Towards Speedy Trials: Reforming the Practice of Adjudicating Cases in the African Human Rights System

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The independence, creativity, and wisdom of those who run the system are absolutely crucial. This includes the Commissioners (and judges) and the staff of the Commission (and Court), as well as the officials of the regional organisation.¹

Abstract

This article highlights weaknesses with the adjudicative mechanism of the African Human Rights Systems which the African Commission on Human and Peoples’ Rights (African Commission) has been following and the African Court on Human and Peoples’ Rights (African Court) has started to follow. The focus of the article is on the African Commission which has been operational for more than 20 years rather than on the African Court which only had its first case decided in December 2009. Among several weaknesses, this article focuses on the unsound organization of the litigation procedure which has resulted in intolerable delay in disposing communications or cases and in low-quality conclusions. Even though the African Commission recently revised its Rules of Procedure, regrettably, insufficient reform has been made. The procedure the African Court followed in disposing its first case is disappointing. The article offers suggestions for further improvement. Some lessons are drawn from the experience of the Inter-American Human Rights System.

I. Introduction to the African Human Rights System

At the core of the African human rights system is the African Charter on Human and Peoples’ Rights (the Charter) which was adopted in 1981 and entered into force in 1986. Weaknesses with the normative and institutional dispensation of the Charter, coupled with the increasing progressiveness of human rights discourse, led to a promulgation of more human rights norms and establishment of human rights institutions. In 1990 the African Charter on the Rights and Welfare of the Child was added to the system. This Charter provides for an enforcing institution, the Committee on the Rights and Welfare of the Child which is composed of eleven members. Thirteen years later the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa joined the system. This Protocol has no enforcing institution of its own. Importantly, now the system includes the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (the Protocol or the African Court’s Protocol). As its name clearly indicates, the African Court’s Protocol established the African Court on Human and Peoples’ Rights (the African Court). All these instruments have entered into force.

The transformation of the Organization of African Unity (OAU) to the African Union (AU) has also come with a new set of norms and institutions highly relevant to human rights and there are other relevant treaties. The most important ones include the Constitutive Act of the African Union; the Protocol on the Amendments to the Constitutive Act of the African Union; the Protocol Relating to the Establishment of the Peace and Security Council of the African Union; the Treaty Establishing the African Economic Community; the Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament; the African Charter on Democracy, Elections and Governance; the Convention Governing the Specific Aspects of Refugee Problems in Africa and the Cultural Charter for Africa. While it is not necessary for this article to present what these treaties are, it should be noted that the African Court is set to enforce all of them, provided a respondent state has ratified them and the African Court’s Protocol.

In several instances the African law-makers showed hastiness in adopting treaties and designing institutions at times causing institutional redundancy. For example, when the OAU was transformed to the AU, the AU came up with the African Court of Justice as one of its main organs while three important institutions namely the African Commission, the Committee on the Rights and Welfare of the Child and the African Court were left out of the AU’s system. After serious academic commentary, they were later on pulled into the system by a resolution of the Assembly of the AU. A concern on institutional redundancy was voiced. Then in July 2005 the AU had to decide to merge the two African Courts together to form the African Court of Justice and Human Rights. In 2008, at a time when the African Court was already functional and waiting for its first case, the Protocol on the Statute of the African Court of Justice and Human Rights came invalidating the separate protocols of both Courts. A new process of ratification and entry into force has started and possibly initiating a sense of instability for the African Court.

II. The Charter, the African Commission and the African Court

The Charter provides for several rights and duties of the individual, rights of peoples’ and obligations of the state. The Charter also provides for the establishment and organization, function and procedure of the African Commission and other general provisions that cover issues of admissibility of communications, state reporting, and confidentiality of the African Commission’s activity and other sources of law for the African Commission to use. The African Commission is composed of eleven part-time Commissioners and a Secretariat with staff and services supposed to be necessary for the effective discharge of the duties of the African Commission. In reality the staff has been inadequate.

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5 Decision on the Merger of the African Court on Human and Peoples Rights and the Court of Justice of the African Union - Assembly/Au/6 (V), Assembly/Au/Dec.83 (V).

6 See article 1 of the Protocol on the Statute of the African Court of Justice and Human Rights.
The African Commission has mandates of both protecting and promoting human rights in Africa. As part of its promotional mandate, the African Commission has examined state reports, organized conferences, launched publications, issued reports on its findings following country visits, passed resolutions on human rights situation of member states and established Special Rapporteurs. Under the protective mandate of the African Commission comes what is commonly called the complaints procedure. Under this procedure states and any natural or juridical person can bring complaints to the African Commission alleging violations of the Charter by a state party. In both inter-state and individual complaints procedures, complainants seek a relief which is normally given in terms of non-binding conclusions and recommendations.

Only one inter-state complaint has so far been brought before the African Commission. Based on this experience, it is also safe to say that there will not be many cases before the African Court in which states are complainants. The more widely employed individual complaints procedure, important as it is, has several weaknesses which necessitated the establishment of the African Court. The African Court has been staffed with judges, adopted its Interim Rules of Procedure and very recently adjudicated its first case in which grave procedural errors contrary to the notion of speedy trial were committed.

The African Court is composed of eleven Judges. The jurisdiction of the African Court extends to all cases and disputes submitted to it concerning the interpretation and application of the Charter, the Protocol and any other relevant human rights instrument ratified by the states concerned. In the event of a dispute as to whether the African Court has jurisdiction, the African Court itself decides.

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13 Ibid, art. 3(2).
Thus, it may be argued that all international human rights treaties are under the jurisdiction of the African Court. Some scholars did not appreciate the African Court’s extended jurisdiction and have argued that if cases could be brought to the African Court on the ground that, for example United Nations treaties have been violated, with no reference to the Charter, this could lead to jurisprudential chaos, and it would undermine the unique nature of the Charter. Instead, they called the terms “relevant human rights instrument” to be understood to restrict the jurisdiction of the African Court beyond the Charter and the Protocol only to those instances where the instrument in question has explicitly provided for the jurisdiction of the African Court.

The African Commission, a state party which has lodged or against which a complaint has been lodged to the African Commission, a state party whose citizen is a victim of human rights violation, African intergovernmental organizations and relevant non governmental organizations (NGOs) with observer status before the African Commission and individuals can institute cases directly before the African Court. However, NGOs and individuals can file cases only if the respondent state has made a voluntary declaration accepting cases from the two sources.

The African Court elects its president and one vice-president for a period of two years and they could be re-elected only once. Unlike the Chairperson of the African Commission, the President of the African Court performs judicial functions on a full-time basis and resides at the seat of the African Court. The African Court appoints its own Registrar and other staff of the registry from among nationals of member states of the AU. The office and residence of the Registrar is located in the same place where the African Court has its seat (in Arusha, Tanzania). Judgments of the African Court are final and not subject to appeal. However, the African Court can review and interpret its decision in the light of new evidence.

Unlike the recommendations of the African Commission, judgments of the African Court are binding. The African Court is required to submit to each regular session of the Assembly of the AU, a report on its work during the previous year specifying, in particular, the cases in which a state has not complied with its judgment. This is expected to give more clout to the judgment of the African Court.

The main aim of the establishment of the African Court is to complement the protective mandate - the complaints procedure - of the African Commission. Optimistically, Viljoen describes the complementary role of the African Court as a move

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16 African Court’s Protocol, supra note 12, art. 5.
17 Ibid, art. 21.
18 Ibid, arts. 24 & 25.
19 Ibid, art. 28(2).
20 Ibid, art. 28(3).
21 Ibid, art. 30.
22 Ibid, art. 31.
23 Ibid, preamble - last paragraph, art. 2 & art. 8.
from quasi-judicial to judicial institution and functioning, thus a change from a mere recommendatory to binding findings; from uncertain to clearly set remedies; from an ad hoc to a comprehensive implementation system; from excessive secrecy in handling the complaints mechanism and its outcome to a more open regime; from delayed to more immediate delivery of justice; from inadequate to adequate handling of urgent cases; from an obscure institution (the African Commission) to a more visible one (the African Court).\textsuperscript{24}

Along this line, the relevance of the African Commission alongside the African Court may be put under a question mark. Yet, the African Commission has to stay, in fact strengthened, for three main reasons. First, the African Court could not take over all the functions and mandates of the African Commission. The African Commission does various activities which the African Court cannot assume; and these activities are too important to be abandoned. Secondly, even with regard to the complaints procedure which the African Court looks fitter to takeover, the fact that individual complainants do not have automatic standing before the African Court without state parties making an optional declaration granting them standing has effectively made the African Court inaccessible to the main complainants.\textsuperscript{25} It is important to note that so far, out of the 25 states that have ratified the Protocol only two, Burkina Faso and Malawi, have made such a declaration. Even though one writer has suggested the impetus\textsuperscript{26} of going around this unhelpful restriction, the African Court is indeed inaccessible and “the dockets of the Court are not likely to be filled with cases.”\textsuperscript{27} In comparison, literally everyone who thinks a right guaranteed by the Charter has been violated by a state party to the Charter could complain to the African Commission.

Thirdly, the African Commission is allowed to file cases out of its own finding and/or to refer cases that it receives from individual complaints before it to the African Court, even if the respondent state has not made the voluntary declaration that gives individual complaints standing before the African Court.\textsuperscript{28} In this way, the African Commission is the only avenue for individual complainants to the African Court in cases against states who have not made the declaration. Even though the African Commission is not going to channel all cases to the African Court, this path has a potential to unlock the African Court.\textsuperscript{29} Thus, it is imperative that the complaints mechanism before the African Commission not only be preserved but also reformed and strengthened. In particular, the speedy trial side of it needs critical consideration to shorten the time cases take at the level of the African Commission. So far, on average, from the time of seizure, the African Commission takes two and a half to three years to dispose a communication and this is at a time when the African Commission is getting less than 20 cases per year.\textsuperscript{30} Otherwise individual complainants who access the African Court by way of the African Commission,

\begin{thebibliography}{99}
\bibitem{court2004}African Court’s Protocol, \textit{supra} note 12, arts 5(1), 5(3) & 34(6). For more on access to the African Court See also Dan Juma, \textit{Access to the African Court on Human and Peoples Rights: A Case of the Poacher Turned Gamekeeper} 4 \textit{ESSEX HUM. RTS. REV.} 1 (2007).
\bibitem{court2008}African Court’s Protocol, \textit{supra} note 12, art 5(1)(a).
\bibitem{weldehaimanot2009}Simon M. Weldehaimanot, Unlocking the African Court of Justice and Human Rights, 2/2 \textit{J. AFR. & INT'L L.} (2009).
\end{thebibliography}
which may become the more frequently travelled road given the restriction to direct access, will be discouraged. Justice delayed is justice denied.

This article was conceived in the second half of 2007 when the African Commission took the initiative to amend its old rules of procedure. It is unfortunate that the African Commission has not taken the opportunity to remedy all the weaknesses with the mechanism while revising its rules despite the possibility for much improvement. However, because the rules are adopted as interim pending harmonization with those of the African Court, there may still be a chance for improvement and thus the need for this article. The African Court and the African Commission had been meeting in order to harmonize their respective interim rules of procedure focusing on those provisions on complementarity and completed the task in October 2009.

III. The Individual Complaints Mechanism in Practice

The individual complaints mechanism envisaged by the Charter lacks clarity. As such the African Commission is commended for being able to develop it into a higher level human rights litigation mechanism. Nevertheless, there is a lot to be desired within the system which could be improved. The main weaknesses are: (1) the time the African Commission takes to dispose of communications and (2) lower quality decisions as a result of flawed procedure of litigation. The framers of the Charter are generally blamed for the inherent weaknesses of the system and the current runners of the system for their lack of creativity and wisdom.

Communications or complaints sent to the Secretariat come in different styles ranging from a well written brief to an ordinary letter. Thus, when received by the front desk officer of the Secretariat, they are registered as incoming letters. After being registered, an incoming letter might be assigned to a legal officer to be studied and its nature determined. Normally, the legal officer remains in charge of the communication. In some cases a legal officer asks the addressor to make clear that if his or her letter represents a communication in accordance with article 55 of the Charter.

Subsequently, a communication is registered and given a name before it is seized of by the African Commission. At this stage, normally the complainant gets a letter of acknowledgment of his/her communication by the Secretariat. The naming practice of the Secretariat shows that a communication is given a number which indicates the total number of communications received by the Secretariat. This number is separated by a slash from the following number which is the year in which the communication is received. In addition, a

31 See Heyns, supra note 15, at 156 & 165.
34 Heyns, supra note 1, at 694. See also Heyns, supra note 15, at 162-65.
36 Heyns, supra note 1, at 701.
37 Interview with Dr. Robert Eno, Senior Legal Officer at the Secretariat of the African Commission in Banjul, the Gambia conducted on January 17 and 24, 2008.
38 Id.
39 Id.
40 African Commission on Human and Peoples Right Communication Procedure (no date) Fact Sheet No. 3 at 3.
communication takes the names of the complainant and the respondent state. In this way the Secretariat compiles a list of received communications which also includes a brief summary of their contents.\textsuperscript{41} The compiled list is transmitted to members of the African Commission and the full text of each communication is made available to Commissioners on demand and sometimes on the initiative of the Secretariat.\textsuperscript{42}

After transmission to the Commissioners, for each communication the Secretariat appoints one Commissioner as Rapporteur by and the Rapporteur is required to make a recommendation on whether or not the African Commission should be seized of a communication.\textsuperscript{43} Such recommendation is made to the African Commission and it is normally considered during one of the two ordinary sessions annually. For the African Commission to be seized of a communication, a communication must allege a \textit{prima facie} violation of the provisions of the Charter by a member state to the Charter.\textsuperscript{44} However, at this stage the African Commission does not require any level of proof from the Complainant.

When important facts are missing, the African Commission, through the Secretariat, may request the author of a communication to furnish clarifications. The clarifications sought are often on the applicability of the Charter to the communication, and to specify in particular the complainant’s name, address, age and profession. The African Commission is also interested in establishing whether the complainant is requesting for anonymity; the defendant state; purpose of the communication; provision(s) of the Charter allegedly violated; the facts of the claim; measures taken by the author to exhaust local remedies and the extent to which the same issue has been settled by another international investigation or settlement body. The African Commission or a working group may also request the state party concerned or the author of the communication to submit in writing additional information or observations relating to the issue of admissibility of the communication. The Secretariat has not been forthcoming with asking for more information thinking that the mandate to do so lies with the Commissioners who sit only twice a year. When asking for clarification or information, the African Commission is required to fix an appropriate time limit for the author to submit the communication so as to avoid undue delay in the procedure provided for by the Charter. The request for clarification referred to above does not prevent the inclusion of the communication in the list mentioned above.\textsuperscript{45} As a matter of law a communication may be declared admissible if the state party concerned fails to submit additional information despite it being given the opportunity to submit the information. However, the African Commission is generally soft on states.\textsuperscript{46}

After a communication is seized of by the African Commission, the complainant and the respondent state are informed and they are asked to provide their submission on admissibility or inadmissibility of the communication to the Secretariat.\textsuperscript{47} When the Secretariat receives submissions from both parties it normally strives to serve the parties

\textsuperscript{41} Sabelo Gumedze, \textit{Bringing Communications before the African Commission on Human and Peoples Rights} 3(1) AFR. HUM. RTS. L. J. 118, 125 (2003).
\textsuperscript{43} Gumedze, supra note 41, at 126.
\textsuperscript{44} Id.
\textsuperscript{45} Old Rules of Procedure of the African Commission, supra note 42, rule 104.
\textsuperscript{46} Ibid, rule 117.
\textsuperscript{47} Gumedze, supra note 41, at 127.
with the submission of each other.\textsuperscript{48} If time allows, through the Secretariat, the parties can exchange their responses. Otherwise, the parties exchange their submissions during a session or after a session.

Despite the opportunity and convenience, seizure and admissibility stages are always undertaken in separate sessions; and these sessions are not always successive.\textsuperscript{49} For admissibility the African Commission examines if the communication meets all the requirements of article 56 of the Charter.\textsuperscript{50} To facilitate its finding on seizure, admissibility and/or merit, the African Commission sometimes sets up one or more working groups, each composed of a maximum of three Commissioners.\textsuperscript{51} The working groups submit recommendations on what they are tasked to do.\textsuperscript{52} In addition, as a matter of practice, legal officers at the Secretariat have started writing opinions to Commissioners both on the admissibility and merits of a communication.\textsuperscript{53} The ultimate decision on admissibility of a communication lies with the Commissioners sitting during a session, regular or extraordinary.

Consideration of the merits is supposed to focus on establishing facts and whether or not those facts amount to a violation of the Charter or other international instruments from which the African Commission can draw inspiration.\textsuperscript{54} However, it is not unusual for states to refer to admissibility at the merits stage. The African Commission devotes a separate session for the consideration of a communication on merits from the sessions where the seizure and admissibility are considered.\textsuperscript{55} The Secretariat prepares draft decisions on the merits which are meant to guide the African Commission in its deliberations.\textsuperscript{56}

After considering a communication on its merits, the African Commission draws conclusions and recommendations which are part of a report outlining in detail the procedure followed and the established facts.\textsuperscript{57}

IV. Weaknesses in the Procedure

The practice of considering communications the African Commission has developed thus requires at least three sessions. It has not been disposing communications in shorter periods of time despite possibilities.\textsuperscript{58} Time has never been sufficient for the African Commission and it is a usual practice to defer communications from one session to another held six months later. Thus, the African Commission’s procedure is not in line with the notion of

\begin{footnotes}
\footnotetext{48}{Ibid, at 136.}
\footnotetext{49}{Ibid, at 127.}
\footnotetext{50}{Fact Sheet, \textit{supra} note 40, at 6 states.}
\footnotetext{51}{Gumedze, \textit{supra} note 41, at 128.}
\footnotetext{52}{Id.}
\footnotetext{53}{Interview with Dr. Feyi Ogunade, Senior Legal Officer at the Secretariat in Banjul, The Gambia, conducted on January 14, 2008.}
\footnotetext{54}{Gumedze, \textit{supra} note 41, at 141.}
\footnotetext{55}{Id.}
\footnotetext{56}{Id.}
\footnotetext{57}{Id. See also Umozurike, \textit{supra} note 27, at 186.}
\end{footnotes}
speedy trial on which the very African Commission has to judge states.\textsuperscript{59} In addition, the procedure has not been satisfactory in terms of providing a clear line for the parties to address each other. This article identifies three areas in which the African Commission should be criticized. (1) The African Commission’s transformation of the relevant provisions of the Charter to adopt three separate stages - seizure, admissibility and merits - six months apart from each other at the very least, is legally unfounded and not time friendly. (2) Insofar as processing and adjudication of communications is concerned, the African Commission has not delegated sufficient power to its full-time Secretariat which would be highly desirable. (3) There is inefficiency in the management of even the faulty design the African Commission has adopted. Each area is elaborated below.

\textbf{A. The Three Separate Stages: Seizure, Admissibility and Merit}

A communication could be filed in December, a week after the November session of the African Commission is over. Such a communication would wait for six months until the May session to be seized of. Legal officers at the Secretariat describe the seizure as a very simple process during which the African Commission examines if a communication alleges facts that amount to violation of any of the rights in the Charter.\textsuperscript{60}

Whereas there has been no way of seizing a communication before the next session, various factors also cause communications not to be seized during one or more sessions. Thus a filed communication with a minor omission, such as lack of signature, waits for five months only to be told by the Commissioners in a session that a signature is missing.\textsuperscript{61} In addition, before a communication is seized of, the Secretariat virtually does nothing with regard to such communication. A communication could be poorly pleaded in relation to all the seven requirements for admissibility article 56 of the Charter provides. For example, the Secretariat does not ask such complainant to consider revising any “disparaging” remarks,\textsuperscript{62} adduce more credible evidence instead of exclusively depending on mass media; attempt to exhaust local remedies and what these remedies are or explain why and what exceptions apply.

In extreme cases, the Secretariat left it for the Commissioners to decide on communications against non-African states. However, the Secretariat now no longer accepts communications against states not a party to the Charter.\textsuperscript{63} This is required by Rules of Procedures of the African Commission (adopted in 1995) which states that no communications concerning a State which is not a party to the Charter shall be received by

\textsuperscript{60} Ogunade, \textit{supra} note 53.
\textsuperscript{61} Eg. Communication 349/07.
\textsuperscript{63} Ogunade, \textit{supra} note 53.
The African Commission or placed in a list of communications. After 1995, communications against non-parties to the Charter are thus deemed “irreceivable.”

On the other hand a communication could be well developed with all the requirements for admissibility being met. In this situation, the Secretariat does not use the inter-session time to bring that communication to the attention of the respondent state and ask that state for a reply. With the old rules of procedure and the practice the respondent state remains uninformed and consequently, nothing takes place from its side until a communication is seized.

During the seizure session, with regard to the seven requirements provided in article 56 of the Charter, the only requirement the African Commission considers is article 56(2) – if the facts alleged amount to a violation of the Charter or the AU Constitutive Act. According to Eno, at this stage the African Commission does not bother itself with other inadequacies of a communication and does not even advise the complainant to try to fix apparent omissions in his/her communication such as use of disparaging language. Likewise, the African Commission does not attempt to explore how the other requirements are met or pleaded. There is no sound reason why the African Commission does not look at all the factors of article 56 at one stage event if such an opportunity exists. The African Commission looks at the rest of the requirements six months later during the admissibility stage. For any minor omission, the complainant gets informed after six months.

There is no basis in the Charter or in any other document for the African Commission to have three stages separated from each other by six months for adjudicating a single communication. The following section investigates the legal foundation of the three stages.

B. Mandate of Commissioners vis-à-vis the Secretariat

At the outset, it is important to consider the question of who makes up the African Commission. Addressing this question is important to understand the allocation of tasks. There is a tendency to look at the African Commission as composed of Commissioners only and the Secretariat as an appendage. This tendency minimizes the role the Secretariat could play. It is true that article 31(1) of the Charter states that the African Commission shall consist of eleven members. This provision does not state that the African Commission shall have eleven Commissioners only. However, several other provisions of the Charter seem to support the argument that when the Charter refers to the African Commission, it means the eleven Commissioners only. “Commissioners” would have been a better term to refer to the Commissioners than “members of the African Commission.”

The Secretariat General of the Organization of African Unity shall appoint the Secretariat of the African Commission. He shall also provide the staff and services necessary for the effective discharge

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64 Old Rules of Procedures of the African Commission, supra note 42, rule 102(2).
66 Eno, supra note 37.
67 Id.
of the duties of the African Commission. The Organization of African Unity shall bear the costs of the staff and services.

Is the Secretariat part of the African Commission? A positive answer is supported by article 45 of the Charter – “The functions of the African Commission”. Since its establishment, the Secretariat has carried out several functions of the African Commission and if the practice helps to interpret the Charter, the Secretariat is indeed part of the African Commission. With the above note in mind it is important to look at article 55 of the Charter which provides:

1. Before each Session, the Secretary of the African Commission shall make a list of the communications other than those of States parties to the present Charter and transmit them to the members of the African Commission, who shall indicate which communications should be considered by the African Commission.
2. A communication shall be considered by the African Commission if a simple majority of its members so decide.

Article 55 has indeed restricted the role of the Secretariat to providing a mere “list of the communications … and transmit them to” Commissioners. The Commissioners themselves “indicate which communications should be considered” seemingly justifying the unconvincing “seizure” stage the African Commission has been following as supported by article 55. Yet, there is another time friendly interpretation of article 55. The most important term in the above provisions is “considered”. Any communication inevitably has many aspects which need to be “considered”. With regard to the term “considered”, the key issue is therefore which points should be considered by the Commissioners and which points have to be considered by the Secretariat. The ordinary meaning of the term “considered” does not lend any help. The Human Rights Committee has attempted to ascribe a meaning to the term. The Committee, in assessing its powers under Article 5(1) of the first Optional Protocol to the International Covenant on Civil and Political Rights, has taken the view that the verb “consider” extends beyond reaching a decision on the facts of the case and includes post-decision implementation and measures. According to the Committee, the word “consider” need not be taken as meaning consideration of a case only until the adoption of a final decision but consideration in the sense of engaging in those tasks deemed necessary to ensure implementation of the provisions of the Covenant.1

One can argue, based on the Committee’s explanation, that consideration of a communication includes simple and pure secretarial acts such as receiving and registering a communication, to adjudication on substantive matters to post-decision follow-ups. The meaning the Committee ascribed to the term indicates that what the African Commission’s Secretariat does to a communication is part of the consideration process of the communication. This interpretation seems to agree with Article 57 of the Charter which provides that “[p]rior to any substantive consideration, all communications shall be brought to the knowledge of the state concerned.” Article 57 hints that there is substantive and non-substantive consideration of a communication. However, article 57 does not clarify what aspects of a consideration are substantive and or what are not substantive.

The first paragraph of Article 56 is, however, clear - communications referred to under Article 55 “shall be considered [by the Commissioners] if they” meet all the requirements listed under Article 56(1) to (7) inclusive. From the terms “if they,” it appears clear that the Commissioners can only consider a communication after the seven requirements under Article 56 are met. Along this line, the most important question is, who

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69 Article 5(1) of the Optional Protocol to the ICCPR.
70 Odinkalu, supra note 65, at 373.
considers whether or not the requirements under Article 56 are met. One reading of article 55 seems to indicate that everything, even minor omissions such as a signature, should be considered by the Commissioners. This line of interpretation is not favorable to the notion of speedy trial which the very Charter provides. One can also more convincingly argue that the Secretariat’s mandate under article 55(1) comes at what is now post-admissibility stage. Article 55(1) mandates the Secretariat to make a list of the communications from individuals and transmit them to the members of the African Commission, who shall indicate which communications should be considered by the Commissioners. The Secretariat could provide to the Commissioners a list of communications that in its judgment meet all admissibility requirements.

Therefore, following the indication in article 57, the African Commission should have classified consideration of a communication into substantive and non-substantive parts and leave the latter part to be handled by its Secretariat. “Merit” and “substance” are synonymous words. Because the African Commission has a separate “merits” stage, one could argue that consideration of admissibility and seizure are not substantive considerations but rather procedural which should be left to the Secretariat. It is true that there will be a grey area but this should be interpreted in favor of making the system more effective.

C. No Sufficient Delegation of Power

If one is inclined to believe that the Charter does not give to the Secretariat powers to seize and admit communications as this article asserts, for expeditious disposition of communications, such powers should be delegated to the Secretariat. Various lines of argument support both conclusions. Simple logic dictates that the Commissioners, who meet only twice a year for around ten days, should not sit to consider whether or not a communication’s author is indicated and the communication is signed (article 56(1)), a communication is addressed against state party to the Charter on account of a violation of the AU Constitutive Act or the Charter (56(2)), the language used in writing the communication is not disparaging (56(3)) and facts alleged in a communication are not based exclusively on news disseminated through the mass media (56(4)). With regard to the principle of exhaustion of local remedies (56(5)) and the principle of res judicata (56(7)), the legal officers and legal interns at the Secretariat are informed enough to make sound judgment. In fact, they agree that some of the requirements under article 56 of the Charter, particularly paragraph 1, 2, 3 and 4 are not substantive in nature or complicated. Thus they seem to suggest that the Secretariat should be given the power to decide upon such issues. Regrettably, as things stand now, even a simple one, such as making every communication known to the respondent state prior to any substantive consideration, is a power of the part-time Chairperson rather than the Secretariat.

Importantly, because the legal officers are fulltime employees, they can dedicate more time and energy to develop their reasoning to support a conclusion. The expertise and attention available for the Secretariat to decide on these issues offers a considerable advantage over the Commissioners who come to sessions for only a short time, after having

72 Ogunade, supra note 53.
73 Art. 57 of Charter and Rule 112,
been unprepared and detached during the inter-session period.\textsuperscript{74} In addition, not all Commissioners are trained in law, let alone in human rights law.

\textbf{D. Lack of Communication between the Parties}

Another fallacy with the previous procedure is the fact that after seizure the African Commission simultaneously asks both the state and the complainant to submit their position on admissibility and later on merits at the same time.\textsuperscript{75} As a result the parties do not normally respond to each other. On local remedies, for example, the complainant may plead that there are no effective remedies worthy of exhaustion and, as a result, the exception where the complaint is not even required to make an attempt applies. The state may simply say the complainant did not even attempt to exhaust local remedies. Had the state been asked to reply to the contentions of the complainant after reading the latter’s version, chances are the state would have directly responded to the contentions.

\textbf{V. The Reform Introduced: Insufficient}

Some of the improvements introduced by the interim rules of the African Commission are that the Secretariat is empowered to ensure communications addressed to the African Commission contain all the relevant elements for admissibility which are presented in a slightly more elaborate fashion than in the old rules of procedure.\textsuperscript{76} Another important addition is that in the event some of this information is missing from a communication, the Secretariat is empowered to contact the complainant to furnish these.\textsuperscript{77} With the old rules it is the “African Commission [or a working group of Commissioners] through the Secretariat” that could ask for additional information.\textsuperscript{78} So, the Secretariat will not simply wait for the African Commission to sit for seizure in the face of apparent omission.

Regrettably, the interim rules have not avoided the three stages - seizure, admissibility and merit. After seizure which is still left in the hand of Commissioners sitting in a session, important reform is introduced aimed at having both parties communicate to each other and thus sharpen their difference.\textsuperscript{79} When the African Commission has decided to be seized of a communication, it is required to promptly transmit a copy of the complaint to the respondent state and simultaneously inform the complainant of the decision on seizure, and request the complainant to present evidence and arguments on admissibility within two months. Upon receipt of the complainant’s observations on admissibility, then the Secretariat is required to transmit a copy to and to request the respondent state to make a written submission, containing its arguments and evidence on admissibility, within two months of its receipt of the African Commission’s request. The Secretariat is empowered within a week of receipt of the state’s submission to provide the complainant with a copy. Then, the complainant has a chance to comment on the submission of the state within one month of receipt. The African Commission may ask the parties to present supplementary

\textsuperscript{74} Eno, \textit{supra} note 37.

\textsuperscript{75} Ogunade, \textit{supra} note 53.


\textsuperscript{77} Ibid, rule 96(3).

\textsuperscript{78} Old Rules of the African Commission, \textit{supra} note 42, rules 104 & 117.

\textsuperscript{79} Interim Rules of the African Commission, \textit{supra} note 76, rule 108.
observations during an oral hearing. After seizure and admissibility, a similar procedure is required to be followed at the stage where the merit of a communication is considered. Any explanation or statements submitted by the respondent state is required to be communicated, through the Secretariat, to the complainant, who may submit any additional written information or observations within one month, with no possibility for extension of time.

The Interim Rules have maintained the African Commission’s power to appoint a Rapporteur or working groups from among its members to review questions of seizure, admissibility and the merits of any communication(s) and to make recommendations to the Commissioners sitting in session.

VI. The Need for More Reform

Many aspects of the practice so far followed and the reform introduced are unconvincing. Further reform is suggested along the following lines: (1) merging the three stages, (2) delegating more roles to the Secretariat and (3) chambering the Commissioners.

First, the African Commission should do away with the three separate stages which consume more than 12 months at the very least but more than two years in many cases. Several individuals who have worked closely with the African Commission have repeatedly advised so and change in this regard is long overdue. The African Commission should, assuming that it has sufficient information it needs from both parties, in principle be ready to dispose a case in one session. A framework that makes this arrangement possible is outlined below.

Second, the Secretariat should have the power to process communications towards maturity in terms of the requirements under Article 56. Thus, from the time the Secretariat receives a communication, it needs to be in constant conversation with the complainant to fix any omissions that could delay the determination of the communication. The need for the Secretariat to assume this mandate is already heeded by the Interim Rules - the Secretariat is empowered to make sure all the requirements for admissibility are met and in case some are missing to contact the complainant to furnish it. For this purpose the Secretariat needs to allocate a legal officer for developing each communication. The Secretariat should not confine itself to sending a checklist of missing requirements. It should rather, whenever necessary having regard to the nature of the complainant, explain what each item is. In this way, not only would the Secretariat play a promotional role but it would also lend a hand in providing legal aid.

To be able to obtain all the relevant information necessary for determination at any stage, revising the African Commission’s guidelines for submission of communications and developing a format could help the complainant to meet the requirements for admissibility. Preferably, a communication should be filed in the form of a legal brief. The brief needs to have an identification part in which the complainant identifies himself/herself, provides his/her address, indicates whether or not she wants to remain anonymous, mentions the respondent state and the articles of the Charter she thinks are violated. The second part of the brief should state facts that are alleged to amount to a violation of a right. The third part

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80 Ibid, rule 111.
81 Ibid, rule 100.
82 Interview with Alpha Fall, former legal officer at the African Commission, conducted in February 2008.
83 Interim Rules of the African Commission, supra note 76, rules 96(2) & (3).
of the brief should explain how the requirements for admissibility are met and prayers for admissibility. The fourth part of the brief should explain how the alleged facts amount to violations of rights. Finally the fifth part needs to provide prayers on the remedial actions the complainant seeks. It is true that some complainants may not be able to write a legal brief and in this case the Secretariat should lend assistance. However, majority of the litigants before the African Commission are capable NGOs.

At this development stage, often, the Secretariat would be communicating with the complainant. During the development stage, the Secretariat should be free to involve Commissioners and other parties whom the Secretariat believes are well informed to help in the development of a communication. The Secretariat is part of the African Commission and should not be deterred from using powers given to the African Commission by the Charter, specifically the power to resort to any appropriate method of investigation. If the Secretariat thinks that the complainant has brought something the respondent state should be notified of, with the aim of preparing the latter for a response, the Secretariat should have the power to do so. For example, a communication which has provided all the information required for admissibility except that the complainant is not sure as to whether or not she shall remain anonymous should be sent to the respondent state by withholding the identity of the complainant. In any case, at a stage when the Secretariat feels that sufficient relevant information is furnished by the complainant on all the requirements, it should be given power to ask the respondent state for a reply following the format of the suggested brief.

Even though article 57 of the Charter gives this power to the Chairperson of the African Commission, this is something that could be delegated to the Secretariat or which the Secretariat could do leaving the ratification to the Chairperson.

Time is essential and the Secretariat should strictly put states to respect deadlines with a clear notice that, should they fail to reply, allegation of the complainant will be taken as true. After receiving a reply from the state, the Secretariat should, if necessary, inform the complainant asking the latter to reply in a month. After this the Secretariat should be given the power to draw a prima facie ruling on admissibility and inform both parties. In case of a finding of prima facie admissibility the Secretariat should register a case and inform both parties to submit arguments on the merits. The Secretariat should always instruct the state to be prepared to defend the case on merits even if the state is intending to challenge the admissibility ruling of the Secretariat as a preliminary objection before the Commissioners consider the merits of the case.

Once the Secretariat has submitted a communication to the Commissioners sitting in full (or to a chamber of the African Commission as suggested below) the Commissioners should always be poised to consider merits of the case. As the practice before the Inter-American Commission shows, many states would probably contest the admissibility finding of the Secretariat before the Commissioners. In fact, even before the African Commission, some states often dwell on admissibility arguments while the African Commission has moved on to the merit stage. However, not all states would do so. In any case, states should be allowed to raise any admissibility challenge as a preliminary objection when they stand before the Commissioners. In such a case the Commissioners should first quickly rule

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84 Charter, art 46.
on that objection. Unless fully convinced by the respondent state, the Commissioner should always lean towards upholding the admissibility ruling of the Secretariat and should rather proceed considering the merits of a communication before them. Should the state convince the African Commission that the communication prima facie admitted by the Secretariat be ruled inadmissible, the Commissioners should reverse the finding of its Secretariat. The African Commission should give a reasoned decision. In all other cases, reasoning on admissibility could be contained in the final conclusions and recommendations of the African Commission.

Thirdly, in anticipation of more communications coming, the African Commission could also sit in chambers. It is true that at this stage the African Commission is not even overburdened with communications when compared with the Inter-American Commission. In its 22 years of existence, the African Commission has received close to 400 communications – less than 20 in a year. When the caseload mounts, the African Commission could produce three chambers of three Commissioners each with two Commissioners remaining unallocated or two chambers of five Commissioners each. In this case, the Secretariat could allocate communications it has ruled prima facie admissible to each chamber having regard to areas of expertise of each chamber.

However, two provisions of the Charter seem to make chambering impossible unless the African Commission is willing to be flexible. Article 42(3) of the Charter has set the quorum at seven Commissioners. Importantly article 55(2) clearly states that a “communication shall be considered by the African Commission if a simple majority of its members so decide.” The Secretariat’s ruling on admissibility should not be problematic as it can be justified as a delegated authority by the whole African Commission. Likewise, the whole African Commission could also delegate power to its chambers so that decisions taken by each chamber could be considered as passed by the majority of all Commissioners. Alternatively, the African Commission could comply with the Charter by sitting together and having six of its eleven Commissioners consider all communications admitted by the Secretariat. After chambers reach a decision, six Commissioners could endorse such decisions in order to comply with the Charter.

VII. Harmony Between the Commission and the Court

Any proposal for reform should pay attention to the complementary relation between the African Commission and the African Court. Complementarity is affected by those who are entitled to submit cases to the African Court. It should be noted that state parties whose citizen is a victim of human rights violation, individuals and NGOs satisfying the requirements mentioned above and African intergovernmental organizations can be complainants before the African Court without the need to file a case before the African Commission. A state party which has lodged a complaint and/or against which the complaint has been lodged at the African Commission can also file a case before the African Court in a manner that should be similar to an appeal. However, such a state cannot appeal

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89 African Court’s Protocol, supra note 12, arts 5 & 34(6).
90 Heyns, supra note 15, at 170.
against an interlocutory decision of the African Commission on issues such as admissibility and provisional measures.\textsuperscript{91} Also, the African Commission is not restricted to referring cases complainants may bring to it; it can file cases as a complainant in the same way African intergovernmental organizations can do.\textsuperscript{92}

\section*{A. How Complementary?}

From the African Commission’s side complementarity is defined. The bureaux (composed of the Chair and Vice-Chair) of the African Commission and the African Court are required to meet at least once a year, and as often as necessary to ensure a good working relationship between the two institutions and the African Commission is required to consult with the African Court before the modification of any of its Interim Rules relating to their relationship.\textsuperscript{93} This is important. Yet, when it comes to referring cases the Interim Rules of the African Commission adopted a restrictive complementarity than some scholars suggested. One category of communications the African Commission may refer to the African Court are those decided on the merits and the state has not complied or is unwilling to comply with its recommendations within a period of time which seems to be one to two years long.\textsuperscript{94} The African Commission has, by way of its Interim Rules, obliged the African Court not to entertain cases appealed by a state party which has lodged or against which the complaint has been lodged at the African Commission until the African Commission has reached a decision on the [merits of] cases.

Second category of communications which the African Commission has decided to immediately refer to the African Court is the ones in which the African Commission has taken provisional measures and the respondent state party to the Protocol has not complied with the provisional measures. Communication of this nature can be referred at any stage of their progress before the African Commission. A close reading of this provision seems to indicate that the African Commission refers only the “situation” of non-compliance with provisional measures.\textsuperscript{95} If it thinks necessary, the African Commission has thus to refer the case again to the African Court after a finding on the merits. If the African Court does not look at the whole case but on the situation of non-compliance with provisional measures only, and provided that the African Court indorses the measures of the African Commission, the only advantage of the referral is the provisional measures become binding and enforceable with the backing of the AU.

The African Commission could institute a case before the African Court against a state party that has ratified the Protocol out of its investigative mandate if a situation has come to its attention that, in its view, constitutes one of serious and massive violations of human rights as provided for under article 58 of the Charter. In this situation the African Court’s Protocol and the Interim Rules allow the African Commission to be a complainant on its own right.\textsuperscript{96} However, the African Commission is unwise to restrict the power given to it by article 5(1)(a) of the Protocol to incidents of serious and massive violations of human rights.

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\textsuperscript{91} Interim Rules of the African Commission, \textit{supra} note 76, rule 119(5).
\textsuperscript{92} For more see Weldehaimanot, \textit{supra} note 29.
\textsuperscript{93} Interim Rules of the African Commission, \textit{supra} note 76, rule 118.
\textsuperscript{94} Ibid, rule 119(1).
\textsuperscript{95} Ibid, rule 124(3)(b).
\textsuperscript{96} Ibid, rule 119(4) & African Court’s Protocol, art. 5(1)(a). For more discussion of this possibility see Weldehaimanot, \textit{supra} note 29.
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In addition to the newly adopted Interim Rules, the complementary relationship between the African Court and the African Commission has been a subject of academic commentary. Because individuals or NGOs who have no direct access to the African Court have no competence to refer their complaints before the African Commission and states are unlikely to do so, it is left to the African Commission to refer matters. On how cases could reach the African Court, Viljoen, for example, noted that if the African Commission continues to favor individuals, states will probably “appeal” the African Commission’s findings before the African Court on the grounds that the African Commission violated the Charter. However, Viljoen rightly added a caveat that this path would be a less travelled road which would depend on the initiative of respondent states. Viljoen explained that states may be reluctant to submit cases to the African Court because of the binding nature of its decisions. “In other words, states may prefer the certainty of a non-binding finding against them over the possibility of a binding decision. Moreover, there seems to be little incentive for states prevailing at the African Commission level to submit to a potentially disadvantageous African Court judgment.”

Arguing that the Protocol does not explicitly require that the African Commission make findings on the admissibility and merits of a case before submitting it to the African Court, Viljoen gave three stages at which referral is possible:

First, the African Commission may submit a case to the African Court without making any findings at all. Second, it could submit a case after making some findings, for example, after it had made a finding of fact, a finding on admissibility, or after unsuccessfully trying to negotiate a friendly settlement. Finally, the African Commission could submit a case to the African Court after its final disposition, i.e., a finding on the merits or a friendly settlement.

The third scenario, as explained above, is what the African Commission has eventually adopted. Thus, only Viljoen’s first and second scenarios need expanding. Further expanding his premises Viljoen explains that in the first scenario, after a preliminary hearing at the African Commission level, the African Court could decide on both admissibility and the merits of the case, or try to reach an amicable settlement. Viljoen argues that the travaux préparatoires of the Protocol suggest that another consideration is the importance and urgency of the matter, such as allegations of serious or massive human rights violations. Therefore, the criteria for direct referral to the African Court depend not only on the urgency of the matter, but also the ramifications of omitting the role of the African Commission.

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

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97 Viljoen, supra note 24, at 24.
98 Id.
100 Ibid, at 24.
104 Ibid, at 27.
settlement. He thus concluded “that many cases may be directly submitted to the African Court without undermining the African Commission's role”.

With his second scenario Viljoen suggested that the African Commission could adopt a more fluid approach and submit a case to the African Court after partial review that would require the African Commission to conduct admissibility findings or after conducting fact-finding and, if applicable, settlement negotiations but before considering the merits so that proceedings before the African Court would then deal primarily with legal, rather than factual, questions. Not only does Viljoen believe that the Protocol does not exclude this possibility but also this approach could lead to a more efficient division of labor, fewer delays, and a better use of resources since witnesses would only testify once and only one set of arguments and pleadings would be required.

Many scholars have advised that the success of the African Court is measured by the number of cases it gets and have thus lamented the limited access the main customers are given. The African Commission is now poised as a gatekeeper with a task of screening access of the main customers to the Court. The Inter-American Commission has been reluctant to transfer as many cases as the Inter-American Court wanted and the latter has reprimanded the first on the issue that the American Convention on Human Rights does not require “that the Commission determine that the Convention has been violated before the case may be referred by it to the Court.” According to the Inter-American Court, factors such as the controversial nature of the issue, the novelty of the issue, and the general importance of the issue to the hemisphere at large may play a role in a decision to refer. Viljoen also agrees that “[u]rgency need not be a criterion, thus making submission the rule rather than the exception.” Along this line, noting that thus far the African Commission has decided in favor of individuals in most cases, Viljoen called upon the African Commission to “refer all cases decided against individuals to the African Court, unless some exceptional circumstance, such as manifest lack of substance, is present.” In addition, Viljoen noted, the “African Commission could decide that resources and time should be prioritized for cases with a "good chance of winning" so as not to harm the public perception of the African Court and trigger the development of a negative jurisprudence.”

The African Commission, as reflected in its Interim Rules, also appears very mean with referring cases. The complementarity approach adopted by the new Interim Rules makes the suggested reform more feasible and easy to follow. Yet a wider approach to complementarity, for example as suggested by Viljoen, appears better and the proposed reform at the African Commission level serves this approach too.

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106 Ibid, at 31-32.
108 Id. at, para. 25.
109 Viljoen, supra note 24, at 33.
110 Ibid, at 35.
111 Id.
B. Will there be Three Stages before the African Court?

Will the African Court have seizure, admissibility and merit stages? Will the African Court rule on admissibility despite the fact that a case is referred to it by the African Commission? The African Court is required to rule on the admissibility of cases taking into account the requirements for admissibility in the Charter. This provision makes sense for cases that are freshly instituted before the African Court as opposed to cases referred to it by the African Commission. When deciding on the admissibility of a case instituted directly by individuals or NGOs, the African Court can request the opinion of the African Commission and the latter is required to give it as soon as possible. This type of cases can also be filed by way of referral by the African Commission. For cases that the African Commission refers to the African Court before reaching the admissibility stage (there will be none according to the Interim Rules) it makes sense for the African Court to dwell on admissibility. However, for cases that are referred after a decision on admissibility or on merit is given by the African Commission, it is indeed a waste of time and resources to consider again matters of admissibility.

It is thus suggested that the African Court regards as properly admitted all cases submitted to it by the African Commission after the latter makes a ruling on admissibility or merit. As far as cases freshly instituted before the African Court, the African Court should delegate its Registrar to make a prima facie in/admissibility ruling which, in case of a prima facie finding of admissibility by the Registrar, a respondent state may be allowed to raise a preliminary objection to the African Court which should always be inclined to consider merits only. The proposed reform at the African Commission is suggested to apply to the African Court mutatis mutandis.

Before the African Court, the seizure stage as practiced before the African Commission appears to have been avoided. The Rules of the Court require applicants to file cases in the Court Registry, one copy of the application containing a summary of the facts of the case and of the evidence intended to be adduced. The said application has to be signed by the Applicant or by his/her representative. Furthermore, the Rules require applications to comply with several requirements such as to give clear particulars of the Applicant and of the party or parties against whom such application has been brought; specification of the alleged violation; evidence of exhaustion of local remedies and indication of orders or the injunctions sought. Importantly, all applications filed by individuals and Non-Governmental Organizations shall meet the other admissibility conditions as set out in article 56 of the Charter.

The Registrar is required to acknowledge receipt of the application and this is a critical stage. While acknowledging receipt of the application, the Registrar of the Court can and should include a checklist of the requirements missing and suggestions on how they

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112 African Court’s Protocol, supra note 12, art. 6(2).
113 Ibid, art. 6(1).
114 For lessons from the Inter-American system see Jo M. Pasqualucci, Preliminary Objections before the Inter-American Court of Human Rights: Legitimate Issues and Illegitimate Tactics 40 VA. J. INT’L L. 1, 54-97 (1999).
115 African Court’s Interim Rules, supra note 10, rule 34(1).
116 Id.
117 Ibid, rule 34(2)
118 Ibid, rule 34(3)
119 Ibid, rule 34(4).
120 Id.
can be furnished. If there is anything of non-administrative issues that demands passing of a decision, the Registrar can rely on the President of the Court who is required to be placed fulltime at the seat of the Court.

Unlike the African Commission’s Secretariat which remains largely silent until a case is seized by the Commission, the Registrar is required to effect service of the application on the other party and do whole range of notifications to many organs of the AU. But, again, logic dictates that the Registrar should effect service to the other party only when a mature application is filed. An application filed against the United States of America or an African state which is not a party to the Protocol or which has not made the voluntary declaration is certainly not mature. The Judges sitting in one of the two regular sessions should not be called to rule that they have no jurisdiction over the United States of America.

Whenever the Court finds that there is no merit in an application, the Court’s Protocol further requires the Court to dismiss such application giving reasons for its decision. The Court has power to conduct preliminary examination of its jurisdiction and the admissibility of the application in accordance with relevant parts of the Charter related to admissibility of a case. In addition, the Court can request the parties to submit any factual information, documents or other material considered by the Court to be relevant. Here, the Court should not only mean the Judges but also the Registrar; and there are many points on which the latter can decide upon. Dismissing cases filed against non-members states should be the task of the Registrar and this should be done before the filing is registered as a case. In addition, as suggested earlier, speedy disposition of cases demands that the fulltime Registrar and the full time President of the Court should be given powers to decide on admissibility with a chance being reserved to any party to object such decisions before the Judges in session. The Court can “entrust additional duties to the Registrar” and it should empower the Registrar to make a prima facie finding of admissibility. If not, the delay that has crippled the Commission will affect the Court too; and the first case of the Court shows no signs for speedy trials.

C. The African Court’s First Case: A Bad Starter

The African Court has adjudicated its first case, which should have not been the first in any case, and the procedures of the Court have been tested. Regretfully, the Court committed a grave procedural mistake.

The case was filed by an individual against Senegal, a state party to the African Court’s Protocol but which has not made the required voluntary declaration that enables individuals or NGOs to bring cases before the African Court against Senegal. Because the AU Commission in Addis Ababa, Ethiopia, is the depository of AU treaties, ratifications, reservations, and declarations related to a particular treaty, the African Court is given the benefit of doubt when the complainant wrongly asserted in his pleading that Senegal has made the voluntary declaration while it has not. However, this does not give excuse to the

121 Ibid, rule 34(6).
122 Ibid, rule 34(6) & 35.
123 Ibid, rule 38.
124 Ibid, rule 39(1).
125 Ibid, rule 39(2).
126 Ibid, rule 25(3).
127 Michelot Yogogomboye v. The Republic of Senegal, supra note 11, para 1 & 27.
128 Ibid, para 17.
Registrar of the Court not to, on a regular basis, get from the AU Commission updates on the voluntary declarations of states.

The Registrar, without caring to establish that Senegal has made the voluntary declaration, or fully knowing that it has not, served Senegal with a copy of the application and asked the state to defend it.\textsuperscript{129} Aggravating the error of the Registrar, Senegal was also willing to defend\textsuperscript{130} the case while, as the dissenting judge rightly noted, it “could have limited itself to indicating that it had not made the declaration ... and that, consequently, the Court had no jurisdiction.”\textsuperscript{131} It was wrong for the Registrar to serve Senegal without ascertaining deposit of its declaration. Graver error, however, was that the Registrar committed the case to trial after Senegal made it clear that it has not made the declaration. As a result, the Court went into a full scale trial. In the course of the trial, the African Court eventually requested the AU Commission to forward to the Court a copy of the list of the States Parties that have made the declaration and found out that Senegal has not done so.\textsuperscript{132} A case that could have been settled in a week with a simple letter after the Registrar received the application, took more than a year and received a solemn judgment.

If the first case will be a precedent, the African Court will follow a worst practice than the African Commission has been following. On the good side of the case, one Judge has written a rather insightful dissenting opinion not only noting the procedural errors but also essentially endorsing the recommendations made in this article.\textsuperscript{133}

\section{VIII. Lessons from the Inter-American System}

While the arguments made for improvement are plausible on their own, the practice that has evolved in the Inter-American System provides further reinforcement. The Inter-American System is similar to the African system in many respects. The Inter-American System is composed of many human rights treaties and two monitoring institutions: The Inter-American Commission on Human Rights (Inter-American Commission) and the Inter-American Court of Human Rights (Inter-American Court). The Inter-American Commission is composed of seven members, and has a Secretariat composed of a full-time Executive Secretary, two Assistant Secretaries and other professional staff, many of whom are legal officers with law degrees from their countries. At present the Inter-American Commission does more or less what the African Commission does. Two functions of the Inter-American Commission are important for this comparison: (1) that the Inter-American Commission considers complaints from any person and (2) that the Inter-American Commission serves as a path to the Inter-American Court by way of the cases the Commission refers to the Court. There is no substantial difference between the two systems.

The American Convention on Human Rights adopted in San José, Costa Rica, on 22 November 1969 (American Convention) uses the same terms as the African Charter: “members of Commission” and “the Commission” when referring to the seven Commissioners. Bearing this reference into consideration, the power to consider admissibility of a complaint is given to the Commissioners by the Convention which the

\textsuperscript{129} Ibid, para 5.
\textsuperscript{130} Ibid, para 8.
\textsuperscript{131} Ibid, Separate Opinion of Judge Fatsah Ouguergouz, para 18.
\textsuperscript{132} Id. para 36.
\textsuperscript{133} Ibid, Separate Opinion of Judge Fatsah Ouguergouz.
Commissioners cannot amend.\textsuperscript{134} This could be taken as a similar power to the power conferred by article 55 of the African Charter to the African Commission. However, with regard to the actual procedure of considering complaints, the Inter-American Commission has a notably different procedure from the African Commission in a sense that there is no seizure and \textit{formal} admissibility stage.\textsuperscript{135} This is one aspect the African Commission could borrow to avoid its ill founded and ill justified seizure stage. Secondly, the Secretariat of the Inter-American Commission is, by way of the Rules of Procedure (Regulations), authorized by the Inter-American Commission to determine whether or not a petition or complaint is \textit{prima facie} admissible, which the African Commission’s Secretariat does not do.\textsuperscript{136} There is no legal obstacle barring the African Commissioners from delegating such powers to their Secretariat. Indeed the permanency and the resources of the latter make a compelling case for such delegation.

Thus, in practice, upon receipt of the initial communication from the petitioner and other early information, the Inter-American Commission’s Secretariat Lawyer in charge of the country against which the complaint is directed considers whether the case is \textit{prima facie} admissible. The decision is taken mostly on the basis of the information provided by the petitioner at the pre-registration stage.\textsuperscript{137} Complaints clearly showing that domestic remedies have not been exhausted prompt the Secretariat to request further information from the petitioner regarding failure or inability to exhaust local remedies before it decides whether to open the case or to declare it inadmissible.\textsuperscript{138} When there is a risk to life, the Secretariat tends to be lenient on exhaustion of local remedies leaving it to the state and the petitioner to provide further information on the local remedies issue as the petition progresses.

If a petition is not \textit{prima facie} admissible, the petitioner will be informed that the petition does not meet the specific requirements for admissibility. Still, with more relevant facts pertaining to admissibility a petitioner can cause the Secretariat to change its previous position. If a petition is \textit{prima facie} admissible, the Secretariat registers it and opens the case (give it a case number). Yet, as the case continues a respondent state could again raise admissibility challenge and, depending on the strength of the state’s argument, the Inter-American Commission hears admissibility issue and if convinced it can declare inadmissible a case (as they are called) which the Secretariat considered to be \textit{prima facie} admissible. Otherwise, the processing continues and the case is dealt with on the merits.\textsuperscript{139}

With most cases the Secretariat declares as \textit{prima facie} admissible, there is no reasoned explanation given to both parties except mere information of the Secretariat’s ruling. Even if with a case the Inter-American Commission proceeds on the basis of a \textit{prima facie} admissible ruling of the Secretariat, it merely includes a statement confirming the case’s admissibility in the final decision on the merits. However, in a few cases the Inter-American Commission has disagreed with the \textit{prima facie} admissibility finding of the Secretariat, it issued a separate decision declaring the petition admissible.\textsuperscript{140} In addition in some cases where the respondent state strongly argues on admissibility issues, the Inter-American Commission has opted to

\begin{itemize}
  \item \textsuperscript{134} American Convention, arts, 41, 45, 46, 47 and 48.
  \item \textsuperscript{136} Article 26 of the Rules of Procedure of the Inter-American Commission.
  \item \textsuperscript{137} Cerna, \textit{supra} note 135, at 80.
  \item \textsuperscript{138} Id.
  \item \textsuperscript{139} Cerna, \textit{supra} note 135, at 80.
  \item \textsuperscript{140} Ibid, at 81.
\end{itemize}
give a separate reasoning on admissibility as if it is interested in appeasing the respondent state. The Inter-American Court also endorsed the Inter-American Commission’s practice.

With regard to complementarity, the Inter-American System also offers a good lesson to the African System. Similar to accessing the African Court, only states parties and the Inter-American Commission have the right to submit a case to the Inter-American Court. In drawing the complementary relationship, mainly on referring cases to the African Court, the African Commission has uncritically copied the practice of the Inter-American system. There is no clear guideline in the American Convention as to the nature of the cases the Inter-American Commission is required to refer. However, its rules of procedure provide that if the Inter-American Commission considers that the state has not complied with its recommendations, and giving fundamental consideration to obtaining justice in the particular case, based, among others, on the position of the petitioner, the nature and seriousness of the violation; the need to develop or clarify the case-law of the system, the future effect of the decision within the legal systems of the Member states, and the quality of the evidence available; it is required to refer the case to the Court. However, such a referral is not possible if there is a reasoned decision by an absolute majority of the members of the Inter-American Commission to the contrary. In practice, the Inter-American Commission is attacked for not referring sufficient cases to the Inter-American Court.

The problem with both the Inter-American Commission and the African Commission is that referring cases only after deciding on their merits takes long time. In addition, referring cases where the respondent states failed to comply only, fails to offer the various advantages a generous referral policy would offer. However, the fact that the African Commission gave individuals whose case is referred to the African Court the right to pursue their case by their own is commendable. For years, only the Inter-American Commission had the right to appear before the Inter-American Court to represent individuals whose cases has been referred. The restriction was so illogical that the Inter-American Commission started to sneak in complainants or their lawyers labeling them as the Commission’s lawyers.

Finally, the Inter-American Court claims to have a power to reconsider a decision of the Inter-American Commission on admissibility in any case that is referred to the Court. The Inter-American Commission takes extensive period of time to determine on admissibility of an individual petition. To make matters worse state parties often use preliminary exceptions to review the admissibility of a case referred against them to the Inter-American Court. To eliminate this practice some scholars suggest that “the norm should require all state parties to argue issues of admissibility only before the

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141 Ibid, at 82.
143 American Convention, art 61(1).
144 Rules of Procedure of the Inter-American Commission, art 44.
147 Interim Rules of the African Commission, supra note 76, rule 124(1)(a).
148 Cerna, supra note 135, at 83.
In addition, it was suggested that the Inter-American Court should not re-open questions of “pure” admissibility which should be resolved by the Inter-American Commission. Regrettably, as explained above, the African Court seems to decide on admissibility on all cases referred to it from the African Commission. This will significantly contribute to delays.

IX. Conclusion

When the legislators at the continental level are leaders who sit at the apex of the human rights abusive systems in their countries, continental human rights instruments could rarely be as good as the subjects would want them. With regard to the complaints procedure, the weaknesses of the African Charter are so apparent. However, returning to the legislature for amendment may not be desirable. For this reason, scholars who have ventured on possible reform of the system have cautioned not to press for amendment even though they agree that amending the weak legal texts is the best and desirable way. In the circumstance, creativity and wisdom of those who run the system remain absolutely crucial. Even though those who run the system should not be called to embark on radical reforms that could anger states to the extent of eradicating or crippling the system further, they should progressively tune the system towards a better protection and promotional apparatus. As suggested in the article, the adjudicative mechanism of the African human rights system is desperately in need of reform to render justice expeditiously. Justice delayed is justice denied.

149 Rescia & Seitles, supra note 146, at 629.
150 Cerna, supra note 135, at 83.