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An African Human Rights Court: Reflections from the perspective of the Inter-American system

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1 Introduction

This paper will look at the relationship between the Inter-American Commission of Human Rights (Inter-American Commission) and the Inter-American Court of Human Rights (Inter-American Court), the African Commission on Human and Peoples' Rights (African Commission) and the future African Court of Human Rights (African Court). This relationship will be looked at in the following manner:

Firstly, the parallels between the Americas and Africa will be drawn by looking at historical, political and legal similarities and differences.

Secondly, a number of provisions of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights (Protocol on the African Court)[1] will be examined. Emphasis will be placed on some of the characteristics that stand out, and attention will be drawn to at least a couple of areas in the instrument which may present problems in the future.

Thirdly, suggestions will be made which might be useful for getting the Protocol on the African Court into force, and for the establishment of an effective African Court.

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1 Adopted by the Thirty Fourth ordinary session of the Assembly of Heads of State and Government of the Organisation of African Unity (OAU) in Ouagadougou in 1998. See http://www.up.ac.za/chr/ahrdb/ahrdb.html.

2 Similarities and differences between the Americas and Africa

At first glance, it might seem to the casual observer that the western hemisphere, the so-called Americas, has little in common with the African continent. But upon closer examination, one realises that both regions are products of their respective colonial histories. They have experiences marked by racism and economic exploitation. Both regions cover enormous geographic areas with extremely diverse populations that speak numerous languages. Both continents have histories marked by repressive governments and military dictatorships.

Moreover, the Americas, as well as the African continent, have been the scenes of numerous massive and gross human rights violations in the past, and in some countries these still continue to exist. In terms of international organisations, the Organisation of American States (OAS), in the Americas, and the Organisation of African Unity (OAU), now known as the African Union (AU), in Africa, have been relatively weak and under-funded institutions. In the field of human rights, both systems have evolved slowly and in piecemeal fashion over time. In the Americas, following World War II, there was an instrument to protect human rights, but no commission or supervisory body. That instrument is the American Declaration of the Rights and Duties of Man (American Declaration).[2] It was adopted in 1948 in Bogota, Colombia. The American Declaration contains a series of civil and political as well as social, economic and cultural rights, but provides no enforcement mechanism. The Inter-American Commission that now protects rights under the American Declaration was not created until 1960.[3] It was not the product of a treaty, but a mere resolution of a meeting of foreign ministers of the American countries. In the case of Africa, the African Charter on Human and Peoples' Rights (African Charter) was adopted in 1981 and came into force in 1986, and presently has 53 state parties.

It was not until 1978 that the Americas had a human rights treaty.[4] It is known as the American Convention of Human Rights (American Convention), sometimes referred to as the Pact of San Jose, the Costa Rican capital in which it was adopted. In that year the eleventh member state of the OAS deposited its instrument of ratification, bringing the multilateral convention into force. Today only 25 of the 35 member states of the OAS have ratified the American Convention. There is therefore an incomplete, unconsolidated and indeed dual system, in

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2 Approved by the Ninth International Conference of American States at Bogota, Colombia 1948. See *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser L/V/1.4 8 (22 May 2001) 15–21.

3 As above, 6–8.

4 As above, 8–9, 23–47.

which 25 countries are subject to the terms of the American Convention and the remaining 10 member states of the OAS are accountable under the terms of the American Declaration.[5] Notable for their not having ratified are the United States of America and Canada. The American Convention, among other things, established the Inter-American Court of Human Rights. The Court was set up in 1980 and is based in San Jose, Costa Rica.[6]

3 Background to and features of an African Court

In 1986, the African Charter entered into force.[7] But the African Charter did not contemplate the establishment of a court. An African Court will only come into force when a certain number of AU member states have ratified the additional Protocol on the African Court. Therefore in both the Americas and Africa the development of the international law of human rights and its attendant enforcement mechanisms have been slow to develop and are still incomplete.

It is important to examine some of the characteristics of the Protocol on the African Court. To date six AU member states have ratified the Protocol on the African Court and it will not come into force until a total of 15 states have deposited their instruments of ratification with the Secretariat of the AU in Addis Ababa, Ethiopia.[8] So at this point it is not known if or when the Court will come into being, but in the field of international law of human rights, one must be optimistic and we presume that in the not too distant future Africa, in addition to having a commission, will also have a court in which cases of alleged human rights violations might be litigated.

The Protocol on the African Court has a number of outstanding features. For example, it expressly excludes the participation of national judges in cases involving nationals from their country.[9] Just the opposite is the case in the Inter-American system. Article 55 of the American Convention permits judges who are nationals of member states to sit on cases involving their own countries.[10] In this respect, the Protocol on the African Court is clearly superior. In addition, the Protocol on the African Court does not contemplate the appointment of *ad hoc* judges. The

5 As above, 48.

6 As above, 11–13.

7 Adopted by the Eighteenth OAU Assembly of Heads of State and Government at Nairobi in July 1981, entered into force on 21 October 1986; reproduced in (1982) 21 *International Legal Materials* 58.

8 Sénégal, Burkina Faso, The Gambia, Mali, Uganda and South Africa. See Fourteenth Annual Activity Report of the African Commission on Human and Peoples' Rights.

9 Art 22 Protocol on the African Court (n 1 above).

10 As above, arts 55 & 41.

American Convention, on the other hand, provides that when a case is brought against a state party to the American Convention and no judge on the Inter-American Court is a national of the accused state, the state has the right to appoint an *ad hoc* judge.[11] However, the participation of *ad hoc* judges in the litigation of contentious cases before the Inter-American Court has not proved helpful. On the contrary, in at least some instances it has even proved disruptive.[12]

Another feature of the Protocol on the African Court which is novel and potentially quite useful is a provision that will allow the future African Court to conduct inquiries.[13] Such inquiries would be, in effect, on-site visits for the purpose of fact-finding with respect to accusations and other claims. On the down side, it is unclear what this might mean for the African Commission's own field investigations and fact-finding.

Another provision of the Protocol, which is promising, involves the role of the Council of Ministers in the enforcement of judgments. The Protocol on the African Court provides that the Council of Ministers is to guarantee 'compliance' with the African Court's decisions. This is also an improvement over the American Convention.[14]

It is important to note that the Protocol on the African Court, in at least two different provisions, mentions the issue of gender representation on the African Court.[15] This is a good idea. In the Americas, in 22 years there has been only one female judge on the Inter-American Court and in the more than 43 years that the Inter-American Commission has been in operation, only five commissioners have been women. While exhortatory in character, the provisions in the Protocol on the African Court which call for gender balance in the African Court's composition will help in overcoming this historical imbalance.

Another article of the Protocol on the African Court calls for a full-time president.[16] In the Inter-American system, neither the president of the Inter-American Commission nor the president of the Inter-American Court are full-time, salaried officials. The success of this new model in the African context will depend in great measure on the level of co-ordination and understanding that exists between the registrar of the future African Court and its president. It will be necessary to clearly define

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11 As above, art 55(3).

12 Peru under the Fujimori administration named an *ad hoc* judge who was both partial and disruptive of proceedings in which he participated. The author of this paper was present at his outburst during the reading of a court judgment on a case against his state. The President of the court ruled him out of order and adjourned the proceedings while he continued to rant.

13 Art 26(1) Protocol on the African Court (n 1 above).

14 As above, arts 30 & 31.

15 As above, arts 12(2) & 14(3).

16 As above, arts 15(4) & 21(2).

the respective duties of these two functionaries to avoid difficulty in the administration of the African Court's affairs.

The Protocol on the African Court also contemplates a role for the African Court in the search for amicable settlement of disputes.[17] Thus, both the African Commission as well as the African Court will be charged with actively pursuing conciliation of disputes and their resolution through out of court settlements. In the Americas only the Inter-American Commission is involved in promoting friendly settlements of disputes.

One feature of the Protocol on the African Court that is of concern has to do with the notion of geographical representation on the African Court.[18] Under the Protocol on the African Court, there will be a total of 11 judges. While geographical distribution of judges is desirable in the abstract, this criterion should be subsidiary to the bigger question of the quality of the individuals who will sit on the African Court. Regional rivalries based on differences of languages, religions, customs and geography so often impede multilateral co-operation. It is imperative that state parties to the Protocol on the African Court not lose sight of the goal of trying to establish a high quality institution composed of the most able women and men who will sit in judgment on human rights cases that will affect the citizens of the entire continent. The issue of geographical representation should not be allowed to dilute the quality of the African Court.

Finally, it is important to observe that article 5(3) of the Protocol on the African Court will allow state parties, by way of a separate declaration, to recognise the standing of individuals and non-governmental organisations (NGOs) before the African Court.[19] There is no comparable provision in the instruments that govern the Inter-American human rights system. It remains to be seen how many member states of the AU will offer separate acceptance instruments and avail themselves of this option in the Protocol on the African Court.

4 Measures to ensure the prompt establishment of the African Court

There are a number of steps, both juridical and logistical, which can be taken to contribute to the prompt and solid establishment of a future African Court. These are the following:

There is a need for civil society in Africa to actively lobby the AU governments that have yet to ratify the Protocol on the African Court to

[17] As above, art 9.
[18] As above, art 14(2).
[19] As above, arts 5(3) & 34(6).

do so. There are still nine ratifications lacking for the entry into force of the Protocol on the African Court and, hence, the creation of the African Court. It is imperative that African governments accept the terms of the Protocol on the African Court without reservations and allow the African Court to come into existence.

Once the Protocol on the African Court enters into force and the Secretary-General of the AU has notified member states of the AU, nominations will be opened for the election of judges to the African Court. During this process it will be extremely important that civil society, through human rights NGOs, is vigilant with respect to the candidates. The African NGO community needs to be pro-active to seek out, recommend and promote independent, highly qualified and outstanding African jurists to be judges on the future African Court. In the Americas, on one occasion the foreign ministers of the OAS elected a former minister of the Somoza dictatorship in Nicaragua to serve as a judge on the Inter-American Court.[20] In that case, civil society, NGOs and those within the Inter-American human rights system did not do anything and failed to oppose the candidacy.

In order for a future African Court to be successful, it will require adequate financial and human resources. It will need proper quarters and a well-trained staff, modern office equipment and the support of competent administrative personnel. It will also need a fund that will permit the African Court to provide legal aid to indigent petitioners. It has been suggested that the AU fund the future African Court directly and not through the General Secretariat of the AU.[21] This is a practical suggestion and the AU member states will assure proper financing of the African Court in a direct fashion.

The question of which cases are selected for litigation before the African Court is crucial. In the Americas there have emerged, at least tacitly, a number of criteria for the selection of individual cases to be taken before the Inter-American Court. The first criterion goes to the competence of the Inter-American Court to hear a case. The African Court will only be able to adjudicate cases involving countries that have not only ratified the African Charter, but have also ratified the Protocol on the African Court and thereby accepted the African Court's jurisdiction. Secondly, the Inter-American Commission has sent matters of a serious nature to the Inter-American Court, cases in which grave violations of human rights have been alleged. Since not all cases can be sent to the African Court, it seems reasonable to select cases involving

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[20] Former Judge Alejandro Montiel Arguello served as Nicaraguan foreign minister as well as ambassador to the United Nations during the latter years of the Somoza dictatorship.

[21] M Hansungule 'African Court of Human and Peoples' Rights', paper delivered to a Special Interest Group Seminar for the Forum on the Participation of the NGOs at the 31st ordinary session of the African Commission held from 29 April to 1 May 2002 in Pretoria, South Africa.

important issues, avoiding frivolous or marginal claims that will have little impact on large numbers of people.

Perhaps cases should not be taken to the African Court unless there is a good chance of winning. This is because it is expensive and time-consuming to litigate a case before an international court. Therefore, much thought should be given to the likelihood of prevailing in a particular case to be brought before such a body.

The last criterion concerns the potential exemplary impact of a court's decision in a given case. The question to be asked is whether a particular case has the potential for establishing jurisprudence that will widely affect the respect for human rights in the countries of the region.

The African Commission should not repeat the mistakes that have been made in the Americas and in Europe, by failing to send cases to the African Court in its early years. The African Commission should send significant cases to the African Court without delay as soon as that body begins to function.[22]

The issue of the presentation of *amicus curiae* briefs needs to be looked at.[23] Once cases have been presented to the African Court, it will be important that African NGOs and NGOs outside of the region as well as private attorneys and academics present *amicus curiae* briefs to the African Court to assist the judges in their deliberations.

There is a need to address the issue of advisory opinions.[24] Advisory opinions can be very helpful in establishing a body of jurisprudence that will have a continental impact on human rights. Advisory opinions concern the interpretation of the African Charter, the Protocol on the African Court and other relevant human rights instruments. African states and AU organs should be encouraged to utilise the African Court, once it is operational, by requesting advisory opinions.

A further suggestion is that the African Commission utilise the provisions of the Protocol on the African Court which contemplate the issuance of provisional measures in urgent and serious cases in which there is a danger of irreparable harm to persons.[25] Provisional measures offer rapid relief. They are in the nature of injunctions or interdicts or writs of *mandamus*. Sometimes they take the form of restraining orders or cease and desist orders. They are flexible, quick and economical and

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[22] Both the European and Inter-American Commissions on Human Rights were very slow in presenting contentious cases to their respective courts. In the latter case, although established in 1980, the first case was not presented until 1986. *Velasquez Rodriguez v Honduras* IACHR (18 April 1986) Ser L/V/II 68, Doc 8 Rev 1. This case was taken to the Inter-American Court with two almost identical companion cases against the same state. The next contentious case was not presented to the Inter-American Court until 1990.

[23] Art 26(2) Protocol on the African Court (n 1 above).

[24] As above, art 4.

[25] As above, art 27(2).

can offer a prompt response in emergency situations. African NGOs should be encouraged to request provisional measures in these circumstances.

It is important to consider the role of the victim and his or her representative before the African Court. In the Americas we have started to expand the role of the victim in litigation before the Inter-American Court. This is happening in two ways: Firstly, the victim and his representative, often times human rights NGOs, have been designated as legal advisors to the Inter-American Commission. This permits the victim a place at the table alongside the Inter-American Commission and allows the victim to actively participate in the litigation of his case. This would include the examination and cross-examination of witnesses and the presentation of oral arguments during public hearings. Secondly, in the Inter-American system, the Inter-American Court has in recent years permitted victims to make separate arguments on the question of reparations and legal costs. Since it is the victim who has suffered a loss, be it of life, property or dignity, it is reasonable that the victim be allowed to formulate his own demands and arguments concerning those claims before the African Court. It is important that the African Commission and African Court also consider an expanded role for the victim and his/her representatives in contentious cases.

Since the judging of individual cases is a lengthy and expensive process, the future African Court needs to be flexible in the reception of foreign depositions instead of bringing witnesses to the seat of the African Court for *de novo* trials. One technique which would enable the African Court to see witnesses would be to receive video tape recordings of testimony rendered under oath with all the guarantees of due process in a confrontational setting in which attorneys for the state would have an opportunity to examine witnesses. These economical measures can go a long way towards accelerating the litigation of cases and mitigating related expenses.

The most effective weapon in the arsenal of human rights activists is still the marshalling of shame. In this regard, NGOs can play an extremely important role in preparing and disseminating succinct, accurate and thoughtful press *communiqués* and assuring that they are widely distributed to the relevant national and international media.

A related matter concerns the future location of the African Court. It is very important that the African Court have its seat in a large African city which is readily accessible to all parties, both in terms of transportation and communication. It is vital that the African Court be located in a media centre which will assure adequate coverage of its activities and the dissemination of its work to public opinion.

The question of enforcement must also be looked at. Of course, historically enforcement has been the weakest point of the international regional mechanisms that exist for the protection and promotion of human rights. States should be strongly encouraged to enter into

friendly settlements. Once states co-operate with the African Commission and African Court, it is essential that they receive appropriate commendation for their willingness to arrive at constructive solutions to admit violations. Similarly, when states refuse to co-operate with the African Commission or African Court, either by withdrawing consent for the conduct of an on-site visit or by failure to comply with court orders, prompt publication and denunciation of the fact should be made.

In the Inter-American system, the American Convention provides that court judgments on reparations may be executed in national courts.[26] Unfortunately there is no similar provision in either the African Charter or the Protocol on the African Court. States should be encouraged to comply in terms of their own law and civil society should be encouraged to lobby actively through state organs to give real effect to future judgments by the African Court.

Although the establishment of the African Court may still be a few years away, it is not too early to be thinking about the drafting of regulations which the African Court will eventually promulgate to govern its own procedures. NGOs, academics and think-tanks active in the field of the international law of human rights could make a notable contribution to the development of the future African Court by beginning to work on a draft set of regulations which future judges on the African Court could use in preparing their own rules of procedure.[27] Such rules should be harmonised with those of the African Commission to ensure the smooth flow of cases between the two bodies and to avoid duplication or conflicts between the two supervisory organs in the management of contentious issues.

There are two provisions of the Protocol on the African Court that give cause for concern. One is contained in article 4 and refers to advisory opinions.[28] Article 4(1), *inter alia,* states that the African Court may provide an opinion on any legal matter related to the African Charter or other relevant human rights instrument. The concern here is that this broad jurisdiction exceeds the competence of the African Commission as provided in the African Charter and would permit the African Court to interpret 'any other relevant human rights instrument', a faculty the African Commission itself does not possess. There could be a fear that this asymmetry could give rise to problems in connection with the African Court's competence and its jurisprudential co-ordination with the Commission.

Another worrisome provision in the Protocol on the African Court is found in article 6(3), which states that 'the Court may consider cases or

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[26] Art 68(2) American Convention (n 2 above).

[27] Art 33 Protocol on the African Court (n 1 above). See also (n 2 above) Rules of Procedure of the Inter-American Court of Human Rights 165–187.

[28] Art 4 Protocol on the African Court (n 1 above).

transfer them to the Commission'.[29] It remains to be seen how a future African Court will utilise this power. If relied upon unduly, it could be misemployed so as to side-step cases viewed as politically inconvenient and thereby frustrate the object and purpose of the African Charter.

5 Conclusion

The movement towards the establishment of a judicial body to judge human rights cases in Africa is inexorable and will ultimately lead to the creation of a complementary supervisory organ which will contribute to the strengthening of the African human rights system. The African Court envisioned in the Protocol on the African Court holds out the promise for an important advance in the rule of law on the continent. Civil society has an important stake in the outcome of this process. It is incumbent on all parties to the process to work towards ensuring that the Protocol on the African Court comes into force and is implemented. This next logical step in the evolution of the rule of law in Africa promises to aid in the ongoing struggle for greater respect for human rights on the continent.

[29] As above, art 6(3).