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Development of the African Human Rights System in the Last Decade

by Vincent O. Nmehielle

IN 1996, THE AFRICAN COMMISSION on Human and Peoples' Rights (African Commission or Commission), the global human rights community, and those with an interest in African human rights, celebrated ten years of the African Charter on Human and Peoples' Rights (African Human Rights Charter) entry into force during the Commission's 20th Ordinary Session in Grand Bay, Mauritania from October 21 to 31. It was indeed a milestone for the African regional human rights system, which until then was not given much of a chance with regard to its ability to actualize the objectives and aspirations contained in the African Human Rights Charter. Indeed, the adoption of the African Human Rights Charter gave recognition to the great need to give more serious attention to the promotion and protection of human rights in the African continent and to provide some institutional oversight in that regard in the face of the incessant, gross human rights violations that characterized post-colonial African governance. However, early reviews of the African Human Rights Charter were negative. Gino Naldi, in his contribution to *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000* (2002), wrote that it "has largely proved to date to be a false dawn for the promotion and protection of human rights in Africa." The last decade of the African Human Rights System (African System) proved a mixture of these assessments.

The African System, conceived with the entry into force of the African Human Rights Charter in 1986, has existed for eighteen years, while the African Commission has been in existence for seventeen years since its inauguration in 1987. For the avoidance of confusion, subsequent reference to the African System encompasses the African Human Rights Charter, mechanisms established under it, and other human rights instruments adopted by the African regional umbrella (whether under the defunct Organization of African Unity (OAU), or its successor the African Union (AU)). Human rights instruments under the African System include the Convention on Specific Aspects of Refugee Problems in Africa (Refugee Convention), the African Charter on the Rights and Welfare of the Child (Child Rights Charter), the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights (Protocol on the Human Rights Court), and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Women's Rights Protocol). While the inclusion of these instruments in the African System is quite in order, the African Human Rights Charter and the mechanisms established under it form the basis of this article, or any other such evaluative work, with necessary references to the other instruments as deemed appropriate.

This paper tries to provide an overview of the African System's development over the past ten years, with a view to visualizing how the past development could inform the future evolution of the system. One would say that the African System has developed progressively in the last ten years within its peculiar circumstances, taking into consideration the fact that it has been in existence for a total of eighteen years. To properly assess this development, I think it instructive to

assess the development of the African System in the last decade from normative or quasi-normative and institutional perspectives. These perspectives would then inform the future of the system as a regional entity that should impact human rights promotion and protection within the African continent in the 21st century.

NORMATIVE AND QUASI-NORMATIVE DEVELOPMENT OF THE AFRICAN SYSTEM

THE AFRICAN HUMAN RIGHTS CHARTER

The African Human Rights Charter remains the primary normative instrument for the promotion and protection of human rights in the continent. There is also the arguable notion that the charter of the defunct OAU (OAU Charter) was a reinforcing larger instrument because the African System was established under the auspices of that regional organization. The extent to which the OAU Charter could be said to have had a positive normative effect on the African Human Rights Charter is quite doubtful, since it could not be said to have expressly provided for human rights protection as a continental objective. The Constitutive Act of the new AU appears to be more positively oriented towards human rights promotion and protection in the continent and thus would have a larger normative impact on the future development of the African System.

In the last decade, the African Human Rights Charter remained relatively unchanged apart from additional protocols that were adopted to enhance either its substantive provisions or to complement the system's institutional enforcement mechanism. Each of these protocols will be discussed in turn. Generally, the substantive provisions of the African Human Rights Charter accord with similar provisions in other principal international and regional human rights instruments, such as the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the American Convention on Human Rights (American Convention), and the European Convention for Human Rights and Fundamental Freedoms (European Convention). The fact that the African Human Rights Charter contains elaborate provisions for the substantive protection of human rights in all areas without being hampered by the traditional divide between civil and political rights on the one hand and economic, social, and cultural rights on the other remains one of its unique characteristics. Its extension of human rights protection to what has been termed "group" or "collective" rights that ordinarily were not classified as falling either within civil and political rights, or economic, social, and cultural rights, is also an enduring legacy.

Right from its adoption through to the last decade, some provisions of the African Human Rights Charter have been subjected to serious criticisms because of "their tendency to dilute the human rights protections enshrined therein" as Nsongurua Udombana stated in his piece "Towards the African Court on Human and Peoples' Rights: Better Late than Never" published in the *Yale Human Rights and Development Law Journal* in 2000. The concern in this regard has always been with the so-called "claw-back" clauses that are quite visible in the charter, to the effect that they subject provisions of the charter to domestic law, thereby limiting the potency of such provisions. In many aspects, the limiting provisions in question run thus:

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“except for reasons and conditions previously laid down by law” (Article 6 in relation to the right to security and liberty of the person), “within the law” (Article 9, dealing with freedom of expression and opinion), “subject to law and order” (Article 8 on freedom of conscience and the right to practice a religion of one’s choice), “in accordance with the provisions of appropriate laws” (Article 14 on the right to property), etc.

The fear is that these “claw-back” clauses “permit the routine breach of the Charter obligations for reasons of public utility or national security and confine many of the Charter’s protections to rights as they are defined and limited by domestic legislation.” (Article 14) The concerns expressed by various commentators on this aspect of the charter’s provisions are quite well-placed, but they have not been borne out of the African Commission’s interpretation of those provisions in its development of the charter’s normative content. The African Commission has, in fact, variously rejected that interpretation, and reinforced the overarching reach of international human rights law, which does not succumb to flimsy domestic laws or regulations that tend to limit the enjoyment of human rights protection without cause, or in a very irregular situation. In a series of cases consolidated in *Media Rights Agenda and Constitutional Rights Project v. Nigeria* the Commission set of the standard for reviewing state limitation of human rights:

The African Charter does not contain a derogation clause. Therefore limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances [paragraph 67]. The only legitimate reasons for limitations to rights and freedoms of the African Charter are found in Article 27(2), that is that the rights of the Charter “shall be exercised with due regard to the rights of others, collective security, morality and common interest” [paragraph 68]. The reasons for possible limitation must be founded in a legitimate state interest and the evils of limitations of rights must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained [paragraph 69].

The African Commission’s bravery in reaching this decision is remarkable, a feature of the passage of time and maturity of the African System, as this was not always the case, especially in the first five to eight years of the Commission’s existence. Other problematic areas of the African Human Rights Charter’s substantive provisions include the provisions on individual duties; the lack of provision for effective remedies, or an effective enforcement machinery, based on which the charter was referred in the early years as “a paper tiger” that depended on public opinion for its enforcement as stated by U.O. Umozirike in *The African Charter on Human and People’s Rights* 25 (1992); and the lack of a provision for several “internationally recognized civil and political rights, as well as socio-economic rights” (Heyns 2001) such as the right to privacy, the prohibition of forced labor, the right to form trade unions, the satisfactory protection of women’s rights, etc. The suggestion is that this calls for a revision of the charter’s normative content.

It is not certain that a revision of the charter’s normative content will, on its own, impact the effectiveness of the charter or its enforcement mechanism without any positive action on the part of the institutional monitoring organs of the African System. Over the years, the African Commission has shown that the lack of express provisions on specific rights in the charter would not prevent positive interpretation

of international human rights law that may be implied in the substantive provisions of the charter, as some of its decisions have indicated. This has, however, not stopped further normative development of human rights within the objectives of the charter in particular areas where something had to be done beyond extending the reach of the charter through mere inference. The Women’s Rights Protocol and similar protocols fill in the normative gaps in the charter, while the Protocol on the Human Rights Court seeks to remedy the lack of an effective enforcement machinery. On the issue of duties, it must be noted that it is an innovation in the African System that has not really done any harm to human rights protection on the continent contrary to commentaries on it. No state party to the African Human Rights Charter has pleaded it as a defense for the state’s violation of human rights. Neither has the African Commission found individual duty as a basis for excusing a state party’s abuse of human rights. I do not perceive that this would change any time soon, if ever.

The normative development of the African Human Rights System has not been static, but it has neither succumbed to every suggestion for the African Human Rights Charter’s revision. It has rather been informed by various needs that may arise by the use of additional protocols, conventions, or other quasi-normative tools such as declarations, rules of procedure, or resolutions.

THE CHILD RIGHTS CHARTER

An early evidence of the inadequacy of the normative content of the African Human Rights Charter was the adoption of the Child Rights Charter thirteen years ago to specifically provide for the protection of children as a particular class of persons that was not adequately protected under the Human Rights Charter. The Child Rights Charter was Africa’s enlistment to the ideals of the UN Convention on the Rights of the Child (UN Child Rights Convention) but with an African emphasis because of the perceived exposure of the African child “to a particular set of dangerous circumstances” as stated by Gino Naldi in his aforementioned work. The charter deals with all aspects of children’s rights, ranging from civil, political, social, and economic rights to the prohibition of child soldiers, the prohibition of harmful social and cultural practices, the recognition of the best interest of the child principle, protection from child labor, protection from sexual exploitation, etc. The Child Rights Charter entered into force in 1999 and has a supervisory mechanism: an eleven-member African Committee of Experts on the Rights and Welfare of the Child (African Child Rights Committee), whose functions are akin to that of the African Commission. The first members of the committee were elected on July 10, 2001, and had their first meeting from April 29 to May 3, 2002. Among other functions, the committee receives periodic reports from states parties on implementing measures they have taken within two years of becoming a party and every three years thereafter. Under Article 44 of the Child Rights Charter, the committee is also mandated to receive communications “from any person, group or non-governmental organization recognized by the Organization of African Unity, by a Member State, or the United Nations relating to any matter covered by this Charter.”

The recognition of the rights of the child as a component norm of the African System was an idea that was welcomed. However, the monitoring mechanism continues to be criticized as needless duplication that should have been adequately covered under the mandate of the African Commission, particularly because of the lack of adequate resources, which has been a handicap of the African System. This situation has been described as an instance of lack of harmonization among human rights instruments and institutions. It does not appear

that there would be any change of mind in this regard. The African Child Rights Committee, it appears, is here to stay and has taken steps to entrench itself as part of the African Human Rights System. It completed its third meeting since its inauguration in 2002.

THE PROTOCOL ON THE HUMAN RIGHTS COURT

The adoption of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Court) in 1998 may technically not be construed as a normative development but rather as an institutional development of the African System. On the other hand, it could be regarded as a normative development because its eventual entry into force "and the constitution of the court is sure to have an impact on the future behavior of African states" as stated by the author in "The African Union and African Renaissance: A New Era for Human Rights Protection in Africa?" published in the *Singapore Journal of International and Comparative Law* (2003). After all, the Court would interpret the norms enshrined in the African Human Rights Charter in determining state behavior.

As I have indicated elsewhere, "the adoption of the Protocol was a culmination of an effort that began four years earlier in 1994—a year that marked the beginning of a new dispensation in the mission to

Protocol in June 1998. The Protocol entered into force on January 25, 2004, after the requisite fifteen ratifications had been met. The Court is expected to be constituted presumably before the end of the year.

The Women's Rights Protocol

It became apparent quite early in the establishment of the African System that the African Human Rights Charter did not provide for the rights of women beyond the cursory mention of women in Article 18. But it was not until the 18th Ordinary Session of the African Commission in 1995 that the case for the appointment of a special rapporteur on the rights of women and the need for an additional protocol on the rights of women were tabled before the African Commission. After considering various drafts prepared by a working group established for that purpose, the African Commission adopted a draft protocol at its 26th Ordinary Session and transmitted the draft to the Secretariat General of the OAU "for continuation of the process of its preparation and adoption by the competent bodies of the OAU" (paragraph 28). As successor to the OAU, the AU recently adopted the protocol at its assembly's second summit in Maputo, Mozambique, in July 2003 and opened the protocol for signature and ratification.

Although the Women's Rights Protocol is not yet in force, its adoption signals a positive development in the African continent—a

“A rather symbolic way of reemphasizing the normative development of the African System is the use of declarations to highlight the importance of human rights in the continent.”

strengthen institutional mechanisms for human rights protection" (Id.). During its Summit in Tunis, Tunisia, that year, the Assembly of Heads of State and Government of the OAU adopted a resolution directing the OAU's secretary-general to "convene a meeting of government experts to ponder in conjunction with the African Commission on Human and Peoples' Rights over the means to enhance the efficiency of the Commission in considering particularly the establishment of an African Court on Human and Peoples' Rights" (preamble paragraph 4). The resolution emphasized that the OAU was aware of the "need to strengthen the African Mechanism for the protection of human rights" (preamble paragraph 6) and was "[c]oncerned by the situation obtaining in the area of human and peoples' rights" (preamble paragraph 7). Just a little over a year thereafter, the Secretary-General convened a meeting of government experts in Cape Town, South Africa, in collaboration with the government of South Africa. This initial meeting produced the first draft of the Protocol to the African Charter on Human and Peoples' Rights for the Establishment of an African Court on Human and Peoples' Rights (Protocol). Subsequent meetings held in Nouakchott, Mauritania, and Addis Ababa, Ethiopia, in 1997, resulted in different drafts of the Protocol before its approval by the Conference of Ministers of Justice/Attorneys-General on December 12, 1997 in Addis Ababa; the OAU Council of Ministers in February 1998; and finally the Assembly of Heads of State and Government, which adopted the

determination to break with traditional notions and conceptions of women. Apart from reemphasizing and taking further UN instruments on women's rights, the protocol enshrines the mainstreaming of gender equality in African affairs, which the AU considers as one of its principles under Article 4(i) of the AU Constitutive Act. The AU has begun implementing this principle in constituting its organs, thereby giving women a place they have not occupied in African affairs; one-half of the AU Commission (Secretariat) is composed of women commissioners.

An important development in the protocol, which departs from the Child Rights Charter, is that the protocol's supervision falls within the mechanism established in the African Human Rights Charter. The African Commission and the Human Rights Court would monitor its implementation and interpret its normative effect, respectively.

DECLARATIONS

A rather symbolic way of reemphasizing the normative development of the African System is the use of declarations to highlight the importance of human rights in the continent. This emphasis became necessary with the recognition that the continuous deterioration of human rights in the continent was due to "civil wars, international conflicts, dictatorial rule, the collapse of civil society, economic crises and natural disasters" as stated by Gino Naldi in his aforementioned work. The Grand Bay Declaration and Plan of Action, adopted by the

First OAU Ministerial Conference on Human Rights in Africa, held in Grand Bay, Mauritius, from April 12 to 16, 1999, was the first instrument to reflect this renewed emphasis. The declaration elevated human rights to a cross-cutting height in African affairs, ranging from democracy to collective peace and security, bad governance and corruption, unconstitutional changes of government, refugee problems, etc. While the declaration is of no binding legal effect, it reinforces existing obligations and underscores their supreme normative value. It becomes the impetus for “a need to adopt a multi-faceted approach to the task of eliminating the causes of human rights violations in Africa” (Article 8). The declaration is today often cited as manifesting a regional commitment to human rights in addition to the legally binding instruments. A recent reenactment of this normative symbolism is the Kigali Declaration adopted by the First African AU Ministerial Conference on Human Rights in Africa on May 8, 2003, in Kigali, Rwanda. The declaration endorses the Grand Bay Declaration and calls on states parties to support African human rights initiatives.

THE DEVELOPMENT OF THE AFRICAN SYSTEM’S SUPERVISORY MECHANISM

THE AFRICAN COMMISSION

Despite the seeming normative progress made by the African System in terms of substantive human rights instruments, everyone agrees that human rights instruments do not implement themselves. In the last ten years, we saw an African Commission that has passed through various stages in its development in organizing itself and carrying out its mandate under Article 45 of the African Human Rights Charter in promoting human rights, ensuring their protection, interpreting the provisions of the charter, and performing any other task that may be assigned by its regional mother organization—the OAU, now the AU.

The early years of the African Commission up to 1993 were very difficult years in which the Commission proceeded cautiously in carrying out its mandate with very little zeal in that regard vis-à-vis the obligation of member states under the African Human Rights Charter. The independence of the Commission was also questioned particularly because a majority of its eleven part-time members were either diplomats or serving members of member states’ governments. While the composition of the Commission in this regard has not changed much, recent trends show the increasing nomination and election of “independent” experts to the Commission. In the same vein, we are also beginning to see an increasing number of women as members of the Commission unlike in the early period when there were no women Commissioners until 1993, when Vera Valentina De Mello Duarte Martins of Cape Verde was elected. The most recent Chairperson of the Commission is a woman, Mrs. Salamata Sawadogo, who was elected during the last ordinary session of the Commission.

The functioning of the Commission has also evolved from a period of no qualified professional staff at its secretariat, apart from the secretary who was seconded from the OAU, to a somewhat reasonable, albeit epileptic, situation. The professional staff is sponsored or seconded by other organizations to work for the Commission. As such, staff members are not assured security of tenure in their jobs. The staff situation of the Commission is quite serious and needs a lasting solution if the Commission is expected to function in any meaningful manner.

Related to the issue of poor staffing is the lack of financial resources at the disposal of the Commission to carry out its mandate.

The OAU was known to have financially neglected the Commission for the better part of its existence, leaving it to depend mostly on donor funds.

The bi-annual, two-week sessions of the Commission have grown in the last ten years to become elaborate gatherings of the international human rights community in which members of the community engage with the Commission and African states. Initially, the Commission’s sessions were less significant, but as time went on states parties began to get involved even, in some cases, with the sole intention of refuting “unfounded” allegations of human rights violations made against them by various non-governmental organizations. To date, the Commission has held thirty-four Ordinary Sessions, the last of which was held in Banjul, The Gambia, from November 6 to November 20, 2003. The thirty-fifth session is slated for May 3 – 17 this year in Dakar, Senegal. It is usually at these sessions that the

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Commission performs the three most important aspects of its protective mandate: consideration of state reports, inter-state complaints, and individual complaints. Indeed, two weeks (four weeks in a year) have been found to be quite too short for any meaningful work in these areas even though the Commission has increasingly made good use of the short period to deal with these aspects of its functions.

The Commission has, over the years, tried to organize itself in a manner that would present it with some focus by adopting programs or plans of action. The first and preliminary program of action was adopted in 1988; the second was for 1992-1996; the third (the Mauritius Plan of Action), for 1996-2001. The most recent plan of action is for 2003-2006 and was adopted at the Commission’s thirty-third Ordinary Session. The Commission has not always fulfilled the goals set out in those plans, resulting in the goals set in previous plans being carried over to the next plan. While it is not clear how the Commission arrives at the duration for its plans of action, it appears that the resources available to the Commission determine the goals it sets for its functioning. The resources are usually inadequate, necessitating the secretariat to prioritize.

In recent years, the Commission has tried to make the most of its promotional mandate within available resources. Members of the Commission engage in extensive promotional activities and visits to states parties to the African Human Rights Charter based on a system of allocation of states to commissioners. The promotional visits afford

the commissioners an opportunity to engage with government officials and institutions, as well as with civil society in states parties, on the African Charter and human rights in general. The commissioners normally report their promotional activities at the Commission's sessions. Despite the increase in and the importance of promotional visits, Victor Dankwa, a member of the Commission, regrets "that written accounts of all promotional visits by commissioners cannot be obtained at the Secretariat." The Commission has also held a number of conferences and seminars in collaboration with a number of civil society organizations. The issues covered included women's rights, impunity, prison conditions, fair trials, etc. These conferences and seminars often resulted in resolutions, such as those on the Women's Protocol, aimed at furthering the normative significance of the African Human Rights Charter, the appointment of a special rapporteur on women's rights, and other such initiatives. Apart from conferences, seminars, and the like, the Commission has passed a number of recommendations and resolutions, many of which also serve protective functions. Many of the resolutions and recommendations deal with specific human rights situations in the continent, such as the genocide that took place in Rwanda or the human rights situation in Nigeria during the reign of brutal military dictatorships.

Despite the recent establishment of a documentation center with donor help, the Commission still needs to do more in the area of publications, particularly regarding "the promotion of the Charter and the dissemination of the work of the Commission." In this regard, Dankwa, in his contribution to *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000* (2002), points out that "[t]he Human Rights Commission in Bangui, Central African Republic, for instance, did not have a copy of the African Charter when [he] visited it last year (2001) and it was the same in the Ministries of Justice and Foreign Affairs in Monrovia, Liberia, where the original decision was taken to prepare a draft African Charter on Human and Peoples' Rights."

The point must, however, be made that "the promotional mandate of the Commission is enormous and the Commission is merely scratching the surface of that mandate." There is still a lot of ignorance in the continent about the notion of rights and quite a lot of effort and resources are required to bridge this gap.

The protective mandate of the Commission has progressively developed to some degree, to the point where it has arguably entrenched itself as an institutional supervisory mechanism. One of the earliest signs of this development was the 1995 revision of its Rules of Procedure that simplified the Commission's procedure from the original rules of 1988. Similarly, the 1998 Amended Guidelines for the Preparation of Periodic Reports by States Parties simplified state reporting from the complications noticed in the 1988 guidelines. A protective innovation, which also served a promotive function, was the appointment of special rapporteurs to deal with thematic issues of human rights protection in the continent. They conduct investigations and research on those themes and issue reports and recommendations. Three such rapporteurs have been appointed: the Special Rapporteur on Summary, Arbitrary and Extra-judicial Killings in Africa; the Special Rapporteur on Prison and Conditions of Detention in Africa; and the Special Rapporteur on the Rights of Women in Africa. To special rapporteurs has recently been added "focal points," which function in more or less the same manner as the special rapporteurs, and working groups. There are four focal points: a Focal Point on Freedom of Expression in Africa; a Focal Point on Human Rights Defenders in Africa; a Focal Point on Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa; and a

Focal Point on Refugees and Displaced Persons in Africa. There is also a working group on Indigenous Populations and Communities.

One noticeable aspect about those appointed special rapporteurs, focal points, or members of a working group is that they are also members of the African Commission. The Commission has not found it suitable to appoint people outside the Commission to these positions, which has hampered the success of the incumbents against the expectation of civil society from such commendable innovation. The ability of the commissioners to effectively perform the duties required has been affected by their individual work as part-timers in the Commission, their functions as commissioners, as well as their individual will and political persuasion.

An aspect of the Commission's protective mandate that has suffered serious neglect over the period is state reporting, which is required under Article 62 of the African Charter. Despite simplifying the procedural guidelines, very few states have complied with their obligation in this regard. A majority of the states never submitted their first reports on time; second and subsequent reports remain overdue and some do not even bother to submit any report at all. Perhaps, the Commission would need an effective follow-up system to deal with this problem.

The communication (complaint mechanism) procedure of the African Commission under Article 55 of the African Human Rights Charter has seen the most significant development in terms of individual complaints, the number of complaints filed, and the elimination of the "oath of secrecy" regarding every aspect of the complaint proceedings, which had resulted in the lack of legal reasoning in opinions and a reluctance to progressively interpret the charter. In recent times, confidentiality regarding complaints is gradually giving way to some level of openness. The Commission has begun to deploy progressive comparative analytical skills in dealing with issues of human rights violations that come before it. A particularly good example is the recent case of *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, where the Commission not only positively ruled on the enforceability of economic, social, and cultural rights, but it became innovative in protecting rights not ordinarily provided for in the African Charter through comparative use of international human rights law principles. The Commission has been very pragmatic in its recent application of the admissibility requirements, particularly the exhaustion of local remedies principle under the African Human Rights Charter, making them more compatible with progressive rules of international human rights law.

Despite the fact that the Commission continues to assert and entrench itself in its protective function, there is still a lack of an effective remedial mechanism. Its finding of a violation on the part of a state party to the African Human Rights Charter does not necessarily afford a remedy to the victim. In many situations, the Commission finds that a victim is entitled to compensation, but it fails to determine what the compensation should be, thus leaving it to the state in question to configure what it should do.

An overview of the institutional development of the African System cannot be complete without a mention of the role of NGOs in this regard and their relationship with the African Commission. The relationship between both entities has been quite unique, as developed by the practice of the Commission. The African Commission is by far the most NGO-friendly human rights supervisory body in Africa, thus making it possible for NGOs and civil society generally to continue providing "crucial support in strengthening" the Commission's mandate (Ahmed Motala *in* Murray and Evans

2002). That relationship existed from the inception of the African System and continues to grow, as evidenced by the large number of civil society groups that have observer status with the African Commission and that participate in its Ordinary Sessions. As of its last session, over 300 NGOs have observer status with the Commission. NGOs continue to be very relevant in both the promotive and protective mandates of the Commission in bringing human rights situations in the continent to the attention of the Commission through reports, conferences, workshops and seminars, and in playing active roles in the individual complaint mechanism that the Commission ingeniously extracted from the very vague provisions of Article 55 of the African Charter.

THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

It is the lack of an effective enforcement mechanism under the African Human Rights Charter that necessitated the adoption of the Protocol on the African Human Rights Court. The OAU in its later years felt convinced that “the attainment of the objectives of the African Charter on Human and Peoples’ Rights requires the establishment of an African Court on Human and Peoples’ Rights to complement and reinforce the functions of the African Commission on Human and Peoples’ Rights” (Protocol to the African Human Rights Court, preambular paragraph 7). This means that with the entry into force of the protocol, there will be a dual supervisory mechanism under the African Human Rights Charter for purposes of ensuring more effective human rights enforcement. While this is a welcome development in the African System, it is important to highlight that critical areas in this regard would be the relationship between the Human Rights Court and the African Commission, and the seizing by the Court of direct individual complaints. The latter, under Articles 5 and 34 of the protocol, is dependent on states parties’ acceptance by a declaration of the Court’s competence to receive such individual complaints. Also important is the provision of adequate resources for the effective functioning of the Court, the lack of which has been a perennial problem that has punctuated and adversely affected the development of the African Commission.

CONCLUSION: WHAT FUTURE FOR THE AFRICAN SYSTEM?

THE LAST DECADE OF THE AFRICAN SYSTEM’S DEVELOPMENT has seen a system that, like its European and Inter-American counterparts in their early years, has struggled to remain relevant in the midst of difficult circumstances. The next ten years of the African System should entail a consolidation in the areas where its development has been positively steady, while it strives to improve in the areas where it has failed. If the signs that seem to be coming out of the continent are any indication, one could predict that the next decade will see an African System that will be in a position to advance human rights protection in the continent. The emergence of the AU as an attempt to reposition Africa in international and inter-African relations speaks volumes in terms of a new desire to lift human rights beyond mere lip service. The AU Constitutive Act, unlike the OAU Charter, identifies as one of the bases of agreement for promulgating the Act a determination “to promote and protect human and peoples’ rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law” (preambular paragraph 10). Various objectives of the AU address human rights issues directly or impliedly: it seeks to “encourage international cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of

Human Rights; to promote peace, security, and stability on the continent; to promote democratic principles and institutions, popular participation and good governance; 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” (AU Constitutive Act, Articles 3(e), (f), (g) and (h)).

It is, however, clear that progressive objectives in regional normative instruments would serve little purpose if a proactive stance is not taken to make those objectives a reality. The progressive development of the African System in the next decade will largely depend on the willingness of the AU as a regional entity and the ability of individual African countries to live up to their obligations. The provision of adequate financial and human resources for the African System is a *sine qua non* for the effective functioning of the African Commission, the soon to be established African Human Rights Court, and other supervisory mechanisms that implement other normative instruments. In other words, there must be institutional empowerment of these organs in keeping with the AU’s determination “to take all necessary measures to strengthen our common institutions and provide them with the necessary powers and resources to enable them to discharge their respective mandates effectively” (preambular paragraph 11). This was not much of the case in the last decade. If this determination is followed through, it is likely that there will be more gains in the positive development of the African System.

Member states of the AU must also begin to regard the various human rights institutions as partners in the promotion and protection of human rights rather than as opponents. States must be made to take seriously their obligation under the African Charter and other human rights instruments to submit periodic reports on domestic implementation of human rights instruments. Similarly, the AU would have to take a proactive stance by exerting itself in encouraging a positive state of human rights protections by member states in their domestic settings. The AU’s obligation is predicated upon the seemingly serious commitment to human rights under the AU Constitutive Act and the New Partnership for Africa’s Development (NEPAD).

The independence of the members of the supervisory organs, whether commissioners in the African Commission or judges in the new African Human Rights Court, remains crucial. The charge of lack of independence against members of the African Commission was rife in the early years of the Commission. Over the years, there have been improvements in this regard and one hopes that the future of the African System will see more independence for experts as members of the supervisory organs.

Undoubtedly, these long-standing fears about a poor human rights culture in Africa and a weak supervisory mechanism persist. But we must acknowledge that these are the challenges that the Constitutive Act of the AU and the NEPAD initiative seek to address. With the necessary political will and a strong AU, it is more likely than not that a new human rights era is in the offing for the African continent. A proper evaluation in that respect lies in the future, as we watch the AU battle the legacy of the now defunct OAU—the failure to adopt a proactive human rights stance that characterized the past 40 years of its existence.”

The failures of the OAU in terms of the African Human Rights System are the challenges that the African Union has to confront and decisively deal with.

HRB