and the duties of the child towards the family and society in art 31).

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However, the other overriding "African" feature of the African Charter, "duties" placed on individuals, is reiterated. This may create contradictions and tensions in the African Children's Charter. Children are protected against discriminatory cultural practices, but must also "respect his parents and elders *at all times*".[811] This responsibility of obedience has been criticised by Van Bueren, who finds it "too unquestioning and general".[812] But one need not adopt a confrontational approach to the interpretation of the Charter. If a holistic approach is adopted, the duty of obedience may be reconciled with, for example, the prohibition of harmful cultural practices. The duty of obedience placed on the child must be viewed within the context of the Charter as a whole. The prohibition of certain practices forms part of the framework of the Charter. The duties are to be given content to harmonise it with the framework already established, and not to confront the very setting within which it exists.

What the Charter indeed unequivocally succeeds with is to set a higher threshold and give better protection to children in Africa than the UN instrument has done. This appears clearest in the definition of "child", and its impact on armed conflict and child marriages. More effective implementation is made possible by **allowing for individual complaints** about violations of the African Children's Charter. These positive features are, paradoxically, both the Charter's outstanding accomplishment and biggest draw-back. Under the Charter the fullest possible realisation of children's various rights can be secured. But it seems rather unlikely that governments will easily accept these responsibilities by ratifying the Charter. In marked contrast to the UN equivalent, which 52 African states have ratified, so far only six states have ratified the African version. The reason for the insufficient ratification rate is not that the Charter lacks an "African" content, or was a wasteful exercise, in that it made no new positive contribution. The explanation rather lies in the reluctance of African states to accept the higher levels of protection

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811 Art 31(a) of the African Children's Charter, my emphasis.

812 (1991) 8 *International Children's Rights Monitor* 20 at 22. She adds: "To educate children that where family members or elders are abusing, neglecting or exploiting them, they remain obliged to respect the abuser is patently ridiculous". Not that she directs blanket criticism against all "responsibilities". The duty to work for the cohesion of the family "can provide children with a sense of value".

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accorded to children, and the supervision of a treaty body which may be approached by individual complainants.[813]

3.7 The OAU and the environment

In recent times, the influence of the environment on the well-being of individuals has been highlighted. Although the protection of the environment is primarily dependant on non-legal factors (such as government policy, local and international economic forces, demographics and natural elements), international treaties may also play a part by creating or stimulating an appropriate (legal) framework to improve environmental protection. The African Charter devotes one article to the "right to a general satisfactory environment" favourable to the development of "all peoples".[814] The adoption of this provision was preceded and followed by two treaties which deal more specifically with the environment. These treaties are now discussed briefly. Moreover, in the later Treaty establishing the African Economic Community ("AEC"), specific provision is also made for the environment and the ban on import of hazardous waste into Africa and across African borders.[815]

3.7.1 The African Convention on the Conservation of Nature and Natural Resources

An African instrument on the environment, the African Convention on the Conservation of Nature and Natural Resources, was adopted in 1968 in Algiers by the OAU Heads of State and

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813 Two approaches seem possible: One may either be critical of the effort, as it clearly went beyond what African states were prepared to accept, and therefore runs the risk of becoming a dead letter. But one may also take an optimistic stance and argue that the Charter sets an ideal, and that civil society must pressurise governments to ratify. As soon as the Charter is ratified by fifteen states, it could become a shining example of a group of African states who set the tone of a new era of human rights protection in Africa.

814 Art 24 of the Charter.

815 Arts 58 and 59 of the Abuja Treaty.

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Government.[816] It entered into force on 16 June 1969. This convention concerns itself primarily with wildlife, but also extends to many other aspects, such as the use of resources like soil and water. It has been described (in 1985) as the "most comprehensive multilateral treaty for the conservation of nature yet negotiated",[817] in which environmental concerns and development are linked.[818] As is the case with other treaties on the environment, no administrative structure is created to ensure implementation. As a result, the provisions have largely remained neglected.[819] Still, the Convention "has stimulated useful conservation measures in some countries and remains the framework on which a substantial body of national legislation is based".[820] By 1985, 28 states have become party to the Convention. A further 14 had at that stage signed the treaty, without ratifying it.[821] By 31 March 1997, the number of ratifications had only risen by one.[822] This indicates that this Convention has lost some of its initial impact.

3.7.2 The Bamako Convention

The Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa was adopted on 30 January 1991 by a conference of Ministers of the Environment from 51 African states who were also all members of the OAU.[823] This followed on the heels of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, adopted under UN supervision on 22 March 1989.[824] Given the high degree of specialisation and uniformity due to standardised technical terminology, it should hardly be surprising that the regional treaty borrows extensively from its international predecessor. Not only the sequence of issues dealt with, but also

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816 OAU doc CAB/LEG/24.1, adopted on 15 September 1968.

817 Lyster (1985) at 115.

818 See eg art VII of the Convention.

819 *Ibid.*

820 *Ibid.*

821 For a list of these states, see Lyster (1985) at 115.

822 Only Gabon became a party since 1985, in 1988

823 See text in (1993) 1 *AYBIL* 268 - 293.

824 See text in (1989) 28 *ILM* 656.

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the wording of articles correspond very closely in the two instruments.[825] The Bamako Convention has one article more, dealing with its registration with the UN, once it has become operational. The other 29 articles of the respective documents deal with the same subject matter, mostly using the same formulations. But it would have been even more surprising if the African treaty completely mirrored the Basel Convention. What would the *raison d'être* of the Bamako Convention then be?[826]

- As its title suggests, the Bamako document deals specifically with the importing of hazardous waste *into Africa* and its movement across African borders. It places a total ban on the import of waste into the continent, and regulates waste movement within Africa itself. The Basel Convention, in contrast, contains no ban. It is regulatory, in that it permits and regulates all transboundary movement of hazardous waste.[827]

- The scope of the Bamako document is more extensive, as it broadens the definition of "hazardous waste".[828] The inclusion of artificially created radioactive waste in the list of controlled waste streams is of particular relevance.[829]

Other minor changes may be observed. For instance, the Basel Convention requires twenty ratifications before its entry into force; the Bamako Convention requires ten ratifications.[830] The former entered into force on 5 May 1992.[831] By 31 December 1992 only three African states had ratified the Basel Convention: Mauritius, Nigeria and Senegal.[832] On the same date, of the three only Mauritius had also ratified the Bamako Convention. Except Mauritius, another two African

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825 Both envisage implementation primarily through national institutions, with trans-national institutions in the form of a Secretariat and Conference (see arts 5, 15 and 16 of the Bamako Convention).

826 See in general Ouguergouz (1993) 1 *AYBIL* 195.

827 See Cheyne (1994) 6 *RADIC* 493 at 499.

828 See Ouguergouz (1993) 1 *AYBIL* 195 at 201.

829 See Annex I. This aspect has probably inhibited ratification by a country like South Africa.

830 Art 25 of both conventions.

831 See Ouguergouz (1993) 1 *AYBIL* 195 at 196.

832 *Ibid.*

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countries (Tunisia and Zimbabwe) had by then ratified the regional instrument. The Bamako Convention will turn into force on 22 April 1998.[833]

833 Based on information provided by Tiyanjana Maluwa, in his capacity as head of the legal division of the OAU. The Bamako Convention envisaged its entry into force on the ninetieth day after the deposit of the tenth instrument of ratification by the signatory states. This was interpreted to mean that it was only the ratification of the original signatories to the treaty which would count in computing the ten ratifications and not those ratifications by states which acceded to the treaty only after its adoption. This happened on 21 January 1998, when the tenth original signatory state (Benin) deposited its instrument of ratification. No Secretariat has as yet been established, mainly due to a lack of funds (according to officials of the South African Department of Foreign Affairs).

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A chart giving the status of ratification of these two instruments is now provided:[834]

TABLE J: AFRICAN HUMAN RIGHTS INSTRUMENTS ON THE ENVIRONMENT AS AT 31 MARCH 1997

OAU member states	The African Convention on the Conservation of Nature and Natural Resources (entered into force on 16 June 1969)		Bamako Convention (not yet in force)	
Country	**Signed**	**Ratified**	**Signed**	**Ratified**
Algeria	15/09/68	05/02/83		
Angola				
Benin	15/09/68		30/01/91	
Botswana	15/09/68			
Burkina Faso	15/09/68	16/08/69	30/01/91	
Burundi	15/09/68			
Cameroon	15/09/68	18/07/77	01/03/91	11/07/94
Cape Verde				
Central African Republic	15/09/68	16/03/70	30/01/91	
Chad	15/09/68		27/01/91	
Comoros				
Congo	15/09/68	04/04/81		
Côte d'Ivoire	15/09/68	15/01/69	30/01/91	13/07/94
Djibouti		11/04/78	20/12/91	
Egypt	15/09/68	06/03/72	30/01/91	
Equatorial Guinea				

834 See CAB/LEG/24.1 and CAB/LEG/170. The Bamako Convention comes into force 90 days after the date of deposit of the tenth instrument of ratification. This will be on 22 April 1998, being the ninetieth day after ratification by the tenth of the original signatories to the Convention. It is not clear to me why this restrictive interpretation was adopted. If all acceding states were included in the computation process, rather than only the original signatories, the Convention would have entered into force much earlier, already in 1994, following the ratification by Côte d'Ivoire on 13 July 1994.

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OAU member states	The African Convention on the Conservation of Nature and Natural Resources (entered into force on 16 June 1969)		Bamako Convention (not yet in force)	
Country	**Signed**	**Ratified**	**Signed**	**Ratified**
Eritrea				
Ethiopia	15/09/68			
Gabon	15/09/68	09/05/88		
Gambia	15/09/68			
Ghana	15/09/68	17/05/69		
Guinea	15/09/68		30/01/91	
Guinea-Bissau			01/03/91	
Kenya	15/09/68	12/05/69		
Lesotho	15/09/68		01/06/91	
Liberia	15/09/68	21/09/78		
Libya	15/09/68		30/01/91	02/11/92
Madagascar	15/09/68	03/09/71		
Malawi		06/03/73		
Mali	15/09/68	03/06/74	30/01/91	06/06/91
Mauritania	15/09/68			
Mauritius	15/09/68			29/10/92
Mozambique		28/02/81		
Namibia				
Niger	15/09/68	10/01/70	30/01/91	
Nigeria	15/09/68	02/04/74		
Rwanda	15/09/68	19/11/79	26/08/91	
Sahrawi Arab Democratic Rep				
São Tomé e Príncipe				
Senegal	15/09/68	03/02/72	30/01/91	16/02/94
Seychelles		31/08/77		
Sierra Leone	15/09/68			
Somalia	15/09/68		01/06/91	
South Africa				
Sudan	15/09/68	09/10/73		21/09/93
Swaziland	15/09/68	25/03/69	29/06/92	
Tanzania	15/09/68	07/09/74	26/11/91	15/02/93
Togo	15/09/68	24/10/79	30/01/91	06/05/96

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OAU member states	The African Convention on the Conservation of Nature and Natural Resources (entered into force on 16 June 1969)		Bamako Convention (not yet in force)	
Country	Signed	Ratified	Signed	Ratified
Tunisia	15/09/68	21/12/76	20/05/91	06/04/92
Uganda	15/09/68	15/11/77		
Zaïre	15/09/68	29/05/76		15/09/94
Zambia	15/09/68	29/03/72		
Zimbabwe				10/07/92

3.8 The OAU and women's rights

3.8.1 From private to public

African public life has been dominated by men. The negotiations resulting in the OAU Charter and the African Charter were characterised by the absence of any meaningful contribution by women. Indeed, **all** the decisions of the Assembly of Heads of State and Government since the OAU was founded in 1963 until 1996, had been taken by men. The first female head of state, former senator Ruth Perry, was appointed Head of the Council of State of Liberia by an ECOWAS summit in August 1996.[835] The new African trend to appoint Vice-Presidents allowed President Jammeh of the Gambia to appoint a woman, Isatou Saidy, as his deputy.[836]

Few women have also been elevated to the role of judge in African states. The 1990s saw a gradual change in this trend. Examples of some of the increasing number of women now holding

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835 "Iron Lady may be Angel of Peace" (1996) Nov/Dec *Africa Today* 42-43. See also Wells "Lady at the Top" (Jan - March 1997) at 32: She has given new content to the position of head of state, by eg converting part of her home into a feeding centre for displaced people.

836 See (June-July 1997) *African Topics* 33. One may not but feel some scepticism, as such a step is aimed at securing the female vote.

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high judicial office are Justice Lady Effie Owuor (High Court judge in Kenya), Justice Anastasia Msosa (Malawi's only High Court judge, who previously was Chairperson of the Electoral Commission) and Justices O'Regan and Mokgoro (on the South African Constitutional Court).

The African Commission on Human and Peoples' Rights has not been free from similar criticisms. It was founded as an all-male institution. Only in December 1993, when Mrs Duarte-Martins took her seat at the Commission's 14th session, was this stronghold broken. At the 18th session, the number of women doubled, when newly-elected commissioner Ondziel-Gnelenga took her seat. A female presence is essential for seriously addressing the situation of women in Africa. The male perspective inherent in the following statement reminds one of that fact: "It is almost embarrassing for me to have to question the Gambian delegate, not just because she is a woman, but because of the debt we owe to Gambia".[837] In a later interview, the first woman commissioner was asked how she had been received by her male colleagues. Her response underlies the role of stigmatisation: "In principle I have been treated as an equal. But people are used to seeing a woman in different roles. Sometimes some unexpected comments have been made."[838]

Any African legal instrument is bound to confront, in one way or another, the African split personality. African society remains poised between tradition and modernity.[839] It is a modern tree with ancient roots, forming a single organic whole. In traditional Africa, the role of women was predominately restricted to the private sphere of the family. Women were, and still are, regarded as fulfilling functions (childbearing, child care, sustaining a family) which by necessity subordinate them to men. These sentiments are prevailing in much of Africa today. In many respects, though, the role of women has changed, leading to greater acceptance of their role in public life and their equality as partners in the family sphere.

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837 Examination of state reports vol. 3 (1995) at 24 (Commissioner Umozurike, prefacing his remarks about the examination of the Gambian state report).

838 Interview reported in (1996) (Oct - Dec) *AFLAQ* at 15.

839 See, generally, Ouguergouz (1993) at eg 84 – 91.

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3.8.2 Provisions on women in the African Charter

The African Charter is not blind to this duality. On the one hand, traditional values inherited from ancient African civilisations are incorporated.[840] These values find their counter-weight in the duty of states not to discriminate, in any form, on the basis of a person's sex.[841] Male dominance and female subordination (bordering on disregard) is suggested by the language of the Charter. Male pronouns[842] and words such as "chairman" are used throughout the document. However, any fear that the rights in the Charter are in fact reserved for men only, are immediately dispelled. These rights, we are assured, are the entitlements of all individuals, irrespective of their sex.[843] Article 3 reinforces the approach of ensuring equality, by providing for equality before the law. In this discourse, women are no different from men: The rights of the one sex applies to the other. So, the right to dignity may be invoked by women pertaining to cultural practices that ridicule their status, the right not to be treated inhumanely may be invoked to criminalise female circumcision, and so forth.

However, the Charter also moves outside the equality rhetoric. It singles out women for special treatment and specific measures. This is done in article 18, where women and children are categorised together as groups deserving of "protection". This is followed, in the next sub-article, by the provision that the aged and disabled "shall *also* have the right to special measures of protection".[844] One may easily form the impression that women are viewed only within the family context, and are deserving of special protective measures, in the same sense as children, the aged and disabled are.

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840 See the Preamble: All human rights in the Charter are inspired by "virtues of their historical tradition and values of African civilization". Also refer to the duty (in art 29(1)) to preserve the harmonious development of the family and the emphasis of respect in the family environment.

841 Again, in the Preamble: States proclaim that they are conscious of their duty to dismantle all forms of discrimination, "particularly those based on ... sex...". Art 2 converts this into a legal obligation on states: Every individual shall be entitled to the rights in the Charter without distinction of sex, among others.

842 See eg art 9(2) ("his opinions"); art 12(1) ("provided he abides by the law") and art 17(2) ("his community").

843 Art 2.

844 Art 18(4) (my emphasis).

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The special measures that should be directed at protecting women (and at ensuring the elimination of discrimination against them)[845] are not delineated. They are to be found in "international declarations and conventions"[846] on the elimination of discrimination against and the protection of women. Immediately, the major international human rights instrument on women's rights, CEDAW, comes to mind. This is a comprehensive codification of various rights, and deals with aspects as diverse as voting, nationality, gender stereotyping, cultural practices and ownership.

One has to keep in mind that CEDAW has been passed two years prior to the adoption of the Charter. This fact is only "obliquely apparent"[847] from the wording of the Charter. Oloka-Onyango and Tamale[848] have argued that the drafters of the African Charter were "only minimally influenced by CEDAW's provisions",[849] because there is only one article in the Charter dealing with women's rights. The authors are also critical of the wording of that article, which only incorporates CEDAW "by inference and not by name".[850] They find evidence of the lack of African leaders' enthusiasm for CEDAW in the fact that they did not initiate a regional duplication. In this, they argue, the response was markedly different from those following the adoption of the Universal Declaration, the 1966 covenants and the international conventions on refugees and children. Of these only the last, the case of children, provides a clear contrast. A regional children's treaty was in fact elaborated after the African Charter, with its incorporation of international human rights protection as regards both women and children,[851] had entered into force.

Langley acknowledges, but is less critical of the incorporation by reference.[852] If all the conventions referred to had explicitly been included in the Charter, it would have been "overly complicated".[853]

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845 See art 18(3).

846 *Ibid.*

847 Oloka-Onyango (1996) 24 *Denver Jnl of Int1 Law and Policy* 349 at 372.

848 (1995) 17 *HRQ* 691.

849 At 719.

850 *Ibid.*

851 Art 18(3) of the African Charter.

852 (1987) 7 *Boston College Third World Law Jnl* 215.

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On the other hand, had only some of these rights been incorporated specifically, it would have created the impression that other rights have in fact been excluded.[854]

3.8.3 Are all states parties to the Charter bound by CEDAW?

Does this imply that all states parties to the African Charter have, by virtue of article 18(3), become bound to implement all the provisions of CEDAW? To answer this question, a distinction has to be drawn between those states parties which have ratified CEDAW, and those which have not ratified it.

As for the **states that have ratified CEDAW**: The provision in the African Charter serves to reiterate their obligations under CEDAW. It reminds the state and the individuals of the supplement to the Charter contained in the international instrument. In a sense it is an unnecessary duplication. This duality would also imply that reporting on the realisation of rights in CEDAW must be presented to both the African Commission and the Committee on the Rights of Women.

As for the second group of states, those that **have not formally undertaken the CEDAW obligations**: It is submitted that these states also become bound to observe the provisions of CEDAW, on the following grounds:

- Article 18(3) of the African Charter refers to the elimination of discrimination and protection of the rights of women "as stipulated in international declarations and conventions". No mention is made of any requirement of ratification of the applicable conventions. In this respect, the provisions in article 18(3) should be contrasted with those in article 60. Article 60 refers to international law on human and peoples' rights from which the Commission may "draw inspiration". Particular mention is made of UN instruments "of which the parties to the present Charter are members". Prior ratification enters into discussion on article 60, but not on article 18(3).

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853 At 220.

854 *Ibid.*

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- CEDAW was adopted by the UN in 1979, and entered into force on 3 September 1981. As the adoption of the African Charter (on 21 October 1981) post-dates the adoption of CEDAW, it must be presumed that reference to "international conventions" include CEDAW. In any event, the Charter only took effect in 1986, when CEDAW was already well established and ratified by numerous African states.

- This argument also finds support in article 1 of the Charter. This article requires states to recognise, without qualification, the rights, duties and freedoms enshrined in the Charter. In its guidelines for reporting the Commission devoted a very comprehensive part to reporting on women's rights, in which the guidelines of the Committee of Women's Rights were largely mirrored. All states parties to the Charter are, in terms of these guidelines, required to report on obligations set out in CEDAW, and not explicitly in the Charter.

- If only some (and not all) states parties to the Charter are obliged to implement CEDAW, it will lead to a duality in the system of human rights protection under the African Charter. Some women in Africa will have recourse to protection which is far more extensive than that afforded to other women.

- If this interpretation is not followed, article 18(3) would mean that only states parties to CEDAW are bound by the applicable "international convention". But these states are already bound to observe CEDAW by virtue of their ratification thereof. Article 18(3) would be rendered meaningless if it only affects those states that have, in any case, already undertaken the obligations.

3.8.4 Proposals for reform

Even if it is accepted that all states parties to the Charter have these obligations to ensure the rights set out in CEDAW, reality is different. To women who suffer from human rights violations around Africa, it does not signify whether states are *de iure* bound by CEDAW or not. A general perception exists that the Charter does not suffice to protect women or to guarantee their equality. From this frustration was born the campaign for the elaboration of a specific document on the rights of the African woman.

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This issue has been on the agenda for quite some time now. At the 6th NGO Workshop, a study on the issue of women's rights was requested. Two commissioners, Duarte-Martins and Dankwa, were subsequently, at the Commissions 17th session, entrusted with the task to "initiate work on an additional protocol on the rights of Women".[855] At its 19th session the Commission decided to appoint a Special Rapporteur on the rights of women at its 20th session. It was also decided that the rapporteur would work under commissioners Duarte-Martins and Dankwa.[856] This did not materialise: The Commission only "reiterated its commitment to elaborate the additional protocol on the rights of African women and to appoint a Special Rapporteur".[857] It decided to consider proposals in this regard "at its forthcoming session".[858] Before the 21st session, a draft Protocol was prepared by a group of experts.[859] The basis of this draft was a document prepared by commissioner Dankwa, with the collaboration of commissioners Duarte and Ondziel-Gnelenga. According to the final communiqué the Draft Protocol "was discussed" at the Commission's session.

Today, wide agreement exists about the need to highlight the necessity that women's rights should be taken seriously by states that have ratified the Charter and by other African states. There is consensus on the fact that women's rights should be codified. Disagreement prevails about the exact form which this should take. Four options have been advanced:

- an amendment of the Charter;
- a Protocol, optional or additional to the Charter;
- an independent African Women's Rights Charter; and

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855 See Final Communiqué, 17th session, ACHPR/COM.FIN/XVII/Rev. 3 at par 30.

856 Ninth Annual Activity Report at 7.

857 See Final Communiqué, 20th session at par 3.3.1(f) 19.

858 *Ibid.*

859 Final Communiqué of 21st session.

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- interpretative declarations by the Commission.[860]

The arguments for and against each of these courses of action are now considered:

- An important argument in favour of the first two options is that both models build onto an existing system and may, as such, be quicker to be drafted and more likely to be accepted by states.[861] By merely amending the Charter, the danger that a superfluous instrument will be created, is excluded. A major disadvantage of both these possibilities is that the problematic aspects and flaws of the Charter (such as the emphasis on the family and its weak implementation) will also apply to the Protocol.[862] A serious disadvantage of an optional (or additional) protocol is that such an option can create a dual system (with the possibility of some states opting out).

- Kibwana supports the adoption of a distinct African Women's Charter.[863] The main argument he forwards is that such an instrument would not be parasitic on the Charter, as a new Charter can loosen itself from it. This means that it can be a far-reaching document, and that it can provide for meaningful implementation. He mentions two major disadvantages: It may take a long time to agree on its content and to have it adopted. In addition, given that CEDAW already exists, such a charter will not be entirely new. In my view, especially the last factor should be accorded sufficient weight in one's consideration of the issue. Experience regarding the African Charter on the Rights and Welfare of the Child has shown that elaborating a regional equivalent of an accepted international instrument may lead to unnecessary duplication. It has also indicated the reluctance of states to ratify an instrument with effective

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860 Most commissioners seem to favour some form of protocol on women's rights. Of those expressing their views on the issue in (1996) (Oct - Dec) *AFLAQ*, Amega (at 43), Dankwa (at 12) and Kisanga (at 32) to varying degrees question the need or necessity of supplementing the Charter with another instrument. Discussing improvements to the Charter, a meeting of governmental experts in Cape Town proposed that a protocol to the Charter on the rights of women should be elaborated. Alternatively, they agreed, a separate instrument on the rights of women should be formulated (See OAU/LEG/EXP/HPR/RPT/ (I) Rev 1 at 3).

861 See Kibwana (1995) 5 *Review of the African Commission* 1 at 11-12. See the contrary view of Benedek (1995) 5 *Review of the African Commission* 21 at 31.

862 See eg Kibwana (1995) 5 *Review of the African Commission* 1 at 12 and Benedek (1995) 5 *Review of the African Commission* 21 at 31.

863 See arguments in (1995) 5 *Review of the African Commission* 1 at 11-12.

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enforcement procedures. Another affirmation of rights will not bring states closer to taking even their existing obligations seriously. Wasted energy and false expectations may be the only end-results of these efforts.

- This leaves the last option, which Benedek favours.[864] He concedes that it might be necessary, in the longer term, to include rights into the Charter which have not been contained in it (and by CEDAW, one should add). As an immediate step, though, it makes more sense for the Commission to issue an interpretative declaration (or "general comment")[865] about women's rights under the Charter. This will have immediate effect. It could be done in terms of the Commission's quasi-judicial mandate,[866] or at the request of a state party, the OAU, or an African organisation recognised by the OAU.[867] The last category should include NGOs with observer status at the Commission. Such a clear statement about the rights of women may serve as a rallying cry in attempts to improve the position of women under the Charter. This course is less dramatic than the first two, but will certainly be effected with the least delay. Given that many of the rights in the Charter may be invoked by women who suffer human rights violations, NGOs should focus on bringing concrete cases to the Commission. A single finding in a real case might have more worth than many words, declarations and declamations.

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864 See his position in (1995) 5 *Review of the African Commission* 21 at 32.

865 In a sense, the guidelines for state reporting are already "interpretations" of the substantive provisions on women. See the discussion at par 3.3.4.2i above.

866 In terms of art 45(1)(b).

867 In terms of art 45(3).

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TABLE K: AFRICAN HUMAN RIGHTS TREATIES AS AT 31 MARCH 1997

	African Charter on Human and Peoples' Rights (entered into force 21 October 1986)[868]		OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (entered into force 20 June 1974)[869]		African Charter on the Rights and Welfare of the Child (not yet entered into force)[870]	
Country	**Signed**	**Ratified**	**Signed**	**Ratified**	**Signed**	**Ratified**
Algeria	10/04/86	01/03/87	10/09/69	25/05/74		
Angola		02/03/90		30/04/81		
Benin		20/01/86	10/09/69	26/02/73	27/02/92	
Botswana		17/07/86	10/09/69	04/05/95		
Burkina Faso	05/03/84	06/07/84	10/09/69	19/03/74	27/02/92	08/06/92
Burundi		28/07/89	10/09/69	31/10/75		
Cameroon	23/07/87	20/06/89	10/09/69	07/09/75	16/09/92	
Cape Verde	31/03/86	02/06/87		16/02/89	27/02/92	20/07/93
Central African Republic		26/04/86	10/09/69	23/07/70		
Chad	29/05/86	09/10/86	10/09/69	12/08/81		
Comoros		01/06/86				
Congo	27/11/81	09/12/82	10/09/69	16/01/71	28/02/92	
Côte d'Ivoire		06/01/92	10/09/69			
Djibouti	20/12/91	11/11/91			28/02/92	
Egypt	16/11/81	20/03/84		12/06/80		
Equatorial Guinea	18/08/86	07/04/86	10/09/69	08/09/80		
Eritrea						
Ethiopia			10/09/69	15/10/73		
Gabon	26/02/82	20/02/86		21/03/86	27/02/92	
Gambia	11/02/83	08/06/83	10/09/69	12/11/80		
Ghana		24/01/89	10/09/69	19/06/75		

868 See CAB/LEG/67.1

869 See CAB/LEG/24.3

870 See CAB/LEG/24.9

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	African Charter on Human and Peoples' Rights (entered into force 21 October 1986)[868]		OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (entered into force 20 June 1974)[869]		African Charter on the Rights and Welfare of the Child (not yet entered into force)[870]	
Country	**Signed**	**Ratified**	**Signed**	**Ratified**	**Signed**	**Ratified**
Guinea	09/12/81	16/02/82	10/09/69	18/10/72		
Guinea-Bissau		04/12/85		27/06/89		
Kenya		23/01/92	10/09/69	23/06/92		
Lesotho	07/03/84	10/02/92		18/11/88		
Liberia	31/01/83	04/08/82	10/09/69	01/10/71		
Libya	30/05/85	19/07/86		25/04/81		
Madagascar		09/03/92	10/09/69			
Malawi	23/02/90	17/11/89		04/11/87		
Mali	13/11/81	21/12/81	10/09/69	10/10/81		
Mauritania	25/02/82	14/06/86	10/09/69	22/07/72		
Mauritius	27/02/92	19/06/92	10/09/69		07/11/91	14/02/92
Mozambique		22/02/89		22/02/89		
Namibia		30/07/92				
Niger	09/07/86	15/07/86	10/09/69	16/09/71		
Nigeria	31/08/82	22/06/83	10/09/69	23/05/86		
Rwanda	11/11/81	15/07/83	10/09/69	19/11/79	02/10/91	
Sahrawi Arab Democratic Rep	10/04/86	02/05/86			23/10/92	
São Tomé and Príncipe		23/05/86				
Senegal	23/09/81	13/08/82	10/09/69	01/04/71	18/05/92	
Seychelles		13/04/92		11/09/80	27/02/92	13/02/92
Sierra Leone	27/08/81	21/09/83		28/12/87	14/04/92	
Somalia	26/02/82	31/07/85	10/09/69		01/06/91	
South Africa	09/07/96	09/07/96		15/12/95		
Sudan	03/09/82	18/02/86	10/09/69	24/12/72		
Swaziland		15/09/95	10/09/69	16/01/89	29/06/92	
Tanzania	31/05/82	18/02/84	10/09/69	10/01/75		
Togo	26/02/82	05/11/82	10/09/69	10/04/70	27/02/92	
Tunisia		16/03/83	10/09/69	17/11/89	16/06/95	
Uganda	18/08/86	10/05/86	10/09/69	24/07/87	26/02/92	17/08/94
Zaïre	23/07/87	20/07/87	10/09/69	14/02/73		

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	African Charter on Human and Peoples' Rights (entered into force 21 October 1986)[868]		OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (entered into force 20 June 1974)[869]		African Charter on the Rights and Welfare of the Child (not yet entered into force)[870]	
Country	**Signed**	**Ratified**	**Signed**	**Ratified**	**Signed**	**Ratified**
Zambia	17/01/83	19/01/84	10/09/69	30/07/73	28/02/92	
Zimbabwe	20/02/86	30/05/86		28/09/85		19/01/95

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Chapter 4 THE REALISATION OF HUMAN RIGHTS IN AFRICA THROUGH SUB-REGIONAL INSTITUTIONS

4.1 Introduction
4.2 Defunct institutions
4.2.1 Court of Appeal of East Africa
4.2.2 West African Court of Appeal
4.3 Judicial institutions in the framework of present sub-regional organisations
4.3.1 ECOWAS Court of Justice
4.3.2 SADC Tribunal
4.3.3 COMESA Court of Justice
4.3.4 Maghreb Court of Justice
4.4 Future option for sub-regional organisations in Africa
4.5 The Commonwealth in Africa
4.5.1 The Commonwealth and human rights in Africa
4.5.2 The Judicial Committee of the Privy Council
4.6 Conclusions

4.1 Introduction

A number of sub-regional inter-governmental organisations and institutions have been functioning and still function in Africa today. Those predating African independence had (and still have, where they still exist) close links with colonialism (or its aftermath). The East African Community is an example of an organisation that is now defunct. Examples of defunct institutions are the Court of Appeal of East Africa, the West African Court of Appeal and the Rhodesia and Nyassaland Court of Appeal. Presently, a multiplicity of organisations, mainly concerned with economic priorities and co-operation, exist sub-regionally in Africa. The most important of these are the Economic Community of West African States ("ECOWAS"), the Southern African Development Community

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("SADC"), the Common Market of Eastern and Southern Africa ("COMESA") and the Maghreb Arab Union.[1]

One of the reasons for the emergence of these regional arrangements is the **failure of the OAU to address Africa's economic problems**. At its inception in 1963, the OAU Charter proclaimed its involvement in economic development, but due to the context of its origin and first years, it focused almost exclusively on the political aims set out in its founding Charter. It was targeted mainly at colonialism and the eradication of racially discriminatory political orders from Africa.[2] The newly independent constituent party states of the OAU jealously guarded their own sovereignty. Not only the OAU's potential impact on internal political issues, but also its potential of collectively addressing economic concerns, was constrained in the process.

So far, the **impact of the African human rights regime on the sub-regional level** has been insignificant. In none of these treaties are the provisions of the Charter incorporated as binding obligations on states. There is little talk on their part of implementing human rights as part of their mandate, or of the possiblity of accession to the African Charter in the near future. This does not mean that human rights are not mentioned, referred to or incorporated at all.[3] But wherever that is done, it remains very limited and without implementation. In general, individuals may also not refer cases to and do not have standing before sub-regional judicial institutions, making it impossible for them to raise concerns in these fora.

This Chapter investigates the extent to which these sub-regional arrangements have been and can be vehicles for the improvement of human rights on the continent. Each of these organisations provides for a court or tribunal to resolve conflicts or to interpret the founding treaty. This judicial

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1 There are numerous other sub-regional organisations in existence in Africa today, including the Economic Community of the Countries of the Great Lakes ("CEPGL"), the Southern African Customs Union ("SACU"), the Mano River Union, the Customs and Economic Union of Central Africa ("UOEAC") and the African and Mauritian Common Organisation ("OCAM"). See eg Elias (88) at 25 – 29.

2 See ch 3.1.1 above.

3 It should be conceded that, as these institutions are directed at socio-economic goals, they aim indirectly at the implementation of socio-economic rights. Even so, the rights discourse, with all that follows therefrom, is not adopted.

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dimension will be the centre of focus and will lead into more general observations on courts in a supra-national, but sub-regional setting. First, those institutions which have ceased to operate are dealt with, and then an exposition is given of those functioning at present.

4.2 Defunct institutions

Africa's colonial past presents one with some early precedents of inter-territorial arrangements of a judicial nature. Examples are the Court of Appeal of East Africa, the West African Court of Appeal and the Rhodesia and Nyassaland Court of Appeal.[4] Of these, the courts in East and West Africa extended the furthest geographically and covered the longest period of time. They are discussed here.

4.2.1 Court of Appeal of East Africa[5]

4.2.1.1 Overview of its evolution

The East African Court of Appeal was established in 1902 by the British colonial authorities in respect of the territories that would later become known as Kenya, Malawi and Uganda.[6] This Court was one of the institutions of the British East Africa High Commission.[7] Unity at the judicial level was just one form of a broader process of inter-territorial political co-operation that in 1947 became concretised in the East African High Commission.[8] The evolutionary process of

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4 See, in general on these courts, Roberts-Wray (1966) at 760-761, 783 and 220-221 respectively.

5 The name of this institution differs through the decades. It was initially called the Eastern African Court of Appeal. Its last appearance was as the Court of Appeal of East Africa.

6 Mvungi (1994) points out that trade networks, political dynamism and social mingling had over centuries succeeded in establishing a common cultural identity and a "non-tribal common language", known as Kiswahili (at 108).

7 See Elias (1988) at 26.

8 See Kato (1971) 7 *East African Law Jnl* 1 at 2.

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establishing a supra-national court in East Africa was thus part and parcel of "the general desire of the British Colonial regime to join the three territories, a desire which was later welcomed and almost concretised by African politicians".[9]

Zanzibar, Aden and Tanganyika were later added to the Court's jurisdiction. Nyassaland (Malawi) was excluded when the Rhodesia and Nyassaland Court of Appeal came to be established in 1947.[10] At that stage the Court consisted of the Chief Justices and other judges of superior courts of the countries over which it had jurisdiction. Practical problems arose, prompting an investigation.[11] The investigation revealed that an increase in the number of cases submitted to the Court had led to delays in their finalisation. This caused concern, especially as many cases involved persons convicted of murder and awaiting execution. In 1946 the Court already sat for twenty weeks yearly. This took up a considerable amount of the Chief Justices' time. They were obviously primarily needed in their own countries, and their duties there were subsequently neglected. Pressure was not only exerted on their domestic duties. A tendency also developed to deal very rapidly with cases at the East African Court of Appeal. In other words, the main cause of the difficulties faced by the Court was identified as the temporary basis of judicial appointment to the Court.

These findings led to structural reforms of the system. In terms of reforms effected in 1950, three permanent Court members were appointed to the Court. All other judges of superior courts of the countries involved were eligible to sit on the Court. A permanent seat was also established at Nairobi, Kenya. The choice of the seat was motivated with reference to Nairobi's central geographical location. On occasion the Court could also sit in other countries.

It should be noted that the possibility was also raised that a separate court of appeal could be established for each of the major territories. The official investigation, reporting on possible reforms, rejected such a course of action: "If this were done, ... East Africa would be left without

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9 *Ibid.*

10 See Roberts-Wray (1966) at 760.

11 For background to these problems and the solutions offered, see *Proposals for the Re-Organization of the Eastern African Court of Appeal* (1948).

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any high co-ordinating legal authority, and moreover these territories would be unable to fulfil commitments already entered into with other Colonial Governments".[12]

The role of the Court in the broader policy of "indirect" colonial rule is apparent from the fact that the judges were appointed by the Governor of Kenya,[13] and were usually "expatriates".[14]

The **East African Community** was established when the Treaty for East African Cooperation was concluded between Kenya, Tanzania and Uganda in 1967,[15] following the independence of the three countries. It provided for co-operation in various fields. The Court, as the Court of Appeal of East Africa, was retained in its previous form as one of the institutions of the Community. Another judicial institution was provided for under this Treaty.[16] This Court, the Common Market Tribunal of the East African Community, had the task of ensuring observance of treaty law, such as allegations of breach of treaty obligations. Two cases had been referred to the Tribunal. Due to the fact that it was never fully constituted these cases were never considered.[17] The Community, and with it the Court, was abolished in 1977.[18]

On paper, the future prospects for co-operation in East Africa must still be regarded as good. Factors uniting the three states (Kenya, Tanzania and Uganda), are:

- geographic proximity

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12 *Proposals for the Re-Organization of the Eastern African Court of Appeal* (1948) at 3.

13 See (1971) 7 *East African Law Jnl* 1 at 11.

14 In 1970 the permanent members of the Court were President Newbold, Vice President Duffus and Justice Spry. In the same year Mr Justice Lutta became the first East African to hold a position as permanent member of the Court.

15 By the Treaty of East African Co-operation signed at Kampala, and which entered into force in December 1967. It took over the assets and liabilities of the East African Common Services Organisation ("EACSO"), which was established in 1962. The EACSO was established to take over from the British East Africa High Commission (see Elias (1988) at 26).

16 Another "tribunal" established under the EAC was the East African Industrial Court: see art 84 of the EAC Treaty.

17 Schermers and Blokker (1995) at 433. By May 1970 two cases had been referred to the Tribunal, which had at that stage not been constituted.

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- institutional links[19]
- shared history
- broad knowledge of one language, Swahili
- ethnic ties across borders, for example the presence of Luos in all three states.

However, whether there is room for such an arrangement in the light of the development of COMESA and SADC, seems questionable.[20]

4.2.1.2 Functioning of the Court

In general, the Court exercised **judicial restraint**. Writing optimistically about the future of the Court in 1971, Kato expressed the opinion that it survived because it did not involve itself in political controversy.[21] One of the reasons was the limited jurisdiction of the Court as far as human rights matters were concerned.

The first of the three states to become independent, **Tanzania**, did not include a Bill of Rights in its Constitution.[22] Questions of the interpretation of human rights as such could therefore not arise. As for the Constitution, the Court was excluded from hearing any appeal concerning its

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18 On its demise, see Mvungi (1994) at 118.

19 For a recent manifestation of these links, see the Establishment of the Lake Victoria Fisheries Organisation between Kenya, Tanzania and Uganda ((1997) 36 *ILM* 667).

20 See also Muzan (1994) 15 *African Study Monographs* 37, who argues that the efforts to establish a federation between the three states in the early 1960s failed because the Ugandan leader Okello was too protective of the role of the Kabaka of the Buganda.

21 See Kato (1971) 1 *East African Law Jnl* 1 at 30. He considered the future if the Court to be "bright".

22 Also, before a one party state was established in 1968, the possibility was considered, but rejected: See *Report of the Presidential Commission* (1968) at 30-32.

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interpretation.[23] However, other contentious issues, such as cases involving *habeas corpus* directions, could be heard by the Court.[24]

Uganda became independent next, in 1962. Its independence Constitution included a Bill of Rights. The Court, however, had no jurisdiction to entertain an appeal from a Ugandan Court dealing with Chapter III of the Constitution, which contained fundamental human rights. In terms of section 95 of the independence Constitution, issues involving a substantial question of law could be referred to the Ugandan High Court, but not to the East African Court of Appeal.[25]

Independence for **Kenya** came last of the three, in 1963. Its Constitution was clear about the limitations on the Court's role in the internal affairs of the newly independent nation. The jurisdiction of the Court was excluded as far as the interpretation of the Constitution and the enforcement of human rights provisions in the Constitution were concerned.[26]

From an analysis of the Court's annual reports[27] it is clear that the Court was **constantly utilised**. The total number of appeals for some years are given as examples:

- 1961: 297 appeals
- 1962: 300 appeals
- 1963: 278 appeals
- 1970: 289 appeals
- 1971: 254 appeals
- 1972: 231 appeals
- 1973: 220 appeals
- 1974: 195 appeals

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23 S 9 of the Appellate Jurisdiction Ordinance 55 of 1961, referred to by Kato (1971) 7 *East African Law Jnl* 1 at 20.

24 S 8(3) of the Appellate Jurisdiction Ordinance 55 of 1961, referred to in (1971) 7 *East African Law Jnl* 1 at 20

25 See Kato (1971) 1 *East African Law Jnl* 1 at 22.

26 See Kato (1971) 1 *East African Law Jnl* 1 at 28.

27 *Court of Appeal for East Africa Annual Reports*, consulted in the Nairobi University Library, Africana section. Other data in this discussion is also based on this analysis.

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- 1975: 248 appeals
- 1976: 199 appeals

In general, a slight decreasing trend, as well as a significant drop in numbers between 1975 and 1976, may be identified.

The total number of appeals originating in the **three national legal systems** from 1970 to 1973, and in 1976 are as follows:

- 1970: Kenya (76), Uganda (146), Tanzania (67)
- 1971: Kenya (81), Uganda (97), Tanzania (76)
- 1972: Kenya (76), Uganda (88), Tanzania (67)
- 1973: Kenya (90), Uganda (53), Tanzania (77)
- 1976: Kenya (95), Uganda (30), Tanzania (74)

From these figures it appears that a relatively constant number of appeals from Kenya and Tanzania were submitted annually. Another feature is that the number of Kenyan cases were always slightly more than that emanating from Tanzania. Most striking, however, is the steady **decrease of cases brought from Uganda**. Within seven years the number of Ugandan cases changed from the highest to the lowest of the three states.

The **majority** of cases heard by the Court were **criminal cases**. In 1962, for example, 201 of the 300 cases were criminal appeals. Of the criminal appeals before the Court in 1971, it dismissed 148, and allowed 39.[28] This trend continued: In 1973, 107 criminal appeals were dismissed, and 46 allowed; in 1976 100 criminal appeals were dismissed, and 55 allowed. The majority of criminal appeals involved murder convictions. In 1973, for instance, 91 murder cases were heard, and in 1976, 73. In general, the Court interfered more frequently in civil cases. Of the civil appeals heard in 1971, 32 were dismissed and 22 allowed. In 1973, the number of civil appeals allowed (25) exceeded the number dismissed (17). In 1976 the Court disallowed 46 and 31 civil appeals.

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[28] Including those allowed in part. The discussion here is, again, based on an analysis of annual reports of the Court personally undertaken in the Africana section, University of Nairobi Library, Nairobi, Kenya.

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4.2.1.3 Demise of the Court

The most important reason for the Court's demise is the lack of continued political will at the inter-governmental level. Kenyan domination appears from the facts about the functioning of the Court set out above. Kato described the term from 1951 to 1961 as the period in which the Court became fully Kenyan.[29] This factor caused tension between Kenya and especially Tanzania. But all three states contributed in the eventual collapse. Businessmen in Kenya pressurised the government to withdraw, as the Court's appellate jurisdiction had affected their interests. In Tanzania, a socialist state and economic structure was being developed. This was in clear conflict with the broadly capitalist economies of Kenya and Uganda. Tanzania became reluctant to submit all civil matters to the jurisdiction of a Court dominated by lawyers with a liberal-capitalist world view.

In Uganda, Idi Amin took over power by military means in 1971, causing a break-down of civil and state institutions.[30] This was reflected in the declining number of cases from Uganda after 1973. Amin's gross human rights violations presented Tanzanian president Nyerere with an ideal opportunity to disband the East Africa Community. This happened in 1977.[31] In any event, when Tanzanian forces invaded Uganda, little prospect remained of political and judicial unity. Tanzania subsequently developed closer ties with Southern African states. In 1980 it became part of SADCC, and remained a member of the reconstituted SADC.[32]

4.2.1.4 Case-law

The case-law of the Court of Appeal of East Africa, in its various forms, presents early examples of a supra-national African human rights jurisprudence. One such case, also frequently cited by

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29 (1971) 7 *East African Law Jnl* 1 at 11 - 17.

30 See Republic of Uganda (1994) at 24.

31 See United Republic of Tanzania (1979) at 2.

32 Brooks (1993) at 450.

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the Court itself, is *Njuguna s/o Kimani v R.*[33] The principles set out in that case were valuable in both the colonial and post-colonial eras:

- It is highly improper for the police to keep a suspect in unlawful custody and prolong their questioning of him by refraining from formally charging him.
- A judge has a discretion to exclude statements obtained by improper means, even if they are admissible under established rules.
- Formal cautioning of a suspect is of little significance when given to a prisoner who has been in the police officer's custody for weeks, and who has previously been induced by questioning to incriminate himself.

This did not mean that these principles were rigorously followed in all instances. In *Ochieng v Uganda*[34] a suspect was unlawfully detained for nine days and repeatedly interrogated. His subsequent confession was the object of argument. Allowing the confession, the Court stated the following: "The fact that the necessary safeguards provided for by law had not been carried out ... would not in itself prevent a voluntary confession of guilt" if the judge kept that fact in mind when deciding on admissibility.[35]

In *Ibingira v Uganda*[36] the Court allowed an appeal by making an order of *habeas corpus*. As this case dealt with what later came to be known as a "claw-back clause", it is of particular relevance to the interpretation of the African Charter. Section 19(1)(j) of the Ugandan Constitution provides the following: "No ... person shall be deprived of his liberty save as may be authorised by law in any of the following cases, that is to say to such extent as may be necessary in the execution of a lawful order requiring that person to remain within a specified area within Uganda ...". On behalf of Uganda it was contended that a deportation order was "authorised by law" as "it is made under

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33 [1954] EACA 21.

34 [1969] EA 1.

35 At 4 E-F.

36 [1966] EA 306 (*per* Acting Vice-President Spry).

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statutory power".[37] The authority of law and the requirement of "lawfulness", in this view, refer to compliance with the procedure prescribed by statute. If this interpretation were accepted, section 19(1) would authorise legislation for the restriction of the movements and residence of the individual, thus allowing for the violation of guaranteed rights. The Court did not accept the interpretation proposed on behalf of the state. The effect of the reference to "lawful order" in section 19(1) "is to provide that lawful orders made under a statute restricting freedom of movement shall not constitute violations of the right to personal liberty", the Court held.[38] Terms such as "authorised by law" and "lawful" have to be interpreted in the light of the Constitution as a whole, including the provisions on fundamental rights.

4.2.2 West African Court of Appeal

The West African Court of Appeal was established later (in 1928), and its functioning came to an end earlier (towards the end of the 1950s), than its eastern equivalent.[39] It was established for all the British dependencies along the African West coast: The Gold Coast, Nigeria, Sierra Leone and the Gambia. Liberia, the only other West African anglophone area with a common law-based legal system, was not included. This is explained by the fact that Liberia was already an independent state and had no historical links with Britain.

In 1948 the principal judicial officials of this Court were made permanent. These structural changes could not prevent the Court's demise. It "disappeared by a process of erosion",[40] as the territories gained independence. The first to sever its ties was Ghana (previously the Gold Coast), in 1957. Ghana immediately set up its own Court of Appeal,[41] a move that seems to have contradicted Nkrumah's efforts at regional unity in other spheres. Nigeria followed. A combined Court of Appeal was then established for the two remaining non-independent territories, the Gambia and Sierra Leone. Also this came to an end soon, with the independence of Sierra Leone.

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37 At 310 b-c.

38 At 310 d.

39 See Roberts-Wray (1966) at 783.

40 Roberts-Wray (1966) at 783.

41 West African Court of Appeal (Amendment) Order in Council, 1957.

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Compared to the experience in East Africa, this Court had much less "staying power". Some of the reasons that may account for this difference are:

- The territories (countries) did not form a geographic unit, but were dispersed along the West coast. This had obvious implications for logistical arrangements and other practical matters.
- The Court was not a component part of a more comprehensive regional structure. No inter-territorial judicial institution is likely to flourish in the absence of a clearly expressed political will of the participating territories to pursue collective goals.

4.3 Judicial institutions in the framework of present sub-regional organisations

4.3.1 ECOWAS Court of Justice

The Economic Community of West African States ("ECOWAS") was formed in 1975.[42] Its aim is to promote economic development in Western Africa by establishing a common market, harmonising economic policies, including agriculture, industrial development and monetary policies. ECOWAS institutions are the Authority of Heads of State and Government, the Council of Ministers, the Community Court of Justice, an Executive Secretariat and some specialised commissions. In 1993 the Treaty was amended.[43] By 1997, sixteen states in West Africa had become members. They are Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, the Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone and Togo.[44]

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42 Treaty reproduced in (1975) 14 *ILM* 1200, entered into by Côte d'Ivoire, Dahomey, the Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Togo and Upper Volta. (See the 1975 Treaty also in Awechue (gen ed) (1991) at 82.)

43 See (1996) 35 *ILM* 660. The revised Treaty was done at Cotonou, Benin, 24 July 1993.

44 *Africa South of the Sahara* (1997) at 107.

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No explicit reference to human rights is to be found in the original ECOWAS Treaty. Neither did any of the 65 articles forming the body of the treaty refer to human rights as such. This omission must be viewed against the contemporaneous background. Few would have thought, at that stage, that an African Charter would be given effect within a decade. A limited number of provisions, such as the freedom of movement and residence[45] have human rights implications, but does not extend the Court's jurisdiction to human rights matters as such.

Disputes arising from the application of the Treaty had to be resolved by the states among themselves, and in amicable settlement "by direct agreement".[46] Failing such a settlement, any of the parties involved may refer the matter to the Community Court of Justice. This Court is provided for in the 1975 treaty to "ensure observance of law and justice".[47] In 1991, due to the "scope and degree of regional integration ECOWAS had embarked on",[48] a Protocol setting up a Community Court of Justice was adopted. In other words, this Protocol, already provided for in 1975,[49] took fifteen years to realise. The Protocol adopted on 6 July 1991 does not in any way extend the competencies of the Court. It clarifies that only states parties may seize the Court, also "on behalf of its nationals".[50] Proceedings may be instituted against another state or an ECOWAS institution.

After the ECOWAS Treaty was amended in 1993, one of the fundamental principles of the organisation relates to "the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights".[51] This shift in emphasis has been brought about, primarily, by the adoption of and ratification by ECOWAS member states of the African Charter in the intervening years. This development provides a clear example of the increased importance attached to the Charter in African political life. Institutions

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45 Art 27 of the ECOWAS 1975 Treaty.

46 Art 56 of the ECOWAS 1975 Treaty.

47 Art 11(1) of the ECOWAS 1975 Treaty.

48 Final Communiqué of the Fourteenth Session of the Authority of Heads of State and Government, Abuja, July 1991 contained in (1991) 19 *Official Journal of ECOWAS* 62.

49 Art 11(2) of the ECOWAS 1975 Treaty.

50 Art 9(3) of the Protocol.

51 Art 4(g) of the revised ECOWAS Treaty. See also the Preamble par 4 of the revised Treaty.

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provided for include the Community Court of Justice, retained in its old form, and an Arbitration Tribunal. The powers and composition of these institutions are not regulated by the Treaty, but are to be set out in Protocols to the Treaty. In the case of the Court of Justice, this has already been done.

Although ECOWAS was initially designed as a sub-regional organisation for the pursuit of economic and social goals, it has gradually extended its mandate.[52] Two protocols, which supplement the 1975 Treaty, illustrate this shift. The one is the 1978 Protocol on Non-Aggression, and the other is the 1981 Protocol on Mutual Assistance on Defence.[53] The internal conflict in one of the ECOWAS member states, Liberia, prompted the establishment of the ECOWAS Mediation Standing Committee in 1990. Not all ECOWAS members participated, but decisions were taken on behalf of the Authority of the Heads of State and Government. These decisions called for a cease-fire between the warring parties and established a cease-fire observing force, called the ECOWAS Military Observer Group ("ECOMOG"). The force consisted of troops from member states, and soon it counted approximately 5 000. Not all the ECOWAS member states approved of the decision of the Mediation Standing Committee. Some regarded ECOMOG as interference in the domestic affairs of a member state. The ECOWAS Authority of Heads of State and Government subsequently approved the Committee's decisions

Initial attempt at a cease-fire and a national coalition failed. In 1991 the Yamoussoukrou agreement was reached, providing for a cease-fire and elections. ECOWAS imposed sanctions on the National Patriotic Front of Liberia ("NPFL") when they failed to keep to the agreement. The UN Security Council endorsed these decisions. The UN eventually became actively involved when the Secretary General appointed a Special Representative to Liberia. The UN Special Representative was instrumental in getting the parties to sign the Cotonou Agreement in 1993. In terms of this agreement ECOWAS was assigned primary responsibility to ensure implementation of the treaty, which provided for a cease-fire and election in early 1994. The role of the UN was to

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52 On ECOMOG, see Weller (1994), Ouguergouz (1994) 2 *AYBIL* 208 and Kwakwa (1994) 2 *AYBIL* 9.

53 Reprinted in full by Weller (1994) at 18 - 24.

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ensure an impartial application of the treaty provisions. To this end, the UN Observer Mission in Liberia ("UNOMIL") was established.[54]

The establishment of ECOMOG is significant in particular for the following three reasons:

- Most relevant as far as human rights are concerned: It marks a **decisive shift** in focus away from economic goals to the promotion of human rights. The intervention was directed not only at securing lives by ending the massacres, but ultimately at the restoration of democratic governance and institutions.[55]

- ECOMOG is the **first regional peace-keeping initiative** on the African continent.[56] As such, it may be indicative of an emerging trend that Africa endeavours to solve its own problems. Strict adherence to notions of state sovereignty would have made these efforts impossible. This operation is premised on the assumption that internal events in one state are of concern to other states and may allow them, under certain circumstances, to interfere.

- The UN force, UNOMIL, was deployed as the first United Nations peace-keeping mission undertaken in **co-operation** with a peace-keeping operation already established by another international organization.[57] This illustrates the extent to which the interests of the UN and a African sub-regional organisations could coincide.

4.3.2 SADC Tribunal

In 1992 a number of Southern African states adopted a "Declaration regarding Establishment of the Southern African Development Community",[58] followed in 1993 by the adoption of the Treaty establishing the Southern African Development Community ("SADC").[59] It was created through

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54 See ch 2.3.1(e) above.

55 See sources in Weller (1994) at xxii.

56 Kwakwa (1994) 2 *AYBIL* 9 at 26.

57 Ouguergouz (1994) 2 *AYBIL* 208.

58 See (1993) 32 *ILM* 267.

59 The SADC Treaty appears at (1993) 32 *ILM* 116 and (1993) 5 *RADIC* 418.

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the transformation of a pre-existing regional institution, the Southern African Development Co-ordination Conference ("SADCC"). SADCC was founded in 1980 mainly as a bulwark against South Africa's stated policy of establishing a "Southern African constellation of states". The current member states of SADC are: Angola, Botswana, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.[60] Of the twelve, three (Mauritius, Namibia and South Africa) have never been members of SADCC. SADC is aimed at regional peace and security, co-operation in a number of sectors, and at integrating regional economies. Its stated ideals are much more ambitious than those of SADCC.

Reference to **human rights** is found in the Preamble to the Treaty, which declares that the member states are "mindful of the need to involve peoples of the Region centrally" in development and integration, "particularly through the guarantee of democratic rights, observance of human rights and the rule of law". One of the five groups of principles in accordance with which SADC will act, is "human rights, democracy and the rule of law".[61] In this respect the SADC Treaty allows for a more significant role to human rights than the EC in its establishing treaty. Like the EC Treaty, the SADC Treaty guarantees equal treatment and non-discrimination in member states and by SADC and its institutions.[62] Though less precise than the EC Treaty, its objectives have clear socio-economic implications.[63]

Disputes arising from the interpretation and application of the Charter should be settled amicably through a process of friendly settlement.[64] If a dispute cannot be settled amicably, it is to be referred to the **SADC Tribunal**. The Tribunal is one of six SADC institutions established under the Treaty.[65] It can adjudicate disputes or give advisory opinions.[66] Its decisions will be final and

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60 In September 1997, the Summit of Heads of State and Government approved the applications for membership of the Democratic Republic of Congo (the former Zaïre) and the Seychelles.

61 Art 4 of the SADC Treaty.

62 Art 6(2) and 6(3) of the SADC Treaty.

63 See eg art 5(1)(a) of the SADC Treaty.

64 Art 32 of the SADC Treaty.

65 Art 9 of the SADC Treaty.

66 Art 16 of the SADC Treaty.

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binding.[67] A protocol establishing the tribunal must be adopted by the Summit of Heads of State and Government of SADC. This will set out the composition, powers, functions and procedures of the Tribunal.[68] As the Protocol has not been elaborated, the details and actual functioning of the Tribunal remains a subject of speculation. So, too, does the role of the individual in the system. It is not clear whether only states parties would be able to seize the tribunal. It is suggested that individuals should be granted standing and the right to refer cases to a future judicial organ. This would be in line with the SADC Treaty, which already provides for the full involvement of individuals and NGOs in the process of regional integration.[69]

The **lack of effective implementation** of the commitment to human rights in the Treaty has been criticised.[70] In 1996, these criticisms culminated in a draft regional human rights charter, which was drafted by NGOs in some of the member states.[71] The charter, which carries no official SADC stamp of approval, provides for civil and political rights, as well as cultural rights, the right to health and to a clean environment. It goes much further, however, by proposing the establishment of a SADC Human Rights Court. The Charter would only apply after a prospective litigant had exhausted domestic remedies. It further provides that any state "which does not comply with an order of the Court interpreting this Charter shall be suspended from SADC for the duration of its non-compliance with such order". The proposal has as yet not been considered seriously by the Summit of Heads of State and Government of SADC. Although most states have included similar

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67 Art 16(5) of the SADC Treaty.

68 Art 16(2) of SADC Treaty.

69 Art 23(2) of the SADC Treaty.

70 Mvungi (1994) referred to the fact that SADC members are obliged to act in accordance with principles of democracy, human rights and the rule of law, but that the Treaty "does not establish a regional human rights regime that will make these principles and ideals a reality" (at 161). He therefore recommended that SADC conclude a "Human Rights Convention" and establish a "fully fledged Court of Justice with appellate jurisdiction on human rights and community law cases" (at 161). He also made a clear link between regional integration, democratic government and human rights: "Member states of the SADC cannot proceed towards any regional integration without ensuring that they respect and guarantee basic rights of their subjects. This commitment can only be guaranteed at regional level by introducing a regional convention on human rights to be applied by an independent regional human rights court" (at 69).

71 (13 - 19 May 1996) *West Africa* 743.

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rights in their own constitutions, a supra-national court giving final pronouncements thereon may still seem like a threat to national sovereignty.

It must be questioned whether a **separate human rights court** should be established. The principle of a court to adjudicate on regional matters has been accepted. Another institution need not be established. Rather, the jurisdiction of the SADC Tribunal should be extended to include human rights. Efforts in this direction need to be intensified, to ensure that the SADC Tribunal is not established without serious consideration of these possibilities. It will be much more difficult to overturn the position once a Tribunal which excludes human rights matters has already been set up.

In 1996, SADC launched the **Organ on Politics, Defence and Security** ("OPDS").[72] Its mandate includes human rights matters.[73] The OPDS has so far involved itself mainly in security matters. At a Summit of the OPDS, held on 2 October 1996, the situation in Angola was discussed. The Summit noted that "the prevailing situation in Angola is the remaining major obstacle to total regional stability".[74] A call was made on UNITA to fulfil its commitments in terms of the Lusaka Protocol. Amnesty International has recommended that this organ should serve as an "effective means to ensure uniform training in the protection of fundamental rights within the sub-region".[75]

In 1997 a **Parliamentary Forum** was set up. Its membership is open to national parliaments of the SADC member states.[76] Each parliament must ensure fair representation of women, and all political parties to the Forum. The Forum will be an integral institution within SADC, with its seat in Windhoek, Namibia. Organs of the Parliamentary Forum will be a plenary assembly, an

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72 See Amnesty International (1997) at 10.

73 One of its stated objectives is to "promote and enhance the development of democratic institutions and practices within members states, and to encourage the observance of universal human rights as provided for in the Charters and Conventions of the OAU and United Nations" (see Amnesty International (1997) at 10). See also Gyan-Apenteng and Mwananyanda "The Birth of Sahringon" (April – May 1997) *African Topics* 22.

74 See par 10 of Communiqué of the Summit, 2 October 1996, Luanda, Angola.

75 (1997) at 10.

76 The account of the Parliamentary Forum is based on information in (1997) 34 *Africa Research Bulletin* 12636

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executive committee, the office of the Secretary-General and standing committees. The Forum is mandated not only to promote economic co-operation, but also to advance democracy, the rule of law and human rights in the sub-region.

Efforts to secure the place of human rights within the activities of SADC depend largely on NGOs.[77] For this reason, the recent creation of the Southern African Human Rights NGO Network ("SAHRINGON") is important. It was established between over 60 NGOs in the region. The objectives of the Network include "forming a platform to lobby SADC members to prioritise human rights issues".[78]

4.3.3 COMESA Court of Justice

The Common Market of Eastern and Southern Africa ("COMESA") was established in 1993.[79] Its aim is to enhance economic development in the region.[80] COMESA was established in the place of the Preferential Trade Area of Eastern and Southern African states ("PTA") of 1981.[81] The scope of COMESA is much broader than that of the PTA. It is open for ratification by a large number of states, stretching from Angola, to Eritrea, and the Comoros. It was created within the ambit of the broader ideals of the creation of an African Economic Community.

One of the institutions of the regional body is a yet to be established Court of Justice. This Court has to ensure "the adherence to law in the interpretation and application" of the Treaty.[82] Seven

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77 See also Amnesty International (1997) at 14, for a recommendation that the Heads of State should make a declaration affirming their commitment to human rights at their August 1997 summit.

78 On its establishment, see Gyan-Apenteng and Mwananyanda "The Birth of Sahringon" (April – May 1997) *African Topics* 22.

79 See (1994) 33 *ILM* 1067.

80 See art 3 of the COMESA Treaty.

81 The PTA wound itself up on 5 November 1993 and established COMESA in its place. The PTA comprised 23 countries in East and Southern Africa ((1994) *New African Market Bulletin* at 23).

82 See art 19 of COMESA Treaty.

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judges are appointed by the COMESA Authority for a once-renewable term of five years.[83] Not more than one national from a specific member state may hold judicial office simultaneously. The Court has a contentious and advisory jurisdiction.[84] Court judgments are binding and member states undertake to implement them without delay.[85] The Court may also grant appropriate interim orders.[86]

Not only COMESA institutions and member states, but also legal and natural persons may bring cases before the Court.[87] That means that individuals may refer the legality of any act, regulation, directive or decision of the Council or any member state to the Court, arguing that it is unlawful or an infringement of treaty provisions. Domestic remedies have to be exhausted before a legal or natural person may approach the Court. According to reports, the Court can be a reality by 1998.[88] The acting legal director of COMESA, Karangizi, said in March 1997 that the establishment of the Court will be on the agenda of the summit to be held on 10 April 1997.[89] He expected that the host country would be designated at the Summit. However, this did not happen.

COMESA is **not aimed at realising any specific aims in the field of human rights**. But as the treaty establishing COMESA suggests, issues pertaining to human rights cannot be divorced totally from its functioning. In the Preamble, reference is made to "the principles of international law governing relations between sovereign states, and the principles of liberty, fundamental freedoms and the rule of law". This formulation may be read as an attempt at reconciling the sanctity of the state with attempts to protect human rights within the state. The initial hesitance is supplemented by an unequivocal adherence to human rights as part of the organisation's fundamental principles. These principles include the promotion and sustenance of a democratic system of governance in each Member State,[90] the recognition and observance of the rule of law,[91] and the recognition,

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83 Arts 20, 21 of the COMESA Treaty.

84 Advisory jurisdiction is regulated by art 32 of the COMESA Treaty.

85 Art 34(3) of the COMESA Treaty.

86 In terms of art 35 of the COMESA Treaty.

87 See art 26 of the COMESA Treaty.

88 See news release by Panafrican News Agency, also at e-mail <camnet@vm.cnuce.cnr.it>

89 *Ibid.*

90 Art 6(h) of the COMESA Treaty.

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promotion and protection of human and peoples' rights in accordance with the African Charter.[92] The inclusion of human rights as part of COMESA's fundamental principles and the possibility of individual actions, make this a system full of potential human rights realisation.

4.3.4 Maghreb Court of Justice

The Treaty of Marrakech, establishing the Maghreb Arab Union, was concluded in 1989 between Mauritania, Morocco, Algeria, Tunisia and Libya.[93] The main aims of the union are to promote regional security, to create viable regional economic integration and to develop trade and other links with the European Union.

A Maghreb Court of Justice, consisting of two judges from each state, is instituted. Its function is to adjudicate on disputes relating to the interpretation and application of the Treaty and other agreements within the ambit of the Union.[94] Human rights are not expressly referred to in the Treaty, making it practically impossible for this Court to base any of its decisions on human rights considerations. Its seat is to be established at Nouakchott, Mauritania. The Court will have contentious and advisory jurisdiction. In its latter capacity, the Court will provide advice to the Presidential Council.[95]

4.4 Future options for sub-regional organisations in African

Two main options seem available to establish effective human rights protection at the sub-regional level in Africa:

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91 Art 6(g) of the COMESA Treaty.

92 Art 6(e) of the COMESA Treaty.

93 See, in general on the Maghreb Arab Union, El Kahiri (1994) 2 *AYBIL* 141.

94 Art 13(2) of the Marrakech Treaty.

95 See El Kahiri (1994) 2 *AYBIL* 141 at 146.

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- Each of these regional inter-governmental organisations may adopt its **own sub-regional charter on human rights**, to be enforced by and within the jurisdiction of the specific community courts of justice.[96]

- Each regional economic grouping may as institutions **accede to the African Charter**. The specific community Court of justice would then be able to draw inspiration from the Charter in exercising its mandate.[97]

Arguments **favouring** the option of **sub-regional charters** include:

- There could be institutional and practical difficulties in sub-regional groupings acceding to the African Charter. At present **only states** are parties, and no provision is made for accession of institutions other than states.[98] Such a change would require an amendment to the Charter. The process of adopting regional charters will be much quicker and appears more feasible. The treaties of existing sub-regional organisations also leave open the possibility of accession to an instrument such as the African Charter.[99]

- The protection granted by the **African Charter has been criticised as insufficient**, especially due to the inclusion of "claw-back" clauses.[100] It seems quite likely that at least some regional groupings would create a higher human rights standard. Unlike Europe, where an EC Convention on Human Rights would merely restate the European Convention on Human Rights, such conventions would not be superfluous in Africa.

- In fact, the sub-regional human rights instruments could be utilised as a **basis for addressing the shortcomings of the African Charter**. Once the different regional economic regimes

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96 See, on this possibility, Benedek in Theodoropoulos (ed) (1992) at 28, who foresaw such a possibility in Southern Africa. In his view, this could be accompanied by a revision of the Charter to fulfil the needs of the sub-region.

97 See also ch 5, on similar options open to the European Community to accede to the European Convention.

98 In terms of art 63(1) of the Charter.

99 See eg art 84(1) of the 1993 ECOWAS Treaty, which provides that member states may "among themselves" conclude agreements with other international organisations, provided that the agreement is not incompatible with the provisions of the Treaty. See also art 24(1) of the SADC Treaty.

integrate, the higher level of protection will be a *fait accompli*. If this would be the case in different regions, pressure will be exerted to adopt amendments to the African Charter at that stage.

Some arguments in support of **acceding to the African Charter** are as follows:

- Sub-regional human rights standards will only **enhance and accentuate differences**. It would be preferable that one common standard, based on the African Charter, starts evolving. To set up new regimes would be divisive, and contrary to the movement towards African unity. These differences may be so great that once the African Economic Community ("AEC") is established, they are unbridgeable.[101]

- The option of creating new charters will take **time and effort**, requiring the member states to agree on a common standard. It might be difficult. Regions should rather opt for a charter already agreed upon and in fact ratified by just about all African states. It has reached a degree of familiarity.

- The argument that regional charters can **raise the human rights standard** set out in the African Charter may be correct, but the same aim can be attained if the African Charter is interpreted and applied creatively by activist regional "economic" courts.

- Once an African Court on Human Rights has been established, the functions of the regional courts will be fulfilled by the AEC Court of Justice. If both would adjudicate on the basis of the African Charter, a **cohesive jurisprudence** will develop, each with its own focus. This will lead to **cross-fertilisation** and will strengthen both institutions. In terms of the Abuja Treaty, no human rights charter is provided for. Neither is accession to the African Charter by the Court of Justice an explicit possibility. Once the African Court of Justice starts functioning, the easiest would be to accede to the African Charter if the different regional institutions had by then already done so.

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100 See also ch 8.2.3 below.

101 See also ch 8.2.5 below.

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Whichever alternative is followed, it is argued here that the sub-regional institutions in Africa should take decisive steps at incorporating human rights concerns meaningfully into their organisations. Sub-regional structures are already in place and function at a level closest to individual Africans. The success of the project to realise human rights in Africa depends on efforts at this level as well.

4.5 The Commonwealth in Africa

The Commonwealth (or Commonwealth of Nations) is a loose association which brings together over 1.5 billion people from different ethnic and cultural backgrounds from all corners of the globe.[102] Membership of the Commonwealth is based on a common acknowledgement of the British Monarch as unifying head, as illustrated by a past of direct and indirect British rule or administrative links with other Commonwealth members. By 1997, 19 African states, all from the sub-Saharan region, have become members of the Commonwealth.[103] This included recently-admitted Cameroon and Mozambique. Although membership of the Commonwealth extends worldwide, it clearly has a significant African membership. The role of the Commonwealth in sub-Sahara Africa is to some extent similar to that of a sub-regional organisation. Its role in the realisation of rights in states of the region is now investigated.

4.5.1 The Commonwealth and human rights in Africa

The principal decision-making organ of the Commonwealth is the **Commonwealth Heads of Government Meeting** ("CHOGM"), which takes place every two years. The CHOGM has not adopted a coherent or consistent approach to human rights violations in member states.[104] The

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102 See (1995) *Report of the Commonwealth Secretary-General.*

103 These 19 states are Botswana, Cameroon, the Gambia, Ghana, Kenya, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, Sierra Leone, South Africa, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe.

104 Duxbury (1997) 46 *ICLQ* 344 at 361.

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Commonwealth is built on consensus and informal means of persuasion. An exception to this approach is the condemnation of massive human rights violations in **Uganda** at the 1977 meeting. A clear indication that human rights standards form one of the cornerstones of the organisation was the adoption in 1991 of the Harare Declaration. At the 1995 meeting in Auckland **Nigeria** was suspended because of its serious violation of the Harare Declaration.[105] At the same meeting, two other African countries, **Sierra Leone**[106] and the **Gambia**, were also targeted because of their human rights abuses.

The **Commonwealth Secretariat** provides administrative support to further the human rights agenda of the Commonwealth. It has adopted a pro-active role by organising training workshops on human rights for public officials. The Secretariat's Legal and Constitutional Division has been active in various fields, such as the publication of law reports and the *Commonwealth Law Bulletin*. One of its major contributions (with the NGO Interights) to the improvement of human rights in member states has been a series of colloquia on the domestic application of international human rights norms.[107] The Secretariat was further involved in the monitoring of elections in **Namibia**, **South Africa**, the **Seychelles** and **Kenya**.[108] In 1985 the Human Rights Unit of the Secratariat was set up. It has, since then, been involved in human rights promotion and training.[109] It has also developed two "accession kits" to assist governments when they have ratified CEDAW and the two UN Covenants.[110]

NGOs play an important role in the Commonwealth, and have contributed to the prominence of human rights on the organisation's agenda. Most prominent of the NGOs dealing with human rights is the **Human Rights Initiative**.

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105 The Ministerial Action Group has subsequently followed a process of continued dialogue.

106 On 11 July 1997 the Commonwealth suspended Sierra Leone until the Armed Forces Provisional Council was replaced by a democratically elected government (see (1997) Sept *New African* at 21).

107 See Commonwealth Secretariat (1988 - 1993) *Developing Human Rights Jurisprudence* vols 1 to 6.

108 See (1995) *Report of the Secretary-General* at 73.

109 Duxbury (1997) 46 *ICLQ* 344 at 359.

110 Duxbury (1997) 46 *ICLQ* 344 at 358.

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The Commonwealth's impact in the field of human rights has been limited by the nature and objectives of the association, which relate to friendship and co-operation. As in the case with the UN, effective supervision of standards was hampered by the doctrine of non-interference in the domestic affairs of states. But the Commonwealth allowed an exception in the case of South Africa. Even though **South Africa** was not a member, its close links with a number of Commonwealth states (the "Front Line states") prompted a decision to impose sanctions against South Africa.[111] The fact-finding mission of the Eminent Persons Group again demonstrated intervention by the Commonwealth in the internal affairs of states.[112]

The Commonwealth has given a prominent role to human rights, especially by standard setting and promotion. This has been described as a tidal wave which must be ridden.[113] In fact, it has used the human rights debate "to reaffirm and reform its role as an international organisation".[114] But the effective supervision of standards has been almost non-existent. The Secretariat has consistently denied that it has any role in investigating the human rights conduct of member states.[115]

The Human Rights Initiative and some commentators have proposed the creation of a Commonwealth adjudicatory machinery in the form of a judicial mechanism as a way of ensuring that "the Commonwealth can be taken seriously on human rights matters".[116] This proposal has not received serious consideration within formal Commonwealth structures,[117] as it is generally regarded as falling foul of the consensual framework within which the "family" of members co-exist. However, the Judicial Committee of the Privy Council has been and still is in existence as a judicial institution in the Commonwealth. Although its mandate does not specifically include human rights matters, it has adjudicated on human rights issues arising in African member states.

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111 Only the UK consistently opposed that decision.

112 See Saravanamutto (1995) *The Round Table* 145.

113 Chongwe (1992) 4 *RADIC* 962.

114 Duxbury (1997) 46 *ICLQ* 344 at 345.

115 Duxbury (1997) 46 *ICLQ* 344 at 348.

116 See sources quoted by Duxbury (1997) 46 *ICLQ* 344 at 374.

117 *Ibid.*

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4.5.2 The Judicial Committee of the Privy Council

The Judicial Committee of the Privy Council does not fit squarely in any of the categories of "defunct", "present" or "future" judicial institutions. Although many African states are members of the British Commonwealth, the possibility of a final appeal to the Privy Council only exists in a limited category of cases in two states on the continent today. The Gambia and Mauritius are the two African states that have retained the possibility of a final appeal to London.[118]

This was not always the case. The Judicial Committee of the Privy Council for many years performed the function of final court of appeal for former British colonies not only in Africa but in the world at large. It helped to develop the local law in many states, geographically far removed from the British Isles. As a constitutional court it influenced legal developments, particularly in Canada. Especially in developing countries it sought to preserve "certain fundamentals of criminal justice".[119]

In the period 1980 to 1994 one case involving constitutional matters emanating from the Gambia, and a number of similar cases involving Mauritius have been reported in the Commonwealth Law Reports.

In the single Gambian case, *Attorney-General of the Gambia v Jobe*[120] the Privy Council underscored the need for a purposive and generous approach to constitutional interpretation. Lord Diplock said the following: "A constitution and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in a state are to be entitled, is to be given a generous and purposive construction".[121] However, its application of the presumption of constitutionality showed deference to legislative authority.

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118 Bradley and Ewing (1993) at 343.

119 *Ibid.*

120 [1985] LRC (Const) 556.

121 At 183.

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Of the nine Mauritian cases noted, five dealt with property rights.[122] The Privy Council overturned the domestic finding in five of the nine cases.[123] Constitutional violations were found in two cases. In one case, the Privy Council found a breach of the fundamental right to be provided with an interpreter.[124] In another, the provision in the Dangerous Drugs Act which enabled a prosecutor to fix sentence was held to violate the principle of separation of powers.[125] In *Mungroo v R* [126] the issue of unreasonable delay in the finalisation of a criminal trial was considered. Taking account of the prevailing social and economic conditions, the Privy Council found that a period of four years did not constitute unreasonable delay. It is submitted here that the decision is not in line with international trends, and diminished the constitutional protection to a negligible level.

In one instance the Privy Council allowed an appeal instituted by the government.[127] Reversing a finding by the Supreme Court of Mauritius, the Privy Council found that a deprivation of property did not amount to a violation of the chapter on fundamental rights.

A thread that runs through judgments of the Privy Council is the need for a broad and purposive approach to constitutional interpretation,[128] which implies a narrow interpretation of constitutional restrictions.[129] Individual decisions may serve as counter-balance to the set ideal. In *De Boucherville v The State*[130] the accused was convicted on 21 February 1986 and sentenced to death. More than eight years later (on 18 April 1994), the Judicial Committee of the Privy Council

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122 Nine cases which have been decided by the Privy Council in respect of Mauritius have been reported in the Commonweatlth Law reports since 1985. A striking feature of the Mauritian cases submitted to the Privy Council is that property rights was the most frequently litigated issue.

123 See the following cases: *Société United Docks v Government of Mauritius* [1985] LRC (Const) 801 (partially allowed); *Norton v Public Service Commission* [1988] LRC (Const) 944; *Ali v R* [1992] LRC (Const) 401; *Government of Mauritius v Union Flacq Sugar Estates* [1993] 1 LRC 616 and *Kunnath v The State* [1993] 2 LRC 326.

124 *Kunnath v The State* [1993] 2 LRC 326.

125 *Ali v R* [1992] LRC (Const) 401.

126 [1992] LRC (Const) 591.

127 *Government of Mauritius v Union Flacq Sugar Estates* [1993] 1 LRC 616.

128 See also, eg, the *Société Union Docks* case, above at n123.

129 See *Ramburn* case above, at 275g.

130 [1994] 2 LRC 602.

gave finality to the convicted person's fate. The Privy Council considered the case in the light of the common law. It then referred to the constitutional provision, and remarked that it took the common law no further.

In my respectful view this is an incorrect approach. In the Court's approach no weight was accorded to the difference between constitutional and common law interpretation. Furthermore, there had been unreasonable delay in the execution of the death penalty in the particular case. Not only was the issue brushed over, but Lord Woolf's concluding remarks are made in a spirit of excessive courtesy to the authorities. Responding to the issue of the lengthy period spent on death row, he remarked that "their Lordships have no reason to doubt that the appropriate authorities in Mauritius will deal with the situation in accordance with the correct principles".[131] This statement is an uncritical acceptance of the length of time already spent awaiting finality.

A question that arises concerning the Gambia and Mauritius is whether an appeal to the Privy Council is one of the "domestic remedies" to be exhausted before the African Commission will declare a communication admissible. The Commission has not stated its views on the subject. Ankumah has put forward two arguments why an appeal to the Privy Council should not be required as part of "domestic remedies".[132] Requiring a petitioner to first take the case to England would be costly and bring about undue hardship. Further, requiring prior submission of the petition to a former colonial power "might be inconsistent with the notion of having an African Charter designed to meet the special needs of African people".[133]

These judgments illustrate that accepting the Privy Council's jurisdiction is not merely a formality, but may have a significant practical effect. For this reason, the Singapore Parliament passed legislation that made an appeal to the Privy Council conditional on consent by all parties involved. This new law came into force on 1 May 1989, having been rushed through Parliament. The intention was to disable any further appeal in a case pending before the Singapore Court of Appeal. That case dealt with press freedom. A decision on the basis of Privy Council precedents

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131 At 609e-f.

132 (1966) at 69.

133 *Ibid.*

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was unlikely to favour the Singapore government. A decision by the Singapore Court of Appeal was postponed until the new act came into operation, rendering an appeal to the Privy Council no longer possible. [134]

4.6 Conclusions

- The historical view of sub-regional courts undertaken here shows that a close link exists between the political success of a regional body and the viability of courts established under its auspices. The success of institutions established sub-regionally depends on the existence of an effective and functional political structure.

- Human rights have not featured prominently on the agenda of modern regional organisations in Africa. Predictably, these organisations have concerned themselves more with economic matters and regional unity. Promising developments have been taking place in SADC, the most recently established of the sub-regional groupings. SADC has the most expansive human rights-related mandate. This may perhaps be explained with reference to the fact that the countries in Southern Africa have suffered denials of human rights for a longer period than other African countries. Playing an almost inevitable hegemonic role in the region, the democratic South Africa has reinforced concerns for human rights within SADC. It is argued elsewhere that this region has already started to and is best positioned to produce a regional human rights jurisprudence. The notion of human rights is given a much more important position in the amended ECOWAS Treaty of 1993 than in the original 1975 Treaty. It remains to be seen whether these changes are largely cosmetic responses, occasioned by the rhetorical demands of international relations, or whether human rights concerns will be integrated meaningfully within the activities of ECOWAS.

- Although each of these institutions provides for judicialised conflict resolution, such methods were almost uniformly absent from the activities of the organisation or were ineffectual.

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134 See Bradley (1990) *Public Law* 453-461.

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- Of all the sub-regional bodies, the Privy Council had the most significant impact. This must be one of the reasons why most African states have abolished this avenue of recourse soon after independence.

- Two main options for the improvement of regional human rights are open to regional institutions: acceding to the African Charter, or the adoption of independent regional human rights charters. Each of these possible courses has its advantages and disadvantages. Accepting one of the options will enhance the movement towards economic, legal and political unity already underway in Africa. Economic and political liberalisation should go hand in hand in growing regional integration. Constitutional reform at the regional level must include an effective human rights framework in which democratic governance can be ensured at both national and supra-national levels. Sub-regional institutions should incorporate serious concern for human rights into their mandates without delay. The option favoured in this study is accession to the African Charter by the existing sub-regional organisations.

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Chapter 5 PRECEDENTS AND PROSPECTS - THE REALISATION OF HUMAN RIGHTS IN REGIONAL SYSTEMS OUTSIDE AFRICA

5.1 The European system
- 5.1.1 Civil and political rights under the European Convention
- 5.1.2 Socio-economic rights
- 5.1.3 The Organisation for Security and Co-operation in Europe
- 5.1.4 European Community law and human rights
- 5.1.5 Relevance for Africa

5.2 The Inter-American system
- 5.2.1 A brief history
- 5.2.2 The Commission and the realisation of human rights
- 5.2.3 The Court and the realisation of human rights
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- 5.2.5 Relevance for Africa

5.3 The emerging Asian system

5.4 The Arab and Islamic world
- 5.4.1 The Arab League
- 5.4.2 The Organisation of the Islamic Conference

Comparison is made here with other regional and sub-regional systems. Some of them already provide for extensive realisation of rights. This is the case particularly with the European and Inter-American systems, to which most of this chapter is devoted. In other regions, such as Asia and the Middle East, regional human rights sytems have not been developed. What follows here is not a detailed analysis of each of these systems. Rather, the purpose is to focus on the extent to which rights have been realised in the supra-national sphere under the auspices of inter-governmental organisations, and methods used and mechanisms created to ensure this. Attempts at erecting new systems will also be under consideration. The relevance of these experiences for the African human rights system will be highlighted, or is implicit.

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5.1 The European system

Discussions about the European human rights system usually centre around the European Convention for the Protection of Human Rights and Freedoms ("the European Convention").[1] An abundance of literature already exists about the Convention and its two main bodies, the European Commission of Human Rights ("European Commission") and the European Court of Human Rights ("the Court").[2] But this convention and these institutions are by no means the only institutional mechanisms created to ensure the realisation of human rights in Europe.[3] In fact, they are, like the CCPR, directed only at **civil and political rights**.[4] So, too, is the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment ("the ECPT"), and its implementing body, the European Committee for the Prevention of Torture. This first "line of defence" will be discussed briefly.

A second group of rights, directed at the **socio-economic** position in European states, developed later. A different regime was established for their monitoring under the European Social Charter. The role and impact of this level of human rights guarantees will also be explained.

The dependence of human rights on political stability and peace between states has been accepted as the point of departure for a system **linking human rights and security** in Europe, under the Organisation for Security and Co-operation in Europe ("OSCE"). This mechanism forms a third trench in the defence of human rights.

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1 Signed on 4 November 1950, entered into force on 3 September 1953. The text is reprinted in numerous sources, see eg Brownlie (1988) at 320. See also the eleven Protocols adopted thereto.

2 See eg Van Dijk and Van Hoof (1990), Macdonald *et al* (eds) (1993), Harris *et al* (1995) and Kempees (1996).

3 The discussion here is not exhaustive of all human rights conventions and bodies in Europe. For example, the Convention on Human Rights and Bioethics is not discussed here. For a full text, see (1997) 39 *ILM* at 817.

4 With the possible exception of the right to education (usually considered a socio-economic right) in Protocol no 1. As the duty on states parties in terms of the Protocol is not to promote or fulfil the right, but to respect and protect it, it also fits in the category of civil and political rights. The relevant part of the article (art 2) reads as follows: "No person shall be denied the right to education".

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Finally, closer **economic co-operation** has increased the role and influence of European Community law in all European member states. The Court of Justice of the European Communities is playing an ever-increasing role in the construction of a just Europe. Matters pertaining to human rights concerns cannot be divorced totally from "economic" issues. By incorporating human rights concerns into its jurisprudence, the European Court of Justice has gradually created a fourth line of defence of human rights in Europe.

5.1.1 Civil and political rights under the European Convention

5.1.1.1 Deciding on ways of realising rights in Europe

The aftermath of the Second World War saw inroads into state sovereignty in Europe, as a number of regional organisations were formed. An effort was immediately launched to adopt a global human rights instrument under UN auspices. In the light of the difficulties experienced to reach agreement on the text, it was decided to adopt a "hortatory declaration" as a starting point, to be followed by a legally binding document.[5] Soon after the adoption of the Universal Declaration in 1948 it became clear that reaching agreement on a legally binding embodiment of the Declaration would be a protracted process. This process was accelarated at the regional level and culminated in the adoption of the European Convention as the "first steps for the collective enforcement of certain of the rights stated in the Universal Declaration".[6]

Not only the atrocities of the recent war, but also the impending threat of communism, underscored the value of democracy and the protection of human rights to European states and served as a basis for co-operation. The most important of these bodies was the Council of Europe. Its Statute was signed on 5 May 1949, highlighting the recognition of human rights both as a declared purpose and

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5 See Buergenthal (1995) at 29.

6 Preamble to the European Convention.

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as a precondition for membership.[7] At the first session of the Council of Europe (August 1949), Teitgen of France proposed the establishment of an organisation to ensure human rights protection collectively for all Europe.[8] Within a relatively short time, the European Convention was finalised and signed (on 4 November 1950), introducing two revolutionary features which flew in the face of traditional concepts of state sovereignty: **individual complaints** and **binding court decisions**. The willingness of states to transfer sovereignty (albeit to a limited extent) accounted for the swiftness with which agreement was reached on principle and detail.

This willingness was by no means universal. Several delegations attempted to obstruct various aspects of the proposed system. Underlying tensions are apparent from a perusal of the deliberations during the negotiating process that led to the adoption of the European Convention, especially in relation to an appropriate enforcement mechanism. From a current African perspective, it is instructive to investigate the reasons forwarded against the establishment of a court, particularly allowing for individual petition to the Commission (and to the Court). Some of the arguments and counter-arguments were the following:

i *Redundancy*[9]

The institution of a court is not a priority in most of the European countries, it was argued, seeing that in most of them "freedom has been, traditionally, better defended than in any other part of the world".[10] Another argument on redundancy was that a Commission would serve as a sufficient guarantee, rendering a court "superfluous".[11] Teitgen answered this argument by drawing attention to the fact that a report by the Commission is not the same as a legally binding court decision.[12]

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7 Art 3 of the Statute of the Council of Europe reads as follows: "Every Member of the Council of Europe must accept the principles of the rule of law and the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms ...".

8 See in general Council of Europe (1979) vols I to VIII. References to deliberations are to this source.

9 See ch 8.1.11 on the argument that establishing an African Court on Human and Peoples' Rights will cause unnecessary and costly duplication.

10 Fayat (Belgium) in vol I at 90.

11 Rolin (Belgium) in vol II at 154.

12 Vol II at 172.

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Only a court will illustrate the resolve of European countries to respect fundamental rights, he continued, "not by simple Recommendations appearing in the newspapers, but by legal verdicts which shall have the authority of a Court in the conscience of public opinion".[13]

Another argument based on considerations of redundancy was that there already was a court in place, the PCIJ.[14] Teitgen answered this contention by showing that it would be inappropriate to rely on an international organ to adjudicate on issues arising in Europe. The fact that the PICJ was made up of all nationalities also meant that Europeans would have to submit disputes to judges "belonging to countries whose political structures, ideals and morality are different from those which constitute our common heritage".[15] The important development of a common European system was regarded by some to be undermined by recourse to a court outside Europe. A representative from Italy, Dominedo, formulated this concern: "Appeal to a Court whose competence is extra-European does not contribute to the progressive formation of European unity."[16]

ii Anti-democratic nature

Basing his view on experience in the United States, Ungoed-Thomas described individual petition as "the most anti-democratic" procedure that could possibly be conceived.[17]

iii State sovereignty violated[18]

Akan (Turkey) saw no need to allow an individual to bring a case against his own state before a supra-national court: "Before a united Europe can be achieved, it will be very difficult to obtain from national Parliaments, in spite of their concern for the protection of human rights, their

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13 Vol II at 180.

14 See statement by Rolin (Belgium) vol II at 148. In fact, the ICJ replaced the PCIJ when the UN Charter was adopted in 1945 (see art 92 of the UN Charter).

15 Teitgen (France) in vol I at 288.

16 Vol II at 158.

17 Vol II at 168.

18 Refer to ch 8.1.1 on "state sovereignty as main obstacle" to acceptance by states of the proposed African Court on Human and Peoples' Rights.

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approval on this point, because these Parliaments and their national courts would be subjected to the control of a supra-national body".[19] A representative of the United Kingdom (Maxwell-Fyfe) responded that the establishment of a court would mean some voluntary surrender of sovereignty: "the sovereign right to suppress liberty and democratic institutions".[20] Like all treaties, he added, a surrender of some sovereignty is implied. Creating a court would be a "new departure", and an "international assurance of what ordinary people want".[21]

iv Public embarrassment[22]

Rolin (Belgium) motivated his view that individual petition to a court would be unacceptable to states, by referring to the potential danger of a finding of a "particularly degrading character" against a state.[23] He also warned against the "serious political implications" of such a system.[24] A human rights system not backed by effective enforcement would be hypocrisy, retorted Bibault (France). Without a minimum means of execution, a proclaimed European law of human rights "would be vain and the legislator useless".[25] A system of human rights protection "without a Court is something worse than the absence of law".[26]

v Opposition to world order

The post-war era was one of optimism and a belief in a new world order based on universal values and peace. Criticism was expressed that a regional system would gravitate into the opposite direction. Although the majority of the delegates were of the opinion that the European project

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19 See vol II at 164.

20 Vol I at 122.

21 *Ibid.*

22 This argument is closely linked to the previous one, as it is also directed at placing domestic concerns beyond international scrutiny.

23 Vol II at 154.

24 *Ibid.*

25 Vol II at 162.

26 *Ibid.*

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aimed at creating a European legal order, they did not consider the European system of law as presenting a threat to the evolution of an international system.[27]

vi Political manipulation[28]

A fear expressed particularly in relation to individual complaints directed to the Commission (and, then, to the Court) was that individuals may be motivated by political goals. Ungoed-Thomas made the following intervention: "It will be open to politically inspired application. This is the kind of opportunity which invites action by those on the extreme right and those on the extreme left, with whom none of us here have sympathy".[29]

vii Fear of being overrun by applications

Another argument raised against individual petition was that the Commission (and Court) would be overrun by "shoals of applications".[30]

From the discussion that follows, it will transpire to what extent these concerns have indeed become realities in the development of the European human rights system.

5.1.1.2 A gradual process

The present system of human rights protection under the Council of Europe is generally recognised as the most comprehensive and most frequently utilised of the regional systems, if not of all supra-national human rights systems. But the present system was not put into place overnight. A gradual evolution saw the development of the present features of the system, which are as follows:

- Two main institutions, the Commission and the Court of Human Rights, are functioning.

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27 Vol II at 172 (*per* Teitgen).

28 See, in this regard, the comments of some OAU member states on the "exceptional jurisdiction" provided for the Cape Town proposal for an African Court on Human Rights (ch 7.1.8).

29 Vol II at 188.

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- Accession to the European Convention is a political precondition for membership of the Council of Europe.
- The Court has jurisdiction in respect of all contentious disputes.
- Individuals may complain to the Commission about the alleged violation of their rights.
- Aggrieved individuals may participate in the proceedings before both the Commission and the Court.
- In most instances, an aggrieved individual may decide to refer a case to the Court.

These features overlap along the following historical route:

i Institutional evolution

The European Convention was adopted in 1950. Ten ratifications were required for its entry into force.[31] This condition was met in three years, and the Convention turned into force in 1953. The Commission started functioning soon thereafter, but the Court was only established in 1959. The delay was due mainly to the fact that the Convention made the acceptance of the Court's jurisdiction optional.[32] In terms of the Convention, the Court would only be established once eight states have accepted its jurisdiction.[33] In 1960, the Commission referred the first case for the Court's consideration, leading to its first judgment on 1 July 1961, more than ten years after the Convention was adopted.[34] Another case was filed in the same year.[35] Thereafter, five years lapsed

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30 Vol II at 188.

31 Art 66(2) of the Convention. See eg Van Dijk and Van Hoof (1990) at 2 (for a brief history).

32 See art 46 of the Convention.

33 Art 56 of the Convention.

34 The *Lawless* case, Series A 3, judgment of 1 July 1961 on the merits. See also Series A 1 and A 2, dealing with preliminary objections and procedure.

35 The *De Becker* case, Series A 4, judgment of 27 March 1962.

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before the next case reached the Court.[36] Judgment on the merits of that case was delivered only in 1968.[37]

The initial trickle of cases stands in stark contrast to the constant stream that has been gathering in volume since the early 1980s.[38] The number of annual applications to the Commission exceeded 500 for the first time in 1970, and passed the 1 000 mark in 1988. By 1994, the number of applications received yearly stood at 2944. If the Court's work from 1959 to 1994 is divided into two periods, a similar contrast is noted. In the first period of eighteen years (1959 - 1976), eighteen cases were referred to the Court, and 26 judgments (on preliminary issues, on the merits and on compensation) were delivered. The second period of eighteen years (1977 - 1994) saw 488 cases being referred to the Court, with 472 judgments delivered.[39]

ii Ratification of Convention

Ratification of the European Convention is only open to members of the Council of Europe.[40] From its foundation, the Council set out to ensure that democracy and human rights are strengthened in Europe, so as to prevent the recurrence of atrocities such as those committed in Nazi Germany. Acceptance of the Council principles of "the rule of law and the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms" is therefore a political prerequisite for ratification of the Convention.[41] There was, traditionally, no compulsion on members of the Council to ratify or accede to the Convention. When states from the former "Eastern bloc" started joining the Council of Europe in the 1990s, the practice had already been established that Council members accede to the Convention when becoming members of the Council. This has been incorporated as a political, rather than a legal prerequisite. By 31 December 1996 40 states had

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36 Buergenthal (1995) at 135.

37 *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium,* Series A 6, judgment of 23 July 1968.

38 Based on an analysis of data in *Council of Europe Survey* (1994B) at 20 - 21.

39 Council of Europe (1995) *Organisation and Working of the Court* at 6.

40 Art 66(1) of the European Convention.

41 Art 3 of the Statute of the Council of Europe.

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become members of the Council of Europe.[42] Of these states, 34 had ratified the European Convention.[43] The other six Council members had by then already signed the Convention.

iii Compulsory jurisdiction of Court

The acceptance of the Court's jurisdiction was made optional.[37] This was one of the compromises arising from the drafting process. It took from 1953 to 1959 before eight states had accepted the Court's jurisdiction.[44] All the states parties to the Convention in 1995 have accepted the Court's compulsory jurisdiction.[45] In respect of states that ratified or acceded to the Convention in the last decade, almost all accepted both the Court's jurisdiction and the individual complaints procedure at ratification or accession.[46] By 31 December 1996 all 34 states parties to the Convention have accepted the compulsory jurisdiction of the Court.[47]

iv Acceptance of individual complaints procedure

The right to individual petition does not follow automatically from a state's ratification of the Convention, but requires a declaration by a state to that effect.[48] The first state to do so was Sweden, on 4 February 1952,[49] some two years after the Convention had been adopted. In the case of other major European powers, it took much longer. The UK only accepted the right to individual petition in 1966, and France as late as 1981.[50] Today it is accepted as a political obligation that all new member states should accept the right of individuals to bring complaints against them. By 31 December 1996 all 34 states parties to the Convention have made

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42 See (1997) 22 *EurLRev* 82.

43 (1997) 22 *EurLRev* 82 at 83 – 84. Five other states have only signed the Convention. They are Croatia, Latvia, Moldova, Russia and Ukraine. The sixth state, Macedonia, ratified the Convention in April 1997.

44 See the list of declarations in (1996) 17 *HRLJ* 234.

45 See Harris *et al* (1995) at 653.

46 See (1996) 17 *HRLJ* 234.

47 See (1997) 22 European Law Review 82 at 83 – 84. Macedonia ratified the Convention on 10 April 1997, but did not immediately accept the jurisdiction of the Court.

48 Art 25(1) of the Convention.

49 See table in (1996) 17 *HRLJ* 234.

50 *Ibid.*

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declarations accepting the right of individuals to claim that their rights under the Convention have been violated.[51]

v Competence of individual complainant to seize the Court

Although the idea of empowering individuals to seize the European Court of Human Rights has been raised when the Convention was drafted, it was not accepted by member states. Only the Commission or a state party was allowed to seize the Court.[52] In the drafters' view, the interests of individuals would be sufficiently defended by either the Commission, or by states (by directing complaints against other states).[53] Protocol no 9, adopted in 1990, provides individual complainants with the right to seize the Court. These provisions only entered into force after the Protocol was ratified by ten states. This happened on 1 October 1994.[54]

Under Protocol no 9 an individual has an unrestricted right to refer a case to the Court. But the Court was protected against a possible flood of individual references by the creation of a "screening" system by a three-member panel of the Court.[55] The panel may dispose of the matter only by unanimous vote.[56] If they do not unanimously decide that the case should be heard, the Court will then not consider the matter. They will reject the request for the Court's consideration if it "does not raise a serious question affecting the interpretation or application of the Convention".[57] The extension of the list of those who may seize the Court is another illustration of the greater emphasis placed on the role of the individual in international (human rights) law in recent times.[58] It also illustrates the tendency to incorporate the substantive provisions relating to procedural

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51 (1997) 22 *EurLRev* 82 at 83 – 84. Macedonia has not made such a declaration when it ratified the Convention. For a web site with information on the status of ratification of European human rights instruments, see http://www.coe.fr/tablconv/.

52 Art 48 of the original Convention.

53 See Council of Europe (1990) at 5.

54 See table of ratification in (1996) 17 *HRLJ* 234 - 235.

55 See art 48(2) of the Convention, as amended.

56 Interestingly, the panel must include the judge elected in respect of the country from which the complainant comes.

57 Art 48(2) of the Convention, as amended.

58 Sometimes referred to as the "humanisation of international law".

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rights, which international tribunals apply, into the procedure of these tribunals. Under the Convention, an individual has the right of access to his or her local courts; surely this right must also apply to the Court itself.[59]

vi *Individual complainant's* locus standi *and participation*

Initially, the Convention did not provide for the participation of an individual complainant in proceedings before the Court. The individual was, for obvious reasons, involved in the process of establishing facts by the Commission. In its first judgment, the Court had to address the extent of an individual's participation in proceedings before the Court. The Court acknowledged that it is in the interests of justice to take the views of the applicant into consideration.[60] The Court also observed that it could hear individuals in terms of its own Rules.[61] In 1970, the Court held that the lawyers of the petitioner could be included in the Commission's legal team.[62] This process culminated in the Court adopting amended rules in 1983, which authorised "individuals to appear in their own right and to be separately represented in proceedings before the Court".[63] This still applies in respect of individuals from states parties that have not ratified Protocol no 9.

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59 "Equality of arms", and the right of both parties to participate in proceedings concerning them, are rights guaranteed under the Convention, but were negated in front of the Court prior to the reforms brought about by Protocol no 9.

60 See the *Lawless* case, Series A 1, judgment of 14 November 1960 (at 15: "the whole of the proceedings in the Court ... are upon issues which concern the Applicant ... accordingly, it is in the interests of the proper administration of justice that the Court should have knowledge of, and, if need be, take into consideration, the Applicant's point of view...").

61 In terms of Rule 40 (as amended), the Court may hear a witness or expert or anyone else whose evidence seems "likely to assist in the carrying out" of the Court's task.

62 See the *De Wilde, Ooms and Versyp* case, Series A 12, judgment of 18 November 1970.

63 Buergenthal (1995) at 138.

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5.1.1.3 The Commission and the realisation of rights

The European Convention creates a Commission of Human Rights. It consists of a number of full-time commissioners equal to the number of states parties to the Convention.[64] Its seat is at Strasbourg, France. It was created in 1954, but started operating only in July 1955, after the requisite six states had recognised the right of individual petition to the Commission.[65]

In contrast to other human rights commissions and other non-judicial human rights bodies, the European Commission only has a protective mandate. Promotion of human rights and examination of state reports, functions which are for example central to the African Commission, are omitted from this Commission's mandate. On-site investigations and the drafting of country reports, important functions of the Inter-American Commission, also do not feature on the agenda of its European counterpart.

In principle, the Commission is a quasi-judicial screening mechanism in relation to individual and inter-state petitions. Most complaints have been directed by individuals.[66] From 1955 to 1995, over 25 000 applications have been registered.[67] The Commission receives some 6 000 applications annually, of which only about 2 000 are registered.[68]

In considering individual petitions, the Commission goes through the following steps:

- Its first, and most frequently exercised function, is consideration of the admissibility of a complaint. For this purpose, the Commission divides itself into committees of at least three members. Committees may declare petitions inadmissible, but only by a unanimous decision.

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64 Art 20 of the Convention.

65 In terms of art 25 of the Convention. See also Robertson and Merrils (1992) at 110.

66 See Council of Europe (1995b) at 7.

67 *Ibid.*

68 See Schermers and Blokker (1995) at 425.

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Chambers of seven members may also decide on admissibility. Only about five percent of all registered cases are declared admissible.[69]

- After a complaint has been declared admissible, the Commission establishes the facts.
- During this process of fact-finding, the Commission must involve itself in an effort to secure a friendly settlement between the parties. It is estimated that about ten percent of cases submitted for friendly settlement succeed on that basis.[70]
- In those cases not settled amicably, the Commission draws up a report. A "report" is a finding on the question whether a Convention right has been violated or not. The finding is based on the facts found by the Commission. This decision is usually given by a seven-member chamber of the Commission. This route is followed whenever the case can be dealt with on the basis of "established case-law" or when it raises no "serious question affecting the interpretation or application of the Convention". When this route cannot be followed, the plenary (full) Commission decides whether a right has been violated or not.
- The report is then transmitted to the Council of Ministers.[71]
- Within three months of sending the report to the Council, the parties to the case, as well as the Commission, may decide to refer the matter to the European Court for its final decision. As far as the Commission is concerned, this decision is taken by a plenary session.

In considering inter-state petitions, the procedure differs in the following respects: An inter-state petition is assigned to a rapporteur, who prepares a report. From the rapporteur, the case goes directly to the plenary Commission, which has exclusive jurisdiction in such matters. By 1996, only eleven inter-state applications had been lodged with the Commission.[72] The most far-reaching was that submitted by a number of member states against Greece in 1967 and 1970, after the

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69 Approximately 90 percent of all registered cases are rejected as inadmissible (see Council of Europe (1995b) at 7).

70 Krüger (1990) *NTVM* 127.

71 On the role of the Council of Ministers, see par 5.1.1.5 below.

72 For a list, see Steiner and Alston (1996) at 594 - 595.

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"Greek Colonels" had seized power and suspended democracy.[73] The Commission undertook a fact-finding mission and found that the Convention had been violated. Greece denounced the Council of Europe and the Convention, but became a member again later and ratified the Convention again.[74]

5.1.1.4 The Court and the realisation of rights

The European Court consists of a number of judges equal to the number of states parties to the Council of Europe.[75] These judges serve on a full-time basis. The seat of the Court is in Strasbourg, in the same building as the Commission.

The Court has contentious and advisory jurisdiction. The latter was only introduced in 1970, when Protocol no 2 entered into force. It is of a very limited nature and has rarely been invoked.

Within three months of the date on which the Commission submitted its report to the Committee of Ministers, any of the parties to the dispute and the Commission may refer the case to the Court. As far as the Court's consideration of these cases is concerned, a distinction should be drawn between cases referred by the Commission and a state party (on the one hand), and cases referred by an individual, an NGO or group of individuals (on the other hand).

Cases referred by states parties or the Commission are considered by a panel of nine judges. In contrast, cases brought by individuals have to be screened first. A three-member panel may, by unanimous vote, decide that the Court need not consider the matter. Such a decision may be based on a finding that the case "does not raise serious questions affecting the interpretation and application of the Convention" or that there are no other reasons that "warrant consideration by the

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73 The Commission also undertook an on-site investigation to establish the facts (see Robertson and Merrils (1992) at 112).

74 On this history, see Robertson and Merrils (1993) at 278.

75 Art 38 of the Convention.

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Court".[76] If the panel makes such a finding, the Committee of Ministers decides whether a violation has occurred.

The President (or Vice-President) of the Court sits as *ex officio* member of the Court. The remaining members are drawn by lot. Up to 1993, the nine-member chamber relinquished jurisdiction in favour of a Plenary Court (consisting of all the judges of the Court) when serious questions affecting the interpretation of the Convention arose.[77] After an 1993 amendment, the Rules of Court now provide for the composition of a Grand Chamber of nineteen members in such matters.[78] This change was necessitated by the increase in the number of participating states (and judges). In exceptional cases, the Grand Chamber in turn relinquishes its jurisdiction to the Plenary Court. This is the case when "the issues raised are particularly serious or involve a significant change of existing case-law".[79]

As for the substantive matters considered by the Court, the main issues dealt with relate to articles 5 and 6, and arose in the context of a "fair trial".[80] Other aspects typically dealt with include the right to a private life and freedom of expression.[81]

5.1.1.5 The role of the Committee of Ministers

The Committee of Ministers of the Council of Europe consists of all the Foreign Affairs Ministers of the member states of the Council. It is the Council's policy-making and executive organ. As such, it is involved in various aspects of the life of the Council, which include human rights. However, the Committee remains a political body, comprised of government representatives. Almost by definition, decisions taken are motivated by their political interests, not their independent

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76 Art 48 of the Convention, as amended by Protocol no 9.

77 See eg Harris *et al* (1995) at 655.

78 Amended Rule of Court 51.

79 Rule of the European Court 51(5).

80 See the overview of case-law by Kempees (1996), covering pages 31-503 of the 839 pages on substantive provisions.

81 See again, Kempees (1996) at eg 523 - 538, 647 - 664.

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human rights expertise. The Committee of Ministers of the Council of Europe plays an important role in the European human rights system. Its functions may be classified as political, judicial and supervisory.

i Political function

Its political function derives from its power to control the budget of all the Council bodies,[82] to determine the emoluments paid to the judges of the Court[83] and to elect the members of the Commission.[84]

ii Judicial function

The Committee's judicial function relates to both inter-state and individual complaints under the Convention. Inter-state applications are investigated by the Commission and may be referred to the Court for its decision. If the state complained against had not accepted the jurisdiction of the Court, the Committee decides the question of a violation of the Convention on the basis of the report drafted by the Commission. In the case of individual applications, the Committee has a complementary role. When neither the Commission nor a state party has referred a case to the Court, it is the Committee that has to decide whether the Convention has been violated.[85]

Granting a judicial functions to a political body was one of the compromises reached when the Convention was adopted. The potential conflict between political considerations and human rights concerns has largely been avoided as the Committee has "in almost all cases"[86] followed the findings in the Commission report.

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82 Art 3 of the Statute of the Council of Europe.

83 Art 42 of the Convention.

84 Art 21 of the Convention.

85 Art 32 of the Convention.

86 Gomien *et al* (1996) at 36.

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iii Supervisory function

The Committee's executing function is that of supervising the execution of the Court's judgments.[87] The judgment may relate to the Court's order of "just compensation"[88] or to "general measures that involve changes of practice or of legislation to avoid repetition of similar situations of violations".[89] This function comes into play once the Court (or the Committee itself) found a violation, and also when the parties agreed to a friendly settlement before the Court. In the latter instance, the Committee oversees any promise made by a party.

The method of ensuring compliance is based on the fear of governments to be exposed publicly and repeatedly as violators of human rights. The details are as follows: The violator-state must provide the Committee with written confirmation of payment or of any other steps it was required to take. If the state does not provide this assurance (either because it has not yet paid or because it can, for some other reason, not inform the Committee of the measures taken in execution) the case will remain on the Committee's agenda. This implies that at least twice a year a representative of that state "will be required in front of the Committee to provide information, explanations or justification with regard to the state of execution".[90]

5.1.1.6 Institutional reforms

The major reform which the European system is currently undergoing envisages the phasing out of the Commission.

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87 Art 54 of the Convention.

88 In terms of art 50 of the Convention.

89 Ravaud in Macdonald *et al* (1993) at 654.

90 Ravaud in Macdonald *et al* (1993) at 654.

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i Historical process

As early as 1982, the Council's Committee of Experts discussed the possible merger of the European Commission and Court of Human Rights.[91] The Swiss government introduced the idea at the political level in 1985 (during the Ministerial Conference on Human Rights).[92] The Parliamentary Assembly, in a 1988 recommendation on the improvement of the procedures of the European Convention, recommended that "the Committee of Ministers consider the possibility of merging the European Court and Commission of Human Rights, while weighing carefully the arguments for and against".[93] When, at the beginning of 1992, it appeared that an impasse was reached, the Committee on Legal Affairs and Human Rights decided to hold a hearing on the matter. This took place on 15 June 1992 and led to the Parliamentary Assembly adopting a resolution on "Reform of the Control Mechanisms of the European Convention".[94] Further deliberations resulted in Protocol no 11 to the European Convention being signed on 11 May 1994.[95]

ii Reasons for reform

- Overburdening workload caused backlogs and delays

The need for reform arose primarily from the success of the Council and the Convention. Soon after the "democratic revolutions" in Eastern and Central Europe took place, the new states approached the Council for membership. At the end of 1989, the membership of the Council numbered 23; by the end of 1996 it had grown to 39.[96] As explained elsewhere,[97] accession to the European Convention and acceptance of the optional clauses had at that stage become a political

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91 Meyer-Ladewig in Macdonald *et al* (eds) (1993) 909 at 917.

92 *Ibid.*

93 Recommendation 1087 (1988).

94 Recommendation 1194 (1992).

95 See, generally on Protocol no 11, Schermers (1995) 20 *EurLRev* 559.

96 In chronological order, the following states joined: Estonia, Lithuania, Slovenia, Czech Republic, Slovakia, Romania, Andorra, Latvia, Albania, Moldowa, Macedonia, Ukraine and Russia (see (1996) 17 *HRLJ* 234 - 235).

97 See ch 5.1.1.2 above.

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precondition for membership of the Council. Many of the new states have fulfilled the conditions by ratifying the Convention, and became members of the Council. This meant that a few million more people could potentially lodge complaints with the European Commission.

Even without such a surge of new states becoming party to the Convention, the system had already become overburdened by the number of complaints directed against states parties. A few statistics will provide proof: In 1955, 138 applications to the Commission were registered. In the following two years, the number was even lower (104 applications in 1956 and 101 applications in 1957).[98] The contrast with the number of applications registered in the early 1990s is overwhelming:[99]

- 1990 : 1657 applications
- 1991 : 1648 applications
- 1992 : 1861 applications
- 1993 : 2037 applications

Explanations for this dramatic increase are the acceptance by more states of the Convention and its optional clauses, the increased awareness of the general public through media exposure (creating a domino-effect of similar cases),[100] and the greater involvement of lawyers in the system.[101] The Convention institutions could not adequately handle the increase in workload. This resulted in an unacceptable backlog of and delay in disposing of cases. The backlog at the Commission is

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98 (1993) *European Commission of Human Rights: Survey of Statistics* at 16.

99 (1993) *European Commission of Human Rights: Survey of Statistics* at 17.

100 See eg the cases decided against Italy in 1991 (Series A 195, 196 and 197, judgments of 19 February 1991). From 1961 to 1990, Italy was involved in only nine cases before the Court. Suddenly, in 1991, 16 cases against Italy were decided. Fourteen of these cases dealt with delays in trial proceedings. This stream of complaints may be traced back to two previous judgments of the Court which involved claims based on delays in criminal proceedings (*Corigliano v Italy*, Series A 57, judgment of 10 December 1982 and *Capuano, Baggetha and Milasi v Italy*, Series A 119, judgment of 25 June 1987). The Court's decisions in the 1991 applications were delivered on the same day, and all amounted to a finding of violation. The impact of this in any domestic system could not have been insignificant.

101 According to Commission Statistics ((1993) *European Commission of Human Rights: Survey of Statistics* at 16-17) the percentage of applications introduced through lawyers remained below 20% until 1969. This percentage increased steadily, exceeding 50% for the first time in 1987.

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illustrated by the following:[102] By the end of January 1994, the number of cases pending a decision by the Commission stood at 2 672. Of these, more than 1 487 had not yet been looked at by the Commission at all. The number of cases pending before the Court also continued to rise, reaching 97 at the end of May 1991.[103] On average, it took more than five years for the Commission or Court to reach a final decision.[104] If these problems were left unresolved, they could easily cause a loss of confidence and trust in the system. The Convention system itself is taking almost as long to resolve cases as it allows for in domestic systems.[105]

- Unnecessary duplication

This concern is related to the first, and is a product of the two-tier system arrived at as a compromise during the drafting of the Convention. In the light of the pressing workload, the duplication of functions performed by both the Commission and the Court has been scrutinised critically. Under the two-stage procedure, the Commission decides on admissibility of complaints and on the merits of each case declared admissible. The Commission's report to the Committee of Ministers must "state its opinion as to whether the facts found disclose a breach by the State concerned".[106] This decision is "taken again" by the Court. The Court may also reconsider the issue of admissibility. The duplication "concerns the written pleadings, the hearings, and the deliberations in camera".[107]

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102 From Council of Europe (1994b) *Protocol no 11 to the European Convention on Human Rights and Explanatory Report* at 19.

103 Meyer-Ladewig in Macdonald *et al* (eds) (1993) at 911.

104 Meyer-Ladewig in Macdonald *et al* (eds) (1993) at 193. See also Sudre *et al* (1993) 5 *RUDH* at 4, 219, 380: In 1992 the average time it took for a case to be decided in Strasbourg was 5 years and 6 months (4 years and 4 months at the Commission phase; 13 months at the Court phase). In 1993 the average period increased to 5 years and 8 months.

105 See eg *Maj v Italy*, Series A 196, judgment of 19 February 1991 (total delay found was more than five years and eight months. Case lodged with Commission on 18 July 1987, meaning that the case took three and a half years to be resolved by the Convention system).

106 Art 31(1) of the Convention.

107 (1992) *Council of Europe: Explanatory Memorandum to Recommendation 1194* at 10.

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- Political nature of decisions by Committee of Ministers

The role of a political organ, the Committee of Ministers, in the process of deciding on human rights violations is also an inheritance as part of the drafters' compromise. Because the jurisdiction of the Court was made optional (at the insistence of some states), the report of a quasi-judicial body, the Commission, would have been the only "finding" in matters not referred to the Court. This was unacceptable. As a result, it was agreed that the Committee of Ministers should be empowered to play the role of the Court in those cases. This provided the Committee with the competence to give final and binding decisions in some cases. Criticism has been directed at the inclusion of the Committee in the decision-making process. It does not decide on legal grounds but by considerations of political expediency, potentially undermining the impartiality and neutrality of the process.

- More transparency

The Commission phase is shrouded in secrecy. The system is also rather complicated, making it difficult to understand and rendering it inaccessible to the ordinary person.

- Saving costs

Procedural simplification and streamlining could have the effect of lower litigation costs to the individual complainant, and also to the governments keeping the system in place.

iii Proposals for reform

Three main proposals for reform, each aimed at correcting the defects of the present system, emerged during deliberations:[108]

- Some interested parties, especially serving members of the European Court, were of the opinion that a radical improvement of the present working conditions would redress the

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108 See Council of Europe (1994b) at 15 - 20.

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problem of an overburdened and beleaguered system. This could amount to better technical support, and to converting semi-full-time positions into full-time positions.[109]

- The Swedish and Dutch governments came up with proposals that were broadly similar to one another. In terms thereof, a two-tier judicial system would be created. Decisions taken by the existing Commission would be transformed into legally binding decisions. The Commission-become-Court will serve as court of first instance, to be supplemented by a second judicial structure. This second court would be a final court of appeal. To ensure that it does not become clogged with cases, this Court would have to grant leave to appeal against decisions of the court of first instance.

- Others supported the merging of the Commission and Court into one, new judicial institution. This would mean that a single court becomes responsible for both admissibility decisions and final decisions on the merits, and that the Commission as a separate institution disappears.

iv *Reform introduced by Protocol no 11*

The Council of Europe adopted the third of the three proposals discussed above, in the form of Protocol no 11. When Protocol no 11 will have been ratified by all the states parties to the European Convention, the institutional framework of the Convention will be changed dramatically.[110] The present two-tier process will make place for a single process before a single judicial institution, the European Court of Human Rights.[111] This reform will discard with the quasi-judicial roles of the European Commission and the Committee of Ministers.[112] The Court will consist of full-time members, equal in number to the number of parties to the European Convention.[113]

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109 Compare the argument in ch 8.2.9 below that the existing African Commission should be strengthened, rather than creating a new institution (such as an African Court on Human and Peoples' Rights).

110 See art 34 of the Protocol.

111 It can also be seen as a "merger" of the Commission and Court. See eg Council of Europe (1994b) at 17.

112 The Committee of Ministers retains its supervisory role, though, in terms of art 46(2) of the Convention, as it will be amended.

113 See art 2 of the Protocol.

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An individual or state may direct petitions directly to the Court. As a rule, cases will be heard by a Chamber that consists of seven judges.[114] The Chamber will ordinarily consider the admissibility and merits of the violation separately.[115] A committee of three judges may dispose of the matter, if they reach a unanimous finding of inadmissibility.[116] The Court never sits in plenary session, but provision is made for a Grand Chamber of seventeen judges. The Grand Chamber enters into the picture when a Chamber decides to relinquish its jurisdiction. It serves as court of final appeal. A Chamber may at any time relinquish its jurisdiction on two grounds:[117]

- A serious question about the interpretation and application of the Convention has arisen.
- There is a possibility that the Chamber may deviate from a previous judgment of the Court.

In such an event, the Grand Chamber will pronounce on the matter. The Grand Chamber will also hear appeals against decisions by Chambers. Appeals are not lodged directly with the Grand Chamber. Provision is made for a "leave to appeal" procedure: A panel of five judges of the Grand Chamber will decide if a case should be referred to the Grand Chamber. Two grounds would justify such higher consideration:[118]

- If the request raises a serious question about the interpretation and application of the Charter.
- If the request involves a serious issue of general importance.

Although the Court is a judicial body, it will retain the Commission's function to make itself available with a view to securing a friendly settlement "on the basis of respect for human rights".[119] This prospective function is dealt with in some detail, and provides for the Court to undertake investigation, "for the effective conduct of which the States concerned shall furnish all necessary

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114 See arts 27 and 29 of Convention, as it will be amended.

115 Art 29(3) of the Convention, as amended by Protocol no 11.

116 See art 28 of the Convention, as it will be amended by Protocol no 11. This finding is not appealable.

117 See art 30 of the Convention, as it will read after Protocol no 11 has turned into force.

118 See art 43(2) of the Convention, as it will be amended.

119 Art 38(1) of the future version of the Convention.

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facilities".[120] It remains to be seen whether a single (judicial) institution will be able to perform both judicial and conciliatory functions.

The coming into force of the Protocol will make the reforms brought about by Protocol no 9 irrelevant.[121] Under Protocol no 11, there is no restriction on the parties who are allowed to approach or seize the Court. By the end of 1996, eighteen of the 39 members of the Council of Europe have ratified Protocol 11. Absent from the list of ratifying states are not only some of the new members (Croatia, Latvia, Poland, Moldova, Russia and Ukraine), but also some of the founding members (Belgium and Italy).[122]

5.1.1.7 The Convention against Torture

The European instrument against torture developed directly as a result of frustrations with shortcomings of the UN instrument. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") was adopted under UN auspices in 1984.[123] It entered into force in 1987, after twenty UN member states had ratified it.[124] International supervision of this convention takes the traditional form of compulsory periodic state reporting and an optional individual complaints procedure.[125] It goes a step further, though, by providing for a "confidential inquiry" when the Committee against Torture receives "well-founded indications that torture is being systematically practised" in a ratifying state.[126] This inquiry may include a visit to the state, but only with the consent of the state concerned.[127] Confidentiality will surround the entire process, unless the Committee includes "a summary account" thereof in its annual report.[128]

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120 As detailed in art 38 of the Convention, as it will read after amendment by Protocol no 11.

121 See art 2(8) of Protocol no 11.

122 See table (1997) 22 European Law Review 82 at 83 – 84. This means that only three states which have already ratified the Convention are still required to ratify Protocol no 11.

123 See discussion at ch 2.4.5 above.

124 Art 27 of CAT

125 See arts 19 and 21 of CAT.

126 Art 20 of CAT.

127 See art 20(4) and 20(5) of CAT.

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Efforts have been made to adopt an optional protocol to CAT, in terms of which *compulsory* on-site investigations would be undertaken by the Committee.[129] When it became clear that the universal realisation of such a protocol was unlikely, these principles were incorporated in the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("ECPT"). This regional equivalent of CAT was adopted in 1987, and took effect in 1989.[130] By the end of 1996 30 states had already ratified the ECPT.[131] Another four states joined in first half of 1997.[132]

The supervision provided for is quite revolutionary. The ECPT rejects both the two main traditional implementation mechanisms, state reporting and individual complaints, and accepts the proposals previously raised in the UN context. States who ratify the ECPT permit the European Committee for the Prevention of Torture to visit any place within their jurisdiction "where persons are deprived of their liberty by a public authority" without needing to obtain permission.[133] In other words, by virtue of their ratification, states accept this competence of the Committee, rendering the requirement of consent obsolete.[134] Visits may be periodic or on an *ad hoc* basis. The extent of the Committee's powers are quite astounding: It may interview all detainees in private,[135] it has unlimited access to any place where persons are deprived of their liberty,[136] and it is entitled to all information necessary to carry out its task.[137]

As in the case of the UN body, the Committee draws up a general annual report. This report is submitted to the Committee of Ministers transferred to the Parliamentary Assembly, and may then

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128 Art 2095) of CAT.

129 Danelius in Macdonald *et al* (eds) (1993) at 266.

130 In terms of art 19 of the European Convention for the Prevention of Torture ("ECPT").

131 See (1997) 22 *EurLRev* 82 at 89 – 90.

132 They are Albania, Andorra, Estonia and Ukraine ((1997) 22 *EurLRev* 82 at 89 – 90).

133 Art 2 of ECPT.

134 Exceptional circumstances are provided for states to make representations against a visit by the Committee, on grounds of eg national defence and public safety (art 9). See also art 14, for state competence to refuse particular individuals to visit.

135 Art 8(3) of ECPT.

136 Art 8(2)(c) of ECPT.

137 Art 8(2) of ECPT.

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be made public.[138] In general, the principle of confidentiality obtains. The Committee's report will always be published if the state party concerned requests its publication.[139] After a visit, the Committee draws up an *ad hoc* report in which its findings are set out. This may contain recommendations about how the situation of persons deprived of liberty may be improved in that particular state.[140] The most powerful tool in the hands in the Committee is its competence to "make a public statement" if a state fails to co-operate or to implement its recommendations.[141]

The Committee is made up of independent experts. The number of experts is equal to the number of states parties.[142] A "competence in the field of human rights or having professional experience in the areas covered by this Convention"[143] is required in order to be chosen. These requirements have led to medical doctors and specialists on the penitentiary system being elected as Committee members.[144] This non-judicial approach created the possibility of undertaking visits and of taking proactive steps, enabling the Committee to achieve certain results that would not have been possible using strictly juridical means.[145] Some of these results are that regular visits were carried out,[146] conditions were "thoroughly"[147] investigated and reports were published with the consent of the states concerned.[148] This method of securing the realisation of detainees' rights supplement the judicial means provided for in the European Convention.[149] This dual system of judicial (*ex post*

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138 Art 12 of ECPT.

139 Art 11(2) of ECPT.

140 Art 10(1) of ECPT.

141 Art 10(2) of ECPT.

142 Art 4 of ECPT.

143 Art 4(2) of ECPT.

144 Danelius in Macdonald *et al* (eds) (1993) at 266.

145 Danelius in Macdonald *et al* (eds) (1993) at 274.

146 In 1990, four periodic and one ad hoc visit (to Turkey) were undertaken. An *ad hoc* visit was again undertaken to Turkey the following year. By 1994, the emphasis has shifted: In that year, an equal number (five) of periodic and ad hoc visits were carried out (see Council of Europe (1995b) at 121 – 122).

147 Danelius in Macdonald *et al* (eds) (1993) at 274.

148 By the end of 1994, a total of 38 reports have been made public (see Council of Europe (1995b) at 123 – 130).

149 Art 3 of that Convention, the prohibition against torture or inhuman or degrading treatment or punishment, still applies. Complaints under this article which led to a decision by the European Court include *Ireland v*

Footnotes continued on next page.

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facto) and non-judicial (proactive and preventative) protection may serve as a model for future developments in the eternal quest for effective human rights guarantees, especially for detainees. An important aspect that may be improved, is the attention devoted to NGOs. Their role should be strengthened to secure reliable fact-finding and to alert the Committee. At present, the Committee heavily relies on its secretariat in Strasbourg.[150]

5.1.2 Socio-economic rights

Member states of the Council of Europe adopted the European Social Charter in 1961.[151] It was intended as a pendant to the European Convention, as it supplements the Convention by providing for social rights, such as the right to just working conditions, the right to organise and to social security.[152] But the Social Charter does not deal with aspects such as non-discrimination on the basis of sex in the workplace or participation of workers in decisions affecting working conditions. Where the European Convention may be regarded as the regional counterpart to the CCPR, the European Social Charter finds its equivalent in the CESCR.

The European Social Charter entered into force in 1965, well before its international counterpart.[153] By the end of 1996 21 member states of the Council of Europe had ratified the Charter.[154]

State reporting is the only means of supervision provided for in the Social Charter. These reports deal with the extent to which governments have complied with their obligations. It is submitted bi-annually to a Committee of Experts.[155] The Committee consists of seven independent experts.[156]

UK, Series A25, judgment of 18 January 1978 (1978) and the *Soering* case (Series A 161, judgment of 7 July 1989). See Cassese in Macdonald *et al* (eds) (1993) 225.

150 Boyle in Hannum (ed) (1992) 133 at 151-152.

151 For the full text, see UN Treaty Series vol 529 at 89, adopted on 18 October 1961, entered into force 26 February 1965.

152 See Shrubsall (1989) 18 *Industrial Law Jnl* 39.

153 See ch 2.4.3 above.

154 See (1997) 22 *EurLRev* 82 at 87 – 88.

155 Art 21 of the European Social Charter.

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These experts are mostly academics.[157] The Committee may also request states to submit reports at different intervals. The Committee of Experts considers the state report and issues "conclusions", which are contained in its own report.[158] A group of governmental civil servants, the Governmental Social Committee, then considers the report. Their own "conclusions", to which the Committee of Experts' report is appended, is transmitted to the Committee of Ministers.[159] The Parliamentary Assembly of the Council of Europe is also provided an opportunity to consider the report of the Committee of Experts and issue its "views".[160] After considering these various reports, the Committee of Ministers "may make to each Contracting Party any necessary recommendations".[161]

The brief discussion so far reveals substantive omissions and difficulties in supervision. These defects have subsequently been addressed.

In May 1988, the Committee of Ministers adopted an additional Protocol ("the additional Protocol") to the European Social Charter.[162] This Protocol starts off with policy aims which all ratifying states have to pursue "by all appropriate means".[163] This is followed, in Part II, by four articles dealing with equal treatment, the right to information and consultation, the right to take part in the determination of improvement in working conditions and the right of elderly persons to social protection. States have to accept at least one of these articles at ratification. The Additional Protocol entered into force on 4 September 1992.[164]

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156 Art 25 of the European Social Charter.

157 See eg Shrubsall (1989) 18 *Industrial Law Jnl* 39 at 51.

158 See art 27(1) of the European Social Charter.

159 Art 27 of the European Social Charter.

160 Art 28 of the European Social Charter.

161 Art 29 of the European Social Charter.

162 At the end of 1996 only 6 states have ratified the Additional Protocol ((1997) 22 *EurLRev* 82 at 87 – 88. They are Denmark, Finland, Italy, the Netherlands, Norway and Sweden.

163 Part I of the Additional Protocol.

164 See eg Council of Europe (1995b) at 21.

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Apart from the Protocol adding these substantive provisions, an amending Protocol ("the amending Protocol") was adopted to improve existing supervision.[165] In terms of the amending Protocol, adopted in 1991, the following changes will be effected:

- The number of members of the Committee of experts is increased to "at least nine".[166] This was necessitated by the considerable workload experienced by the Committee.

- The complicated and multiple consideration of state reports is simplified. The Parliamentary Assembly no longer has a role in the normal process of supervision. The role of the governmental committee is limited. Experience has shown that the governmental committee was much less likely to find violations on the part of states parties than the Committee of Experts. In the eleventh reporting cycle, for example, the experts found 46 violations, and the governmental committee only ten.[167] Under the amending Protocol, the Committee of Experts decide alone whether a violation has occurred or not. The governmental committee retains a role, though. Based on the finding by the Committee of Experts and policy considerations, the governmental committee recommends specific steps which the Committee of Ministers may adopt. The Committee shall adopt a resolution covering individual recommendations to the states parties concerned.[168] This amendment also aims at ensuring that the Committee of Ministers adopts country-specific recommendations, and not only recommendations general to all states parties.

- NGOs are accorded a more important role, for instance, in respect of the submission of their views about state reports.[169]

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165 For the text, see (1992) 31 *ILM* at 155. It was adopted on 21 October 1991, but it has not yet entered into force. This will happen when all the states parties to the Charter have ratified the amending Protocol (see art 8 of the amending Protocol). At the end of 1996 11 of the 21 parties to the Charter have already ratified the 1991 Protocol ((1997) 22 *EurLRev* 87 – 88). See also Boerefijn *et al* (1991) *ICJ Review* 42.

166 Art 3 of the amending Protocol.

167 See Harris (1992) 41 *ICLQ* 659 at 662.

168 Art 5 of the amending Protocol.

169 Art 1(1) of the amending Protocol.

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Improvements to the existing system of state reporting have been followed by deliberations about radical reform of Charter supervision. "Radical" refers not only to extent of reforms of the European system, but to global patterns of supervising socio-economic rights. In 1995, the Council of Europe adopted a further Protocol to the European Social Charter ("the collective complaints Protocol"), which will provide for a system of collective complaints.[170] The Protocol requires ratification by five parties to the Charter before it will enter into force.[171] By the end of 1996 only two states (Cyprus and Norway) had ratified the collective complaints Protocol.[172]

In terms of its Preamble, the aim of the Protocol is to improve effective enforcement of the Charter and to strengthen the participation of management, labour and NGOs. The Protocol provides that states may recognise the right of organisations to file complaints against them for non-compliance with the provisions of the Social Charter, as amended. Organisations that may lodge complaints are employer bodies, trade unions, or any other organisation recognised by a government.[173] These complaints will be investigated by the Committee of Experts, who will adopt a resolution and will compile a report.[174] The Committee of Ministers will then make a finding. The report may be published.[175]

A revised text of the Social Charter, incorporating and consolidating the changes brought about since 1961, has been adopted in 1996.[176]

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170 It was adopted on 9 November 1995. For a text of the Protocol, see (1995) 34 *ILM* at 1453 and (1995) 54 *ICJ Review* 105.

171 Art 14 of the 1995 Protocol.

172 (1997) 22 *EurLRev* at 87 – 88.

173 Arts 1 and 2 of 1995 Protocol.

174 See arts 6 - 8 of the 1995 Protocol for the procedure before the Committee of Experts and the Committee of Ministers.

175 Art 8(2) of the 1995 Protocol.

176 For the text, see (1997) 36 *ILM* at 31.

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5.1.3 The Organisation for Security and Co-operation in Europe

What is now the Organisation for Security and Co-operation in Europe ("OSCE") was created in 1975 as the Conference on Security and Co-opeartion in Europe ("CSCE").[177] The CSCE was created when the Helsinki Final Act was signed. At the Budapest Summit of December 1994 it was decided to change the name to the OSCE. The term "organisation" more accurately reflects the functioning of the grouping, which serves as a forum in which security and human rights concerns are discussed and reconciled. It is not strictly a "European" organisation, as the USA and Canada are also members.

Unnecessary duplication and rivalry between the OSCE and the Convention organs should be avoided. This has already been highlighted in the Charter of Paris. It recognised the contribution of the Council of Europe in the promotion of human rights and democracy, welcomed the accession to the Convention by member states of the OSCE and the "readiness of the Council of Europe to make its experience available to the OSCE".[178]

The CSCE established a "Human Dimension Mechanism" in 1989.[179] This "mechanism" is geared towards a diplomatic resolution of human rights issues at the political level. States may be requested to reply to queries. If this does not prove to be staisfactory, the complaining state may seek a bilateral meeting. If this also fails, a full meeting of the CSCE will discuss the matter. As this procedure is not open to individuals or NGOs, its impact may remain limited. The OSCE has highlighted human rights in international relations, and has ensured its constant place on the political agenda, especially in the process of democratisation in Eastern Europe.

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177 For a background to the change, see Sapiro (1995) 89 *AJIL* 631.

178 Charter of Paris, in (1990) *HRLJ* 379.

179 See, generally, Boyle in Hannum (ed) (1992) 133 at 155-156.

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5.1.4 European Community law and human rights

The European Economic Community ("EEC") was founded in 1958[180] as an instrument for European economic integration.[181] When the European Union ("EU") was formed in 1993, the EEC was incorporated as one of its institutions,[182] but it was renamed the European Community ("EC").[183] At present most states of what has traditionally been considered to be "Western Europe" are members of the EU, and therefore also of the EC.[184] It should be distinguished clearly from the Council of Europe, which gave birth to the European Convention and administers its organs. Under that system, the European Court of Human Rights, based in Strasbourg, gives final judgments. In contrast, the Court of Justice of the European Communities, based in Luxembourg, interprets and enforces EC law.[185] At its inception the EC was seen as primarily concerned with economic integration and harmonisation in Europe. The Court of Justice was seen as the organ that would resolve disputes about the application of EC law, and about the actions of the EC institutions. It should hardly come as a surprise that the Treaty of Rome did not make reference to the concept of human rights. When it was adopted, only a few years had lapsed since the elaboration of the European Convention on Human Rights, which turned into force in 1953.

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180 By the Treaty of Rome, signed in Rome on 25 March 1957.

181 Excluding those aspects regulated by the European Coal and Steel Community ("ECSC") and the European Atomic Energy Community ("Euratom"). These institutions no longer have an independent existence, but are absorbed into the EC (see Mathijsen (1995) at 4).

182 The EU embraces three "pillars": One is the EC; the other two deal with foreign and security policy, and with justice and home affairs (see Duff *et al* (1994) at 19).

183 Article G, Treaty of European Union. It commenced on 1 November 1993.

184 The Treaty of Maastricht (or the "Treaty of European Union") of 1992 was signed by 12 countries: Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxemburg, Netherlands, Portugal and the UK (see web site gopher://wiretap.spies.com for the Treaty). The membership of the Union was expanded to 15 on 1 January 1995 when Austria, Finland and Sweden became members. Although Norway had applied for membership, its electorate rejected the proposed adhesion by referendum. This relative homogeneity is bound to be upset in the near future, as the Commission has proposed that five Central and East European states (Poland, Hungary, the Czech Republic, Slovenia and Estonia) should be invited to begin accession talks in 1998, along with Cyprus, towards whom a commitment to admission already exists. All these states have already become members of the Council of Europe, have acceded to the European Covention and have made declarations in terms of arts 25 and 46 thereof.

185 Art 164 of the EEC Treaty.

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Although human rights had at that stage gained importance globally, it was regarded as separate from and not impacting on the process of economic integration.[186]

Despite the fact that explicit reference to the concept is omitted, a number of substantive provisions of the Treaty establishing the EEC embodied fundamental rights.[187] These provisions include the prohibition against discrimination,[188] freedom of movement of workers,[189] freedom of association[190] and equal pay for men and women.[191] In its interpretation of these provisions, the Court of Justice involved itself in matters of "equal treatment, access to employment and the promotion of sexual equality from schooling to public life".[192]

However, these specified rights did not provide for all instances of potential violation of fundamental human rights within the EC context. Soon cases based on the infringement of non-included rights ended up before the Court of Justice. The process started in the domestic law of Germany, when the compatibility of EC law with the German Basic Law was raised. Initially, the Court of Justice refused to recognise that EC law provisions may be declared incompatible with fundamental rights not included in the EC Treaty.[193] A crisis was caused by the German Constitutional Court's subsequent response. It held that German citizens may invoke the German Basic Law to test the compatibility of EC law with domestic constitutional guarantees. This meant

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186 See Cohen-Jonathan (1981) 29 *European YB* 112.

187 See Grabitz in Bates *et al* (1983) at 194.

188 Eg arts 7, 36, 40(3), 67(1), 68(2), 85(1)(d).

189 Eg art 48 of EEC Treaty. Not to be confused, as was done in the South African case, *Case v Minister of Safety and Security* 1996 3 SA 617 (CC) at par 31 - reference should have been to the European Court of Human Rights, not to the European Court of Justice.

190 Eg art 118(1) of EEC Treaty.

191 Art 119 of EEC Treaty.

192 Duparc (1992) at 12.

193 See the Court's decisions in *Stork v High Authority* [1959] ECR 17 and *Geitling v High Authority* [1960] ECR 423 and *Sgarlata v Commission* [1965] ECR 215. Brown and Kennedy (1994) 333 speculates that the "issue may have been presented in the wrong way". In *Sgarlata*, for instance, the applicants objected that, if a specific article was applied, individuals would be deprived of all protection by the Court both under EC law and under national law. These considerations were held not to override the clearly restrictive wording of the applicable article (at 227).

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that EC law could be investigated domestically to ensure that it does not detract from existing domestic constitutional protection.[194] Obviously such a situation could not be tolerated, as different national constitutions (and courts) could provide (or decide) differently. Differences in EC law would undermine the very aim towards which the EC was directed.

Gradually the Court of Justice addressed this problem. The main difficulty was that the EC Treaty did not create or stipulate a basis on which EC law may be extended beyond values which were "purely economic".[195] In *Stauer v Ulm*[196] the Court made its first *obiter* reference to fundamental rights "enshrined in the general principles of Community law".[197] Addressing the issue squarely in *International Handelsgesellschaft v Einfuhr und Vorratsstelle Getreide*,[198] the Court found that EC law cannot be invalidated for running counter to fundamental rights set out in the state Constitution. However, the Court had to ensure the compatibility of EC law with the general principles of law protected by the Court of Justice. Because fundamental rights form an integral part of EC's general principles of law, it provides an "analogous guarantee" to that in domestic bills of rights. In other words, not the European Convention, but the common tradition of rights protected in the various European states has been recognised as incorporating human rights into the general legal principles of EC law.

One has to take the parallel progress made by the European Court of Human Rights into consideration. While it came into being on 21 January 1959,[199] it handed down its first judgment only in November 1960. From 1963 to 1966 no judgments were given. The total number of judgments for the period 1960 to 1974 was nine, less than one annually.[200] In other words, when these developments were taking place in the Court of Justice, there was no comprehensive human rights case-law or consciousness in Europe.

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194 See Wessman (1992) at 26.

195 Duparc (1992) at 12.

196 [1969] ECR 419.

197 *Ibid.*

198 [1970] ECR 1125.

199 See Harris *et al* (1995) at 648.

200 *European Court of Human Rights: Survey 1959-1994* (1995) at 36-37.

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In 1974, the European Court of Justice repeated that it is "bound to draw inspiration from constitutional traditions common to all Member States"[201] and must declare invalid "incompatible with fundamental rights recognised and protected by the Constitutions of those States".[202] However, it enlarged the pool from which inspiration could be drawn to include "treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories".[203] In *Nold*[204] the Court did not spell it out that the European Convention is now also a source of "general legal principles" of EC law. The reason probably was because France, the state involved in that case, only ratified the European Convention subsequent to the proceedings. However, in cases thereafter, it was unequivocally stated that the European Convention is one of those treaties which may be invoked to supplement EC law.[205] The rights protected under Community law is not restricted to the content of the European Convention, but extends to rights not included under the Convention[206] and to general principles of equity.[207]

This process of including human rights into EC law culminated in the European Parliament, the Council of Ministers and the Commission of the European Communities adopting a Joint Declaration on Fundamental Rights in 1977.[208] In this declaration these three community institutions emphasised the importance of human rights within the European Community. As far as the content of these rights is concerned, specific rights where not elaborated. The Constitutions of Member States and the European Convention on Human Rights were cited as sources from which these rights are derived.

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201 *Nold v Commission* [1974] ECR 491 at 507.

202 *Ibid.*

203 *Ibid.*

204 *Nold v Commission* [1974] ECR 491.

205 *Rutili v Minister of the Interior* [1975] ECR 1219 dealing with aliens at 1232: See also *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727 at 3745.

206 See the *Nold* case above: The right to freely pursue a trade is a fundamental right recognised under Community law, although it is not included in the Convention.

207 See *Klensch v Secrétaire d'Etat* [1986] ECR 3505 par 9.

208 Wessman (1992) at 6.

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In retrospect, it seems clear that the EC should have had a specified human rights basis at its inception. As the powers of the European Communities increase, the lack of systematic protection of human rights becomes more and more apparent. It is also clear that human rights will play an increasing but paradoxical "push and pull" role in the European Community. On the one hand, rights may serve as a tool to "pull" towards greater integration. Clapham [209] referred to rights such as freedom of movement from country to country and the prohibition against discrimination that will facilitate integration. On the other hand, potential victims of the increasing integration may use rights to "push away" the tentacles of an increasing bureaucracy (for instance, by securing the right to participation in decision making).

Two ways of addressing the inadequacy of human rights protection under current Community law have been identified:[210]

- A codified catalogue of human rights to be observed by the EC may be adopted.
- The EC may accede to the European Convention on Human Rights.

The first option will give concrete content to the Joint Declaration of 1977. Arguments raised against this option include the following:

- It is unlikely that sufficient consensus about its content will easily be reached, especially on socio-economic rights.
- Anyone within an EC member state can already rely on the rights set out in the European Convention. As it is unlikely that a separate community human rights charter will "go further" than existing protection, it would be superfluous.[211]
- The European Commission and Court of Human Rights have been in existence for a considerable period of time. These institutions have built a reputation in Europe and

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209 (1991) at 10.

210 See eg Wessman (1992) at 7-9 and Brown and Kennedy (1994) at 338-339.

211 Kapteyn and Verloren van Themaat (1990) at 169.

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internationally and have accumulated a comprehensive case-law. Rather than "risk denigrating the achievements" of theses institutions, these achievements "should be built on".[212]

The European Parliament has, in 1989, indicated its preference for the first option by adopting the Charter on Rights of Citizens of the European Community.[213] This includes social and economic rights,[214] a step which has been explained as an attempt by the European Parliament to improve its image in the eyes of the Community citizens.[215]

A less drastic step than adopting a "Community Catalogue" of rights, would be to amend the Treaty, by inserting a simple article reading "measures incompatible with fundamental rights are inadmissible in the field of application of Community Law".[216]

Accession to the European Convention, on the other hand, would require the following:

- All the present members to the Convention would have to agree to such a step.
- Special procedural and substantive problems raised by the accession of a non-state party, will have to be negotiated through an accession protocol.

The Court of Justice of the European Communities has also given a negative answer when asked for its opinion on the question whether accession of the EC to the European Convention would be compatible with the EC Treaty.[217] The Court of Justice held that the EC Treaty does not allow the EC to accede to the Convention. No Treaty provision explicitly or implicitly allows for a power to conclude international human rights conventions. Accession to the European Convention would amount to an amendment to the EC Treaty, as "it would entail the entry of the Community into a

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212 Clapham (1991) at 96.

213 See Neuwahl in Neuwahl and Rosas (eds) (1995) 1 at 16.

214 Kapteyn and Verloren van Themaat (1990) at 168.

215 Kapteyn and Verloren van Themaat (1990) at 169.

216 Clapham (1991) at 96.

217 Opinion 2/94 of 28 March 1996, reproduced in (1996) 17 *HRLJ* 51.

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distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order".[218]

The advantages of accession to a potential victim are minimal. As Clapham pointed out, there "is nothing to stop anyone complaining to the Strasbourg Commission of Human Rights about the national implementation of a Community provision".[219] The only added remedy would be the opportunity for Community citizens to complain to the Strasbourg institutions about acts and legislation of Community organs. In principle, though, even these complaints could be adjudicated by the European Court of Justice.

5.1.5 Relevance for Africa

5.1.5.1 The prime example of regional human rights protection

The Universal Declaration of 1948 marked a rhetorical commitment to human rights by those states adopting it. From the outset, the idea was to concretise these declared rights into a legally binding form. Long before this could be attained at the global level, the member states of the Council of Europe adopted the European Convention, providing the first example of an enforceable regional human rights treaty. The Convention marks the first application of the principle that a state may be held accountable in the supra-national arena for the way in which it treats its own nationals. This aspect of the Convention served as a precedent for the development of the right to individual petition provided for in the Optional Protocol to the CCPR, in the American Convention and also in the African Charter. It has evolved into an efficient and effective system for the realisation of human rights in Europe and served as a model for other regional human rights systems.[220]

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218 See par 34 of its Opinion 2/94.

219 (1991) at 97.

220 See Mubiala (1997) 9 *RADIC* 42 at 54.

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5.1.5.2 The impact of the Convention in Africa and on Africans

i Impact of Convention on independence Constitutions

Viewed historically, the European Convention had a significant influence on the present position pertaining to human rights in Africa. At the national level, many African constitutions contain a Bill of Rights in which rights reminiscent of those in the European Convention are set out. On the supra-national level, the Convention has "served to some extent as a model" for the African Charter. [221]

The impact of the Convention on the African Charter stands, at first glance, in need of explanation. Why did the drafters use as a model something from the European continent, associated with former colonial masters? The answer lies in the fact that the Convention had been appropriated by numerous African states. Firstly, the Convention was extended to "European colonies" in Africa.[222] Secondly, the Convention became incorporated into domestic legal systems. Nigeria was the first country to include a Bill of Rights, modelled on the European Convention, in its independence Constitution.[223] As Heyns explains, the Minorities Commission, involved in the drafting of the Nigerian independence Constitution, had to address the "fears of exploitation of the minorities"[224] in Nigeria. It opted to guarantee a list of fundamental rights to all individuals. In its motivation, the Commission remarked: "We have therefore considered what provisions may suitably be inserted in the Constitution and have given particular attention to the Convention on Human Rights to which, we understand, Her Majesty's Government has adhered on behalf of the

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221 Heyns (1995) 11 *SAJHR* 252 at 253.

222 That is, by means of art 63 of the Convention, the "colonial clause". In terms thereof, a state party to the Convention could extend its application to any colony. An eloquent attempt by Leopold Senghor to ensure that the Convention is extended automatically to all colonies and dependencies, was rejected. The "colonial clause" gave states the option of extending the Convention, as opposed to extension being a necessary consequence of ratification.

223 See Elias (1959 - 1960) 2 *Jnl of the ICJ* 30.

224 (1995) 11 *SAJHR* 252 at 257.

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Nigerian Government".[225] This is a reference to the fact that the United Kingdom had made a declaration in 1953,[226] in terms of which the European Convention was extended to its colonies.

Many other anglophone states in Africa, gaining independence soon after Nigeria, followed its example by also including a Bill of Rights in their Constitutions.[227] Independence constitutions influenced by the European Convention in this indirect way are those of Botswana, Kenya, Lesotho, Malawi, Sierra Leone, Swaziland, Uganda and Zambia. In most of these countries the new Constitution was not clothed with legitimacy, as it was perceived as an alien structure imposed by a colonial power. Its classic liberalism contained very little which reverberated with collectivist African ideologies.[228]

In at least one anglophone country, Liberia, the idea of a Bill of Rights was not incorporated through the European Convention. Liberia was established as a colony of freed slaves from the United States. It gained independence in 1847. Already then, individual rights were protected, indicating that the United States example inspired the drafters.[229]

One of the original states parties to the Convention, the United Kingdom, served as an example of a state without a written constitution and Bill of Rights. Basing itself in part on this example, Tanzania in 1968 rejected the introduction of a Bill of Rights.[230]
Taking the present as point of departure, how deeply has the Convention been implanted in African soil? Three related questions are posed:

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225 Command Paper 505, H M S O London (1958) 97.

226 In terms of art 63 (the "colonial clause") of the European Convention. See Heyns (1995) 11 *SAJHR* 252 at 255.

227 See De Smith (1961) 10 *ICLQ* 83 and (1961) 10 *ICLQ* 215.

228 See eg De Smith (1964) at 184 - 185.

229 Adegbite in Eide and Schou (eds) (1968) at 72.

230 The United Republic of Tanzania (1968) at 32: "Behind this decision is our belief that the rights of the individual in any society depend [more] on the ethical sense of the people than on formal guarantees in the law. The process of Government in the United Kingdom provides a striking example of the force of a national ethic in controlling the exercise of political power."

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ii *Have the Convention-based human rights provisions been retained in subsequent constitutions in these states?*

One of the salient characteristics of both the Convention and the Nigerian Independence Constitution is the exclusion of socio-economic rights. This has been taken over into other independence constitutions. Later constitutions addressed this omission, often only by adding directives of state policy.

The property clause in most post-independence constitutions represented an attempt to retain the vested rights of privileged minorities. These versions, again based on the Nigerian model, were subsequently discarded in numerous states, such as Lesotho, Malawi, Swaziland, Uganda and Zimbabwe.[231]

iii *Where Convention-based human rights provisions were retained, what was the Convention's indirect impact?*

Ghai and McAulsan[232] noted that the Convention had a minimal impact in a Commonwealth state like Kenya. Some of the reasons for this lack of influence are:

- The Convention did not automatically become incorporated into Kenyan law. Applicants could therefore not bring cases of violations to domestic courts. In Commonwealth Africa, the dualist theory is followed, in terms of which international treaties have to be made part of domestic law by specific legislation. This was not done in respect of the European Convention.

- Individuals could also not bring cases to the European Commission or European Court of Human Rights, as Britain had not accepted the right to individual petition. An aggrieved individual depended on another state party to the Convention to take up his or her case. International relations dictate that states parties are reluctant to initiate proceedings against other states.

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231 See Roux (1996) 8 *RADIC* 755 at 762 n44. In the case of Zimbabwe, a constitutional amendment was adopted on changes to the Declaration of Rights after the expiry of the ten year moratorium (at 781).

232 Ghai and McAulsan (1970) at 412-413.

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Heyns cites one case in which an attempt was made to seize the Court in respect of violations of rights in Africa.[233] This avenue was necessitated by the fact that the UK had only accepted the right to individual petition on 14 January 1966.[234] At that stage, most of the former British colonies had already gained independence. The other major colonial power, France, accepted individual petition much later, in 1981.[235] Another important player in Africa, Portugal, only ratified the Convention in 1978.[236]

Other reasons for the meagre impact of the Convention is that it had hardly become known at all in Africa,[237] and that colonial extension of the Convention was made "with due regard ... to local requirements", undermining the potential effect of the Convention.[238]

iv What is the role of the extensive jurisprudence of the European Convention in the legal systems of these countries?

With reference to examples from courts in Botswana, Namibia, Mauritius, Namibia, South Africa and Zimbabwe, Heyns has shown that the Convention has been referred to by municipal courts in Africa "when dealing with human rights-related issues".[239] But much more encompassing is the reliance on case-law of the European Court and Commission of Human Rights, sometimes without reference to the Convention as such. This list of Southern African courts invoking both the Convention and European Court of Human rights case-law, compiled by Heyns, is now updated:[240]

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233 At 255 - 256. See Vasak (1962) at 8: In 1960, two African statesmen visited Iceland, in connection with the detention of Banda, leader of the independence movement in Nyassaland. Iceland was chosen because it was, at the time, engaged in a dispute of its own with the UK about the right of British vessels to fish in Icelandic waters. Banda was released before Iceland could finally decide whether to file an inter-state complaint.

234 See table in (1996) 17 *HRLJ* 234.

235 *Ibid.*

236 *Ibid.*

237 See Vasak (1962) at 8.

238 Art 63(3) of the Convention.

239 (1995) 11 *SAJHR* 252 at 253, footnotes 5 to 9.

240 Heyns set out the full list in (1995) 11 *SAJHR* 252 at 253.

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- In Namibia, one may add the Supreme Court decision in *Kauesa v Minister of Home Affairs*.[241]

- As for South Africa, one may add *S v Shuma*,[242] *Gardener v Whittaker*,[243] *De Klerk v Du Plessis*,[244] *S v Makwanyane*,[245] *S v Williams*,[246] *Shabalala v Attorney-General, Transvaal*,[247] *Case v Minister of Safety and Security*,[248] *Coetzee v Government of RSA*,[249] *Ferreira v Levin*,[250] *Bernstein v Bester*,[251] *Dabelstein v Hildebrandt*[252] and *ex parte Gauteng Legislature*.[253] For instance, more important than its reference to the Convention, is the South African Constitutional Court's reliance in *S v Williams*[254] on the European Court of Human Rights decision in *Tyrer v UK*.[255] Not only the Convention, but other human rights instruments

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241 1996 4 SA 965 (NmSC) (at 978 - 983). As for South Africa, see also *S v Harber* 1988 3 SA 396 (A) (at 422), where reference is made to the European Court of Human Rights decision on contempt of court in *The Sunday Times v UK*. The court found the decision not compelling because South African courts are "obviously free to strike a balance between the dictates of freedom of expression and those of due administration of justice, and are not enjoined to regard freedom of expression as the superior or even primary principle".

242 1994 4 SA 583 (E) (at 590 D-E, noting that there is no general limitation clause in the European Convention).

243 1995 2 SA 672 (E) (at 682 H-I).

244 1995 2 SA 40 (T) (at 48).

245 1995 3 SA 391 (CC) (at par 35, 68 (*per* Chaskalson P), at par 324 (n 221) (*per* O'Regan J)).

246 1995 3 SA 632 (CC) (par 21, n 24, par 27).

247 1995 1 SA 608 (T) (at 639, before rejecting all public international law and foreign judgments - at 642 J).

248 1996 3 SA 617; 1995 1 SACR 587 (CC) (at eg par 31 (*per* Mokgoro J) and par 104 (*per* Madala J)).

249 1995 4 SA 631; 1995 6 SACLR (CC) (the Explanatory Report on the Fourth Protocol to the Convention is quoted by Sachs J at par 53; see also par 57 and 58).

250 1996 1 SA 985 (CC) (at par 170 (*per* Chaskalson P), also at par 58 (nn 64, 65) (*per* Ackermann J)).

251 1996 2 SA 751 (CC) (at par 72, 74, 106 (*per* Ackermann J)).

252 1996 3 SA 42 (C) (at 61G-62A).

253 1996 3 SA 165 (CC) (par 71).

254 1995 3 SA 632 (CC).

255 At par 27, 33, 42, 48.

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subsequently adopted under the auspices of the Council of Europe, have featured in South African case-law.[256]

- In Zimbabwe,[257] recent cases that referred to the Convention are *Rattigan v Chief Immigration Officer, Zimbabwe,*[258] *Nyambirai v National Social Security Authority,*[259] and *Retrofit v Posts and Telecommunications Corporation.*[260] Madhuku[261] analysed some Zimbabwean cases and concluded that case-law of the European Court of Human Rights strongly influenced the development of a constitutional jurisprudence in Zimbabwe. Relying on these comparative cases has freed judges from "the ghost of precedent", enabling them to adopt an activist approach. In her view, the Court has in at least one instance gone too far. The application in *Rattigan v Chief Immigration Officer* was based on freedom of movement.[262] In its interpretation of this right, the Zimbabwean Supreme Court made reference to European case-law based on the protection of family life. This went beyond "adopting interpretations of ECHR on similar provisions" and was "perhaps an abuse of comparative analysis".[263] Zimbabwean cases in which European case-law, rather than the Convention, served as interpretative tools include *Woods v Minister of Justice, Legal and Parliamentary Affairs,*[264] *Rattigan v Chief Immigration Officer, Zimbabwe*[265] and *Nyambirai v National Social Security Authority.*[266]

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256 See eg Sachs J's reliance on the European Convention on the Protection of Minorities in *Dispute Concerning the Constitutionality of Gauteng School Education Bill of 1995* 1996 2 SACLR 117 (CC) (at par 88).

257 For a discussion of the impact of the European Convention on Zimbabwean law, see Madhuku (1996) 8 *RADIC* 932.

258 1995 2 SA 182 (ZSC) (at 189G-H).

259 1996 1 SA 645 (ZSC) (at 645-646).

260 1996 1 SA 847 (ZSC) (at 861A).

261 (1996) 8 *RADIC* 932.

262 Art 22 of the Zimbabwe Constitution.

263 (1996) 8 *RADIC* 932 at 941.

264 1995 1 SA 703 (ZSC) at 705-706 (*Golder v UK, Silver v UK).*

265 1995 2 SA 182 (ZSC) at 190 (*Moustaquim v Belgium, Beljoudi v France* and a judgment by the European Commission).

266 1996 1 SA 636 (ZSC) (at 645-646) (Commission reports; *James v UK*).

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v *Impact of proceedings in terms of the Convention on Africans*

Africans have also approached the European Commission, alleging violations of the European Convention by member states in respect of Africans resident in a European state. Without at all attempting to provide a catalogue of cases in which this had been the case, a few examples are cited:

- An infamous example is the case of *East African Asians v UK*,[267] which concerned persons resident in Africa. A number of applicants, of Asian origin, but holding UK passports, were refused permission to remain in the UK permanently. They made these applications in 1970, arising from a campaign to expel all Asians from Kenya and Uganda, their country of residence. The European Commission of Human Rights (in 1973) found the UK in violation of various provisions of the European Convention. As the case was not referred to the Court by either the Commission or the UK, it was left to the Committee of Ministers to adopt an appropriate resolution. In this resolution, adopted in 1977, the Committee of Ministers concluded that no violation of the Convention had occurred.[268] In arriving at this conclusion, the ministers took into account that the applicants were all given permission to stay permanently in the UK during the proceedings before the Commission. It further took into account that the annual quota of East African Asians allowed to settle permanently increased from an initial 1500 to 5000 in 1975.

- Another example, that of *Lamguindaz v UK*, also involves the UK.[269] The applicant, a Moroccan citizen, had been living in the UK since an early age. He was convicted on numerous offences while living in the UK. After another conviction in 1990, he was deported to Morocco. His application was based on the violation of his right to a family life, as his whole family lived in the UK. He also alleged that he was discriminated against on grounds of nationality. After the Commission had found a violation of article 8 of the Convention, the matter was settled amicably when the British government revoked the deportation order, allowed the applicant to re-enter the UK, granted him indefinite leave to remain, allowed him to

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267 See the Commission's report in (1994) 15 *HRLJ* 215.

268 See the text of the resolution in (1994) 15 *HRLJ* 232.

269 See Commission's view on admissibility in (1992) 13 *HRLJ* 400.

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apply for naturalisation and paid his costs.[270] The Court took notice of the terms of the friendly settlement and struck the case off its list of cases.[271] The Convention has clearly granted material relief to this African applicant.[272]

vi What is the role of the Convention in the practice of the African Commission?

As has been pointed out, the Commission has not developed any case-law to speak of.[273] In none of the decisions made public so far has the Commission referred to provisions of or case-law decided under either the European (or American) Convention. Such reliance is possible by virtue of articles 60 and 61 of the Charter, which provide that the Commission must draw inspiration "from international law on human and peoples' rights" and must take "special international conventions" into consideration. A careful reading of articles 60 and 61 reveals that the reference to international law is qualified. Article 60 includes a list of provisions from which the Commission should "particularly" draw inspiration. This refers to other regional (African) instruments, and to instruments adopted in the global sphere (under UN auspices). No reference is made to other regional systems. Also, article 61 refers to international conventions laying down rules *which OAU member states expressly recognize*. In other words, the European Convention could be invoked as an interpretative aid only insofar as the Charter contains provisions similar to those in the Convention. Article 61 further refers to "*African* practices" and "general principles of law recognised by *African* states" as sources of inspiration.[274] The only aspect which is stated in unqualified terms is "customs generally accepted by law".

As for its future relevance, Heyns warns that Convention jurisprudence should not be followed as a wholesale "common law" of a number of African states, but rather considered "critically and cautiously as one of the available options".[275]

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270 See (1993) 17 EHRR 213 at 218 for the Commission's decision.

271 See (1993) 17 EHRR 213 at 220 for the Court's judgment in this matter.

272 See also in this regard *Moustaquim v Belgium* (1991) 13 EHRR 802 and *Beldjoudi v France* (1992) 14 EHRR 801.

273 See ch 6.2.3 below.

274 Emphasis added.

275 (1995) 11 *SAJHR* 252 at 262.

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5.1.5.3 European aid and human rights in Africa

A series of Lomé Conventions have been concluded between member states, the Council and the Commission of the Community (on the one hand) and states in Africa, the Caribbean and Pacific (the "ACP" states, on the other hand). The first Lomé Convention was concluded in 1975 between 46 ACP states and nine European states. It was revised after five years. Lomé III spanned the next five year-period, 1986 - 1991.[276] In terms of the Fourth Convention, an amount of 12 000 million ECU (the equivalent of about 8 000 million pounds) has been made available for development aid in the ACP countries.

The preamble to the Fourth Lomé Convention reaffirms the faith in fundamental rights expressed in the UN Charter. It further recognises the "need to respect and guarantee civil and political rights and to strive to bring about full enjoyment of economic, social and cultural rights". In the body of the Convention the close link between human rights and development is highlighted: "Co-operation shall be directed towards development centred on man, the main protagonist and beneficiary of development, which thus entails respect for and promotion of all human rights".[277] Specific provision is made for the allocation of financial resources to the promotion of human rights in the ACP states, but at the request of the states.[278] Lomé IV marks the first time human rights has been made an essential element of ACP-EU relations.[279]

Development aid is, however, not granted conditional to human rights compliance. From the European perspective, at least two reasons may be cited for the omission of a provision suspending aid in the case of violations of human rights. The one is the difficulty of assessing facts and of making such a decision. In the absence of elaborate procedures, "suspension of aid on the grounds

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276 See eg (1996) 10 *Interights Bulletin* at 2.

277 Art 5(1) of Lomé IV.

278 Art 5(3) of Lomé IV.

279 An opinion expressed in (1996) 10 *Interights Bulletin* at 2.

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of violations of human rights will prove open to abuse".[280] In the second place, there is no clear consensus that aid embargoes will effectively further the protection of human rights.[281]

Not only the particular states have received aid from external sources - also the African Commission has been a recipient of funds, especially from Europe. Major supporters of the African Commission have included the Raoul Wallenberg Institute (Lund, Sweden) and The Danish Centre for Human Rights. Some commissioners have expressed their misgivings about the Commission's dependence on these outside sources.[282] In the opinion of the majority the Commission was not compromising their objectives by accepting donations from "partners" who work towards the same goal: the realisation of human rights globally.[283]

To some commentators, these steps represent limited attempts by former colonial powers to redress the "excessive exploitation, indeed the theft, of resources"[284] of former colonies by powers that formerly administered their territories. The question has been raised whether depleted states are entitled to sue the state which was responsible for administering the colonial territory in terms of the right to development.[285] Bedjaoui shows that this issue had already been raised by the first conference of Non-aligned countries in 1961, where a formula for the right to reparation and compensation was suggested.[286] Aid by former colonial masters is never couched in such terms, but is presented as "mutually beneficial co-operation".

The campaign for African reparations was relaunched in the 1990s, when a conference on reparations was held in Lagos, Nigeria.[287] This was followed by a second conference in 1993, and

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280 Clapham (1991) at 80.

281 *Ibid.*

282 See interviews with Commissioners Beye, Kisanga and Ndiaye ((1996) (Oct - Dec) *AFLAQ* at 18, 31 and 43 respectively.

283 Interviews with Commissioners Nguema, Ben Salem and Rezzag-Bara, for example: see (1996) (Oct - Dec) *AFLAQ* at 8, 35 and 46, respectively.

284 Bedjaoui (1986) 2 *Lesotho Law Jnl* 93 at 117.

285 See eg Bedjaoui (1986) 2 *Lesotho Law Jnl* 93 at 118.

286 See Bedjaoui (1986) 2 *Lesotho Law Jnl* 93 at 128 (n 12).

287 See Abiola (1992) at 4.

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the adoption of the Abuja declaration.[288] The African Reparations Movement ("ARM") is aimed at obtaining reparation for enslavement and the effects of colonialism in Africa. Slavery retarded African development, the movement argues, when millions of active Africans were removed into forced labour in the "new world". With the abolition of slavery, foreign focus turned to Africa itself, resulting in the exploitation of its resources and potential. Economic aid is not regarded as sufficient reparation.[289] International precedent are cited in support of the movement's contentions.[290]

5.1.5.4 Some differences with the African system

i European homogeneity

Africa lacks the homogeneity of the European system. The European Convention system is "closed", departing from a strong sense of common identity, concretised in common membership of the Council of Europe. To become a member of the Council of Europe, states have to comply with the basic principles of the Council. These are democracy, rule of law, and respect for human rights. Initially, "respect for human rights" did not imply that ratification of the Convention (or acceptance of the individual complaints and of the Court's jurisdiction) served as a prerequisite for membership of the Council. Only in 1989 have all the member states of the Council complied with the three requirements of ratification, acceptance of individual complaints, and consent to the Court's jurisdiction. This meant that membership of the Council of Europe has become "regarded

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288 See the web page of the African Reparations Movement (UK) ("ARM (UK)") at http://the.arc.co.uk/arm/FAQs.html

289 At the cited web page, the ARM (UK) observes as follows: ARM believes that foreign aid is a double-edged sword which usually ends up with the recipient country owing more to the donor countries than they originally received. ARM also believes that African people owed many trillions of dollars compensation ... The wage bill of 50 million people for a period of over 400 years is so vast that, were the ARM to demand full compensation, all the countries in the North would be pauperised and they would indeed be in the position of the current countries of the South".

290 The state of Israel receives vast amounts of money yearly from Germany. The basis of this compensation is the suffering of Jews under Nazi rule during the Holocaust. Recently, the ICJ has ordered Iraq to pay reparations to Kuwait for damages suffered by Kuwait during the Gulf War.

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as inseparable from the undertaking to accept all obligations under the Convention, including the optional clauses".[291]

At the same time (1989) revolutionary changes saw new states emerging in Central and Eastern Europe. When some of these states started expressing the desire to become part of the Council of Europe, compliance with the three requirements listed above were made a political condition. The question of a state's admittance to the Council rests with the Committee of Ministers, responding to a proposal by the Parliamentary Assembly. In order to report on requests for membership by the "new" states, the Assembly set up teams of experts to visit the states concerned (with their consent). Such teams visited and compiled reports on Lithuania, Latvia, Estonia, Slovenia, Rumania, the Czech Republic, Slovakia, Russia and the Ukraine.

Russia applied for membership of the Council of Europe on 7 May 1992. Two rapporteurs examined and reported to the Parliamentary Assembly of the Council. The reports dealt with the legal system, the state of democracy, the economy, areas of political and military tension, the organisation of the judiciary, criminal law and human rights. Rapporteur Meuhlemann concluded as follows: "Russia does not yet meet all Council of Europe standards but integration is better than isolation; co-operation is better than confrontation".[292] On 25 January 1996 the Parliamentary Assembly of the Council of Europe decided to invite Russia to become a member. On 28 February 1996 Russia became the Council's 39th member.[293]

ii Democratic basis of Council of Europe

Democracy is, at worst, a stranger, and at best a recent arrival on the African continent. The Convention is founded on the idea that states maintain a basic democratic system. This forms part of the prerequisites for becoming a member of the Council of Europe. No similar requirement is

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291 Strasser in Macdonald (ed) (1993) at 777.

292 See Meuhlemann "Information Report" (1996) 17 *HRLJ* 185, and decision by Parliamentary Assembly (1996) 17 *HRLJ* 185.

293 See Meuhlemann (1996) 17 *HRLJ* at 194.

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set for membership of the OAU. On the contrary, the OAU has until the late 1970s largely been a club of African dictators.

Under the European Convention, the principle of state-compliance is ensured. The Commission and Court only have to deal with the fine-tuning of the system. In exceptional instances, the Convention has played some role in restoring democracy. An example is provided in the inter-state complaint of *Denmark, Sweden, Norway and the Netherlands v Greece*.[294]

Even in the context of the criminal trial, where complaints mostly originate, violations are exceptional occurrences embedded in generally favourable conditions. Exceptions confirm this trend. Tomuschat observes that a series of cases brought against Italy reveals not just non-compliance on an individual case basis, but "a general breakdown of the judicial system".[295] He continues to show that the general effectiveness of the Convention organ also suffered a "breakdown" under these circumstances.[296] This gives support to a contention that the European system is directed at individual cases that represent isolated events against a backdrop of habitual compliance.

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294 Applications 3321 – 3323 and 3344/67, (1968) 11 *YB of the European Convention* at 690. The Commission set a task team to undertake investaigations in Greece. Following a finding by the Commission and the Committee of Ministers that the Greek government was responsible for a practice of torture and ill-treatment, Greece denounced the Statute of the Council of Europe, withdrew from the institution and denounced the European Convention. In 1974, after the restoration of democratic government, Greece resumed its membership and once again ratified the Convention (see Robertson (1977) at 40 – 42).

295 Tomuschat (1992) 13 *HRLJ* 401 at 406.

296 Tomuschat (1992) 13 *HRLJ* 401 at 404 - 405.

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5.2 *The Inter-American system*

5.2.1 A brief history

As in the case of Europe, the Inter-American system took some time to become a functional system. In the Americas, institutional and substantive evolution stretches more years and considerably more phases than in Europe. This story needs to be told briefly:

It started at the political level, with states in the region seeking closer co-operation since the previous century.[297] In 1948, this movement culminated in the establishment of the Organisation of American States ("OAS") through the adoption of the OAS Charter. Not a very detailed, but at least a principled, commitment to human rights was included in the founding Charter.[298] At the same conference, the founding members adopted the American Declaration of the Rights and Duties of Man. This was, however, simply a resolution and not intended as a binding obligation on states.[299] No institutional arrangement was made for the implementation or supervision of the proclaimed rights either.

The lack of any institutional framework, apparent in the face of numerous human rights violations in the region, received the attention of the OAS ministers of foreign affairs meeting in 1959. By a resolution, they created a Commission to further ensure respect for human rights. Members of this Commission were elected and it started functioning as an autonomous entity within the OAS framework in 1960. The basis of its promotional and protective functions was the American Declaration. Through the Commission's activities, the Declaration has gradually been accepted as a "normative instrument that embodies the authoritative interpretation" of the "fundamental rights"

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297 See Buergenthal and Shelton (1995) at 37.

298 The principle of "the fundamental rights of the individual without distinction as to race, nationality, creed or sex" was affirmed in art 5(j) of the original Charter.

299 See Buergenthal (1975) 69 *AJIL* 828 at 829. This Declaration was in fact adopted before the Universal Declaration.

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referred to in the OAS Charter.[300] Eventually, to draw this development to its conclusion, the Inter-American Court of Human Rights declared that "the Declaration is for these states (OAS member states) a source of international obligations related to the Charter of the Organization".[301]

The fact that the Commission lacked a clear treaty basis, did not deter it from functioning proactively. As will be discussed below, it examined complaints, made recommendations and drafted reports. In 1970, the Commission was converted into one of the principal organs of the OAS, with the coming into effect of the Protocol of Buenos Aires.[302] Almost simultaneously, in 1969, the American Convention on Human Rights was adopted at an inter-governmental conference organised by the OAS. It took until 1978 to secure the ratification of eleven of the member states.[303] Its entry into force required the OAS General Assembly to provide for a new Statute for a reconstituted Commission. The new Statute, adopted in 1979, highlights the Commission's dual role, the one under the OAS Charter (in relation to all OAS member states) and the other under the American Convention (in relation to those OAS members that have ratified the Convention).

The American Convention of 1969 also provides for the establishment of the Inter-American Court of Human Rights. The Court was only established in 1980, after its first seven judges had been elected and its Statute had been approved by the OAS General Assembly and entered into force.[304] The Court delivered its first advisory judgment in 1982.[305] Two cases were submitted and decided (in 1981 and 1993) on the jurisdiction of the Court, but the first judgment in which the Court proceeded to consider the merits, was given only in 1988.[306]

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300 Buergenthal (1995) at 180.

301 Advisory Opinion OC-10/89, I-A Court Series A 10 at par 45.

302 This protocol amended the OAS Charter and gave the Commission an "institutional and constitutional legitimacy it had not previously enjoyed" (Buergenthal (1995) at 183).

303 As required by art 74(2) of the American Convention.

304 See eg Mower (1991) at 114.

305 The *'Other Treaties' Subject to the Consultative Jurisdiction of the Court* case, I-A Court Series A 1, judgment of 24 September 1982.

306 The *Velásquez Rodríguez* case, I-A Court Series C 4, judgment of 29 July 1988. See also the Preliminary Objections judgment in this case, I-A Court, Series C 1, judgment of 26 July 1987.

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The reasons why the first judgment of the Court was delivered only then, are the following:

- Most obviously, the non-acceptance of the optional jurisdiction of the Court by a majority of states reduces the potential impact of the Court.[307]

- The Commission was established first, quite some time before the Court. An inevitable feeling of loss of power, stature and influence on the part of serving commissioners and secretarial personnel no doubt contributed to some feeling of resentment at the "intrusion" of the new institution. In the first few years a number of cases could have been referred to the Court, but the Commission persisted in virtually ignoring the Court. Mower euphemistically refers to the Commission's inclination to "concentrate on own responsibilities".[308]

- Even though the Commission had not referred cases to the Court, the possibility of such a referral induced states to co-operate with the Commission. The mere presence of a court was used to exert pressure on states to work with the Commission in order to resolve disputes. By exerting its influence in this indirect way, the Court was deprived an opportunity to adjudicate publicly in contentious cases.

With the ratification of more states and the changing attitude of the Commission, the first contentious case was brought to court. The Court's decision was in itself also instrumental in generating publicity and enthusiasm for the Court, accentuating its role and accelerating its progress. In its first fifteen years of existence, the Court issued fourteen advisory judgments and seventeen judgments in various phases of eleven different cases submitted to it.[309]

The normative framework was also extended progressively. The Inter-American Convention to Prevent and Punish Torture was adopted in 1985, and entered into force in 1987. It reinforces and expands upon guarantees in the American Declaration and Convention. No additional supervisory body was created. The Commission is given the rather weak mandate to "endeavor in its annual

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307 See art 62(3) of the American Convention. By 1987, only ten states have accepted the Court's jurisdiction (Mower (1991) at 122).

308 Mower (1991) at 79.

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report to analyze the existing situation in the member states ... in regard to the prevention and elimination of torture".[310] Further elaboration of civil and political rights are: the Protocol to the American Convention on Human Rights to Abolish the Death Penalty,[311] the Inter-American Convention on Forced Disappearance of Persons[312] and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women.[313]

An important additional Protocol, dealing with socio-economic rights, was adopted in 1988. It is known as the "Protocol of San Salvador", but is officially called the Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights.[314] It has not entered into force yet, but when it does, states parties will have to submit periodic reports to the Inter-American Economic and Social Council on the progressive measures taken to ensure respect for the rights set out in the Protocol.[315] The Commission may also "formulate such observations and recommendations as it deems pertinent concerning the status of the economic, social and cultural rights" in the Protocol.[316] In respect of the right to organise and to join trade unions, the right of trade unions to function freely, and the right to education, individuals may apply to the Commission in terms of the complaints mechanism provided for under the American Convention.[317]

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309 See list in Buergenthal and Shelton (1995) at 687 - 689, also giving references to where the full texts of these judgments may be found.

310 Art 17 of the Inter-American Convention to Prevent and Punish Torture; full text quoted in Buergenthal and Shelton (1995) at 638 - 640.

311 The Protocol enters into force for those states that ratify it; see full text in Buergenthal and Shelton (1995) at 637.

312 It requires ratification by two states, not secured by 1 August 1995: Buergenthal and Shelton (1995) at 641 - 644.

313 In force since 3 March 1995, see Buergenthal and Shelton (1995) at 645 - 648.

314 See the full text of 22 articles in Buergenthal and Shelton (1995) at 631 - 636.

315 Art 19 of the Protocol.

316 Art 19(7) of the Protocol.

317 Art 19(6) of the Protocol. This is only the case when these rights are violated "by actions directly attributable to a State Party to this Protocol".

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By 1995, the OAS had 35 members, of which 25 had by then ratified the American Convention.[318] The major OAS members that had not ratified, are Canada and the USA. Other non-ratifying states include the "smaller English-speaking Caribbean nations".[319] At the same date, sixteen states parties have recognised the contentious jurisdiction of the Court. They were, with date of acceptance: Costa Rica (1980), Peru, Honduras, Venezuela (1981), Ecuador, Argentina (1984), Uruguay, Colombia (1985), Guatemala (1987), Suriname (1988), Panama, Chile, Nicaragua (1990), Trinidad and Tobago (1991) ,as well as Paraguay and Bolivia (1993).[320]

5.2.2 The Commission and the realisation of human rights

The Commission's dual role appears from the brief historical introduction above. At first, the Commission acted on the basis of the OAS Charter. Later, it was mandated to act in terms of the Convention.

5.2.2.1 Commission as Charter-based organ

To explain the way in which the Commission started functioning in the 1960s, one must take the contemporaneous social, political and economic factors into account. Politically, numerous Latin American regimes were repressive and authoritarian. There was little room for the rule of law to exist, and for an independent judiciary to function. Socio-economic conditions led to further deprivations. Arising from this context, the Commission became confronted with violations of three rights in particular: the **right to life**, the right to **liberty,** and the protection of **personal security and integrity**.[321] Violations of these rights did not present themselves as isolated events, severed in time and space, but as threats to masses of people, stretching over lengthy periods of time. In most instances, a significant sector of the population, or the population as a whole,

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318 See Buergenthal (1995) at 174 and 194.

319 See Buergenthal (1995) at 194.

320 Buergenthal and Shelton (1995) at 617.

321 See Medina Quiroga (1988) at 76 - 85, on the Commission's initial handling of gross and systematic violations.

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suffered from threats to the three stated rights. Redress could generally not be postponed, as the nature of the interests threatened dictated urgency of response.

The Commission still considered individual complaints, but could not use that method as the model for its total functioning. The individual complaints procedure, as it is used under the European Convention, departs from certain assumptions. It assumes that the rule of law is in place within an existing democracy. Breaches of rights are isolated events that should be brought to conformity with generally-accepted standards. It assumes, further, that states will co-operate, by, for instance, giving consent for investigations and by providing the Commission with information necessary to fulfil its functions. After being faced repeatedly with the incorrectness of these assumptions, the Commission developed a system that caters for both "individual" and "general" cases. "General" or massive and serious violations received priority.

The Commission's competence to protect human rights was formally acknowledged only in 1965. An amendment to the Statute of the Commission was adopted, followed by changes to the Commission's own regulations.[322] In these, a distinction was drawn between the supervision of human rights of a "general" and of an "individual" nature. The Commission had a general competence to survey all rights contained in the American Declaration. On the basis of violations, the Commission draws up reports about the situation in a specific country. The procedure adopted by the Commission is swift and flexible. Formal, legalistic requirements about time periods and the exhaustion of domestic remedies do not apply. Information is obtained from individual complaints directed to the Commission, other sources, and on-site investigations if the state agrees thereto. This report may at any time be made public by the Commission. This country-specific report could also be included in the Commission's comprehensive annual report to the OAS.

Individual complaints could also be examined. Under the 1965 resolution, individuals could only base their claims on seven of the 27 rights in the Declaration. These were the "preferred rights".

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322 See Medina Quiroga (1988) at 78 - 80.

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They were articles 1, 2, 3, 4, 18, 25 and 26 of the American Declaration.[323] This avenue was more legal in nature, as strict requirements of exhaustion of local remedies had to be followed. An investigation of the complaint could lead to a finding that a right had been violated, to recommendations to states, and a report.

One of the most significant contributions of the Commission was the system of reporting on its examination of the human rights situation in OAS member states. In cases where states concerned did not consent to a visit by the Commission, reports were prepared on the basis of complaints received and evidence heard outside the state.[324] The Dominican Republic became the first state to permit the Commission to undertake an on-site investigation. The Inter-American Commission is unique among inter-govermental organs in its ability to react to widespread violations of human rights and in initiating investigation of the human rights record in a country. Through these reports governments were exposed to unfavourable publicity, causing changes in conduct and raising public awareness.[325]

5.2.2.2 Commission as Convention-based organ

Under the Convention, the Commission has three main functions: It may undertake on-site investigations and draw up country reports, it may process individual complaints, and it may recommend measures to promote human rights in the region.[326] While country studies and reports constituted the main function of the Commission in the 1970s and 1980s, it has declined in importance after most military dictatorships have been replaced by democratically-elected governments in the 1990s. Country studies played a significant role in this change. Vivanco

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323 The preferred rights deal with the right to life, liberty and security (art 1), the right to equality (art 2), the right to religious freedom (art 3), the right to freedom of expression (art 4), the right to a fair trial (art 18), the right to protection from arbitrary arrest (art 25), and the right to due process of law (art 26).

324 The first two countries investigated on this basis were Cuba and Haiti (see Buergenthal and Shelton (1995) at 290).

325 See Mower (1991) at 85.

326 Art 41 of the American Convention.

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argues that the importance of reports is declining, and that individual complaints present the most direct and feasible way of realising rights in the Americas today.[327]

The Commission decides on the admissibility of individual complaints.[328] If a complaint is declared admissible, the Commission investigates the facts. During this process the Commission must place itself at the disposal of the parties "with a view to reaching a friendly settlement".[329] If the parties do not arrive at an amicable resolution of the dispute, the Commission sets out its conclusion on the matter in a report.[330] The report is transmitted to the state concerned. The state now has three months within which to react to the recommendations of the Commission. The case may also be referred to the Court in that period.

The Commission is responsible for overseeing the implementation of its recommendation if the matter is not referred to the Court. A state may be required to implement recommendations within a specified period. After expiry of the period the Commission may decide to publish its report. Eventually, the matter may be placed before the OAS General Assembly.

5.2.3 The Court and the realisation of human rights

The Inter-American Court derives its powers exclusively from the American Convention. In terms thereof, the Court can issue three kinds of judgments: advisory opinions, findings of and remedies to violations in individual cases, and interim orders.

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327 See Vivanco (1993) at 11.

328 For an overview of the Commission's procedure, see eg Buergenthal (1995) at 199 – 207 and Mower (1991) at 67 – 88.

329 Art 481(f) of the Convention.

330 Art 50 of the Convention.

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5.2.3.1 Advisory jurisdiction

It is especially in the exercise of its advisory jurisdiction that the Court has been influential. So far, the Court has made use of its advisory jurisdiction more extensively than its contentious jurisdiction. It has issued fourteen advisory opinions in the first fifteen years of its existence. The Court's advisory jurisdiction extends beyond the states parties to the Convention, as all OAS member states may request advisory opinions.[331] Thus far, however, all requests have come from the Commission and states parties only.[332] Although advisory opinions are not legally binding, it will be shown below[333] that these judgments "have considerable persuasive effect not only for the states which are party to such proceedings, but for the entire inter-American system".[334]

5.2.3.2 Contentious jurisdiction

The contentious jurisdiction of the Court has been used relatively infrequently. One reason is the fact that the Court's contentious jurisdiction has to be accepted by states. Another reasons why the Court's jurisdiction has not been invoked more frequently, is that the most pressing and prevalent violations in Latin America are by their very nature better supervised by a non-judicial or quasi-judicial institution. This is especially true for the period of widespread military rule in Latin America during the 1970s and 1980s. The mechanism of country reports provided the best means of addressing these situations of massive and systematic human rights violations. With the election of democratic governments in most of the OAS member states in the 1990s, on-site investigations and specific country reports have declined notably. In future, human rights victims will have to rely increasingly on individual petitions to redress violations of their rights.[335] This is bound to increase the importance of the Court's contentious jurisdiction.

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331 See cases listed in Buergenthal and Shelton (1995) at 687.

332 See Buergenthal and Shelton (1995) at 265.

333 Par 5.2.5(f) below.

334 Davidson (1997) at 232.

335 See Vivanco (1994) at 16 –17 of typed manuscript.

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5.2.3.3 Interim orders

At present, the American Convention is the only international human rights instrument which provides for interim orders. The Court must adopt provisional measures in "cases of extreme gravity and urgency" when such measures are "necessary to avoid irreparable damage to persons".[336] Interim measures may be ordered after a case has been submitted to the Court,[337] or at the request of the Commission, when the case is still under consideration by it.[338]

5.2.4 Co-existence with institution providing of regional economic integration

The Organisation of American States set out as a regional political body. Only later, with the forming of MERCOSUR, initiatives were taken towards economic integration in the region.[339] The objectives of MERCOSUR are trade liberalisation, co-ordination of macro-economic policies, establishing a common external tariff, negotiation of special agreements and the institutionalisation of a dispute-solving framework.[340] MERCOSUR lacks a court to interpret community law, such as the European Court of Justice. Instead, an arbitration procedure is provided for.[341] Arbitration only enters the picture after direct negotiations and recourse to conciliation have proved to be unsuccessful.[342] Only then will an arbitration panel of three members be appointed to give a binding judgment. This has been described as "the only instance where a MERCOSUR body has

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336 Art 63(2) of the American Convention.

337 As was done in the *Velásquez Rodríguez*, *Godínez Cruz*, and *Garbi* and *Corrales* cases, see (1981) 2 *HRLJ* 108.

338 More often invoked, see eg *Chunimá* case (1992) 13 *HRLJ* 253, *Chipoco* case (1993) 14 *HRLJ* 257 and *Reggiardo-Tolosa* case (1994) 15 *HRLJ* 259.

339 MERCOSUR is the acronym for the Common Market among Brazil, Argentina, Uruguay and Paraguay. For a background, see Viejobueno (1995) 20 *SAYIL* 81.

340 Viejobueno (1995) 20 *SAYIL* 81 at 102.

341 See Protocol of Brasilia for the Settlement of Disputes (1997) 36 *ILM* at 691.

342 Viejobueno (1995) 20 *SAYIL* 81 at 113 -114.

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been granted a degree of supra-nationality, in that the interpretation laid down by the tribunal is taken as the final word on the matter".[343]

The *ad hoc* nature of the tribunal means that a body of case-law will not readily develop. It seems unlikely, at least in the short term, that a human rights-based jurisprudence will evolve along the lines of the trend traced in the European Court of Justice. It is further unlikely that an overlap of the two institutions will occur in the field of human rights adjudication, as has been the case in Europe.

5.2.5 Relevance for Africa

Of the two major regional regimes which have preceded the adoption of the African Charter, the Inter-American system is of much more relevance to the African situation than the European.[344] Some of the reasons for this statement are now discussed. Despite this fact, African courts have made infrequent use of Inter-American case-law as a guide to consitutional interpretation.[345] Examples of reliance on this system in Southern Africa are found in Namibian,[346] South African[347] and Zimbabwean case-law.[348]

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343 Viejobueno (1995) 20 *SAYIL* 81 at 114.

344 For a general overview and comparison of the three systems, see Weston, Lukes and Hnatt (1987) 20 *Vanderbilt Jnl of Transnational Law* 585.

345 Especially compared to the extent of reliance on cases decided under the European Convention. This state of affairs has been influenced by Africa's (post) colonial link with Europe, as well as by inaccessibility, language differences and the fact that relatively few judgments have to date been delivered by the Inter-American Court of Human Rights.

346 See eg *Kauesa v Minister of Home Affairs* 1995 1 SA 51 (NmH) (at 90,91).

347 In South Africa, it was referred to in *S v Rudman* 1989 3 SA 368 (C), where Cooper J emphasised that the Convention had not been ratified by South Africa and that it did not form part of customary international law (at 376), in *S v Makwanyane* 1995 3 SA 391 (CC) (at par 35, nn 48, 52), *Coetzee v Government of RSA* 1995 6 SACLR 1 (CC) (at par 52) and *Ferreira v Levin* 1996 1 SA 984 (CC) (at par 170).

348 Reference is found in eg *S v Juvenile* 1990 4 SA 151 (ZSC) (at 155 H-I) and *Retrofit v Posts and Telecommunications Corporation* 1996 1 SA 847 (ZSC) (at 856 G-H).

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5.2.5.1 Socio-economic similarities

The generally favourable economic conditions in Western Europe contrast sharply with those in Latin American states. Poverty was and still is an acute problem in all of Latin America. One indicator of the consequences of poverty is low life expectancy - one-tenth of children in Central America, for example, will die before the age of five.[349] These countries also have high unemployment, low literacy and education levels, and carry heavy burdens of external debt.[350] The socio-economic profile of Africa is broadly similar to that of Latin America.

An example of how these factors impact on the work of the Inter-American Commission and Court is the way in which the requirements of "exhaustion of local remedies" had been dealt with. In its request for the Court's advisory opinion in *Exceptions to the Exhaustion of Domestic Remedies*[351] case, the Commission asked the Court's advice on the following question: Is an indigent, who is unable to avail himself (or herself) of potential remedies in his or her own legal system due to economic circumstances, required to exhaust local remedies? The Court answered in the negative, concluding that "if legal services are required ... and a person is unable to obtain such services because of his indigence, then that person would be exempted from the requirement to exhaust local remedies".[352] The basis of this finding was that requiring the exhaustion of domestic remedies under such circumstances would infringe a person's right to equal protection before the law. Equal protection before the law includes the right not to be discriminated against by reason of economic status.[353] Such an approach seems equally appropriate in an African setting.

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349 See Mower (1991) at 5.

350 Mower (1991) at 6.

351 Advisory opinion OC 11/90, judgment of 10 August 1990, see also (1991) 12 *HRLJ* 20.

352 At par 30 of the judgment.

353 See par 22 of the judgment.

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5.2.5.2 Political contexts similar

To be admitted to the Council of **Europe**, prospective member states have to be **stable** and established **democracies**. With the exception of Greece in the 1970s, democracy as an accepted form of governance has never been threatened in states parties to the European Convention. Democratic governance and stable governments in European enhanced the commitment of states parties to human rights and their co-operation with the Commission. In contrast, **authoritarianism** has characterised forms of government in **Latin America**. Mower finds its basis in similar political practices of native Indians and hierarchical institutions imposed by Spanish and Portuguese colonial rule.[354] A movement towards democracy may be discerned in Latin America during the 1980s. This process was also enhanced by the Commission. This movement itself led to regional **instability**, with states hovering between the old (despotism, authoritarianism) and the new (democracy).

The co-operation of governments has been a major obstacle in the Inter-American system. Similarly, the first ten years of the African Commission's functioning has only seen a very gradual shift towards better state co-operation. This has been illustrated, in recent years, by states allowing the Commission to undertake on-site visits, and by their participation in the activities of the Commission. But the limited extent to which states sometimes contribute positively, is overshadowed by their non-compliance of basic duties, such as reporting and responding to queries by the Commission.

5.2.5.3 Negative impact of colonialism

Latin America and Africa share **a history of colonialism**. Its legacy partly informs the current socio-economic and political situation in both Africa and Latin and Central America. This factor underlies many of the problems and disadvantages experienced in a post-colonial context. The European system does not have to grapple with these burdens of the past.

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354 (1991) at 13.

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5.2.5.4 Nature and scope of violations

From the three first features, it follows that the nature and scope of human rights violations differ in Western Europe (on the one hand) and in Africa and Latin America (on the other). Findings of violations under the European Convention are not directed at achieving fundamental institutional reform. They are directed at aberrations in a democratic system directed towards the realisation of basic rights. Some of these "aberrations" were very serious, for instance torture and maltreatment of prisoners. But typically, violations are raised within the context of the right to a fair trial, to ensure its "fairness". So, issues such as the length of proceedings, the impartiality of presiding officers, and the provision of legal defence have been raised. While these issues are important, they amount to a "fine-tuning" or technical refinement of the engine of the European system. Recently, some cases involving allegations of patterns of gross human rights violations have demonstrated the shortcomings of the European system in this regard.[355]

In contrast, considering the nature of regional violations, the image of a complete "overhaul" of the engine in the case of the Inter-American system comes to mind. Mower[356] identifies three recurring violations of a "grim" and "devastating" form in Latin America: forced disappearances (which led to politically motivated killing); summary executions (again, on political grounds) and systematic torture. The initial focus of the Commission was exclusively on series or patterns of violations, and not on individual cases. Individual cases only become relevant as examples of mass violations. Addressing isolated incidents in an *ad hoc* way would not have gone to the root causes - the existence of repressive regimes that implemented these atrocities.

In short, the Inter-American system was directed not merely at enhancing the human rights performance of established democracies, but at establishing and strengthening democracy itself. The extent of human rights violations in Africa, the struggle for democracy to take root and the nature of violations already submitted to the African Commission[357] all underscore the similarity between the Latin American and African experience.

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355 See Reidy, Hampson and Boyle (1997) 15 *NQHR* 161.

356 (1991) at 25-30.

357 See ch 3.3.3 (b) above.

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5.2.5.5 Lack of regional homogeneity

The profile of members of the Council of Europe has traditionally been clearly more homogenous than that of the OAS. With states like Canada, the USA, Cuba, Brazil, Chile, Mexico and Antigua all under one umbrella, the cumulative effect of socio-economic, ideological, cultural, linguistic,[358] political and historical differences are more pronounced in this region than in Europe. After the fall of the Berlin Wall and the demise of socialism, many former "East" European states have joined the Council of Europe.[359] This has changed the character of the Council of Europe, introducing socio-economic, cultural, linguistic and political differences. Although not all OAS member states have ratified the American Convention, they are all bound by the OAS Charter and the Commission's mandate thereunder. Africa, with 53 OAU member states, and with its linguistic, cultural, legal, political and economic dissimilarities, resembles the Americas more than Europe. This factor will determine to a large extent how far judicial activism can extend.

5.2.5.6 Role of advisory opinions

The acceptance of the jurisdiction of the European Court is today regarded as a political requirement for ratification of the Convention. Before the increase in numbers of Council member states after the events of 1989, all the Convention states parties had already accepted the Court's jurisdiction. In Latin America, the number of states accepting the Court's jurisdiction grew slowly. By 1995, 17 of the 25 states parties to the Convention have accepted it.[360] A similar trend may be expected in Africa. However, acceptance only refers to the Court's "contentions" jurisdiction. This leaves room for the Court to impact on the position in all states through its advisory judgments, even where they have not accepted the Court's contentious jurisdiction.

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358 The dominant language in Latin America is Spanish, but Portuguese is the official language of Brasil. To this list should be added English (official language in eg Jamaica and Trinidad and Tobago) and French (in parts of Canada).

359 Fifteen states joined the Council of Europe between 1990 and 1996. They are Bulgaria, Croatia, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Macedonia, Moldova, Poland, Romania, Russia, Slovakia, Slovenia and Ukraine ((1997) 22 *EurLRev* 82 – 83).

360 See Buergenthal (1995) at 208 – 209.

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The following example from the Inter-American system illustrates this. In *Restrictions to the Death Penalty (articles 4 (2) and 4(4); American Convention on Human Rights)*[361] the Commission presented a case to the Court for an advisory opinion on a situation related to Guatemala. In terms of the Convention, states may not apply the death penalty to crimes for which it was not provided previously under the domestic law of that state. The government of Guatemala extended the penalty to political offences by creating Courts of Special Jurisdiction. Guatemala had not accepted the Court's contentious jurisdiction at that stage.[362]

The government of Guatemala attended the Court sitting and argued that an advisory opinion should not be issued. This argument arose from the state's concern "that this was a contentious case disguised as a request for an advisory opinion".[363] Rejecting this argument, the Court drew a clear distinction between contentious and advisory proceedings:[364] "There are no parties (in advisory proceedings) in the sense that there are no complainants and respondents; no State is required to defend itself against formal changes, for the proceeding does not contemplate formal changes; no judicial sanctions are envisaged and none can be decreed." As for the merits, the Court found the prohibition on the extension of the imposition of capital punishment to be absolute. Despite the fact that the judgment was not binding on the Guatemalan government, it abolished the Courts of Special Jurisdiction in 1983. The government also granted amnesty to all those sentenced to death by these courts previously.[365] Although it was a subsequent government that implemented these steps, the present ruler had already promised them.[366]

Another example is presented by the Inter-American Court's *Advisory Opinion on International Responsibility for the Promulgation and Enforcement of Laws in Violation of the American Convention on Human Rights*.[367] The judgment was given following a request by the Commission

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361 IA Court HR OC-3/83, 8 September 1983. Series A 3, reprinted in (1983) 4 *HRLJ* 339.

362 It did so in 1987 (Buergenthal and Shelton (1995) at 617).

363 Cerna (1992) 63 *British YB of Intl Law* 135 at 162.

364 At par 22.

365 By Decree Law 74/84, see Cerna (1992) 63 *British YB of Intl Law* 135 at 164.

366 Cerna (1992) 63 *British YB of Intl Law* 135 at 164.

367 Advisory Opinion OC-14/94, decided on 9 December 1994. The text of the judgment is reprinted in (1995) 34 *ILM* at 1188.

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for an advisory opinion on the extension of the death penalty for additional crimes in the new Constitution of Peru.[368] Peru had at that stage not made a declaration accepting the jurisdiction of the Court. The government of Peru raised the preliminary objection that the Court was not mandated to express an opinion on the compatibility with the Convention of the local law of Peru. Finding the questions posed for the Court's determination to be "general in nature", the Court found that the Commission had standing to make the request for an opinion.[369] The principle enunciated by the Court was of a general nature, but its application to the situation in Peru was no secret to anyone.[370]

The Commission has also requested opinions on matters of general concern, not involving any particular state. An illustration is provided by the Court's advisory opinion on the question whether the judicial guarantee of *habeas corpus* may be suspended during a state of emergency.[371] *Habeas corpus* is not guaranteed in the American Convention, but the Court linked it to the right to liberty and not to be exposed to torture. As this is a non-derogable right, the judicial guarantee was also held to be non-derogable. Following this judgment, the Nicaraguan government desisted from suspending *habeas corpus* guarantees.[372]

5.2.5.7 Necessity of urgent interim relief

The nature of violations in the Inter-American system (mainly disappearances and systematic torture) and the lack of co-operation (or, even worse, the undermining) by violating states make

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368 This extension of the death penalty is in clear conflict with art 4(2) of the Convention, which provides that that the application of the death penalty "shall not be extended to crimes to which it does not presently apply".

369 Par 24 of the judgment.

370 The general principle enunciated was that "the promulgation of a law in manifest conflict with the obligations assumed by a State upon ratifying or acceding to the Convention is a violation of that treaty" and "gives rise to international responsibility for the State in question" (Court's finding).

371 *Habeas Corpus in Emergency Situations (Article 27(2), 25(1), 7(6) of the American Convention*), case OC - 8/87, judgment of 30 January 1987, Series A 8. See also (1988) 9 *HRLJ* 94, and Cerna in (1992) 63 *British YB of Intl Law* 135 at 186 - 189.

372 See Vivanco (1993) at 13 (n 28).

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urgent interim relief imperative. Already during its consideration of the first contentious case, the Inter-American Court made use of the powers granted by the Convention. Witnesses who testified or still had to be called in the *Velàsquez Rodriguez* case were threatened. The Commission reported that a Honduran, summoned by the Court to appear as witness, was killed "on a public thoroughfare (in the capital city) by a group of armed men who .... fled in a vehicle". Soon thereafter, the Court was informed of the assassination of a man who testified before the Court, and whose testimony was hostile to the Honduran government.[373] The Court held a public hearing and issued provisional measures requiring the government to report within two weeks on measures it had adopted to protect witnesses and about the investigation of the assassinations.

Two more recent instances in which the Inter-American Court ordered provisional measures are *Tamayo v Peru* and *Lancayo v Nicaragua*.[374] In the latter case, the Court ordered provisional measures for the protection of the life of a presidential candidate, Arnoldo Aleman Lacayo. He was subsequently elected as president and took office in 1997. In Europe, the Court refused the Commission's competence to order interim measures.[375]

The Protocol establishing an African Court on Human Rights provides explicitly for interim measures.[376] This provision is informed by the failure of existing mechanisms to prevent the escalation of serious human rights violations on the continent. In this respect, again, the Latin American experience is of relevance to Africa.

5.2.5.8 Importance of conciliation functions

Friendly settlement procedures are allowed under both the European and Inter-American systems. The practice of the European Commission has rendered conciliation through amicable settlement almost irrelevant under the European Convention. From 1955 to 1989, for example, of the 14 241

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373 See Steiner and Alston (1996) at 652.

374 See (1996) 4 *Human Rights Brief* at 2,7.

375 See *Cruz Varas v Sweden*, Series A 201, judgment of 20 March 1991 (but with a slender 10 - 9 majority.)

376 See ch 7 below.

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cases finally decided by the Commission, only 84 amounted to "friendly settlements".[377] With the adoption of Protocol no 11, the total obliteration of non-judicial, conciliatory means is a likely consequence of the future evolution of the European system. In a single institution, the emphasis will tend to fall almost exclusively on the legal dimension of rights realisation.

In contrast, the evolution of the Inter-American system was dominated by a non-judicial body, the Commission. Conciliation was very much part of its fact-finding activities and on-site investigations. By their very nature, these functions lend themselves much better to conciliation. This will ensure the "continuing relevance" of non-judicial conceptions in the American system.[378]

Factors such as the low level of "infiltration" of a culture of adjudication in traditional African societies, the (often) massive scale of violations and Africa's traditional preference for informal dispute resolution methods all support conciliation rather than adjudication as a method of social organisation and control.

5.2.5.9 Pre-existence of Commission

Under the Inter-American system a non-judicial structure (the Inter-American Commission) was established initially (in 1960). A judicial mechanism, the Inter-American Court, was launched only in 1980, twenty years after the first Commission was established.[379] This has led to a measure of tension in the relationship between the two institutions. Their inter-relationship is of particular importance, because the Commission is the main mechanism through which cases are referred to the Court. Two institutions - a commission and a court - were also set up under the European Convention, but they started off more or less simultaneously.

The African experience is again set to follow the Latin American example closer than the European. The African Commission was established in 1987. It has gradually settled itself over a

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377 Council of Europe (1989) at 16.

378 See Cerna in Janis (1992) at 131.

379 See eg Buergental (1995) at 181.

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decade as a body of importance. In my view, the establishment of an African Court on Human Rights should not be expected before the turn of the century. This means that the African Commission will have been in existence for more than a decade and a half by that time. Similar tensions as in the Inter-American system may be expected, and should be anticipated and planned for.

5.2.5.10 More importance attached to reparations

The Inter-American and European systems differ from one another in two respects when it comes to reparations. The **competence** of the Inter-American Court to order reparations is **much broader** than that of the European Court.[380] The Inter-American Court has not only ordered pecuniary damages, but also **nonpecuniary or moral damages, rehabilitation and satisfaction**.[381] The Inter-American Court has also ruled that both the **victim's entitlement** to pecuniary and nonpecuniary damages automatically **passes to the victim's heirs**.[382] It is doubtful whether the position under the European Convention is similar.[383]

In these two respects, too, the Inter-American system has undergone developments which are closer to African values. In traditional African societies reparations were indispensable to restore the balance caused by some disruption of the societal fabric. Given the importance of the family, also in its extended form, the Latin American approach to the heir's entitlement would also seem closer to home to an African.

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380 The European Court is restricted to financial compensation - it may not order other remedial measures (see Pasqualucci (1996) 18 *Michigan Jnl of Intl Law* 1 at 10-11).

381 See ch 7 below, and Pasqualucci (1996) 18 *Michigan Jnl of Intl Law* 1 at 32-42.

382 See Pasqualucci (1996) 18 *Michigan Jnl of Intl Law* 1 at 17.

383 *Ibid.*

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5.3 *The emerging Asian system*

No regional human rights system has evolved in Asia yet. Asia is also the region in which internationally accepted human rights instruments enjoy the lowest global ratification percentage.[384] Following the adoption of an African human rights instrument, the UN in 1982 convened a seminar in Colombo (Sri Lanka) to discuss the possibility of similar steps in Asia.[385] Government representatives from most Asian countries were not in favour of establishing a regional commission, expressing their preference for a global approach.[386]

On a sub-regional level, however, such efforts have been more fruitful. Given their commitment to human rights domestically, Australia and New Zealand have become the focal point of a sub-regional system in the Pacific Island region. Non-governmental initiatives to create such a sub-regional system were launched. Meetings were organised under the auspices of LAWASIA, an Asian NGO based in Australia.[387] A Pacific Island Human Rights Charter was drafted by NGOs in 1989. Governmental comment was invited. The proposal opted for implementation by means of a commission: "In proposing a Pacific Island human rights commission but not a court for the region, the drafters followed the African model".[388]

Some reasons for the failure of the emergence of systematic and institutional regional human rights protection in the Asian region are apparent from the following factors:

- A prerequisite for implementation of human rights norms on a regional level is the adherence to similar norms in domestic systems. Numerous Asian countries do not have a record of human rights protection, even on a formal level, and do not provide for constitutional protection of

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384 See eg Bayefsky in Henkin and Hargrove (eds) (1994) at 291, Table I, illustrating that Asia as a region has the lowest rate of ratification of all regions in the world. The Table shows that the Asian rate of ratification is consistently lower than that of Africa, the group with the second lowest ratification percentage.

385 Seminar on national, local and regional arrangements for the promotion and protection of human rights in the Asian region. See Leary in Welch and Leary (eds) (1990) 13 at 16-18.

386 Leary in Welch and Leary (eds) (1990) at 16, 24.

387 See Leary in Welch and Leary (eds) (1990) at 18-19.

388 See Leary in Welch and Leary (eds) (1990) at 19.

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human rights. The existence of military and other forms of authoritarian government clearly impedes advances in this direction.

- "Asia" is hardly a homogenous single "region". It is geographically fragmented, consisting of more than 35 countries in the Indian sub-continent, South East Asia and the Pacific Islands. Religious and cultural differences abound. Some countries are strongly influenced by Islam, others by Hinduism, Buddhism, Confucianism and Christianity. Languages spoken include Hindu, Urdu, Tamil, Japanese, Thai, Mandarin and English. Ethnic driven groups, such as Malays, Chinese, Indians, Polynesians, Japanese and Afghanis co-exist in the region. Levels of economic development vary significantly: Highly industrialised countries (such as Japan, Singapore, South Korea) may be contrasted with developing countries where suffering and poverty is rife (the likes of Bangladesh, Indonesia and India). Governmental structures include "western" democracies (in Australia and India) and authoritarian regimes (in Bangladesh, Burma and China).

- Asian cultural traditions differ from those in the West. The concept of "human rights" is often regarded as alien.[389]

- No institution which can facilitate regional co-operation on a political level, exists. The other three regional human rights systems were all preceded by regional political organisations (the Council of Europe, the Organisation of American States and the Organisation of African Unity). However, there is a tendency that sub-regional structures are evolving. The Association of South-East Asian Nations ("ASEAN") and South Asian Association for Regional Co-operation ("SAARC") are examples of bodies for sub-regional economic and political co-operation.[390]

At least the first three of the four factors mentioned above would resonate in discussions about human rights protection on the African continent. In the light of this diversity one has to agree with

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389 From an Indian perspective, see Pannikar (1982) 120 *Diogenes* 75. More generally, see Kausikan (1993) 24 *Foreign Policy* 92.

390 Leary in Welch and Leary (eds) (1990) at 14-15.

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Leary that the more preferable approach is "a sub-regional approach which attempts to build on the greater cultural homogeneity of a smaller area".[391]

5.4 *The Arab and Islamic world*

African states feature prominently among the members of the two major Arabic and Islamic organisations, the Arab League and the Organisation of Islamic Conference ("OIC"). The role of human rights under these two regimes is discussed briefly.

5.4.1 The Arab League

The League of Arab States was founded in terms of the Pact of the League of Arab States of 1945.[392] Its overriding aim is to strengthen unity among Arab states by designing closer links between its members.[393] The Pact emphasises the independence and sovereignty of the members. No mention is made in the founding document of either the contents or principles of human rights. The League institutions include the Council, the General Secretariat and an administrative tribunal, founded in 1964. Of the 22 member states of the League of Arab States in 1996, ten were from Africa.[394] They were Algeria, the Comoros, Djibouti, Egypt, Libya, Mauritania, Morocco, Somalia, Sudan and Tunisia.

At the international conference on human rights held in Teheran in 1968, some Arab states, with the assistance of the secretariat of the Arab League, managed to have the position of the Arabs in the territories occupied by Israel included in the agenda. This successful invocation of "human rights" issues, following a number of defeats at the hands of Israel in 1967, created an awareness of human rights among the Arab states. However, at the Teheran conference, and thereafter, the

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391 Leary in Welch and Leary (eds) (1990) at 16.

392 See MacDonald (1965).

393 See art 2 of the Pact of the League of Arab States.

394 See *Middle East and North Africa 1997* (1996) at 228.

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commitment of the Arab League to human rights was primarily "a means of censuring Israel over its treatment of the inhabitants of the occupied territories".[395] Soon after the conference, in 1968, a regional conference on human rights was held in Beirut, where the Permanent Arab Commission on Human Rights was established. From its inception, this was a highly politicised body. The political nature of the commission is accentuated by the method of appointment. The commission does not consist of independent experts, as in many other international human rights bodies, but of government representatives. The Commission may only submit recommendations and suggestions to the League Council, another political body.[396]

In 1979, the Union of Arab Lawyers elaborated the Arab Convention on Human Rights. Its status remains unofficial.[397] The Arab human rights movement exerted pressure for the adoption of a more comprehensive and binding human rights instrument and at Syracuse the movement presented a draft covenant.[398] It provided for an individual complaints procedure and an Arab Court of Human Rights.[399] Almost surprisingly, and with very little fanfare, the Council of the Arab League adopted the Arab Convention (or "Covenant", or "Charter") of Human Rights at its 102nd meeting in 1994.[400] The Charter is not yet in force, as it must first be ratified by seven League member states.[401]

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395 Robertson and Merrills (1992) at 198.

396 Robertson and Merrils (1992) at 198 -199.

397 See Merrils and Robertson (1992) at 200.

398 Or "charter". In the literature available to me, the two terms are used interchangeably.

399 See Abu Se'Ada (1995) 1 *Huqooq Al Insaan* 28, and Robertson and Merrills (1992) at 200.

400 For the full text, see (1996) 56 *ICJ Review* 57. Rishwami (1996) 10 *Interights Bulletin* 8 at 10 is worth quoting in full: "During the Ordinary Session no 102, which took place in September 1994, resolution 5437 approving the Charter was adopted through a procedural manoeuvre. When this agenda-item was opened for discussion ... the then Jordanian Minister of Education, asked if there was any objection to approving the instrument. Kuwait asked to adjourn the discussion until the Council of Arab Ministers finalises the Arab Declaration on Human Rights. The Chairman put the Kuwaiti motion to the vote. ... The defeat of the motion was interpreted as an endorsement of the Charter". The Kuwaiti motion received only seven votes. None of these states were from Africa.

401 Arab Organisation of Human Rights (1995) *Human Rights Situation in the Arab World* deals with the adopted charter, at 1 - 6. By 1996, only one state, Iraq, has signed, but not ratified, the Charter (see Rishmawi (1996) 10 *Interights Bulletin* 8).

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As far as substantive rights are concerned, the charter draws heavily on international documents, such as the CCPR and CESCR.[402] Unfortunately, these substantive rights have been rendered almost meaningless by the inclusion of articles 3 and 4 into the Convention. Article 3 states that the rights "contained within the constitutions and law of the member states shall not be restricted or overruled on the basis that they are not contained within the Covenant or that they are contradicted by it".[403] Article 4 allows for measures that would contradict the stipulations of the Covenant "in cases of public emergencies that threaten the existence of the nation".[404] Some internationally recognised human rights have been omitted from the Charter. Most striking among these omissions are the freedom from slavery and the right to change one's religion.

Not surprisingly, the Arab Convention did not follow proposals for an individual complaints procedure or for the creation of an Arab Court of Human Rights. The only supervising feature takes the form of a committee of human rights experts.[405] Seven experts in the field of human rights are elected from candidates proposed by member states to the Charter.[406] Committee members serve in their personal capacities. The only function provided for this committee is the examination of state reports.[407] States have to submit an initial report within a year of ratification.[408] Thereafter, reports are to be submitted every three years.

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402 The inclusion of the Cairo Declaration creates a contradiction, Rishwami (1996 (10) *Interights Bulletin* 8) argued.

403 As quoted by Abu Se'Ada (1995) 1 *Huqooq Al Insaan* 28 at 29. The full version of this article, which is quite difficult to follow, is as follows: "There will be no restriction of any basic human right which is recognised or existent in any State party to this Charter, by virtue of law, treaties or custom. Nor may [these rights] be derogated from under the pretext that they have not been recognised in this Charter, or recognised to a lesser degree".

404 *Ibid.* The relevance is highlighted in Arab League states: see the situation in Syria and Egypt, where states of emergency have been in force since the 1960s (1996) 10 *Interights Bulletin* 8 at 9.

405 See Rishmawi (1996) 10 *Interights Bulletin* 8 at 9 - 10.

406 Art 40(B) of the Arab Charter.

407 Art 41(1) of the Arab Charter.

408 *Ibid.*

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One promising feature is the competence of the Committee to address queries to states parties, to which states must answer by submitting a report.[409] However, in all these cases the only follow-up provided for is that the Committee may address its comments to a political body, the Permanent Arab Commission on Human Rights. The Commission on Human Rights, in turn, reports to the League Council. Implementation under the Arab Charter on Human Rights is weak. The mechanisms established are inadequate. This regional system "offers little to the universal system and does little to advance human rights protection in the Arab World".[410]

The substantive weaknesses and lack of meaningful safeguards and implementation mechanisms invite the conclusion that the most recent instrument adopted under the auspices of the Arab League is little more than a declamatory statement intended to change international perceptions about human rights in Arab states. It is intended mainly for consumption on the level of international politics, to be used as a basis for criticism of Israeli human rights abuses. It has been pointed out that the Covenant had very little media exposure and subsequently "very little effect on Arab public opinion".[411] Clearly, the individual is not to be accorded any significant role within this framework. Only one member state of the League has as yet signed the Charter.[412] It seems unlikely that this regional instrument will enter into force soon.

For those states that are members of both the OAU and the Arab League, the African system provides a higher level of protection. Except for the African regional regime, international human rights regimes also provide for higher levels of protection for those states that have ratified such international instruments. Among these instruments, the CESCR, CCPR, the CRC and CEDAW have been ratified by a number of Arab League states. However, many of these states have entered far-reaching reservations at ratification, especially in the case of CEDAW.[413] The assumption that the African members of the Arab League take human rights obligations more seriously than other

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409 Art 41(2) of the Arab Charter.

410 See Rishwami (1996) 10 *Interights Bulletin* 8 at 10.

411 Arab Organisation for Human Rights (1995) at 3.

412 This country is Iraq: see (1996) 56 *ICJ Review* 57.

413 See ch 2.4.4 above.

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League members is confirmed by the fact that the three League members who have, by 1994, adhered to the CCPR Optional Protocol, were all African.[414]

Two approaches to the evaluation of the Arab system are possible. One may regard its establishment as a positive development. Although it has certain deficiencies, it must be viewed as part of a gradual process. Seen from this perspective, it is better to have a weak system in place, than having nothing at all. One may, on the other hand, regard the system as meaningless and mere make-belief. Viewed from an African perspective, the argument for gradual evolution should find little favour, as Africa is at present moving beyond this phase to improve the effective functioning of its human rights system.

5.4.2 The Organisation of the Islamic Conference

The Organisation of Islamic Conference ("OIC") aims at the promotion of Islamic solidarity among member states. It works towards co-operation in the economic, cultural and political spheres. A Conference summit is held approximately every three years. Its institutions include the Conference of Ministers of Foreign Affairs, the secretariat and specialised commissions.[415] Of the 52 members in 1996, close to a majority (25 states) were African.[416] These states were: Algeria, Benin, Burkina Faso, Cameroon, Chad, Comoros,[417] Djibouti, Egypt, Gabon, Gambia, Guinea, Guinea-Bissau, Libya, Mali, Mauritania, Morocco, Mozambique, Niger, Nigeria, Senegal, Sierra Leone, Somalia, Sudan, Tunisia and Uganda. African countries generally perform better than other OIC states as far as ratification of international human rights instruments are concerned.[418]

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414 These states were Algeria, Libya and Somalia: see Arab Organisation of Human Rights (1995) at 2.

415 See *The Middle East and North Africa* (1997) at 235.

416 *The Middle East and North Africa* (1997) at 234.

417 See the preamble to the 1992 Constitution, which proclaims this state's commitment at the global level to the UN Charter, and at the regional level to the OAU Charter and the OIC Charter. This is a good illustration of the duality, but reconciliation of African and Islamic influences.

418 See the ratification chart (1996) 10 *Interights Bulletin* 42. Two OIC member states, Indonesia and Oman, have not ratified any international human rights instruments.

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The major human rights document adopted under this framework is the Cairo Declaration on Human Rights in Islam.[419] It was adopted by members of the OIC at Cairo in 1990 and is clearly of a declamatory nature only. As its title indicates, and given the aims of the OIC, the declaration is based closely on the principles of the Shari'ah.[420] In a concluding provision, it is stipulated that all "rights and freedoms ... are subject to the Islam Shari'ah".[421]

Many rights are explicitly limited by the provisions of the Shari'ah. Examples are the right to life,[422] regulation of punishment[423] and the right to assume public office.[424] These deviations are extreme to the extent of threatening the international project to attain a core consensus on human rights across cultural barriers.

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419 UN doc A/45/421/5/21797 at 199.

420 In general, on human rights and Islam, see An-Na'im (1990) 3 *Harvard HR Jnl* 13.

421 Art 24 of the Cairo Declaration.

422 Art 2 of the Cairo Declaration.

423 Art 19(d) of the Cairo Declaration.

424 Art 23(b) of the Cairo Declaration.

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

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

- 6.1.1 Early roots, genesis and demise of an idea
- 6.1.2 Academic and other criticism of the lack of a court
- 6.1.3 Preliminary work
- 6.1.4 Window of opportunity
- 6.1.5 Institutional steps

6.2 Arguments in favour of an Court on Human and Poeples' Rights

- 6.2.1 Binding, authoritative and conclusive decisions
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- 6.2.3 Taking "universalism" seriously
- 6.2.4 Development of an African human rights jurisprudence
- 6.2.5 Publicity will be maximised
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- 6.2.8 An impartial tribunal can depoliticise conflict
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- 6.2.10 Non-acceptance of the court's jurisdiction will expose hypocrites
- 6.2.11 Enhanced state co-operation
- 6.2.12 Consistent approach to violations
- 6.2.13 Logical culmination of previous efforts

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

6.1.1 Early roots, genesis and demise of an idea

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

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

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

2 *Ibid.*

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

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

Footnotes continued on next page.

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

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

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

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

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

7 See par 6.1.5 (c) below.

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

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

10 See M'Baye (1992) at 164.

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

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

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

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

12 (1992) at 164.

13 *Ibid.*

14 (1992) at 166.

15 *Ibid.*

16 See Part II of the Charter.

17 Ouguergouz (1993) at 75.

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6.1.2 Academic and other criticism of the lack of a court

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

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

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

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

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

21 Kodjo (1990) 11 *HRLJ* 280.

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

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

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

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

26 (1995) at 151.

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

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

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27 Eze (1984) at 226.

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

29 Rembe (1985) at 138.

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

31 M'Baye (1992) at 164.

32 M'Baye (1992) at 165.

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

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

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

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

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

34 *Ibid.*

35 *Ibid.*

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

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

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

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

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

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

39 *Ibid.*

40 *Ibid.*

41 Heinz (1990).

42 Quoted by Heinz (1990) at 8.

43 *Ibid.*

44 *Ibid.*

45 Benedek Executive Summary at 2.

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

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

6.1.3 Preliminary work

6.1.3.1 African Charter

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

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

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

48 (1988) 1 *AYBIL* 83.

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

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

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

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

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

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

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

54 M'Baye (1992) at 151.

55 See M'Baye (1992) at 148.

56 See M'Baye (1992) at 149.

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6.1.3.2 African Court on Human and Peoples' Rights

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

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

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

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

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

59 International Commission of Jurists (1993a).

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

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

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

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60 *Ibid.*

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

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

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

64 Sock (1993) at 6 of typed paper.

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

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

The workshop concluded with detailed recommendations that

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

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

66 (1994) 56 *ICJ Newsletter* 2.

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

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

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

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

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

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

69 As prescribed by art 19 of the OAU Charter.

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

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

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

6.1.4 Window of opportunity

6.1.4.1 The late 1970s: The African Charter

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

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71 *Ibid.*

72 Art 92 of the UN Charter.

73 Art 66 of the Charter.

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

75 (1992) 3.

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

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

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

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

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

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

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

79 Young (1996) at 56.

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

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

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

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

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81 Akende (1982) at 1.

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

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

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

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

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

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

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

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

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

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

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

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

92 See Breytenbach (1996) at 31.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

106 Previous colonies of France, Portugal and Spain.

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

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

6.1.5 Institutional steps

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

6.1.5.1 Official go-ahead by Assembly

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

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107 Sock (1993) at 1.

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

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i *African Charter*

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

ii *African Court on Human and Peoples' Rights*

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

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

110 Naldi (1989) at 110.

111 (1995) at 164.

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

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

114 *Ibid.*

115 AHG/ Res. 230 (XXX).

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

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

6.1.5.2 Meeting of experts

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

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116 *Ibid.*

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

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

119 Sock (1994).

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i African Charter

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

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

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

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

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

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

124 *Ibid.*

125 See M'Baye (1992) at 153.

126 *Ibid.*

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

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ii African Court on Human and Peoples' Rights

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

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

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

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

129 *Ibid.*

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

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

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

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

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

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

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

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

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

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

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

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

6.1.5.3 Ministerial conference and approval by Council of Ministers

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

i African Charter

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

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

138 See discussion in ch 7.2.35 below.

139 See M'Baye (1992) at 158.

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

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

ii *African Court on Human and Peoples' Rights*

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

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140 See M'Baye (1992) at 157.

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

142 OAU CH/ 1149 (XXXVII).

143 See M'Baye (1992) at 158.

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

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

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

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

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

146 *Ibid.*

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

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

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

150 *Ibid.*

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

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

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

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

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

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

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

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

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

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

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

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

i The African Charter

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

ii The African Court on Human and Peoples' Rights

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

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157 See Ouguergouz (1993) at 64.

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

6.1.5.5 Entry into force

i The African Charter

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

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

159 They seized power on 25 May 1997.

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

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

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

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

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

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

ii The African Court on Human and Peoples' Rights

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

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

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

165 Congo, Guinea and Senegal.

166 Welch (1995) at 166.

167 Art 31 of the draft Protocol.

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

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

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

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

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

170 (1996).

171 (1996) at 37 - 38.

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

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

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

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

6.1.5.6 Putting institutions into place (operationalisation)

i African Commission, established under the African Charter

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

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

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

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

ii The African Court on Human and Peoples' Rights

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

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

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

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175 See Second Activity Report at par 13.

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

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

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6.2.1 Binding, authoritative and conclusive decisions

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

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

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

179 Rembe (1991) at 44.

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

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

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

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

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

6.2.2 Implementation of effective remedies

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

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

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184 See art 27(2) of the Protocol.

185 See par 3.3.3.1.iv above.

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

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

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

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

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

6.2.3 Taking "universalism" seriously

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

6.2.4 Development of an African human rights jurisprudence

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

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189 Art 26(1) of the Protocol.

190 Art 29(2) of the Protocol.

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

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

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

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

193 Notably in the American Declaration.

194 Steiner and Alston (1996) at 692.

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

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

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

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

Footnotes continued on next page.

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

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

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

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

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

201 Ankumah (1996) at 164.

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

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

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

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

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

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

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

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

205 See ch 3.3.3.3 above.

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

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

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

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

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

208 See ch 3.1 above.

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

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

6.2.5 Publicity will be maximised

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

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209 See ch 3.1 above.

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

211 See ch 8.1.10 below.

212 See ch 2 above.

213 Photocopy of speech at 8, as typed.

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

6.2.6 Strengthening local courts

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

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

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

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214 See art 10(1) of the Protocol.

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

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

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

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

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

217 *Ibid.*

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

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6.2.8 An impartial tribunal can depoliticise conflict

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

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

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

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

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

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

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

6.2.9 Change in perceptions may strengthen the African human rights system

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

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

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

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222 See art 25(2) of the Protocol.

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

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

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

226 See Table B above.

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

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

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

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

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227 See eg ch 2.4.4 above.

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

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

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

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6.2.11 Enhanced state co-operation

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

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

6.2.12 Consistent approach to violations

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

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

232 See art 28 of the Protocol.

233 See ch 3.3.1 above.

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

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

6.2.13 Logical culmination of previous efforts

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

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

236 Resolution 115.

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

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Chapter 7 DISCUSSION OF DRAFT PROTOCOL

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7.1 Introduction

The historical process, through which the draft Protocol establishing an African Court on Human and Peoples' Rights was adopted, has been discussed elsewhere.[1] The aim of this chapter is to analyse the proposed Protocol. The Protocol should be scrutinised critically to ensure that the proposed Court takes the form best suited to the realisation of human rights in Africa. The basis of discussion is the draft Protocol which was adopted at Cape Town in September 1995,[2] as subsequently amended at Nouakchott in April 1997.[3] The purpose of this analysis is twofold. As the proposed Protocol to the Charter is not yet finalised, further comments could probably still be considered before the final version is adopted. On the other hand, it is accepted that its basic form has already been moulded. How to maximise the Court's effectiveness and its putting into place is therefore the other aim of this analysis.

An initial question arises: At which level should this Protocol be discussed? Different levels of simplifying or explaining legal texts may and should be identified:[4]

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1 Chapter 6.1 above.

2 OAU/LEG/EXP/AFC/HPR/PRO (I) Rev I, reprinted in (1996) 8 *RADIC* 493.

3 OAU/LEG/EXP/AFC/HPR/PROT (2), adopted at the second government legal experts meeting, held from 11 to 14 April in Nouakchott, Mauritania.

4 During the drafting of the South African Constitution much emphasis has been placed on a "plain language" approach. To me, it was never clear at which level this "simplification" is directed. A comparison between the interim and final Constitutions reveals a deletion of words such as "shall", changing of passive voice constructions, shortening of sentences, division into sub-sections and listing of different aspects by item.

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- *Explanation for lawyers*

The text may be explained for lawyers' consumption. This means that the text remains a document for lawyers. It is only made easier to access, understand and apply. The vocabulary remains locked in a technical register. But even in discussions aimed at lawyers overly formalistic and traditional legal language ("legalese") can and should still be avoided by applying the tenets of "plain English" (or "plain language").[5] In this chapter, the draft Protocol will first (and primarily) be discussed at this level. Some suggestions will illustrate how "plain language" tenets could be used to redraft the proposed provisions.

- *Simplification directed at the average informed adult*

To communicate with the average informed adult, one has to escape from the legal register to make room for the general, everyday vocabulary. Especially those "lay persons" in a position to create wider understanding or application of the law should be able to understand the relevant texts.[6] People like teachers, police officials, prison officials, para-legals, members of NGOs and community workers should all be in a position to understand and create wider understanding. In this chapter, the simplified version takes the form of a scheme that highlights the most important features of the Protocol, and its relationship to the African Charter.[7] It is presented in a colourful and user-friendly way. A schematic presentation has the added advantage of giving an overview at one glance. The reader is spared the trouble of struggling through the 34 articles of the Protocol and the 68 articles of the Charter to reconstruct meaning.

The final Constitution certainly is much more elegant and easier to read, but still by no means accessible to the average South African.

5 In these tenets, see eg the Law Reform Commission of Victoria (Australia) *Drafting Manual*, and a series of articles in *Michigan Bar Review*, see eg (1993) *Michigan Bar Review* 826 and 1198, and (1994) *Michigan Bar Review* 326.

6 As Gutto indicates, the use of "plain language" in law is ultimately aimed at making institutions "accessible" and more "participatory" ((1995) 11 *SAJHR* 311)).

7 I call it a scheme, but the term "algorithm" has also been used (see Mnqaba (1995)). The purpose of such an "algorithm" is to present rules in a visually more comprehensible and attractive format. It is done by breaking the rule up into questions, each with a "yes" or "no" answer. The user proceeds through the scheme by asking questions and ends up at the desired endpoint, which answers his or her legal problem.

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- *Simplification directed at the relatively illiterate majority*

Using ordinary vocabulary, schemes or charts will still not reach the relatively illiterate majority. To really simplify a legal document, one needs to rethink concepts. Merely translating technical concepts into everyday language is insufficient.[8] In Africa, especially, the deficiencies in education

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[8] See eg the 1983 Constitution of Liberia, which was accompanied by a "simplified version" drafted by the Constitutional Advisory Assembly. This presents on illustration of how constitutional texts may be made accessible to "all" nationals. Two examples are cited:

Example 1

Article 1 from the Constitution:

STRUCTURE OF THE STATE

All power is inherent in the people. All free governments are instituted by their authority and for their benefit and they have the right to alter and reform the same when their safety and happiness so require. In order to ensure democratic government which responds to the wishes of the governed, the people shall have the right at such period, and in such manner as provided for under this Constitution to cause their public servants to leave office and to fill vacancies by regular elections and appointments.

Article 1 of the simplified text:

STRUCTURE OF THE STATE

(HOW OUR COUNTRY IS MADE)

The people have the power to make a government and they have the right to change it if the government is not good.

Example 2

Article 22 from the Constitution:

(a) Every person shall have the right to own property alone as well as in association with others; provided that only Liberian citizens shall have the right to own real property within the Republic.

(b) Private property rights, however, shall not extend to any mineral resources on or beneath any land or to any lands under the seas and waterways of the Republic. All mineral resources in and under the seas and other waterways shall belong to the Republic and be used by and for the entire Republic.

(c) Non-citizen missionary, educational and other benevolent institutions shall have the right to own property, as long as that property is used for the purposes for which acquired; property no longer so used shall escheat to the Republic.

(d) The Republic may, on the basis of reciprocity, convey to a foreign government property to be used perpetually for its diplomatic activities. This land shall not be transferred or otherwise conveyed to any other party or used for any other purpose, except upon the expressed permission of the Government of Liberia. All property so conveyed may escheat to the Republic in the event of a cessation of diplomatic relations.

Article 22 from the simplified text:

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and information dissemination have been identified as paramount obstacles in communication. Any project aimed at making a legal instrument accessible to Africans has to attach considerable weight to this factor. Otherwise, "accessibility" and "promotion" not only remain ineffectual, but also become dishonest rhetoric. A few seminars or a few speeches broadcast on national television are bound to have minimal impact on the rural majority. Ultimately, in the African context, reinventing legal texts in local languages stands the best chance of conveying their content to the African masses. As this can hardly be attempted here,[9] an effort will be made to discuss the Protocol only at the first and second levels identified above.

7.2 Explanation for lawyers

The most recent draft Protocol, the one adopted by governmental experts in April 1997 at Nouakchott (the "Nouakchott Protocol"),[10] forms the basis of discussion. Reference will be made to the following previous drafts and *travaux préparatoires*:

- the proposal adopted at the 5th International Commission of Jurists Workshop on NGO Participation in the African Commission, held in Addis Ababa in November 1993 (the "Addis Ababa proposal");[11]

Every person in Liberia shall have the right to own property alone or together with other people, but only Liberian citizens can buy land and own deed. Properties like gold, diamond, iron ore, and so forth, under the ground belong to government. Church people and other foreigners whose purpose is not to make profit shall be allowed to buy lands. If they stop doing the thing for which they bought the land and begin to make profit, then the land will go back to the government. Government will give lands to Ambassadors from different countries and if they stop to work in Liberia, then the government will take back the land.

While this may be an admirable attempt at creating an understandable text, the end-product is a mixture of legal concepts (such as "deed" "citizens" and "properties").

9 Primarily due to the variety of languages spoken in Africa.

10 It is also referred to as "the Protocol", document OAU/LEG/AFC/HPR/PROT(2), adopted in Nouakchott on 14 April 1997.

11 International Commission of Jurists document Additional Protocol to the African Charter on Human and Peoples' Rights, Fifth International Commission of Jurists Workshop on NGO Participation in the African Commission on Human and Peoples' Rights, 28 - 30 November 1993, Addis Ababa, Ethiopia.

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- "Explanatory Notes to Draft Additional Protocol",[12] drafted by a group of experts who met under International Commission of Jurists auspices in Geneva to finalise the Addis Ababa proposal.
- the version adopted by the first meeting of government legal experts at Cape Town in September 1995 (the "Cape Town Protocol");[13]
- the report adopted with the draft (Cape Town) Protocol,[14] which reflects the deliberations during the Cape Town meeting;
- comments by OAU member states in response to an invitation by the Secretary-General for commentary on the Cape Town Protocol, which are contained in the Report of the OAU Secretary-General, prepared for the 65th meeting of the Council of Ministers;[15]

The African Court on Human and Peoples' Rights, as proposed in the Nouakchott Protocol, is compared to other international courts. Courts that are included are, at the global level, the International Court of Justice (the "ICJ") and the International Tribunals established in respect of the ex-Yugoslavia and Rwanda. Courts referred to at the regional level are the European and Inter-American Courts of Human Rights and the European Court of Justice. At the sub-regional level, the various courts provided for in the treaties of African regional organisations are considered.[16]

7.2.1 Form of the Protocol

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12 Also an International Commission of Jurists document, marked "Fifth Workshop on NGO Participation in the African Commission on Human and Peoples' Rights", 28 - 30 November 1993, Addis Ababa, Ethiopia. This will be referred to as "Explanatory Notes". "Explanatory notes" were also made available to delegates at the Cape Town meeting. This largely resembles the previously drafted explanatory notes.

13 Document OAU/LEG/EXP/AFC/HPR/PRO (I) Rev I, adopted in Cape Town on 12 September 1995.

14 OAU document OAU/LEG/EXP/AFC/HPR/RPT (I) Rev I Report on Government Experts Meeting on the Establishment of an African Court on Human and Peoples' Rights 6 - 12 September 1995, Cape Town, South Africa.

15 See OAU document CM/1996 (LXV), Report of the Secretary-General on the Draft Protocol on the Establishment of an African Court on Human and Peoples' Rights, prepared for the 65th ordinary session of the OAU Council of Ministers (24 - 28 February 1997, Tripoli, Libya).

16 See eg the most detailed, the Protocol on the ECOWAS Community Court of Justice in (1991) 19 *Official Jnl of ECOWAS* 4.

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The African Charter, adopted in 1981, does not provide for a judicial body, such as a court. In international law, generally, there is no obligation to submit inter-state disputes or disputes involving states and individuals or NGOs for judicial settlement by an international tribunal.[17] The decisions of an international court only bind a state that has given prior consent to accept the court's jurisdiction. Consent may be given in one of two ways: It may be given on an *ad hoc* basis, for the purpose of a particular dispute, or it may be of a more general nature, as provided for in a treaty before any concrete dispute arises. The states parties to the African Charter did not provide any such consent. The question therefore arises: If a Court on Human and Peoples' Rights is to be established, by what mechanism should this be set in place: by amendment to the Charter, or by an amending or optional Protocol to the Charter?

7.2.1.1 Amendment to the Charter?

The Court may be established by way of an amendment to the African Charter. The process of amendment is provided for in the Charter, and must proceed as follows:[18]

- Any state party may present a written request for an amendment to the OAU Secretary-General.
- All states parties are then informed of the proposal, and the state sponsoring the amendment gives an opportunity to the Commission to express its opinion.
- The Assembly of Heads of State and Government "may" then "consider" the draft amendment. A simple majority of the states parties is required to approve the amendment.

If a simple majority has approved amendment, it comes into force only for those states that have "accepted" the amendment. The commencement date is three months after the Secretary-General has received "notice of the acceptance". It is not clear whether a state's vote at the Assembly meeting to "approve" the amendment in itself constitutes "acceptance". A strict reading of the text

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17 Bilder in Henkin & Hargrove (eds) (1994) at 319.

18 Art 68 of the African Charter.

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(that is, the deliberate terminological difference between "accept" and "approve") seems to suggest that the vote of approval merely opens up the process. States still have to file a "notice of acceptance" before they will be bound by the amendment. In this interpretation the process of amendment resembles that of agreeing to an optional protocol.

Another interpretation is also possible. Approval of the amendment may be interpreted by states as changing their obligations under the Charter, without them being required to file separate notices of acceptance. If the last interpretation is accepted, the simple majority required to secure approval may be too burdensome to create an African Human Rights Court in the foreseeable future. Uncertainty surrounding the precise process of amendment,[19] and the high threshold required to effect amendment that is likely to be accepted in the Protocol (a simple majority of OAU member states), are major obstacles on this possible route to establishing a court.

7.2.1.2 A Protocol: Amending or optional?

A distinction should be drawn between amending and optional protocols:

- An amending protocol introduces fundamental reform, and requires the consent of all the states parties to the original treaty in order for it to enter into force.[20] Protocol no 11 to the European Convention is an example of an amending protocol, which requires the consent of all states parties before it will enter into force.[21]

- All states parties to the original treaty need not accept an optional protocol. The original states will have to create it, and their support is necessary to open the process of optional ratification. But the Protocol may turn into force if a much smaller number of states have ratified it, as in the case of the Optional Protocols to the CCPR. An optional (or "additional") Protocol has been adopted to set up another Court in Africa. The ECOWAS Court of Justice was

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19 The African Charter has not been amended since its inception.

20 As is required in the case of Protocol no 11 to the European Convention. (See, about the nature of that Protocol, Council of Europe (1994b) at par 55.)

21 See ch 5.1.1 above.

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established by way of a Protocol that was adopted by the Heads of State and Government of ECOWAS. At its adoption, the Protocol entered into force "provisionally", but it will only enter into force "definitively" after ratified by at least seven member states.[22]

The African Charter provides that special protocols or agreements may, if necessary, supplement the provisions of the Charter.[23] The Charter does not provide for any other requirements to be met, leaving it to the protocol or agreement to spell out particulars. This factor clearly makes it appropriate to refer to the Nouakchott Protocol as an "optional" (or even an "additional Protocol"), as it supplements the Charter. This seems to present the most promising route to secure the participation of a smaller number of states than 26 (a simple majority of OAU members), at least initially, to get the Court going.

But will an optional Protocol creating a court not be an "amending" protocol[24] as well? It is arguable that the Protocol does more than "supplement" the Charter. State parties to the African Charter have, at the time of ratification, not consented to the jurisdiction of a regional tribunal. Such a fundamental amendment cannot automatically bind states parties to the African Charter. In this argument, the Protocol should rather be termed an "amendment" or an "amending" Protocol and should be adopted in terms of article 68 of the Charter. An amendment or "amending Protocol" will require the consent of all states parties to the Charter to be bound by the jurisdiction of the Court. In my view, there is no reason why this route has to be followed, and a number of considerations weigh heavily against it. In the European system, it was imperative to adopt Protocol no 11 as an amending Protocol, as it would cause one institution (the European Commission) to be replaced by another (the Court). The changes brought about by the Protocol under discussion are less dramatic: An existing institution (the Commission) is retained, with its functions merely being supplemented (by the Court).

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22 Art 34 of the Protocol establishing the ECOWAS Community Court of Justice.

23 Art 66.

24 And therefore also an "amendment' in terms of art 68 of the Charter.

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7.2.2 Preamble

Those member states of the OAU that agree to the Protocol, will do so with the following preambular declaration in mind:

Considering that the Charter of the Organisation of African Unity recognises that freedom, equality, justice, peace and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples,

Noting that the African Charter on Human and Peoples' Rights reaffirms adherence to the principles of Human and Peoples' Rights, freedom and duties contained in the declarations, conventions and other instruments adopted by the OAU, and other international organisations,

Recognising that the twofold objective of the African Charter on Human and Peoples' Rights is to ensure on the one hand promotion and on the other protection of human and peoples' rights, freedoms and duties,

Recognising further, the efforts of the African Commission on Human and Peoples' Rights in the protection and promotion of human and peoples' rights since its inception in 1987,

Recalling Resolution AHG/Res.230 (XXX) adopted by the Assembly of Heads of State and Government in June 1994 in Tunis, Tunisia, requesting the Secretary-General to convene a Government experts' meeting to ponder, in conjunction with the African Commission, over the means to enhance the efficiency of the African Commission in considering particularly the establishment of an African Court on Human and Peoples' Rights,

Firmly convinced that the attainment of the objectives of the African Charter of Human and Peoples' Rights requires the establishment of an African Court on Human Peoples' Rights to complement and reinforce the functions of the African Commission on Human and Peoples' Rights.

The Preamble provides the historical and political context in which the Protocol stands to be adopted. In the first paragraph, reference is made to the founding document of the OAU, its

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Charter of 1963.[25] Being embedded in the OAU framework, the Protocol is not isolated from broader African concerns, such as efforts to enhance unity by the adoption of the Abuja Treaty establishing the African Economic Community. From the second paragraph, the close link between the African Charter, adopted in 1981, and this Protocol, is stressed. The link lies in the fact that the African Commission has proved to be insufficient to protect human and peoples' rights provided for in the Charter. An African Court on Human and Peoples' Rights is to supplement, not to substitute, the protection already undertaken by the Commission. The Commission retains its mandate. The Court's supplementary nature underscores the past and future contribution of the Commission.

Close reliance is placed on the authority of the Charter and of the Assembly as the source of the Protocol. The creation of a Court is presented as a continuation of trends, rather than a rupture with the past or a futuristic novelty. The authority of the Heads of State and Government is invoked by referring to their resolution which formally set the process of adoption into motion. In the last paragraph, the clearest indication is given of the drafters' passionate support for the establishment of the Court. Their "firm conviction" that a Court is "required", is based on the provisions of an existing instrument, the African Charter. A Court is to be established, not as a court for court's sake, or to threaten state sovereignty, but to realise the "attainment of the objectives of the African Charter".

The Protocol preamble differs from the Addis Ababa proposal in one small, but significant respect. The Cape Town draft incorporated and the Nouakchott draft retained the word "duties" in the third paragraph of the Preamble. This mirrors the inclusion of the concept both in the preamble to and in the substantive part of the African Charter. This could be read as an attempt, at the rhetorical level, to provide the Protocol with a clearer "African" foundation. At a conceptual level, it seeks to

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25 The first paragraph of this Preamble is identical to the second paragraph of the Preamble to the African Charter.

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provide a notion familiar to African societies as a jurisprudential counter-balance to "rights and freedoms" included in the Charter.[26]

7.2.3 Article 1: Establishment of the Court

> *There shall be established an African Court on Human and Peoples' Rights "hereinafter referred to as the Court", the organisation, jurisdiction and functioning of which shall be governed by the present Protocol.*[27]

Aspects related to the proposed Court are regulated by the Protocol. Implicitly, this is a reminder that the African Charter does not provide for a court, and therefore this provision underlines the need for a separate Protocol. Article 1 has to be read with article 32, which empowers the Court to draw up its own Rules of procedure. The Protocol will, subsequently, be "extended" by these rules.

What's in a name? In the name of this "African Court on Human and Peoples' Rights", two elements are most striking:

- It is established as an explicitly continental ("African") Court, on the model of the two other regional human rights courts, the "European" and "Inter-American" Courts.
- Where the other two Courts are denoted Courts of "Human Rights", this one is a Court of "Human and Peoples' Rights". This recalls the substantive provisions contained in the African

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26 See Heyns (1996), who proposed that the "final" South African Constitution should make use of the "African" concept of "duties" to limit rights, rather than limitation mechanisms taken over from systems without roots in African soil.

27 Only the words "the Court" should have been placed in inverted commas. Redrafted according to plain language tenets, this article could read: "This Protocol establishes an African Court on Human Peoples' Rights and regulates its organisation, jurisdiction and functioning." The redrafted version discarded two formalistic and meaningless "shall"s, converted two passive voice constructions into the active voice, and reduced the number of words. A general definition article could be inserted at the end of the Protocol, which would clarify the shortened references. It would in my view also suffice to place ("the Court") after "Rights" in the version under discussion.

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Charter, which set out the basis for the Court's jurisdiction. In other words, this feature also emphasises the "African" nature of the Court.

Note should be taken of the potential terminological snag created by the use of prepositions in the regional systems. The founding documents are the African Charter *on* Human and Peoples' Rights, the American Convention *on* Human Rights and the European Convention *on* Human Rights[28]. While the other two Courts are courts "*of* Human Rights", the African equivalent is a court "*on* Human and Peoples' Rights".[29] This preference is probably informed by the name of the existing supervisory body under the Charter, the African Commission *on* Human and Peoples' Rights.

7.2.4 Article 2: Relationship between the Court and the Commission

> *The Court shall complement the protective mandate of the African Commission on Human and Peoples' Rights "hereinafter referred to as the Commission", conferred upon it by the African Charter on Human and Peoples' Rights, "hereinafter referred to as the Charter".*[30]

Two objectives of the African Charter are identified in the Preamble to the Protocol: **promotion** and **protection** of rights, freedoms and duties. Since its inception, the Commission had been entrusted with both these functions. This article clearly states that the Court does not substitute, but rather supplements, complements and reinforces the work of the Commission. But the supplementary function extends only as far as the protective function is concerned. This means that promotion remains the exclusive domain of the Commission, while protection becomes the

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28 Officially known as the European Convention for the Protection of Human Rights and Freedoms, though. But see eg Harris *et al* (1995) *Law of the European Convention on Human Rights.*

29 This was not the case in the Cape Town draft, where "of" was used.

30 Again, the inelegancy of the inverted commas arises. The relevant phrase should rather have read "hereinafter referred to as 'the Commission'". Another attempt at redrafting: "The Court complements the protective mandate which the African Charter has conferred upon (granted ?) the Commission".

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joint responsibility of the Commission and the Court. In fact, the general rule is that a communication will be entertained by both the Commission (first) and the Court (thereafter).

A rigid categorisation between promotion and protection does not reflect reality. The Court's judgments, especially advisory opinions, may have a great educational and promotional value. As for the primacy of the promotional function in the work of the African Commission: The European Commission, operating in a vastly different context, has no explicit mandate to promote human rights awareness. The Inter-American Commission has a mandate to "develop awareness of human rights among the peoples of America".[31] This region, which is in need of mass awareness raising, has also seen the development of a specific institute for the promotion of human rights.[32] A similar evolution in Africa would be advisable.

As far as the protective function is concerned, the focus of the Commission's work could also be affected. Its role should be to screen complaints to ensure that the Court is not overrun by complaints, and to collect data and information.[33] This will require an extension of the present fact-finding mandate of the Commission. It is submitted that the competence to undertake effective factual studies, to interview witnesses and to collect evidence is already provided for in the Charter.[34]

The two other regional systems each also has a two-tier system in place, in terms of which complaints are directed first to the Commission. Only after a filtering process may the Court's jurisdiction be invoked. In both the European and the American system the Commissions have been much more active than the Court.[35]

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31 Art 41(a) of the American Convention.

32 The Center for Justice and International Law (CEJIL).

33 This is in line with commissioner Amega's opinion that "the Commission serves as an organ of investigation" in terms of the Protocol ((1997) 7 *African HR Newsletter* at 2).

34 See the wide mandate in art 46 of the Charter: "The Commission may resort to any appropriate method of investigation...".

35 See ch 5.1 and 5.2 above.

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7.2.5 Article 3: Jurisdiction

1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and the application of the Charter, this Protocol and any other applicable African Human Rights instrument.

2 In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by decision of the Court.

This article introduces the two different types of jurisdiction the Court may assume: **advisory** (mainly abstract "interpretation") and **contentious** (matters arising from the concrete "application" of the Charter). This jurisdiction is not restricted to the Charter and the Protocol, but extends to "any other applicable African Human Rights instrument". This reference is repeated in article 4(1), where this aspect is discussed.

The implication of this provision is that once a state has ratified the Protocol, it accepts, as a necessary consequence, the Court's compulsory jurisdiction relating to both individual and inter-state complaints. In terms of the Charter, both types of complaints are automatically possible once a state has ratified the Charter. In this sense, inroads into state sovereignty therefore follow immediately after ratification. The respective positions under the European and Inter-American systems differ. In terms of the European Convention, ratifying states automatically accept the Commission's jurisdiction in relation to inter-state complaints.[36] States may at any stage after ratification formally recognise the competence of the Commission to receive individual applications.[37] The position in the American Convention is the inverse: States become liable for scrutiny by the Commission on the basis of individual complaints automatically when they ratify the American Convention,[38] while the inter-state complaint procedure is optional.[39] States parties

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36 Art 24 of the European Convention.

37 Art 25 of the European Convention.

38 Art 44 of the American Convention.

39 Art 45(1) of the American Convention.

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to both these regional Conventions must make express declarations that they accept the jurisdiction of the respective Courts.[40]

Under the Protocol, ratification entails accepting the jurisdiction of the Court in all instances. Tunisia presented a proposal at the Nouakchott meeting that the competence of the Court should be made subject to the requirement of a declaration from each state party accepting such competence.[41]

The jurisdiction of the Court extends to "cases ... submitted to it concerning the interpretation and application of the Charter ... and any other applicable African Human Rights instrument". Its advisory jurisdiction explicitly provides for opinions not only on the African Charter, but also on "other African human rights instruments".[42] A question that arises in this regard, is whether the Court's contentious jurisdiction also includes the provisions in "other African human rights instruments". In terms of this article, the Court has jurisdiction about the "application" of the Charter and "any other applicable African human rights instrument". Does this mean that the Court is endowed with contentious jurisdiction over disputes arising from the Convention on the Conservation of Nature and Natural Resources, for example, or any other regional human rights instruments?

Three arguments may be raised against such an interpretation.

- Article 3 states the general position on jurisdiction. Because the Court's advisory jurisdiction includes opinions on "other African human rights instruments", this aspect must be included in the general provision on jurisdiction. When the Protocol treats advisory jurisdiction, it repeats reference to these "other" instruments. Nowhere else is reference made to "other African human rights instruments" again. The implication is that the term is only included under the general provision for "jurisdiction" to provide for "advisory", and not contentious, jurisdiction.

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40 Art 46 of the European Convention and art 62 of the American Convention. Both provisions distinguish between conditional and unconditional acceptance of the Court's jurisdiction.

41 See OAU/LEG/EXP/AFCHPR/RPT(2) at par 19.

42 See art 4 of the Protocol, and the accompanying discussion.

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- Human rights instruments in force in Africa, apart from the African Charter, do not provide for individual complaints mechanisms. It seems unreasonable to accept that the Protocol would have such a crucial amending effect on these instruments.

- If ratification of the Protocol entails the possibility of bringing individual complaints under all African human rights instruments, future ratifications of the existing human rights instruments will be inhibited, as will ratification of future African human rights instruments and of the Protocol itself.

Côte d'Ivoire objected to article 3(2) on the grounds that the Court will be a judge in its own cause by ruling on its own competence.[43] Instead, the government argued that the Commission should be given the competence to rule on a dispute. In his report on the state comments, the Secretary-General refuted this objection as follows: "The complementarity between the Commission and the Court and the need to ensure speedy and less costly settlement of cases would make such a proposal unwise, if not unworkable. Indeed, this would subject one of the bodies to the other, something the draft has tried to avoid."[44]

7.2.6 Article 4: Advisory opinions

1. At the request of a member State of the OAU, any of its organs, or any African organisation recognised by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or other applicable African human rights instruments.

2. The Court shall give reasons for its advisory opinions provided that every judge shall be entitled to deliver a separate or dissenting opinion.

7.2.6.1 Standing to request an opinion

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43 See OAU document CM/1996 (LXV) Annex III (h).

44 See OAU document CM/1996 (LXV) at 6.

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The provision for standing to request an advisory opinion is very broad. There is, first of all, no requirement that a state must have ratified the Protocol - all member states of the OAU may make a request in terms of this article. Besides, not only member states, but also any OAU organ and "any African organisation recognised by the OAU" may approach the court for an advisory opinion. OAU organs include the Commission, the Secretary-General and the Council of Ministers. NGOs with observer status with the African Commission should all qualify as "recognised" organisations.[45] After the Commission's 15th session, there were 131 "organisations granted observer status" with the Commission.[46] At present the number has increased beyond 200.[47] Individuals may not approach the Court for advisory opinions.[48]

Experience under the Inter-American system has shown that requests for advisory opinions are more likely to come from the Commission than from individual states.[49] By requesting an opinion on an issue affecting states that had not accepted the jurisdiction of the Court, such states could be brought indirectly under the purview of the Court.[50] Although advisory opinions are not legally binding, they are legitimate and authoritative pronouncements of legal principle. Non-compliance

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45 It is suggested that the recognition of an NGO through the granting of observer status by the African Commission would mean that the NGO is an "organisation recognised by the OAU". The Commission is established by and functions as an institution under OAU auspices. As far as could be ascertained, no other procedure exists for the recognition of NGOs by the OAU.

46 See the Commission's Seventh Activity Report, OAU document AHG/198/ (XXX), listed at 36 to 61. However, a number of these organisations (such as Amnesty International, or International PEN, or even the International Commission of Jurists) are not in the narrow sense of the word "African" in nature. A broad interpretation should be followed to include all organisations which are actively involved in improving the plight of Africans. These organisations have in the past been active in bringing cases to the Commission.

47 See ch 3.3.1.10 above.

48 See also the competence of the ECOWAS Community Court of Justice, art 10 of the Protocol. Individuals do not have standing at all before that Court.

49 See Buergenthal & Shelton (1995) at 265: Of the first fourteen advisory opinions, five requests came from the Commission. At that stage 16 states have made declarations accepting the Court's jurisdiction. Of this 16, only five states approached the Court for advisory opinions: Costa Rica (four cases), Uruguay (three cases), and one each from Colombia and Peru. Argentina joined in one of the cases presented by Uruguay.

50 See ch 5.2 above.

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does not constitute a breach of treaty obligations, but "the state is on notice that its conduct violates its treaty obligations".[51]

7.2.6.2 Subject matter of advisory opinions

Opinions may be sought not only on the interpretation of the Charter, but on matters relating to "other applicable African human rights instruments"[52] as well. Examples of instruments implied here are the African Convention on the Conservation of Nature and Natural Resources of 1968, the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969, the Convention on the Rights of the African Child of 1989 and the African Convention on the Ban on the Import of All Forms of Hazardous Waste into Africa and the Control of Transboundary Movements of Such Waste Generated in Africa (the "Bamako Convention", adopted in 1991).

Declarations with which a state expressed its agreement are also included. So, for example, will the Algiers Declaration on the Rights of Peoples be included in the Court's advisory jurisdiction.[53] The end result of the inclusion of "other African human rights instruments" would be that states would have to consider with more seriousness the consequences of signing or ratifying any regional instrument. If, for instance, a convention on the rights of African women is adopted, or the Charter is supplemented with an additional or optional protocol on women's rights,[54] states will have to bear in mind that the Court may give advisory opinions on that instrument.

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51 Buergenthal (1995) at 221.

52 The Cape Town draft did not include the word "applicable". The latter draft is to be preferred, as it uses the same terminology as art 3.

53 Contained in Shivji (1989) at 111 - 115, and discussed by him at eg 95 - 103. Other African human rights declarations are The Dar es Salaam Declaration on Academic Freedom and Social Responsibility of Academics (of 1990), the Khartoum Declaration on Africa's Refugee Crisis (of 1990), and the Kampala Declaration on Intellectual Freedom and Social Responsibility of 29 November 1990. For the texts of these declarations, see web site www.umn.edu/humanrts/africa/KAMDOK.htm.

54 See ch 3.8 above.

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This also means that a judicial institution will in some cases substitute the function of a non-legal, conciliatiatory mechanism provided for under the original treaty. In terms of the African Convention on the Conservation of Nature and Natural Resources, disputes about the interpretation and application of the Convention "which cannot be settled by negotiation, shall at the request of any party be submitted to the Commission of Mediation, Conciliation and Arbitration"[55] of the OAU. An issue that immediately arises is whether the assumption of jurisdiction by the African Court on Human and Peoples' Rights would amount to an amendment of that treaty. Would states have to consent, or will this automatically became applicable even to states that have ratified the Convention before the new Court was instituted?

Article 4 restricts the human rights instruments on which advisory opinions may be rendered, to those of "African" origin and does not extend to international human rights instruments (such as the CCPR or CRC) which OAU member states have ratified. To enlarge the scope of the Court's jurisdiction to include all human rights instruments to which a state may be party, does not seem feasible. This would for example mean that the UN Human Rights Committee and the Court would have simultaneous jurisdiction in a matter arising from the CCPR.

The Addis Ababa proposal stipulated that the Court may provide a requesting state "with opinions regarding the compatibility of any of its domestic laws with the aforesaid treaties".[56] It is submitted that the omission of this provision does not exclude the Court from exercising this competence. It could have been inserted *ex abundanti cautela*, but the phrase "any legal matter", used in article 4(1), is sufficiently broad to include opinions on proposed or promulgated domestic legislation.

Article 64(1) of the American Convention extends the advisory jurisdiction of the Inter-American Court to treaties "concerning the protection of human rights in the American states". Specific provision is also made for states to request an opinion as to the compatibility of domestic laws with the American Convention or other international instruments. Peru brought a request for

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55 Art XVIII of the Convention.

56 See art 28(2) of the proposal. This is similar to art 64(2) of the American Convention. See eg the advisory opinion of the Court in *Proposed Amendments to the Naturalization Provision of the Political Constitution of Costa Rica*, I-A Court Series A 4, judgment of 19 January 1984.

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clarification by the Court of the phrase "other treaties concerning the protection of human rights in the American states".[57] The Court concluded that its advisory jurisdiction could in general be exercised "with regard to any provision dealing with the protection of human rights set forth in any international treaty applicable in the American states".[58] This competence is independent of the nature of the treaty (bilateral or multilateral), whether human rights is the principal or merely an incidental purpose of the treaty, and whether the treaty is open to non-members of the inter-American system.[59] The Court may, however, decline to provide an advisory opinion in a particular case. Possible grounds for a refusal to give an advisory opinion on a matter would be when the issues raised "deal mainly with international obligations assumed by a non-American state or with the structure ... of international organs ... outside the inter-American system".[60]

One of the main objections against a wide interpretation of article 74 was that it would cause conflicting interpretations emanating from the Court and from other international treaty monitoring bodies, such as the Human Rights Committee. The Inter-American Court's response was as follows: In domestic courts and internationally there are instances of courts that are not hierarchically integrated. On the international plain, the ICJ has jurisdiction to give an advisory opinion on any legal question. That would include the American Convention. When conflicts occur, they would not be "particularly serious",[61] as advisory opinions lack the binding force of contentious judgments.

The advisory jurisdiction provided for in the Protocol is much more expansive than the narrowly circumscribed advisory jurisdiction provided for in the European system. In terms of Protocol no 2 to the European Convention, the European Court may at the request of the Committee of Ministers, give advisory opinions. These opinions may not deal with "any question relating to the content or scope of the rights or freedoms defined in section I"[62] of the European Convention. Nor may it

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57 *'Other Treaties' Subject to the Advisory Jurisdiction of the Court (Art 64 of the American Convention on Human Rights)* IACHR, OC-1/82 of 24 September 1982, Series A: Judgments and Opinions 1.

58 Series A: Judgments and Opinions 1 at par 52.

59 *Ibid.*

60 *Ibid.*

61 Series A: Judgments and Opinions 1 at par 51.

62 Art 1(1) of Protocol 2 to the European Convention.

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relate to any other question that the Commission, Court or Committee of Ministers might have to consider "in consequence of any such proceedings".[63]

7.2.6.3 Other issues

A question that might arise is whether a domestic court may approach the African Court of its own accord. The "request of a member State" seems to refer to the state-as-government, rather than to component parts, such as individual judges. Another issue that might arise relates to the word "may". It implies that the Court cannot be compelled to entertain a request, but has a discretion to give an advisory opinion.

The Cape Town meeting of experts agreed that "the Court should not entertain requests for advisory opinion on questions which the African Commission was in the process of considering".[64] This flows from the complementary nature of the two bodies. The Commission may be "considering" a case not only as a communication, but may also be involved in the interpretation of the Charter "at the request of a State Party, an institution of the OAU or an organization recognised by the OAU".[65] This is an example of an aspect that should be stipulated in the Rules of procedure of the Court and of the Commission.

7.2.7 Article 5: Seizure of the Court

1. The following are entitled to submit cases to the Court:

a. The Commission.

b. The State Party which has lodged a complaint to the Commission.

c. The State Party against which a complaint has been lodged at the Commission.

2. When a State Party has a legal interest in a case, it may submit a request to the Court to be permitted to join.

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63 Art 1(2) of Protocol 2 to the European Convention.

64 See OAU/LEG/EXP/AFC/HPR/RPT/ (I) Rev 1 at par 17.

65 In terms of art 45(3) of the African Charter.

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Articles 5 and 6 regulate the Court's personal jurisdiction, or competence *ratione personae*.

7.2.7.1 Individual complaints

As a general rule, individuals or NGOs do not have standing before the Court, as only the Commission or a state party may "seize" the Court. In other words, after an individual complaint had been directed to the Commission, the complainant loses control of the direction in which the matter progresses further. The complainant has no right to have the case submitted to the Court. However, the state against which the complaint was directed, is entitled to submit the case to the Court. So, too, is the Commission. If a state was found to be in violation of the Charter, and neither it nor the Commission refers the case to the Court, the individual is powerless to refer the case to the Court.

The European system also initially allowed only the Commission or a state party to bring a case before the Court.[66] The position in Europe has changed in late 1994, when Protocol no 9 to the European Convention entered into force. Article 5 of the Protocol amended article 48 of the Convention to include a new category of persons that may refer a case to the Court, namely "the person, non-governmental organization or group of individuals having lodged the complaint with the Commission". A screening mechanism was simultaneously introduced, effectively requiring members of this category to obtain "leave to appeal" to the Court. The Court will only consider a petition by an NGO or individual(s) if it succeeds at the first hurdle. This hurdle takes the form of a three-member, *ad hoc* panel of the Court. *Ex officio* represented on this panel will be the judge(s) of the state(s) involved. The criteria for successful clearance of this hurdle are the following:

- The case must raise a "serious question affecting the interpretation or application of the Convention".
- It must for some "other reason warrant consideration by the Court".

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66 Art 48 of the European Convention.

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Only a unanimous finding by the panel on the basis of the above against hearing the case prevents the Court's consideration of the merit of the petition.[67]

In the Inter-American system individuals have standing only before the Commission. Thereafter, the Commission and states parties only have the right to refer a case for the Court's consideration.[68] This provision has been criticised,[69] as it presumes that the Commission will always represent the interests of the individual complainant. This is an incorrect assumption, because the Commission seeks diplomatic, rather than legal solutions, in controversial cases which "threaten to disrupt delicate relations within the inter-American system".[70] The individual is less likely to want to sacrifice judicial resolution for political compromise.

Although individuals may approach the Court under the circumstances set out in article 6, this represents the exception rather than the rule. It is submitted that the developments in the other two regional systems should be followed. The consensus-seeking approach of the Commission increases the possibility that individuals may become victims of political compromise and diplomatic trade-off.

7.2.7.2 Inter-state complaints

As far as state complaints are concerned, both the complaining state and the state complained against may submit the case to the Court. State parties retain the right to submit a request to the Court "to join" proceedings before the Court when they have "a legal interest in a case". The infrequency of such complaints in the European and the non-existence of any such cases under the African Commission and the Inter-American Courts has illustrated that a functional human rights system cannot depend on inter-state complaints.

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67 Art 5 of Protocol 9 to the European Convention, inserting article 48(2) into the Convention.

68 Art 61 of the American Convention.

69 At the Nouakchott meeting it was pointed out that "the statutes of the Inter-American Court on Human Rights were now being amended to allow individuals and NGOs to have access to the Court without hindrance" (OAU/LEG/EXP/AFCHPR/RPT(2) at par 20).

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7.2.7.3 Referral by Commission

It is not made clear on which grounds the Commission should decide to refer a case to the Court. Presumably, if it has found no violation, the Commission will not refer the case. In all other cases, it seems advisable for the Commission to refer the case. Even if the Court's judgment would amount to a repetition of existing precedents, there should be a referral. If this is not done, a discrepancy will exist between cases in which the Commission had found violations, and cases in which the Court had given a final judgment. The reason for this discrepancy lies in the fact that the execution of Court judgments is explicitly monitored. The Council of Ministers is principally responsible for supervision, but the Assembly and the Court itself also play a role in ensuring compliance.

No such provision exists in the case of a finding by the Commission. The Commission's decision is merely included in its annual report to the Assembly, and remains confidential until then. This situation is caused by the weak implementation regime created by the African Charter in 1981. It will surely be untenable that some violations of the Charter (those found by the Court) will be supervised, while others (found by the Commission) will stand as mere recommendations in an annual report. Commissioner Amega envisages that matters referred to the Court are "somehow an appeal for the reversal of the decision or report" of the Commission.[71] In the light of the discussion above, this view should not be followed, as matters may also be referred to ensure effective realisation.

In this respect, one has to be mindful of an important difference between the African and European systems. In Europe, the Committee of Ministers at present still has a judicial function in cases not referred to the Court. In these cases, the Committee's decision becomes the final, binding decision. The European Commission thus has a function to determine which of the Court or the Committee of Ministers would be more suitable for a final decision. Some "political" matters could arguably be decided "best" by the Committee. By contrast, this will not be the case in the African system, where the Commission is unable to make final, binding decisions and the Council of Ministers has

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70 Vivanco (1994) at 86.

71 See (1997) 7 *African HR Newsletter* at 2.

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no judicial role. No such role is envisaged in the Protocol for the Council of Ministers. It would therefore be appropriate for the African Commission to refer all cases of likely violations to the Court. It should be noted that the merger of the Commission and the Court under the European system in terms of Protocol no 11 will dispense with the role of the Committee of Ministers in respect of decisions by the Commission. Because all decisions will be taken by one institution, the role of the Committee in deciding matters not referred to the Court falls away.

7.2.8 Article 6: Other forms of submission of cases to the Court

1. The Court may entitle NGOs with observer status before the Commission, and individuals to institute directly before it, urgent cases or serious, systematic or massive violations of human rights.

2. As the Court decides on the admissibility of a case instituted under the first paragraph of this article, it requests the opinion of the Commission which must give it as soon as possible.

3. The Court rules on the admissibility of a case while taking account of the provisions stated in article 56 of the Charter.

4. The Court itself may consider the case or refer it to the Commission.

5. At any time after the ratification of this Protocol, the State must make a declaration accepting the competence of the Court to receive petitions under the first paragraph of this article. The Court shall not receive any petition involving a State Party which has not made such a declaration.

7.2.8.1 Direct access

In terms of the Cape Town Protocol, the Court could "on exceptional grounds, allow individuals, non-governmental organisations and groups of individuals to bring cases before the Court, without first proceeding under Article 55 of the Charter".[72] The latest draft refers to cases that may be "instituted directly before" the court. Whatever the formulation, this provision seems to be the

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72 Art 6 of the Cape Town Protocol.

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product of compromise.[73] It goes further than the European and Inter-American systems, by allowing individuals (or groups of individuals) to seize the Court directly, without first approaching the Commission. In these cases, the Court will have original jurisdiction as an institution of first instance at the supra-national level.[74] However, this competence represents the exception, rather than the rule.

The grounds for direct access are two-fold:

- Firstly, the pressing nature ("urgency") of the events and possible redress will be relevant. This would mean that the Commission should be by-passed in order to save time in emergency situations. In this respect, this article has to be read with article 26(2), which provides for provisional measures. The Court may order such measures in cases of "extreme gravity and urgency", in order to "avoid irreparable harm". These should also be considerations of importance in a decision whether direct access to the Court should be allowed. Even if the Commission has the competence to recommend interim steps, a binding court order may be much more appropriate in the circumstances.

- The scale, extent and persistent nature of the violation(s) are also an important reason to approach the Court directly, as the Commission's procedure may take up valuable time. On the other hand, it should always be kept in mind that a judicial body may be inappropriate to redress massive-scale violations.[75]

In the Cape Town Protocol the meaning of the term "exceptional grounds" was left open deliberately. This means that direct access was not restricted to specified factors. Under those provisions, the Court could have provided for more detailed guidelines in its Rules of procedure,

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73 See the report on the Nouakchott meeting of legal experts: "Most delegations were of the view that the Court should be accessible to individuals and non-governmental organizations just like the Commission and the States Parties", but "some delegations", of which Nigeria and Sudan are identified by the name, favoured an optional clause (see OAU/LEG/EXP/AFCHPR/RPT(2) at paras 20 - 24; especially par 23 is not very clear, seemingly a product of incoherent translation).

74 The Explanatory Notes to the Draft Protocol, 28 - 30 November 1993, notes the following: "The working group felt strongly that it is definitely a step in the right direction" (at 6).

75 See argument in ch 8.1.3 above.

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without setting unduly rigid or restrictive requirements. Still, the article dealt with "exceptional" jurisdiction. This has been emphasised in the Explanatory Notes, where it was "envisaged that the great majority of cases which will come before the Court will be referred to it by the Commission after it has first considered the complaint".[76]

Direct access may be warranted in other cases, such as the following:[77]

- Cases in which considerable delay had been caused at the domestic level, or even at the level of the Commission. In such cases the Court should be able to come to the rescue and finalise the matter speedily. The possibility is left open that a case may be submitted to the Commission, and that "exceptional grounds" are only raised thereafter, as the provision refers to "without first proceeding under article 55", and not "without first submitting a case in terms of article 55".

- If the nature of the case reveals that a binding court decision, rather than consensus seeking, is desirable, proceedings in front of the Commission may be superfluous. In other words, if it is already clear at the stage when the complaint is directed to the Court that friendly settlement is either unlikely or will be inappropriate, direct access should be granted.

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76 Explanatory notes to Draft Additional Protocol, 28 - 30 November 1993.

77 In this regard, the grounds on which Rule 17 of the Constitutional Court Rules allows direct access to the South African Constitutional Court are informative: It is allowed "in exceptional circumstances only, which will ordinarily exist only where the matter is of such urgency, or otherwise of such public importance, that the delay necessitated by the use of the ordinary procedure would prejudice the public interest or prejudice the ends of justice and good government". These grounds were successfully invoked in eg *Executive Council of the Western Cape Legislature v President of RSA* 1995 8 SACLR 70 (CC). In this case the Court accepted that local governmental elections in the whole of the province would be jeopardised if the issues involved were not resolved speedily. Direct access was also allowed in *S v Zuma* 1995 3 SACLR 1 (CC) and *S v Mbatha* 1995 10 SACLR 78 (CC) (legal certainty about the constitutionality in the Arms and Ammunition Act 75 of 1969 was considered to be of the utmost public importance). In *Zuma* (at par 11) Kentridge AJ stated that direct access should be allowed "in only the most exceptional cases, and it is certainly not intended to be used to legitimate an incompetent reference".

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- Issues raised in the complaint which clearly involve a point of law that needs to be resolved by the Court's authoritative interpretation of the Charter, should also potentially be sufficient to constitute grounds to justify direct access.

7.2.8.2 Admissibility requirements

Even if direct access is allowed, the ordinary prerequisites for admissibility may not be discarded. The most important of these requirements is the exhaustion of local remedies. In terms of the Protocol these factors have to be "taken into account".[78] This allows for a departure from a rigid application of article 56, as there is no prescription that these conditions have to be met. The flexibility should allow for a generous interpretation.[79] It may also be noted that the corresponding provision in the Addis Ababa proposal was phrased differently. It required the Court to "apply the principles enunciated in Article 56 of the Charter".[80] The Cape Town and Nouakchott versions are less restrictive, as they do not require the "application" of the admissibility prerequisites, but merely that they must "be taken into account".

7.2.8.3 Optional declaration

The Cape Town Protocol made direct access to the Court (on "exceptional grounds") an automatic consequence of ratification, which would bind all states parties. It was often argued that the inclusion of this provision could deter ratification. The Egyptian representative at the Cape Town meeting of experts (Badawi, formerly a Chairman and member of the Commission) made a reservation in respect of article 6, as it was then formulated. He noted that the Court "should be rooted in an efficient Commission which therefore meant that the Commission should not be bypassed in favour of the Court".[81] His second ground of objecting was based on the risk of

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78 Art 6(3) of the Nouakchott Protocol.

79 See also Naldi and Magliveras (1996) 8 *RADIC* 944 at 953 - 954: "If the Court were prepared to approach this provision in a dynamic manner, bearing in mind the purpose of the exceptional jurisdiction, it could overlook technicalities or minor procedural irregularities for the sake of justice".

80 Art 20(2) of the Addis Ababa proposal.

81 OAU/LEG/EXP/AFC/HPR/RPT (I) Rev 1 at 5.

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"opening discussion on the interpretation of Article 55 of the Charter, which, so far, had been interpreted by the Commission as allowing individual complaints and not just "situation" complaints.[82]

Of the nine states submitting comments on the draft Protocol to the Secretary-General, most showed reluctance to accept this provision. Burkina Faso[83] and Sierra Leone[84] endorsed the reservation made by the Egyptian delegates at Cape Town. Tunisia wanted a provision inserted that the Court "shall attempt to assist the parties in arriving at an amicable settlement".[85] Mauritius was the exception, as its views identified article 6 as one of the most welcome features of the Protocol.[86] Côte d'Ivoire had an objection of a different nature, suggesting that it would be advisable that the President of the Court decides whether "exceptional grounds" exist, but after consulting with the Commission. The reason for this proposal is that the proposed procedure would ensure that "the court will not have to indirectly rule twice on the same case".[87]

The Nouakchott Proposal took note of these concerns, and caused an **about-turn** from the Cape Town draft. Acceptance of the direct access procedure is now made optional. This resembles the optional individual complaints mechanism under the European Convention (and to an extent, under the first optional Protocol to the CCPR). In the case of the European Convention the optional mechanism was included as a compromise in the original convention. The Nouakchott proposal provides for an option within an optional protocol, which will be adopted to improve implementation under the African Charter. If this provision is accepted, it will undermine efforts to improve implementation, by providing states with an opportunity of adoption without empowering

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82 *Ibid.*

83 See CM/1996(LXV) Annex III (c).

84 See CM/1996 (LXV) Annex III (f).

85 See CM/1996 (LXV) Annex III (e).

86 See OAU CM/1996 (LXV) Annex III (a). Lesotho had "no objection to the contents of" the Protocol (at Annex III (b)).

87 CM/1996 (LXV) Annex III (g).

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individuals against the state.[88] Article 6(5) creates the impression of an option, upon an option, upon an option...

If the approach of requiring an optional declaration is accepted, a possible alternative to granting individuals standing, is to ensure an explicit role to individuals and NGOs to be represented at hearings as *amici curiae*. This will ensure a role to non-state entities at the Court's hearings, but will not have the same deterring effect on potential ratifying states as the provision for direct access under exceptional circumstances.

7.2.8.4 The decision

A question that has not been answered by the provisions of article 6 is: Does the whole "Court" decide this matter, or may the President, a chamber, or a specific number of judges decide it? The discretion to decide whether a case may be allowed on this ground is that of the Court, as constituted. No provision is made for a "screening panel" to decide the matter. However, the Addis Ababa proposal included a provision along these lines. It provided that the matter "shall be submitted to a panel composed of three judges".[89] It also provided that the Court "may receive representations from the Commission for the purpose of such consideration".[90] In the absence of any such provisions in the Protocol, it must be assumed that the Court will entertain this issue at an ordinary hearing, composed of at least seven judges.[91] The possibility also exists that a chamber of five judges may consider such cases.[92] This matter should be addressed in the Rules of procedure. What is clear, is that the question has to be answered as a threshold question, by way of a preliminary hearing. This aspect also needs to be spelled out in the Rules of procedure.

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88 See also the appeal by NGOs for an amendment to this provision, so that the Court would not depend on the consent of states parties for its jurisdiction over urgent cases (see report of the NGO meeting before the 21st sitting of the Commission: (1997) 7 *African HR Newsletter* at 7).

89 Art 20(3) of the Addis Ababa proposal.

90 *Ibid.*

91 See art 20 of the Cape Town Protocol.

92 See art 20 below, and accompanying discussion in ch 7.2.22 below.

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7.2.9 Article 7: Sources of law

The Court shall apply the provisions of the Charter and other human rights instruments.

The Cape Town draft read as follows: "In its deliberations, the Court shall be guided by the provisions of the Charter and the applicable principles stipulated in Articles 60 and 61 of the Charter".[93] The reference to the African Charter in both drafts is not strictly necessary. If nothing to this effect were included, the Charter would have applied as guideline in interpretation, anyway. One of the reasons for the inclusion of reference to articles 60 and 61 may have been to highlight the potential applicability of international human rights principles, cases and rules in the decisions of the Court. Articles 60 and 61 of the Charter opens the door for the Commission to "draw inspiration from international law on human and peoples' rights" and to "take into consideration ... general or special international conventions". This provision of the Protocol ensures that these competencies are not restricted to the Commission, but extend to the deliberations of the Court as well. Indeed, the wording used in the Cape Town Protocol ("be guided by") suggested stronger reliance on international sources than that used in the Charter ("draw inspiration" and "take into consideration").

The present formulation is very broad. What does "the application" of "other human rights instruments" by the Court entail? "Application" may refer to the Court's contentious jurisdiction.[94] If this were the case, the extension of this jurisdiction to all (and not only "applicable African") human rights instruments would be bewildering. A more plausible interpretation of this article is that it relates to both the advisory and contentious jurisdiction of the Court, setting out which "sources" they may refer to. In this view, "apply" means "use as sources that are to be given consideration".

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93 Art 7 of the Cape Town Protocol.

94 See art 3, where the distinction is drawn between "interpretation" and "application". In one interpretation, the first refers to the Court's advisory jurisdiction, and the second to its contentious jurisdiction.

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7.2.10 Article 8: Conditions for considering communications

1. The Court shall not consider a matter before it originating under the provisions of Article 49 of the Charter until such time as the Commission has prepared a report in terms of Article 52 of the Charter.

2. The Court shall not consider a case originating under the provisions of Article 55 of the Charter until the Commission has considered the matter and prepared a report or taken a decision.

3. The Court may deal with the case only if the matter is brought before it, within three months of the decision of the Commission.

4. Having accepted a case as stipulated in the above provisions, the Court may decide to reject it if, after due consideration, the Court establishes the existence of one of the grounds of inadmissibility in Article 56 of the Charter.

7.2.10.1 Procedure before the Court

This article elaborates further on the co-existence of the Commission and the Court. The Commission retains its function of deciding on admissibility, of endeavouring to reach a friendly settlement, and of making a finding on the merits of the case. As a general rule, these various processes have to be finalised before a state party or the Commission may refer a matter for the Court's consideration. Once this stage has been reached, an individual (or group of individuals, or an NGO) has no competence to refer the case to the Court. From these provisions, it is clear that the Court has no inherent power to consider any matter. It merely reacts to applications brought before it.

The Court not only reconsiders the merits of the case, but also the Commission's finding on admissibility. Decisions on the merits are by majority vote. In terms of the Cape Town Protocol, findings on admissibility had to be taken by a two-thirds majority. It was changed in the

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Nouakchott draft to the more appropriate requirement of a simple majority.[95] This will allow more applicants to pass the "first hurdle", as it will ensure that cases are not decided finally on technical or formalistic grounds. Another aspect should have been added: Findings on (in) admissibility must, like judgments on the merits, be given in open court, or at least with full statement of reasons on which the finding is based. The Protocol is not clear on what the possibilities of appeal or review against findings of inadmissibility are.[96]

In the case of an inter-state complaint, the Commission must always endeavour to reconcile the two states parties by means of an amicable settlement.[97] Only if this fails, should the Commission draw up a report, stating the facts and its findings. When submitting this report to the Assembly, the Commission may make "such recommendations as it deems useful".[98] This is obviously the "report" required by article 8(1) of this Protocol.

In the case of "ordinary" individual communications,[99] the Charter does not clearly provide for the Commission to take "decisions" or draft "reports". In practice, as allowed for in its Rules of procedure, the Commission holds hearings and makes findings on individual communications. These findings are couched as "decisions". Particulars of all these decisions (or "findings") are provided in the Commission's annual report to the Assembly. It must be assumed that the "annual report" to the Assembly, containing decisions on individual communications, is the "report" to which article 8(2) of this Protocol refers.

This still leaves the "special cases", provided for under article 58 of the African Charter. If a communication by one or communications by various individuals reveal "a series of serious or massive violations of human and peoples' rights", the Commission must draw the attention of the

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95 The Tunisian government also raised this issue in its comments to the Secretary-General before consideration of the Protocol by the OAU Council of Ministers (see CM/1996 (LXV) Annex III (e)).

96 This aspect should also be clarified in the Rules of procedure.

97 See art 52 of the Charter. In respect of individual communications this has not been spelt out in the Charter. This omission may be explained with reference to the fact that the procedure relating to individual petitions was left deliberately vague in the Charter.

98 Art 53 of the Charter.

99 In the sense of "not constituting a series of serious or massive violations of human and peoples' rights".

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Assembly to this fact. The Assembly "may" then request the Commission to "undertake an in-depth study". The Commission then has to report on the facts found and must make recommendations to the Assembly. The "report" referred to in article 8(2) of this Protocol may also have this "report" in mind. If that were the case, the Court would have no jurisdiction to decide on massive and serious violations of Charter rights, until the following has happened:

- The Commission has drawn the attention of the Assembly to the occurrence of these violations.
- The Assembly has considered the information, and has decided to request the Commission to undertake fact-finding. The Assembly has a discretion in this regard, and may obviously also decide against such a step.
- The Commission has undertaken the requested study, and has drawn up a report.
- The Commission has submitted the report, with its recommendations, to the Assembly.
- Three months have expired after this report had been submitted to the Assembly.

Such an interpretation would ensure that a case would not be considered simultaneously by the Commission and the Court. But it will extensively delay a depoliticised and final judgment by the Court in cases of massive violations. This may reduce the potential role and impact of the Court. On the other hand, it may be argued that a judicial institution is not best placed to adjudicate on massive violations. The Commission may be better suited to handle such cases. Once more "individualised" cases crystallise, such cases may be brought to the Court for its determination.

7.2.10.2 Three-month time limit

The Protocol provides that the Court may only entertain a matter if it is brought before it "within three months of the decision of the Commission".[100] It may be argued that this provision is likely to prevent many cases from reaching the Court timeously. Communication channels in Africa are

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100 Art 8(3) of the Protocol.

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often unreliable, making a quick response by a state party difficult. It seems inappropriate to import into Africa a deadline which in principle reflects the position in Europe.[101]

An important question is when the three-month period starts running. In terms of the Cape Town draft, the three month period started with "the submission of the report of the Commission to the Assembly of Heads of State and Government". The Cape Town meeting of experts adopted this requirement with the explicit understanding that the period was to run "from the date of the submission of the Commission's report to the Assembly".[102] The report of the Court is submitted only once a year, at the Assembly's annual summit, which usually takes place in June or July.[103] Read in this light, the requirement is not as burdensome as it may seem at first glance. If the Commission made its finding on the merits in, say, September, the parties will have almost a year plus three months to seize the Court. If the violation was found just before the annual Assembly session, the period may indeed be close to three months. The Commission makes its findings during its sessions, which at present take place in March/April and October/November annually. In practice, this will allow for a period of at least six months in which parties may decide to refer a matter to the Court.

The Nouakchott Protocol has reduced the time available to bring a case to the Court. The three-month time limit is restated, but it now starts running when the Commission takes a decision. One advantage of this requirement is that there will be a similar time limit in all cases. But the obvious disadvantage is that access to the Court will certainly be restricted. It limits the time available to the Commission to reconvene and to take decisions, it places undue pressure on states parties to decide on possible referrals, and it all but nullifies the potential pressure individual complainants could exert on the Commission to refer cases to the Court.

The argument here is not that there should be no deadline. There are good reasons why a matter may not be brought before the Court indefinitely. But the period must allow the Commission a

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101 See art 32(1) of the European Convention.

102 See OAU/LEG/EXP/AFC/HPR/RPT (I) Rev 1 at 4.

103 See art 28 of the Protocol.

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reasonable opportunity to consider its options, to get a legal opinion, and instruct legal counsel, if required. Counsel may experience difficulties in obtaining the record or other information.

The requirement set out in the Nouakchott Protocol is inappropriate in an African setting. If the three-month rule were accepted, the period should at least only start running after submission of the Commission's report to the Assembly. It is suggested that a longer period or a more flexible criterion should be used. In this respect, the example of the African Charter may be instructive. In the Charter, the six-month requirement in respect of the exhaustion of local remedies became a "reasonable period".[104] The Commission has not experienced any problems in applying this open standard. Article 8(3) of the draft Protocol should be amended to incorporate a similar flexible standard. If this is not done, this provision may yet become the Achilles heel of the proposed African human rights system.

7.2.11 Article 9: Amicable settlement

The Court may try to reach an amicable settlement in a case pending before it in accordance with the provisions of the Charter.

Previous drafts did not endow the Court with a role of promoting amicable solutions between parties. In its comments on the Cape Town Protocol, directed to the OAU Secretary-General, Tunisia proposed the inclusion of a **conciliatory role** for the Court. The proposal refers to the example of the European Human Rights Commission.[105] It would have been more appropriate, as far as the Court is concerned, to have made reference to Protocol no 11 to the European Convention. Protocol no 11 creates a single institution to oversee implementation of the European Convention. In terms of that role, the Court retains its involvement in efforts to resolve disputes by

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104 Compare art 26 of the European Convention with art 56(6) of the African Charter. In the European system a case must be submitted to the Commission "within a period of six months" of the date a final decision has been taken by the local courts. In the African system the case has to be submitted "within a reasonable period from the time local remedies are exhausted".

105 See CM/1996 (LXV) Annex III (e) at 3.

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amicable settlement.[106] Even so, that model would not be appropriate for the African Court on Human and Peoples' Rights. While the European Commission's settlement role will be lost with the "merging" of the Commission and the Court, the African Commission (and its role in amicable settlements) will be retained in terms of the Protocol. Criticism may justifiably be expressed that "this should not form part of the Court's function" and that "the Commission ... was already mandated to do so".[107]

Still, the role of the Court does not preclude the competence of the African Commission to pursue all attempts to reach an amicable settlement. This aspect is also emphasised in the Protocol establishing the ECOWAS Community Court of Justice.[108] It should therefore be welcomed that this aspect has been included in the Nouakchott Protocol.

7.2.12 Article 10: Hearings and presentations

1. The Court shall conduct its proceedings in public. The Court may, however, conduct proceedings in camera.

2. Any party to a case shall be entitled to be represented by a legal representative of the party's choice. Free legal representation may be provided where the interest of justice so require.

3. Any person, witness or representative of the parties, who appears before the Court, shall enjoy the immunities and privileges in accordance with international law, necessary for the discharging of their functions, tasks and duties in relation to the Court.

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106 See art 38 of the Convention, as it will be amended by Protocol no 11: "If the Court declares an application admissible, the Court must place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights."

107 See OAU/LEG/EXP/AFCHPR/RPT(2) at par 9.

108 See art 9(3) of the Protocol: "A Member State may, on behalf of its nationals, institute proceedings against another Member State or Institutions of the Community, relating to the interpretation and application of the provisions of the Treaty, after attempts to settle the dispute amicably have failed".

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7.2.12.1 Locus standi *and participation by petitioner*

Proceedings before the Court are open to the public. An individual complainant would therefore be allowed to be present at the Court proceedings about his or her case. But is the role of the individual reduced to that of a passive spectator? Two instances have to be distinguished:

- As a general rule, the Commission refers cases and appears on the individual's behalf at Court proceedings. The individual complainant does not have *locus standi*, and must depend on the Commission to state and argue the case.[109] In theory, then, the individual has indirect access to the Court. But this should not exclude the complainant and his or her legal representatives altogether. The Rules of procedure of the Inter-American Court allow that "the delegates whom it designates" may represent the Commission.[110] These delegates may "have the assistance of any person of their choice".[111] The Commission invoked this provision when it chose legal representatives of the victims as its advisers in the Honduran "disappearance" cases.[112] The Rules of procedure of the African Court should allow a similar role to the petitioner and his or her lawyers.

- When the case is before the Court as court of first instance,[113] the role of the Commission is not clear. It would be possible that the individual and his or her legal representative play the role of the Commission. The case has not been before the Commission at all, and the Commission has no knowledge of the facts. The petitioner, and his legal advisers, on the contrary, have been involved in the case and are familiar with the facts and circumstances. Furthermore, no procedure is provided to refer the case back to the Commission, or to involve the Commission in the proceedings before the Court. The provision about legal representation only makes sense under these circumstances, where the individual has to appear before the

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109 The role of the Commission in the European system has been described in the following terms (Van Dijk & Van Hoof (1990) at 137): "The role of the Commission on the proceedings before the Court is best described as that of *amicus curiae*, an independent and impartial advisory organ with respect to the questions of fact and of law concerning a case before the Court".

110 Art 22 of the Rules of procedure of the Inter-American Court.

111 *Ibid.*

112 Cerna in Janis (ed) (1992) at 123.

113 By virtue of art 6 of the Nouakchott Protocol.

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Court without the Commission playing any role. When a case has reached the Court by virtue of article 6, the individual and his or her legal representative have standing before the Court, and may participate in the proceedings. If this was not the case, the provision of legal representation in sub-article 2 would have no possible application.

In cases before the European Court, two measures had been devised to ensure continued participation by the individual complainant. The aim is to ensure fairness to both the state and the individual and to prevent alienating the public from the Court's process. The one measure was devised by the Commission, and catered for greater input by complainants in the preparation and presentation of the individual's case by the Commission. The Court, as a second measure, provided the individual with the opportunity to be represented by his or her own counsel at the Court's hearing.[114]

In both instances the petitioner should be allowed as active a role as possible in the proceedings. This is in keeping with the international tendency to attach more weight to the individual complainant in proceedings initiated by him or her.

7.2.12.2 Procedural rights

The procedural rights of those appearing in front of the Court are discussed under this heading. The provision of these aspects in the Protocol is limited. As a general rule, proceedings should be conducted in public. This provision differs from the right to a hearing granted under the Charter, where no provision is made for the right to a public trial. This is an instance of a potential substantive cross-fertilisation. The Court may order proceedings *in camera*.[115]

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114 See ch 5.1 above.

115 In terms of the Cape Town Protocol, the requirement was included that publicity may only be excluded if it was considered to be "in the interest of justice". As the Rules of the Court should in any event have clarified this open-ended concept, it can just as well be omitted from the Protocol.

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The right to a legal practitioner of one's choice is also guaranteed. Under certain circumstances a legal representative will be appointed, presumably at the Court's expense. Again, the yardstick is the "interests of justice". This may be regarded as introducing too much uncertainty, as the open-endedness of the criterion may lead to varying possibilities. This could place a very heavy financial burden on the infrastructure. In the absence of any institutional support, the responsibility will fall to the NGOs to ensure that cases are brought and representatives are appointed. This provision extends the rights of an individual under the African Charter. Article 7(1)(c) of the Charter grants the "right to defence, including the right to be defended by counsel of his choice". No mention is made of the person who, due to poverty, cannot enforce this right. Article 10(2) of the Protocol must refer to the exceptional instances when an individual or group of individuals approach the Court. It would make little sense to apply this right only in the context of states and the Commission bringing cases before the Court. It will surely be very exceptional for a state to rely on the Court to provide support to obtain a lawyer.

In this respect, the role of NGOs should be highlighted. Local and international NGOs have been instrumental in assisting individuals to file communications with the African Commission. The provision in article 9(2) entails uncertainty, as no indication exists about the extent to which legal aid may be required. Rational economic actors may be poised against ratification in the light of this uncertainty. On the other hand, a wide discretion is allowed to the Court to grant legal representation, or to deny it.[116]

These provisions are in line with a greater awareness in recent years that procedural safeguards should be guaranteed in the proceedings of international human rights enforcement mechanisms. This movement can be illustrated by comparing the international criminal tribunals of Nuremberg and Yugoslavia/Rwanda with each other. The greater emphasis on due process rights lead to the inclusion of a right to appeal and much more elaborate Rules of procedure. In the European

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116 See the provision of art 10(2): Legal representation does not necessarily follow if the interests of justice so require, but "may" be granted under those circumstances, indicating a discretion to allow or disallow legal representation, even though its granting would be in the interests of justice.

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system, for example, the Court made findings about "unreasonable delay" in the finalising of cases while the Court itself on average took longer than a year to finalise a case.[117]

7.2.13 Article 11: Composition

> *1. The Court shall consist of eleven judges, nationals of the Member States of the OAU, elected in an individual capacity from among jurists of high moral character and of recognised practical, judicial or academic competence and experience in the field of human and peoples' rights.*
>
> *2. No two judges shall be nationals of the same state.*

7.2.13.1 Eleven judges

The Court consists of eleven judges. This is less than the number of states required to ratify the Protocol before it enters into force. It is the same as the number of judges on the International Tribunal for Rwanda.[118] The American Convention required eleven ratifications before it (and, with it, the Court) could take effect, but the Court consists of only seven judges. The number of judges on the European Court is enormous in comparison, each member of the Council of Europe being represented.[119] The ECOWAS Community Court of Justice consists of seven members.[120] Eleven is more than the number of judges sitting on almost all the highest courts of individual African countries. In this respect, the Protocol resembles the composition of the South African Constitutional Court. During preceding deliberations, a Court of nine and fifteen judges[121] has also been considered. Having less than eleven judges, it was argued, would save costs. The Cape

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117 See ch 5.1.1.6 above.

118 See art 11 of the Statute of the International Court for Rwanda.

119 At the last count, it numbered 40 ((1997) 22 *Eur L Rev* 82 at 82 – 83).

120 See art 3(2) of the Protocol establishing the ECOWAS Community Court of Justice.

121 The ICJ is made up of fifteen judges - see art 3 of ICJ Statute.

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Town meeting, taking into account that only the President would be full-time and that it may, in time, be necessary to constitute two chambers, agreed unanimously on the number of eleven.[122]

A strong argument against the European model is that it links judges closely to a specific country, and not to the membership as a whole. This has been illustrated in the American system. Like the Inter-American Court, the Inter-American Commission has seven members. In 1993 an attempt by Nicaragua to have the number increased to eleven was narrowly defeated. The argument forwarded by Nicaragua was that an increase in the number would lead to greater "representativity". As Vivanco pointed out, this was a disingenuous effort to enhance control by the OAS governments.[123] The members of the Commission do not represent states, but all the members of the OAS as a whole. Similarly, if the number of judges of the African Court on Human Rights approximate the number of member states of the OAU, the perception will be created that they "represent" their respective governments. This will obviously politicise the Court. The judges should be seen as independent experts who transcend their territorial origin. They are also not to be expected to favour their own governments in any way.

7.2.13.2 Nationals of OAU member states

The judges need not be members of states that ratified the Protocol. This could lead to a situation where the first fifteen ratifying states are "judged" by judges from states which are themselves not subject to the jurisdiction of the Court. A wealthy or otherwise powerful state may be able to use money diplomacy to gain influence over the affairs of other states through the Court. It is suggested that only states that have ratified the Protocol should be able to nominate and vote for judges.[124]

The elected judges need not be nationals from a state that has ratified the African Charter, either. This means that nationals from Eritrea and Ethiopia may be elected as judges. In the Inter-

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122 See OAU/LEG/EXP/AFC/HPR/RPT (I) Rev 1 (at par 18).

123 Vivanco (1994) at 79.

124 See discussion about art 13 in ch 7.2.15 below.

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American system judges must be nationals of an OAS member state.[125] This enabled judge Buergenthal from the United States to be elected as both judge and President of the Inter-American Court. Under the European system, nationals from states that are not members of the Council of Europe, may be elected as judges.[126]

7.2.13.3 Qualifications

Similar to the American Convention, it is stressed that judges serve in their individual capacity. The qualifications required in the African Court are not as rigid as that in the Inter-American system. To qualify as judge in the American system, one has to "possess the qualifications required for the exercise of the highest judicial functions" in his or her own state.[127] Although the African judges must also be "jurists", no formal requirement is laid down. "Practical, judicial or academic competence and experience" in the field of human rights are the only prerequisites.[128] This leaves room for human rights activists, judges and academics to serve on the Court.[129]

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125 Art 53(2).

126 The judge elected in respect of Luxembourg, judge Macdonald, is a national of Canada.

127 See art 4(1) of the Statute of the Inter-American Court. A similar provision was included in the Addis Ababa proposal (art 3(1)). See also the Statute of the International Court for Rwanda, art 12, requiring judges to have qualifications for appointment to the highest judicial office in the country where they are from.

128 See Naldi and Magliveras (1996) 8 *RADIC* 944 at 956: "The drafters of the Protocol should be congratulated for not restricting the ambit of judges to specific jurists and for dropping the requirement in the European and American Conventions that candidates must possess the qualifications required for appointment to the highest judicial offices."

129 See Explanatory Notes to the draft Protocol: "... it was felt that there are many academics and others who have had vast experience in human rights and whose appointment to the Court will benefit it. Therefore jurisconsults were included" (at 1).

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7.2.13.4 *Only one from a particular state*

There may not be more than one national of a particular State on the bench. This echoes article 4(2) of the Statute of the Inter-American Court.[130] The underlying aim is to ensure that as many countries as possible are represented on the Court, so as to avoid domination by one state or a group of states, or a perception to that effect. Making the Court more representative enhances perceptions of impartiality and credibility.

7.2.14 Article 12: Nominations

1. State Parties to the Charter may each propose up to three candidates, at least two of whom shall be nationals of that State.

2. Due consideration shall be given to adequate gender representation in the nomination process.

States parties to the African Charter are allowed to nominate jurists from other OAU member states. This practice should be encouraged, especially in the case of an independent and respected personality overlooked by his or her own state due to political considerations, such as a record of judicial activism.[131]

"Due consideration"[132] should be given to "adequate gender representation" during nominations. This is a directive not found in any of the other regional and international instruments.[133] No

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130 See also art 53(2) of the American Convention, art 3(1) of the Statute of the ICJ. By its very composition, the European system does not necessitate such a provision.

131 See eg the activism of Mwalusanya J in Tanzania, making it unlikely that he will be nominated by his own state (ch 3.4.4.3(v) above).

132 This is stronger than the wording of the Addis Ababa proposal, which read: "Consideration shall be given to adequate gender representation in the composition of the Court".

133 Of the two major regional courts and the ICJ, the European Court and the Inter-American Court each counted a single female judge by 1994. The European judge is Elisabeth Palm, elected in respect of Sweden, whose term expires in 2001 (see (1994) *YB of the European Convention on Human Rights*). Sonia

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similar direction concerning the Commission is given in the Charter itself. The male dominance of the Commission has indeed been a source of criticism. The first female commissioner (commissioner Duarte-Martins, from Cape Verde) was only elected in 1993. In 1995 another woman, commissioner Ondziel-Gnelenga, was elected. The inclusion of the reference to "gender representation" must stand as a sign of the sustained pressure of NGOs to highlight the need to include women in the public sphere of decision-making. Neither of the other two regional Commissions or Courts had been immune from similar critical comment, and still have a male-dominated profile.[134] At the Cape Town discussions, the delegates from Benin and Tunisia were of the view that "whenever a State party nominates two candidates, each of the two genders" should be represented.[135] This formulation is supported.

7.2.15 Article 13: List of candidates

1. Upon entry into force of this Protocol, the Secretary-General of the OAU shall request each State Party to the Charter to present, within 90 days of such a request, its nominees for membership of the Court.

2. The Secretary-General of the OAU shall prepare a list in alphabetical order of the candidates nominated and transmit it to the Member States of the OAU at least thirty days prior to the next session of the Assembly of Heads of State and Government of the OAU ("Assembly").

Picado from Costa Rica was elected as judge on the Inter-American Court in 1988. She served as Vice-President from 1992 to 1995 (see Pasqualluci (1995) 17 *HRQ* 794). By 1996, Rosalyn Higgins had become the first woman to serve as a judge of the ICJ.

134 Three of the 31 commissioners on the European Commission (representing Estonia, Ireland and Norway) are female. Two of them serve as Presidents of the two Chambers (see (1997) 22 *EurLRev* 117).

135 See OAU/LEG/EXP/AFC/HPR/RPT (I) Rev 1 at par 19. See also observations by the Secretary-General in his report on comments by states on Draft Protocol (CM/1996 (LXV) at 7) about the Tunisian proposal made at Cape Town: "This well meaning idea was rejected, particularly by the women delegates. It was argued that a time may soon come when men would be the gender least represented and the gender requiring special attention in the OAU institutions".

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A distinction is drawn between member states of the OAU and states parties to the African Charter. All OAU member states, represented in the Assembly, participate in the **election** of judges. Only those states that have ratified the African Charter may **nominate** candidates. However, candidates may be nationals of any OAU member state. By restricting the power to nominate to those states parties to the Charter, the influence of non-ratifying states is minimised. The near-universal ratification of the Charter has rendered the distinction between OAU members and states parties to the Charter of little importance.

States parties to the Charter have 90 days within which it must nominate suitable candidates. This period should be sufficient to enable states to consult with "relevant persons or bodies within their own countries and outside, regarding persons they should nominate".[136] NGOs, and civil society in general, should be alive to this time limit. Lobbying and pressure should be exerted in the process of governmental nomination. Judges sensitive to human rights will be elected only if national NGOs endeavour to ensure the nomination of human rights champions at the domestic level.

The election takes place at the "next session" of the Assembly. This could be interpreted to refer to "next ordinary session". If the requisite number of ratifications is reached just after one ordinary session, it may take almost a year before the election takes place. "Next session" may refer to any session, including an extraordinary session, which could be arranged for the election of judges in particular. It is a sufficiently weighty aspect to merit urgent and careful consideration. Against the option of organising a special "election" session, stands the financial implications of duplicating sessions of the Assembly.

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136 See International Commission of Jurists document Explanatory Notes to the Draft Protocol, 28 - 30 November 1993.

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7.2.16 Article 14: Elections

1. The judges of the Court shall be elected by secret ballot by the Assembly from the list referred to in Article 12(2)[137] of the present Protocol.

2. States Parties shall ensure that in the Court as a whole there is representation of the main regions of Africa and of their principal legal traditions.

3. Due consideration shall be given to adequate gender representation during the election process.

4. The same procedure and considerations as set out in Articles 11, 12 and 13(1), (2) and (3)[138] shall be followed for the filling of vacancies.

The process of election is not regulated in detail. The article merely states that the judges will be elected in a secret ballot of members of the Assembly. The majority required to be elected is not specified.[139] Judges are elected by all OAU member states, and not only states parties to the Protocol. According to the "Explanatory Notes to Draft Protocol" the Working group and experts have considered whether the judges should not rather be chosen only by states that had ratified the Protocol. Two reasons are given why they opted for an election by the OAU Assembly. "It was felt that if all States are given the right to vote for candidates, it may encourage them to ratify the Protocol". Further, because the Court is an organ of the OAU, it "is accountable to the Assembly",[140] (and should therefore be elected by the Assembly).[141]

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137 This is a reference to the Cape Town Protocol. It should refer to art 13(2) of the "present Protocol".

138 Again, references incorrectly to the Cape Town Protocol. It should read "arts 12, 13 and 14(1), (2) and (3)".

139 All Assembly decisions are by two-thirds majority. This was also the provision in the Cape Town draft (art 13(1)).

140 See "Explanatory Notes on Draft Protocol", discussion of art 13.

141 The reference to "accountability" of judges is strange, as the ideal of the independence of courts is contradicted by the principle that they could be called to account to the other branches (legislative and executive) of government.

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Another option is to keep the number of judges proportionate to the number of states that have ratified the Protocol, and to allow only those states that have ratified the Protocol to vote. This will provide a greater incentive to governments to ratify.

The freedom of choice granted to states parties is constrained by the following considerations:

- The main regions[142] of Africa should be represented in the final result.[143]
- The principal legal traditions should be represented.[144]

Representation of these elements is compulsory - "States parties shall ensure" that there "is" such representation. "Adequate gender representation", on the other hand, need not be "ensured", as only "due consideration" needs to be given thereto. Naldi and Magliveras find the directive to ensure geographical and legal representativity "surprising", as these considerations are not mentioned in the nomination phase.[145] If one considers that all states may nominate judges, it seems highly likely that a sufficient number of judges from the different regions and representing the major legal systems will be nominated. This factor renders compliance with these requirements at the nominations phase superfluous.

Another concern raised by Naldi and Magliveras is the threshold of a two-thirds majority.[146] This seems a more valid point to ponder. The inclusion of this provision in the Protocol may be motivated by the fact that unanimity should underlie decisions as far as possible, and that all OAU Assembly decisions require a similar majority.[147] But it could cause problems if the required majority is not reached. The Protocol does not cater for such an eventuality. Repeated sessions should be held to elect judges. On no account must this requirement be used to stall the putting in

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142 The ICJ Statute provides for the "main forms of civilization" to be represented (art 9 of ICJ Statute).

143 A tendency has developed to favour West Africa in the composition of the Commission. A repetition should be avoided. See Tables E and F in ch 3 above. The dominance of a regional faction or group of states necessarily taints the inclusivity and legitimacy of any institution with a claim to pan-African status.

144 See the discussion below. The report drafted after the Cape Town meeting refers to "African customary law, Islamic law, Common law and civil law": OAU/LEG/EXP/AFC/HPR/RPT (I) Rev 1 at par 19.

145 (1996) 8 *RADIC* 944 at 958.

146 Naldi and Magliveras (1996) 8 *RADIC* 944 at 957.

147 Art 10(2) of the OAU Charter.

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place of the Court. Judges to the ICJ are elected by an absolute majority in both the General Assembly and the Security Council. The ICJ Statute also provides for a deadlock-breaking mechanism when the requirement of a double absolute majority cannot be reached.[148] In its comments about the Cape Town draft, the government of Madagascar proposed that a provision should be included to regulate the situation when the two-thirds majority is not reached. The Secretary-General agreed, and suggested that a new sentence be included which reflects the current practice with regard to election of members of the African Commission. The proposal, to be added after article 13(1), reads as follows: "If the first two ballots are inconclusive, the Assembly may decide to continue the voting process by simple majority".[149] This proposal is strongly supported.

The Nouakchott Protocol deleted the explicit two-thirds majority requirement. This was done after the OAU Legal Adviser had explained that the Rules of procedure of the Assembly stipulate that all decisions of that body are by a two-thirds majority.[150]

7.2.17 Article 15: Term of office

1. *The judges of the Court shall be elected for a period of six years and may be re-elected only once. The terms of four judges elected at the first election shall expire at the end of two years, and the terms of four more judges shall expire at the end of four years.*
2. *The judges whose terms are to expire at the end of the initial periods of two and four years shall be chosen by lot to be drawn by the Secretary-General of the OAU immediately after the first election has been completed.*
3. *A judge elected to replace a judge whose term of office has not expired shall hold office for the remainder of the predecessor's term.*
4. *All judges except the President shall perform their functions on a part-time basis.*

148 See arts 10, 11 and 12 of the ICJ Statute.

149 See CM/1996 (LXV) at 8.

150 See OAU/LEG/EXP/AFCHPR/RPT(2) at par 28.

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The judges are elected for terms of six years.[151] They may be elected once again, making twelve years the longest period a judge may serve on the court.[152] This is similar to the position in the Inter-American system. The European system does not place any limitation on the number of years that a judge may serve.[153] An optimal alternative would be to lengthen the term of office, without providing for the possibility of re-election.[154]

Of the first eleven judges elected, only three will serve the full term of six years. The terms of four other judges expire after two years; that of the other four, after four years. This system of "leap-frogging" is also embodied in the Inter-American system. In the Americas, the term of three of the seven judges first elected expires at the end of three years.[155] A similar built-in mechanism to ensure continuity has been included in the African Charter. In almost all cases, initially, the person whose term expired, was re-elected. While this ensured continuity, it also meant a degree of stagnation.[156]

The Cape Town Protocol stipulated that a judge had to complete cases partly heard by him or her before his or her terms expires.[157] This has been omitted from the later proposal, and will probably be dealt with in the Rules of procedure. Saving costs seems to be the motivation behind allowing

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151 Judges of the ECOWAS Court are appointed for five years, once renewable (art 4(1) of the Protocol establishing the ECOWAS Community Court of Justice).

152 This is an advance on the Addis Ababa proposal, which provided for a once-renewable term of nine years, bringing the total number of years a judge could serve on the Court to eighteen. This is similar to the ICJ Statute (art 13): Judges are elected for 9 years, and may be re-elected. The Explanatory Notes to the Draft Protocol state that the period of nine years "is to ensure security of tenure" (at 3). Consideration should be given to include an age limit. This has been done in the Protocol establishing the ECOWAS Community Court of Justice, art 3(7): "A member of the Court shall not be eligible for re-appointment after the age of 65 years". That Protocol sets further age requirements - no person under 40 years or above 60 years of age is eligible for appointment.

153 See art 40(1) of the European Convention: Judges are elected for 9 years, and may be elected.

154 See Shelton (1996) 56 *ICJ Review* 23.

155 Art 54(1) of the American Convention.

156 See Table D in ch 3 above.

157 Art 14(4) of the Cape Town Protocol.

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judges to continue hearing cases partly heard by them before their terms have expired.[158] The alternative would have been to start cases *de novo* if the term of any one of the presiding judges would expire. Following the route chosen, delegates in Cape Town remained conscious of the fact "this approach could result in having more than eleven judges at one time".[159]

7.2.18 Article 16: Oath of office

After their election, the judges of the Court shall make a solemn declaration to discharge their duties impartially and faithfully.

This provision was not included in the Cape Town Protocol. It is a mirror image of article 38 of the African Charter, which requires similar declarations after the election of members to the African Commission.

7.2.19 Article 17: Independence

1. *The independence of the judges shall be fully ensured in accordance with international law.*
2. *No judge may hear any case in which the same judge has previously taken part as agent, counsel or advocate for one of the parties or as a member of a national or international court or a commission of enquiry or in any other capacity. Any doubt on this point shall be settled by decision of the Court.*
3. *The judges of the Court shall enjoy, from the moment of their election and throughout their term of office, the immunities extended to diplomatic agents in accordance with international law.*
4. *At no time shall the judges of the Court be held liable for any decision or opinion issued in the exercise of their functions.*

158 OAU/LEG/EXP/AFC/HPR/PRT (I) Rev 1 at par 20. See similar provision in ICJ Statute, art 13(3).

159 OAU/LEG/EXP/AFC/HPR/RPT (I) Rev 1 at par 20.

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The lack of independence of the African judiciary has been branded one of the main obstacles to the realisation of rights in Africa.[160] It has indeed been raised as a factor that can easily undermine the meaningful functioning of an African Court on Human Rights. Ensuring the independent functioning of the Court must therefore be an essential feature of the Protocol.

As far as domestic courts are concerned, article 26 of the African Charter places a duty on states parties to "guarantee the independence of the courts". The Protocol extends this principle to the African Court. The 1985 UN Basic Principles on the Independence of the Judiciary served as the most important pre-text for article 15.[161]

7.2.20 Article 18: Incompatibility

The position of judge of the Court is incompatible with any other activity that might interfere with the independence or impartiality of such a judge or the demands of the office, as determined in the Rules of procedure of the Court.

Similar provisions are found in the two other regional human rights Courts.[162] In the Statute of the Inter-American Court three categories of activities that would constitute incompatabily are listed. These are membership of the executive branch of government, being an official of an international organisation, and "any other" activity that might affect the independence or impartiality.[163] This provision has caused judge Sonia Picado to resign her position on the Court to become the Costa Rican ambassador to the United States.[164] In respect of judges of the ICJ, a much stricter standard

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160 See also the discussion of this aspect in ch 3.4.3 and ch 8.

161 See also art 17(2) of the ICJ Statute. See Shelton (1996) 56 *ICJ Review* 23, who discusses the principles of judicial independence in the context of international tribunals.

162 See eg art 40(7) of European Convention and art 71 of American Convention.

163 Art 18(1)(a) of the Statute of the Inter-American Court.

164 See Pasqualluci (1995) 17 *HRQ* 794.

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applies. They are not allowed to exercise "any political or administrative function, or engage in any other occupation of a professional nature".[165]

The position of the African judges (except the President) will differ from that of the ICJ judges, as the African judges are not full-time appointments.[166] As far as the President is concerned, the "demands of the office" should disallow his or her taking other positions of employment. The Rules of procedure (or Statute of the Court) should spell this out.[167] It is suggested that a list similar to the one in the Statute of the Inter-American Court should spell out explicitly that certain professional activities are *per se* incompatible with the role of judge. Except for a vague reference to "impartiality", the African Charter does not set any requirement about "incompatibility".[168] This has led to the election to the African Commission of persons closely linked to governments, a state of affairs which should be prevented as far as possible when it comes to the new Court.[169]

7.2.21 Article 19: Cessation of office

1. A judge shall not be suspended or removed from office unless, by the unanimous decision of the other members of the Court, the judge concerned has been found to be no longer fulfilling the required conditions to be a judge of the Court.

2. Such a judgment of the Court shall become final unless it is set aside by the Assembly at its next session.

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165 This requirement is restated in the Protocol establishing the ECOWAS Community Court of Justice (art 4(11) of the Protocol). The appropriateness of such a requirement in the case of judges that are not full-time is open to serious questioning.

166 Art 16(1) of the ICJ Statute.

167 See also Shelton (1996) 56 *ICJ Review* 23, who identified norms for incompatibility of service as one aspect of judicial independence which needs to be strengtened.

168 See art 31(1) of the African Charter.

169 See eg the position of commissioner Ben Salem (Tunisian ambassador to Senegal), and further Table C above.

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This provision does not regulate the detail of or the difference between the process of suspension and removal of judges.[170] Obviously, the difference between temporary and permanent removal is crucial. The grounds constituting each, will be set out in the Rules of procedure of the Court.

Naldi and Magliveras show that this provision differs from the position in the Inter-American Court. There, the OAS, and not the Court itself, determines judicial sanction. They conclude: "In this way, the important element of neutrality is maintained".[171] It is unclear if, in their opinion, "neutrality" is "maintained" in the Inter-American system or under the proposed Protocol. My opinion is that it is laudable that decisions about suspension and removal of judges have been removed from the political arena. This will go a long way to addressing one of the main concerns about the functioning of an African Court on Human Rights: its independence from political influence and persuasion. A decision about suspension or removal is best made by peers, and within a judicial setting. Not political pressure and short-term policy considerations, but a hearing, culminating in a "judgment", will be the basis of such a decision. In the event of serious reasons for removal or suspension, the Court is also better positioned to expedite the matter, and will not so easily become the victim of delays caused by extraneous factors.

Unfortunately, in terms of the Nouakchott Protocol the final decision about the dismissal of judges lies with the Assembly. It may set aside the Court's unanimous decision without providing reasons. At the Nouakchott meeting especially Nigeria and Tunisia held the firm view that "the Assembly which elected the judges should be involved in their removal".[172] This is similar to the Addis Ababa proposal, where the decision was also left to the Court, but a final veto was allowed

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170 The reason is probably because the two terms are used more or less synonymously, as there could be little reason only to temporarily "suspend" a judge who no longer fulfil the conditions to be a judge.

171 (1996) 8 *RADIC* 944 at 960.

172 See OAU/LEG/EXP/AFCHPR/RPT(2) at par 33. This was not a view uniformly held: "Some delegations ... strongly felt that the new formulation was unnecessary as the Court should be given the powers to suspend and remove any judge without any outside interference, in conformity with the provisions of most human rights instruments and the practice prevailing in Member States" (at par 34).

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to the OAU Assembly.[173] No mention was made of this veto power in the Cape Town report or draft Protocol.[174]

Two other differences with the Addis Ababa proposal may also be noted. The one is that the Addis Ababa proposal sets out the grounds on which the relevant findings could be made. The grounds are "a criminal act, gross or repeated neglect or physical or mental incapacity".[175] Similar provisions should rather be included in the Rules of procedure. The second difference is that the Addis Ababa proposal provides for a judgment by two-thirds majority, while the Cape Town and Nouakchott drafts require judicial unanimity. Two-thirds of the Court is seven judges. The requirement that all judges (except the one being "judged") need to agree, is sound. This will ensure that a judge does not become victim to a pressure group within the Court, and be removed for a petty reason.

7.2.22 Article 20: Presidency of the Court

1. The Court shall elect its President and one Vice-President for a period of two years. They may be re-elected only once.

2. The President shall perform judicial function on a full-time basis and shall reside at the seat of the Court.

The President and Vice-President may be re-elected only once, for a total term of four years. No such prerequisite is included in the Statute of the Inter-American Court.[176] This is more limited

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173 "Such a judgment of the Court shall take effect immediately and will become final unless it is set aside by a two-thirds majority decision of the Assembly" (art 10 of the proposal).

174 Art 17(2) of the Cape Town Protocol reads as follows: "Such a judgment of the Court shall be final and take effect immediately".

175 See the Addis Ababa proposal art 10(1).

176 The Addis Ababa proposal followed this model, by only stipulating that the President and Vice-President "may be re-elected" (see art 11(1) of the proposal).

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than the position pertaining under the ICJ Statute. It allows for the election of judges for three-year periods and indefinite re-election.[177]

Only the President is described as a full-time official of the Court. This implies that other judges are part-time, although the possiblity of them taking their seats on a full-time basis is not excluded. Working sessions are not mentioned in the Protocol.[178] In the Statute of the Inter-American Court regular and special sessions are foreseen.[179] It may later appear advisable that all judges should serve on a full-time basis. Even if the Court is not constantly in session, continued close proximity may be necessary to communicate effectively and work on judgments together. In the short term, however, other reasons dictate that only the President should take his or her seat on a permanent basis. For one, it will cut costs drastically, as only one residence will be needed and as the other judges would not be paid on a full-time basis.[180] Also, the majority of cases will first have to be processed by the Commission, and will take time to reach the Court. To establish eleven judges on a permanent basis immediately, would be premature.

The temporary or permanent nature of the positions of judges on the Inter-American Court was not fixed in the American Convention. The Court, addressing this issue in its draft Statute, opted for seven full-time judges.[181] This option was chosen to secure that the Court would not be regarded as an *ad hoc* court, lacking in prestige and legitimacy. The OAS Assembly found this unacceptable, ostensibly on the grounds "that a full-time court would be too expensive and was unjustified until

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177 Art 21(2) of the ICJ Statute.

178 Compare the "Explanatory Notes to Draft Protocol": "The working group had some discussion as to whether the position of President or Vice-Presidents should be full-time or part-time. It would be rather costly to have all three positions full-time. Furthermore, it may be difficult to have only one person to take a full-time position for three years". A full-time position, it was conceded, "will enhance the efficiency of the Court".

179 Art 22 of the Statute.

180 The question may certainly be posed whether the judges, some of whom will no doubt have been judges in their own countries, would then retain their positions. This factor has to be taken into account when the Rules of procedure stipulate which positions are incompatible with being a member of the Court.

181 See the discussion by Buergenthal (1981) 76 *AJIL* 231 - 235, on which the brief history that follows, is based.

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the Court had a substantial case load".[182] A Court of part-time judges was established, leaving judges free to "practice law, to teach, and to engage in whatever occupations they may have in their native countries".[183] In terms of the Court's Rules of procedure, a Permanent Commission composed of the President, the Vice-President and another judge is constituted to serve as an "executive bureau". This model seemingly served as inspiration for the Addis Ababa proposal that two Vice-Presidents be elected, and that one of them, or the President, "shall perform judicial functions on a full-time basis and shall reside at the seat of the Court".[184]

In light of the fact that only the President is appointed on a full-time basis, it is a sound principle to rotate the Presidency after two, or, at least, four years.

The Rules of procedure should detail the division of work between the President, the Vice-President, and the other judges.

7.2.23 Article 21: Exclusion

If a judge is a national of any of the State parties to a case submitted to the Court, that judge shall not hear the case.

This is an instance in which the Nouakchott draft departs radically from the Cape Town draft. The previous provision made it possible for judges from one state to "retain the right to hear"[185] cases involving his or her state. It was entitled "Right to hear cases". Given that judges should be independent and not have an interest in any particular case, it follows that judges should not be disqualified from hearing cases emanating from the same country as the one of which they are nationals. This principle is accepted in all major international courts.[186] As a matter of fact, it

182 *Ibid.*

183 *Ibid.*

184 Art 11 of the proposal.

185 Art 19 of the Cape Town draft.

186 See art 43 of the European Convention, art 55(1) of the American Convention, arts 31(2) and 31(3) of the ICJ Statute, art 16(4) of the Statute of the European Court of Justice.

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may be regarded as desirable that a judge from the state against which a complaint is directed be represented on the Court. The presence of such a judge will ensure that at least one member of the bench is completely familiar with the applicable legal system. In Africa, with its diversity of legal systems, this factor should be accorded even more importance than in other regions.

The position in the other two regional systems is as follows: In Europe, this factor is accommodated in the provision that the number of judges should be equal to the number of states parties. In practice, however, the European Court sits in chambers of nine judges.[187] The specific judges are chosen by lot, but the judge who is a national of a state party concerned takes his or her seat *ex officio*. If there is no such judge, the state party concerned must appoint an *ad hoc* judge for the purpose of that particular case. The position under the American Convention is different, as the Inter-American Court consists of only seven judges.[188] It is quite likely that a state (or states) party to a case would not be represented on the Court. In such an event, the state may appoint an *ad hoc* judge to serve on the Court for the duration of that case.[189]

It seems advisable that *ad hoc* judges should also be allowed to sit on the African Court. This will not only be in accordance with international tendencies, but will also enhance the effectiveness of the Court, will go a long way towards ensuring state co-operation and will serve the principle of representativity. It is regrettable that the recommendation contained in the Addis Ababa proposal has not been followed. It provided that if "among the judges called upon to hear a case none is a national of any of the States Parties to the case, each of the latter may appoint an *ad hoc* judge".[190] Similar considerations come into play as in the European system, where an *ad hoc* or national judge and a rapporteur-commissioner are appointed. The role of the national judge or commissioner is considered necessary "to guide the other members of the Court through the thicket

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187 Art 43 of the European Convention.

188 Art 52 of the American Convention.

189 See art 55(2) of the American Convention. There could be more than one ad hoc judge in a case: see art 55(3) of the American Convention.

190 Art 12(4) of the Addis Ababa proposal. See also art 12(3) of that proposal, which provides that if one of the judges is a national of a state party in the case, any other state party in the case may also appoint an *ad hoc* judge.

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of national law and remedies and to field any question that arise concerning the domestic context of the dispute".[191]

The inclusion of a provision on *ad hoc* judges was extensively discussed in Cape Town.[192] One reason against such a provision is the financial implications: The presence of these judges, their *per diem* and allowances would have to be paid from the Court's budget.[193] The question may certainly be put whether the potentially restricted resources of the Court should be spent on securing the presence of *ad hoc* judges. On the other hand, the cost of these judges has to be weighed against the cost caused by their absence. These *ad hoc* judges bring specialist knowledge of the legal system concerned. Such expertise will have to be secured by other means if an *ad hoc* judge from the country concerned is not included on the bench. Allowing for *ad hoc* judges would enhance perceptions that the Court is an inclusive and participatory institution, and would counter arguments against the Court based on "state sovereignty".[194]

In its comments to the Secretary-General on the draft Protocol, Madagascar proposed a different possibility.[195] Its proposal allows for an *ad hoc* judge to be appointed in respect of a particular country, but only when a judge from any other state party involved in a dispute, already sits as a judge in that dispute. The Secretary-General was of the opinion that, if the consensus is for having *ad hoc* judges, the Madagascar proposal would be preferable. One should realise that the proposal allows a very limited role to *ad hoc* judges. Two possibilities for their participation is provided for:

- An *ad hoc* judge will be appointed in inter-state disputes, in which one state involved already has a judge on the bench.
- An *ad hoc* judge will also be appointed in the unlikely event of individual complaints being directed against more than one state, and one of these states is represented on the bench.

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191 Harris *et al* (1995) at 654. See, on *ad hoc* judges appointed to ICJ, art 31 Statute of ICJ.

192 It had been provided for in the Addis Ababa proposal, see art 12(3) and 12(4) thereof.

193 CM/1996 (LXV) at 8.

194 See, in this respect, also ch 8.1.1.

195 CM/1996 (LXV) Annex III(i) at 2.

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The Nouakchott Protocol does not incorporate any of these aspects. It embodies a rigid rule that no judge may adjudicate a case which involves a state of which he or she is a national.

7.2.24 Article 22: Quorum

The Court will examine cases brought before it by at least seven judges.

In general a minimum of seven (of the eleven) judges (or two-thirds) must be present to hear and decide a case.[196] It implies that eleven judges usually hear a case, and that if not all eleven are available, at least seven must be present. All decisions of the Inter-American Court have to be adopted by the Plenary Court. The Court does not sit in panels of judges.[197]

The Cape Town Protocol left the door open that two different chambers, consisting of five judges each, may be established. The European experience, where the Court was overwhelmed by an increased case load partly informed this provision. This may be a future development, as no more than a trickle of cases should be expected initially. The possibility of chambers, also for summary proceedings, is provided for in the ICJ Statute.[198] A provision about such a possibility need not be included in the Protocol: The Rules of procedure of the Court will clarify how judges will be designated to take their seats on the bench of particular chambers.

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196 The quorum for the Inter-American Court is five of the seven judges (art 56 of the American Convention). In other words, 7 is the norm, but at least 5 judges must take their seats.

197 Art 59 of the American Convention.

198 A minimum of three judges may constitute a chamber: see art 26(1) of the ICJ Statute.

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7.2.25 Article 23: Registry of the Court

> *1. The Court shall appoint its own Registrar and other staff of the registry according to the Rules of procedure.*
>
> *2. The office and residence of the Registrar shall be at the place where the Court has its seat.*

The Registrar will probably play an important role in the initial functioning of the Court. Many of the reasons for the problematic beginning of the Commission may be sought and have been identified at the secretarial level. The detailed functioning of the Registrar's office will be set out in the Rules of procedure. The selection of the registrar and his or her personnel is clearly of great importance. It is also important that the office be staffed with administrative and legally-skilled personnel. The two only senior Court officials who reside at the seat of the Court are the President and the Registrar. They will co-operate closely, and it is only sensible to accept that the President should have the determining say about whom to appoint. The Registrar must be a person of proven legal and administrative competence. The person appointed to the post must also have an excellent command of either English or French and a working knowledge of the other. It is of importance that the Registry is appointed by the Court, and not by the Secretary-General.[199]

A major constraint in this regard is of a financial nature. The budget of the Registry shall be "determined and borne by the OAU".[200]

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199 As is the case in the OAS, see Cerna in Janis (ed) (1992) at 119.

200 Art 29 of this Protocol, and accompanying discussion.

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7.2.26 Article 24: Seat of the Court

1. The Court shall have its seat at the place determined by the Assembly. However, it may convene in the territory of any Member State of the OAU when a majority of the Court considers it desirable, and with the prior consent of the State concerned.

2. The seat of the Court may be changed by the Assembly after due consultation with the Court.

7.2.26.1 Location of seat

The location of the Court is left open for determination by the Assembly. This decision will probably only be taken when the requisite number of states have ratified the Protocol.[201] As part of its views on the Cape Town Protocol, Tunisia proposed to the Secretary-General that the seat of the Court should be "determined once and for all in the statutes".[202] The Secretary-General opposed the idea. Firstly, he pointed out that it would be contrary to the current practice of the OAU.[203] Secondly, he asked rhetorically: "Can the seat be determined before Member States willing to host the Court come forward with specific offers to enable the Assembly (to) determine which one is more attractive?"[204] Thirdly, it would lead to rigidity. To this one may add the possibility of the deterioration in the political situation in the host state. Any future change of the seat would then require the burdensome and time-consuming process of amendment to the Protocol.

Two models are suggested by the two other major human rights systems. One possibility is that the seat of the Commission and the Court may be the same, as in the European system.[205] The

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201 See the comments by the Secretary-General in his report on state views on the draft Protocol: "... it is envisaged that in conformity with the current OAU practice, the Secretariat would propose to the Asssembly a criteria on hosting the Court once the Protocol enters into force" (*sic*, see CM/1996 (LXV) at 8).

202 See CM/1996 (LXV) Annex III (e) at 5.

203 For his arguments, see CM/1996 (LXV) at 8.

204 *Ibid.*

205 All the Council of Europe institutions are located in Strasbourg, France. See also "Explanatory Notes to Draft Protocol", which states: "It may be most appropriate to have the seat of the Court at the same place

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other is that the Commission and Court are situated in different states, as in the Inter-American system.[206] Another model is suggested in the African context - that the Court's seat is the same as that of the OAU headquarters in Addis Ababa, Ethiopia, although the Commission is in the Gambia.

The middle option is favoured here. This will mean that the continental human rights system will have three separate focal points - the seat of the political authority, that of the Commission, and that of the Court. One of the main arguments favouring this option is that the continent as a whole should be involved in the project to realise human rights in Africa. At the moment the centre of activity is in the north and west. Establishing the Court in sub-equatorial Africa will enhance continental representation and involvement. It will exercise a gravitational pull that spans the continent and will address concerns that the Commission had become dominated by West-African states.

The uniformity of location in Europe was influenced by the fact that all the institutions were created simultaneously. Where one institution (such as the Inter-American Commission) has already established itself, arguments could be entertained about the feasibility of locating the Court elsewhere. A similar debate is possible in Africa, as the Commission is now firmly established in Banjul, the Gambia.

Having the Commission and the Court in one country will enhance personal links and facilitate communication between the two institutions. This could reduce delays and will go a long way to circumventing the adverse effects of the three-month rule.[207] Scarce resources could be "pooled" for the use of both institutions, and will therefore be improved more easily. While these arguments may be convincing in the abstract, they become less convincing if applied to the concrete state of affairs. The present infrastructure available in the Gambia is not sufficient for both institutions.

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where the Commission has its seat. However, it was considered wise to leave that decision to the Assembly as there may be good reasons why the seat of the Court should be established elsewhere".

206 The Inter-American Commission's seat is Washington DC, in the United States, while the Court is located in San José, Costa Rica.

207 See the discussion of art 8(3) below.

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The Gambian government has already been generous in its institutional support of the Commission and it is unlikely that a further burden will be borne with ease. Furthermore, one of the main considerations for the choice of Banjul as Commission seat has subsequently been eroded. The contention was (rightly, at that stage) that the Gambia was one of the few consistently stable democracies in Africa. The military coup d'état of 1994 has nullified the validity of this contention. Other problems, related to connections by air, infrastructure, power supply and available resources, have also arisen.

Based on these experiences, the following prerequisites for the seat of the Court may be listed:

- The seat should not be in Banjul.
- It should be in a state south of the equator.
- It should be located in a stable democracy.
- It should be situated in a state that has already ratified the Protocol or is likely to ratify in the near future.
- The country should have a sound economic base, which will enable it to render institutional support to the establishment of the Court. The most important is the provision of office and court buildings.[208]
- The seat should be in a location easily accessible by air and other routes.
- A well-functioning communication system should be in place.
- It should preferably be situated in a country where NGOs play an active role in society, and may interact with and give support to the activities of the Court.

Some countries that may be suggested are Botswana, Namibia, South Africa, Uganda and Zimbabwe. One factor favouring South Africa is the availability of and access to legal resources. Most major cities have libraries well-stocked with international human rights material. Cape Town

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208 Listed as a "criterion" by the Secretary-General in his report on state comments (CM/1996 (LXV) at 8).

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deserves special mention as a possibility, as it has been the location of the meeting of experts drafting the initial proposed Protocol establishing the Court. The African Charter, one is reminded, is also known as the "Banjul" Charter, referring to the location of the initial drafting and the permanent seat of the Commission.

The third possibility, that the Court takes as its seat that of the OAU, must also be considered. Most of the arguments tilting the scale in favour of not establishing the Commission there, apply to the seat of the Court as well. These arguments relate mainly to the independence of the quasi-judicial and judicial bodies from political control.

7.2.26.2 Temporary changes

The seat may be temporarily changed to the territory of another OAS member state. This may be done when two requirements are met: A majority of the Court must deem it desirable, and the state has to consent to host the sitting.[209]

7.2.26.3 Permanent changes

The Protocol provides that the seat of the Court may be changed. Such a decision is made by the OAU Assembly (including states that have not ratified the Charter and the Protocol).

This contrasts with the Inter-American system, where the seat may be changed by a vote of parties to the American Convention, "in the OAS General Assembly".[210] In other words, the forum is the OAS Assembly, but only states parties vote. A two-thirds majority of the states parties to the Convention (not only those present) must favour such a change before the seat of the Inter-American Court can be changed.

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209 See art 3 of the Statute of the Inter-American Court for similar wording.

210 Art 3(2) of the Statute of the Inter-American Court.

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This rigid "two-thirds" requirement is replaced in the Protocol with a more flexible approach: A change of seat may only be made "after due consultation with the Court". No doubt, the opinions of the members of the Court are of relevance. These views are not made conclusive. The judges need only be "consulted". A distinction may be drawn between "in consultation with" and "after consultation with".[211] The reference to "due consultation" may also be read as a mechanism through which the Court could initiate steps to have the seat changed.[212]

7.2.27 Article 25: Evidence

> *1. As far as possible, after due consideration, the Court will hear submissions by all parties and if deemed necessary, hold an enquiry. The States concerned shall assist by providing relevant facilities for the efficient handling of the case.*
> *2. The Court may receive written and oral evidence and other representations including expert testimony and it shall make a decision on the basis of such evidence and representations.*

Ordinarily, courts consider the facts and the law applicable in a particular matter. They first inquire about facts by receiving evidence. Evidence can include written statements, oral testimony and real evidence. Once the facts have been investigated, the Court considers the applicable law and its application to the facts. To assist the Court in making an informed decision, counsel submits argument on the legal position and the application of the law to the facts. In an appeal court the facts as found are usually used, and only submissions are entertained.

The role of the African Court has not been clarified. The Court has a discretion to hold an enquiry, to allow evidence, and to hear submissions. None of these possibilities are compulsory.

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211 On the distinction between the two terms, see eg the South African case *Colonial Secretary v Molteno School Board* 27 SC 96. "After consultation" implies that the decision-maker must inform other parties involved, but they need not agree with the decision-maker's decision. "In consultation with" requires a consensual agreement between the parties (see Basson & Viljoen (1988) at 57).

212 See Naldi and Magliveras (1996) 8 *RADIC* 944 at 960: The Court is entitled to propose another venue and the Assembly may agree to comply. The Assembly clearly retains a discretion.

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7.2.27.1 Evidential matters

Different legal systems are represented in the African system. As far as the rules of evidence are concerned, definite differences exist between the common law and civil law approaches.

The Inter-American system is dominated by states with civil law backgrounds. The Court's approach may be characterised as "civil law", but is was first formulated in constitutional terms, rather than opting for any existing "domestic" system.[213] As in Africa, states with inquisitorial and accusatorial systems form part of the European human rights system. Potential conflict has largely been avoided by adopting a flexible approach to evidence.[214] At the level of the Commission, its functions of ascertaining the facts and of trying to solve matters amicably necessarily lend themselves to an inquisitorial approach.[215]

The Rules of the International Criminal Tribunal for the former Yugoslavia seem to favour a civil law approach to the admission of evidence. In general, the tribunal must apply rules of evidence which will best favour a fair determination of the matter before it "and may admit *any relevant evidence which it deems of probative value*".[216] The following rule has been adopted as far as the exclusion of evidence is concerned: "No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings".[217]

In the Tribunal's *Decision on the Defence Motion or Hearsay*[218] the defence argued that all hearsay evidence implicating the accused should as a general rule be excluded. The tribunal rejected this contention, holding that it must consider the relevance, the probative value and

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213 See eg art 34 of the Rules of procedure of the Inter-American Court.

214 See eg rule 26 of the Rules of Court of the European Court of Human Rights.

215 See art 28(1)(b) of the Convention.

216 Rule 89.

217 Rule 95 of the Rules of procedure and Evidence of the International Tribunal for Rwanda.

218 5 August 1996, *Tadio* case IT-94-I-T, see Tittemore (1996) 4 *Human Rights Brief* at 4.

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reliability of evidence. Applied to the contested evidence, it meant that the tribunal would "hear both the circumstances under which the evidence arose as well as the content of the statement".

Whatever system the African Court follows, it should adopt a generous approach to questions of admissibility of evidence. In its first contentious case, the Inter-American Court was faced with questions about the admissibility of indirect evidence in the form of circumstantial evidence, *indicia* and presumptions.[219] The Court decided to allow all evidence that provides the Court with information about the relevant facts, without imposing strict and formal limitations.[220] The Court drew a distinction between the strict rules of evidence in a criminal trial, and those applicable in the consideration of a human rights violation: "The objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages resulting from the acts of the States responsible".[221]

7.2.27.2 Submissions

The Court has an option to allow submissions. This much is clear from the use of phrases such as "as far as possible" and "after due consultation". "Other representations" in article 23(2) should include *amicus curiae* briefs, in particular by NGOs with an interest in the matter, or any body that may enlighten the Court.

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219 See the *Velásquez Rodríguez* case, Series C 4, judgment of 29 July 1988.

220 At paras 140 - 146.

221 At par 134.

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7.2.28 Article 26: Findings

1. If the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.

2. In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary.

7.2.28.1 Appropriate remedy

The Court has a wide discretion to make "appropriate orders" to "remedy the violation". No exhaustive list of possible remedies is provided. In the Cape Town Protocol, explicit reference was made to two general remedial possibilities.[222] The one was that the consequences of the violation be remedied. This could constitute an order of *restitutio in integrum*, a complete return or restoration of the position before the violation occurred. The other (not exclusive of the first) was payment of reparation or compensation to an injured party. This last possibility is restated in the Nouakchott Protocol. The Court should not hesitate to make use of this possibility. Especially in the African context, compensation is often the most appropriate remedy. It is appropriate if one considers adjudication in traditional African societies. The Report of the Uganda Constitutional Commission, for example, identified the failure of the post-colonial legal system to take into account Ugandan cultural norms, identified as directed at conciliation and harmony.[223] One of the main problems of this alien orientation has been the lack of compensation paid to victims in the criminal justice sphere. It has often been pointed out that dispute settlement in traditional Africa

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222 Art 24(2) of the Cape Town Protocol.

223 (1993) par 17.25 -17.26.

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was aimed at restoring a societal imbalance.[224] Some form of compensation often contributed to this restoration. The provision in article 24(2) is a verbatim replica of the corresponding provision in the American Convention, showing that compensation as remedy is not peculiar to Africa.[225]

7.2.28.2 "Heads" of damages

Article 26(1) introduces the yardstick of "appropriate" remedial measures. This leads to the question of what may be included under the "heads" of damage: moral, actual or material damage?

The Inter-American Court has awarded actual, moral and material damages. These categories are illustrated well in the case of *Aloeboetoe v Suriname*.[226] In that case Surinamese soldiers abducted a group of men who were members of the Saramanca tribe. After having been ordered to dig their own graves, six of them were killed. The Court awarded moral damage to the successors (also the ascendant-parents) and material damages to victims' successor-wives and children. The Court's judgment represents a significant shift from its two previous judgments, in which it characterised the remedy as *restitutio in integrum*. The Court broadened the scope of damages to "remedy all the consequences of the violation that took place".[227] Restitution has made room for indemnification. One of these consequences was that payment was awarded for expenses to discover the whereabouts of victims' remains.

The Court went further, extending the ambit of "indemnification" clearly beyond monetary compensation. The state also has certain socio-economic responsibilities towards the heirs of the victims, the Court held. A public school had to be reopened for the Saramanca, and the state had to staff it with teaching and administrative staff to ensure its permanent functioning. In addition, the Court placed the state under an obligation to open a medical dispensary and to make it

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224 See also, in the South African context, the South African Law Commission's issue paper 7 on Restorative Justice. The Commission found South Africa not to be on par with the rest of the world as far as victim-compensation is concerned, and recommended a compensation scheme for victims of crime in South Africa.

225 See art. 63(1) of the American Convention: Only the phrase "is appropriate" was deleted in the Protocol.

226 Series C 15, judgment of 10 September 1993, see (1993) 14 *HRLJ* 413.

227 Par 47 of the judgment.

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operational within the next year. The state must also use the means at its disposal to inform those affected about the fate of the victims and the location of their remains.
In their claim the applicants also requested measures of a more symbolical nature. This included requests that the President of Suriname make a public apology and that public facilities in the capital be named after the Salamanca. The Court did not make any order in this respect.

7.2.28.3 Quantum of damages

The quantum (amount) of compensation is not stipulated. The yardstick set in article 26(1) is that of "fair compensation".

In *Aloeboetoe v Suriname*[228] actual damages were assessed on the amount that the victims would have earned during their full working lives. The amount was calculated in the local currency and converted to US $ to circumvent the effect of spiralling inflation in Suriname. The money was placed in two trust funds, to be administered for the benefit of the adult and minor beneficiaries.

Moral damages in the *Velásquez Rodríguez* and *Godínez Cruz* cases was based on the account of a psychiatrist's expert testimony. In *Aloeboetoe*, on the other hand, no expert evidence was led. This may be explained by the fact that the (new) government admitted responsibility. The amount awarded is not motivated, but is presumably based on the on site investigation by a member of the Court's administrative staff. The payment took the form of lump sums paid to the beneficiaries.

7.2.28.4 Injured party

Any "injured party" is broadly recognised as a potential beneficiary.

The question in *Aloeboetoe* was whether the Salamanca tribe as such is an "injured party". Finding that the damage suffered by the tribe was too remote, the Court found that it did not

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228 (1993) 14 *HRLJ* 413.

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qualify. The Court accepted that all persons belong to "intermediate communities". The state's duty to compensate does not extend to such communities. The Court added that in an exceptional case this could be granted if the community suffered direct damages. Criticism has been expressed against the tendency to regard all intermediate communities as identical. Certainly circumstances might arise where a specific community and its members are targeted for genocide. It may be argued that the reluctance to grant a claim collectively is the consequence of not enshrining a group concept in the Convention, and in the African context such group claims are much more likely to succeed.

7.2.28.5 Provisional measures

Before the Protocol aimed at establishing the Africa Court, American Convention was the only international human rights instrument that provides for judicially enforceable provisional measures.[229] Following the wording of Article 63(2) of the American Convention, article 26(2) of the Protocol enables the African Court to adopt legally binding provisional (or interim) measures. This shall however only be done if both the following two criteria are met:

- It must be a case of "extreme gravity and urgency".
- The measures must be necessary "to avoid irreparable damage to persons".

Under the American Convention, a distinction is drawn between matters under the Court's consideration and matters not yet submitted to the Court. The Commission does not have the competence to order interim measures. If a case is still being considered by the Commission, it must therefore refer the case to the Court for its determination on interim measures. A similar distinction is not drawn in the Protocol.[230] The reason may be that the Commission has the capacity

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229 But see also the Protocol establishing the ECOWAS Community Court of Justice, art 20: "The Court ... may order any provisional measures or issue any provisional instructions which it may consider necessary or desirable".

230 The Addis Ababa proposal added to a provision similar to art 24(3), the following: "With respect to a case not yet submitted to the Court, it may act at the request of the Commission".

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to order interim relief.[231] In other words, if a case is still pending before the Commission and urgent relief is required, the Commission will issue recommendations. If the matter is being entertained by the Court, it may order interim relief. One major shortcoming of this procedure is the fact that the views issued by the Commission remain mere recommendations. If interim measures are contained in a judgment of the Court, they will have greater authority. If such an approach is adopted, the concurrent jurisdiction of the Commission may be retained. As soon as it becomes clear that a state is not abiding by the Commission's "views", the case should be referred to the Court for a final judgment.

Buergenthal argues that interim measures have a special importance in the inter-American system.[232] He provides the following motivation, which is equally applicable to Africa: "This is so because the system applies to a region where unlawful governmental action or inaction causing 'irreparable damage to persons' is not an uncommon occurrence".[233] The Inter-American Court has granted interim measures on numerous occasions.[234]

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231 The Commission may, in terms of its Rules of procedure, inform a country of its "views" concerning "the appropriateness of taking provisional measures to avoid irreparable prejudice being caused to the victim of the alleged violation" (Rule 111 of amended Rules).

232 In Bernardt (ed) (1994) 69.

233 *Ibid.*

234 See ch 5.2.5.7 above.

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7.2.29 Article 27: Judgment

1. *The Court shall render its judgment within three months of having completed its deliberations.*
2. *The judgment of the Court taken by majority shall be final and not subject to appeal.*
3. *The judgment of the Court shall be read in open court, due notice having been given to the parties.*
4. *Reasons shall be given for the judgment of the Court.*
5. *If the judgment of the Court does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate or dissenting opinion.*

Judgment on the merits is by majority vote. This is preferable to a higher requirement, such as two-thirds approval. The experience in Europe illustrates that such a requirement may be too burdensome. This has been illustrated in the case of *Huber v Austria*[235], which was strongly criticised.[236] This situation was remedied by Protocol no 10 to the Convention, adopted on 30 March 1992, in terms of which the two-thirds majority required for a finding by the European Commission was reduced to a simple majority. This makes it more difficult for a small group of commissioners (or "states") to undermine finality in decision-making.

The Court's judgment is final, in the sense that it forms the apex of a judicial pyramid that starts with the lowest domestic courts in African countries. No further appeal is possible. This fact alone does not render the decision "binding", in that it is enforced. Only the execution or implementation of the judgment will ensure compliance. Experience in other regions has shown that states do not comply with a judgment of a supra-national court only by virtue of the fact that the Court has delivered a final judgment.

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235 European Court of Human Rights, Series A 188, judgment of 23 October 1990.

236 See Tomuschat (1992) 13 *HRLJ* 401 at 403.

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Judges may deliver dissenting opinions. One of the criticisms of the Commission had been its emphasis of consensus, its lack of rational deliberation and the impossibility of dissent. Its Rules of procedure do not allow for dissenting opinions.

The Nouakchott proposal introduced the requirement in article 27(1): A time limit is set within which the Court must deliver its judgments. This is a salutary principle, but its formulation still leaves room for manoeuvre. The period of three months starts running when the Court has completed "its deliberations" and not after the parties have presented their cases. This leaves open the possibility of the "deliberations" only commencing at some later date, or of uncompleted deliberations being deferred *sine die*. Such an interpretation should be avoided. "Deliberations" are part of the proceedings and follows directly after the parties have presented their cases. Only in highly exceptional cases should the proceedings be postponed for later deliberation.

7.2.30 Article 28: Execution of judgment

The States Parties to the present Protocol undertake to comply with the judgment in any case to which they are parties and to guarantee its execution.

A similar provision is included in the American Convention.[237] That provision spells out that "compensatory damages" may be enforced in the state against which it was ordered, "in accordance with domestic procedure governing the execution of judgments against the state".[238]

The effcetive follow-up to decisions has troubled even the European system, which is otherwise held out as a model of effectiveness. The European Court may order a state to grant "just compensation", but is "debarred from enjoining it to amend its legislation" or to "make a deposit for the payment of the claimant's right to compensation".[239] The European Court thus does not pronounce itself on the question whether domestic law, as such, is in conflict with the Convention.

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237 Art 68(1) of the American Convention.

238 Art 68(2) of the American Convention.

239 See Tomuschat (1992) 13 *HRLJ* 401 at 404, and also *Idrocalce v Italy* (1992) 15 *HRLJ* 156.

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Its duty is to find, in individual cases, whether a provision of the Convention had been violated.[240] However, the Committee of Ministers has included legislative reform in the exercise of its supervising function. Tomuschat gives examples of states that have taken quite some years to amend legislation, and of states that have complied instantly.[241] Another problematic aspect is that a political body such as the Committee of Ministers is not always in a position to evaluate whether legislative steps in fact amount to compliance with the Court's judgment.

As far as orders for compensation are concerned, the European Court orders a state to pay a specific amount in respect of costs, expenses or just satisfaction. In the 1990s it became clear that the Court could not take for granted that states were going to comply promptly with such orders. Consequently, it now orders that payment be made "within the next three months".[242] Even this has not prompted some states to comply with the Court's order.[243] The African Court on Human and Peoples' Rights should take these experiences into account.

7.2.31 Article 29: Notification of judgment

1. *The parties to the case shall be notified of the judgment of the Court and it shall be transmitted to the Member States of the OAU and the Commission.*
2. *The Council of Ministers shall also be notified of the judgment and shall monitor its execution on behalf of the Assembly.*

Although this article is headed "Notification", it deals with an important aspect of enforcement. The main political organ entrusted with monitoring compliance with court judgments is the Council of Ministers. The Council fulfils this function on behalf of the Assembly. The Court is not granted any powers to ensure compliance with its judgments.

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240 This approach is deduced from the wording of art 25 of the Convention.

241 (1992) 13 *HRLJ* 401 at 405 - 406.

242 See the first case in which such an order was made: *Moreira de Azevedo v Portugal,* Series A 208, judgment of 28 August 1991, at 34.

243 See Tomuschat (1992) 13 *HRLJ* 401 at 405.

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To ensure transparency and accountability, the Protocol should add that the Court will release judgments to the public and the press immediately. Future access and reference will be improved if a yearbook of decisions is published annually. The publication should not be left to entrepreneurial individuals, but should be regulated as an integral function of the Court's registry.

The eventual "enforcement" of the Court's judgments is the responsibility of the OAU Assembly. But the Council of Ministers, rather than the Assembly, is given the task of "monitoring" state compliance. It is not clear what this entails. It may indeed be "keeping a mere record of judgments' implementation in the internal legal orders of recalcitrant states".[244] It could also take the form of placing the issue on the agenda of meetings of the Council of Ministers until the state complies. In the European system, the Council of Ministers has the power to censure any non-complying state.[245]

7.2.32 Article 30: Report

> *The Court shall submit to each regular session of the Assembly, a report on its work during the previous year. The report shall specify, in particular, the cases in which the State has not complied with the Court's judgment.*

Like the African Commission, the Court must submit yearly reports to the Assembly. All "measures taken" by the Commission remain confidential until the Assembly decide differently.[246] Being a judicial institution, the activities of the African Court on Human Rights are public knowledge. Access to information contained in judgments and other information is not restricted. In the case of the Court, the main aim of the annual report is to supplement the "enforcement" of judgments. However, it seems difficult for the Court to report about state-compliance, if the

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244 As Naldi and Magliveras suggest: (1996) 8 *RADIC* 944 at 963.

245 See Naldi and Magliveras (1996) 8 *RADIC* 944 at 965. They cite a recent case against Greece in which this step was taken.

246 See ch 3.1 above.

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function of monitoring judgments is given to the Council of Ministers.[247] It would probably make more sense to empower the Council to report to the Assembly on non-compliance and on recommended action that the Assembly may take.[248] If the provision is retained in its present form, the Court should co-operate closely with the Council of Ministers, in order to keep itself informed about the implementation of judgments by states. The involvement of both institutions in overseeing implementation may enhance its effectiveness.

7.2.33 Article 31: Budget

Expenses of the Court, emoluments and allowances for judges and the budget of its registry, shall be determined and borne by the OAU, in accordance with criteria laid down by the OAU in consultation with the Court and bearing in mind the independence of the Court.

Budgetary constraints have greatly contributed to the inefficiency of the African Commission. Being dependent on the OAU, the Commission remained powerless. It is therefore unfortunate to note the drafting history of this article. Initially, in terms of the Addis Ababa proposal, the Court was entitled to "draw up its own budget" and submit it for the Assembly's approval.[249] The present version, adopted at Cape Town, has a different focus, stipulating that the OAU will "determine" the budget. The role of the Court is consultative: Criteria have to be drawn up by the OAU, "in consultation with the Court". The OAU also has to "bear in mind" the independence of the Court in deciding on criteria to fund the Court. These efforts to circumscribe the power of the OAU seem to be little guarantee against political manipulation of available finances.

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247 See also Naldi and Magliveras (1996) 8 *RADIC* 944 at 964. To them, it "is not immediately obvious why this obligation is imposed on the Court". They show that the provision is based on an equivalent in the American Convention. Where the Protocol provides for "monitoring" by the Council of Ministers, the American Convention is silent, leaving it to the Court to report to the Assembly (art 65). The Inter-American Court raised state non-compliance for the first time in its 1990 Annual Report (See Cerna in Janis (1992) at 121 - 122).

248 See art 65 of the American Convention, where similar powers are granted to the Court.

249 Art 14(1) of the proposal.

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A question that regularly arises in this context is: Given the financial difficulties of the OAU, and given that the Court is an OAU institution, should "extra-budgetary resources" be mobilised? The Cape Town meeting addressed this issue and adopted the following principles:[250]

- The independence and integrity of the Court should be ensured.
- The OAU Secretary-General should do all that is necessary to ensure adequate funding for the Court, including mobilising extra budgetary resources.
- The criteria for determining the emoluments and allowances of the judges should be drawn up by the OAU taking into account the provisions of the relevant OAU Rules and Regulations in consultation with the Court.

7.2.34 Article 32: Rules of procedure

The Court shall draw up its Rules and determine its own procedures. The Court may consult the Commission as appropriate.

The Rules of procedure will further spell out the "organisation, jurisdiction and functioning" of the Court.[251] When the African Commission was established, it adopted Rules of procedure at its second session, on 13 February 1988. Amended Rules of procedure were adopted at its 19th session. It may also take some time for the Court to adopt its Rules of procedure. In the light of the complementary nature of the Commission's functions, it will in all likelihood have to amend its rules again, once the Court has finalised its functioning. The two sets of Rules of procedure should ensure the harmonious co-existence of the two institutions. In the light of the co-existence of the Court and Commission, and the Commission's experience in drafting Rules of procedure, the last sentence was added in Nouakchott.

Some of the issues that should be covered in the Rules of procedure are:

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250 See OAU/LEG/EXP/AFC/HPR/RPT (I) Rev 1 at par 24.

251 See art 1 of this Protocol.

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- An indication should be given as to the award of costs. The ICJ Statute provides that parties bear their own costs, unless the Court provides otherwise.[252] It should be kept in mind that a threat of costs should not serve as a deterrent to potential complainants, or to the Commission.[253]

- The language policy of the Court should also be regulated. In the ICJ, two languages (English and French) are provided for, but the use of other languages may be authorised.[254]

- Provision should be made for the frequency and duration of the Court's sessions, especially when it does not have a heavy case load. It remains important for the judges to meet at least twice a year.[255] The door should be left open for more regular sessions, and especially for emergency sessions from time to time.

- Provision should be made for a Victims and Witnesses Unit. The protection and support of witnesses has been given priority in the International Tribunal for Rwanda.[256]

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252 Art 64 of the ICJ Statute.

253 Considerations applicable to a domestic setting, such as the South African Constitutional Court, may also be of relevance here. See the remarks by Ackermann J in *Ferreira v Levin NO* 1996 2 SA 621 (CC), at par 10: the possible "chilling effect" of an adverse cost order on individuals was marked a "very important policy issue which deserves anxious consideration". See also the remarks made by Mohamed DP (as he then was), in *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the School Education Bill, 1995 (Gauteng)* 1996 3 SA 165 (CC), at par 36: "A litigant seeking to test the constitutionality of a statute usually seeks to ventilate an important issue of constitutional principle. Such persons should not be discouraged from doing so be the risk of having to pay the costs of their adversaries, if the court takes a view which is different from the view taken by the petitioner".

254 Art 39 of the ICJ Statute.

255 As is the case in the Inter-American system - see arts 11 and 12 of the Rules of the Court. Anyone who has suffered from the confusion about dates and venues of forthcoming sessions of the African Commission would insist on the insertion of the following highlighted phrase: The Court shall meet twice yearly *on the dates decided by the Court at the immediately preceding session* (see art 11 of the Rules of the Inter-American Court).

256 See Rule 34 of the Rules of procedure and Evidence, UN Doc ITR/3/Rev 1 (1995), which entered into force on 29 June 1995. See also Rule 75: The Court may order appropriate measures for the privacy and protection of victims and witnesses. It may hold *in camera* proceedings to determine eg whether the

Footnotes continued on next page.

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- Grounds which would lead to removal or suspension of judges, should be spelled out.
- It should be clarified how a decision on "exceptional grounds" is to be made. The procedure of this preliminary finding should be delineated.
- A division of functions between the President and Vice-President should be included.
- A rule should be included to ensure that the Commission and the Court do not entertain the same matter simultaneously.

7.2.35 Article 33: Ratification

1. This Protocol shall be open for signature and ratification or accession by any State Party to the Charter.

2. The instrument of ratification or accession to the present Protocol shall be deposited with the Secretary-General of the OAU.

3. The Protocol shall come into force one month after fifteen instruments of ratification or accession have been deposited.

4. For any State Party ratifying or adhering subsequently, the present Protocol shall come into force in respect of that State on the date of the deposit of its instrument of ratification or accession.

5. The Secretary-General shall inform all Member States of the OAU of the entry into force of the present Protocol.

The number of ratifications required is set at **fifteen**. In earlier deliberations, the number was set at nine[257] and eleven.[258] The increase in the required number of states may be a deliberate ploy to delay commencement of the Protocol, or it may be a product of greater optimism about the

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identity of witnesses should not be disclosed, or what measures (such as closed-circuit television) may be adopted to facilitate the testimony of vulnerable victims and witnesses.

257 See eg art 31(3) of the Addis Ababa proposal, and discussion in "Explanatory Notes on Draft Protocol".

258 Art 32(1) of the Cape Town Protocol.

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readiness of states to ratify, occasioned by the democratisation of the 1990s. The likelihood of eleven states ratifying the Protocol within a relatively short time, is not too remote, but the likelihood of fifteen states doing the same is significantly smaller.

When expressing comments about the Cape Town draft Protocol, some states viewed the number required (eleven) as too low.[259] To Tunisia, it "would be difficult to comprehend the binding force of a document which is only ratified by eleven of the 54 Member States of the OAU. Comparison is drawn with the European Convention, which required two-thirds of the states to ratify before it entered into force".[260] The parallel is not convincing. The European Convention did not provide for compulsory acceptance of the jurisdiction of the European Court of Human Rights, but provided for optional acceptance. After eight states parties had accepted it, the first elections for judges were held.[261] At the Nouakchott meeting of legal experts Tunisian insistence on ratification by two-thirds of OAU member states was restated and further supported by Algeria.[262] Nigeria insisted on a simple majority, while Sudan suggested a one-third requirement as a compromise.[263] **All other delegations** (that is, 15 states) were of the opinion that eleven ratifications were adequate and expressed the view that "there was no need to require a higher figure".[264] Despite this clear majority, the principle of striving for consensus caused the meeting to agree on a figure of fifteen. Algeria, Nigeria and Tunisia nevertheless "recorded reservations on this point",[265] indicating that consensus was in fact not arrived at. The agreement arrived at illustrates the negative consequences of consensus seeking at this stage of elaboration. A standard has been eroded under the influence of a small minority of states that are in any event unlikely to ratify the Protocol within the forseeable future.

In the Inter-American system, states can also decide to accept the compulsory jurisdiction of the Court. The Court was constituted and judges were elected once the Convention entered into

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259 See CM/1996 (LXV) Annex III (e) at 5. See also the comments in ch 6.1.5.5 above.

260 See CM/1996 (LXV) Annex III (e) at 5.

261 In terms of art 56 of the European Convention.

262 See OAU/LEG/EXP/AFCHPR/RPT(2) at par 45.

263 *Ibid.*

264 OAU/LEG/EXP/AFCHPR/RPT(2) at par 46.

265 OAU/LEG/EXP/AFCHPR/RPT(2) at par 47.

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force.[266] In other words, the Court could start functioning without a specific number of declarations accepting its jurisdiction being met. This is another instance in which Africa should follow closer in the footsteps of the Latin American system than the European. In Europe, states have generally given their support to developing an effective human rights mechanism. This has not been the case in either the Americas or Africa. In the light of these considerations, the number of eleven seems to have made good sense.

7.2.36 Article 34: Amendments

> *1. The present Protocol may be amended if a State Party to the Protocol makes a written request to that effect to the Secretary-General of the OAU. The Assembly may adopt, by simple majority, the draft amendment after all the States Parties to the present Protocol have been duly informed of it and the Court has given its opinion on the amendment.*
> *2. The Court shall also be entitled to propose such amendments to the present Protocol as it may deem necessary, through the Secretary-General of the OAU.*
> *3. The amendment shall come into force for each State Party which has accepted it one month after the Secretary-General of the OAU has received notice of the acceptance*

The procedure for amending the African Charter, set out above,[267] is mirrored in this proposed article. Four important differences may, however, be identified:

- The dichotomy of the Assembly "approving" and states "accepting" amendment to the Charter by way of notice, is replaced by a dichotomy between the Assembly "adopting" and states "accepting" amendments to the Protocol by way of notice. This, in my view, more clearly suggests that, in the case of the Protocol, the mere fact of adopting the amendments will not bind states.

- The Court, and not only states parties to the Protocol, may initiate amendments to the Protocol. The Commission is not endowed with the same competence in terms of the Charter.

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266 In terms of art 81 of the American Convention.

267 See discussion at ch 7.1.1 above.

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- Amendments to the Charter come into force three months after receipt of the state's notice of acceptance. The period is reduced to one month in relation to the Protocol.

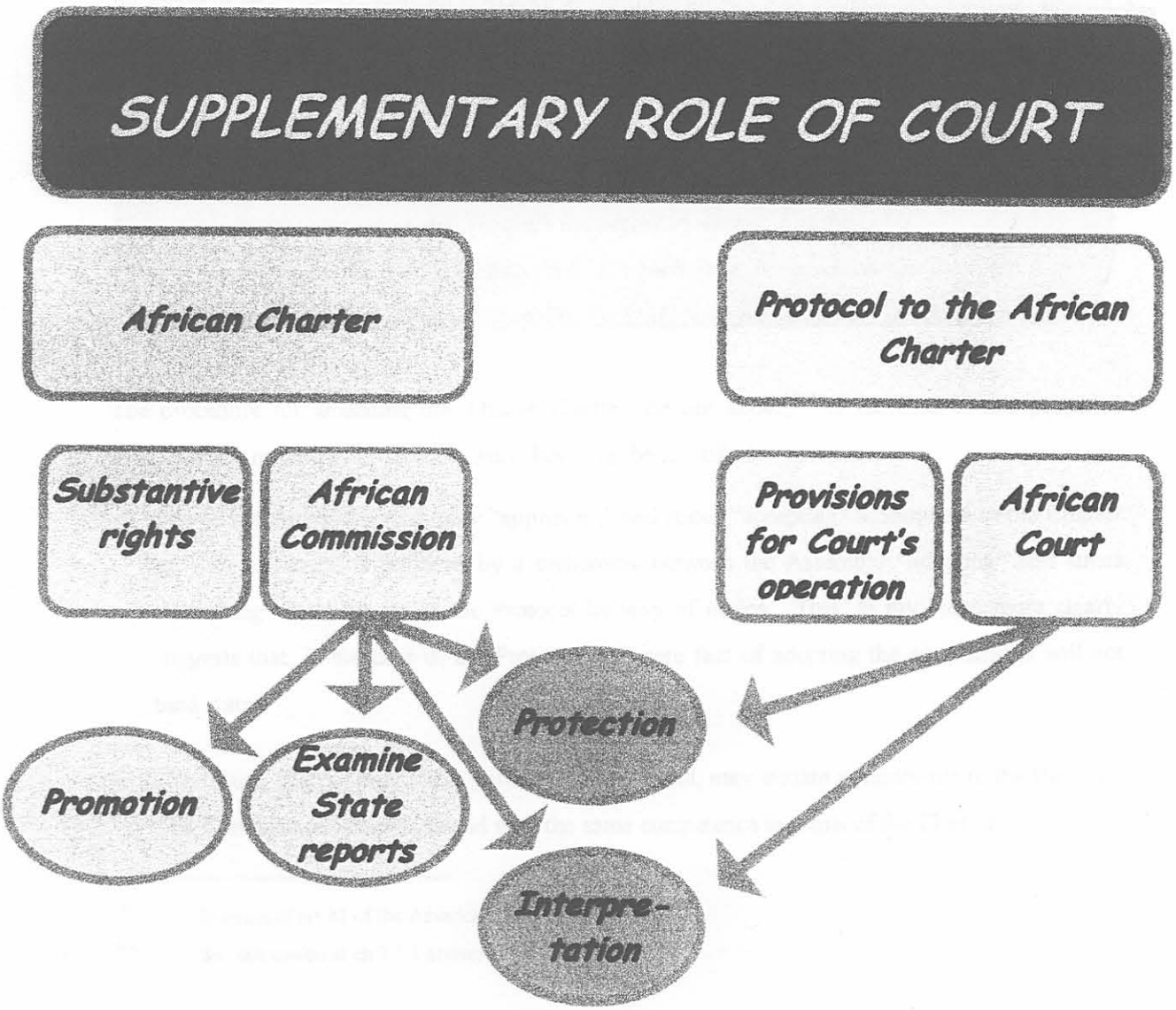
The requirement that the Assembly "may adopt" amendments by a simple majority is extremely problematic. Fifteen ratifications are required to allow the Protocol to enter into force. This is only about a quarter of the total membership of the OAU. Necessary reforms may be thwarted by the majority of member states that have not ratified the Protocol and may not have the intention to do so in the foreseeable future. Rather, the consent of **all states parties to the Protocol** should be sufficient to amend the provisions of the Protocol. Otherwise, even if almost half of the OAU members accept the Court's jurisdiction in future, the system is still held to ransom, because any reform will require the agreement of a simple majority of the OAU member states. The problem that may arise if this happened, is that the Protocol may be reformed to provide more effective realisation of rights. This would make further ratifications all the more difficult, driving a wedge between those states that have ratified the Protocol and those that have not ratified it. In other words, allowing parties to the Protocol to control its evolution may alienate non-parties and may make more ratifications unlikely.

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7.3 *Simplification by schematising*

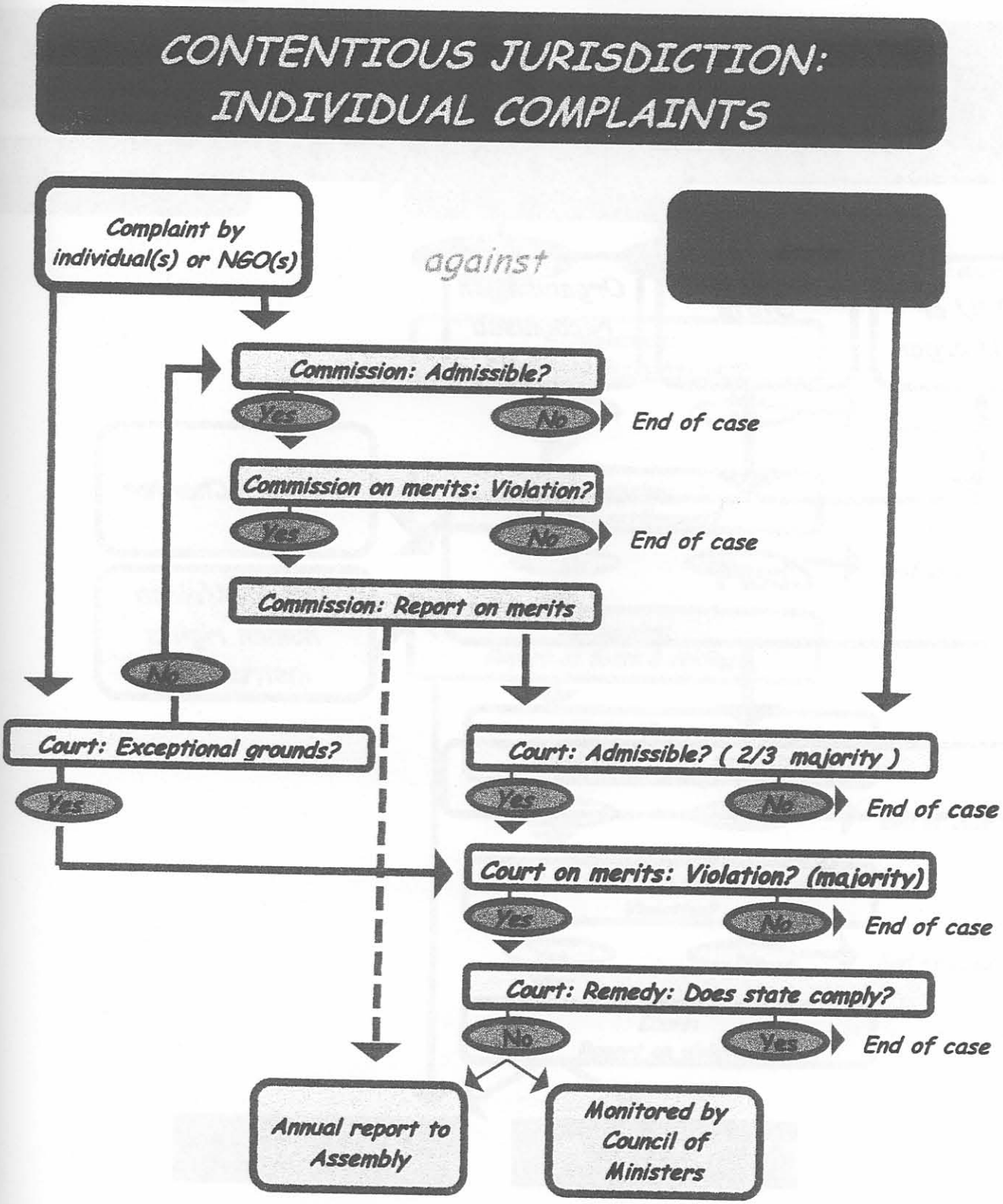
The following five tables set out important aspects of the proposed African Court on Human and Peoples' Rights:

TABLE L: SUPPLEMENTARY ROLE OF THE PROPOSED COURT



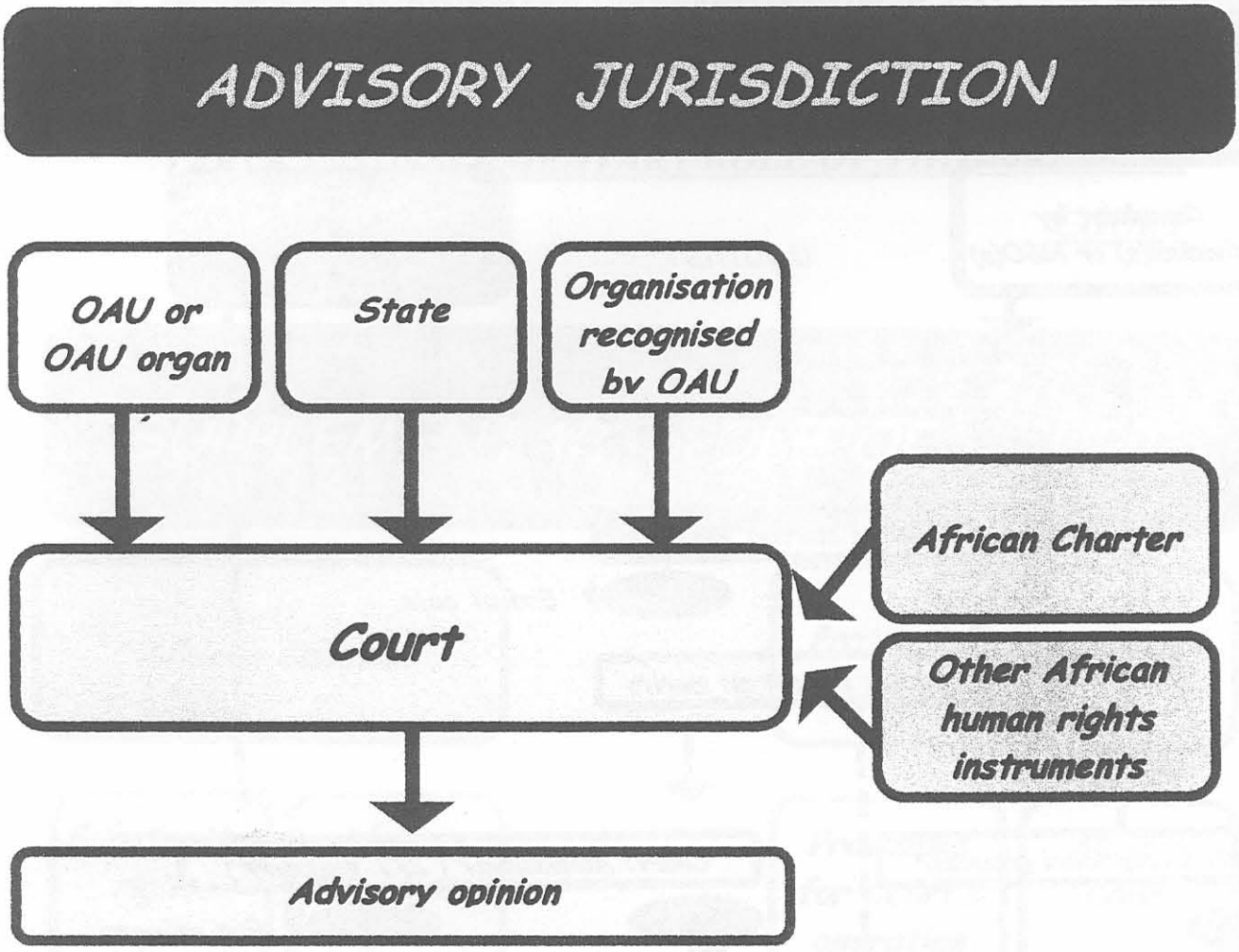
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TABLE M: INDIVIDUAL COMPLAINTS DIRECTED TO THE COMMISSION AND PROPOSED COURT



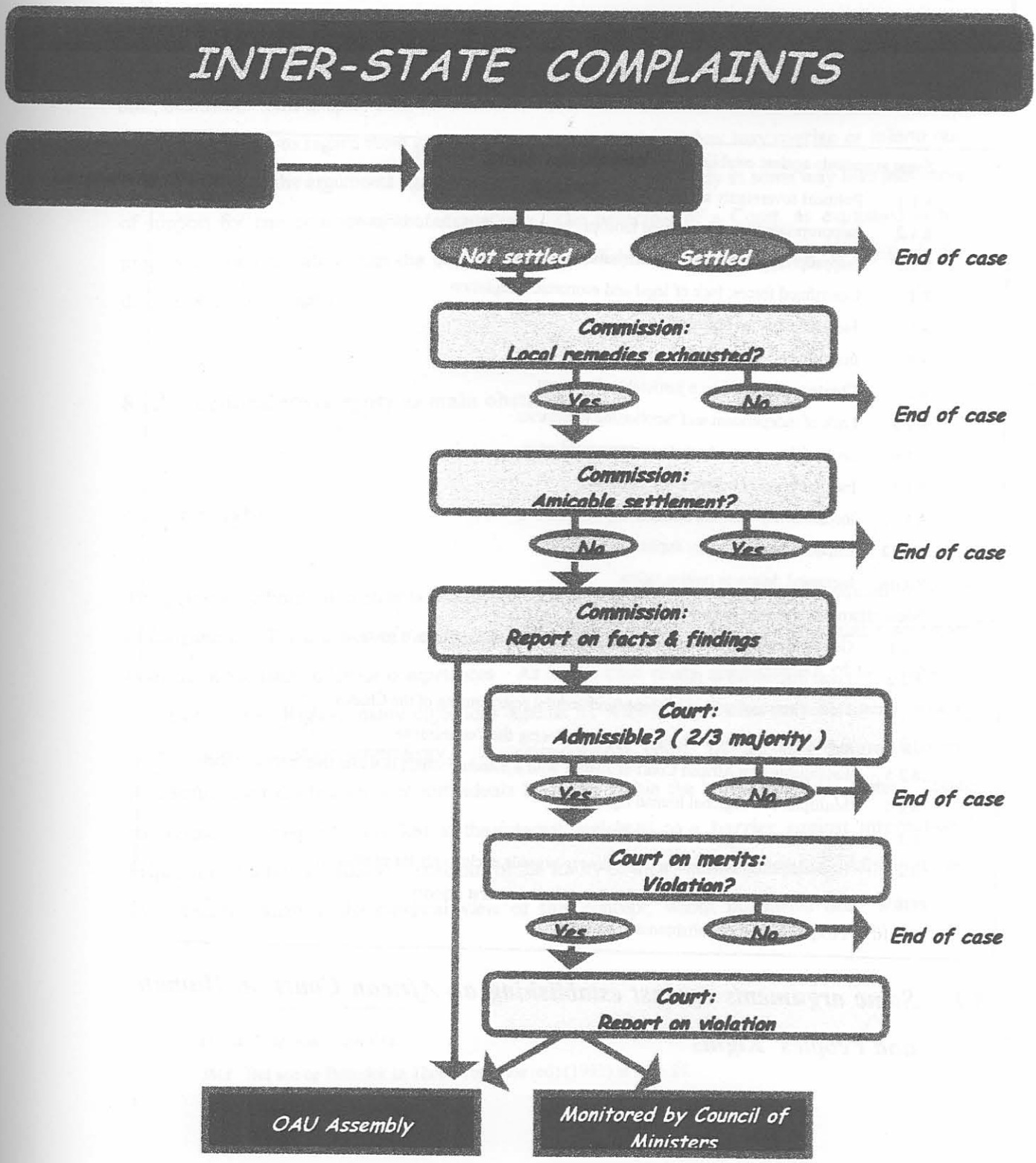
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TABLE N: JURISDICTION OF THE PROPOSED COURT



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TABLE O: INTER-STATE COMPLAINTS SYSTEM UNDER THE PROPOSED COURT



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

8.1 Some arguments against establishing an African Court on Human Rights

- 8.1.1 Political sovereignty as main obstacle
- 8.1.2 Inappropriate forum to address most pressing issue of underdevelopment
- 8.1.3 Inappropriate forum to redress massiveor gross violations
- 8.1.4 Centrifugal forces: lack of legal and economic integration
- 8.1.5 Judicialisation as obfuscation
- 8.1.6 Institutional obstacles and other practicalities
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- 8.1.8 Lack of independent and functioning judiciaries
- 8.1.9 Lack of democratic basis to ensure compliance
- 8.1.10 Inevitable delay before entry into force
- 8.1.11 Inconsistency with the African way of resolving disputes
- 8.1.12 Unnecessary and costly duplication
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8.2 Some alternatives to the Court as proposed

- 8.2.1 Geo-political transformation as prerequisite to address Africa's malaise
- 8.2.2 Local institutions as priority
- 8.2.3 No institutional reform without fundamental restructuring of the Charter
- 8.2.4 A single African human rights Court replacing the Commission
- 8.2.5 Establishing an African Court of Justice with a mandate which is wider than human rights
- 8.2.6 Multiple, sub-regional human rights courts
- 8.2.7 Multiple, sub-regional human rights commissions
- 8.2.8 Reducing the Commission's mandate to provide exclusively for promotion
- 8.2.9 Improving and strengthening the Commission as first priority
- 8.2.10 Postponing the establishment of a court

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

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"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

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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.

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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

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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.

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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]

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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.

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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

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

16 *Ibid.*

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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.

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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.

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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.

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

24 See ch 3.2.2 above.

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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

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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.

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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

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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.

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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

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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.

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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

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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.*

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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

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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.

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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]

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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.

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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**

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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

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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.

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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]

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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).

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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

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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

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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.

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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.

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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.

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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.

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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,

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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

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

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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]

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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.

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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

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

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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

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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.

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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

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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.

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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.

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

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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,

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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.

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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.

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99 See par 8.1.12 below.

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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.

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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

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

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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

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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.

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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]

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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.

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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.

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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.*

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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.

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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.

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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

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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.

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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.

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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).

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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.

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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).

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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

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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.

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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

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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.

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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

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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.

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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.

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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.

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- *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.

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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.

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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.

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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.

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- 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.

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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".

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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]

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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.

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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

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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.

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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

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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.

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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

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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.

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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.

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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.

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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

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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.

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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.

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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

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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.

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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

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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.

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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

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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.

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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

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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.

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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

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204 Mower (1991) at 95.

205 Mower (1991) at 77.

206 The first part of par 8.1.11.1 immediately above.

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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

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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.

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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

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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.

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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

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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."

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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]

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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.

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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

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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

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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

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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.

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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

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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.

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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.

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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).

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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]

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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.

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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

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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.

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"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

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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).

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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]

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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.

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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

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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).

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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.

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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.

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- 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

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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 ...".

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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

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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.

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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]

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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.

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- 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

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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*."

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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

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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".

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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

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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.

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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**

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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.*

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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**.

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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.

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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

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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.

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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.

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303 And translated from the French.

304 *Ibid.*

305 *Ibid.*

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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

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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.

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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

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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.

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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.

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- 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**.

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

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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

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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.

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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

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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.

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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,

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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.*

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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

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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.

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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.

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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.*

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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.

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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.

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- 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.

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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

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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

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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

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347 (1991) at 52.

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

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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**

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349 *Ibid.*

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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

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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.

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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

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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.

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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)

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357 See par 8.1.4 above.

358 See par 8.2.7 immediately following this par.

359 See ch 4.2 above.

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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

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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".

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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

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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

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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

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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".

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- 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

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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:

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377 Annex VIII to the Second Annual Activity Report.

378 (1994) at 8.

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- 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**

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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.

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(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

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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

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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,

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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.

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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.

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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)

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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

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390 (1996) at 197.

391 See ch 3.3.1 above.

392 Ankumah (1996) at 197.

393 *Ibid.*

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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**.

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394 Unofficial transcript of debates during the 15th session.

395 See ch 6.1.4 above.

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Chapter 9 CONCLUSION AND RECOMMENDATIONS

9.1 International human rights law as back-up

9.2 Human rights as limited tool of evolutionary revolution

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

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- 9.4.1 Promotion
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- 9.7.1 African Court on Human Peoples' Rights
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9.8 Co-ordination

9.9 Democratisation, open windows and reform

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.

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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

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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.

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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

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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

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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.

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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

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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

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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.

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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

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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.

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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

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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.

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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.

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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:

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- 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.

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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.

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- 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.

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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

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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.

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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.

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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.

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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).

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