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## A HUMAN RIGHTS COURT FOR AFRICA, AND AFRICANS

*Frans Viljoen\**

The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Protocol) entered into force on January 25, 2004.<sup>1</sup> The highest organ of the Organization of

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1. Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, June 10, 1998 (*entered into force* Jan. 25, 2004) (By December 25, 2003, the required number of ratifications (fifteen) had been deposited; the Protocol entered into force thirty days thereafter, as provided for in art. 34(3) of the Protocol.) [hereinafter Protocol to the African Charter], *reprinted in* 7 AFR. Y.B. INT'L L. 419 (1999), <http://www.africa-union.org/home/welcome.htm>; African Charter on Human and Peoples' Rights, June 21, 1986, art. 66, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (*entered into force* Oct. 21, 1986) (art. 66 allows for "Special protocols or agreements" to "supplement" the Charter) [hereinafter African Charter]. *See also* THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: THE SYSTEM IN PRACTICE, 1986–2000, 353 (Malcolm Evans & Rachel Murray eds., 2002) [hereinafter SYSTEM IN PRACTICE]; FATSAH OUGUERGOUZ, THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: A COMPREHENSIVE AGENDA FOR HUMAN DIGNITY AND SUSTAINABLE DEMOCRACY IN AFRICA 867 (2003); HUMAN RIGHTS LAW IN AFRICA 1999 (Christof Heyns ed., 2002) [hereinafter HUMAN RIGHTS LAW 1999]; HUMAN RIGHTS LAW IN AFRICA (Christof Heyns ed., 2004) [hereinafter HUMAN RIGHTS LAW]. *See generally* Julia Harrington, *The African Court on Human and Peoples' Rights*, in THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: THE SYSTEM IN PRACTICE, 1986–2000 305 (Malcolm Evans and Rachel Murray eds., 2002); Ibrahim Ali Badawi Elsheikh, *The Future Relationship Between the African Court and the African Commission*, 2 AFR. HUM. RTS. L.J. 252 (2002); Nico Krisch, *The Establishment of an African Court on Human and Peoples' Rights*, 58 ZEITSCHRIFT FÜR AUSLANDISCHES ÖFFENTLICHES RECHT UND VÖLKERECHT 713 (1998); Makau Mutua, *The African Human Rights Court: A Two-Legged Stool?*, 21 HUM. RTS. Q. 342 (1999); Gino J. Naldi & Konstantinos D. Magliveras, *Reinforcing the African System of Human Rights: The Protocol on the Establishment of a Regional Court of Human and Peoples' Rights*, 16 NETH. Q. HUM. RTS. 431 (1998); Andreas O'Shea, *A Critical Reflection on the Proposed African Court on Human and Peoples' Rights*, 2 AFR. HUM. RTS. L.J. 285 (2001); Edward Kofi Quashigah, *The African Court of Human Rights: Prospects, in Comparison with the European Court of Human Rights and the Inter-American Court of Human Rights*, in THE

African Unity (OAU), the OAU Assembly of Heads of State and Government (Assembly), adopted the Protocol in July 1998, some five-and-a-half years earlier.<sup>2</sup> The African Court on Human and Peoples' Rights (African Court or African Human Rights Court), after the election of eleven judges, is expected to start functioning in 2005<sup>3</sup> as an institution of the African Union (AU), which replaced the OAU in 2002.<sup>4</sup> The goal of the African Court is to complement the protective mandate of the African Commission on Human and Peoples' Rights (African Commission), which was established as the quasi-judicial implementation body of the African Charter on Human and Peoples' Rights (African Charter) in 1987.<sup>5</sup>

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AFRICAN SOCIETY OF INTERNATIONAL AND COMPARATIVE LAW, TENTH ANNUAL CONFERENCE 59 (A.V. Lowe, et al. eds., 1998); Nsongurua J. Udombana, *Toward the African Court on Human and Peoples' Rights: Better Late than Never*, 3 YALE HUM. RTS. & DEV. L.J. 45 (2000) [hereinafter *Toward the African Court*].

2. O'Shea, *supra* note 1, at 286 n.6.

3. It is not certain when judges will be elected. At its last session in July 2004, the AU Assembly decided that the African Court and the AU's Court of Justice should be "integrated into one Court." A report on the modalities of such a step must be submitted to the Assembly at its next meeting (around January 2005). Assembly of the African Union, Decisions on the Seats of the African Union, 3<sup>rd</sup> Ord. Sess., Assembly/AU/Dec.45(III) (July 6–8, 2004), <http://www.africa-union.org/home/Welcome.htm> (last visited Oct. 10, 2004). The situation is further complicated by the fact that the Protocol of the AU's Court of Justice, adopted July 11, 2003, and requiring fifteen ratifications for its entry into force, had secured four (Comoros, Mauritius, Mozambique, and Rwanda) by July 31, 2004. See *List of Countries Which Have Signed, Ratified/Accessed to the Protocol of the Court of Justice of the African Union*, at <http://www.africa-union.org/home/welcome.htm> (last visited Aug. 28, 2004).

4. On the transformation of OAU into the AU, see generally Konstantinos D. Magliveras & Gino J. Naldi, *The African Union—A New Dawn for Africa?*, 51 INT'L & COMP. L.Q. 415 (2002); Tiyanjana Maluwa, *The Constitutive Act of the African Union and Institution-Building in Postcolonial Africa*, 16 LEIDEN J. INT'L L. 157 (2003), available at <http://journals.cambridge.org> (last visited Aug. 28, 2004); Corinne A. Packer & Donald Rukare, *The New African Union and Its Constitutive Act*, 96 AM. J. INT'L L. 365 (2002).

5. African Charter, *supra* note 1; HUMAN RIGHTS LAW IN AFRICA 7 (Christof H. Heyns ed., 1996); OUGUERGOUZ, *supra* note 1, at 803; SYSTEM IN PRACTICE, *supra* note 1, at 353, app. 1. For an explanation of the African Commission's protective mandate, see Rachel Murray, *A Comparison Between the African and European Courts of Human Rights*, 2 AFR. HUM. RTS. L.J. 195, 196–97 (2002) [hereinafter *Comparison Between the African and European Courts*]. See also EVELYN A. ANKUMAH, THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS: PRACTICE AND PROCEDURES 22–25 (1996); Chidi Anselm

Rather than provide a comprehensive overview of the Protocol, this Article will focus on the role of individuals, referred to as “Africans” in the title, before the African Court.<sup>6</sup> I will ask the following questions: Do individuals have access to (including the standing to bring cases before)<sup>7</sup> the new Court? Will the new Court be able to overcome the African Commission’s weaknesses with regard to individual communications? These questions will be explored in Parts II and III, and are framed by a brief historical introduction in Part I, while Parts IV and V discuss the broader legal context and some procedural issues bearing on the benefits to individuals of the African Court.<sup>8</sup> There are two reasons I chose the “individual” as the prism through which to view the Protocol. First, individuals have emerged from the shadows of the Second World War into the spotlight of international law: exemplifying this trend are the recognition of individual rights in numerous human rights treaties, the acceptance of individual-complaint mechanisms, individual account-

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Odinkalu & Camilla Christensen, *The African Commission on Human and Peoples’ Rights: The Development of its Non-State Communication Procedures*, 20 HUM. RTS. Q. 235 (1998); OUGUERGOUZ, *supra* note 1, at 550–63; Frans Viljoen, *Overview of the African Regional Human Rights System* [hereinafter *Overview of the African Regional Human Rights System*], in HUMAN RIGHTS LAW IN AFRICA 1998 128, 158–82 (Christof H. Heyns & Paul Tavernier eds., 2001) [hereinafter HUMAN RIGHTS LAW 1998].

6. The use of the word “Africans” in the title is not intended in an exclusionary sense, but is chosen to underline the “human” (or “individual”) implications of the new institution. Echoing the African Charter, the term “people” was not used because of the debate regarding its meaning. State parties to the African Charter have obligations to non-African “individuals” within their jurisdictions, and nationality is not a general prerequisite for lodging complaints with either the African Commission or the African Court of Human Rights.

7. “Standing” is used here in a broad sense, denoting “any right to appear as a party before an international court.” Franz Matscher, *Standing Before International Courts and Tribunals*, in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 594 (Max Planck Inst. for Comp. Pub. L. 2000).

8. “Individual” is used here in a broad sense, similar to its use in the phrase “individual complaints mechanism,” which distinguishes it from the phrase “inter-state complaints mechanism.” In other words, “individual” includes groups of individuals, non-governmental organizations (NGOs), as well as their legal and other representatives, such as their relatives. The term also encompasses “person,” “author,” “applicant” and “complainant.” As such, the term is broader than “victim,” a word avoided in this contribution because of its stigmatizing connotation of helplessness and powerlessness.

ability for grave human rights violations before the International Criminal Tribunals for the ex-Yugoslavia (ICTY), Rwanda (ICTR), and the International Criminal Court (ICC), and the principle of universal jurisdiction.<sup>9</sup> Second, it was mainly through individual complaints that the potential of the United Nations (UN) and regional human rights instruments has been unleashed, particularly in the African system.<sup>10</sup> Put differently, the success of the African Court will be determined primarily by the way in which it deals with individuals as its natural and logical constituency.

#### I. INTRODUCTION AND HISTORICAL BACKGROUND

When the African human rights system was forged in the late 1970s and early 1980s, the possibility of an African human rights court was raised, but rejected.<sup>11</sup> Participants in the drafting process concluded that the continent was not yet ready for a judicial institution to make pronouncements on human rights violations committed by states. In the introduction to the first document in the *travaux préparatoires* of the African Charter's substantive provisions, the main drafter, Keba M'Baye, highlighted the omission of a judicial institution, but explained that it was "thought premature to [establish a judicial institution] at this stage."<sup>12</sup> Prophetically, he added that the "ideal is, no doubt, a good and useful one which could be introduced in the

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9. See generally Theodor Meron, *War Crimes Law Comes of Age*, 92 AM. J. INT'L L. 462 (1998).

10. On the significant role and potential of NGOs in Africa, see, for example, CLAUDE E. WELCH, *PROTECTING HUMAN RIGHTS IN AFRICA: ROLES AND STRATEGIES OF NON-GOVERNMENTAL ORGANIZATIONS* (1995); Kwadwo Apiagyeyi-Atua, *Human Rights NGO's and Their Role in the Promotion and Protection of Rights in Africa*, 9 INT'L J. ON MINORITY GROUP RTS. 265 (2002).

11. See Keba M'Baye, Introduction to M'Baye Proposal, Draft African Charter on Human and Peoples' Rights of 1979, OAU Doc. CAB/LEG/67/1, para. 4, reprinted in *HUMAN RIGHTS LAW 1999*, supra note 1, at 65 ("The establishment of a Human Rights Court to redress cases of violation of human rights is not included in the Draft Charter. It is thought premature to do so at this stage. The idea is, no doubt, a good and useful one which could be introduced in the future by means of an additional protocol to the Charter."). The only reference to a court in the later *travaux préparatoires* is the indication that a delegation proposed an amendment establishing an African court to judge crimes against mankind.

12. *Id.*

future by means of an additional protocol to the Charter.”<sup>13</sup> In response to questions posed at the subsequent ministerial meeting, M’Baye, as Chairman of the Committee of Experts, explained that the establishment of an African Human Rights Court was not a pressing concern because the Convention on the Elimination and the Suppression of the Crime of Apartheid already provided for “an international penal court” and the United Nations was considering the establishment of “an international court to repress crime against mankind.”<sup>14</sup> This exchange implies, therefore, that the proposed African Court was initially envisioned as an instrument to punish crimes against humanity, including apartheid. An unnamed delegation proposed the establishment of a court “to judge crimes against mankind *and violations of human rights*,”<sup>15</sup> thus extending the possible material jurisdiction of such a court beyond crimes against humanity. However, those at the meeting concluded that “it was untimely to discuss it,”<sup>16</sup> and there is no indication that optional acceptance of a court’s jurisdiction – similar to the European compromise, which led to the establishment of the European Court of Human Rights (European Court)—was discussed.<sup>17</sup>

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13. *Id.*

14. Organization of African Unity, Rapporteur’s Report of the Ministerial Meeting in Banjul, The Gambia, OAU Doc. CAB/LEG/67/Draft Rapt. Rpt (II) Rev. 4, para. 13 [hereinafter Rapporteur’s Report], *reprinted in* HUMAN RIGHTS LAW 1999, *supra* note 1, at 95.

15. Rapporteur’s Report, *supra* note 14, para. 117 (emphasis added).

16. *Id.*

17. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, (the European Court of Human Rights could only be established after eight states had accepted its optional jurisdiction) [hereinafter European Convention], *available at* <http://www.unhcr.md/article/conv.htm>. The European Convention was fundamentally revised after the adoption of Protocol No. 11 thereto, entering into force on Nov. 1, 1998. *See generally* Council of Europe, Explanatory Report and Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, *Restructuring the Control Machinery Established Thereby*, 33 I.L.M. 943 (1994) [hereinafter Explanatory Report and Protocol No. 11]. Unless otherwise stated, all references to the European Convention in this article are to the 1950 version, not to its subsequent Protocols, because the African system’s structure more closely resembles the initial two-tiered system in Europe (which included both the European Commission of Human Rights and European Court of Human Rights) than the current system (which includes only the European Court of Human Rights).

The inception of the African Charter can be traced to 1961, when a pan-African conference on the rule of law was held in Lagos, Nigeria.<sup>18</sup> The conference, in "The Law of Lagos," recommended that an African Convention on Human Rights be adopted and a court of appropriate jurisdiction be created.<sup>19</sup> Significantly, the conference consisted of judges, practicing lawyers and law professors from 23 states, not merely of activists or NGOs.<sup>20</sup> However, when the OAU was formed some two years later, judicial dispute resolution was not yet a priority and was, instead, overshadowed by preoccupations with sovereignty and territorial integrity.<sup>21</sup> Under the 1963 OAU Charter, disputes were to be resolved by the Assembly of Heads of State and Government.<sup>22</sup> The one legal institution provided for under the Charter, a legal committee, was never established.<sup>23</sup>

This brief historical overview confirms that the establishment of the African Commission as a quasi-judicial body was deliberate. The African Commission was made unmistakably subservient to the Assembly, its political master, to which it had to refer serious cases and report annually.<sup>24</sup> The vague and insufficiently grounded individual complaint procedure in the Charter was strengthened and secured by the African Commission's Rules of Procedure and subsequent practice.<sup>25</sup> States have, for

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18. International Commission of Jurists, *The Law of Lagos*, para. 4 (Jan. 1961), *reprinted in* HUMAN RIGHTS LAW 1999, *supra* note 1, at 299.

19. *Id.* (statement formulated as an invitation to African governments "to study the possibility" of creating "a court of appropriate jurisdiction").

20. *Id.* p.mbl.

21. See Alfred Chanda, *The Organization of African Unity: An Appraisal*, 21-24 ZAMBIA L.J. 1, 17-18 & 28 (1989-1992) (emphasizing the OAU Charter's focus on sovereignty and territorial integrity).

22. See Charter of the Organization of African Unity, May 25, 1963, art. 27, 479 U.N.T.S. 39, 2 I.L.M. 766 [hereinafter OAU Charter], *reprinted in* THE INTERNATIONAL LAW OF HUMAN RIGHTS IN AFRICA: BASIC DOCUMENTS AND ANNOTATED BIBLIOGRAPHY 28 (M. Hamalengwa et al. eds., 1988). See generally Amadu Sesay et al., *THE OAU AFTER TWENTY YEARS* (Yassin El-Ayouty & William I. Zartman eds., 1984) (for a general discussion and history of the OAU).

23. Tiyanjana Maluwa, *International Law-Making in Post-Colonial Africa: The Role of the Organization of African Unity*, 49 NETH. INT'L L. REV. 81, 86 (2002).

24. African Charter, *supra* note 1, arts. 58-59.

25. See Rules of Procedure of the African Commission, Doc. ACHPR/RP/XIX (1988) (*amended* June 10, 1995) [hereinafter Rules of Procedure], available at [http://www.hrni.org/files/instruments/HRNi\\_EN\\_926.html](http://www.hrni.org/files/instruments/HRNi_EN_926.html),

example, argued that only cases concerning massive or serious violations may be lodged with the African Commission.<sup>26</sup> However, the African Commission has rejected such arguments, and remarked that its own practice has evolved to include individual complaints.<sup>27</sup> Since its establishment in 1987, the African Commission's mandate has been both promotional and protective.<sup>28</sup> As part of its promotional mandate, the Commission has examined state reports, organized conferences, launched publications, and established Special Rapporteurs.<sup>29</sup> Commissioners were assigned individual countries to which they have undertaken promotional missions.<sup>30</sup> From 1988 to 1992, the African Commission received 173 individual complaints, an average of fewer than twelve per year,<sup>31</sup> and finalized ninety communications between 1988 and 2001.<sup>32</sup> It has dealt with only one interstate communication, which still had not been finalized by the beginning of 2004.<sup>33</sup> This does not compare favourably to the

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reprinted in HUMAN RIGHTS LAW IN AFRICA 1997 11 (Christof H. Heyns & Morne Van der Linde eds., 1999) [hereinafter HUMAN RIGHTS LAW 1997].

26. *Jawara v. The Gambia*, Communication 147/95, 149/96, 13<sup>th</sup> Ann. Activity Report of the Afr. Comm'n on Human and Peoples' Rights, annex V, at 98, para. 12 (1999–2000) [hereinafter 13<sup>th</sup> Ann. Activity Report], available at [http://www.achpr.org/english/doc\\_target/documentation.html?../activity\\_reports/activity13\\_en.pdf](http://www.achpr.org/english/doc_target/documentation.html?../activity_reports/activity13_en.pdf) (last visited Oct. 10, 2004).

27. *Id.* at 102, para. 42.

28. African Charter, *supra* note 1, art. 45 (sets out Commission's general mandate).

29. *Id.*

30. Victor Dankwa, *The Promotional Role of the African Commission on Human and Peoples' Rights*, in THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: THE SYSTEM IN PRACTICE 335, 341–44 (Michael Evans & Rachel Murray eds., 2002) (Dankwa, an African Commissioner, previously served as Commission Chair). *See also* Distribution of State Parties Among Commissioners, 15<sup>th</sup> Ann. Activity Report of the Afr. Comm'n on Human and Peoples' Rights, Annex III, at 25 (2001–2002) [hereinafter 15<sup>th</sup> Ann. Activity Report].

31. These figures are based on my analysis of the Commission's Annual Activity Reports, excluding those communications directed at non-state parties. Additionally, communications closely related to each other, either by content or by the state party complained against, have been counted together as one communication. With these exclusions, the Commission's official register shows the receipt of 277 communications by the end of 2002.

32. "Finalized" denotes conclusion in a friendly settlement, or findings on admissibility and merits.

33. *See* 15<sup>th</sup> Ann. Activity Report, *supra* note 30, at 13 (stating Commission's intention "to convene an Extraordinary Session to fully consider and

caseload before the European Commission of Human Rights (European Commission) in either the earlier or later part of its life cycle,<sup>34</sup> but it does not significantly differ from the activity before the UN Human Rights Committee (HRC),<sup>35</sup> the UN Committee on the Elimination of All Forms of Racial Discrimination (CERD Committee),<sup>36</sup> or the UN Committee Against Torture (CAT Committee).<sup>37</sup>

The idea of an African Human Rights Court took almost four decades to ripen into the Protocol adopted by the OAU Assembly on June 10, 1998, in Ouagadougou, Burkina Faso.<sup>38</sup> The number of NGOs enjoying observer status with the African Commission had by then grown substantially,<sup>39</sup> and the regular pre-session workshops provided a forum to raise support for the establishment of a court.<sup>40</sup> Sessions of the African Commission became a forum where NGOs campaigned for a court. Thus, pioneered by NGOs, supported by the African Commission, and

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examine" Communication 227/99, Democratic Republic of Congo v. Burundi, Rwanda and Uganda).

34. The European Commission dealt with 4,334 complaints in its first fifteen years of existence. *EUROPÄISCHE MENSCHENRECHTENKOVENTION EMRK-KOMMENTAR 987* (Jochem Abr. Frowein & Wolfgang Peukert eds., 2d ed. 1996) (listing the complaints).

35. From 1977 to 1992, a sixteen year period, the HRC finalized some 240 cases. *MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 900-13* (1993) (containing a list of communications).

36. Since its establishment in 1969, the CERD Committee has received seventeen complaints, twelve of which had been finalized by the beginning of 2000. See ANNE F. BAYEFESKY, *THE UN HUMAN RIGHTS TREATY SYSTEM IN THE 21<sup>ST</sup> CENTURY* 467 (2000).

37. From 1988 through February, 2000, 154 complaints were registered with the CAT Committee and seventy-one have been finalized. See BAYEFESKY, *supra* note 36, at 466.

38. See Ben Kioko, *The Road to the African Court on Human and Peoples' Rights*, in *THE AFRICAN SOCIETY OF INTERNATIONAL AND COMPARATIVE LAW, TENTH ANNUAL CONFERENCE* 70 (1998) (discussing the drafting history of the Protocol).

39. By the end of 1994, some 140 NGOs had been granted observer status with the African Commission. See *Directory of NGOs with Observer Status* (listing dates on which observer status granted), [http://www.achpr.org/english/\\_info/directory\\_ngo\\_en.html](http://www.achpr.org/english/_info/directory_ngo_en.html) (last visited Oct. 10, 2004).

40. Among the many NGOs present at these workshops, the International Commission of Justice (International Commission) was very influential. It produced the first draft; although this draft was tabled at Cape Town, the International Commission's Secretary General at the time, Adama Dieng, was a prominent figure in the process.

in receipt of high-level political backing,<sup>41</sup> the movement for the creation of an African Court received the cautious support of the OAU Assembly in 1994. At its meeting in Tunis, the Assembly asked “the OAU Secretary-General to convene a meeting of government experts to ponder in conjunction with the African Commission ... over the means to enhance the efficiency of the Commission in considering in particular the establishment of an African Court.”<sup>42</sup> This resolution came just as a window of opportunity opened up in Africa following the end of the Cold War. Democratization swept the continent and led to multi-party elections, eventuating political change in Zambia, Benin, South Africa, and Malawi.<sup>43</sup> Tentative attitudes towards judicial institutions have gradually been assuaged by the establishment and greater reliance on domestic constitutional courts, paving the way for acceptance of a continental court.<sup>44</sup> The end of the Cold War also saw the proliferation of new international judicial mechanisms, linking the adoption of the Protocol to a global trend.<sup>45</sup>

Government experts, mainly lawyers, met in Cape Town in September, 1995, and adopted the first draft Protocol (Cape Town Draft Protocol).<sup>46</sup> The Cape Town Draft Protocol made

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41. At the Commission's fourteenth session in 1993, then OAU Secretary General Salim Ahmed Salim stated that the time had come for an African Human Rights Court. See ANKUMAH, *supra* note 5, at 70.

42. Resolution on the African Commission on Human and Peoples' Rights, 13<sup>th</sup> Ord. Session of the Assembly of Heads of State and Government of the Organization of African Unity, June 13–15, 1994, OAU Doc. AHG/Rtes 230 (XXX), available at <http://www1.umn.edu/humanrts/africa/resafchar30th.html> (last visited Oct. 10, 2004).

43. Int'l Inst. for Democracy and Electoral Assistance, *Democracy Forum Report 1997*, ch. 1, at <http://www.idea.int/publications/1997forumreport/chapter1/chapter1.html> (last visited Oct. 10, 2004).

44. See Rainer Arnold, *Constitutional Courts of Central and Eastern European Countries as a Dynamic Source of Modern Legal Ideas*, 18 TUL. EUR. & CIV. L.F. 99, 103, 105, 114 (2003).

45. See Jonathan I. Charney, *The Impact on the International Legal System of the Growth of International Courts and Tribunals*, 31 N.Y.U. J. INT'L L. & POL. 697 (1999).

46. Report of the Government Experts Meeting on the Establishment of an African Court of Human and Peoples' Rights, OAU Doc. OAU/LEG/EXP/AFC/HPR/RPT (I) Rev. 1 [hereinafter Report of the Government Experts], available at [http://www.chr.up.ac.za/centre\\_publications/hrla/referencences/DOCUMENTS%20LEADING%20UP%20TO%20THE%20ESTABLISHMENT%20OF%20THE%20AFRICAN%20COURT%20p.170.doc](http://www.chr.up.ac.za/centre_publications/hrla/referencences/DOCUMENTS%20LEADING%20UP%20TO%20THE%20ESTABLISHMENT%20OF%20THE%20AFRICAN%20COURT%20p.170.doc) (last visited

acceptance of direct access to the African Court by individuals an automatic consequence of ratification.<sup>47</sup> After the Council of Ministers discussed the draft, the Council referred it to another meeting of government experts for further discussion,<sup>48</sup> which took place in Nouakchott, Mauritania, in April, 1997, and culminated in the second draft (Nouakchott Draft Protocol).<sup>49</sup> This draft amended the Cape Town Draft Protocol in two significant respects. First, the number of ratifications required for the Protocol's entry into force was increased from eleven to fifteen.<sup>50</sup> Second, the Nouakchott Draft Protocol made optional a state's acceptance of the African Court's competence to receive petitions directly from individuals.<sup>51</sup> A third meeting of government legal experts, this time enlarged to include diplomats, then took place in Addis Ababa, culminating in the third draft (Addis Ababa Draft Protocol).<sup>52</sup> The changes mentioned above are re-

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Oct. 10, 2004). The Cape Town meeting was organized by OAU General Secretariat with the African Commission and "with the support of the International Commission of Jurists." *Id.* See generally Gino J. Naldi and Konstantinos Magliveras, *The Proposed African Court of Human and Peoples' Rights: Evaluation and Comparison*, 8 AFR. J. INT'L. & COMP. L. 944 (1996) (discussing the Cape Town Draft Protocol).

47. Art. 6 of the Cape Town Draft Protocol allows "individuals, non-governmental organisations and groups of individuals" to bypass the Commission on "exceptional grounds." Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights, Cape Town Draft Protocol, OAU Doc. OAU/LEG/EXP/AFCHPR (1), art. 6 (Sept. 1995) [hereinafter Cape Town Draft Protocol], [http://www.chr.up.ac.za/centre\\_publications/hrla/references/DOCUMENTS%20LEADING%20UP%20TO%20THE%20ESTABLISHMENT%20OF%20THE%20AFRICAN%20COURT%20p.170.doc](http://www.chr.up.ac.za/centre_publications/hrla/references/DOCUMENTS%20LEADING%20UP%20TO%20THE%20ESTABLISHMENT%20OF%20THE%20AFRICAN%20COURT%20p.170.doc), reprinted in HUMAN RIGHTS LAW 1999, *supra* note 1, at 240.

48. Report of the Government Experts, *supra* note 46.

49. Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights, Nouakchott Draft Protocol, OAU Doc. OAU/LEG/EXP/AFCHPR/PRO (2) (Apr. 1997) [hereinafter Nouakchott Draft Protocol], reprinted in HUMAN RIGHTS LAW 1999, *supra* note 1, at 259.

50. *Id.* art. 33(3).

51. *Id.* art. 6.

52. Draft Protocol to the African Chart on Human and Peoples' Rights, Addis Ababa Draft Protocol, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III) Rev. 1 (Dec. 1997) [hereinafter Addis Ababa Draft Protocol], at [http://www.chr.up.ac.za/centre\\_publications/hrla/references/DOCUMENTS%20LEADING%20UP%20TO%20THE%20ESTABLISHMENT%20OF%20THE%20AFRICAN%20COURT%20p.170.doc](http://www.chr.up.ac.za/centre_publications/hrla/references/DOCUMENTS%20LEADING%20UP%20TO%20THE%20ESTABLISHMENT%20OF%20THE%20AFRICAN%20COURT%20p.170.doc).

flected in the Addis Ababa Draft Protocol, which was the last draft version promulgated before it was submitted to a Conference of Ministers of Justice and Attorneys-General, where minor amendments were made. The OAU Assembly then endorsed it without amendment.<sup>53</sup>

At its Twenty-fourth session in October, 1998, the African Commission urged member states to ratify the Protocol “within the shortest possible time.”<sup>54</sup> In that year, however, only two states (Burkina Faso and Senegal) ratified the Protocol.<sup>55</sup> For the next four years, the pace of ratification dropped to one country per year (Gambia in 1999, Mali in 2000, Uganda in 2001, and South Africa in 2002).<sup>56</sup> In 2003, the pace accelerated, with nine states (Algeria, Burundi, Comoros, Côte d’Ivoire, Lesotho, Libya, Mauritius, Rwanda, and Togo) ratifying.<sup>57</sup> By August 31, 2004, four more states (Gabon, Mozambique, Niger, and Nigeria) had become state parties to the Protocol, thus increasing the total number of state parties to nineteen.<sup>58</sup>

There are several factors that may have precipitated this acceleration. The African Commission persisted in prodding states to ratify, as evidenced by a call in May, 2002, urging “all OAU member states to ratify or accede as soon as possible to the Protocol.”<sup>59</sup> In the late 1990s, human rights received strong backing from the OAU Assembly and Secretary-General.<sup>60</sup> The

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53. *See id.* arts. 34(3), 34(6).

54. Resolution on the Ratification of the Additional Protocol on the Creation of the African Court of Human and Peoples’ Rights, 12<sup>th</sup> Ann. Activity Report of the Afr. Comm’n on Human and Peoples’ Rights, annex IV, at 28 (1998–1999) [hereinafter 12<sup>th</sup> Ann. Activity Report].

55. *Id.*

56. African Union, *List of Countries Which Have Signed, Ratified / Acceded to the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights*, at [http://www.africa-union.org/Official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/List/Protocol%20on%20the%20African%20Court%20on%20Human%20and%20Peoples%20Rights.pdf](http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/List/Protocol%20on%20the%20African%20Court%20on%20Human%20and%20Peoples%20Rights.pdf) (last visited Oct. 19, 2004).

57. *Id.*

58. *Id.*

59. Resolution on the Ratification of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, 15<sup>th</sup> Ann. Activity Report, *supra* note 30, annex IV, at 29.

60. *See generally* Kigali Declaration, May 8, 2003, AU Doc. MIN/CONF/HRA/Decl.1 (I).

OAU's first ministerial conference on human rights in Africa was held in 1999, followed by a second (the first under AU auspices) in May, 2003, in Kigali, Rwanda.<sup>61</sup> The Kigali Declaration notes "with concern" that only nine states had ratified the Protocol, and "appeals" to other states to follow suit, in particular "to enable [the Protocol] to come into force by July, 2003 as required by Dec. AHG/Dec. 117 (XXXVIII)."<sup>62</sup> The sudden surge in acceptance may also be indicative of a spirit of greater commitment to African unity and the development of the AU and its institutions. The speed with which a simple majority of member states ratified the Protocol Establishing the Peace and Security Council<sup>63</sup> and the Protocol to the Treaty Establishing the African Economic Community relating to the Pan-African Parliament exemplifies this trend.<sup>64</sup> The institution of the first interstate communication forced governments to take notice of the African human rights system – it is more than coincidental that all three respondent states have ratified the Protocol. On a more cynical note, some states may have been motivated primarily by the prospect of bidding to host the African Court, an avenue open only to state parties to the Protocol.<sup>65</sup> African enthusiasm and participation in establishing the ICC, and its entry into force in 2002, also left its mark on the parallel process of establishing the African Human Rights Court.<sup>66</sup>

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61. *Id.* at 1.

62. *Id.* para. 26.

63. Protocol Relating to the Establishment of the Peace and Security Council of the African Union, July 10, 2002, AU Assembly, 1<sup>st</sup> Ord. Sess., art. 22(5) (*entered into force* Dec. 26, 2003) [hereinafter Protocol Relating to Peace and Security Council], *available at* <http://www.africa-union.org/home/Welcome.htm>.

64. Protocol to the Treaty Establishing the Economic Community Relating to the Pan-African Parliament, Mar. 2, 2001, art. 22 (*entered into force* Dec. 14, 2003), *available at* <http://www.africa-union.org/home/Welcome.htm>.

65. Protocol to the African Charter, *supra* note 1, art. 25(1).

66. African participation in the creation of the ICC has been significant. *See generally* Sivuyile Maqungo, *The African Contribution Towards Establishment of an International Criminal Court*, in 8 AFR. Y.B. INT'L L. 333 (2000). The ICC Statute and Protocol to the African Charter both opened for ratification in 1998; the higher acceptance rate of the ICC Statute by African states is revealing. By Oct. 19, 2004, twenty-six AU members had ratified the ICC Statute, slightly higher than the nineteen Protocol ratifications. *Coalition for the International Criminal Court, States Parties to the Rome Statute of the ICC*, at <http://iccnow.org/countryinfo/worldsignsandratifications.html> (last

## II. COMPLEMENTING THE COMMISSION: FROM QUASI-JUDICIAL TO JUDICIAL

The overarching aim of the African Court is to supplement the African Commission's individual communications procedure.<sup>67</sup> Therefore, the question is whether the African Court will be able to overcome the problems experienced by the Commission in dealing with these communications. Seven inter-linked difficulties associated with the African Commission's efforts, most resulting from its status as a quasi-judicial body, are now discussed, and the African Court's ability, as a judicial institution, to rectify these deficiencies is investigated.

### A. Nature of the Findings: From Recommendatory to Binding

The African Commission's findings (or "reports") are not considered final. They are merely "recommendations" to the political body that had given life to the African Commission, the OAU/AU Assembly.<sup>68</sup> These findings become "final" only when they are contained in the African Commission's Annual Activity Report and approved by the Assembly.<sup>69</sup> This has weakened the impact of the African Commission's findings by inhibiting state compliance.<sup>70</sup>

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visited Oct. 19, 2004); *List of Countries Which Have Signed, Ratified / Acceded to the Protocol*, *supra* note 56. Twelve states (Burkina Faso, Burundi, Gabon, The Gambia, Lesotho, Mali, Mauritius, Niger, Nigeria, Senegal, South Africa and Uganda) have ratified both, thus leaving fourteen states that have ratified the ICC Statute but not the Protocol. *Id.*

67. See African Charter, *supra* note 1, art. 2

68. See African Charter, *supra* note 1, art. 58(2) (note use of the term "recommendations"). See also ANKUMAH, *supra* note 5, at 74.

69. Whether the "adoption" of these findings by the OAU/AU "converts" them into legally binding decisions may depend on the legal force of those decisions. Although it is still somewhat unclear whether OAU decisions are legally binding, AU decisions are. Rules of Procedure of the Assembly of the Union, 1<sup>st</sup> Ord. Sess., art. 33 (July 2002), [http://www.africa-union.org/rule\\_prot/rules\\_Assembly.pdf](http://www.africa-union.org/rule_prot/rules_Assembly.pdf). See also Frans Viljoen & Lirette Louw, *The Status of the Findings of the African Commission: From Moral Persuasion to Legal Obligation*, 48 J. AFR. L. 1, 9–10 (2004); OUGUERGOUZ, *supra* note 1, at 9.

70. See Viljoen & Louw, *supra* note 69, at 2.

Conversely, the decisions of the African Court are final.<sup>71</sup> They will not be subject to appeal (to any other judicial institution) or to political confirmation (by any body of the OAU/AU).<sup>72</sup> The consequence is that these decisions will be unequivocally binding on state parties.<sup>73</sup> State parties will not only “undertake to comply with the judgment in any case to which they are parties,” but also to “guarantee its execution.”<sup>74</sup>

### *B. Remedies: From Uncertainty to Clarity*

The African Commission has no clear legal basis to create remedies, which has led to inconsistent treatment in the punishment of African Charter violations.<sup>75</sup> The African Commission’s remedies may be divided into three categories: no remedy, a very open-ended remedy,<sup>76</sup> and a specific, detailed remedy.<sup>77</sup> The omission of a remedy or the recommendation of an open-ended remedy leaves uncertain what is required of states,

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71. Protocol to the African Charter, *supra* note 1, art. 28(2). The only exception to finality is that the Court may review its own decision “in the light of new evidence.” *Id.* art. 28(3). Other international courts have the same exception. *See, e.g.*, International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, Rule 120(A), U.N. Doc. ITR/3/REV. 1 (1995) (Request for Review), available at <http://www.ictt.org/ENGLISH/rules/240404/240404.pdf>. *See also* Barayagwiza v. The Prosecutor, Case No. ICTR-97-19-AR72 (Mar. 31, 2000), available at [www.ictt.org](http://www.ictt.org).

72. Protocol to the African Charter, *supra* note 1, art. 28(2).

73. *Id.* art. 30.

74. *Id.*

75. African Charter, *supra* note 1, arts. 55–59 (provisions dealing with “other” (i.e., individual) communications make no mention of remedies). *See also* Viljoen & Louw, *supra* note 69, at 10 (discussing remedies).

76. There are several instances in which the Commission has recently found violations of the Charter, but left the issue of an appropriate remedy completely open by failing to stipulate any remedy. *See, e.g.*, Huri-Laws v. Nigeria, Communication 225/98, 14<sup>th</sup> Ann. Activity Report of the Afr. Comm’n on Human and Peoples’ Rights, annex V, at 57 (2000–2001) [hereinafter 14<sup>th</sup> Ann. Activity Report]; Forum of Conscience v. Sierra Leone, Communication 223/98, 14<sup>th</sup> Ann. Activity Report, annex V, at 43 (2000–2001).

77. *See, e.g.*, The Soc. and Econ. Rights Action Ctr. and the Ctr. for Econ. and Soc. Rights v. Nigeria, Communication 155/96, 15<sup>th</sup> Ann. Activity Report, *supra* note 30, annex V, at 31 [hereinafter SERAC Case]; Communications Filed Against the Islamic Republic of Mauritania, Communications 54/91, 61/91, 98/93, 164/97–196/97, 210/98, 13<sup>th</sup> Ann. Activity Report, *supra* note 26, annex V, addendum, at 138 (Commission consolidated communications filed against the Islamic Republic of Mauritania and issued one ruling).

thus impeding follow-up or implementation. For example, in Communication 224/98, *Media Rights Agenda v. Nigeria*, the respondent state was urged “to bring its laws in conformity with the provisions of the [African] Charter.”<sup>78</sup> The African Commission’s failure to define the term “in conformity” may have been one of the reasons for Nigeria’s non-compliance. In contrast, there is a clear legal basis in the Protocol for the provision of remedies, allowing the African Court to make “appropriate orders to remedy the violation.”<sup>79</sup>

*C. Implementation: From an Ad Hoc System to a Comprehensive System*

Given the non-binding nature of findings and the weak legal basis for remedies under the Charter, it is hardly surprising that implementation and enforcement of remedies has been weak. The African Commission has not instituted any sort of compliance system to gather information about states’ responses to the African Commission’s findings.<sup>80</sup> Without the required information, the African Commission has remained passive with respect to the consequences of its findings.<sup>81</sup>

While the African Commission has adopted no systematic compliance mechanism,<sup>82</sup> some Commissioners have undertaken limited follow-up on an ad hoc basis. The most notable example

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78. *Media Rights Agenda v. Nigeria*, Communication 224/98, 14<sup>th</sup> Ann. Activity Report, *supra* note 76, annex V, at 46.

79. Protocol to the African Charter, *supra* note 1, art. 27(1).

80. These insights are based on an evaluation of the activities of the African Commission, undertaken by the author in 2001. See Danish Centre for Human Rights, *Strengthening the Core Activities and Secretariat of the African Commission on Human and Peoples’ Rights*, Evaluations and Reviews of Partnership Programmes—No. 17, at 24 (2001), <http://www.humanrights.dk/upload/application/a66525ef/eandr17.pdf>.

81. The Commission has, for example, not established any systematic method for collecting information about states’ implementation of its recommendations, nor has it developed any records regarding measures taken by states in compliance with its findings. The Commission’s practice differs from that of the UN Human Rights Committee, which provides an annual report noting the status of state compliance with its findings. *Report of the Human Rights Committee*, U.N. Human Rights Committee, 57<sup>th</sup> Sess., Ch. 6, Follow-up Activities Under the Optional Protocol, at 118, U.N. Doc. A/57/40 (Vol. I) (2002), <http://ods-dds-ny.un.org/doc/UNDOC/GEN/N02/668/60/IMG/N0266860.pdf?OpenElement>.

82. See OUGUERGOUZ, *supra* note 1, at 657.

is Commissioner Jainaba John's questions to state parties regarding their implementation of decisions on individual communications during examination of state reports.<sup>83</sup> Another example includes a recommendation, made as part of a remedy, that the state party discuss implementation of the decision in its periodic report.<sup>84</sup> Additionally, remedies ordered in other decisions imply that some sort of follow-up will be undertaken.<sup>85</sup>

Conversely, state parties to the Protocol specifically undertake to implement the findings, including ordered remedies.<sup>86</sup> Institutional or systematic control over enforcement is provided in that the Executive Council must be notified of judgments and must monitor their execution on behalf of the Assembly.<sup>87</sup> In its annual report to the Assembly, the African Court must specify instances of state non-compliance.<sup>88</sup> Non-compliance may result in an AU decision, which in turn may lead to the imposition of sanctions as envisaged under the AU Constitutive Act.<sup>89</sup>

#### *D. Accessibility: From Secrecy to Openness*

Confidentiality obscures the protective work of the African Commission. The requirement that "all measures taken" by the African Commission remain confidential until approved by the Assembly has been interpreted to include any information about individual communications.<sup>90</sup> Sessions of the African Commission are therefore divided into public and private.<sup>91</sup> The public portion of their sessions deals with promotional issues,

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83. See generally 15<sup>th</sup> Ann. Activity Report, *supra* note 30, annex 1 (indicating that states' reports were considered by the African Commission during its Thirty-first Ord. Sess.).

84. See Legal Res. Found. v. Zambia, Communication 211/98, 14<sup>th</sup> Ann. Activity Report, *supra* note 76, annex V, at 86 (remedy ordered).

85. See, e.g., SERAC Case, *supra* note 77.

86. Protocol to the African Charter, *supra* note 1, art. 30.

87. *Id.* art. 29(2).

88. *Id.* art. 31.

89. See Constitutive Act of the African Union, July 11, 2000, OAU Doc. CAB/LEG/23.15, art. 23(2) (*entered into force* May 26, 2001) [hereinafter AU Constitutive Act], [http://www.au2002.gov.za/docs/key\\_oau/au\\_act.htm](http://www.au2002.gov.za/docs/key_oau/au_act.htm).

90. African Charter, *supra* note 1, art. 59(1).

91. See Frans Viljoen, *Introduction to the African Commission and the Regional Human Rights System*, in HUMAN RIGHTS LAW, *supra* note 1, at 358, 427 [hereinafter *Introduction to the African Commission*]. See generally 15<sup>th</sup> Ann. Activity Report, *supra* note 30 (for examples of Commission agendas).

including the examination of state reports; the private portion, which is closed to the public, deals mainly with communications.<sup>92</sup> Because of this policy, decisions are often not accessible and are not widely disseminated. Additionally, there is no systematic publication of the African Commission's decisions.<sup>93</sup> This excessive confidentiality is one of the factors contributing to the low media profile and public awareness of the Commission in Africa.<sup>94</sup>

On the other hand, court proceedings in most countries are usually open to the press and public;<sup>95</sup> the African Court is no different.<sup>96</sup> Although the Protocol includes an exception allowing closed proceedings, in my view it is meant to be used only to protect witnesses in situations where individuals, complainants, or witnesses are seriously threatened.<sup>97</sup> A reasoned judgment has to be "read in open court."<sup>98</sup> All AU members must be notified of decisions.<sup>99</sup> However, no provision has been made for the publication of these reports; although such provisions should be covered in the Rules, there could be finance and resource implications.<sup>100</sup>

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92. See Viljoen, *Introduction to the African Commission*, *supra* note 91.

93. The Commission's most recent decisions are accessible online, and are reported in the Commission's Annual Activity Reports. See [www.achpr.org](http://www.achpr.org). Additionally, the Institute for Human Rights and Development, an NGO based in Banjul, The Gambia, has published a "Compilation of Decisions on Communications of the African Commission on Human and Peoples' Rights."

94. See ANKUMAH, *supra* note 5, at 38.

95. See generally AMERICAN BAR ASSOCIATION, COMMON LAW, COMMON VALUES, COMMON RIGHTS: ESSAYS ON OUR COMMON HERITAGE BY DISTINGUISHED BRITISH AND AMERICAN AUTHORS (2000) (discussing notions of procedural fairness in common law systems, as well as the importance of public scrutiny in the common law system).

96. Protocol to the African Charter, *supra* note 1, art. 10(1). See also Murray, *Comparison Between the African and European Courts*, *supra* note 5, at 215. The African Court's Rules of Procedure should clarify under which circumstances *in camera* proceedings may take place. "Proceedings" should be interpreted broadly to include court documents, such as pleadings; these should be publicly accessible on the Court's web site.

97. See JO M. PASQUALUCCI, THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 195-96 (2003) (for an analysis of a similar exception in the Inter-American system).

98. Protocol to the African Charter, *supra* note 1, art. 28(5).

99. *Id.* art. 29(1).

100. *Id.* art. 28(6) (requiring that the African Court provide reasons for its decisions, but not requiring publication).

*E. Pace of the Process: From Delayed to More Immediate Justice?*

The African Commission also has serious problems with delays in finalizing its communications.<sup>101</sup> Often, a change of government has already taken place by the time the African Commission has reached a finding and recommended a remedy.<sup>102</sup> For example, in the *SERAC* case, the delay between receipt of the communication and entry of the final decision was five years and seven months.<sup>103</sup> To a very limited extent, the delay could be attributed to the state party because of its obstruction of the African Commission's planned on-site mission to Nigeria.<sup>104</sup> The complainant also contributed to the delay, as one postponement was made "pending the receipt of written submissions from the Complainants."<sup>105</sup> However, most of the de-

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101. See generally Dinah Shelton, *Ensuring Justice with Deliberate Speed: Case Management in the European Court of Human Rights and the United States Courts of Appeals*, 21 HUM. RTS. L. J. 337 (2000). Institutional delay was one of the main justifications for the transformation of the European human rights system. The Explanatory Report to Protocol No. 11, establishing a single European Court of Human Rights, describes the extent of the problem:

The backlog of cases before the Commission is considerable. At the end of the Commission's session in January 1994, the number of pending cases stood at 2,672, more than 1,487 of which had not yet been looked at by the Commission. It takes on average over 5 years for a case to be finally determined by the Court or the Committee of Ministers. Also, whereas up to 1988 there were never more than 25 cases referred to the Court in one year, 31 were referred in 1989, 61 in 1990, 93 in 1991, 50 in 1992 and 52 in 1993, and it is probable that the number will increase even more in the next few years ... .

Explanatory Report and Protocol No. 11, *supra* note 17, at 948.

102. See *Comité Cultural pour la Démocratie au Bénin v. Bénin*, Communication 16/88, 8<sup>th</sup> Ann. Activity Report of the Afr. Comm'n on Human and Peoples' Rights, para. 2 (1994–1995) (The Commission decided that "the present government of Benin had satisfactorily resolved the issue of violations of human rights under the previous administration.") [hereinafter 8<sup>th</sup> Ann. Activity Report], <http://www1.umn.edu/humanrts/africa/ACHPR1.htm>. See also *Degli v. Togo*, Communication 83/92, 8<sup>th</sup> Ann. Activity Report, para. 5; *Peoples' Democratic Organisation for Independence and Socialism v. The Gambia*, Communication 44/90, 10<sup>th</sup> Ann. Activity Report of the Afr. Comm'n on Human and Peoples' Rights, at 65 (1996–1997) [hereinafter 10<sup>th</sup> Ann. Activity Report]; *Huri-Laws v. Nigeria*, 14<sup>th</sup> Activity Report, *supra* note 76, at 57.

103. *SERAC* Case, *supra* note 77.

104. *Id.*

105. *Id.* para. 16.

lays can be attributed to the African Commission: the discussion of the Nigeria mission report and “lack of time” are cited as reasons why the case was postponed on only two occasions;<sup>106</sup> more disconcerting are the numerous unexplained postponements.<sup>107</sup>

However, recourse to the African Court may mean more, rather than less, delay. The supplementary nature of the African Court necessitates some duplication.<sup>108</sup> Both the African Commission and Court are required to deal with admissibility and substantive questions,<sup>109</sup> unless a case is submitted directly to the African Court.<sup>110</sup> The ability of complainants to make direct submissions to the African Court depends on whether a state has made an optional declaration to that effect; the declaration is more the exception than the rule.<sup>111</sup> However, once the African Court has deliberated on a judgment, it must render its written opinion within ninety days.<sup>112</sup> Because state parties must comply with the African Court’s judgment “within the time stipulated by the Court,” the inference can be made that the African Court will set timeframes for compliance and that states will be required to abide by them.<sup>113</sup> Nevertheless, requiring separate arguments and findings for two different institutions — the African Commission and the African Court — will inevitably lead to delays. These types of excessive delay were partially responsible for the merger of the European Commis-

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106. *Id.* paras. 18–19. The mission took place from March 7–14, 1994; no final report has been adopted. See also Viljoen, *Overview of the African Regional Human Rights System*, *supra* note 5, at 181.

107. SERAC Case, *supra* note 77, paras. 21–32 (several postponements from the 24<sup>th</sup> to the 29<sup>th</sup> Session).

108. This argument has been crucial in transforming the European human rights machinery into a single judicial institution. See generally CLARE OVEY & ROBIN WHITE, JACOBS AND WHITE, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (3d ed. 2002) (discussing the integration of European human rights policies).

109. Protocol to the African Charter, *supra* note 1, arts. 2, 3, 6.

110. *Id.* art. 34(6).

111. In fact, only one state party, Burkina Faso, has made such an art. 34(6) declaration. See Jean-Baptiste Niyizurugero, *Establishment of an African Court on Human and Peoples’ Rights: the Next Critical Stage*, Association for the Prevention of Torture, n.2, [http://www.apt.ch/africa/court\\_judges.htm#\\_ftnref2](http://www.apt.ch/africa/court_judges.htm#_ftnref2) (last visited Oct. 10, 2004).

112. Protocol to the African Charter, *supra* note 1, art. 28(1).

113. *Id.* art. 30.

sion and Court into one institution.<sup>114</sup> This may well be the long-term solution for the African system if the coexistence of the African Commission and the African Court produces similar or even longer delays in finalizing cases.

*F. Urgent Cases: From Inadequacy to Efficiency?*

The African Charter does not provide for the adoption of interim or provisional measures.<sup>115</sup> The African Commission's Rules of Procedure fill this lacuna by providing that the African Commission may inform a state party on the "appropriateness of taking provisional measures to avoid irreparable damage being caused to the victim of the alleged violation."<sup>116</sup> Such measures may be indicated by the African Commission or, when it is not in session or in cases of urgency, by the Chair, in consultation with other members of the African Commission.<sup>117</sup> The Chair may take "any necessary action" in urgent cases, but must report to the African Commission about action taken at the next session.<sup>118</sup> The African Commission has used this competence in a limited number of cases. For example, the African Commission, based on a communication it received regarding Ken Saro-Wiwa and other Ogoni leaders, adopted interim measures asking the state (Nigeria) not to execute them until the Commission had made a decision.<sup>119</sup> The Nigerian government did not comply,<sup>120</sup> and in its subsequent decision the African Commission indicated that it considers interim measures binding on a state party.<sup>121</sup> However, the African Commission's regular procedure lacks a mechanism for dealing with communications of an urgent nature.<sup>122</sup>

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114. See Explanatory Report and Protocol No. 11, *supra* note 17, at 944.

115. African Charter, *supra* note 1 (no provisions for the adoption of interim measures).

116. Rules of Procedure, *supra* note 25, R. 111(1).

117. *Id.* R. 111(2).

118. *Id.* R. 111(3).

119. Int'l Pen v. Nigeria, Communications 137/94, 139/94, 154/96, 161/97, 12<sup>th</sup> Ann. Activity Report, *supra* note 54, at 65 (Communications consolidated because all concerned the trial and detention of Ken Saro-Wiwa).

120. *Id.*

121. *Id.* at 72-73.

122. The following communications illustrate that the Commission lacks a mechanism for dealing with urgent matters. See Organisation Mondiale Contre la Torture v. Rwanda, Communications 27/89, 46/91, 49/91, 99/93, 10<sup>th</sup>

Under the Protocol, the African Court has a broad mandate to adopt “such provisional measures as it deems necessary” in cases “of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons.”<sup>123</sup> The issue is whether the “adopted measures” are “judgments” that parties have undertaken to execute to be monitored by the AU Executive Council on behalf of the Assembly. The Protocol should be interpreted to include those measures. “Findings,” as defined in Article 27 (for example, a finding of violation, a remedy, or a provisional measure) are the dispositive part of the “judgment.” The terms “finding” and “judgment” are not mutually exclusive. The African Court could clarify this apparent uncertainty by denoting its “finding” on provisional measures as a “judgment,” an avenue followed in the other regional systems.<sup>124</sup>

*G. Profile: From Obscurity to Visibility?*

Despite the vastness of the African continent and the frequency of human rights reports and allegations, very few communications have reached the African Commission.<sup>125</sup> At the domestic level, many factors account for this small caseload, among them illiteracy, political instability or war, absence of civil society, lack of legal aid, lack of access to justice, onerous local remedies, dysfunctional court systems, and corruption. Commission-level factors are also responsible. The African Commission has been ineffective in disseminating information about its existence and its case law<sup>126</sup> and has failed to exploit

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Ann. Activity Report, *supra* note 102, at 49–56 (African Commission failed to issue findings on consolidated communications, submitted from 1989 to 1992 alleging violations against members of the Tutsi group, until Oct. 1996, some seven years after submission of the first communication).

123. Protocol to the African Charter, *supra* note 1, art. 27(2).

124. *Cf.* LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466, at 506, ¶ 109 (June 27) (where the International Court of Justice (ICJ) found that interim measures under art. 41 of its Statute are binding); *Mamatkalov v. Turkey*, App. Nos. 46827/99 & 46951/99, Eur. Ct. H.R. (Feb. 6, 2003), <http://www.echr.coe.int/eng>.

125. *See supra* note 32 and accompanying text.

126. *See* Danish Centre for Human Rights, *supra* note 80, at 43. The African Commission activated an official website and began publishing its decisions on it in 2001, significantly improving the dissemination of information.

media exposure possibilities.<sup>127</sup> Some of the Commission's inadequacies, however, may be a result of its lack of resources and its seat in far-off Banjul.

To some extent, the mere existence of the African Court should generate greater media interest and exposure. A continental court is bound to have a much clearer identity in the minds of Africans. Ultimately, however, the African Court itself will have earned its legitimacy by securing a high profile through the accessibility and transparency of its procedures, the quality of its judgments and the fairness of its findings.

### III. THE INDIVIDUAL BEFORE THE COURT

The coexistence of the African Court with the African Commission means that Africa will have a two-tiered human rights system, similar to the Inter-American system and the European system before Protocol No. 11's entry into force in 1998.<sup>128</sup> The Protocol describes the relationship between the two bodies as complementary and mutually reinforcing.<sup>129</sup> Although the African Court may deal with individual and inter-state cases and has both contentious and advisory jurisdiction, this section will focus mainly on individual cases and contentious proceedings, where the rights of individuals are most at stake.<sup>130</sup> The following issues specifically affecting individuals before the African Court are discussed here: standing to bring cases and the in-

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127. See ANKUMAH, *supra* note 5, at 38–39 (African Commission's restrictive interpretation of confidentiality principle featured in African Charter, art. 59, contributes to public's lack of exposure to, and resultant lack of confidence in, Commission decisions). See also Danish Centre for Human Rights, *supra* note 80, at 34–35 ("Generally, interviewees agree that this is the worst area of the Commissioner's (and its Secretariat's) work, and one in which very little progress can be[] identified. The Secretariat has not ... consistently secured the presence of journalists at sessions, and has not organised a workshop for journalists to promote the African Charter.").

128. See generally Explanatory Report and Protocol No. 11, *supra* note 17.

129. Protocol to the African Charter, *supra* note 1, pmb. & art. 2.

130. Although the African Court has jurisdiction over inter-state complaints, states must still submit their complaints against other states to the Commission. Assuming that the African Commission determines that the case is admissible and that there is a violation on the merits, the Commission or one of the state parties, either the state lodging the complaint or the state against which the complaint had been lodged, may submit the case to the Court. Protocol to the African Charter, *supra* note 1, art. 5(1)(b) & (c).

volvement of individuals in proceedings before the African Court.

*A. Standing in Contentious Cases: Submission of Individual Complaints to the Court*

Article 5(1) of the Protocol allows the following parties to submit contentious cases to the African Court: “(a) The Commission; (b) The State Party which has lodged a complaint to the Commission; (c) The State Party against which the complaint has been lodged at the Commission; (d) The State Party whose citizen is a victim of human rights violation; (e) African Intergovernmental Organizations.”<sup>131</sup> In addition, Article 5(3) provides that “[t]he Court may entitle relevant NGOs with observer status before the Commission, and individuals to institute cases directly before it, in accordance with Article 34(6) of this Protocol.”<sup>132</sup> Article 34(6) stipulates that “[a]t the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under Article 5(3).”<sup>133</sup>

Thus, there are two roads leading to the African Court. The main road runs through the African Commission. Individuals are not allowed to lift the barrier (i.e., by “submitting cases”) that separates Commission and Court; the African Commission and the respondent state act as gatekeepers. The second road leads directly to the African Court, and bypasses the African Commission. However, only states may permit complainants to bypass the African Commission by making an Article 34(6) declaration to that effect.<sup>134</sup> So far, only one of the nineteen ratifying states has made such a declaration.<sup>135</sup> Because the optional declaration allowing direct access to the African Court is the exception rather than the rule, most cases reaching the African Court will start as communications to the African Commission. Once before the African Commission, however, individuals seem

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131. *Id.* art. 5(1)(a)(b)(c) & (d).

132. *Id.* art. 5(3).

133. *Id.* art. 34(6).

134. *Id.* art. 34(6).

135. *See* Niyizurugero, *supra* note 111.

to lose the capacity to influence the fate of their cases and, as a consequence, to impact the African Court's agenda.<sup>136</sup>

If strengthening the complaints' mechanism to overcome deficiencies inherent in the African Commission's findings is the rationale for establishing the African Court, then the Court should be allowed to play as important a role as possible.<sup>137</sup> Put another way, as many communications as possible should be able to reach the African Court. How appropriate is it, then, to rely on states against whom complaints have been lodged (respondent states) and the African Commission to set the process in motion?

#### 1. Respondent States – Article 5(1)(c)

Reliance on respondent states is unlikely to unleash the African Court's potential. If the African Commission continues to favor individuals, states will probably "appeal" the African Commission's findings before the African Court on the grounds that the African Commission violated the Charter. If this happens in cases where the African Commission finds a violation by the state, the referral of matters to the African Court will depend on the initiative of respondent states. However, states may be reluctant to submit cases to the African Court because of the binding nature of its decisions. In other words, states may prefer the certainty of a non-binding finding against them over the possibility of a binding decision against them. Moreover, there seems to be little incentive for states prevailing at the Commission level to submit to a potentially disadvantageous Court judgment.

#### 2. The Commission – Article 5(1)(a)

Because individuals or NGOs who submit complaints have no competence to refer matters and states are unlikely to do so, it is left to the African Commission to refer matters. The Inter-American experience illustrates the risk of relying on the African Commission to refer cases to the African Court. Although the Inter-American Court of Human Rights (Inter-American

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136. *Id.*

137. See Murray, *Comparison Between the African and European Courts*, *supra* note 5, at 213 (arguing that the Court should be supplied with "a regular list of cases").

Court) was established in 1980, it did not receive its first contentious case until 1986,<sup>138</sup> followed by its second in 1990.<sup>139</sup>

Since the Protocol does not explicitly require that the African Commission make findings on the admissibility and merits of a case before submitting it to the African Court,<sup>140</sup> three possibilities present themselves. First, the African Commission may submit a case to the African Court without making any findings at all. Second, it could submit a case after making some findings, for example, after it had made a finding of fact, a finding on admissibility, or after unsuccessfully trying to negotiate a friendly settlement. Finally, the African Commission could submit a case to the African Court after its final disposition, i.e., a finding on the merits or a friendly settlement. This Article will now consider the following three Scenarios.

*Scenario 1:* In the first scenario, the African Commission could act as a mere conduit to the African Court. After a preliminary hearing at the Commission level, the African Court could decide on both admissibility and the merits of the case, or try to reach an amicable settlement.<sup>141</sup> The African Court could also “overrule” the African Commission and remand the case to the Commission for additional findings.<sup>142</sup>

This course would provide the type of access, best described as “Commission-mediated direct access,” similar to that of a complainant in a domestic court seeking direct access to the highest Constitutional Court without first exhausting the usual domestic constitutional remedies.<sup>143</sup> Under South African constitutional law, for example, lower courts may be bypassed and

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138. See generally Case 7920, Inter-Am. C.H.R., OEA/ser. L/V/II.68, doc. 8 rev 1 (1986), available at <http://www.cidh.org>.

139. David J. Padilla, *An African Human Rights Court: Reflections from the Perspective of the Inter-American System*, 2 AFR. HUM. RTS. L.J. 185, 191 n. 22 (2002).

140. See generally Protocol to the African Charter, *supra* note 1.

141. *Id.* arts. 6(2) & 9.

142. See *id.* art. 6(3) (stating that “[t]he Court may consider cases or transfer them to the Commission”).

143. See Rules of the Constitutional Court, Government Notice (GN) R1603 of 31 Oct. 2003, R. 17(2) (S. Afr.) (effective Dec. 1, 2003) [hereinafter Rules of the Constitutional Court], available at <http://www.concourt.gov.za/rules.html> (last visited Aug. 1, 2004).

a matter may be referred directly to the Constitutional Court if it is "in the interests of justice" to do so.<sup>144</sup>

The *travaux préparatoires* of the Protocol suggest that another consideration is the importance and urgency of the matter, such as allegations of serious or massive human rights violations.<sup>145</sup> Frivolous and baseless complaints should not be allowed direct access to the African Court. However, Commission-mediated direct access would also eliminate the African Commission's role in resolving the communication. Therefore, the criteria for direct referral to the African Court depends not only on the urgency of the matter, but also the ramifications of omitting the role of the African Commission.

For some matters, the African Commission's role may be very important. For example, it may be argued that judicial officers are, by their nature, training, and experience, less equipped to deal with on-site investigations and negotiations than are quasi-judicial officers. If this is true, the African Commission would have an advantage in negotiating friendly settlements and would be better situated to conduct fact-finding, especially in situations where there have been massive violations that require on-site investigations.<sup>146</sup> Therefore, the African Commission's role should not be diminished in matters where these two

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144. *Id.* R. 18(1)–(2). In *Bruce v. Fleecytez Johannesburg CC*, the South African Constitutional Court held that direct access is exceptional and indicated that a complainant's prospects of success and the desirability of a court not to "sit as a court of first and last instance," especially where no further appeal is available, played a part in its decision. 1998 (2) SALR 1143 (CC), paras. 7–8. In Germany, complainants in constitutional matters may approach the *Bundesverfassungsgericht* (German Constitutional Court) directly, but only in exceptional circumstances, i.e., when the Court determines that the matter is of general importance or that serious and unavoidable disadvantage to the complainant would otherwise result. Gesetz über das Bundesverfassungsgericht (Bundesverfassungsgerichts-Gesetz, BVerfGG), 12.3.1951 (BGBl. I S.243), art. 90(2) (Federal Constitutional Court Act) (amended July 16, 1998), <http://www.iuscomp.org/gla/statutes/BVerfGG.htm>.

145. In an earlier draft of the Protocol, which lacked the provision allowing states to make an optional declaration allowing individuals direct access to the court, the African Court was to have the discretion to allow direct access in "urgent cases or serious, systematic or massive violations of human rights." Nouakchott Draft Protocol, *supra* note 49, art. 6(1).

146. See, e.g., Frans Viljoen, *Some Arguments in Favour of and Against an African Court on Human and Peoples' Rights*, in THE AFRICAN SOCIETY OF INTERNATIONAL AND COMPARATIVE LAW, TENTH ANNUAL CONFERENCE 21, 43 (A.V. Lowe et al. eds., 1998) [hereinafter *Some Arguments in Favour*].

functions are at play. Instead, these two functions would be best performed not by judicial institutions, such as the African Court, but by quasi-judicial bodies like the African Commission where formality is less important and ad hoc procedures are more common.

In the pre-1998 European system, the European Commission fulfilled fact-finding functions.<sup>147</sup> Although the European Court was entitled to engage in its own fact-finding,<sup>148</sup> it did so only in “exceptional circumstances.”<sup>149</sup> The European experience also demonstrates that friendly settlement is frequently a commission, not a court, role.<sup>150</sup> By contrast, the Inter-American Court has been much more extensively involved in fact-finding.<sup>151</sup> Oral proceedings before the Inter-American Court form an important part of this process.<sup>152</sup> Although the Inter-American Court has indicated that fact-finding is primarily the role of the Inter-American Commission on Human Rights, it has nevertheless reviewed facts de novo.<sup>153</sup> Indeed, the Inter-American Court has held that it is the sole judicial body with decision-making power, not a court of appeal for Commission decisions.<sup>154</sup> How-

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147. See *Cruz Varas v. Sweden*, 201 Eur. Ct. H.R. (ser. A), para. 74 (1991) [hereinafter *Cruz Varas Case*], <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited Oct. 18, 2004).

148. See Kertsen Rogge, *Fact-finding, in THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS* 677 (R. St. J. Macdonald et al. eds., 1993) (discussing Rules 41 through 46 of the 1992 version of Rules of Court for the European Court).

149. See *Cruz Varas Case*, *supra* note 147, para. 74.

150. From 1955 to 1991, approximately twelve percent of all cases (128 cases) before the European Commission were settled amicably; in the European Court, only twenty-nine friendly settlements (term includes all cases “dropped as a result of actions taken by those who were involved in the case”) were reached between 1962 and 1991. Alexandre Kiss, *Conciliation, in THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS* 703, 704–05 (R. St. J. Macdonald et al. eds., 1993).

151. See Victor Rodriguez Rescia & Marc David Seitles, *The Development of the Inter-American Human Rights System: A Historical Perspective and a Modern-Day Critique*, 16 N.Y.L. SCH. J. HUM. RTS. 593, 629 (2000).

152. *Id.*

153. *Id.*

154. *Velasquez Rodriguez Case, Judgment on Preliminary Objections*, Inter-Am. Ct. H.R. (ser. C) No. 1, para. 29 (June 26, 1987) (“The Court does not act as a court of review, of appeal or other similar court in its dealings with the Commission. Its power to examine and review all actions and decisions of the Commission derives from its character as sole judicial organ in matters con-

ever, the Inter-American Court is unlikely to use its power to conduct on-site investigations.<sup>155</sup>

Domestic courts engage in both settlement and fact-finding activities.<sup>156</sup> Indeed, with the exception of appellate courts, most domestic courts engage in fact-finding on a daily basis.<sup>157</sup> This demonstrates that there is nothing inherent in the judicial function that makes either fact-finding or dispute settlement inappropriate.<sup>158</sup> To some extent, the three regional human rights courts all have settlement and fact-finding functions. In particular, under the African system, the Protocol's direct access provision implies that the African Court will have to engage in both fact-finding and settlement without the African Commission's intervention.<sup>159</sup> These activities are therefore inescapably part of the African Court's functions. In any event, the African Commission has not dealt very effectively with fact-

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cerning the Convention.”), [http://www.corteidh.or.cr/seriecpdf\\_ing/seriec\\_01\\_ing.pdf](http://www.corteidh.or.cr/seriecpdf_ing/seriec_01_ing.pdf).

155. The Inter-American Court's competence to conduct on-site investigations is implicitly granted by its Statute. Statute of the Inter-American Court on Human Rights, Oct. 31, 1979, O.A.S. Res. 448, 9<sup>th</sup> Sess., art. 3 (*entered into force* Jan 1, 1980) [hereinafter Statute of the Inter-American Court], <http://cidh.oas.org/basicos/basic17.htm>. See also *In re Viviana Gallardo*, Advisory Opinion, Inter-Am. Ct. H.R. (ser. A) No. G 101/81, para. 22 (Nov. 13, 1981) (advisory opinion requested by the government of Costa Rica), [http://www.corteidh.or.cr/seriea\\_ing/index.html](http://www.corteidh.or.cr/seriea_ing/index.html).

[A]lthough the Court, as any other judicial organ, does not lack the power to carry out its own investigations, particularly if these are necessary to provide the Court with the information it needs to discharge its functions, the Convention entrusts to the Commission the initial phase of the investigation into the allegations. The Commission also has a conciliatory function empowering it to propose friendly settlements as well as to make the appropriate recommendations to remedy the violation it has found to exist. It is also the body to which the States concerned initially provide all the pertinent information and submissions.

*Id.*

156. See generally Professeur Pierre Met, *Introduction to the English Legal System* (2002), <http://www.u-psud.fr/SCEAUX/enseignement/R.nsf/els.htm?OpenPage> (describing the function of courts in a common law system).

157. *Id.*

158. *Id.*

159. See generally Protocol to the African Charter, *supra* note 1, art. 34(6).

finding.<sup>160</sup> Its findings are often factually weak; additionally, the African Commission has been very reluctant to second-guess the factual findings of a domestic court.<sup>161</sup>

Moreover, neither the Charter nor the Rules of Procedure accords the African Commission any role with regard to friendly settlement procedure.<sup>162</sup> There are also very few instances where the African Commission has attempted to negotiate settlements. Because the African Commission lacks expertise and experience in this area, settlement should not be considered a consistent part of its practice.<sup>163</sup> Indeed, it has no legal competence to settle cases. The Protocol states that the African Court “may try to reach an amicable settlement” in cases before it “in accordance with the provisions of the Charter.”<sup>164</sup> The relevant provision of the Charter, Article 48, read with Article 47 and supplemented by Rule 98 of the Rules of Procedure, relates only to inter-state communications, thus restricting settlement efforts for state parties involved in those disputes.<sup>165</sup> This means that even the African Court has limited authority with regard to settlement negotiations. However, even if this strict reading of the Protocol is adopted, the African Court is still likely to engage in settlement negotiations, scrutinizing and formalizing any agreement parties reach after referral of the case.<sup>166</sup> There-

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160. See Rachel Murray, *Evidence and Fact-finding by the African Commission*, in THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: THE SYSTEM IN PRACTICE, 1986–2000 100, 101–10 (Malcolm Evans & Rachel Murray eds., 2002) [hereinafter *Evidence and Fact-finding*].

161. See Bob Ngozi Njoku v. Egypt, Communication 40/90, 11<sup>th</sup> Ann. Activity Report of the Afr. Comm'n on Human and Peoples' Rights, at 27, para. 60 (1997–1998) (“It does not however beho[o]ve the Commission to judge the facts. This is the responsibility of the Egyptian Courts.”) [hereinafter 11<sup>th</sup> Ann. Activity Report].

162. See OUGUERGOUZ, *supra* note 1, at 641.

163. See *id.* at 642–46 (analyzing the African Commission's limited role in settlement).

164. Protocol to the African Charter, *supra* note 1, art. 9.

165. See African Charter, *supra* note 1, art. 48.

166. See Vincent Berger, *Le règlement amiable devant la Cour européenne des Droits de l'Homme*, in PROTECTING HUMAN RIGHTS: THE EUROPEAN DIMENSION: STUDIES IN HONOUR OF GÉRARD J. WIARDA 55–56 (1988) (discussing instances in which the European Court has handed down judgments formalising friendly settlements or agreements between parties). The Inter-American Court plays a relatively passive role in friendly settlement. See Rules of Procedure of the Inter-American Court of Human Rights, art. 54 (2000) (*amended* Dec. 2003) (providing that the Court may strike cases from

fore, “in accordance with the provisions of the Charter” could be interpreted to refer to the content of the agreement between the parties. Thus, as long as a case is before it, the African Court may try to reach a friendly settlement, but must ensure that the settlement is human rights friendly and comports with the Charter.<sup>167</sup>

It thus follows that many cases may be directly submitted to the African Court without undermining the African Commission’s role. In this scenario, the exhaustion of local remedies would also be relevant to the African Commission’s decision.<sup>168</sup>

Commission-mediated direct access arguably amounts to a de facto “declaration in terms of article 34(6)”<sup>169</sup> for states that had not made any *de jure* declaration, giving rise to a situation where individuals could submit complaints to the African Court against states not accepting direct submissions, thus sidestepping the clear requirements of the Protocol.<sup>170</sup> A response to this argument, however, is that a declaration under Article 34(6) is made explicitly, for all cases, and that Commission-mediated direct access is exceptional and relates to the exigencies of a particular case without implying general acceptance. Moreover, Article 5 allows the African Commission to submit cases to the African Court without stipulating to either the ad-

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its list when “parties to a case before the Court” inform it of the existence of a friendly settlement) [hereinafter Inter-American Court Rules of Procedure], [http://www.corteidh.or.cr/general\\_ing/rules.html](http://www.corteidh.or.cr/general_ing/rules.html); Rules of Procedure of the Inter-American Commission of Human Rights, art. 41(1) (2000) (*amended* Dec. 2003) (requiring the Commission to put itself “at the disposal of the parties concerned”) [hereinafter Inter-American Commission Rules of Procedure], <http://www.cidh.oas.org/Basicos/basic16.htm>.

167. See Kiss, *supra* note 150, at 705 (procedure for friendly settlement in European system “based upon Rule 49 of the present Rules of the [European] Court”).

168. See African Charter, *supra* note 1, art. 56(5) (requiring the exhaustion of local remedies).

169. See Viljoen & Louw, *supra* note 69, at 3.

170. The Protocol does not explicitly provide that all cases must be decided by the African Commission before their submission to the Court. However, if the Commission submits all cases directly to the Court under art. 5(1) without making any findings, the optional declaration mechanism under art. 34(6) would be rendered unnecessary. Protocol to the African Charter, *supra* note 1, arts. 5(1), 34(6).

missibility or the merits of the case.<sup>171</sup> In any event, the African Court is competent to deal with both admissibility and merit.<sup>172</sup> Allowing for Commission-mediated direct access is the method best suited to give effect to the Preamble to the Protocol, (which links the African Court to the “achievement of the legitimate aspirations of the African peoples”)<sup>173</sup> and does not detract from the Court’s main purpose of complementing and reinforcing the African Commission.<sup>174</sup> Adopting this course would also reduce duplication and delays, important goals in a resource-constrained environment, and would guarantee greater “equality of arms” between the state and individual.<sup>175</sup> Still, this should be seen as an exceptional way of reaching the African Court, not the rule.

*Scenario 2:* The African Commission could adopt a more fluid approach and submit a case to the African Court after partial review. This would require the African Commission to conduct admissibility findings.<sup>176</sup> If such a course is adopted, the African system should emulate the European system; that is, the African Commission should not refer cases it has found to be inadmissible.<sup>177</sup>

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171. *Id.* art. 5 (silent as to any requirements African Commission must fulfil before submitting cases to the Court).

172. *Id.* art. 3.

173. *Id.* pml.

174. *See id.*

175. *See, e.g.,* Council of Europe, Explanatory Report on Protocol No. 9 to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 140, para. 13 (*opened for signature* Nov. 6, 1990) (*repealed by* Protocol No. 11 on Nov. 1, 1998) (arguing that change in European Convention is warranted because states and non-state applicants lacked equal access to the European Court), <http://conventions.coe.int/treaty/en/Reports/Html/140.htm>.

176. The African Court can still conduct admissibility findings. In fact, the grounds upon which the Court may base its admissibility findings are broader than the African Commission’s; unlike the Commission, the Court is not compelled to “base” its findings on the grounds established in art. 56 of the Charter, but need only take them into account. *See* Protocol to the African Charter, *supra* note 1, art. 6(2).

177. H.C. Krüger & C.A. Nørgaard, *The Right of Application, in* THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 657, 674–75 (R. St. J. Macdonald et al. eds., 1993) (describing how the European system works).

The African Commission could also conduct fact-finding and, if applicable, settlement negotiations.<sup>178</sup> The African Commission's role would be expanded from that described in scenario one; the African Commission would have the additional authority to refer matters to the African Court after making findings of fact, but before considering the merits. Proceedings before the African Court would then deal primarily with legal, rather than factual, questions. The Protocol does not exclude this possibility.<sup>179</sup> While such an approach would necessitate improvement of the African Commission's fact-finding techniques, it could also be advantageous. It could lead to a more efficient division of labor, fewer delays, and a better use of resources since witnesses would only testify once and only one set of arguments and pleadings would be required.<sup>180</sup> In my opinion, such practical concerns will determine the viability of the co-existence of the Court and the Commission. This proposal thus differs from both the Inter-American and pre-Protocol No. 11 European systems by suggesting a solution appropriate to the African context.

To some extent, this scenario mirrors the Inter-American system, where the Inter-American Commission may refer a matter to the Inter-American Court after failing to reach a friendly settlement.<sup>181</sup> In an advisory opinion resulting from a refusal by

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178. See generally Murray, *Evidence and Fact-finding*, *supra* note 160. See also OUGUERGOUZ, *supra* note 1, at 641–46.

179. The African Court's main role is to determine if there has been a violation of the African Charter. See Protocol to the African Charter, *supra* note 1, art. 27(1) (this provision, entitled "findings," permits the Court to make orders to remedy human rights violations). It appears that the Court's proceedings need not include factual inquiries, and could instead be restricted to questions of law. See *id.* art. 10. This possibility is supported by the language in art. 26, which states that the Court "shall hear submissions by all parties" and hold enquiries only "if deemed necessary." *Id.* art 26(1).

180. See Murray, *Comparison Between African and European Courts*, *supra* note 5, at 198–99 (noting that in the pre-Protocol No. 11 European system, there was a presumption that the European Commission was primarily responsible for fact-finding). Murray argues that "a delegation of responsibility between a Commission that deals with disputes of facts and a Court which looks at cases of disputes of law ... might be useful for the African system." *Id.*

181. American Convention on Human Rights, Nov. 22, 1969, art. 51, 9 I.L.M. 673, 689. (When a settlement is not reached in the Inter-American system, art. 51 allows the Inter-American Commission to "set forth its opin-

the Inter-American Commission to refer a contentious case to the Court, the Inter-American Court held that the Convention does not require “that the Commission determine that the Convention has been violated before the case may be referred by it to the Court.”<sup>182</sup> According to the Inter-American Court, factors such as the controversial nature of the issue, the novelty of the issue, and the general importance of the issue to the hemisphere at large may play a role in a decision to refer.<sup>183</sup> To be clear, this scenario proposes that the African Commission submit to the African Court in as many cases as possible. Urgency need not be a criterion, thus making submission the rule rather than the exception.

*Scenario 3:* Under the third scenario, the African Commission would finalize communications before submitting them to the African Court. The Protocol “appear[s] to suggest” that the Commission will only refer cases after considering them, “thus following the approach of the previous European organs”<sup>184</sup> and that of the Inter-American organs. Under the Inter-American system, the state is given a fixed term within which it must comply with the remedy.<sup>185</sup> After the term’s expiration, the Inter-American Commission decides whether adequate measures were taken.<sup>186</sup> If the Inter-American Commission finds a failure of state compliance, referral to the Inter-American Court is a rebuttable presumption; the Inter-American Commission “shall refer the case to the Court” unless it decides otherwise.<sup>187</sup> When the state prevails, the Inter-American Commission has a “spe-

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ion and conclusions” and then vote on whether that report should be published. Implicit in this is that the Inter-American Commission, as part of its art. 51 obligations, can submit the matter to the Inter-American Court.) [hereinafter American Convention].

182. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29, American Convention on Human Rights), Advisory Opinion OC-5/85, Inter-Am. Ct. H.R. (ser. A) No. 5, para. 24 (1985) [hereinafter Compulsory Membership Case].

183. *Id.* para. 25.

184. Murray, *Comparison Between the African and European Courts*, *supra* note 5, at 198 (arguing that based on art. 8 of the Protocol, the rules of the Court should be adopted “bearing in mind the complementarity between the Commission and the Court”).

185. American Convention, *supra* note 181, art. 51(2).

186. *Id.* art. 51(3).

187. Inter-American Commission Rules of Procedure, *supra* note 166, art. 44.

cial duty to consider the advisability of coming to the Court," especially since the individual has no standing to take the matter further.<sup>188</sup>

Initially, the European system did not allow individuals to submit cases to the Court.<sup>189</sup> However, Protocol No. 9 to the European Convention changed this policy and provided that "the person, non-governmental organisation or group of persons having lodged the complaint with the Commission" could also refer cases to the European Court in their own name and without the mediating presence of the European Commission.<sup>190</sup> This referral was only provisional; a three-judge panel, including the judge from the state complained against, had to give its approval.<sup>191</sup> The panel was to consider whether the matter raised a serious question of interpretation or application, but could also reject referral "for any other reason."<sup>192</sup>

Thus far, the African Commission has decided in favor of individuals in most cases.<sup>193</sup> Should the African Commission submit these cases to the African Court? Although there is an argument that all such cases should be referred to ensure that the recommendatory findings of the Commission are converted into legally binding decisions,<sup>194</sup> the state should be allowed an opportunity to comply with the African Commission's finding

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188. Compulsory Membership Case, *supra* note 182, para. 26.

189. See European Convention, *supra* note 17, art. 25.

190. Protocol No. 9 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 6, 1990, art. 5, 30 I.L.M. 693, 694 (*entered into force* Oct. 1, 1994) [hereinafter Protocol No. 9].

191. *Id.*

192. *Id.*

193. In the first eleven years of its existence, the African Commission made final decisions on the merits in seventeen cases. Fifteen violations were found, and the Commission only found in favor of the state in two cases. See Viljoen, *Overview of the African Regional Human Rights System*, *supra* note 5, at 170–74. The Commission's tendency to find in favor of individuals has continued (at least through the end of 2001). See Viljoen, *Introduction to the African Commission*, *supra* note 91, at 446–53.

194. In the pre-1998 European system, all admissible cases ended in final decisions, either by their submission to the European Court, or in binding decisions of the Committee of Ministers of the Council of Europe. See European Convention, *supra* note 17, art. 32. In the African system, the AU Executive Council is empowered to monitor the African Court's judgements, but not the African Commission's findings. These findings remain "recommendations" unless the AU Assembly confers legal status on them by "adopting" them. See Viljoen & Louw, *supra* note 69, at 9–10.

before the matter is referred to the African Court if compliance is the primary goal. This procedure would reflect the practice of the Inter-American Commission whereby, in the absence of compliance, the Inter-American Commission refers cases automatically to the Inter-American Court, unless there is a “reasoned decision” to the contrary.<sup>195</sup> However, this could lead to further delays, would require improvement of the African Commission’s monitoring and follow-up procedure, and may be manipulated by states.

On the other hand, states are unlikely to subject cases decided against individuals to further scrutiny. The African Commission should, therefore, refer all cases decided against individuals to the African Court, unless some exceptional circumstance, such as manifest lack of substance, is present. If the African Commission adopted a standard requiring a “likelihood of success” for such referrals, the process could become too burdensome and lead to subjectivity in its findings. However, the African Commission could decide that resources and time should be prioritized for cases with a “good chance of winning”<sup>196</sup> so as not to harm the public perception of the African Court and trigger the development of a negative jurisprudence.

### 3. State Party Citizen – Victim: Article 5(1)(d)

A state may also submit a case to the African Court when one of its citizens “is a victim of human rights violation.”<sup>197</sup> Because the Protocol does not also state that the citizen should have “lodged a complaint” with the African Commission as the other two sub-articles dealing with state submission do,<sup>198</sup> the word “is” implies that there is some “objective truth.”

One interpretation is that this “objective truth” is equivalent to the state’s viewpoint. Therefore, this provision opens the door for states to submit cases directly to the African Court if the rights of its citizens are, in its opinion, violated by another state. Thus, some inter-state complaints, namely those which involve citizens, would be privileged, and the inter-state com-

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195. Inter-American Commission Rules of Procedure, *supra* note 166, art. 43(2).

196. Padilla, *supra* note 139, at 191.

197. Protocol of the African Charter, *supra* note 1, art. 5(1)(d).

198. *Id.* art. 5(1)(b)–(c).

plaints system provided for under the Charter would be overridden.

Another interpretation that fits better with the term "is a victim" is that the African Commission must have made a finding that the individual is, indeed, a victim. This is not satisfactory, as it would allow states to submit cases to the African Court only when the Commission has found a violation. If this interpretation is adopted, states must be willing to refer matters on behalf of their citizens, otherwise the African Court will not have jurisdiction.

It is possible that the drafters' intention was only to emulate the pre-Protocol No. 11 European Convention, which allowed a state "whose national is alleged to be a victim" to refer a case to the European Court.<sup>199</sup> *Soering v. U.K* presents a typical illustration of this provision's application: the applicant, a German national, lodged a complaint against the United Kingdom, where he was residing at the time of the complaint.<sup>200</sup> After the European Commission's final report had been adopted and transferred to the Committee of Ministers, the Commission, respondent United Kingdom, and the German government successively referred the case to the European Court.<sup>201</sup>

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199. European Convention, *supra* note 17, art. 48.

200. *See generally* *Soering v. United Kingdom*, 11 Eur. Ct. H.R. 439 (1989).

201. It was referred by the European Commission on Jan. 25, 1989; the United Kingdom on Jan. 30, 1989; and Germany on Feb. 3, 1989. *See* LUKE CLEMENTS, EUROPEAN HUMAN RIGHTS: TAKING A CASE UNDER THE CONVENTION 74 (1994). *See also* Bob Ngozi Njoku v. Egypt, Communication 40/90, 11<sup>th</sup> Ann. Activity Report, *supra* note 161, at 27 (illustrating the potential usefulness of a provision allowing a state, whose citizen is an alleged victim, to refer a case to the African Court). A Nigerian national who was arrested while in the "transit zone" of Cairo Airport, and who was charged, convicted, and sentenced to life imprisonment on a drug-related offence in Egypt, directed a complaint to the Commission. Reluctant to interfere with the factual findings of the Egyptian courts, the Commission concluded that there was no violation of the African Charter. Under these circumstances, it is unlikely that the Commission or Egypt would have submitted the case to the Court, but Nigeria might have, had art. 5(1)(d) of the Protocol been in place at the time. *See id.* para. 60.

#### 4. African Intergovernmental Organizations—Article 5(1)(e)

African intergovernmental organizations may also submit cases to the African Court.<sup>202</sup> One such institution is the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee),<sup>203</sup> the implementing body of the African Charter on the Rights and Welfare of the African Child (African Children's Charter). After finalizing a case, the African Children's Committee has the same competence as the African Commission to refer cases to the African Court.<sup>204</sup> It is possible that other intergovernmental organizations, such as regional economic arrangements, or even the AU itself, could submit cases directly to the African Court under Article 5(1)(e).<sup>205</sup> Arguably, this provision enables the AU to submit a case against any AU member state so long as that state breached the AU Charter or any other human rights treaty ratified by that state.<sup>206</sup> Therefore, depending on the disputed subject matter, the AU may access either of the two courts to be established under its auspices: the African Human Rights Court for human rights violations or the African Court of Justice for matters related to economic integration and politics.<sup>207</sup>

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202. Protocol to the African Charter, *supra* note 1, art. 5(1)(e).

203. See generally Amanda Lloyd, *The First Meeting of the African Committee of Experts on the Rights and Welfare of the Child*, 2 AFR. HUM. RTS. L.J. 320 (2002) (discussing the first meeting of the African Children's Committee in 2002).

204. See Protocol to the African Charter, *supra* note 1, art. 5(1)(e).

205. See *id.*

206. See *id.*

207. This implies a judicial duality similar to that between the Strasbourg and Luxembourg institutions in Europe. The AU Assembly adopted the Protocol of the Court of Justice on July 11, 2003. Protocol of the Court of Justice of the African Union, June 11, 2003 (by July 31, 2004, four states had ratified the Protocol, which requires 15 deposited ratifications entry into force) [hereinafter Protocol of the Court of Justice], <http://www.africa-union.org/home/welcome.htm>. See generally Chris M. Peter, *The Proposed African Court of Justice—Jurisprudential, Procedural, Enforcement Problems and Beyond*, 1 E. AFR. J. PEACE & HUM. RTS. 117 (1993) (for an early discussion of the African Court of Justice). See also Nsongurua J. Udombana, *An African Human Rights Court and an African Union Court: A Needful Duality or a Needless Duplication?*, 28 BROOK. J. INT'L L. 811 (2003) (discussing the duality of the two African courts).

## 5. Direct Access – Article 5(3)

State consent, taking the form of a declaration under Article 34(6), is a prerequisite for direct access to the African Court.<sup>208</sup> Although only one of the ratifying states has made an Article 34(6) declaration, the situation is not hopeless; state parties may make such declarations “at any time” subsequent to ratification.<sup>209</sup>

The standing of individuals under the African Commission’s Charter has been quite broad. The Charter does not have the victim requirement found in other conventions (such as the International Covenant on Civil and Political Rights (ICCPR) or the European Convention),<sup>210</sup> and allows individuals, groups or NGOs to lodge communications.<sup>211</sup> Cases that reach the African Court after going through the African Commission must also fulfill these requirements.<sup>212</sup> However, the Protocol does not

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208. Art. 34(6) provides: “At the time of ratification ... or any time thereafter, the State shall make a declaration.” Protocol to the African Charter, *supra* note 1, art. 34(6). Plain language advocates take issue with the word “shall,” arguing that it is often unclear whether “shall” is used to denote a future action or compulsion. The use of “shall” in the Protocol cannot express compulsion, however, as the declaration is *optional*. To some extent it refers to the future, but, in essence, “shall” seems to express a discretionary competence.

209. *Id.* It has been suggested that this provision allows ad hoc declarations for the purpose of a particular case, or for a fixed period. It is difficult to conceive of a situation in which a state would make a case-specific declaration: direct submission of cases depends on the initiative of the individual, who can only commence an action if the state had already made the declaration. For a state to make a case-specific declaration, it would need to foresee that an individual intended to bring such a case. Period-specific declarations should be discouraged, as they invite regression and uncertainty.

210. See, e.g., Human Rights Comm. Decision, *J.H. v. Canada*, Communication 187/85, U.N. GAOR, 40th Sess., Supp. No. 40, at 230, U.N. Doc. A/40/40 (1985) (declaring the communication inadmissible due to a lack of any indication that “the author [had] himself been adversely affected”), available at <http://wwwserver.law.wits.ac.za/humanrts/undocs/session40/187-1985.htm> (last visited on Aug. 22, 2004); Kertsen Rogge, *Examining the Merits of Human Rights Applications—The Legal Issues*, in PROTECTING HUMAN RIGHTS: THE EUROPEAN PERSPECTIVE 1215, 1217 (Paul Mahoney et al., eds., 2000) (noting that art. 34 of the European Convention states that “the individual applicant must be a ‘victim’ of the alleged violation”).

211. See American Convention, *supra* note 181, art. 44 (broad provision permitting “any person or group of persons, or any nongovernmental entity” to lodge petitions with the Inter-American Commission).

212. See OUGUERGOUZ, *supra* note 1, at 732.

contain any language regarding cases brought directly to the African Court. Accordingly, it should not be construed as restrictive of victims' access to the African Court.

Direct access is restricted to NGOs "with observer status before the Commission."<sup>213</sup> The African Commission has granted observer status to over 400 NGOs, both African and international.<sup>214</sup> Although most cases submitted to the African Commission have been submitted by NGOs enjoying observer status,<sup>215</sup> cases can also be brought in the name of an individual when the NGO does not have observer status.<sup>216</sup>

Article 5(3) provides that the African Court "may entitle" individuals to submit cases directly before it so long as the state party has made an Article 34(6) declaration.<sup>217</sup> This phrase should not be read to give the African Court additional discretion to refuse hearing a case. Granting the African Court a discretionary power of refusal would be unduly burdensome on individuals because they would be required to jump two procedural hurdles: the state's acceptance of the optional Article 34(6) mechanism and the African Court's discretionary approval. This discretionary language is rooted in the drafting history of the Protocol and was introduced when direct access was at the African Court's discretion.<sup>218</sup> However, since direct

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213. Protocol to the African Charter, *supra* note 1, art. 5(3).

214. See African Commission, Directory of NGOs with Observer Status, [www.achpr.org/english/\\_info/directory\\_ngo\\_en.html](http://www.achpr.org/english/_info/directory_ngo_en.html) (last visited Aug. 31, 2004).

215. NGOs enjoying observer status that have submitted communications in their own name include Amnesty International, Civil Liberties Organisation (Nigeria), Constitutional Rights Project (Nigeria), International Pen and the Union Interafricaine des Droits de l'Homme. NGOs without observer status, including Centre for Independence of Judges and Lawyers, the Comité Culturel pour la Démocratie au Bénin and the Malawi African Association, have also submitted communications. *See id*; OUGUERGOUZ, *supra* note 1, app. 7, at 907–17.

216. Protocol to the African Charter, *supra* note 1, art. 5(3).

217. *Id.*

218. *See* Draft Additional Protocol to the African Charter on Human and Peoples' Rights, ICJ Draft Additional Protocol, AU Res. 230 (XXX), art. 20(1) (Jan. 28, 1994) [hereinafter ICJ Draft Additional Protocol], [http://www.chr.up.ac.za/centre\\_publications/hrla/references/DOCUMENTS%20LEADING%20UP%20TO%20THE%20ESTABLISHMENT%20OF%20THE%20AFRICAN%20COURT%20p.170.doc](http://www.chr.up.ac.za/centre_publications/hrla/references/DOCUMENTS%20LEADING%20UP%20TO%20THE%20ESTABLISHMENT%20OF%20THE%20AFRICAN%20COURT%20p.170.doc); Cape Town Draft Protocol, *supra* note 47, art. 6(1); Nouakchott Draft Protocol, *supra* note 49, art. 6(1).

access became subject to an optional state declaration, the drafters' failure to remove the language appears to be a mere oversight. Therefore, the provision should be interpreted to place authorization for direct access "within the sole domain" of state parties.<sup>219</sup>

The Protocol also restricts the competence of groups to bring cases.<sup>220</sup> This seems counterintuitive, in the light of the peoples' concept inherent in the Charter. If the rights of individuals and peoples are the golden threads running through the Charter, the standing requirements must reflect that. As this is excluded, this aspect should be clarified in the Rules of the Court.

### *B. Role of Individuals Before the Court*

The African Commission's Rules of Procedure require that respondent states and complainants submit written information and observations on the admissibility and merits of the case,<sup>221</sup> which allows the African Commission to consider the complainants' arguments when making decisions.<sup>222</sup> Additionally, despite the lack of any substantive provision within the Charter, the African Commission generally allows individuals or NGOs to be present at hearings or be represented during its consideration of communications lodged by those individuals or NGOs.<sup>223</sup> However, no provision has been made for legal aid or for the awarding of costs in either the Charter or the Commission's Rules of Procedure.

Individuals who bring a case directly before the African Court are entitled, as a "party to a case," to be represented by a legal representative of their choice.<sup>224</sup> But what about individuals who have lodged communications with the African Commission and whose cases are then submitted to the African Court, either by the Commission or the state? Under these circumstances, the individual remains "a party" to the case; the African Com-

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219. OUGUERGOUZ, *supra* note 1, at 724.

220. *Id.* at 714–24 (discussing the jurisdiction of the African Court).

221. Rules of Procedure, *supra* note 25, R. 119 (stating the Commission's procedures for consideration of a communication).

222. Murray, *Evidence and Fact-finding*, *supra* note 160, at 102–03 (noting that the Commission has relied primarily on written documents in making decisions).

223. *Id.* at 104–06.

224. Protocol to the African Charter, *supra* note 1, art. 10(2).

mission does not become a party to the case merely by submitting the case to the African Court, but, instead, initiates proceedings between the given parties before the Court. In the dual European system, the European Commission's function was primarily to clarify and justify its own opinion and to ensure that all relevant information was placed before the European Court.<sup>225</sup> The contention that the individual remains a party seems logical in light of the fact that state parties may refer cases to the African Court. It would be anomalous to accept that the individual loses its status as a party; it would mean that only states may be parties. It follows that individuals, as parties to the case, are also "entitled to be represented by a legal representative" of their choice when cases involving them are submitted to the African Court by either a state or the African Commission.<sup>226</sup>

This interpretation corresponds with developments under the two other major human rights systems. Initially, neither the European nor the Inter-American systems allowed individuals to be present, nor be represented, or make representations to their courts.<sup>227</sup> Gradually, though, the individual's role grew and both systems allowed individuals the right to be present and represented. Thus, individuals could make submissions directly to the courts in both systems.<sup>228</sup> In all but name, individuals were parties to the case.

Originally, the European Convention did not create a role for complainants in the process before the European Court.<sup>229</sup> Gradually, however, the European Commission, on a discretionary basis, allowed individual complainants to be present as assistants to its lawyers.<sup>230</sup> In its very first case, the European

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225. See CLEMENTS, *supra* note 201, at 75.

226. Protocol to the African Charter, *supra* note 1, art. 10(2).

227. See American Convention, *supra* note 181, art. 57; Statute of the Inter-American Court, *supra* note 155, art. 28.

228. PASQUALUCCI, *supra* note 97, at 20–21.

229. Under Rule 1 of the original Rules of the European Court, the complainant was not regarded as a "party" to the proceedings before the Court. See CLEMENTS, *supra* note 201, at 75 (noting that the applicant's status is much improved under the current Rules).

230. Rule 33(3)(d) in the 1992 Rules of the European Court required the European Court to ask applicants if they wished to participate in the proceedings, and, if so, to provide the particulars of their legal representatives. Under Rule 30(1) (also part of the 1992 Rules), applicants could be represented

Court held that it should be informed of the applicant's views.<sup>231</sup> In a decision ten years later, the European Court held that the applicant's lawyer could act as assistant to the European Commission's delegates, but would "always [be] subject to the control and responsibility of the Delegates."<sup>232</sup> When the amended Rules of Court became effective in 1983, the European Commission became legally obligated to inform applicants of their rights and invite them to be represented at hearings.<sup>233</sup>

In the Inter-American system, a similar pragmatic approach was adopted. The complainant's lawyer was allowed to be part of the Inter-American Commission's legal team, and could "present the petitioner's argument in that capacity, though only under the control of the Commission."<sup>234</sup> However, serving as an "assistant" on the Inter-American Commission's team was not ideal, as the interests and approach of the Inter-American Commission "as guardian of the Convention assisting the Court" and those of the complainant did not always coincide.<sup>235</sup> Consequently, the Rules of Court for the Inter-American Court were amended in 1996 to allow the victims' representatives to

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by appropriately qualified legal practitioners. See CLEMENTS, *supra* note 201, at 75.

231. *Lawless v. Ireland*, 1 Eur. Ct. H.R. (ser. A) at 16 (1960). Neither the applicant nor his representative appeared—the Commission's delegate presented these views as part of his oral submission at the Court's hearing. See Paul Mahoney, *Developments in the Procedure of the European Court of Human Rights: The Revised Rules of Court*, in 3 YEARBOOK OF EUROPEAN LAW 127, 129–30 (F. G. Jacobs ed., 1983).

232. *De Wilde, Ooms, & Versyp v. Belgium*, 12 Eur. Ct. H.R. (ser. A) at 8 (1970).

233. Rules of the European Court of Human Rights, R. 30(1) & 33(3)(d) (*entered into force* Apr. 20, 1992) (pre-Protocol No. 11) [hereinafter 1992 Rules of European Court], reprinted in CLEMENTS, *supra* note 201, at 271–74.

234. David J. Harris, *Regional Protection of Human Rights: The Inter-American Achievement*, in THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 1, 25 (David J. Harris & Stephen Livingstone eds., 1998) (stating that the Commission may "hide a petitioner's lawyer under its skirts"). Padilla, *supra* note 139, at 192 (By designating victims or NGOs as "legal advisors," the Inter-American Court essentially "permits the victim a place at the table alongside" the Commission and "allows the victim to actively participate in the litigation of the case.").

235. Antônio Augusto Cançado Trindade, *The Inter-American Human Rights System at the Dawn of the New Century: Recommendations for Improvement of its Mechanisms of Protection*, in THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 395, 415 (David J. Harris & Stephen Livingstone eds., 1998).

present autonomous arguments “at the stage of reparations.”<sup>236</sup> The 1996 amendments created a strange situation: a complainant could lodge a case before the Inter-American Commission, that is, be in complete control at the *beginning* of the case and could make presentations at the reparations phase before the Inter-American Court at the *end* of the case, but did not have autonomous standing *during* the proceedings.<sup>237</sup> Subsequent amendments to the Rules in 2001, however, provided for complainant participation in all stages of the proceeding before the Inter-American Court.<sup>238</sup>

The importance of the presence and participation of the individual, perhaps, boils down to the function of, and faith in, the African Commission. Sir Humphrey Waldock has suggested that the role of the African Commission in litigation before the African Court is “not litigious: it is ministerial.”<sup>239</sup> The African Commission’s responsibility is to place the relevant elements of the case before the African Court, not to defend the individual’s case. This role should be juxtaposed with that of individuals and their representatives. Rejecting an early challenge to an individual’s presence at a hearing, the European Court said that the European Commission, in its role as “defender of the public interest,” must “make known the Applicant’s views to the Court as a means of throwing light on the points at issue ... even if it does not share them.”<sup>240</sup> Because “the whole of the proceedings before the Court are upon issues which concern the Applicant,” the Court held that it is “in the interests of the proper administration of justice that the Court should have knowledge” of the individual’s contentions.<sup>241</sup> Therefore, in order to ensure a “genuine hearing of both sides in contention,”<sup>242</sup> the African Court should interpret the Protocol to allow indi-

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236. See PASQUALUCCI, *supra* note 97, at 20 (explaining that in the Inter-American system, under the 1996 Rules of the Court, art. 23, victims were allowed representation at the reparations stage of proceedings).

237. See *Trinidad*, *supra* note 235, at 416.

238. See PASQUALUCCI, *supra* note 97, at 20 (Inter-American Court amended the definition of “parties to the case” to include the “victim or the alleged victim, the State, and, only procedurally, the Commission”).

239. See MARK W. JANIS, ET AL., EUROPEAN HUMAN RIGHTS LAW 67 (1995) (viewpoint of Sir Humphrey Waldock).

240. *Lawless*, 1 Eur. Ct. H.R. at 16.

241. *Id.* at 15.

242. *Mahoney*, *supra* note 231, at 131.

viduals to be represented in all hearings before it. The role of the African Commission, then, more clearly becomes that of guardian of the public interest.

#### IV. THE BROADER LEGAL CONTEXT

##### A. *Subject Matter Jurisdiction in Contentious Cases*

Article 3 provides that the African Court's jurisdiction extends to the Charter, the Protocol and "other relevant human rights instruments ratified by the states concerned."<sup>243</sup> While the first two legal bases (the Charter and the Protocol) are not surprising, the third certainly is. At first glance, this provision seems to enlarge the subject matter of the African Court in contentious cases to include all other human rights instruments.<sup>244</sup> The use of qualifiers such as "relevant," "ratified," "human rights" and "by the state concerned," however, may actually serve to limit the Court's subject matter jurisdiction.<sup>245</sup>

The most important qualifier is "ratified," which implies that the instruments referred to must be treaties, not merely declarations or other non-binding legal texts or instruments. African human rights treaties, such as the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention),<sup>246</sup> the 1990 African Charter on the Rights and Welfare of the Child (African Children's Committee)<sup>247</sup> and the 2003 Protocol to the African Charter on the Rights of Women in Africa, should be considered first.<sup>248</sup> Indeed, the Nouakchott Draft Protocol restricted the term "other treaties" to exactly this group by including the word "African" before

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243. Protocol to the African Charter, *supra* note 1, art. 3(1).

244. The Protocol does not restrict the term "other relevant human rights instruments" in art. 3 to certain geographical regions or to certain institutional frameworks (e.g., the OAU/AU). *See id.*

245. *Id.*

246. OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, CAB/LEG/24.3 (*entered into force* June 20, 1974), *reprinted in* HUMAN RIGHTS LAW 1997, *supra* note 25, at 34 [hereinafter OAU Refugee Convention].

247. African Charter on the Rights and Welfare of the Child, July 1990, CAB/LEG/153/Rev 2 [hereinafter African Children's Committee], *reprinted in* HUMAN RIGHTS LAW 1997, *supra* note 25, at 38.

248. *See* Protocol to the African Charter, *supra* note 1, art. 29(1).

“human rights instrument.”<sup>249</sup> The OAU/AU’s inclusion in the African Court’s jurisdictional scope seems logical considering the problematic dispute resolution mechanisms inherent in many of these treaties. For example, the OAU Refugee Convention’s lack of a dispute settlement mechanism has always been one of its weaknesses.<sup>250</sup> Moreover, because the African Children’s Committee’s mandate is so similar to that of the African Commission,<sup>251</sup> and suffers from the same institutional and functional weaknesses, it seems only logical to supplement and reinforce its protective mandate by introducing the African Court as a judicial body with competence over its provisions. African human rights instruments such as the 1976 Algiers Universal Declaration on the Rights of Peoples,<sup>252</sup> the Kampala Declaration on Prison Conditions in Africa,<sup>253</sup> and the numerous resolutions of the African Commission are excluded from serving as a basis for a contentious case because of their non-binding nature.

Reliance is further restricted to “human rights” treaties. Some treaties adopted under OAU auspices have a significant bearing on human rights, but are not human rights instruments in the narrow sense of that phrase. In one of its advisory opinions, the Inter-American Court distinguished “modern human rights treaties,” the objectives of which are “the protection of the basic rights of individual beings irrespective of their nationality,” from “multilateral treaties of the traditional type” that are “concluded to accomplish the reciprocal exchange of

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249. Nouakchott Draft Protocol, *supra* note 49, at 259, art. 3(1).

250. See generally George Okoth-Obbo, *Thirty Years On: A Legal Review of the 1996 OAU Refugee Convention*, 8 AFR. Y.B. INT’L L. 3 (2000) (discussing the OAU Refugee Convention); Robin Ramcharan, *The African Refugee Crisis*, 8 AFR. Y.B. INT’L L. 119 (2000) (arguing that refugee rights offenses should be re-conceptualized as human rights violations and that the African human rights machinery should be improved to deal with such cases).

251. Like the African Commission, the African Children’s Committee has a broad promotional mandate, including the competence to examine state reports, and to consider inter-state and individual communications. African Children’s Committee, *supra* note 247, at 45–46, arts. 42, 43 & 44.

252. Universal Declaration of the Rights of Peoples, Algiers, July 4, 1976, *reprinted in* HUMAN RIGHTS LAW, *supra* note 1, at 782.

253. Kampala Declaration on Prison Conditions in Africa, Res. 36, U.N. ESCOR, 36<sup>th</sup> mtg., annex (1997), <http://www.un.org/documents/ecosoc/res/1997/eres1997-36.htm>, *reprinted in* HUMAN RIGHTS LAW, *supra* note 1, at 822.

rights for the mutual benefit of the contracting State.”<sup>254</sup> The main dividing line is that states assume obligations “towards all individuals within their jurisdiction” when they ratify human rights treaties, and not merely “in relation to other States.”<sup>255</sup> Thus, AU treaties such as the 1968 African Convention on the Conservation of Nature and Natural Resources<sup>256</sup> and the 1977 Convention for the Elimination of Mercenarism in Africa<sup>257</sup> are not included in the African Court’s jurisdiction under Article 3. Although these treaties place obligations upon states that have important human rights implications, they do not provide for human rights in the sense of direct entitlements or subjective rights available to individuals.<sup>258</sup> Likewise, the AU Constitutive Act, the treaty establishing the African Economic Community (AEC Treaty) and regional economic treaties such as the Economic Community of West African States Treaty (ECOWAS Treaty) do not qualify as “human rights” treaties, despite making adherence to the African Charter part of their aims and objectives.<sup>259</sup> The principal goal of these treaties is economic and

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254. Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75), Advisory Opinion OC-2/82, Inter-Am Ct. H.R. (ser. A) No. 2, para. 29 (Sept. 24, 1982), [http://www1.umn.edu/humanrts/iachr/b\\_11\\_4b.htm](http://www1.umn.edu/humanrts/iachr/b_11_4b.htm).

255. *Id.*

256. African Convention on the Conservation of Nature and Natural Resources, Sept. 15, 1968, CAB/LEG/24.1 [hereinafter Convention on Nature], reprinted in HUMAN RIGHTS LAW, *supra* note 1, at 116.

257. OAU Convention for the Elimination of Mercenarism in Africa, July 3, 1977, CM/187 (XXIX) Annex II Rev. 1, <http://www.africa-union.org/home/welcome.htm>, reprinted in HUMAN RIGHTS LAW, *supra* note 1, at 116.

258. Although the purpose of the Convention on Nature is to ensure the conservation of natural resources such as soil and water, individuals do not have standing under the Convention to “enforce” these policies. Convention on Nature, *supra* note 256, arts. 4, 5.

259. See generally Evarist Baimu, *The African Union: Hope for Better Protection of Human Rights in Africa?* 1 AFR. HUM. RTS. L.J. 299 (2001) (discussing the AU); Frans Viljoen, *The Realization of Human Rights in Africa through Sub-Regional Institutions*, 7 AFR. Y.B. INT'L L. 185 (1999). See also Treaty Establishing the African Economic Community, June 3, 1991, art. 3(g), 30 I.L.M. 1241, 1253 (on economic groupings) [hereinafter Treaty Establishing AEC]; Treaty Establishing Common Market for Eastern and Southern Africa, Nov. 5, 1993, art. 6(e), 33 I.L.M. 1067, 1076 [hereinafter Treaty Establishing Common Market]; Economic Community of West African States: Revised Treaty, July 24, 1993, art. 4(g), 35 I.L.M. 660, 668 [hereinafter Economic Community of West African States].

political integration.<sup>260</sup> Although all of these organizations consider human rights in the formulation and application of their policies,<sup>261</sup> this fact alone cannot transform them into human rights organizations or their founding treaties into human rights instruments. This conclusion is supported by the fact that judicial institutions have already been or are being established to settle disputes arising from these treaties.<sup>262</sup>

Because African states do not qualify as state parties to other regional human rights treaties,<sup>263</sup> the omission of “African” implies that the Court can adjudicate matters arising under UN human rights treaties to which AU members, who are also UN members, are parties. The phrase “by the States concerned” implies that an individual communication may be directed to the African Court on the basis of a UN human rights treaty if the respondent state has ratified it.<sup>264</sup> The problems arising from this expansion in jurisdictional scope are legion. For example, it would mean that a communication under the ICCPR could be submitted to either the HRC or the African Court. This may lead to divergence in jurisprudence and to forum-shopping where quasi-judicial and judicial institutions are compared and played off against one another.<sup>265</sup> As Österdahl notes, it “may be a delicate matter for the African Court to apply an international convention to which non-African states are also parties, and to render judgments on how the Convention should

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260. See, e.g., Treaty Establishing AEC, *supra* note 259, at 1253, art. 3(g); Treaty Establishing Common Market, *supra* note 259, at 1067, art. 6(e); Economic Community of West African States, *supra* note 259, at 668, art. 4(g).

261. See Treaty Establishing AEC, *supra* note 259, at 1253, arts. 4(1)(a), 6; Economic Community of West African States, *supra* note 259, at 668, arts. 3(1), 3(2)a–o.

262. For example, the AU Assembly adopted the Protocol to the African Charter, thus creating the African Court. See Protocol to the African Charter, *supra* note 1.

263. Membership in the Council of Europe or the Organization of American States (OAS) is a prerequisite for becoming a state party to either the European Convention or American Convention. European Convention, *supra* note 17, art. 66(1); American Convention, *supra* note 181, art. 74(1).

264. See Christof Heyns, *The African Regional Human Rights System: In Need of Reform?*, 1 AFR. HUM. RTS. L.J. 155, 166–67 (2001) (noting that this interpretation might inhibit states from ratifying the Protocol and UN treaties as a result).

265. See Charney, *supra* note 45, at 699, 706.

be interpreted on a particular point.<sup>266</sup> Even more strikingly, a state that had not accepted the optional individual complaints procedures under Article 34(6) may find that the African Court usurps jurisdiction against it under Article 3.<sup>267</sup> Additionally, this interpretation would allow individuals to submit cases on the basis of UN treaties, such as the Covenant on Economic, Social and Cultural Rights, which ordinarily prohibit the submission of individual communications.<sup>268</sup> A solution is to interpret "States concerned" as all state parties to the Protocol, not only the state against which the complaint is brought. Such a reading would at least restrict the African Court's jurisdiction in contentious cases to UN treaties ratified by all state parties to the Protocol.<sup>269</sup>

But the problems raised may remain illusory, at least for the time being. Nineteen states have ratified the Charter so far and only one has made an Article 34(6) declaration.<sup>270</sup> Because direct access to the Court by individuals is restricted to states

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266. Inger Österdahl, *The Jurisdiction Ratione Materiae of the African Court of Human and People's Rights: A Comparative Critique*, 7 REV. AFR. COMMISSION ON HUM. & PEOPLES RTS. 132 (1998).

267. For example, Lesotho is a state party to the African Charter and the Convention Against Torture (CAT). It has ratified the Protocol, but has not made the optional declaration under CAT allowing individuals to submit communications to the CAT Committee. Therefore, an individual may submit a contentious case to the African Court under the Protocol, alleging a violation by the Lesotho government, even though that individual could not submit a communication to the CAT Committee. Compare Protocol to the African Charter, *supra* note 1, art. 3, and Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, U.N. GAOR, 39<sup>th</sup> Sess., 93d mtg. art. 21(1984), <http://www.un.org/documents/ga/res/39/a39r046.htm>.

268. See, e.g., MATTHEW CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS 98 (1998) (discussing the omission of a petitions procedure in the Covenant). The process of adopting an Optional Protocol to the Covenant, providing for the right of petition, is ongoing. See U.N. Commission on Human Rights, Mar. 14, 2004, UN Doc. E/CN.4/2004/44 (most recent report of the open-ended working group investigating this issue), <http://ods-dds-gva.unog.ch/doc/UNDOC/GEN/G04/120/29/PDF/G0412029.pdf?OpenElement>).

269. This interpretation does not entirely solve the problem. For example, the Convention on the Rights of the Child has been ratified by all the state parties to the Protocol, and, thus, could potentially be interpreted by the African Court.

270. See *List of Countries Which Have Signed, Ratified/Acceded to the Protocol*, *supra* note 56.

making an optional declaration, the extended jurisdiction of Article 3 applies only to those states.<sup>271</sup> Otherwise, cases must first be presented to the Commission using its normative legal framework, which is the African Charter; only violations of the African Charter may be brought before the African Commission.<sup>272</sup> Moreover, even if those cases are referred to the Court (either before, during or after the Commission's consideration), it is questionable whether the African Commission's referral should be restricted to the legal basis of its findings.<sup>273</sup> In my opinion, referral does not extend the initial legal basis under which the case was submitted. The extended jurisdictional basis, with its concomitant problems, will only arise in a relatively small percentage of cases.<sup>274</sup> Individuals bringing cases directly before the African Court should have a much wider array of substantive rights to invoke than they had under the Charter.<sup>275</sup>

### *B. Legal Aid*

Although the Protocol provides that parties may be represented by lawyers of their choice,<sup>276</sup> this "choice" may not be available to all individuals and NGOs if they lack the financial resources to retain their own lawyer. Although the Protocol adds that free legal representation "may be provided where the interests of justice so require,"<sup>277</sup> the use of passive voice, which

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271. See Protocol to the African Charter, *supra* note 1, art. 3.

272. African Charter, *supra* note 1, art. 56(2). *But see* Media Rights Agenda v. Nigeria, Communication 224/98, 14<sup>th</sup> Ann. Activity Report, *supra* note 76, at 57 (Commission found Nigeria in violation of numerous Charter provisions and "Principle 5 of the UN basic Principles on the Independence of the Judiciary").

273. See Protocol to the African Charter, *supra* note 1, arts. 6(1), 6(3), 8.

274. See, e.g., Österdahl, *supra* note 266, at 137 (drawing the distinction between arts. 60 and 61 of the Protocol, which entitle the Commission to draw inspiration, and art. 3, which provides a legal basis for application).

275. Unfortunately, the *travaux préparatoires* of the Protocol do not provide an explanation for the African Court's expansive jurisdiction, leaving one to speculate that it may have been influenced by a misreading of Articles 60 and 61 of the African Charter. The Protocol's drafters also may have been influenced by the notion that all possible means should be brought to bear on states to ensure that their human rights obligations are observed.

276. See Protocol to the African Charter, *supra* note 1, art. 10(2) (stating that "[a]ny party to a case shall be entitled to be represented by a legal representative of the party's choice").

277. *Id.*

identifies neither the subject or the object of such legal aid, seems deliberate and implies that it may not be available to all parties. Because legal aid must contend for the African Court's limited resources, either a special fund should be established to provide legal aid or states should assume responsibility for providing it. Neither possibility is prohibited by the Protocol, and the African Court itself should administer this as a regular part of its budget. The cost may not be great, as the text does not suggest that free representation should extend to local remedies, yet, many potential litigants will fail solely for lack of funds.<sup>278</sup> What role should the inability to exhaust local remedies, due to financial constraints, play in the African Court's decision on admissibility, especially in a case of direct access?<sup>279</sup> Bringing a case before the African Court is bound to be an expensive exercise, as it would include the cost of a senior lawyer and travel expenses.<sup>280</sup>

A passive interpretation of the Protocol leaves open the possibility that states may also benefit from legal aid. This should be applied only in exceptional circumstances, as states normally have their own legal staffs. Other factors to consider when awarding legal aid include at which stage of the proceedings application should be made and whether it should be made to judges or the Registrar. Additionally, since individuals should not be expected to pay costs incurred by governments, the African Court must decide whether to award costs.<sup>281</sup> These aspects

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278. See, e.g., C. F. AMERASINGHE, LOCAL REMEDIES IN INTERNATIONAL LAW 327–32 (2004).

279. See Exceptions to the Exhaustion of Domestic Remedies (Art. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights), Advisory Opinion OC–11/90, Inter–Am. Ct. H.R. (ser. A) No. 11, para. 31 (Aug. 10, 1990) (finding that indigents need not “exhaust the relevant domestic remedies” before appealing directing to the Inter–American Commission when a right granted under the American Convention is involved).

280. The practice in most international tribunals, including the African Commission, is that complainants are represented by lawyers. This would, in the absence of legal aid, impose significant financial burdens on complainants.

281. See, e.g., Murray, *Comparison Between the African and European Courts*, *supra* note 5, at 214.

need to be clarified in the Rules of Procedure or in an addendum thereto, as in the case of the European Court.<sup>282</sup>

### C. *Amici Curiae*

Scholar Abdelsalam Mohamed has highlighted the role of *amicus curiae* briefs in the European and Inter-American Courts.<sup>283</sup> In the Inter-American system, the competence of the Inter-American Court to hear any person whose evidence, statement or opinion it deems to be useful serves as the legal basis for allowing such briefs.<sup>284</sup> In the era before Protocol No. 11, the European Court permitted third-party participation in proceedings based on a similarly-worded provision in its Rules of Court.<sup>285</sup> As a result, NGOs with particular expertise, such as Amnesty International, Article 19 and America Watch, and academics or academic institutions that focus on the issues before courts have assisted these two Courts.<sup>286</sup> Mohamed argues that the Nouakchott Draft Protocol supports an inference that the extension of this possibility to the African Court should be adopted.<sup>287</sup> The Nouakchott Draft Protocol differs from the adopted text in an important respect in that the Protocol does not include the phrase “and other representations.”<sup>288</sup> This seems to suggest a restriction on evidence. It is still debatable

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282. Legal aid under the European system has been described as “very limited and means-tested at state level.” Murray, *Comparison Between the African and European Courts*, *supra* note 5, at 214–15.

283. Abdelsalam A. Mohamed, *Individual and NGO Participation in Human Rights Litigation Before the African Court of Human and Peoples’ Rights: Lessons From the European and Inter-American Courts of Human Rights*, 8 MICH. ST.–DCL J. INT’L L. 377 (1999).

284. Inter-American Court Rules of Procedure, *supra* note 166, art 45(1).

285. 1992 Rules of European Court, *supra* note 233, at 277, R. 41(1). See also Anthony Lester, *Amici Curiae: Third Party Interventions before the European Court of Human Rights*, in PROTECTING HUMAN RIGHTS: THE EUROPEAN DIMENSION 341 (Franz Matscher & Herbert Petzold eds., 1988).

286. See, e.g., Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 AM. J. INT’L L. 611, 634–37 (1994).

287. See Mohamed, *supra* note 283, at 379–80 (basing his inference on language in the Nouakchott Draft Protocol).

288. Compare Nouakchott Draft Protocol, *supra* note 49, art. 25(2) (stating that the Court “may receive written and oral evidence and other representations”), and Protocol to the African Charter, *supra* note 1, art. 26(2) (similar provision, but Protocol lacks the phrase “other representation”).

whether the distinction between evidence and testimony is significant, which leaves the door open for the Rules to include *amicus curiae* briefs as part of the term “testimony.”<sup>289</sup>

The most persuasive rationale for third-party arguments is that they may assist the African Court by providing it with comprehensive legal arguments.<sup>290</sup> A court with relatively meager resources should embrace opportunities to hear supplementary arguments. However, such “friends of the Court” should refrain from stifling the voices of the parties, and hearing them should not become overly burdensome. Therefore, the African Court should first receive and peruse arguments made by parties, and then decide if third-party briefs make valuable contributions. The African Court may also decide to consider such arguments only in written form.

#### *D. Advisory Opinions: Role for NGOs*

Even if an advisory opinion is not binding on the party requesting it, it may have profound persuasive force and international repercussions.<sup>291</sup> Advisory opinions have been used extensively and effectively in the Inter-American system.<sup>292</sup> During its fledgling years, the Inter-American Court dealt with more advisory than contentious cases, primarily because the Inter-American Commission and respondent states were reluctant to submit contentious cases to the Inter-American Court.<sup>293</sup> Former Inter-American Court Judge Thomas Buergenthal claims that this development was fortunate because it provided the Inter-American Court with a chance to consolidate itself, as

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289. Evidence is defined as “something that tends to prove; ground for belief,” while testimony is defined as “a declaration or statement made under oath or affirmation by a witness in a court, often in response to questioning, to establish a fact.” WEBSTER’S NEW WORLD COLLEGE DICTIONARY 493, 1480 (4<sup>th</sup> ed. 1999).

290. Mohamed, *supra* note 283, at 382–83.

291. Jo M. Pasqualucci, *Advisory Practice of the Inter-American Court of Human Rights: Contributing to the Evolution of International Human Rights Law*, 38 STAN. J. INT’L L. 241, 242 (2002).

292. PASQUALUCCI, *supra* note 97, at 80.

293. See David Harris, *Regional Protection of Human Rights: The Inter-American Achievement*, in THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 1, 23 (David J. Harris & Stephen Livingstone eds., 1998) (noting the reluctance of the Commission to make referrals and the small number of states accepting the African Court’s optional jurisdiction).

governments in “fragile emerging democracies” found it “easier to give effect to an advisory opinion than to comply with a contentious decision in a case they lost.”<sup>294</sup> The situation faced by the Inter-American Court is clearly analogous to Africa, where democracy is still seeking a strong foothold.<sup>295</sup>

Three entities may request advisory opinions and claim standing before the African Court: states, the AU and its organs, and a broader and undefined group called “African organisations.”<sup>296</sup> As in the Inter-American system, state parties may make such requests;<sup>297</sup> most of the Inter-American Court’s advisory opinions were given at the request of state parties. States requesting an advisory opinion from the African Court need not have ratified the Protocol, therefore, this aspect of the African Court’s jurisdiction is open to non-state parties.<sup>298</sup>

The AU and any of its organs may also request advisory opinions.<sup>299</sup> Such requests could be duplicative, however, as the African Court of Justice, once formed, is to have jurisdiction over the interpretation and application of the AU Constitutive Act;<sup>300</sup> the African Court of Justice will also have advisory jurisdiction.<sup>301</sup> Reading the two protocols together, it would seem that the AU should refer matters with a human rights focus to the African Court of Human Rights. Although allowing the AU and

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294. Thomas Buergenthal, *The European and Inter-American Human Rights Courts: Beneficial Interaction*, in PROTECTING HUMAN RIGHTS: THE EUROPEAN PERSPECTIVE 123, 131 (Paul Mahoney et al. eds., 2000).

295. See Österdahl, *supra* note 266, at 141 (noting that the “softer, less obliging channel of advisory opinions” may be more applicable outside a “well-functioning democratic environment characterised by the rule of law”).

296. Protocol to the African Charter, *supra* note 1, art. 4(1).

297. *Id.* See also American Convention, *supra* note 181, art. 64 (stating that a member state may request an advisory “opinion regarding the compatibility of any of its domestic laws with ... international instruments”).

298. See Protocol to the African Charter, *supra* note 1, arts. 3, 5 (states must be parties to the African Charter).

299. *Id.* art. 4(1).

300. AU Constitutive Act, *supra* note 89, art. 26. See Udombana, *Toward the African Court*, *supra* note 1, at 78.

301. Protocol of the Court of Justice, *supra* note 207, art. 44(1) (provides that AU organs, as well as a “Regional Economic Community” may request advisory opinions “on any legal question”). See also *id.* art. 20 (expansive formulation of Article 44(1) should be read with Article 20, which provides that the Court “shall have regard to” the broad category of “international treaties”).

other African intergovernmental organizations to request advisory opinions may seem problematic because they are not parties to the Protocol or the African Charter and, thus, cannot be held accountable for failure to comply with the Protocol's provisions,<sup>302</sup> the fact that they all subscribe to African Charter's standards and goals makes it less so. Therefore, the African Human Rights Court should be the judicial institution to advise about human rights matters related to policy development and formulation.

Any "African organisation recognised by the AU" may also request an advisory opinion from the African Human Rights Court.<sup>303</sup> In parts of the Protocol, the terms "African intergovernmental organisations" and "NGOs with observer status before the Commission" have been used.<sup>304</sup> Thus, the word "organisation" is a generic term, and encompasses both intergovernmental and non-governmental bodies. However, the organizations must be "African,"<sup>305</sup> an "African organisation" does not include NGOs enjoying observer status with the African Commission because members of that group need not be African. The organization must also be "recognised by the AU."<sup>306</sup> All African NGOs enjoying observer status with the African Commission should qualify as such; observer status should be regarded as a form of recognition by the AU. Regional economic arrangements such as ECOWAS and the Southern Africa Development Community (SADC), which are part of the AEC regional economic arrangements and building blocks of the AU, also qualify. Other African organizations should also be able to request advisory opinions, so long as their work is associated with the AU or AEC.

It is possible that NGOs requesting advisory opinions will try to use the procedure to bring disputes against states that have not accepted the African Court's contentious jurisdiction. States and AU organs may also attempt to abuse the African Court's advisory procedure by cloaking contentious cases as re-

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302. Protocol to the African Charter, *supra* note 1, art. 4(1) (provides that the OAU, any of its organs "or any African organization recognized by the OAU" may approach the Court with a request for an advisory opinion).

303. *Id.*

304. *Id.* arts. 5(1)(e), 5(3) (respectively).

305. *Id.* art. 4(1).

306. *Id.* art. 5(3).

quests for advisory opinions. The potential for abuse by NGOs should not be overstated, however, as the African Court's advisory opinions are only advisory and, thus, remain non-binding.<sup>307</sup>

Advisory opinions may be requested on a legal matter relating to the Charter or "any other relevant human rights instruments."<sup>308</sup> The subject matter jurisdiction for advisory opinions is broader than for contentious cases and includes questions concerning any human rights "instrument," those both non-binding and declaratory and those open to ratification and binding. Any conceivable human rights document may be invoked, as long as it is relevant. However, even though the African Court's advisory subject matter jurisdiction is much broader than its contentious jurisdiction, it is less controversial because of its non-binding nature.

## V. PROCEDURAL ISSUES

Other issues, such as the seat of the Court, the election of judges, the adoption of Rules of Procedure and the importance of resources, are likely to affect the success of individual cases before the African Court.

### A. *Seat of the Court*

The seat of the African Court is not specified in the Protocol. Determination of the seat is left to the AU Assembly once the Protocol enters into force.<sup>309</sup> The seat must be "from among State parties" to the Protocol.<sup>310</sup> The seat of the African Commission, Banjul, presented numerous problems for individuals, particularly because of its inaccessibility and the cost of transportation to reach it.<sup>311</sup> Inadequate infrastructure and lack of immediate access to the media and important role-players also cause difficulties.<sup>312</sup> Therefore, the problems arising from the choice of Banjul as the African Commission's seat should be avoided. The state in which the African Court is based should

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307. PASQUALUCCI, *supra* note 97, at 29.

308. Protocol to the African Charter, *supra* note 1, art. 4(1).

309. *Id.* art. 25.

310. *Id.* art. 25 (1).

311. ANKUMAH, *supra* note 5, at 186 (alluding to these factors).

312. *See generally* Danish Centre for Human Rights, *supra* note 80.

have: (1) political and economic stability; (2) a sustained record of democracy, good governance and domestic human rights protection; (3) a developed infrastructure, a travel hub and regular connections to international travel routes; (4) institutions of higher learning equipped and willing to support the Court and its Registry; (5) a good record of submitting state reports and other forms of cooperation (such as implementing recommendations) with the African Commission and UN treaty bodies; and (6) international media, diplomatic corps and international organizations. Ultimately, however, the decisive factor will be the state party's commitment to undertake the financial and political responsibilities of housing the African Court.

Other factors may also have to be considered. Symbolism may play a role; for example, inviting venues include Dakar (Ile Gôréé, emphasizing the post-colonial aspect), Cape Town (Robben Island, as a post-apartheid icon linked to the struggle against "foreign domination") and Kigali (in post-genocide Rwanda). Another factor is the distance between the seats of the African Commission and the African Court. The European model, when it still functioned with dual institutions, provided for a joint seat at Strasbourg.<sup>313</sup> In the Inter-American system, the seats of the Court and Commission are separated by vast distances—San José, Costa Rica, and Washington D.C.<sup>314</sup> The geographic separation of these two institutions may account, at least partly, for the initial lack of cooperation between the Inter-American Commission and Court. In any event, discussions concerning the African Court's location may prompt reconsideration of the Commission's location.

### *B. Election of Judges*

The African Court will consist of eleven judges elected for six-year terms.<sup>315</sup> Unlike the European system, not every state

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313. 1992 Rules of European Court, *supra* note 233, at 265, R. 15.

314. Statute of the Inter-American Court, *supra* note 155, art. 3.; Statute of the Inter-American Commission on Human Rights, Oct. 1979, O.A.S. Res. 447, 9<sup>th</sup> Sess., art. 16, <http://www.cidh.org/Basicos/basic15.htm>.

315. Protocol to the African Charter, *supra* note 1, art. 15. Judges may be re-elected once, and to ensure continuity only three judges of the initial group will serve a full six-year term. Four judges will serve only two years and four others will serve only four years. Judges are allocated terms in accordance

party will be represented on the African Court.<sup>316</sup> In fact, a judge may not hear cases involving his or her own state.<sup>317</sup> The elected judges choose their own President and Vice-President for a once-renewable term of two years.<sup>318</sup> As the only judge serving on a full-time basis and residing at the seat of the African Court,<sup>319</sup> the President is likely to play a very important role in the establishment and running of the African Court. The President will also work closely with the Registrar, whom the African Court appoints to this full-time position, and who also resides at the seat.<sup>320</sup>

The phases of nomination and election of judges should be clearly distinguished. Only state parties to the Protocol may nominate candidates.<sup>321</sup> When the Secretary General calls for nominations, each member state may nominate three individuals, two of whom must be nationals of that state.<sup>322</sup> Thus, they may also nominate candidates from AU member states that have not accepted the Protocol.<sup>323</sup> A list of these names is sent

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with lots drawn by the Chair of the AU commission (previously the OAU Secretary General). *Id.*

316. *See id.* art. 14(2); LCHR's Chart Showing Gender and Regional Balance in Elections to International Courts and Tribunals, at [www.humanrights-first.org/International\\_justice/icc/election/judges\\_gender\\_region\\_040303.pdf](http://www.humanrights-first.org/International_justice/icc/election/judges_gender_region_040303.pdf) (last visited Oct. 24, 2004).

317. Protocol to the African Charter, *supra* note 1, art. 22. The exclusion of judge-nationals from hearings also differs from the ICJ's appointment of ad hoc judges from states involved in disputes before it. *See* Statute of the International Court of Justice, June 26, 1945, art. 31, 59 Stat. 1031, 33 U.N.T.S. 993, <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm>. *See also* Krisch, *supra* note 1, at 717 (noting that the Protocol position improves the perception of impartiality and may "represent a reaction to the problems of the Commission in this respect"). The intended impartiality of the African Court's judiciary is underscored throughout the Protocol. *See* Protocol to the African Charter, *supra* note 1, art. 11(1) (judges are "elected in an individual capacity"); *id.* art. 16 (judges must take an oath to "discharge their duties impartially and faithfully").

318. Protocol to the African Charter, *supra* note 1, art. 21(1).

319. *Id.* art. 21(2).

320. *Id.* art. 24. Unlike the Protocol, the African Charter provides that the OAU Secretary General shall appoint the Secretary to the African Commission. The Commission's dissatisfaction with its inability to appoint or dismiss its Secretary may have influenced the Protocol's appointment provision for the African Court. *Compare id.*, and African Charter, *supra* note 1, art. 41.

321. Protocol to the African Charter, *supra* note 1, art. 12(1).

322. *Id.* arts. 12(1), 13(1).

323. *Id.* art. 12(1).

to the members of the Assembly thirty days before its next session.<sup>324</sup>

The Assembly, composed of fifty-three states, chooses the judges from those nominated.<sup>325</sup> This may seem inadvisable, but leaving the decision to the AU makes sense because any of the other states may become a state party during the general term of tenure, and should have some say in the composition of the African Court.<sup>326</sup> Furthermore, the African Court is an AU institution, and the AU takes political responsibility for its functioning and the enforcement of its judgments. The African Court and AU are intertwined in many ways: the African Court is dependent on the AU for its budget,<sup>327</sup> the AU Assembly has the final say over the removal of judges from office<sup>328</sup> and determines, and may change, the African Court's seat,<sup>329</sup> the Court reports annually to the Assembly, specifying instances of non-compliance,<sup>330</sup> and the monitoring judgments is the Assembly's responsibility.<sup>331</sup> Thus, the Assembly has a vested political and financial interest in and responsibility for the African Court. In any event, this methodology is also followed for the election of members to the African Commission.<sup>332</sup>

The election process is guided by the qualifications of the candidate and the need for a balanced judiciary.<sup>333</sup> Candidates must be AU nationals, not necessarily of state parties, must be "jurists" by profession, with specific and demonstrated human

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324. *Id.* art. 13(2). At its third ordinary session, the AU decided to hold sessions no longer annually, but twice a year. Assembly of the African Union, 3<sup>rd</sup> Ann. Sess., AU Doc.Assembly/AU/Dec.53 (III) (July 6–8, 2004).

325. Protocol to the African Charter, *supra* note 1, art. 14; *List of Countries Which Have Signed, Ratified / Acceded to the Protocol*, *supra* note 56.

326. In the Inter-American system, state parties to the American Convention nominate and elect judges. American Convention, *supra* note 181, art. 53. In Europe, before Protocol No. 11, the Council of Europe, its Court and Parliamentary Assembly respectively, nominated and elected judges (one judge per state). European Convention, *supra* note 17, art. 39(1).

327. Protocol to the African Charter, *supra* note 1, art. 32.

328. *Id.* art. 19(2).

329. *Id.* art. 25.

330. *Id.* art. 31.

331. *Id.* art. 29(2).

332. All fifty-three AU members have been state parties to the African Charter since 1999, so this distinction is no longer relevant. *List of Countries Which Have Signed, Ratified / Acceded to the Protocol*, *supra* note 56.

333. Protocol to the African Charter, *supra* note 1, arts. 11, 14.

rights expertise and experience (“competence and experience in the field of human rights”) and should be “of high moral character.”<sup>334</sup> Additionally, there must be “adequate gender representation” (not “equal,” which, in any event, is impossible in a court of eleven judges),<sup>335</sup> as well as representation of geographical areas and Africa’s “principal legal traditions.”<sup>336</sup> This addresses a recurring problem with the election of members to the African Commission as there was occasionally overrepresentation or non-representation of a region. The Protocol correctly links geographic concerns to varying legal traditions.<sup>337</sup> It would, for instance, not make sense to ensure proportional representation for the West African region by electing two judges from Anglophone/common law countries. While the regional representation requirement may be met if each of the five regions is “represented” by at least one judge on the African Court,<sup>338</sup> greater attention should be paid to insuring that each legal tradition is represented, such as the Islamic/Shari’ah-based system, the

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334. *Id.* art. 11(1).

335. *Id.* arts. 14(3), 12(2) (Article 12 requires that “due consideration” be given to “adequate gender representation.”). *See also* AU Constitutive Act, *supra* note 89, art. 4(1) (defining the promotion of gender equality as one of the AU’s principles). Women are underrepresented in international law, including international judicial bodies; at the beginning of 2003, only eleven of the forty-three judges on the European Court were women. *See* INTERRIGHTS, JUDICIAL INDEPENDENCE: LAW AND PRACTICE OF APPOINTMENTS TO THE EUROPEAN COURT OF HUMAN RIGHTS 32 (2003), at [http://www.nchr.gr/downloads/Judicial\\_Appointments\\_to\\_ECHR.pdf](http://www.nchr.gr/downloads/Judicial_Appointments_to_ECHR.pdf). There has never been more than one woman of the seven judges on the Inter-American Court. *See generally* Inter-American Court of Human Rights, at [http://www.corteidh.or.cr/general\\_ing/composition.html](http://www.corteidh.or.cr/general_ing/composition.html) (providing the names of both current and former judges). It appears that female participation in quasi-judicial bodies is more generally accepted; the African Commission has seen its female representation increase from zero out of eleven in 1993 to five out of eleven in 2003, including its President (Commissioner Sawadogo). *See generally* African Commission on Human and Peoples’ Rights, at [http://www.achpr.org/english/\\_info/members\\_en.html](http://www.achpr.org/english/_info/members_en.html). Two of the seven members of the Inter-American Commission were women at the beginning of 2003. *See generally* Inter-American Commission on Human Rights, at [www.cidh.org](http://www.cidh.org).

336. Protocol to the African Charter, *supra* note 1, art. 14(2).

337. *Id.*

338. The nineteen ratifying states cover all five regions—north (two), west (seven), east (three, including the island states of Comoros and Mauritius), central (five) and south (two). *See List of Countries Which Have Signed, Ratified/Acceded to the Protocol*, *supra* note 56.

common law system, the civil law system, and the particular brand of mixed "Roman-Dutch law" in Southern Africa.<sup>339</sup> The candidates' personal profiles should be such as to insure that expertise of traditional African customary law and tradition is also represented.<sup>340</sup>

Individuals have a role in the domestic nomination process and the AU's election process. NGOs and individuals in state parties should involve themselves by nominating competent persons internally or by challenging incompetent or inappropriate candidates at the domestic level. For this to be possible, AU member states should ensure that the domestic nomination process is transparent and that a free exchange of information is readily available. These efforts should extend to the election process, which should be supported by civil society in all AU member states. It is important that the process be as transparent as possible, with the *curriculum vitae* of a candidate subjected to public scrutiny. The Protocol provides that a judge's position is incompatible with "any activity that might interfere with the independence or impartiality" of judges.<sup>341</sup> Although the Rules of Procedure will prescribe what these activities are, efforts should be made to prevent the election of candidates who clearly elude these criteria.<sup>342</sup> Such vigilance is necessary because judges have the competence to draft Rules of Procedure<sup>343</sup> and, once elected, may do so to suit their personal ends.

### C. Adoption of Rules of Procedure

The African Court "shall draw up its Rules and determine its procedures."<sup>344</sup> As the discussion above makes clear, these rules

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339. See generally J.N.D. Anderson, *The Adaptation of Muslim Law in Sub-Saharan Africa*, in AFRICAN LAW: ADAPTATION AND DEVELOPMENT 149 (Hilda Kuper & Leo Kuper eds., 1965) (discussing Islamic/Shari'ah-based systems); 1-2 READINGS IN AFRICAN LAW (Eugene Cotran ed., 1970) (discussing common and civil law systems); Leslie Rubin, *The Adaptation of Customary Family Law in South Africa*, in AFRICAN LAW: ADAPTATION AND DEVELOPMENT 196 (Hilda Kuper & Leo Kuper eds., 1965) (discussing Roman-Dutch law).

340. See Protocol to the African Charter, *supra* note 1, art. 14(2).

341. See *id.* arts. 18, 8.

342. Some Commissioners served as ambassadors for their countries in other African states, inviting the perception that they exercise bias in their decision-making.

343. See Protocol to the African Charter, *supra* note 1, art. 33.

344. *Id.* art. 33.

may go a long way to strengthen or weaken the position of individuals before the African Court. As suggested by the Protocol,<sup>345</sup> the African Court should consult the African Commission on numerous issues. Such discussions, to be held soon after the inauguration of the judges, may result in amendments to the Commission's Rules of Procedure.<sup>346</sup>

The Commission's Rules of Procedure should clarify under which circumstances it may submit cases to the African Court. There are a number of possibilities. First, the Rules could provide for direct submission to the African Court, without consideration by the African Commission, under exceptional circumstances of immediate importance. Second, the Rules could allow the African Commission to submit a case after declaring it admissible and conducting fact-finding. If this possibility is accepted, the Commission's Rules of Procedure must incorporate a clear fact-finding procedure. However, room must be left for the African Court to deal with the factual issues. Third, the Rules could determine which factors to account for when the African Commission refers a matter to the African Court after making a finding on the merits or after having amicably resolved the matter. Obviously, the Court's Rules of Procedure must correspond with all these provisions and grant individuals a clear right to be represented before it, either personally or through counsel.

When parties before the African Court reach an amicable settlement, the African Court must scrutinize the agreement for its compliance with human rights, and must formally adopt it as a judgment in order to enable implementation or monitoring.<sup>347</sup> Such judgments serve not only the interests of individual

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345. *Id.* (providing that "[t]he Court shall consult the Commission as appropriate").

346. See Badawi Elsheikh, *supra* note 1, at 258.

347. See Protocol to the African Charter, *supra* note 1, art. 9. A literal interpretation of "in accordance with the provisions of the Charter" would restrict the Court's competence to deal with settlements because the African Charter only provides for settlement in communications between inter-state parties; it is silent on settlement negotiations involving individuals. African Charter, *supra* note 1, arts. 47-51. Another interpretation of that phrase is that the settlement in *any case* before the Court must be human-rights-friendly, or "in accordance with the (substance of the) provisions of the Charter." See Protocol to the African Charter, *supra* note 1, art. 9. See also Euro-

parties before the African Court, but also the general interest of human rights protection. The judgment should indicate the precise nature of action required by the state, such as the nature of legislative amendments or the amount of compensation, and should specify a time period within which action must be taken.<sup>348</sup>

The Commission's Rules of Procedure should be amended to allow submission to the African Court, enabling the African Court to take provisional measures in urgent cases that have not yet been submitted to it for consideration.<sup>349</sup> When a contentious case is pending before the African Court, individuals should be allowed to present a request for provisional measures directly to the African Court. They should also be allowed to present their views about state compliance.<sup>350</sup>

Third-party arguments (*amicus curiae* briefs) should be allowed, but only under suitable conditions.<sup>351</sup> An emphasis on written submissions may, for example, ensure that the African Court only hears from those who set out views or authorities not covered by the parties or the African Commission.

#### *D. Importance of Resources*

The African Court's establishment comes at a time of competing claims to limited resources.<sup>352</sup> To a large extent, the AU

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pean Court of Human Rights, Rules of Court, R. 44(2), 62(3), 38 I.L.M. 208, 226, 234 (1998) [hereinafter Rules of Court].

348. See, e.g., *Skoogström v. Sweden*, 83 Eur. Ct. H.R. (ser. A) at 11 (1984) (dissenting opinion).

349. See *supra* Part II.A (discussing interim measures).

350. See, e.g., Inter-American Court Rules of Procedure, *supra* note 166, art. 25(6) ("The beneficiaries of urgent measures or provisional measures ordered by the President may address their comments on the report made by the State directly to the Court. The Inter-American Commission of Human Rights shall present observations to the State's report and to the observations of the beneficiaries or their representatives.").

351. See, e.g., 1992 Rules of the European Court, *supra* note 233, R. 37(2) ("The President may ... invite or grant leave ... to any person concerned other than the applicant ... to submit written comments ... on issues which he shall specify.").

352. The AU's financial resources have remained constant, but claims on its resources have increased because of the entry into force of a number of legal instruments, e.g., the Protocol to the Treaty establishing the African Economic Community relating to the Pan-African Parliament, the Protocol Relating to the Peace and Security Council and the Protocol to the African Charter

Constitutive Act is only a framework document that allows for the adoption of detailed “Protocols” to establish institutional organs.<sup>353</sup> The Constitutive Act stipulates such action with respect to the Pan-African Parliament, the Court of Justice, the African Central Bank, the African Monetary Fund and the African Investment Bank.<sup>354</sup> The Economic, Social and Cultural Council’s functions and organization shall be determined “by the Assembly.”<sup>355</sup>

When the AU was launched in 2002, few of its institutional components had been set up.<sup>356</sup> At present, three institutions — the Peace and Security Council, the Pan-African Parliament and the African Human Rights Court — are in the process of being established.<sup>357</sup> All functional treaty bodies are developed through phases: negotiation, adoption, formal acceptance, entry into force, and operationalization. The fifth phase of operationalization is sometimes underplayed, but it is of determinative importance. Institutional mechanisms and procedures are only words on paper without the personnel, paper, printers, buildings and infrastructure to make them a reality. Meager allocations of resources undermine independence. Over the years, the OAU has suffered from problems of inadequate financing. Despite numerous pleas by the OAU/AU Assembly that the neces-

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on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights.

353. AU Constitutive Act, *supra* note 89, arts. 17(2), 18(2).

354. *Id.* arts. 17(2), 18(2), 19.

355. *Id.* art. 22(2).

356. Packer & Rukare, *supra* note 4, at 377.

357. See Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament, Mar. 2, 2001 (entered into force Dec. 14, 2003), <http://www.africa-union.org/home/Welcome.htm>. The AU Assembly designated South Africa as the country to host the Pan-African Parliament. Assembly of the African Union, Decision on The Launching and the Establishment of the Pan African Parliament, 3d Ord. Sess., AU Doc. Assembly/AU/Dec.39 (III) (July 2004). See also African Union, *List of Countries Which Have Signed, Ratified/Acceded to the Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament* (46 states have become parties to the Protocol), at <http://www.africa-union.org/home/Welcome.htm> (last visited Oct. 25, 2004). See also Protocol Relating to Peace and Security Council, *supra* note 63; African Union, *List of Countries Which Have Signed, Ratified/Acceded to the Protocol Relating to the Establishment of the Peace and Security Council of the African Union* (36 states have become parties), at <http://www.africa-union.org/home/Welcome.htm> (last visited Oct. 25, 2004).

sary resources should be allocated to the African Commission, funding for its activities is still lacking.<sup>358</sup> Whatever modalities of coexistence are worked out, the fact remains that the African Court's progress depends on a well-resourced and functional African Commission. It should be recalled that the African Children's Committee was also launched recently and has not yet been provided with a functional Secretariat. Where institutional proliferation meets financial need, there are bound to be casualties.

A preliminary report on the financial implications of the African Court already indicates that the Court will not have adequate resources to meet its needs.<sup>359</sup> The largest items are the projected salaries for the full-time President of the Court, the Registrar, a documents specialist, an accountant, two secretaries and two drivers/assistants.<sup>360</sup> It is by no means certain that a legal officer/researcher will be included in the budget. By the same estimate, only \$2,500 was budgeted for library books for the first year.<sup>361</sup>

## VI. CONCLUSION

The dawn of a new century has witnessed manifold institutional renewals at the regional level in Africa. These institutions, including the African Human Rights Court, should now be strengthened to ensure their growth, taking into account that the measure of their success will be the extent to which they are able to improve the lives of Africans. The key to unleashing the African Court's potential lies in the hands of the Court itself.

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358. See, e.g., Annual Activities of the African Commission on Human and People's Rights, AHG/Dec 126 (XXXIV), in African Union Declarations and Decisions Adopted by the Thirty-Fourth Ordinary Session of the Assembly of Heads of State and Government (1998), available at [http://www.africa-union.org/Official\\_documents/Heads%20of%20State%20Summits/hog/8HoGAssembly1998.pdf](http://www.africa-union.org/Official_documents/Heads%20of%20State%20Summits/hog/8HoGAssembly1998.pdf) ("Reiterat[ing] its earlier decisions concerning the means for the functioning of the Commission.")

359. Practical Issues Relating to the African Court, reprinted in HUMAN RIGHTS LAW 1999, *supra* note 1, at 293.

360. *Id.* at 294.

361. *Id.* at 295.

First and foremost, the African Court must not become a white elephant — all institution and no cases to decide.<sup>362</sup> To prevent this, the African Court must ensure that its Rules of Procedure allow access to individuals as extensively as the Protocol permits. The African Court must cooperate with the African Commission, whose Rules also need to be adapted. To summarize, it is suggested here that the African Commission should usually decide on the admissibility of communications, but not on their merits. Inadmissible cases should end at the Commission level. With respect to admissible cases, the African Commission should engage in fact-finding and make efforts to negotiate a friendly settlement before submitting the case to the African Court. In exceptional, urgent cases, the African Commission may refer the case to the African Court without addressing it at all. Such an approach will unlock the potential of the Court to supplement and strengthen the African Commission's role in protecting individuals by ensuring that the deficiencies inherent in the quasi-judicial nature of the Commission are overcome without causing more delay and cost.

Allowing individuals the broadest possible standing before the African Court may well mean that the Commission's protective role is restricted to admissibility findings in most cases and fact-finding in some cases. Such an approach would enable the African Commission to focus on that part of its mandate earmarked as promotional but which also serves definite protective ends. Its non-communication-based role should be enhanced by way of the resumption of on-site investigations, the improvement and extension of the examination of state reports, promotion and education of human rights generally and the Charter in particular, as well as proactive activities of Special Rapporteurs. This is the best reading one could give to the requirement of "complementarity" between the Commission and Court.<sup>363</sup> The African Commission is retained and reinforced as the AU's main quasi-judicial human rights institution while and the African Court is developed as its main judicial institution. This "complementarity" avoids duplication and delay.

For all the attention devoted to continental judicial institutions as manifestations of international human rights protec-

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362. A variant on "all dressed up and nowhere to go."

363. Protocol to the African Charter, *supra* note 1, art. 8.

tion, their role and potential remain limited in comparison with national institutions. National courts have to be the port of first call for individuals, yet they are frequently ignored. There are beliefs, deeply embedded in many African states, that inform a reluctance to use law and courts to resolve disputes. Much of African life is "informal" and exists side-by-side with more "formal" aspects of life.<sup>364</sup> Over-formalized legal systems reinforce this formality. Reliance on the law may be fanciful in a context of low literacy, inaccessible sources (even legislation and law reports), a lack of lawyers and legal aid, and conditions of poverty or conflict overshadowing other concerns. Legal norms are perceived as lacking legitimacy, as being transplants from some European metropolis, and as consisting of rules and norms that are juxtaposed unfavorably with traditional ways of life. As an instrument of a highly centralized authority, law does not penetrate into vast rural areas, thus remaining remote and inaccessible. Bureaucracies and courts are either dysfunctional or function very slowly, and are steeped in corruption.<sup>365</sup> International human rights law's focus on "exhaustion of local remedies" takes too much for granted, and does not sufficiently account for these factors. International tribunals face many problems: overly formal systems, intimidating procedures, lack of information, inaccessible texts, the perception that their decisions reflect a regional consensus in which local specificities play only a minimal role, and the general remoteness of human rights ideology from the daily lives of individuals. These problems are compounded in the African regional human rights system. Exercising a quasi-judicial mandate, an effective African Commission bolstered by recourse to the African Human Rights Court could go some distance in solving these difficulties.

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364. See generally Abdullahi A. An-Na'im, *Protecting Human Rights in Plural Legal Systems of Africa: A Comparative Overview*, in UNIVERSAL RIGHTS, LOCAL REMEDIES: IMPLEMENTING HUMAN RIGHTS IN THE LEGAL SYSTEMS OF AFRICA 39, 58–60 (Abdullahi A. An-Na'im ed., 1999); Chidi Anselm Odinkalu & Ibrahima Kane, *An Assessment of Information and Training Resources*, in UNIVERSAL RIGHTS, LOCAL REMEDIES: IMPLEMENTING HUMAN RIGHTS IN THE LEGAL SYSTEMS OF AFRICA 65, 68 (Abdullahi A. An-Na'im ed., 1999).

365. See, e.g., *Ending the Graft in East Africa*, DAILY NATION (Keyna), Oct. 6, 2003, available at <http://www.nationaudio.com?News/EastAfrica/06102003/Opinion/Editorial106102003779.html>.