TOWARDS A MORE EFFECTIVE AFRICAN SYSTEM OF HUMAN RIGHTS: "ENTEBBE PROPOSALS"

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I. INTRODUCTION

Since October 1986, protection of human rights in Africa as a region has largely been defined through the African Charter on Human and Peoples' Rights[2]. The Charter has been pivotal in influencing the development of regional standards on human rights on the continent. Even though it may not have scored visible successes to show, its role as the principal source of legislation on human rights in Africa cannot be denied. Stemming the tide of human rights violation in the world's most troubled region may doubtlessly be a tall order for the Charter and its Commission. However, few would deny its normative value.

In June 1998, the OAU Assembly of Heads of State and Government once again returned to the drawing board this time to adopt a protocol to introduce an institution that had ominously been forgotten in 1981, namely, the African Court on Human and Peoples' Rights.[3] Last year in July 2003, the African Union (as the OAU is now known) used the occasion to, amongst other things, adopt a far-reaching Protocol on Women's Rights.[4] Together with the 1990 African Charter on the Rights and Welfare of the Child,[5] the Human Rights Charter with its two Protocols constitute the architecture of the African human rights system. The two Protocols have been added simply to amend the Charter and therefore complete the architecture.

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[2] . Otherwise known as the Banjul Charter, the African Charter was adopted in 1981 by the Assembly of Heads of State and Government of the Organisation of African Unity (OAU), at the time the official body of African States. However, following the adoption of the Constitutive Act in Togo in July 2000 and its coming into force at a colourful ceremony at the Assembly of Heads of State and Government held at Durban, South Africa in July 2002, the OAU was repealed and replaced by the African Union (AU). At the instance of Rwanda, the African Charter was given the second name of the 'Banjul Charter' in order to acknowledge the special role the tiny African state of The Gambia played in hosting the conferences of experts and officials that drew up the Charter.

[3] . Adopted in Ouagadougou, Burkina Faso, on 9th June 1998 and entered into force on 25th January 2004 following ratification by Comoros earlier in December bringing the total number of states that had ratified to 15 required for the protocol to come into force. The fifteen states are: Algeria, Burundi, Comoros, Gambia, Mauritius, Lesotho, Mali, Rwanda, South Africa, Senegal, Togo, Uganda, Libya, Burkina Faso and Cote d'Ivoire. See African Union website: http://www.africa-union.org/home/welcome.htm

[4] . One of the Protocol's teething challenges is the credibility and legitimacy equation. It is not known, for instance, to exist among those that are in the first place responsible for its existence. In a research conducted this year at selected African foreign missions in Europe, it was found that most African diplomats were unaware of the instrument and what it was all about. See Hansungule, Michelo. 'The African Protocol on Women's Rights: Prospects and Constraints'. 2004. Center for Human Rights. University of Pretoria. In the research, we interviewed diplomats from Democratic Republic of Congo (DRC), Egypt, Lesotho, Libya and Zambia based in Stockholm and Copenhagen. All of them expressed ignorance of the Protocol.

[5] . Some of the states that have ratified the African Children's Charter include the following: Angola, Benin, Burkina Faso, Cameroon, Cape Verde, Chad, Eritrea, Guinea, Kenya, Lesotho, Malawi, Mali, Mauritius, Mozambique, Niger, Senegal, Seychelles, South Africa, Togo, Uganda and Zimbabwe. The Charter entered into force on November 29, 1999 – nine years after adoption. Since then, the Committee set out under the treaty has had meetings to prepare the programme of action and begin to enforce the instrument.

At its inception, the African Charter drew one of the noisiest criticisms, particularly, but not only from the western academia.[6] One of the reasons behind this is its perceived tendency to dilute the paradigm of human rights. Scholars have pointed to a number of normative and structural deficits in the orientation of the Charter framework. Kenyan-born academic, Makau Wa Mutua, has made a diligent observation that criticism against the African Charter is because it departs from the narrow formulations of other regional and international human rights instruments.[7] In particular, Mutua refers to the fact that the Charter espouses no less than three generations of rights, including what he calls 'the controversial concept of peoples rights', in addition to the imposition of duties[8] on individuals. However, the Kenyan academic disagrees with the criticisms raised particularly in western scholarship and instead finds an inexorable link between the concepts of human rights, peoples' rights and duties of individuals.

Besides criticizing the Charter in as far as the textual differences between it and preexisting western frameworks are concerned, western scholarship also lambasted the African society together with other non-western societies accusing them of not being based on the original concept of human rights. Human rights, they argued, cannot be other than as seen in the West. Jack Donnelly provocatively claims that the principal of human rights is nothing but a Western artifact.[9] Imbued with this view, Rhoda Howard[10] refused to acknowledge a simple fact: that indigenous African society did have a concept of human rights. Like Donnelly, Howard strongly contends that rights attach only to individuals and not to groups or peoples as provided for in the African Charter. To the extent that the Charter raises issues unfamiliar in the individual dialect of the Western principle of human rights, it is venturing into uncharted waters and therefore making no point.

At the center of these debates is the historical divide between advocates of universalism versus those of cultural relativism. These two schools of thought have dominated the idea of human rights in Africa as never before. Rhoda Howard and others have clashed with cultural relativists. According to them, it is plain that the idea of human rights is specific to European civilization. Non-Western civilizations can only fraudulently claim this same concept. Only with the incorporation of non-European societies into European societies, the argument goes, were human rights 'discovered' in hitherto 'rightless' societies.

It is with this background in mind that it can be said that the Charter has been successful. At least to the extent that it has lasted this far, and even weathered some of its severest critics, it has been successful. Most that criticized the instrument would be surprised that it is still very much around, and even operational. However, it is true that the Charter's record has been far from being pleasing. Though not necessarily for the reasons put forth by its critics, it is clear that nearly twenty years later, the Charter's objectives are yet to be implemented. Below, we have tabulated numerous areas that need serious addressing not only in response to criticisms but so as to make it more relevant to developing circumstances.

II. THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

Currently, African countries through the African Union (AU) are undergoing comprehensive reforms. The replacement of the 1963 Charter of the Organization of African Unity (OAU) with the African Union is the clearest indication yet that change is in the offing in Africa. Besides the Constitutive Act which ushered in the AU, several other instruments have been ushered in almost at the same time. Some of

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[6] Among these see Theo van Boven 'The Relationship between Peoples' Rights and Human Rights in the African Charter' 7 Hum. Rts. L.J. 183 (1986); Richard Gittleman 'The African Charter on Human and Peoples' Rights: A Legal Analysis' 22 Val. J. Int'L. 667 (1982); Jean-Bernard Marie 'Relations between Peoples' Rights and Human Rights: Semantic and Methodological Distinctions, A Comparison and Appraisal' 20 Vand. J. Transnat'L. 585 (1987)

[7] . Makau Mutua. Virginia Journal of International Law. Winter, 1995. p.339

[8] . Interestingly, certain aspects of the International Bill of Rights have striking similarities with the African Charter. For example, the Universal Declaration of Human Rights does contain the notion of duties in article 27. If this is defined to mean being responsible to society and others around you, the sense is the same as in the Charter.

[9] . See especially Jack Donnelly 'Human Rights and Western Liberalism' in Abdullahi A. An-Naim & Francis M. Deng (eds) *Human Rights in Africa: Cross Cultural Perspectiv*es (1990) 31

[10] . Rhoda Howard 'Group Versus Individual Identity in the African Debate on Human Rights' in An-Naim & Deng, ibid, 159.

these instruments deal with terrorism, corruption, economic integration, women, etc. However, general human rights seem not to have been taken into account. The 1981 African Charter on Human and Peoples' Rights obviously needs review if not complete change. The same atmosphere that characterized the continent in Africa in the 80s is what characterized the making of the African Charter. For example, at that time, Africa was preoccupied with cold war issues such as colonialism and apartheid. The preamble to the Charter is full of these concepts.

By calling for a review of the Charter, we are not simply asking for stronger realignment with western models. Indeed, it is now more than ever before that we need to borrow heavily from our own civilization to help chart a stronger and more durable human rights heritage. For instance, the death penalty clause in Article 4 of the African Charter, the theme of this workshop, needs revisiting. Perhaps, one question we should be asking ourselves is why African states do not seem to buy the many arguments being put forth in favour of abolishing capital punishment. The answer is very simple: Africa cannot hear any more of the Western calls for the abolition of the penalty, which in the first place was introduced in Africa by the West itself. Indigenous Africa did not practice the death penalty save in war situations. Just like the prison, the rope together with the executioner, were forced onto Africa by 'Western civilization'. It should be pointed out that to call for the abolition of the death penalty is to return Africa to its civilization. In deleting article 4 from the African Charter, it should be explained that Africa is only being original. Similarly, it is original for Africa to emphasise the principles of reform and rehabilitation, instead of imprisonment.

The example above is only intended to buttress the argument for reform of the African system. Some of the issues that obviously call for attention in our call for reform will be listed and briefly analyzed below.

A. Claw Back Clauses

The most notable shortcoming in the African Charter is the imprecise and incomplete formulation of the system of human rights. Due to the political realities prevailing in African countries at the time of drafting the Charter, it was not possible to provide for some of the human rights guarantees in the instrument as they are in equivalent treaties. Most human rights standards in the Charter are couched in the form of 'claw-back' clauses. No doubt, 'claw-back' clauses stand as the lowest point in the Charter. Even though the Commission has somehow found a way around this problem, the fact is that claw-back clauses constitute a significant source of concern. It must be understood that while the rights regime is not self-sufficient, a lot more can be done to try and minimize opportunities for abuses taking advantage of deliberate inadequacies. As most African Charter rights stand at the moment, there is ample ground for suggesting that States are permitted greater latitude and extraordinary flexibility in trying to identify the extent of their obligations.

Even more worrying, claw-back clauses constitute a form of a permit for the already unwilling State to engage in wanton and routine breach of the Charter obligations using the reasons of public utility or national security, etc. To provide a Charter standard subject to a claw-back clause is effectively to define and limit it to the standards in the domestic sphere. Consequently, bad governments would understand such an outcome as entitling them to determine the scope of their obligations under the instrument. The effect of claw-back provisions is for governments to retrieve through their national law what they have lost at the regional forum. With the claw-back clauses, national systems including those that may be inconsistent with international standards would effectively remain unaffected.

B. Derogation Clauses

The African Charter for its part contains no derogation clause at all. By contrast, most international human rights conventions dictate special powers of derogation. Under these clauses, certain rights are declared to be non-derogable under all circumstances while precise conditions and legal requirements for permissible derogation are laid out for others. Among these rights, the right to 'life', is usually non-derogable.

There is little or no room for arbitrariness under such well-defined standards, whereas opportunities for discretionary abuse under the Charter's 'claw-back clauses' are broad and well-used. Indeed, the African Commission has explicitly stated that no derogation is permitted from any of the rights in the Charter at any time. The African Charter, unlike other human rights instruments, does not allow for States parties to

derogate from their treaty obligations during emergency situations.[11] A revision of the African Charter should excise the offending *claw back clauses;* insert a provision on non-derogable rights, and another specifying from which rights States can derogate, when and under what conditions.[12]

It is worth noting here that in the absence of a derogation clause in the African Charter, and considering the highly specific role of the limitation clauses it contains, States Parties wishing to derogate from its provisions without breaching their undertaking have no alternative but to turn to the Law of Treaties.

C. Peoples' Rights

Another worrying aspect of the Charter is its concept of *'peoples' rights'*. It is important to note here that the Charter does not even attempt to define the controversial word '*people's'*. Too much emphasis on the peoples' rights might negate the protection of individual rights. Undoubtedly, it could be used to suppress the rights of individuals who might opt to refuse being enmeshed into the collective. In addition, it opens the Charter to differing interpretations by States and individuals alike based on their own ideological persuasions. It is worth noting that African States are made up of heterogeneous groups mostly each with a distinct language and sometimes culture and territory. As a result, minorities in Africa do not enjoy any special form of protection beyond the general right of non-discrimination in Article 2, which inter alia refers to race, ethnic group or national origin.[13]

D. Duties

In spite of the positive aspects of some of the ancient African traditional values, there is no doubt that some of them need reviewing. Africa should not shy away from discarding some of its ancient values which are derogating from the idea of dignity, while retaining those that tend to enrich this concept.

One significant feature of the African Charter which may lead to some difficulties in its implementation and which could forestall the promotion of individual rights is the emphasis on duties. The African Charter takes the view that individual rights cannot make sense in a social and political vacuum, unless they are coupled with duties on individuals. Some of the duty provisions are pious hopes which could have no practical effect. Article 29 (1), for instance, imposes a duty on the individual to preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need.[14]

At worst, these provisions are oppressive and in fact, could be used by states to curtail individual human rights as well as peoples' rights. Article 27 (2) of the Charter imposes a duty on each individual to exercise his or her rights and freedoms subject to collective security, morality, common interest, etc. This narrows the scope of the space within which an individual can exercise his freedom especially because the phrases 'common security', 'morality', and 'common interest' are by no means easy to define.[15]

E. Women

Duties on individuals to preserve the harmonious development of the family and to work for the cohesion and respect of the family raise questions about the commitment of the African Charter to women's rights. There is a perception and fear that either the African Charter does not adequately protect or could be used

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[11] Murray, Rachel 'Serious or Massive Violations under the African Charter on Human and Peoples' Rights: A Comparison with the Inter-American and European Mechanism' NQHR 2, 1992

[12] Makau Mutua 'The African Human Rights System: A Critical Evaluation' available at <http://www.undp.org/hdro/MUTUA.pdf>

[13] . Michelo Hansungule 'The African Charter on Human and Peoples' Rights: A Critical Review' (2001) African Yearbook of International Law 8 pp 265-331.

[14] . Article 29 (1)

[15] . Hansungule, (n 12) 294.

to abuse women's rights. The family provisions have been thought to condone and support oppressive and retrogressive structures and practices of the previous social and political order.

The language, which places duties on States and individuals to the family, has been interpreted as entrenching oppressive family structures which marginalize and exclude women from participation in political, social, economic and cultural activities of the society. Other writers are of the view that, such provisions in the Charter, support and reinforce the discriminatory treatment of women on the basis of gender in marriage, property, ownership, inheritance, and impose on them unconscionable labour and reproductive burdens.[16]

Mention should be made of the introduction of the African Protocol on Women's Rights.[17] Although only recently adopted, the Protocol is the clearest signal to have come from the AU of African states' commitment towards the emancipation of more than half the region's human race. Unlike before, the Protocol has introduced some of the most radical proposals specifically to address women's oppression in marriage, family, unequal property and ownership patterns, unfair inheritance practices, etc. However, it is too early to assess the results of an instrument which is not even in force yet.

III. THE COMMISSION ON HUMAN AND PEOPLES' RIGHTS

The Commission was established in 1987, one year after the coming into force of the Charter, which means that it has been around for over ten years now. However, it has been described as 'a regional human rights organization still under construction, caught between hard realities and the soft African Charter on Human and Peoples' Rights'.[18] Like most government building projects in Africa, construction is taking rather too long to complete.

The mandate of the Commission is spelt out in Article 45 of the Charter. According to this provision, the Commission shall promote human and peoples' rights through a number of different activities; ensure the protection of human and peoples' rights; interpret the provisions of the Charter at the request of a State Party or the AU, and finally, perform any other tasks entrusted to it by the Assembly of Heads of State and Government (AHSG) of the AU. Taking the state reporting procedure under Article 62 into account, the Commission has the mandate to examine reports from states, and through it, complaints by states. It would appear that this broad and slightly ambiguous mandate would however offer the Commission greater latitude for action.

A. Shortcomings in the Mandate of the Commission

1. The Flaws in the Promotional Mandate

(i) Article 45 (1) (a)

In addition to its general role of promoting human and peoples' rights, the Commission shall in particular 'collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights and, should the case arise, give its views or make recommendations to Governments'. It is not very clear how the Commission should go about giving its views or making recommendations to Governments. There are no guidelines to suggest how this could be done and in what particular cases the provision would become alive.

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[16] E. Welch, Jr. 'Human Rights and African Women: A Comparison of Protection under Two Major Treaties' 15 Hum. Rts. Q 548: 1993.

[17] . Adopted at the Summit of Heads of State and Government of the African Union held in Maputo, Mozambique, in July 2003.

[18] . Inger Osterdahl, 'Implementing Human Rights in Africa – The African Commission on Human and Peoples' Rights and Individual Communications' Swedish Institute of International Law. Uppsala: Justus Fordag, 2002, p 9

The promotional mandate of the Commission under Art.45 (1) (b) also includes 'to formulate and lay down, the principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which the African Governments may base their legislation'. The wording in this section is ambiguous. If it refers to the problems Governments may have in implementing the Charter in their own national legal systems, then it would mean the Commission may help the States Parties in solving the problems that may arise when the Charter intersects with national law. It may also mean that the Commission should issue guidelines for legislation, which the States Parties may follow when drafting local legislation in order that the legislation is not inconsistent with the Charter. The latter construction seems to be more realistic. Unfortunately, the Commission has not as yet formulated or laid down any such principles or rules.

In the area of protection of human rights, the Commission stands as a toothless bulldog. The Commission can bark – it is, in fact, barking. It was not, however, created to bite. After more than a decade of existence, the Commission can barely be said to have made any significant contribution to human rights protection in the region. Despite its seemingly broad mandate, the Commission suffers from many structural infirmities. Indeed, while purportedly created to protect human rights in the region, the Commission lacks enforcement power or remedial authority. At the same time, it is handicapped by confidentiality clauses that restrict public access to, and awareness of, the Commission's work.

Some of the Commission's greatest weaknesses – both structurally and normatively are further recapitulated and considered below.

B. Structural and Normative Shortcomings.

1. Lack of Effective Access to the Commission by Individuals

The Charter provides that the functions of the Commission shall be to 'ensure the protection of human and peoples' rights under conditions laid down by the present Charter'. The conditions laid down however significantly restrict the ability of individuals to seek recourse to the Commission. The Charter is evidently too state-centric. There is so much emphasis placed on the role of the state that it is questionable whether the aim is to protect individual's rights now or in the future under the Charter. Articles 47 to 54 of the Charter cover only communications from states alleging breaches of the protected standards in the jurisdictions of other States' Parties. According to the Charter, such communications shall be addressed directly to the state accused of the complained breaches, as well as the Commission. Significantly, the Commission does not get involved until three months after such a complaint.

Again, the Commission comes in only if the issue has not been settled to the satisfaction of the two states involved through bilateral negotiation or by any other peaceful methods.[19] Even when the communication concerning violations is sent directly to the Commission as provided for under Article 49, the Commission cannot act on such a complaint until is satisfied that all local remedies have been exhausted.[20]

Moreover, when the Commission acts, the objective is to reach an amicable solution between the two states, not between the aggrieved individual and the state concerned. Under such conditions, it appears that, the Commission will be settling inter-state disputes rather than serving as a watchdog of human rights transgressions. The open door policy has allowed some states to join the Charter and at the same time to continue with their previous policies of violating human rights without being bothered with the Charter interdictions.

These restrictions have recently forced the Commission to decide the first inter-state complaint without regard to the Charter. In the DRC versus Burundi, Rwanda and Uganda, the DRC complained that the respondents violated several provisions of the Charter through the invasion of its territory. The Commission decided for the DRC.

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[19] . art 48
[20] . art 50

2. Individual Complaints

Although it is clear from the mandate of the Commission that its purpose is to examine the victim's complaints, the drafters of the Charter never used the word 'victim'. Article 55 only refers to 'other communications' so that one has to read the word 'individual communications' or 'petitions' into this. In fact throughout the Charter, there is no recognition that a State Party could be guilty of violating the rights of its people. The provisions made for petition by non-state actors, especially individuals, are to say the least, grossly inadequate. Such a petition will be entertained only if it secures a simple majority of the eleven-man Commission.[21] This again contrasts unfavourably with the situation resulting under the European Convention on Human Rights. This draconian power in the hands of commissioners is visibly missing from the European Convention.

Given the fact that members of the Commission are in the final analysis, nominees of their national governments,[22] such a provision could easily expose them to undue political pressure or influence, thus negating the spirit of the Monrovia summit, the spirit which led to the adoption of the ACHPR.

Even when the Commission is predisposed to entertain a petition from an aggrieved individual, such a petition could be jeopardized by the provisions of Article 56. While the requirement under this article is not only vague, it may be used to forestall consideration of petitions by the Commission no matter how serious the allegations contained in the petitions might be. Articles 56 imposes hurdles which a petitioner has to overcome before he can be heard by the Commission. Some of the hurdles are as follows

1. He must not write in disparaging or insulting language directed against the State concerned and its institutions;
2. He must have exhausted local remedies[23].

Given the circumstances in most African states, the Charter is unrealistic in requiring a petitioner to exhaust local remedies before having recourse to the Commission. Assuming that provisions for such local remedies are contained in domestic statutes, the state's leadership may have a grip on the state apparatus like the Police, the army and judiciary, so that it would be fool-hardy to expect an individual to successfully use these same institutions to redress an injustice committed by the Head of State. Any such attempt may lead the aggrieved person into a more precarious situation such as perpetual incarceration without trial or worse.

Article 55(2) is a dangerous clause to be crafted into a human rights treaty. It is important to ensure that victims are protected with the most effective means possible but this clause clearly suggests otherwise. The clause allows the Commission a very wide discretion to shut out someone who is trying to complain sometimes even without stating any grounds. In a number of cases, victims were turned away virtually empty-handed. In other words, a victim of human rights abuse can virtually be left stranded without any remedy or explanation as to why the due process is not open to him.

By contrast, few procedural requirements exist for inter-state complaints. The cynicism of this discrepancy is revealed by the fact that States are the least likely parties to seek vindication of the human rights of citizens of another State through the Commission. This reality has been amply borne out by the African, Inter-American and the UN global system, in which not a single interstate complaint has been filed despite decades of work and heavy caseloads reaching into tens of thousands especially for the latter two institutions.

3. No Enforcement Powers

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[21] . art 55 (2)
[22] . art 33
[23] . arts 56 (3) and (5)

As a powerful Commission might challenge the credibility of African political leaders in their respective countries, the OAU Heads of State were understandably reluctant to grant the Commission a significant role in protecting human rights. The Commission was envisaged almost exclusively as a body to *promote* human rights. It cannot award damages, restitution or reparations. It is not empowered to condemn an offending State; it can only make recommendations to the parties. It was, and still is, vested with very few powers. Consequently, blatant disregard of the Commission's recommendations, orders, and pronouncements by Member States has become the norm in Africa. For example, both the Botswana and the Nigerian governments have fragrantly disregarded the African Commission in the cases of Bosch and Ken Saro Wiwa.[24]

IV. AFRICAN HUMAN RIGHTS COURT

The African Human Rights Court is a potentially significant development in the protection of human rights on a continent that has been plagued with serious human rights violations ever since colonial rule.

One of the serious shortcomings of the African Human Rights Court is the limitation of access placed by the Protocol on individuals and NGOs. The Protocol provides for two types of access to the Court: automatic and optional. The African Human Rights Commission States' Parties and African Intergovernmental Organizations enjoy unfettered or 'automatic' access to the Court, once a State ratifies the Protocol.[25] In stark contrast, individuals and NGOs cannot bring a suit against a State unless two requirements are met. First, the Court has a discretionary power either to grant or deny such access.[26] Second, at the time of ratification of the Protocol or thereafter, the State must have made a declaration accepting the jurisdiction of the Court to hear such cases.[27]

While limiting individuals and NGOs' access to the Court may have been necessary to get States on board, it is nevertheless disappointing and a terrible blow to the standing and reputation of the Court in the eyes of most Africans. After all, it is individuals and NGOs, and not the African Commission, Regional Intergovernmental Organizations, or State Parties, who will be the primary beneficiaries and users of the Court. The proposed Court is not meant to be an institution for the protection of the rights of States or OAU/AU organs. A human rights court is primarily a forum for protecting citizens against the State and other State agencies. This limitation will render the Court virtually meaningless unless it is interpreted broadly and liberally.

It is important to note here that that, one of the major conclusions to be drawn from the European mechanism for the protection of human rights is the importance of individual petition to the European Court of Human Rights. One of the greatest achievements of the procedure introduced by Protocol 11 to the Convention on Human Rights is exactly that it eliminated the optional nature of the right of individual petition to the European Court.

VI. ENTEBBE PROPOSALS

What should be done? In the context of the OAU/AU, an organization with scarce financial resources and limited moral clarity and vision, the establishment of a new framework should be approached somberly. A human rights framework will only be useful if it genuinely seeks to correct shortcomings in the current mechanisms and provides victims with a real and accessible forum in which to vindicate their rights. What

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[24] . Ms. Bosch was executed on 31st March 2001 ignoring the African Commission's intervention. Similarly, the Nigerian government went ahead to execute environmentalist and human rights activist Ken Saro Wiwa in spite of the Commission's intervention. See Cases No. 137/94, 139/94, 154/96 and 161/97 *International Pen, Constitutional Rights Project, Interights v Nigeria.*

[25] . arts 5 (1), 5 (2) of the Protocol

[26] . art 5 (3)

[27] . art5 (3).

the AU and the African regional system do not need is yet another remote and opaque bureaucracy that provides little and delivers nothing.[28]

Again, what should be done?

1. There is need to recognize that the continent's basic human rights instrument, the African Charter, has deep normative flaws that must be addressed immediately in a bid to try and give the region an appropriate legal framework within which to protect human rights;

2. Some of the classical human rights standards notably Article 4 on the right to life and Article 13 on the right to public service badly need the necessary political will from appropriate authorities and after that adequate re-christening. For example, the Charter should pronounce the right to life as an absolute right not subjected to any restriction in line with the dictates of African civilization. Similarly, there is a need to upgrade the Article 13 standard to a standard prevailing in the universal sphere. After more than a decade of democracy, time has come for African States to embrace democracy completely;

3. In particular, 'claw back' clauses that permit African States to restrict the exercise and enjoyment of basic human rights to the maximum extent allowed by domestic law should be reviewed and restructured;

4. The need to insert a provision on non-derogable rights, and another specifying from which rights States can derogate, when and under what conditions. At present, the African Charter lacks expression on derogation, which appears to be unnecessary because States are in effect permitted to derogate by the 'claw back' clauses i.e. to suspend, de facto, certain rights by enacting legislation. In any event, nothing in the Charter prevents States from denying certain rights during national emergencies;

[28] . One of the rare successes of the African Commission is its decision *Re Economic and Social Rights Action v. Nigeria* (2001). The Commission has come to be identified with this decision. However, it is a case of 'one step forward two steps backwards' for the Commission. For instance, its more recent decision involving the execution of Ms. Bosch by Botswana in which it upheld the application of the death penalty has subtracted from its already empty basket. The decision has disappointed some of its ardent supporters such as Botswana's human rights group, DITSHWANELO. Organizations such as DITSHWANELO that had hoped the Commission would overrule the death penalty in the Charter were understandably disappointed when it (Commission) instead upheld Botswana's decision to go ahead and execute murder and similar convicts.

5. There should be incorporated in the Charter an explicit clause, stating the binding nature of the decisions of the African Court and Commission in the event that the two bodies are retained in the post-reform instrument;

6. Article 34 on nominations to the African Commission calls for review. Previously, some States have abused this clause, sending to the Commission only persons perceived to be harmless to their interests with the result that the Commission has lost out as fearless people are ignored by the nominator;

7. While the idea of a Protocol for women's rights is long overdue, care should be taken to ensure that this exercise does not simply copy from existing western mechanisms. Where necessary, efforts should be made to try and enthuse the system with positive African values;

8. Peoples' rights together with individual duties have left many people uncomfortable. Even though the 'duty to the community' is enshrined in Article 29 of the Universal Declaration, most people have questioned the use of this particular word. Similarly, advocates of human rights as a concept closely knit with individuals find it inconsistent that the Charter has devoted several parts of the clauses to the peoples' rights. On the other hand, however, advocates of these terms do not find it at all wrong to have the words in the treaty. What is required is to reexamine these concepts with a view to balance them alongside individual rights.