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The Constitutive Act of the African Union, African Courts and the Protection of Human Rights: New Dispensation?

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I. Introduction

During the process of setting up the African Union (AU) and the African Court of Human and Peoples' Rights (ACH)—which is on course to being transformed into the African Court of Justice and Human Rights (ACJH)¹—the framers of these institutions' constitutive instruments tried to learn from the best practices of the existing regional arrangements, such as the Inter-American and European human rights systems. Yet, more than ten years after the establishment of the AU, the organization continues to struggle with fully responding to human rights abuses in member states. Boggled down by technicalities, the ACH has not been able to tackle urgent human rights issues as it remains handicapped by instruments that do not allow it to proceed to the merits of most cases. The African Commission on Human and Peoples' Rights (African Commission) remains largely insulated from the ACH because it has hardly taken advantage of the principle of complementarity with the latter. In the premises, this Article argues that on the whole, despite some notable achievements, the African human rights system remains inadequately equipped—from normative and procedural standpoints—to more effectively protect human rights, and that a number of radical, far-reaching reforms or amendments are imperative in order to present a more consistent, effective and comprehensive human rights protection regime. These reforms include, but are not limited to, the elimination of the requirement that states submit a separate declaration that allows individuals and non-governmental organizations (NGOs) access to the African courts, the merging of the African Commission with the ACH or ACJH, better financing of the African courts, expansion of the jurisdiction of an expanded African court, and amendments to the African Charter to provide for a better normative framework. Unless the African Union undertakes such radical changes, it will continue to engage in mere human rights rhetoric, which cannot constitute a genuinely new human rights dispensation or metamorphosis.

Before the Organization of African Unity (OAU) was reconstituted as the AU, African States paid lip service to human rights issues. The establishment of the AU through the adoption of the Constitutive Act of the African Union² (Constitutive Act) was a watershed moment that African States tried to seize upon to institutionalize and streamline human rights promotion and protection, and send a clear signal that the AU was making a radical departure from the past, characterized by utter disregard for human rights protection. Yet, the African human rights normative framework remained predominantly unchanged because the primary instrument—the African Charter on Human and Peoples' Rights³ (African Charter)—relates to an era when human rights were relegated to the periphery of

1. Protocol on the Statute of the African Court of Justice and Human Rights, *adopted* July 1, 2008 [hereinafter ACJH Protocol/Statute], *available at* http://au.int/en/sites/default/files/PROTOCOL_STATUTE_AFRICAN_COURT_JUSTICE_AND_HUMAN_RIGHTS.pdf.

2. Constitutive Act of the African Union, *adopted* July 11, 2000, OAU Doc. CAB/LEG/23.15 (entered into force May 26, 2001) [hereinafter AU Constitutive Act].

3. African Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (entered into force Oct. 23, 1986) [hereinafter African Charter].

African States' concerns.⁴ Some authors⁵ who have written on this subject in the past have stopped short of indicating specific provisions of the African Charter in need of reform. Focusing on, among others, the recent activity reports of the African Commission,⁶ this Article tries to indicate the difficulties that are already being experienced since the adoption of the Constitutive Act and the creation of the ACH. To these ends, Part I of this Article examines the revolutionary nature of the Constitutive Act, which by its terms introduced a reinvigorated focus on human rights at the political level, giving rise to the establishment of judicial institutions for better protection of human rights, although the practical implementation has largely fallen short. Part II is a critical examination of the primary human rights instrument—the African Charter—insofar as it stands in need of normative and procedural improvements. Part III is a critical evaluation of the constitutive instrument of the ACH and its jurisprudence and a discussion of the proposed ACJH. Part IV examines the need to transform the wider socio-economic and political context in which the human rights protection regime takes place. Part V presents recommendations and conclusions.

II. Constitutive Act of the African Union

The Constitutive Act of the African Union represents a serious commitment to the promotion and protection of human rights, at least in comparison to the Charter of the Organization of African Unity (OAU Charter). Under the OAU Charter, “the rights of the OAU Member States prevailed over those of their people.”⁷ Simply put, “[h]uman rights protection did not feature high on the agenda of the newly independent States.”⁸ The OAU Charter was preoccupied with “the rights to independent existence, self-determination and territorial integrity [which] are more State’s rights than human or peoples’ rights.”⁹ Indeed, the “OAU’s early practice demonstrates very little focus on human rights, which it considered to be matters that fall within the internal affairs of States.”¹⁰ In contrast, the Constitutive Act is an ambitious document because three of its fourteen objectives and six of its sixteen guiding

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4. See Dan Juma, *Access to the African Court on Human and People’s Rights: A Case of the Poacher Turned Gamekeeper*, ESSEX HUM. RTS. REV., Sept. 2007, at 1, (citing R. COHEN ET AL., HUMAN RIGHTS AND GOVERNANCE IN AFRICA (1993)).
 5. See e.g., Christof Heyns, *The African Regional Human Rights System: In Need of Reform?*, 1 AFR. HUM. RTS. L.J. 155, 159–73 (2001) (observing that the Charter system reform could take place in a number of ways: amendment of the Charter, the African Human rights Court protocol, and the rules of procedure; and at an informal level, it could involve changes in the practices of the African Commission on Human Rights).
 6. See e.g., Activity Rep. of the Exec. Council of the African Comm’n on Hum. & Peoples’ Rights [ACHPR], 13th Ordinary Sess., June 24–28, 2008, Annex I & II, EX.CL/446(XIII), available at http://www.achpr.org/files/activity-reports/23/achpr4243eo4_actrep23_20072008_eng.pdf.
 7. André Mbata B. Mangu, *The Changing Human Rights Landscape in Africa: Organisation of African Unity, African Union, New Partnership for Africa’s Development and the African Court*, 23 NETH. Q. HUM. RTS. 379, 382 (2005).
 8. Frans Viljoen & Evarist Baimu, *Courts for Africa: Considering the Co-Existence of the African Court on Human and Peoples’ Rights and the African Court of Justice*, 22 NETH. Q. HUM. RTS. 241, 245 (2004).
 9. Mangu, *supra* note 7, at 382.
 10. Viljoen & Baimu, *supra* note 8, at 245.

principles focus on human rights. The overarching objective of the AU was to achieve a decisive break from the past characterized by lackluster commitment to human rights, through the promotion of peace and security, democratic principles, economic and social development and the protection of human rights.¹¹ To this end, the preamble of the Constitutive Act unambiguously and boldly provides that the AU is “DETERMINED to promote and protect human and peoples’ rights.”¹² Additionally, it provides that the African Union aims to “encourage international cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights,”¹³ and to “promote and protect human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights and other relevant human rights instruments.”¹⁴ It also provides that the African Union shall function, among other things, on the basis of “respect for democratic principles, human rights, the rule of law and good governance.”¹⁵ The Constitutive Act also provides that the AU shall promote gender equality,¹⁶ social justice to ensure balanced economic development,¹⁷ respect for the sanctity of human life, the condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities,¹⁸ as well as condemnation and rejection of unconstitutional change of government.¹⁹ In fact, adopting a more muscular and aggressive approach to cases of grave violations of human rights, the amended Constitutive Act provides for the “right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.”²⁰ At least on the books, this appears to be a radical departure from the rigid insistence on the principle of non-interference that was the centerpiece of the OAU Charter.²¹ This principle “contributed to the reluctance of Member States to seriously pursue human rights promotion and enforcement [in the face of] a persistent unwillingness among member states to criticize one another in the face of flagrant human rights abuse.”²² In this sense, the Constitutive Act tries

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11. See Anne Pieter van der Mei, *The Ordeal of African Unity—Past, Present and Future of the African Union* (Maastricht Faculty of Law, Working Paper No. 5, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1345732.
 12. AU Constitutive Act, *supra* note 2, pmb1.
 13. *Id.* art. 3(e).
 14. *Id.* art. 3(h).
 15. *Id.* art. 4(m).
 16. *Id.* art. 4(l).
 17. *Id.* art. 4(n).
 18. AU Constitutive Act, *supra* note 2, art. 4(o).
 19. *Id.* art. 4(p).
 20. Protocol on Amendments to the Constitutive Act of the African Union art. 4(h), adopted July 11, 2003, available at http://www.au.int/en/sites/default/files/PROTOCOL_AMENDMENTS_CONSTITUTIVE_ACT_OF_THE_AFRICAN_UNION.pdf.
 21. Charter of the Organization of African Unity art. III(2), done May 25, 1963, 479 U.N.T.S. 39 [hereinafter OAU Charter], available at http://www.au.int/en/sites/default/files/OAU_Charter_1963.pdf; see also Nsongurua J. Udombana, *Toward the African Court on Human and Peoples’ Rights: Better Late Than Never*, 3 YALE HUM. RTS. & DEV. L.J. 45, 56 (2000) (observing that the principle of non-interference was “a foundation stone of the [OAU], a rule regarded as sacrosanct, to which States have rigidly adhered.”).
 22. Udombana, *supra* note 21, at 56.

to establish a new human rights paradigm and culture of promotion and respect for human rights. But the proof of the pudding is in the eating; so was the emphasis on human rights in the Constitutive Act more on rhetoric but less on substance?

It has been noted that the progressive provisions of the Constitutive Act are only as good as the AU member states are willing to act upon them.²³ Certainly, from a normative standpoint the Constitutive Act inspired the adoption of a plethora of new human rights instruments that sought to broaden the scope of human rights protected under the African human rights system. For example, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa²⁴ explicitly indicates that it affirms "the principle of promoting gender equality as enshrined in the Constitutive Act of the African Union."²⁵ The African Charter on Democracy, Elections and Governance also indicates that it is inspired and premised on the Constitutive Act, to the extent that it indicates that it is "[i]nspired by the objectives and principles enshrined in the Constitutive Act of the African Union, particularly Articles 3 and 4, which emphasise the significance of good governance, popular participation, the rule of law and human rights."²⁶ The African Union can be commended for taking a more serious and determined stand on human rights violations, especially with regard to violations of democracy.²⁷ But it has been noted that these changes at least "reflect a radical shift in their attitude and language."²⁸ Without the Constitutive Act, the Protocol on the Establishment of the African Court of Human and Peoples' Rights (ACH Protocol) and the Protocol on the Statute of the African Court of Justice and Human Rights

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23. Mangu, *supra* note 7, at 386 ("AU intervention in case of gross human rights violations will depend on a decision of the (AU) Peace and Security Council, . . . the political will of many African leaders within the AU, the existence of a well-trained and equipped African army, the willingness of AU Member States to contribute troops, and the importance of financial and material resources at the disposal of the AU to perform its mission.").
24. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, *adopted* July 11, 2003 [hereinafter Protocol on Women's Rights], *available at* <http://www.au.int/en/sites/default/files/Protocol%20on%20the%20Rights%20of%20Women.pdf>.
25. *See id.* pmb1.
26. African Charter on Democracy, Elections and Governance pmb1, *adopted* Jan. 30, 2007, *available at* http://www.au.int/en/sites/default/files/AFRICAN_CHARTER_ON_DEMOCRACY_ELECTIONS_AND_GOVERNANCE.pdf.
27. *See* Mangu, *supra* note 7, at 387 (noting that "the debate about human rights in Zimbabwe during the 2004 AU summit sent a strong message that there would be little tolerance this time around and African leaders were no longer so enthusiastic about turning a blind eye or a deaf ear to the cries of the victims of human rights violations on the continent," and that "[t]he AU also took a proactive approach by sending an observation mission in the Sudanese province of Darfur where militia allied with the Khartoum Government were accused of grave human rights violations, including genocide" and that in "[d]ealing with unconstitutional changes of government in Africa, the AU should be commended for the position adopted by its Member States *vis-à-vis* the . . . *coup d'état* in Togo."). Also, in April 2010, Guinea-Bissau's military took control of the country in a *coup d'état*. In response, the AU suspended Guinea-Bissau from the AU until constitutional order could be restored. Again, in response to the military coup in Mali in March 2012, the AU swiftly responded by suspending Mali from the AU.
28. Fatsah Ouguergouz, *The Establishment of an African Court of Human and Peoples' Rights: A Judicial Premiere for the African Union*, 11 AFR. Y.B. INT'L L. 79, 81 (2003).

(ACJH Protocol/Statute) would have been inconceivable based on the existing framework.²⁹ The ACJH Protocol/Statute is premised on the recognition “that the Constitutive Act of the African Union provides for the establishment of a Court of Justice charged with hearing, among other things, all cases relating to interpretation or application of the said Act or of all other Treaties adopted within the framework of the Union.”³⁰ In fact, Konstantinos D. Magliveras and Gino J. Naldi observe that the establishment of the African Court of Justice (AU Court) (by Article 18 of the Constitutive Act) as the principal judicial organ of the AU signaled a welcome departure from the OAU.³¹ These authors also indicate that “[t]he AU makes plain its break with the past by considering that the AU Court has an essential role to play in helping achieve its objectives.”³²

It has been noted, however, that the Constitutive Act offers “few possibilities to ensure conformity with the norms set out in the Act,”³³ and that “unlike the UN Charter, the Act does not provide for expulsion of a member State that persistently violates the principles, including the human rights principles, set out in the Act.”³⁴ The AU has been willing to engage in human rights rhetoric and platitudes, but it has been less decisive in following up with concrete action. The AU’s commitment has been tested in a few areas such as its response to the disputed elections in Zimbabwe and Kenya, as well as its response to situations of grave violations of human rights such as Darfur, Sudan and Libya. It has been noted that “violations of human rights, constitutionalism, and democracy in Zimbabwe and other African countries were not met by African leaders with the same condemnation and rejection as they did [in] Togo,”³⁵ Guinea-Bissau, and Mali.

III. The African Charter on Human and People’s Rights

A. Normative Inadequacies

Although the “Charter and its Protocol on the Rights of Women in Africa, the OAU Refugee Convention and the African Charter on the Rights and Welfare of the Child constitute the African regional human rights system,”³⁶ this Section will focus on the African Charter. The African Charter is presupposed to be the primary and most comprehensive human rights instrument of the Constitutive Act, but this foundational instrument is insufficiently synchronized with the Constitutive Act’s more progressive

29. ACJH Protocol/Statute *supra* note 1. This statute has not yet entered into force. As of September 3, 2012, only five countries had ratified it. Article 9(1) of this protocol provides that the protocol and the statute annexed to it will come into force after the deposit of fifteen instruments of ratification.

30. ACJH Protocol/Statute *supra* note 1, pmbl.

31. Konstantinos D. Magliveras & Gino J. Naldi, *The African Court of Justice*, 66 HEIDELBERG J. OF INT’L L. 187, 188 (2006).

32. *Id.* at 189.

33. Viljoen & Baimu, *supra* note 8, at 248–49.

34. *Id.* at 249.

35. Mangu, *supra* note 7, at 388.

36. Viljoen & Baimu, *supra* note 8, at 246.

objectives. The African Charter was forged in the light of OAU political³⁷ realities in Africa that constrained or limited the scope of norms that were articulated therein. Most African states at the time of the adoption of the African Charter were either authoritarian or had infant democracies.³⁸ The adoption of the African Charter was important in three ways. “First, it was thought that the existence of geographic, political, social, historical and cultural affinities among states of a particular region” was a good foundation on which human rights could be nurtured and enforced.³⁹ Second, the regional human rights instruments were to represent a consensus on the human rights norms in Africa.⁴⁰ Last, it was hoped that the human rights system would legitimize “the human rights language” in Africa.⁴¹ Those objectives do not have particular resonance with the Constitutive Act.

The core problem is that “despite the fact that the Charter will gain [a] more important role in enforcing rights across the continent due to the [African Court of Human and Peoples’ Rights], the Charter itself is a weak document.”⁴² Merely strengthening the enforcement mechanisms is insufficient, as this effort must be “accompanied by a radical revision of the provisions of the African Charter.”⁴³ So far, the African Union has focused on restructuring the enforcement mechanisms—notably by establish-

37. In 1979, the Assembly of Heads of State and Government met in Monrovia, Liberia, and adopted a decision requesting the General Secretariat to draft a Charter on human and peoples’ rights. At the meeting of experts to draft the Charter in December in Dakar, Senegal, President Senghor of Senegal reminded the experts to “keep constantly in mind our values of civilisation and the real needs of Africa.” Chidi Anselm Odinkalu, *Implementing Economic, Social and Cultural Rights under the African Charter on Human and Peoples’ Rights*, in *THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS: THE SYSTEM IN PRACTICE*, 1986–2000, at 178, 187 (Malcom D. Evans & Rachel Murray eds., 2002). However, while they had before them treaties from the U.N., Europe, and America, they decided to take a separate course on many issues because they felt their African values, political realities, traditions and culture required such a deviation. The OAU Charter made little reference to human rights despite the endorsement of the principles enshrined in the Universal Declaration of Human Rights in the preamble. Many years later, the African leaders enacted the Constitutive Act, this time trying to emulate the European Union and other parts of the world and suggesting that they were determined to “promote and protect human and peoples’ rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law.” AU Constitutive Act, *supra* note 2, pmb1. The Constitutive Act puts human rights at the center. *See id.* arts. 3, 4. Article 3 of the Constitutive Act states that the African Union’s objectives include to “[p]romote and protect human and people’s right in accordance with the African Charter on Human and Peoples’ Rights.” *Id.* art. 3. However, the African Charter had different objectives—predominantly to promote self-determination of emerging African States and not to promote the rights of citizens in those countries.

38. *See* Juma, *supra* note 4, at 1.

39. Dan Juma, *Lost, (or Found) in Transition? The Anatomy of the New African Court of Justice and Human Rights*, 13 MAX PLANCK Y.B. U.N. L. 267, 271 (2009).

40. *Id.* at 272 (citing B. H. Weston et al., *Regional Human Rights Regimes: A Comparison and Appraisal*, 20 VAND. J. TRANSNAT’L L. 587, 589 (1987)).

41. *Id.* (citing INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 792 (Henry J. Steiner & Philip Alston eds., 2d ed. 2000)).

42. Elise G. Nalbandian, *The Challenges Facing African Court of Human And Peoples’ Rights*, 1 MIZAN L. REV. 75, 78 (2007).

43. Andreas O’Shea, *A Critical Reflection on the Proposed African Court on Human and Peoples’ Rights*, 1 AFR. HUM. RTS. L.J. 285, 290 (2001).

ing African courts—without tackling an equally important problem—the weaknesses within the African Charter. This approach can only lead to limited improvements in the protection of human rights.

The African Charter's substantive rights provisions need reform in a number of respects. For example, Article 4 provides that "[h]uman beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right."⁴⁴ But the African Charter does not elaborate the scope or content of the right to life. For example, it is not clear what "human being" means. With respect to freedom of expression or speech, the African Charter, unlike other comparable international human rights instruments, does not define the individual's right to information and his or her right to freely express and disseminate his or her opinions.⁴⁵ While the Constitutive Act aims to promote greater commitment to democracy, the existing provisions of the African Charter relate to a different and more repressive dispensation. Article 11 of the African Charter provides for the right to freedom of assembly.⁴⁶ Freedom of association cannot be dissociated from freedom of assembly. Without regular gatherings, the members of an association cannot have an effective existence. Hence, freedom of assembly belongs to the bunch of rights indispensable to democracy. However, compared to Article 21 of the International Covenant on Civil and Political Rights⁴⁷ and comparable provisions of the American (Article 15)⁴⁸ and European human rights instruments (Article 11),⁴⁹ the African Charter's corresponding provision does not specifically refer to the concept of "democratic society." This is a serious omission because the concept introduces the requirement of proportionality regarding any restrictive measures that the state may impose on the right to freedoms of assembly and association and their intended purposes.

The African Charter provides that

The Commission shall draw inspiration from international law on human and peoples'

44. African Charter, *supra* note 3, art. 4.

45. *Id.* art. 9.

46. *Id.* art. 11 ("Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.")

47. International Covenant on Civil and Political Rights, art. 21, G.A. Res. 2200A (XXI), Annex, U.N. GAOR, 21st Sess. Supp. No. 16 at 55, U.N. Doc. A/6316 (Dec. 19, 1966), 999 U.N.T.S. 171 ("The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a *democratic society* in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others." (emphasis added)).

48. American Convention on Human Rights: "Pact of San José, Costa Rica," art. 15, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 ("The right of peaceful assembly, without arms, is recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and necessary in a *democratic society* in the interest of national security, public safety or public order, or to protect public health or morals or the rights or freedom of others." (emphasis added)).

49. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 11(2), *concluded* Nov. 4, 1950, 213 U.N.T.S. 221 ("No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a *democratic society* in the interests of national security or public safety . . ." (emphasis added)).

rights, particularly from the . . . Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights . . . of which the parties to the present Charter are members.⁵⁰

However, "inspiration" does not necessarily mean that the African Commission is bound to apply "other instruments" in case these conflict with the African Charter.

Moreover, as if the normative inadequacies are not enough, what the African Charter gives with one hand, it takes away with the other because of its sweeping or overbroad limitation clauses or "claw-back" clauses juxtaposed against almost every normative provision.⁵¹ The "claw-back" provisions have "overwhelmed the integrity of the rights."⁵² The "claw-back" clauses include "clauses like 'except for reasons and conditions previously laid down by law,' 'subject to law and order,' 'within the law,' 'abides by the law,' 'in accordance with the provisions of the law,' and other restrictions justified for the 'protection of national security.'"⁵³ These provisions allow African states and governments to restrict basic human rights and freedoms to the extent allowed by their various national laws.⁵⁴ Interpreting the "claw-back" provisions this way to restrict human rights to the extent allowed under domestic laws renders "the utility of the Charter as an instrument of international supervision . . . questionable."⁵⁵

The preceding paragraph makes it apparent that the African Charter is broad in terms of its material jurisdiction or jurisdiction *ratione materiae*. It tries to import by reference certain norms of international human rights instruments.⁵⁶ Commenters identified it as a potentially good thing from a remedial standpoint in terms of making up for what is lacking in the African Charter. For example, it is

50. African Charter, *supra* note 3, art. 60.

51. *See, e.g., id.* art. 14 (providing in one part that: "The right to property shall be guaranteed."). This right is limited extensively by the second part of the article which provides: "It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws." *Id.* The limitation here is seen in the fact that the African Charter makes no reference to a "democratic society" and the laws by which individual property rights may be denied might as well come from an authoritarian or military regime.

52. Awol Kassim Allo, *Derogations or Limitations? Rethinking the African Human Rights System of Derogation in Light of the European System*, 2 ETHIOPIAN J. LEGAL EDUC. 21, 37-38 (2009).

53. Makau Matua, *The African Human Rights Court: A Two-Legged Stool?*, 21 HUM. RTS. Q. 342, 358 (1999) (citing Makau wa Mutua, *African Renaissance*, N.Y. TIMES, May 11, 1991, at L23).

54. *See* Makau Matua, *The Construction of the African Human Rights System: Prospects and Pitfalls, in REALIZING HUMAN RIGHTS: MOVING FROM INSPIRATION TO IMPACT* 143, 146 (Samantha Power & Graham Allison eds., 2000).

55. *See* Allo, *supra* note 52, at 37-38.

56. *See* African Charter, *supra* note 3, art. 60. Indeed, the provision has been extended to the African Court of Human Rights in certain respects by Article 3(1) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human Rights (ACH Protocol), art. 3(1), adopted June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III) [hereinafter ACH Protocol], available at http://www.achpr.org/files/instruments/court-establishment/achpr_instr_proto_court_eng.pdf ("The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.").

argued that if a “state party to the African Charter tried to invoke a claw-back clause to justify a breach of internationally protected rights . . . [t]he victim could simply invoke a treaty protecting the same rights, such as the ICCPR, that did not include a similar claw-back clause.”⁵⁷ But, based on the Vienna Convention on the Law of Treaties (VCLT), the African Charter cannot be amended by implication,⁵⁸ especially in cases of explicit conflict with other international human rights instruments. In fact, any attempt to make other treaties applicable risks rendering the African Charter inapplicable because according to the VCLT, “[w]hen a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.”⁵⁹ In any case, according to the *lex specialis derogat legi generali* rule of interpretation, if there are two rules that bind the same subject matter, the more specific rule prevails over the more general rule.⁶⁰ This would probably be the case where the African Charter specifically makes human rights subject to the provisions of national law. In any case, the use of such norms in other instruments, even if applicable, is limited to providing inspiration, and to that extent is a subsidiary means, which means those sources do not provide legally binding rules in the African context.⁶¹ This appears to be the sense in which the African Commission has been citing to decisions of the European Court of Human Rights, among others.⁶² In *Chinhamo*, for example, the African Commission cited *Countess Spencer v. United Kingdom*, a

57. Robert Wundeh Eno, *The Jurisdiction of the African Court on Human and Peoples' Rights*, 2 AFR. HUM. RTS. L.J. 223, 227 (2002).

58. Vienna Convention on the Law of Treaties art. 40, *done* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

59. *Id.* art. 30(2).

60. For application between different instruments, see *Mavrommatis Palestine Concessions*, (Greece v. U.K.), 1924 P.C.I.J. (ser. A) No. 2, at 31 (Aug. 30).

61. See African Charter, *supra* note 3, art. 61 (“The Commission shall also take into consideration, as *subsidiary measures* to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by Member States of the Organization of African Unity, African practices consistent with international norms on Human and Peoples' Rights, customs generally accepted as law, general principles of law recognized by African States as well as legal precedents and doctrine.” (emphasis added)).

62. The African Commission has made reference to jurisprudence and documents of other international bodies, such as the U.N. Human Rights Committee and the European Court of Human Rights. The Commission has also used international law in its decisions. The African Commission refers to decisions and jurisprudence from other international and regional bodies; the African Commission even finds violations of other international instruments. See *Malawi African Ass'n v. Mauritania*, Decision, Comm. No. 54/91, 61/91, 98/93, 164/97, 196/97, 210/98, 13th ACHPR AAR Annex V (1999–2000), *available at* http://www.worldcourts.com/achpr/eng/decisions/2000.05.11_Malawi_African_Association_v_Mauritania.htm. See also the recent decisions in *Inst. for Human Rights & Dev. in Africa v. Republic of Angola*, Decision, Comm. No. 292/04 IHRDA 24th AAR (2004), *available at* http://www.achpr.org/files/sessions/43rd/communications/292.04/achpr43_292_04_eng.pdf; *Obert Chinhamo v. Republic of Zimbabwe*, Comm. No. 307/05, 23d ACHPR AAR (2007), *available at* http://www.achpr.org/files/sessions/42nd/communications/307.05/achpr42_307_05_eng.pdf.

case from the European Commission on Human Rights.⁶³ In fact, the African Commission invoked Article 60⁶⁴ of the African Charter to use civil rights decisions of the United States of America. In *Institute for Human Rights and Development in Africa v. Republic of Angola*, the Commission noted that “[i]n terms of Article 60 of the Charter, this Commission can also be inspired in this regard by the famous case of *Brown v. Board of Education of Topeka*.”⁶⁵ But these references can, at best, provide persuasive authority.

B. Procedural and Institutional Inadequacies

One scholar noted that “[a]lthough the African Charter makes a significant contribution to the human rights corpus, it creates an ineffectual enforcement system.”⁶⁶ The African Charter created an enforcement body—the African Commission—that can bark but not bite. Thus, the African Commission has been described as “a mixture of impotence, incompetence, ponderous irrelevance and even lack of independence bordering on complicity in the violation of human rights in Africa.”⁶⁷ But this is because the African Commission did not have any enforcement powers, it was “not empowered to condemn an offending State,” it could only make recommendations to states parties, and so there was blatant disregard of the Commission’s recommendations, orders, and pronouncements by member states.⁶⁸ The case that epitomizes this situation is *International PEN ex rel. Ken Saro-Wiwa v. Nigeria*.⁶⁹ Ken Saro-Wiwa, a Nigerian environmentalist and leader of the Movement for the Survival of the Ogoni Peoples, along with eight of his associates, were sentenced to death by a Special Tribunal for Civil Disturbances. The African Commission immediately issued provisional measures, which the Nigerian government blatantly ignored, following through on the execution of these activists. Weakened by lack of compliance, the African Commission has had very few petitions that resulted in adverse judgments, and a vast majority of them were disposed of as inadmissible,⁷⁰ withdrawn, or concluded through friendly settlement. Even then, it would be wrong

63. See *Chinhamo*, Comm. No. 307/05, 23d ACHPR AAR, at ¶ 85.

64. See African Charter, *supra* note 3, art. 60 (“The Commission shall draw inspiration from international law on human and peoples’ rights, particularly from the provisions of various African instruments on human and peoples’ rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples’ rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members.”).

65. *Inst. for Human Rights & Dev. in Africa*, Comm. No. 292/04 IHRDA 24th AAR, ¶ 46.

66. *Matua*, *supra* note 53, at 343.

67. *Mangu*, *supra* note 7, at 384.

68. *Udombana*, *supra* note 21, at 67.

69. *Int’l Pen v. Nigeria*, Comm. No. 137/94, 139/94, 154/96, 161/97 12th ACHPR AAR Annex V (Oct. 31, 1998), available at http://www1.umn.edu/humanrts/africa/comcases/137-94_139-94_154-96_161-97.html.

70. For example, a quick review indicates that of 156 petitions before the African Commission, eighty-two were ruled inadmissible and seventy-four were decided on merits. See *African Human Rights: Case Law*

to argue that the African Commission did not achieve anything. Despite odds and the problem of the enforcement of its decisions which was left to the OAU Assembly of Heads of State and Government, the Commission contributed to paving the way for a better protection of human and peoples' rights.⁷¹

But there are further issues relating to procedure in the African Charter that need attention. The African Charter needs to provide clearer steps with regard to exhaustion of domestic remedies. For example, it provides that the Commission can take up matters after the exhaustion of local remedies, unless doing so would be unduly prolonged.⁷² Although it makes reference to three months as the time period communication between two states, the African Charter does not specify what constitutes an "unduly prolonged" period of time. What this means is that the enforcement bodies have to look to other human rights institutions such as the Inter-American and European institutions for indications as to what "reasonable" time could mean.⁷³ The African Commission in *Mouvement Burkinabe des Droits de l'Homme et des Peuples v. Burkina Faso* dealt with the right to a hearing within a reasonable time.⁷⁴ The Commission found that the failure of Burkina Faso's Supreme Court to make a decision within fifteen years on the complainant Halidou Ouedrago's human rights abuses by the Burkina Faso government amounted to a denial of justice and a violation of an impartial trial within a reasonable time.⁷⁵ However, there were no precise criteria that the African Commission could rely on in regard to what amounted to "unreasonable" time.⁷⁶

Regarding admissibility, Article 56(2) of the African Charter provides that a communication or petition must comply with the OAU Charter and/or African Charter. However, the Constitutive Act replaces the OAU Charter. The African Commission confronted this issue in *Obert Chingamo v. Republic of Zimbabwe*.⁷⁷ The African Commission had to interpret the provisions of Article 56(2) of the African Charter which provides that a communication is not admissible if it is incompatible with the African Charter and/or the Charter of the OAU. The African Commission resolved this by treating the AU as if

Analyser, INST. FOR HUM. RTS. & DEV. IN AFRICA (IHRDA), <http://caselaw.ihrda.org/acmhpr/> (last visited Mar. 31, 2013).

71. Mangu, *supra* note 7, at 384.

72. See African Charter, *supra* note 3, arts. 47–50.

73. See, e.g., *Obert Chingamo v. Republic of Zimbabwe*, Comm. No. 307/05, 23d ACHPR AAR, ¶ 89 (2007), available at http://www.achpr.org/files/sessions/42nd/communications/307.05/achpr42_307_05_eng.pdf (African Commission expressing hesitancy as to whether it should follow the practice of other human rights bodies in this respect: "Even if the Commission were to adopt the practice of other regional bodies to consider six months as the reasonable period to submit complaints . . .").

74. *Mouvement Burkinabé v. Burkina Faso*, Comm. No. 204/97, 14th ACHPR AAR (2001), available at <http://www1.umn.edu/humanrts/africa/comcases/204-97.html>. See also Robert P. Barnidge Jr., *The African Commission on Human and People's Rights and the Inter-American Commission on Human Rights: Addressing the Right to an Impartial Hearing on Detention and Trial within a Reasonable Time and the Presumption of Innocence*, 4 AFRICAN HUM. RTS L.J. 108, 112–13 (2004).

75. *Mouvement Burkinabé*, Comm. No. 204/97, 14th ACHPR AAR.

76. See African Charter, *supra* note 3, art. 7(1)(d).

77. *Chingamo*, Comm. No. 307/05, 23d ACHPR AAR.

it were the equivalent of the OAU.

A potentially important mechanism for human rights protection is the requirement of bi-annual state reports to the Africa Commission. Article 62 of the African Charter provides that “[e]ach State Party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter.”⁷⁸ However, most states have not taken seriously their reporting obligations, and the African Charter does not provide for any consequences in cases of such failure. In one of its activity reports, the African Commission indicated that as of 2008, only fifteen of the fifty-three African States had submitted all of their reports.⁷⁹ However, even the observations and recommendations of the African Commission with regard to those few reports do not have any significant impact on those states.⁸⁰

The African Commission’s work has further been hampered by the confidentiality and lack of transparency provisions of the African Charter. The African Charter provides that “[a]ll measures taken within the provisions of the present Chapter shall remain *confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide*.”⁸¹ The implication of this is that “the decision on whether to publicize a human rights violation on the part of an African State is reserved to the discretion of her sister States.”⁸² The African Commission cannot publish its findings until they are confirmed by the African Heads of State. As a result, little was known about the African Commission’s work on tragedies in Burundi, Rwanda, Liberia, the Democratic Republic of Congo, Sudan, Kenya and Zimbabwe. Yet, in the realm of human rights enforcement, public naming and shaming can be a crucially effective implementation tool. In light of these weaknesses, the need for more effective enforcement mechanisms was glaring in the wake of the establishment of the African Union. The most important product of this effort has been the establishment of the ACH, slated to become the ACJH.

IV. The African Human Rights Courts

A. *African Court of Human and Peoples’ Rights: A Milestone*

The creation of the ACH heralded a new era in human rights enforcement.⁸³ The African Charter originally provided only for the African Commission, which would deliver legally non-binding views

78. See African Charter, *supra* note 3, art. 62.

79. Those states include: Algeria, Cameroon, Central African Republic, Egypt, Kenya, Libya, Mauritania, Nigeria, Rwanda, Seychelles, South Africa, Tunisia, Uganda, Zambia and Zimbabwe. For a critique of the procedures relating to state reports, see generally Frans Viljoen, *Examination of State Report at the 27th Session of the African Commission on Human and Peoples’ Rights: A Critical Analysis and Proposal for Reform*, 16 S. AFR. J. HUM. RTS. 576 (2000).

80. Matua, *supra* note 53, at 350.

81. See African Charter, *supra* note 3, art. 59(1) (emphasis added).

82. Udombana, *supra* note 21, at 69.

83. See ACH Protocol, *supra* note 56, art. 4.

or recommendations on communications or petitions. It never provided for a judicial institution with the ability to render binding judgments. The functions of the African Commission were primarily “promotional and protective.”⁸⁴ Specifically, the African Commission has three main functions—“examining state reports, considering communications . . . , and expounding the African Charter.”⁸⁵

These weaknesses and shortcomings of the African Commission led to the adoption of Resolution on the African Commission on Human and Peoples’ Rights in June 1996 by the OAU Assembly of Heads of States and Governments, which requested the OAU Secretary General to convene a meeting of government experts to examine the efficiency of the African Commission with a view to improving it.⁸⁶ The result was the continued operation of the African Commission, and the creation of the ACH, with the intention that the institutions would complement each other. Article 2 of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (ACH Protocol) provides that the court “shall complement the protective mandate of the African Commission on Human and Peoples’ Right.”⁸⁷

But this complementarity does not seem to be working as envisaged. There is need to make it mandatory that if, after a certain period, a state party has not complied with a recommendation of the African Commission, the African Commission automatically refers the case to the ACH (or the planned ACJH). So far the rules of the African Commission are optional or discretionary on this point. Some commentators have noted that it is not clear whether the African Commission has a legal obligation to refer cases to the ACH and at what stage the cases may be referred.⁸⁸ According to Judge Fatsah Ouguerouz, the “*travaux préparatoires* of the Protocol show that it was originally planned to include all proceedings before the Court in the immediate extension of those brought before the Commission, but that this idea was subsequently abandoned.”⁸⁹ The rule states that

If the Commission has taken a decision with respect to a communication submitted under the Charter. . . and considers that the State has not complied or is unwilling to comply with its recommendations . . . it *may* submit the communication to the Court pursuant to Article 5(1)(a) of the Protocol.⁹⁰

This is not only helpful as it indicates that the African Commission is complementary to the ACH but only if it so chooses, which can have a negative effect on complementarity,⁹¹ and yet the principal

84. Mutua, *supra* note 53, at 345.

85. *Id.* (citing the various applicable African Charter articles) (footnotes omitted).

86. Resolution on the African Commission on Human and Peoples’ Rights, 30th Ord. Sess., June 13–15, 1994, Doc. AHG/Res.260 (XXX), available at <http://www1.umn.edu/humanrts/africa/resafchar30th.html>.

87. ACH Protocol, *supra* note 56, art. 2.

88. Juma, *supra* note 4, at 8.

89. Ouguerouz, *supra* note 28, at 108.

90. Rules of Procedure of the African Commission on Human and Peoples’ Rights, R. 118(1) (2010) [hereinafter African Commission Rules of Procedure], available at http://www.achpr.org/files/instruments/rules-of-procedure-2010/rules_of_procedure_2010_en.pdf (emphasis added).

91. See Nalbandian, *supra* note 42, at 87 n.63, 88 (arguing that if the African Commission chose to “broadly interpret[] its discretion as to which cases to submit,” “very few cases may be sent on to the Court by the

reason for the establishment of the African Court of Human Rights was to “enhance the efficiency of the protective mandate under the African Charter”⁹² relative to the African Commission. If this rule were not discretionary but mandatory, it would help fill the lacuna left in place by the fact that some states have been reluctant to make the declaration that grants individuals direct access to the ACH.⁹³ Individuals may be less willing to submit their petitions to the African Commission, and yet this “could relieve pressure on the court if the Commission forwards only cases with a certain likelihood of success.”⁹⁴ In this respect, the Inter-American Commission on Human Rights is instructive, because its rules mandatorily provide that if “the Commission considers that the State has not complied with the recommendations of the report approved in accordance with Article 50 of the American Convention, it *shall* refer the case to the Court.”⁹⁵ At the very least, the African Commission should be required to inform the African Court in cases in which it decides not to refer such cases to the African Court. For example, the rules of the European Commission of Human Rights—which was later amalgamated with the European Court of Human Rights—provided that “[w]here the Commission decides not to bring the case before the Court, it shall so inform the Court, the Committee of Ministers and the parties to the application.”⁹⁶ Be that as it may, the European human rights systems ultimately abandoned that mechanism and the Inter-American system requires the Commission to refer all cases of non-compliance to the court.

As one scholar points out, “[i]t took another twenty years after the adoption of the OAU Charter to establish an explicit human rights instrument for the region” in the form of the African Charter on Human and People’s Rights in 1981.⁹⁷ The greatest weakness of this instrument “was its failure to provide for an institutional safeguard in the form of a judicial organ in the African system.”⁹⁸ It took almost another twenty years for the African Union to create a judicial institution for the enforcement of human rights. In light of this, it would be expected that African leaders would seize this opportunity to seriously commit themselves to allowing their citizens to have ready access to that judicial institution. However, the ACH Protocol provides for only limited numbers of entities and individuals that could direct legal standing before the ACH. Article 5 of the ACH Protocol provides that the following

Commission which will in effect mean that the Court will hear a small number of cases at best, or more likely, none at all”).

92. Ibrahim Ali Badawi Elsheikh, *The Future Relationship between the African Court and the African Commission*, 2 AFR. HUM. RTS. L.J. 252, 256 (2002).

93. Andreas Zimmermann & Jelena Bäuml, *Current Challenges Facing the African Court on Human and Peoples’ Rights*, 7 KAS INT’L REP. 38, 44 (2010), available at http://www.kas.de/wf/doc/kas_20018-544-2-30.pdf?100630122123.

94. *Id.*

95. Rules of Procedure of the Inter-American Commission on Human Rights, R. 45(1) (2011) available at <http://www.oas.org/en/iachr/mandate/Basics/22.RULES%20OF%20PROCEDURE%20IA%20COMMISSION.pdf> (emphasis added).

96. Rules of Procedure of the European Commission of Human Rights, R. 61(3) (1993), available at http://www.hrcr.org/docs/Eur_Commission/commrules.html.

97. Udombana, *supra* note 21, at 58.

98. *Id.* at 63.

entities have access to this ACH: the African Commission, the state party which has lodged a complaint to the Commission, the state party against which the complaint has been lodged at the Commission; the state party whose citizen is a victim of human rights violation, and African Inter-governmental organizations.⁹⁹ In fact, the ACH is also granted further discretion as to whether to allow an individual or NGO to institute a case directly. According to the ACH Protocol, this “Court *may* entitle relevant Non Governmental Organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with Article 34(6) of this Protocol.”¹⁰⁰ The requirement of Article 5(3) read in conjunction with Article 34(6) of the ACH Protocol is this: a state must make an optional declaration before its citizens can individually and directly institute cases before the ACH. According to Judge Fatsah Ouguerouz of the ACH, this means the “Court’s jurisdiction is not automatic and that bringing a case before it depends upon its discretionary power.”¹⁰¹ The restriction of access to the ACH “defies the primary *raison d’être* of international human rights law,”¹⁰² which is to protect the individual or group from the state. It really amounts to relying on the “state to institute cases [A] case of the poacher turned gamekeeper.”¹⁰³ As such, personal jurisdiction or *jurisdiction ratione personae* of the Court is severely constrained. This provision means that the ACH Protocol shows no greater commitment to human rights protection than the provisions relating to the African Commission in the African Charter—it is a perpetuation of the old dispensation at least with regard to those states that have refused to submit to this optional jurisdiction, and a vast majority of them have not done so. It has been argued that “the restrictive access to the Court may undermine the utility of the Court.”¹⁰⁴ It has been noted, however, that is not unheard of that human rights systems require such optional declarations in cases of individual petitions. Robert Eno observes that,

Prior to the coming into force of Protocol 11 to the European Convention, articles 25(1) and 46(1) required the High Contracting Parties to make separate declarations to allow the European Commission and the European Court respectively to entertain communications from individuals and NGOs. In the case of the Inter-American Court, individuals, groups of individuals and NGOs legally recognised by the OAS are only entitled to submit cases to the Inter-American Commission, which, if the case arises, at the end of the proceedings, transmits them to the Inter-American Court for judgment. Individuals and NGOs do not have direct access to the Inter-American Court.¹⁰⁵

Even then, the Inter-American system makes it mandatory for the Inter-American Commission on Human Rights to refer cases of non-compliance to the Inter-American Court of Human Rights, and the

99. See ACH Protocol, *supra* note 56, art. 5(1).

100. *Id.* art. 5(3) (emphasis added).

101. Ouguerouz, *supra* note 28, at 114.

102. Juma, *supra* note 4, at 1.

103. *Id.*

104. *Id.*

105. Eno, *supra* note 57, at 230.

European Commission is no longer in existence. In light of the limited protective mandate of the African Commission, ACH constitutes a milestone in the protection of human rights precisely because of the fact that for the first time as a truly judicial institution it would be enforcing human rights decisions in the African region in a legally binding manner. But, the ACH has had limited success in its first years of operation as an analysis of its jurisprudence indicates.

The individual petitions restriction as well as the fact that the ACH is not strictly required to hear cases submitted to the African Commission¹⁰⁶ do not reflect a serious commitment of African States to provide an effective human rights protection regime since states parties to the ACH Protocol rarely sue each other in order to enforce human rights. Unsurprisingly, of the twenty-six states out of the fifty-four member states of the African Union that have ratified the Protocol, currently only five of them (Burkina Faso, Ghana, Malawi, Mali, and Tanzania) have made the declaration allowing individuals and NGOs to directly bring cases before the Court.¹⁰⁷ This is a continuation of the “claw-back” mentality discussed earlier—the attempt to provide for human rights protection in letter only but never¹⁰⁸ in any realistic manner. The restrictive access of individuals and NGOs to the ACH does little to protect the individuals from states that violate human rights but at the same time want to be party to human rights instruments as long as consequences are not assured. Also, such restrictive access “defies the object of internationalization and regionalization of human rights protection.”¹⁰⁹ Moreover the limited access by individuals to the ACH in comparison to the access granted to the states undermines the “principle of equality of arms.”¹¹⁰ This is because individuals are placed at a disadvantage by not having the same opportunities as the states to present their cases to the ACH.¹¹¹ For this reason, Gina Bekker predicts that “it is unlikely that this newly-created body will fare any better than its predecessor in providing for the more effective protection of human rights and, in fact, given the constraints of who may petition the Court, it may do even worse.”¹¹²

B. Jurisprudence of the African Court of Human Rights

106. Rules of Court of the African Court on Human and Peoples’ Rights, R. 29(3)(c) (“The Court may also, if it deems it necessary, hear, under Rule 45 of the Rules, the individual or NGO that initiated a communication to the Commission pursuant to Article 55 of the Charter.”).

107. *The African Court Gives a Lecture at Tumaini University*, AFRICAN COURT OF HUMAN & PEOPLES’ RIGHTS, June 12, 2012, <http://www.african-court.org/en/index.php/news/latest-news/153-lecture-at-makumira>.

108. For example the only case of inter-state complaint before the African Commission has been *D. R. Congo v. Burundi, Rwanda & Uganda*, Comm. No. 227/99 (2003), available at <http://www1.umn.edu/humanrts/africa/comcases/227-99.html>.

109. Juma, *supra* note 39, at 291.

110. *Id.* at 293.

111. *Id.*

112. Gina Bekker, *The African Court on Human and Peoples’ Rights: Safeguarding the Interests of African States*, 51 J. AFR. L. 151, 172 (2007).

Between 2008 (when the ACH became ready to receive applications) and June 2012, the ACH received twenty-two applications and three requests for its advisory opinion.¹¹³ Twenty-two applications is not a particularly impressive number, even without considering the result in those applications. But this is partly the inevitable result of the optional jurisdiction of the ACH regarding individual petitions. This number may also be due to the fact that very few Africans or organizations even know of the existence of the ACH or of their rights. It is important to publish the list of states that have made the said declaration on the ACH's website in order to offer better guidance to individuals and non-governmental organizations.

Even then, the ACH has been criticized for its lack of expeditiousness. For example, it took over a year for this court to dispose of its first case,¹¹⁴ and it did so merely on the basis of a technicality without considering the merits. However, this court would not be the first one to suffer from such sluggishness. For example, the "Inter-American Court of Human Rights heard its first case a whole six years after its establishment in 1980, with a further four years before the second."¹¹⁵

This effect of the optional jurisdiction of the ACH relative to individual petitions has been shown in the jurisprudence of the ACH. For example, in *Michelot Yogogombaye v. The Republic of Senegal*,¹¹⁶ Mr. Michelot Yogogombaye, a Chadian national, brought a case against the Republic of Senegal, with a view to obtaining the suspension of ongoing proceedings instituted by Senegal with the objective to charge, try and sentence Mr. Houssein Habré, a former Head of State of Chad, who was living as an aslyee in Senegal. Senegal raised a number of preliminary objections regarding the jurisdiction of the ACH and admissibility of the application, asserting that it had not made any declaration accepting the jurisdiction of the ACH to deal with applications brought by individuals. The ACH held that because Senegal had not submitted the said declaration, there was no jurisdiction to hear cases instituted directly against Senegal if those cases were by individuals or non-governmental organizations. The ACH has gone on to deny jurisdiction in most of the cases that have come before it on similar grounds. It disposed of *Youssef Ababou v. Morocco* with little difficulty.¹¹⁷ The applicant alleged that the Kingdom of Morocco had refused, and continued to refuse, to issue his documents to him, which included a national identity card and a passport. However, citing Article 3(1) of its Protocol, the court held that because "this is an application brought against a State which is not a member of the African Union, which has neither signed nor ratified the Protocol establishing the Court, the Court concludes that manifestly, it does not have the jurisdiction to hear the application."¹¹⁸ In *Efoua Mbozo'o Samuel v. Pan African*

113. *The African Court Gives a Lecture at Tuzuni University*, *supra* note 107.

114. *Yogogombaye v. Republic of Senegal*, App. No. 001/2008, Judgment (Afr. Ct. Hum. & Peoples' Rts. Dec. 15, 2009), available at <http://www1.umn.edu/humanrts/africa/comcases/1-2008.pdf>.

115. Zimmermann & Bäumlér *supra* note 93, at 52.

116. *Yogogombaye*, App. No. 001/2008, Judgment.

117. *Ababou v. Kingdom of Morocco*, App. No. 007/2011, Decision (Afr. Ct. Hum. & Peoples' Rts. Sept. 2, 2011), available at http://www.worldcourts.com/acthpr/eng/decisions/2011.09.02_Ababou_v_Morocco.pdf.

118. *Id.* ¶ 12.

Parliament,¹¹⁹ Samuel, domiciled in Yaoundé, Cameroon, brought before the ACH a case against the Pan African Parliament, alleging a breach of his contract of employment as well as a breach of Article 13 (a), (b) of the OAU Staff Regulations, and improper refusal to renew his contract. The ACH held that,

[I]t is clear that this application is exclusively grounded upon breach of employment contract in accordance with Article 13 (a) and (b) of the OAU Staff Regulations, for which the Court lacks jurisdiction in terms of Article 3 of the Protocol. This is therefore a case which, in terms of the OAU Staff Regulations, is within the competence of the Ad hoc Administrative Tribunal of the African Union. Further, in accordance with Article 29(1)(c) of its Protocol, the Court with jurisdiction over any appeals from this Ad hoc Administrative Tribunal is the African Court of Justice and Human Rights.¹²⁰

In *Femi Falana v. The African Union*,¹²¹ the applicant filed an application stating that after he had made several unsuccessful efforts to get the Government of Nigeria to deposit the declaration required under Article 34(6) of the ACH Protocol, he decided to file an application against the AU as representative of its fifty three states, asking the ACH to find Article 34(6) of the ACH Protocol inconsistent with Articles 1, 2, 7, 13, 26, and 66 of the African Charter. The applicant argued, among other things, that the requirement to make a declaration to allow access to the ACH is a violation of his right to be heard guaranteed under Article 7 of the African Charter. The Respondent argued that Article 34(6) the ACH Protocol refers to a state and therefore submitted that the because the AU is not a state, it could not ratify the ACH Protocol, and that the ACH Protocol could not be interpreted in a manner which called upon a corporate entity to assume obligations on behalf of the state. The ACH denied the applicant access, simply holding that “pursuant to Articles 5(3) and 34(6) of the Protocol, read together, it does not have the jurisdiction to hear the Application filed by Mr. Femi Falana against the African Union.”¹²² While noting that as an international organization, the AU has a legal personality separate from the legal personality of its member states, the ACH nevertheless held that individuals may not proceed against non-state entities such as the AU for a collective responsibility of states for violation of human rights, stating simply that only state parties may be sued before the ACH.¹²³

But the power of the ACH must not be overstated. Ultimately, even if the ACH issued legally binding decisions on merit, if the AU and/or AU member states as such are not serious about implementing those decisions, the ACH will not be effective in bringing about a new era of human rights protection. An example is a case brought against Libya for provisional measures. While on the one hand in *African Commission on Human and Peoples’ Rights v. The Great Socialist Libyan People’s Arab Jamahiriya*,¹²⁴ the

119. Samuel v. Pan African Parliament, App. No. 010/2011, Decision (Afr. Ct. Hum. & Peoples’ Rts. Sept.30, 2011), available at http://www.worldcourts.com/acthpr/eng/decisions/2011.09.30_Samuel_v_Pan_African_Parliament.pdf.

120. *Id.* ¶ 6.

121. Falana v. African Union, App. No. 001/11, (Afr. Ct. Hum. & Peoples’ Rts. 2012).

122. *Id.*

123. *Id.*

124. African Comm’n on Human and Peoples’ Rights v. Great Socialist Peoples’ Libyan Arab Jamahiriya, App. No. 004/2011 (Afr. Ct. Hum. & Peoples’ Rts. 2012).

ACH ordered that The Great Socialist People's Libyan Arab Jamahiriya immediately refrain from any action that would result in loss of life or violation of physical integrity of persons, which could be a breach of the provisions of the African Charter or of other international human rights instruments to which it is a party, and the AU adopted a resolution that sought a political process to the resolution of the crisis, arguing "only a political solution will make it possible to promote, in a sustainable way, the legitimate aspirations of the Libyan people for reform, democracy, good governance and the rule of law."¹²⁵

A particularly important weakness of the new human rights regime is the continuation of the limited direct access of individuals and non-governmental organizations to the court. This restriction as well as the fact that the African Court is not strictly required to hear cases submitted to the African Commission¹²⁶ does not reflect a serious commitment on the part of African states to provide an effective human rights protection regime since states parties rarely sue each other in order to enforce human rights. This is a continuation of the "claw-back" mentality discussed earlier—the attempt to provide for human rights protection in letter only but never¹²⁷ in any realistic manner. Article 30(f) of the Statute of the African Court provides that individuals have access to the court, subject to the provisions of Article 8 of the ACJH Protocol/Statute.¹²⁸ Article 8 of ACJH Protocol/Statute provides that "[a]ny Member State may, at the time of signature or when depositing its instrument of ratification or accession, or at any time thereafter, make a declaration accepting the competence of the Court to receive cases under Article 30(f) involving a State which has not made such a declaration."¹²⁹ These provisions are certainly a continuation of the status quo with respect to the protection of human rights. It means that African states are giving with one hand and taking back with the other. Yet, it is important to note that although twenty-six states out of the fifty-four member states of the AU have ratified the Protocol, currently only five of them (Burkina Faso, Ghana, Malawi, Mali, and Tanzania) have made the declaration allowing individuals and NGOs to directly bring cases before the Court.¹³⁰ Unfortunately, the ACJH Protocol/Statute does not provide for a transitional provision regarding those declarations which were already made under the Protocol for one year. All that the Statute of the ACJH provides for is continued validity of the ACH Protocol for one year or a period that the AU determines, in order to allow the ACH to "take the necessary measures for the transfer of its prerogatives, assets, rights and

125. Press Release, The AU Intensifies Its Efforts towards a Political Solution in Libya and Stresses the Importance of the Respect of the Letter and Spirit of Resolution 1973 (2011), *available at* <http://www.au.int/en/sites/default/files/Press%20release%20on%20Libya%203%2005%2011.pdf>.

126. Rules of Court of the African Court on Human and Peoples' Rights, R. 29(3)(c) ("The Court may also, if it deems it necessary, hear, under Rule 45 of the Rules, the individual or NGO that initiated a communication to the Commission pursuant to Article 55 of the Charter.").

127. See *D. R. Congo v. Burundi, Rwanda & Uganda*, Comm. No. 227/99 (2003), *available at* <http://www1.umn.edu/humanrts/africa/comcases/227-99.html>.

128. ACJH Protocol/Statute, *supra* note 1, art. 30(f).

129. *Id.* art. 8(3).

130. *The African Court Gives a Lecture at Tumaini University*, *supra* note 107.

obligations to the African Court of Justice and Human Rights.”¹³¹ In light of the explicit language of the Statute of the ACJH regarding the need for states parties to make declarations regarding individual petitions, it does not seem that those declarations made under the ACH Protocol carry over to the ACJH Protocol/Statute, which means that the ACJH will have to start from scratch and will not benefit from earlier declarations made under the ACH Protocol.

But, in the absence of an amendment to the ACH Protocol, could the ACH creatively navigate this jurisdictional cul-de-sac, or does the language of the ACH Protocol essentially tie its hands in every instance? In *Michelot Yogogombaye v. The Republic of Senegal*,¹³² the separate opinion of Judge Fatsah Ouguergouz appears to be open to exploring that creativity. Judge Fatsah Ouguergouz opined that because there is no time limit provided for states parties to the ACH Protocol to file or submit optional declaration regarding individual petitions, the prescription that every state party “shall” make a declaration does not have any real legal effect.¹³³ He also argued that in light of the *travaux préparatoires* of the ACH Protocol, the filing of the declaration is optional. He stated that the filing of the optional declaration does not need to be done “before” the filing of an application because the ACH Protocol simply states that the declaration may be made “at the time of ratification or any time thereafter.” Accordingly, nothing in the ACH Protocol prevents a state party from making the declaration after an application has been introduced against it. He also argued that if a state can accept the jurisdiction of the ACH by filing an optional declaration “at any time,” nothing in the ACH Protocol prevents it from granting its consent after the introduction of the application, in a manner other than through an optional declaration. He noted that this possibility was codified, for example, in Article 62, paragraph 3, of the American Convention on Human Rights and Article 48 of the European Convention on Human Rights before this latter Convention was amended by Protocol 11.¹³⁴ Accordingly, he argued that the provisions on jurisdiction regarding individual petitions must not be interpreted literally, but must be read in light of the object and purpose of the Protocol, and in particular, in light of Article 3 entitled “Jurisdiction” of the Court. He went on to argue that because Article 3 provides in a general manner that “the jurisdiction of the Court shall extend to all cases and disputes submitted to it” and it also provides that “in the event of dispute as to whether the Court has jurisdiction, the Court shall decide,” it lies with the ACH to determine the conditions for the validity of its seizure, and to do so only in the light of the principle of consent—the idea that state’s consent is part of state sovereignty.¹³⁵ Accordingly, he argued, consent of the state party is the only condition for the ACH to exercise jurisdiction with regard to applications brought by individuals, and this consent may be expressed before the filing of an application against the state party, or it “may be expressed later, either formally through the filing

131. ACJH Protocol/Statute *supra* note 1, art. 7.

132. *Yogogombaye v. Republic of Senegal*, App. No. 001/2008, Judgment (Afr. Ct. Hum. & Peoples’ Rts. Dec. 15, 2009), available at <http://www1.umn.edu/humanrts/africa/comcases/1-2008.pdf>.

133. *Id.*

134. *Id.*

135. *Id.*

of such a declaration, or informally or implicitly through *forum prorogatum*.”¹³⁶ *Forum prorogatum* or “prorogation of competence,” he explained, may be understood as the acceptance of the jurisdiction of an international court by a state after the seizure of the court by another state or an individual, and this is done either expressly or tacitly through decisive acts or unequivocal behavior. The decisive acts may consist in effective participation in the proceedings, either by pleading on the merits, or by making findings on the merits or any other act implying a lack of objection against any future decision on the merits. He cited to the jurisprudence of the International Court of Justice for the proposition that this could constitute tacit acceptance of jurisdiction, which cannot be revoked, by virtue of the doctrine of *bona fide* or *estoppel*.¹³⁷ He concluded that the ACH does not therefore have to reject an application until the state party has expressly objected to the jurisdiction of the ACH because it has not filed the declaration because there is always the possibility of a *forum prorogatum*.¹³⁸

But, the creativeness that Judge Fatsah Ouguergouz advocates would not even have to be invoked if the African Commission was willing to bring cases on behalf of individuals. The ACH Protocol provides that the African Commission may bring cases to ACH, but this is not mandatory: “The Commission may, pursuant to Rule 84(2) submit a communication before the Court against a State Party if a situation that, in its view, constitutes one of serious or massive violations of human rights as provided for under Article 58 of the African Charter, has come to its attention.”¹³⁹ Apart from *African Commission on Human and Peoples’ Rights v. The Great Socialist Libyan People’s Arab Jamahiriya*,¹⁴⁰ the African Commission has not shown much appetite to submit cases to the ACH.

The African Commission’s proceedings against the Great Socialist People’s Libyan Arab Jamahiriya alleged serious and massive violations of human rights guaranteed under the African Charter. Perhaps the African Commission did this only because of the gravity of the situation, but there is nothing in the ACH Protocol that limits the African Commission’s action in this regard only to situations of extreme gravity.

The role of the African Commission has not been rendered less important, redundant, or irrelevant because of the establishment of the ACH. The African Commission could play an important role if it was under the obligation to refer particular cases to the African Court for final disposition, if only to render them legally binding. The reason for this is that it could save the ACH time and resources. As Judge Fatsah Ouguergouz predicts, “in the not too distant future, the Court may be flooded with a

136. *Id.*

137. *Id.*

138. *Id.*

139. African Commission Rules of Procedure, *supra* note 90, R. 118(3).

140. African Comm’n on Human and Peoples’ Rights v. Great Socialist Peoples’ Libyan Arab Jamahiriya, App. No. 004/2011 (Afr. Ct. Hum. & Peoples’ Rts. 2012).

whole range of applications which it would not be able to dispose of satisfactorily because of the limited material and human resources at its disposal.”¹⁴¹ Unfortunately, the rules of procedure of the African Commission, Rules of Procedure of the ACH, and the ACH Protocol do not provide for this level of relationship and collaboration between the ACH and the African Commission. Rule 118(1) of the 2010 Rules of Procedure of the African Commission provides that,

If the Commission has taken a decision with respect to a communication submitted under Articles 48, 49 or 55 of the Charter and considers that the State has not complied or is unwilling to comply with its recommendations in respect of the communication within the period stated in Rule 112(2), it may submit the communication to the Court pursuant to Article 5 (1)(a) of the Protocol and inform the parties accordingly.¹⁴²

But in connection with the African Commission’s ability to bring petitions, the issue that arises is whether, if a case is declared inadmissible before the African Commission, the applicant may nevertheless bring it before the ACH. The Rules of Procedure of the African Commission give some indication as to what happens in this regard.¹⁴³ The American Convention on Human Rights seems to directly deal with this issue for it provides that only states parties and the Inter-American Commission of Human Rights shall have the right to submit cases to the court.¹⁴⁴

As an aside, the reasoning of the ACH has been more elaborate than the early jurisprudence of the African Commission. Elaborate and reasoned judgments lend credibility and legitimacy¹⁴⁵ to the work of the ACH, a refreshing departure from earlier, more assertory decisions of the African Commission which were sometimes only a couple of paragraphs long, with very little indication of how the decision was reached.¹⁴⁶ Judge Fatsah Ouguergouz, in particular, has insisted on the importance of providing

141. *Alexandre v. Cameroon and Nigeria*, App. No. 008/2011, Dissenting Opinion of Judge Fatsah Ouguergouz, ¶ 35 (Afr. Ct. Hum. & Peoples’ Rts. Sep. 23, 2011), available at <http://www.africancourtcoalition.org/images/docs/afr-court/decision%20008-2011%20do.pdf>.

142. African Commission Rules of Procedure, *supra* note 90, R. 118(1).

143. *See id.* R. 119(1) (providing that the Commission can be requested to provide its opinion on the admissibility of a communication pending before the ACH).

144. American Convention on Human Rights: “Pact of San José, Costa Rica,” art. 61(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

145. *See e.g.*, Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 5 (1957) (observing that an assertive decision does “not attempt to gain reasoned acceptance for the result, and thus does not make law in the sense which the term ‘law’ must have in a democratic society.”).

146. This happened in numerous cases which can’t be stated here, but see, for example, *Academic Staff of Nigerian Universities v. Nigeria*, Comm. No. 107/93 ACHPR (1993), available at http://www.worldcourts.com/achpr/eng/decisions/Undated_ASNU_v_Nigeria.htm, the ACHPR said this and no more: “From the evidence adduced by the author, local remedies have not been exhausted. The communication is therefore inadmissible. The Commission draws the attention of the author to article 56 of the Charter.”). A similar approach can be seen in *Achutan v. Malawi*, Decision, Comm. Nos. 64/92, 68/92, 78/92, 7th ACHPR AAR Annex IX (1994), available at http://www.worldcourts.com/achpr/eng/decisions/Undated_Achutan_v_Malawi_AR07.htm; *Amnesty Int’l v. Tunisia*, Comm. No. 69/92 ACHPR (1994), available at <http://www1.umn.edu/humanrts/africa/comcases/69-92.html>; *Aturu v. Nigeria*, Comm. No. 72/92 ACHPR (1994), available at <http://www1.umn.edu/humanrts/africa/comcases/72-92.html>; *Austrian*

reasoned judgments,¹⁴⁷ observing that “[t]he integrity of the Court’s judicial function indeed requires that reasons be provided for decisions . . . so as to comply with the requirements of predictability and consistency which are the essential ingredients that underpin the principle of legal certainty which should be guaranteed by the Court at all times.”¹⁴⁸ The ACH Protocol also provides that “[r]easons shall be given for the judgment of the Court.”¹⁴⁹

The ACH also needs to demonstrate that it is not willing to simply abdicate its responsibility by referring cases to other bodies such as the African Commission, which are not as empowered to deliver legally binding decisions and which can be inefficient in terms of time and resources, especially as the ACH does not meet on a regular basis as Judge Fatsah Ouguergouz pointed out in his dissent in *Ekollo Moundi Alexandre v. Cameroon and Nigeria*, in which the ACH transferred the matter to the African Commission.¹⁵⁰ Article 6(3) allows the ACH to consider the cases or transfer them to the African Commission. In light of the fact that the decisions of the African Commission do not have legally binding effect, it is important that the ACH develops criteria that lead most cases to be considered by this court rather than transferred to the African Commission if the ACH wants to project itself as the harbinger of a new dispensation in human rights protection across the continent and that it is no longer business as usual. Judge Fatsah Ouguergouz appropriately observed that

In deciding not to rule on the merits of a case over which it has jurisdiction, the African Court could however be opening the door to a veritable denial of justice; the referral of the case to the Commission for determination on the merits would not suffice to forestall such a denial of justice since only the Court does have powers of a judicial nature.¹⁵¹

It has been argued that Article 6(3) of the ACH Protocol could be used by the ACH to “side-step cases viewed as politically inconvenient.”¹⁵²

Other criticisms of the ACH are more structural. The ACH has only sixteen judges¹⁵³ for a continent

Committee against Torture v. Burundi, Comm. No. 26/89 ACHPR (1989), available at <http://www1.umn.edu/humanrts/africa/comcases/26-89.html>; Ayele v. Togo, Comm. No. 35/89 ACHPR (1994), available at <http://www1.umn.edu/humanrts/africa/comcases/35-89.html>; Bariga v. Nigeria, Comm. No. 57/91 ACHPR (1994), available at <http://www1.umn.edu/humanrts/africa/comcases/57-91.html>; Buyingo v. Uganda, Comm. No. 8/88 ACHPR (1995), available at <http://www1.umn.edu/humanrts/africa/comcases/8-88.html>; and Capitaio v. Tanzania, Comm. No. 53/91 ACHPR (1994), available at <http://www1.umn.edu/humanrts/africa/comcases/53-91.html>. The African Commission could argue that some of these cases were disposed of on the basis of manifest lack of jurisdiction, but even in other cases decided on the merits, the African Commission simply restated the facts and the applicable law, but with very little or no reasoning as to how it applied the law to the facts or how it reached the decision.

147. *Alexandre*, App. No. 008/2011, ¶ 21.

148. *Id.* ¶ 24.

149. ACH Protocol, *supra* note 56, art. 28.

150. *Alexandre*, App. No. 008/2011.

151. *Id.* ¶ 34.

152. David Padilla, *An African Human Rights Court: Reflections from the Perspective of the Inter-American System*, 2 AFR. HUM. RTS. L.J. 185, 194 (2002).

153. See ACJH Protocol/Statute *supra* note 1, art. 3(1).

of about a billion people. Europe and Africa have just about the same population.¹⁵⁴ A developing continent might have more human rights problems that would necessitate the adoption of appropriate enforcement resources. By comparison, the European Court of Human Rights consists of a number of judges “equal to that of the High Contracting Parties.”¹⁵⁵ In the case of Africa, that number would be fifty-three. The statute provides, though, that “[u]pon recommendation of the Court, the Assembly, may, review the number of Judges.”¹⁵⁶

C. *The African Court of Human Rights and Justice*

It is important to first note that the proposed ACJH would merge the Court of Justice of the Union or the AU Court and the ACH. The ACJ is a creature of the Constitutive Act.¹⁵⁷ To operationalize this ACJ, the African Union adopted the Protocol of the Court of Justice of the African Union on July 11, 2003. Subsequently, however, the African Union adopted¹⁵⁸ the Protocol on the Statute of the African Court of Justice and Human Rights (ACJH Protocol/Statute), to merge the African Court on Human and Peoples’ Rights and the Court of Justice of Union into a single court—the ACJH.¹⁵⁹ The ACJH has not yet come into existence because the mandatory fifteen ratifications of the ACJH Protocol/Statute to enter into force have not been reached. But the provisions of the ACJH can be analyzed even before the ACJH becomes operational.

To ensure a seamless transition from the ACH to the ACJH, when the ACJH Protocol/Statute becomes operational any cases pending before the ACH which shall not have been concluded before the entry into force of the ACJH Protocol/Statute shall be transferred to the Human Rights Section of the ACJH.¹⁶⁰ Additionally, the ACH Protocol will remain in force for a transitional period not exceeding one year or any other period determined by the African Union Assembly, after entry into force of the ACJH Protocol/Statute, which would enable the ACH to take the necessary measures for the transfer of its prerogatives, assets, rights and obligations to the ACJH.¹⁶¹ The ACJH will have both a General

154. See U.N. Dep’t of Econ. and Social Affairs (DESA), Population Division, *World Population to 2300*, at 187, available at <http://www.un.org/en/development/desa/population/publications/pdf/trends/WorldPop2300final.pdf> (In the year 2000, Africa’s population was 796 million and Europe’s was 728 million).

155. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 20, *concluded* Nov. 4, 1950, 213 U.N.T.S. 221.

156. ACJH Protocol/Statute *supra* note 1, art. 3(1).

157. See AU Constitutive Act, *supra* note 2, art. 18.

158. Decision on the Seats of the African Union, Assembly/AU/Dec.45 (III), in Assembly of the African Union, 3d Ord. Sess., July 6–8, 2004, available at <http://www.africa-union.org/au%20summit%202004/Assm/Assembly%20Decisions%20-Final.pdf>. See also Decision on the Merger of the African Court on Human and Peoples’ Rights and the Court of Justice of the African Union, Assembly/AU/Dec.83 (V), in Decisions, Declarations and Resolution, 5th Ord. Sess., July 4–5, 2005; ACJH Protocol/Statute *supra* note 1, arts. 1–2.

159. ACJH Protocol/Statute *supra* note 1, art. 1.

160. *Id.* art. 5.

161. *Id.* art. 7.

Affairs Section and a Human Rights Section.¹⁶² What is not so clear is whether these transitional provisions also concern declarations regarding individual petitions already made under ACH Protocol. All that the ACJH Protocol/Statute provides for is the continued validity of the ACH Protocol for one year or a period that the AU determines, in order to allow the ACH to “take the necessary measures for the transfer of its prerogatives, assets, rights and obligations to the African Court of Justice and Human Rights.”¹⁶³ In light of the explicit language of the ACJH Protocol/Statute regarding the need for states parties to make declarations regarding individual petitions, it does not seem that those declarations made under the ACH Protocol remain effective under the ACJH Protocol/Statute, which means that the ACJHR will have to start over and will not benefit from earlier declarations made under the ACH Protocol.

The merged court has certain advantages. First, this helps to avoid duplication or proliferation of courts and it promotes efficiency.¹⁶⁴ Second, a “single court would avoid splitting of resources, both human and financial, towards maintaining two courts.”¹⁶⁵ The experience of the African Commission more than demonstrates the need for doing this. The “African Commission, face[s] severe underfunding and understaffing problems, which affect their effectiveness,”¹⁶⁶ and “many African countries seem unwilling or unable to pay in a time their dues to the regional organisation.”¹⁶⁷ Third, the merger sends a signal that economic and other matters are not being prioritized over human rights concerns but that all of these issues are of equal weight and importance. Fourth, the “synergy between political and economic matters on the one hand, and human rights, on the other, necessitates an integrated court.”¹⁶⁸ But the counterpoint to this could be that economic issues and human rights are “increasingly acknowledged as highly specialised fields,”¹⁶⁹ and that a merger could in fact risk the relegation of human rights issues to the periphery.¹⁷⁰ Fifth, the merger helps to avoid the “serious risk of conflicting jurisprudence, as the same rules of law might be given different interpretations in different cases. . . the AU Constitutive Act, which the Court of Justice is designated to interpret, encompasses human rights issues.”¹⁷¹

162. *Id.* art. 17.

163. *Id.* art. 7.

164. 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, 849 (2003) (arguing that “Africa does not need two or more courts and that the AU should settle for a single court to interpret all African legal instruments and adjudicate conflicts arising therefrom. Having two courts in Africa will not only present financial difficulty, but will also unnecessarily duplicate efforts and even create potential inconsistency.”).

165. Kithure Kindiki, *The Proposed Integration of the African Court of Justice and the African Court of Human and Peoples' Rights: Legal Difficulties and Merits*, 15 *AFR. J. INT'L & COMP. L.* 138, 144 (2007).

166. Viljoen & Baimu, *supra* note 8, at 252.

167. *Id.* at 253.

168. Kindiki, *supra* note 165, at 145.

169. Viljoen & Baimu, *supra* note 8, at 254.

170. *Id.*

171. Kindiki, *supra* note 165, at 145.

In spite of all of these advantages, “[n]ow that one of the twin African courts is . . . functional . . . vested interests might make submerging of the human rights Court into the Court of Justice very difficult even though it could be the most pragmatic thing to do.”¹⁷² It is therefore suggested that in order not to frustrate

[L]egitimate expectation of those judges and the countries which had nominated them. . . [a] more practical way of dealing with the serving judges would have been to provide that irrespective of the date of entry into force of the protocol on the integrated court, election of judges thereto will not take place until the 2 year terms of four of the initial judges of the human rights court have lapsed.¹⁷³

Of greater concern, however, is that the problems associated with the ACH are perpetuated under the ACJH. For example, while individuals can bring petitions for human rights violations against states,¹⁷⁴ this is only possible if the individual’s state of nationality has previously made a declaration accepting the competence of the ACJH to receive such cases.¹⁷⁵ The critique of the ACH Protocol in regard to individual petitions applies equally here as well. This means that although the ACJH Protocol/Statute is progressive in other respects, especially with regard to enforcement of the ACJH’s judgments, adopting the approaches of the European Union,¹⁷⁶ ultimately the ACJH does not advance human rights protection far enough.

While the ACJH Protocol/Statute provides that the ACJH will be complementary to the work of the African Commission,¹⁷⁷ the ACJH Protocol/Statute appears to have lost “some key complementarity provisions” enshrined in the ACH Protocol.¹⁷⁸ For example, the ACH Protocol made provisions for the court to “transfer cases it deemed necessary to the Commission.”¹⁷⁹ For practical reasons, it is important that the ACJH strengthens, rather than undermines, the African Commission precisely because of “the limited resources, human and material, which have been available to the Commission, as it would most probably be the case with the Court,”¹⁸⁰ unless it appears that the African Commission is unwilling to cooperate. Additionally, “the [ACJH] Protocol has also failed to clearly demarcate the responsibilities and institutional relations between the Court and African Commission in their contentious and advisory jurisdictions.”¹⁸¹

172. *Id.* at 141.

173. *Id.* at 144.

174. ACJH Protocol/Statute *supra* note 1, art. 30(f).

175. *Id.* art. 8(3).

176. Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms 6, May 13, 2004, C.E.T.S. 194 (2004) (entered into force June 1, 2010) (amending Article 46(2) to say that “[t]he final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.”).

177. ACJH Protocol/Statute *supra* note 1, art. 27(2).

178. Juma, *supra* note 39, at 284.

179. *Id.* at 284 (citing ACH Protocol, *supra* note 56, art. 6(3)).

180. Elsheikh, *supra* note 92, at 253.

181. Juma, *supra* note 39, at 285–86 (citing Elsheikh, *supra* note 92).

Since the ACJH is not only concerned with human rights but has a general mandate as well, it should have included criminal matters such as genocide, crimes against humanity and war crimes within its material jurisdiction or *jurisdiction ratione materiae*. This could be helpful for nations that are still transitioning from conflicts, especially in the wake of African criticism of the International Criminal Court as being an overly euro-centric court.¹⁸²

While the ACJH Protocol/Statute provides that the ACJH shall be “impartial and independent,” it is not clear how it will be able to effectuate these critically important qualities. For example, Article 5(1) of the ACJH Protocol/Statute provides that each state party to the ACJH Protocol/Statute may submit candidates for the post of judge of the Court. The fact that the terms of office are limited and they are political appointees may inject politics into the process and may compromise competence in spite of the fact that the statute provides that judges shall be persons recognized for their “competence and experience in international law and/or, human rights.”¹⁸³ Nowhere in the ACJH Statute does it provide for independent applications by other potentially suitable candidates. A close reading of ACJH Protocol/Statute suggests that candidates must be submitted and endorsed only by their respective states of nationality.¹⁸⁴ This could potentially exclude the more qualified ACJH candidates from competing for positions on the ACJH, particularly those who have been critical of their respective governments. That could easily be the reason that they are not submitted by their state of nationality.¹⁸⁵ The statute should have provided for the possibility of a state party nominating qualified persons from other contracting state parties to the ACJH Protocol/Statute. The American Convention of Human Rights is instructive in this regard. It provides that “[e]ach of the States Parties may propose up to three candidates, nationals of the state that proposes them or of any other member state of the Organization of American States.”¹⁸⁶

With regard to the independence of the judges, the ACJH Protocol/Statute provides that “[i]n the

182. See, e.g., *Museveni Wants Africa to Embrace ICC*, NEW VISION (June 1, 2010), <http://www.newvision.co.ug/D/8/12/721470> (President Museveni of Uganda urged African delegations attending the Kampala Review conference to discredit the claim that the ICC is a court for Europeans to judge Africans).

183. ACJH Protocol/Statute *supra* note 1, art. 4.

184. *Id.* Annex art. 5(2) (provides that “[e]ach State Party may present up to two (2) candidates and shall take into account equitable gender representation in the nomination process.”).

185. For example, Justice George Kanyeihamba of Uganda maintained that the Uganda government blocked the renewal of his tenure with ACH because of his critical stance towards the government of Mr. Yoweri Museveni. See Emmanuel Gyezaho, *Museveni Must Go, Says Kanyeihamba*, DAILY MONITOR (June 3, 2009), <http://www.monitor.co.ug/News/Education/-/688336/708626/-/10d8efk/-/index.html>. This was not the first time that the Uganda government blocked the nomination of a qualified candidate. Mr. Olara Otunnu, former U.N. Under-Secretary and Special Representative for Children and Armed Conflict, was denied a Ugandan nomination for his criticism of the Museveni government. He renounced his Ugandan citizenship and adopted that of the Ivory Coast for the purposes of his nomination to the U.N. job. See Mercy Nalugo et al., *Otunnu is UPC's Next President*, DAILY MONITOR (Mar. 14, 2010), <http://www.monitor.co.ug/News/National/-/688334/879186/-/wja5yn/-/index.html>.

186. American Convention on Human Rights: “Pact of San José, Costa Rica,” art. 53(2), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (emphasis added).

performance of the judicial functions and duties, the Court and its Judges shall not be subject to the direction or control of any person or body.”¹⁸⁷ While this provision is basically the same as that in the European Convention on Human Rights,¹⁸⁸ ultimately the enforcement of the decisions of the Court depend on the political process¹⁸⁹ which, in light of the experience of the African Commission, can be slow, secretive and frustrating.¹⁹⁰ But the ACJH will be able to render its judgments in open court.¹⁹¹

Articles 50 and 51 of the ACJH Protocol/Statute also make provisions for states parties and organs of the AU to intervene in the proceedings of the ACJH interpreting the Constitutive Act or treaties, in which they are not parties.¹⁹² Individuals and NGOs, however, are excluded from exercising similar rights and cannot intervene even if the case affects them in one way or another.¹⁹³

The ACJH Protocol/Statute must be credited for a number of progressive provisions. It provides, for example, that “[w]here a party has failed to comply with a judgment, the Court shall refer the matter to the Assembly, which shall decide upon measures to be taken to give effect to that judgment,”¹⁹⁴ and that “[t]he Assembly [of Heads of State of the African Union] may impose sanctions by virtue of paragraph 2 of Article 23 of the Constitutive Act.”¹⁹⁵ Article 23(2) of the Constitutive Act provides that “any Member State that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly,” and that the ACJH can submit an annual report to the Assembly of Heads of State of the African Union in which it is expected to specify the cases in which a party has not complied with the judgments of this court.¹⁹⁶ However, save for a few cases,¹⁹⁷ the AU’s record does not reflect serious, concerted and consistent

187. ACJH Protocol/Statute *supra* note 1, art. 12(3).

188. *Id.* art. 21(3).

189. *Id.* Annex art. 57 (provides that “[t]he Court shall submit to the Assembly, an annual report on its work during the previous year. The report shall specify, in particular, the cases in which a party has not complied with the judgment of the Court.”).

190. African Charter, *supra* note 3, art. 59.

191. ACJH Protocol/Statute *supra* note 1, art. 43(4).

192. *Id.* arts. 50–51.

193. *See* Juma, *supra* note 39, at 296.

194. ACJH Protocol/Statute *supra* note 1, Annex art. 46(4).

195. *Id.* Annex art. 46(5).

196. *Id.* Annex art. 57.

197. For example, in response to the political crisis in Madagascar, the AU imposed a number of sanctions specifically targeting Rajoelina’s assets and Rajoelina’s supporters. *See African Union Acts Against Madagascar’s Rajoelina*, BBC NEWS (Mar. 18, 2010), <http://news.bbc.co.uk/2/hi/africa/8574051.stm>. When Guinea’s Moussa Dadis Camara seized power on December 23, 2008 in a military coup and subsequently failed to renege on his promise to swiftly restore the constitutional order, the African Council issued “targeted sanctions including denial of visas, travel restrictions and freezing of assets.” *AU, US Impose Sanctions on Guinea Junta* MAIL & GUARDIAN (Oct. 30, 2009), <http://mg.co.za/article/2009-10-30-au-us-impose-sanctions-on-guinea-junta>. However, the cases in which the African Union has not resolutely and firmly responded to human rights and political crises of similar or even of graver magnitude far outstrip the cases just discussed. For example, consider the African Union, Zimbabwe, and its feeble response to

commitment to the application of such sanctions to noncompliant African member states. As such, while a more publicized approach will result in more naming and shaming which can help advance enforcement efforts somewhat more than was previously the case under the African Commission,¹⁹⁸ this too can only be effective depending on the degree to which African states actually care about shame and criticism. In sum, although the documents regarding the legal effect of the African Courts are impressive, they ultimately may not amount to more than paper tigers.

V. Transforming Political, Economic, and Social Context in Africa

The promotion and protection of human rights cannot take place in isolation or in a vacuum. Any regional system can have only as much human rights protection as the political and economic realities in that region permit. Indeed, “[t]here is no future for the human rights movement in Africa unless it can secure domestic ideological, financial, and moral support from interested constituencies.”¹⁹⁹ Significant financial resources are necessary to have effective human rights enforcement institutions. So, perhaps a multi-faceted approach is imperative. This calls for the promotion and acceleration of transformation of socio-political conditions in Africa. To this end, at the turn of the Millennium the international community applauded and showcased each democratic improvement in Africa such as Botswana, South Africa, Senegal, and Uganda, among others, as examples for the rest of Africa.²⁰⁰ This needs to be done consistently. In the aftermath of September 11, 2001, the world’s attention shifted to the Middle East, and Africa was mostly relevant only to the extent that it was strategically important in the fight against global terrorism. But Africa’s concerns went well beyond that. When the global economic recession arrived in 2008, the interest in Africa receded even further. This is as true of the United Nations as it is true of the most consequential global actors, such as the United States.

But, the challenge goes first to Africans and the AU. The AU should continue to improve the political, socio-economic conditions in Africa, which are prerequisites for the full enjoyment of human rights in the respective member states of the AU. The rest of the world can only do so much for Africa. The AU should stand ever more firmly against regimes that assume power by extra-constitutional means as has happened recently in a few countries.²⁰¹ Over time, a new culture will emerge that will provide a

the political crises in Libya and Kenya. The African Union has consistently failed to effect change in Zimbabwe, although President Mugabe has clung to power for the last thirty years, flouting democratic principles entrenched in the Constitutive Act of the African Union and human rights principles in the African Charter. Neither was the African Union able to challenge Gaddafi’s stranglehold on power for almost forty years, nor was it able to take on Kenya’s situation when election violence broke out in 2007.

198. Zimmermann & Bäumlér, *supra* note 93, at 48.

199. Makau W. Mutau, *African Human Rights Organizations: Questions of Context and Legitimacy* (Buff. Legal Stud. Research Paper Series No. 2010-003), in *HUMAN RIGHTS, THE RULE OF LAW, AND DEVELOPMENT IN AFRICA* 191, 196 (Paul Tyambe Zeleza & Philip J. McConaughay eds., 2004).

200. Pres. George W. Bush, Presidential Address to the Nation, Oct. 7, 2001, available at <http://georgewbush-whitehouse.archives.gov/news/releases/2001/10/20011007-8.html>.

201. Examples are the 2008 coup in Guinea and the recent coup attempt in Guinea-Bissau. See Jeffrey Gettle-

solid foundation for the promotion and protection of human rights. It is remarkable that in “the 45 years to 2001, 80 successful and 108 unsuccessful coups took place in Africa.”²⁰² The Constitutive Act provides for the suspension of the membership of such regimes from participation in the activities of the union.²⁰³ But this provision has been inconsistently enforced.

In addition, the AU must be seen to make a real difference in the lives of the citizens of the individual countries. More than ever, it is imperative for the AU to work towards meaningful economic integration that has succeeded in other regions such as the European Union. It is not enough for the AU to replicate human rights instruments of the European Union without working to change the conditions on the ground that supports the realization of such instruments. The Treaty Establishing the African Economic Community recognizes that “economic integration of the Continent is a pre-requisite for the realization of the objectives of the OAU.”²⁰⁴ It establishes praiseworthy objectives including the “liberalisation of trade through the abolition, among Member States, of Customs Duties levied on imports and exports and the abolition, among Member States of Non-Tariff Barriers in order to establish a free trade area at the level of each regional economic community,”²⁰⁵ “adoption of a common trade policy vis-à-vis third States,”²⁰⁶ “establishment of a common market,”²⁰⁷ and “gradual removal, among Member States, of obstacles to the free movement of persons, goods, services and capital and the right of residence and establishment.”²⁰⁸ But it is now almost twenty years since the adoption of this treaty and yet there is very little to show in terms of the realization of these noble objectives. But adopting international treaties must have consequences. Countries must be ready to help investors and to open their doors and set certain continental trade rules that are conducive to continent-wide trade.

VI. Recommendations and Conclusion

It is important for African leaders to continue to cultivate a serious commitment to the enforcement of human rights. The African region has gone a long way in articulating human rights norms, evidenced by the adoption of the Constitutive Act which explicitly commits the political institutions to human

man, *A Largely Welcomed Coup in Guinea*, N.Y. TIMES (Dec. 25, 2008), <http://www.nytimes.com/2008/12/25/world/africa/25iht-25guinea-FW.18922395.html>; see also *Guinea-Bissau Leaders Held in Apparent Coup*, BBC NEWS, <http://news.bbc.co.uk/2/hi/8599070.stm> (last updated Apr. 1, 2010).

202. See Jeremy Sarkin, *The Role of the United Nations, the African Union and Africa's Sub-Regional Organizations in Dealing with Africa's Human Rights Problems: Connecting Humanitarian Intervention and the Responsibility to Protect*, 53 J. AFR. L. 1, 2 (2009).

203. AU Constitutive Act, *supra* note 2, art. 30.

204. Treaty Establishing the African Economic Community pmbl., *adopted* June 3, 1991 [hereinafter AEC Treaty], available at http://www.africa-union.org/root/au/Documents/Treaties/Text/AEC_Treaty_1991.pdf. Forty-nine African countries had ratified this treaty as of March 30, 2010.

205. *Id.* art. 4(2)(d).

206. *Id.* art. 4(2)(f).

207. *Id.* art. 4(2)(h).

208. *Id.* art. 4(2)(i).

rights and creates new institutions for the enforcement of human rights protections. However, it is still important for ACH Protocol as well as the ACJH Protocol/Statute to provide direct individual access to these human rights enforcement institutions. The requirement that state parties should first make a declaration permitting individual or NGO petitions should be eliminated. Some commentators have suggested that this requirement, which essentially is an *opt-in* provision, should be replaced with a provision that permits states parties “to *opt out* of accepting the otherwise automatic jurisdiction of the Court over individual and NGO petitions.”²⁰⁹ Also, there should be no requirements for NGOs to first have observer status before they can present petitions to the ACJH or ACH. As Udombana argues in respect to the African Commission, “the requirement of obtaining ‘observer status’ before the Commission potentially implies a longer, more expensive process that few small NGOs are likely to be able to undertake.”²¹⁰

Yet, even if individuals had direct access to African human rights enforcement institutions, the reality in Africa is that there is still a need to develop a culture of commitment to respect for human rights. This has relevance for the enforcement of human rights generally. It has been noted that ultimately, the future of the ACH “is dependent on the will of the African states,”²¹¹ among others. It seems a “logical, but not necessarily correct, argument . . . that if the experiment has succeeded in Europe, it can also prosper in Africa. This is probably the reason why Africa’s integration agenda is closely patterned after the European model.”²¹² But in fact, “mere emulation of the European experiment may not work in Africa.”²¹³ European “countries were motivated to unify because of the tragic and costly war, the fear of Nazi Germany, and the apprehension of communist expansion. In contrast, Africa’s current movement has more to do with the challenges resulting from globalization than the euphoria of unity.”²¹⁴ As Udombana puts it, Africa “cannot transplant the European model of integration, including the paraphernalia of courts and other institutions, to Africa and expect it to flourish without carefully tailoring it to the specific needs of the region.” Those needs include the need to create sufficient political, economic and social conditions that would support the rule of law, without which new judicial institutions would be useless. Those conditions include creating democratic governance across African states as well as improved economic conditions.

It is also important to adopt a proper and realistic attitude. The ACH and the ACJH cannot be expected at their inception to perform at the same level as the regional human rights courts in the Inter-American system or the European Union. In any event, the ACH or ACJH inevitably serve states that are still developing from the standpoint of commitment to the rule of law and available economic and human resources. The challenges that these courts face are unique because of the diverse cultures,

209. Udombana, *supra* note 21, at 99.

210. *Id.* at 100.

211. Zimmermann & Bäumlér, *supra* note 93, at 52.

212. Udombana, *supra* note 164, at 852.

213. *Id.* at 853.

214. *Id.*

political heterogeneity and enormous geographical space across the African continent.

There is also a need to educate Africans about the ACH or ACJH. Education is power. Unless ACH or ACJH is popularized in the African consciousness it will remain at the periphery of peoples' lives. NGOs in various countries can play a significant role in this regard. But lawyers and law schools should also take an active part in popularizing the ACH or ACJH.

The ACH's or ACJH's jurisdiction should be expanded to include criminal matters such as genocide, crimes against humanity and war crimes. Many African countries still have issues of grave violations of human rights that also have a criminal component that cannot be left to a single global court such as the International Court of Justice.

In light of the fact that the African Commission has only discretionary powers to refer a case to the ACH/ACJH, the reluctance of the African Commission to refer cases of noncompliance to the ACH, as well as the fact that a hierarchical order between the African Commission and the African Court is not intended, perhaps it is time to face the truth that the African Commission has served its purpose and should now merge the African Commission with the ACH or replace it with a chamber of the ACH, which would open the possibility of cases reaching a grand chamber of the ACH. This would also put the scant human and financial resources available to the African Commission to better use. This recommendation is reinforced by the recognition that it appears that the African Commission fears that "it will lose all importance next to a strong court, since it is paid little attention as it is,"²¹⁵ and an admission that "co-operation between the Commission and the Court is likely to prove difficult in practice."²¹⁶ In these circumstances, it would be better to abandon the principle of complementarity between the ACJHR/ACH and the African Commission.

Ultimately, for these new mechanisms to succeed it will be necessary for African States to commit themselves to provide "adequate financial and human resources. It will need proper quarters and a well-trained staff, modern office equipment and the support of competent administrative personnel."²¹⁷

It is important that the relationship between the various judicial and quasi-judicial institutions is as smooth and seamless as possible to avoid not only conflicts of jurisdiction but also wastage of time and other resources through overlapping jurisdictions and duplication. For example, the relation of the ACJH to the Court of Justice of the African Economic Community (AEC) is not a clear one.²¹⁸ It is noteworthy that the ACJH Protocol/Statute does not spell out the relationship between the AEC and ACJH.

In conclusion, if the AU ends at instituting new judicial institutions, without transforming the un-

215. Zimmermann & Bäumler, *supra* note 93, at 50.

216. Ouguergouz, *supra* note 28, at 99.

217. Padilla, *supra* note 152, at 190.

218. AEC Treaty, *supra* note 204, art. 18(1).

derlying normative frameworks or procedural bottle-necks such as restricting direct access to individuals or NGOs to such institutions, as well as working to improve conditions on the ground that foster the promotion and protection of human rights, there will be no new human rights dispensation.