

## A critical reflection on the proposed African Court on Human and Peoples' Rights

*Andreas O'Shea\**

Senior Lecturer, University of Durban-Westville, Durban

### 1 Introduction

The background to the agreement for the establishment of a human rights court for Africa is by now well known.<sup>1</sup> The idea was initially debated in 1961 at the same conference at which the 'Law of Lagos' was adopted. Such a court was apparently deliberately omitted from the provisions of the African Charter on Human and Peoples' Rights (African Charter or Charter) concluded 20 years later, despite the adoption of such courts in Europe and America.<sup>2</sup> There was nonetheless agreement to establish a quasi-judicial protective body similar to the United Nations Human Rights Committee. This body would lack any ability to render binding or enforceable decisions. This body would be called the African Commission on Human and Peoples' Rights (the African Commission

---

\* LLB (Hons) (Coventry), Lic Spec (Louvain/Liège); aoshea@pixie.udw.ac.za

<sup>1</sup> See J Mubangizi & A O'Shea 'An African Court on Human and Peoples' Rights' (1999) 24 *South African Yearbook of International Law* 256 257–258; M Mutua 'The African Human Rights Court: A two-legged stool?' (1999) 21 *Human Rights Quarterly* 342 352; A O'Shea 'A Human Rights Court in an African context' (2001) *Commonwealth Law Bulletin* (forthcoming); A Stemmet 'A future African Court for Human and Peoples' Rights' (1998) 23 *South African Yearbook of International Law* 233 234.

<sup>2</sup> Arts 38–56 European Convention on Human Rights and Fundamental Freedoms of 1950; Arts 52–73 American Convention on Human Rights of 1969.

or Commission),<sup>3</sup> a useful tool for the promotion of human rights but a largely ineffective mechanism for the protection of human rights.<sup>4</sup>

The eventual re-consideration of the idea of a court in 1994 was a reaction to a growing sense of the inadequacy of the protection offered by the present system. The Assembly of Heads of State and Government requested the Secretary General of the Organisation of African Unity (OAU) to call upon government experts to:<sup>5</sup>

ponder in conjunction with the African Commission on Human and Peoples' Rights over the means to enhance the efficiency of the Commission in considering particularly the establishment of an African Court on Human and Peoples' Rights.

This request eventually culminated in the conclusion of the Protocol establishing the African Court on Human and Peoples' Rights in 1998.<sup>6</sup> It was, however, a presumptive question. Why should it have been assumed that the establishment of a court was a likely solution to the problem of the inefficiencies of the Commission? By asking government experts to focus on the question of the establishment of a court, their attention might have been drawn away from the Commission itself and how its performance may have been improved. A court may or may not have been the answer or the complete answer. The presumptive nature of the question is perhaps reflected in the fact that a draft document on a court was produced only just over a year later.

There are a number of arguments that can be and have been raised against the establishment of the proposed court or a court at all. In the following sections, the merits of these arguments will be examined with a view to reflecting seriously on this significant and inevitable step in the development of an African human rights system.

---

<sup>3</sup> Arts 30–59 African Charter on Human and Peoples' Rights of 1981; see generally EA Ankumah *The African Commission on Human and Peoples' Rights: Powers and procedures* 1996; E Bello 'The mandate of the African Commission on Human and Peoples' Rights' (1988) 1 *African Journal of International Law* 31; F Viljoen 'Review of the African Commission on Human and Peoples' Rights: 21 October 1986 to 1 January 1997' in C Heyns (ed) *Human rights law in Africa 1997* (1999) 47; K van Walvaren 'African Commission on Human and Peoples' Rights' (1993) 11 *Netherlands Quarterly of Human Rights* 116.

<sup>4</sup> See generally W Benedek 'The African Charter and the African Commission on Human and Peoples' Rights: How to make it more effective' (1993) 11 *Netherlands Quarterly of Human Rights* 25; Mutua (n 1 above) 345–346; CE Welch 'The African Commission on Human and Peoples' Rights: A five-year report and assessment' (1992) 14 *Human Rights Quarterly* 43.

<sup>5</sup> *Report of Government Experts Meeting*, AHG/Res 230, 30th ordinary session of the Assembly of Heads of State and Government, Tunis, Tunisia, June 1994, cited in IAB El-Sheikh 'Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights: Introductory note' (1997) 9 *African Journal of International and Comparative Law* 943 (n 1).

## 2 Objections to the idea of a court of human rights for Africa

The first assumption implicit in the 1994 request of the Assembly of Heads of State and Government of the OAU is that the concept of a court of human rights is in principle a good idea for Africa. Although obvious to some, it is hard to take this assertion as a foregone conclusion when the OAU has itself avoided the issue for more than 30 years and only two other regions of the world have felt it necessary to establish such a body. Furthermore, a number of states have supported the international human rights movement by becoming parties to regional and global human rights treaties, but have simultaneously refrained from acceding to the necessary protocol or making the necessary declaration to establish the competence of a judicial body to receive individual complaints.<sup>7</sup> Although these trends can be partly explained by the reluctance of states to expose themselves to international scrutiny, their stance is not always devoid of principled explanation.

One of the least acceptable explanations for the rejection of the idea of a court is a cultural one. According to this argument, a human rights court has no place in Africa because African tradition dictates that Africans resolve their disputes through amicable settlement.<sup>8</sup> I have addressed the deficiencies in this argument elsewhere,<sup>9</sup> but essentially it fails to have regard to the inequality of bargaining power between governments and their citizens. It also ignores the factual reality of an almost complete failure on the part of some African societies to settle their differences amicably and with respect for human rights.<sup>10</sup>

Another objection is one that views the matter from both a national and an insular perspective. This argument rests on the premise that there are adequate mechanisms for the protection of human rights on a national level. It may be said that at national level a constitution with

---

<sup>6</sup> See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, reprinted in (1998) *ICJ Review* (special issue) 227.

<sup>7</sup> Eg as at 25 March 2001, only 98 out of the 147 parties to the International Covenant on Civil and Political Rights of 1966 have become party to the First Optional Protocol, thereby accepting the jurisdiction of the Human Rights Committee to accept individual communications.

<sup>8</sup> UO Umzurike 'The African Charter on Human and Peoples' Rights' (1983) 77 *American Journal of International Law* 902-909. This idea that Africans settle matters by discussion was promoted to justify one party democracy: see K Wiredu 'Democracy and consensus in African traditional politics: A plea for a non-party polity' in EC Eze (ed) *Postcolonial African philosophy* (1997) 303.

<sup>9</sup> O'Shea (n 1 above).

<sup>10</sup> The Rwandan genocide is an extreme, but clear illustration: See African Rights *Rwanda: Death, despair and defiance* (1995).

a bill of rights exists. That bill of rights reflects all the important provisions of human rights treaties and may be enforced through a constitutional court that will give primacy to the constitution and the bill of rights. What need is there then for yet another body to perform this identical judicial function? The South African Constitutional Court may serve as an example. The Constitutional Court applies the Constitution that incorporates most of the content of the African Charter and arguably goes further.<sup>11</sup> Other decisions, rulings and legislation may be declared unconstitutional if they infringe the Bill of Rights.<sup>12</sup> The Court itself operates in a very similar fashion to the proposed African Court. It consists, like the African court, of 11 judges,<sup>13</sup> its decisions are final and binding<sup>14</sup> and its judges are in practice selected from personalities that have struggled for the protection of human rights and fundamental freedoms.

Naturally, not every African state can boast this level of judicial protection of human rights,<sup>15</sup> but the need for a court should not be confined to the need to compensate for the lack of an effective constitutional court within certain states. There are justifications for regional protection over and above national guarantees. A constitution is not merely a document for the protection of human rights, but also reflects the needs of the state as determined by the constitution-making processes. This national interest may need to be balanced against the bill of rights by constitutional court judges. This balance and its resulting limitation on human rights may offend internationally accepted standards for the protection of human rights and should therefore be subject to international judicial scrutiny.

A pertinent illustration of this on the national level is the South African Constitutional Court's decision on the constitutionality of amnesty.<sup>16</sup> When it was argued that the South African amnesty provisions violated the right of access to court and certain provisions of international humanitarian law, the Court promptly reminded itself that it was concerned, not with the international legality of amnesty, but its legality in terms of the South African Constitution.<sup>17</sup> Since the epilogue to the interim Constitution had expressly provided for amnesty, it was difficult for the Court to uphold that it was unconstitutional or contrary to the

---

<sup>11</sup> Secs 7–39 Constitution of the Republic of South Africa Act 108 of 1996.

<sup>12</sup> Secs 2 & 167 South African Constitution.

<sup>13</sup> Sec 167(1) South African Constitution.

<sup>14</sup> Sec 167(3)(c) South African Constitution.

<sup>15</sup> See J Allain & A O'Shea 'African disunity? Comparing human rights law and practice in the north and south of Africa' (2001) 22 *Human Rights Quarterly* (forthcoming).

<sup>16</sup> *Azanian Peoples' Organisation (AZAPO) & others v President of the Republic of South Africa & others* 1996 (4) SA 671 (CC).

<sup>17</sup> *Per* Mahomed DP at 688.

Bill of Rights. Only a regional or global human rights body could have objectively measured the South African amnesty provisions against internationally accepted standards of human rights protection.

The other difficulty presents itself when the national courts prove to be ineffective in the enforcement of their decisions or their ability to remain impartial without being subject to harassment or dismissal. In Zimbabwe the courts rendered decisions upholding the right to property. The executive and enforcement organs of the state, however, failed to respect these decisions. In these circumstances, a regional body could potentially provide its stamp of international disapproval.

Apart from these limitations to the national process, a regional body has the advantage of setting regional standards in an area of law that is by nature controversial and uncertain in its particulars.

Perhaps the most forceful argument against any form of regional judicial intervention in human rights protection is one of resource allocation. African states rank among the poorest in the world. African communities are ravaged by poverty, lack of adequate health care services and scant infrastructure. There are also a plethora of mass human rights violations across the continent. Governments with necessarily limited resources must fund any regional initiative. They have no other option than to prioritise. In the context of human rights, it may be argued, the priority must lie with the promotion of human rights, as opposed to its protection in individual cases.<sup>18</sup> Resources should, according to this argument, be concentrated on building a human rights culture through education and activities. This must be especially so when the returns from individual human rights protection prove to be of limited value.

While this type of argument deserves serious consideration, it has to be admitted that there is no one solution to the problem of human rights in Africa. The African Commission has indeed had a largely promotional role, but the human rights situation in Africa remains shocking. No one component for the effective protection of human rights can be completely sacrificed because of limited resources. However, this aspect will be expanded upon in the next section to argue that while the need for a judicial body is undisputed, the specifically proposed form of that body in the Protocol to the African Charter may be inappropriate in the circumstances.

### **3 The desirability of a two-tier protective mandate**

There is a growing consensus among academics and governments that an effective judicial mechanism for the protection of human rights is

---

<sup>18</sup> A similar argument was employed in the *AZAPO* case (n 16 above), in order to justify a limitation on the right of access to the national courts: especially at 695.

both desirable and necessary in the African context, as elsewhere. The complete rejection of the protective function of the African human rights system is no longer tenable. However, serious questions may be raised in relation to the actual solution adopted in terms of the Protocol to the African Charter. This is especially so with respect to what the Court achieves in terms of improving upon the work of the Commission or to the proposed relationship between the Commission and the Court.

It has been persuasively argued by Makau Mutua that the mere establishment of a court will not serve to eradicate the deficiencies of the African human rights system of protection.<sup>19</sup> It is argued that this must be accompanied by a radical revision of the provisions of the African Charter and a clear division of labour that completely removes the protective function from the mandate of the Commission.

Mutua therefore raises both normative and institutional objections to the proposed court. While the African Charter provides much room for manoeuvre, it is not clear why this should in itself constitute an objection to the establishment of the court in its proposed form. Presumably, the Court can itself, through creative reasoning, redress any potential deficiencies resulting from the ambiguities and 'claw-back' clauses in the Charter. There is much in the rules on the interpretation of treaties that would enable the Court to do so. In particular, a treaty must be interpreted in the light of its object and purpose, as well as the context and words used.<sup>20</sup> Further, a court is entitled to have regard to subsequent treaty developments in the interpretation of a human rights treaty.<sup>21</sup> This the Court is of course specifically invited to do by the Protocol, which allows it to interpret and apply other treaties to which the member states are parties.<sup>22</sup> Mutua's fear of the implications of a conservative bench can always be rectified through a further protocol, as he suggests in relation to women's rights,<sup>23</sup> without the need of delaying the establishment of the Court until such changes have been effected.

Mutua's institutional objection to the relationship between the Commission and the Court focuses on the concern that the Court should be seen to be independent from the Commission, which has failed in its mandate. He notes that:<sup>24</sup>

it is absolutely critical that the Court be, and be perceived as, separate and independent from the African Commission to avoid burdening it with the severe image problems and the anaemia associated with its older sibling.

<sup>19</sup> Mutua (n 1 above).

<sup>20</sup> Art 31(1) Vienna Convention on the Law of Treaties of 1969.

<sup>21</sup> Art 31(3).

<sup>22</sup> Art 7 Protocol to the African Charter.

<sup>23</sup> n 1 above 360; in fact such a Protocol is likely to come into effect.

<sup>24</sup> As above.

His proposal for rectifying this problem is a clear division of labour between the Commission and the Court such that the Court has the exclusive protective mandate.<sup>25</sup> Save that the Commission should continue to administer the reporting mechanism, this result may be necessary for other fundamental reasons.

Firstly, and most obviously, it is questionable whether it is a rational allocation of resources to have two separate organs with a judicial mandate. What would this dual system add to the ineffectiveness of the Commission's decisions that could not be equally achieved by simply taking over those cases? Although such a solution was adopted in the European and Inter-American systems,<sup>26</sup> the system was designed so that only the Commission could receive individual communications and that the matter could only be taken before the Court by the Commission.<sup>27</sup> It should also be borne in mind that neither system is plagued with the level of financial restriction imposed on an African system for the protection of human rights. The African Commission has been severely hampered by inadequate resources.<sup>28</sup> The Commission's Secretariat has reportedly depended on external financial assistance from the European Union and the UN Voluntary Fund for Advisory Services.<sup>29</sup>

Secondly, this two-tier system is bound to adversely affect the length of delays in the final resolution of matters. It has been noted that a complainant has to wait in the region of three years for a matter to be heard by the Human Rights Committee, while complainants had to wait a staggering five years until a hearing in the former two-stage European system.<sup>30</sup>

It is the increasing caseload and consequent extended length of proceedings in the European system that led to Protocol 11 to the European Convention on Human Rights and Fundamental Freedoms.<sup>31</sup>

This Protocol amended the Convention to the extent that the machinery of the Commission and the Court would be fused into a single court. This move was felt to be all the more necessary because of the expansion in the membership of the Council of Europe.<sup>32</sup> The African system has

<sup>25</sup> As above.

<sup>26</sup> See the European Convention on Human Rights and Fundamental Freedoms of 1950; American Convention on Human Rights of 1969.

<sup>27</sup> n 26 above, art 48 & art 61 respectively.

<sup>28</sup> W Benedek 'The judiciary and human rights in Africa: The Banjul Seminar and the Training Workshop for a Core of Human Rights Advocates of November 1989' (1990) 11 *Human Rights Law Journal* 247 250.

<sup>29</sup> Welch (n 4 above).

<sup>30</sup> L Heffernan 'A comparative view of individual petition procedures under the European Convention on Human Rights and the International Covenant on Civil and Political Rights' (1997) 19 *Human Rights Quarterly* 78 111.

<sup>31</sup> Signed 11 May 1994 (1994) 33 *International Legal Materials* 943.

<sup>32</sup> See the official website of the European Court of Human Rights: <<http://www.echr.coe.int>> (accessed 31 July 2001).

to potentially deal with matters from 53 member states of the OAU. This number could increase to 54 or more in the case of future secessions. Most of these states have a greater landmass and population enduring frequent and intrusive violations of their rights.

It is not even certain to what extent the proposed African Court as part of a two-sided machine can be said to rectify the deficiencies of the African Commission. As Mutua comments:<sup>33</sup> A human rights court will only be useful if it genuinely seeks to correct the shortcomings of the African human rights system and provides victims of human rights violations with a real and accessible forum in which to vindicate their basic rights.

Both organs may receive inter-state complaints, but these represent a most theoretical avenue for the effective protection of human rights. The experience of the African Commission has demonstrated that African states will very rarely bring formal judicial or quasi-judicial proceedings against other African states for the treatment of their own citizens.<sup>34</sup> Similar trends are reflected in the operation of the Human Rights Committee and the European Commission on Human Rights. While the Human Rights Committee has apparently never received such a complaint, the European Commission and Court have received some.<sup>35</sup> Therefore, the central basis for the effective protection of human rights is the individual complaint. Neither organ has the automatic competence to receive individual communications and render binding decisions in relation to them. The African Commission can receive individual complaints but cannot render binding decisions. For its part the African Court can render binding decisions but can only deal with complaints from individuals and NGOs when a state has made a declaration accepting that competence.<sup>36</sup>

The explanation offered for this conditional system for the receipt of individual communications is that it might otherwise be difficult to acquire the necessary number of ratifications from African states.<sup>37</sup> Yet, since the primary purpose of setting up the Court was to ameliorate deficiencies in the operation of the African Commission, one might question the usefulness of securing parties whose citizens cannot directly take advantage of the system.

<sup>33</sup> n 1 above 357.

<sup>34</sup> It was noted in 1998 that there had been no such complaint before the Commission in its entire history: see CA Odinkalu & C Christensen 'The African Commission on Human and Peoples' Rights: The development of its non-state communication procedures' (1998) 20 *Human Rights Quarterly* 235 238.

<sup>35</sup> See eg *Ireland v United Kingdom* ECHR (18 January 1978) 25 Ser A; *Denmark v Greece*; *Norway v Greece*; *Sweden v Greece*; *Netherlands v Greece* (1969) 12 *Yearbook of the European Court of Human Rights* 1.

<sup>36</sup> Arts 5(3) & 34(6) Protocol to the African Charter.

<sup>37</sup> El-Sheikh (n 5 above) 947.



None of this is to say that the African Commission should cease to exist or that the Court should not come into existence. In one sense it is desirable that a two-tier system should be retained for the promotion and protection of human and peoples' rights. Clearly, the Commission potentially plays a very significant role in the promotion of human rights, which is essential in the African context and nicely complements the protective role of the Court. The difficulty comes in justifying a protective and judicial as opposed to promotional function for the Commission and the Court, when this would entail one possessing the snout and the other the tail.

#### **4 The Commission and the Court: An unresolved dichotomy**

These objections to the adoption of a two-tier system in respect of the protective function of the African system deal with the general difficulties of such a system in the African context, having regard to the respective powers of the two bodies. In the light of such considerations one would expect the Protocol to set out clearly the relationship between the Commission and the Court in a manner that reveals the desirability of this model. It does not.

In fact, the relationship between the two organs is only dealt with in the most general terms, which give little if any hint as to how the machinery actually works. The difficulty created by such ambiguity is demonstrated by the Commission's mandate in terms of the African Charter. The seasoned visitor to the provisions of the Charter will be familiar with the bald assertion in article 45 that the Commission must 'ensure the protection of human and peoples' rights under conditions laid down by the present Charter'. This apparently broad mandate is accompanied by more specific directions in article 58 requiring the Commission to draw special cases to the attention of the Assembly of Heads of State and Government. Such cases are those revealing the existence of a series of serious and massive violations of human and peoples' rights. In cases of this nature the Assembly of Heads of State and Government may request the Commission to undertake an in-depth study. These provisions led to a debate over whether the African Commission in fact had any competence to consider individual communications alleging violations that did not reveal a series of serious and massive violations of human and peoples' rights.<sup>38</sup> Although the Commission clearly interpreted the African Charter in a manner that permitted it to deal with other individual communications, the

<sup>38</sup> Benedek (n 4 above) 31; Odinkalu & Christensen (n 34 above) 235 239–244.

framework for the functioning of the Commission had apparently not been clearly set out from the outset.

If now the same level of ambiguity pertains to the relationship between Court and Commission, then this indicates that the implications of a two-tier system for administering the protective function of the African system have not been clearly thought out. How in such circumstances can the member states of the OAU be sure of its desirability?

A perusal of the provisions of the Protocol confirms such ambiguity incontrovertibly. Article 2 provides for the basic principle of 'complementarity' as between the Court and the Commission. Accordingly, it provides: 'The Court shall, bearing in mind the provisions of this Protocol, complement the protective mandate of the African Commission on Human and Peoples' Rights . . . '.

This statement represents little more than an acknowledgment that both organs shall retain a protective mandate and operate in harmony as far as possible. Article 8 also speaks of 'the 'complementarity' between the Commission and the Court', when it directs the Court to address the issue in its rules of procedure. International criminal lawyers will be familiar with the principle of 'complementarity' as it applies to the proposed International Criminal Court.<sup>39</sup> This principle represents the idea that the international court and national court jointly retain jurisdiction to try perpetrators of crimes covered by the jurisdiction of the international court. In this context the idea of 'complementarity' makes perfect sense because neither the international court nor the national courts will be the best or possible forum for dealing with all cases. This might arise from political constraints and/or the sheer number of cases involved.

It is not clear what the justification for the duplication of roles represented in the notion of 'complementarity' could be in the context of a regional court for the protection of human rights, assuming the essential functions and the nature of the parties are identical. It should be remembered that in the European and American models the essential functions and nature of the parties were not identical, since individuals could not access those courts directly. It might be argued that the Commission would operate as a kind of filter for cases so that the Court only hears those cases that are admissible and significant for the development of human rights jurisprudence. However, this purpose may be served in another way without vesting the protective function in both the Commission and the Court. The Human Rights Committee operates as a single body, but it makes use of working groups to give preliminary

---

<sup>39</sup> Preamble & art 1 Statute of the International Criminal Court (1998) 37 *International Legal Materials* 999.

consideration to the question of admissibility.<sup>40</sup> Likewise, one finds mechanisms adopted in national courts and international tribunals that serve to screen the admissibility of appeals. Thus, for instance, in the International Criminal Tribunal for Rwanda, when deciding whether a preliminary motion falls within the category of a challenge based on jurisdiction, a three, as opposed to five, judge bench of the Appeal Chamber will sit. It will decide, usually on paper, whether the notice of appeal falls within that category.<sup>41</sup>

There would seem to be no reason in principle why the African Court could not adopt a similar procedure rather than simply sharing the caseload with the African Commission. One difficulty with this suggestion with respect to the Court as elaborated in the Protocol is that the Court consists of part-time judges. Given the prestige of the position of a judge of an international tribunal there would seem to be no logical justification for this aspect of the functioning of the Court in any event. It has been pointed out that this might adversely affect the integrity and independence of the Court.<sup>42</sup>

The Protocol adopts an unusual formula for determining the admissibility of an application that would appear to involve a possible three or four way movement of the docket in ping-pong fashion. Article 6 stipulates that when the Court is deciding on the question of admissibility, it may request the opinion of the Commission 'which it shall give as soon as possible'. Where the opinion of the Commission has been requested, and once it has been received, the Court will rule on admissibility. Thereafter, assuming the application to be admissible, the Court may decide to refer the case back to the Commission in any event. This apparently convoluted procedure may be contrasted with the procedures in terms of the European and Inter-American systems (Protocol 11 to the European Convention aside) where, since the matter can only be brought to the Court through the Commission, it makes the preliminary decision on admissibility. The matter may be raised again before the Court but there is essentially only one movement of the case between the Commission and the Court. If the opinion of the Commission is sought, the Court will not have to wait for it, but it will be given during the course of the proceedings before the Court.

In terms of how the workload is shared between the Court and the Commission, the Protocol adopts a framework procedure which is certainly novel, but of questionable value. It states that 'the Court may

---

<sup>40</sup> See Adoption of the Rules of Procedure of the Committee in accordance with article 39 of the Covenant (Rules 79-97), UN GAOR, Human Rights Committee, 1st session, UN Doc CCPR/C/L.2/Add.2 (1977).

<sup>41</sup> Rule 72(H) of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda (February 2000).

<sup>42</sup> See Mutua (n 1 above) 356.

consider cases or transfer them to the Commission'.<sup>43</sup> This procedure necessarily comes about because an individual or state may approach the Commission or the Court, and the choice would appear to be entirely in their hands. There is no way of predicting which cases will start with the Commission or which cases will start with the Court. Consequently, the Court must act as its own filter and channel some cases back to the Commission. This clearly demonstrates the inefficiency of a two-tier system where both organs may receive the same type of application.

The scant provisions dealing with the relationship between the Commission and the Court give insufficiently clear guidance on how the machinery will operate in practice. Indeed, such guidance as there is serves to enlighten one as to the potential inefficiencies and length of proceedings under this future two-tier system. One is left entirely unconvinced as to the wisdom of retaining the existing framework for the Commission and then juxtaposing a court.

The Protocol recognises that the mechanism needs further clarification and refinement, but refrains from filling this gap. It is left to the Court itself to lay down in its rules of procedure 'the detailed conditions under which the Court shall consider cases brought before it, bearing in mind the complementarity between the Commission and the Court'.<sup>44</sup>

It is of course common for the founding instruments of international tribunals to leave it to the tribunal to adopt its own rules of procedure and evidence. It is even frequently the case that it will set out such a loose framework that much of what counsel would need to know about the functioning of the tribunal would be found in these rules, to be developed after the establishment of the tribunal. This can be said to be the case for the European Court of Human Rights and Fundamental Freedoms,<sup>45</sup> the Inter-American Court on Human Rights,<sup>46</sup> and the International Criminal Tribunals for the Former Yugoslavia<sup>47</sup> and for Rwanda.<sup>48</sup> This is not the case with the International Criminal Court where the contracting parties vested the task in the hands of a group of experts and where such rules were subject to adoption.

Nevertheless, where a matter is structural in nature and goes to the very heart of the rationale for the machinery, one would expect the matter to be clearly thought out and set out in the founding document. By leaving this task to the judges, the Protocol confers on them a

---

<sup>43</sup> Art 6(3) Protocol to the African Charter.

<sup>44</sup> Art 8.

<sup>45</sup> Art 4 European Convention on Human Rights and Fundamental Freedoms.

<sup>46</sup> Art 60 American Convention on Human Rights.

<sup>47</sup> Art 15 Statute of the International Tribunal for the Former Yugoslavia (1993) *International Legal Materials* 1192.

<sup>48</sup> Art 14 Statute of the International Tribunal for Rwanda (1994) *International Legal Materials* 1598.

quasi-political function and imposes on them a burden that might be perceived to render them ultimately responsible for the failure of the machinery. This is not only an unfair burden for the judicial officers to bear. It is also entirely inappropriate and constitutes an incredible leap of faith that somehow and in some way this poorly thought-out concept will find a way to work in an acceptable manner.

## 5 Conclusion

It is quite understandable that the perceived deficiencies in the African Commission on Human and Peoples' Rights should lead to an initiative to rectify those problems. It is perhaps unfortunate that the group of experts that produced the first draft of the Protocol was not simply asked this, without being given the particular mandate with respect to the Court. This might have led to a broader analysis of the problem at its roots. In the event, a specific request in relation to the Court was made and events rocketed in that direction from the inception of the consideration of the problem.

Since the first consideration of the Court in 1961, the issue remained effectively dormant for some 30 years. Then from the point of resurgence, a first draft appeared a year later and a treaty was concluded three years after that in 1998. The time frame and circumstances were not radically different from those of the parallel development of an international criminal court. In that case the work of the late 1940s had to be suspended because of the Cold War and was not re-ignited until 1992, when the General Assembly of the United Nations requested the International Law Commission to produce a draft statute. This was done in 1994 and four years later, in 1998, the Statute of the International Criminal Court was concluded.

Yet somehow a comparison of the results in both cases, admittedly dealing with different subject matter, highlights a substantial contrast in the thoroughness of evaluation and formulation. One cannot help feeling that the Protocol to the African Charter on Human and Peoples' Rights for the Establishment of an African Court of Human and Peoples' Rights has been somewhat rushed.

As a concept it is laudable. There can be no doubt that a human rights court is not only a good idea for Africa, but that it has also become practically essential for it. There are also aspects of the Protocol, including in particular the potential access of individuals and NGOs, which must be applauded, although this is a qualified gain given the need for a declaration of acceptance from states. The Court is a significant milestone in the protection of human and peoples' rights in Africa. In fact, it is so significant that it had to be the best it could be. This is where a serious question mark still remains. Given the wealth of experience to draw from in the European and Inter-American models and the

developments they have gone through, has the Protocol really revealed a model that represents the best possible formula for Africa?

There has been a total failure to adequately question and examine the appropriateness of pairing the protective function of the Court with the existing protective function of the Commission. There has further been a failure to adequately justify and clarify the proper relationship between the Court and the Commission.

The Commission's lack of teeth combined with the Court's absence of guaranteed access for interested parties may prove to be a particular thorn in the side of the workability of the machinery. Everything will depend largely on the political will of states to make the necessary declarations accepting individual and NGO access.

It is also foreseeable that the Court might face almost insurmountable problems in terms of the length of proceedings and the ability to make a meaningful impact on improving upon the acknowledged inefficiencies of the Commission in its protective function.

Nonetheless, there is probably no turning back now. There is probably no more time for thought or reflection and it is now a question of damage control. There can be little doubt, however, that in years to come the member states of the African Union will be forced to a similar conclusion reached by the Council of Europe that the protective function would be more efficiently housed in one body.