

The future relationship between the African Court and the African Commission

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The Assembly of Heads of State and Government of the Organisation of African Unity (OAU), meeting in Ouagadougou, Burkina Faso from 8 to 10 June 1998, adopted the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Protocol on the African Court or Protocol).¹ The Protocol has not yet entered into force.²

This article deals, briefly, with some aspects of the future relationship between the African Court on Human and Peoples' Rights (African Court or Court) and the African Commission on Human and Peoples' Rights (African Commission or Commission)³ under the following headings: introduction; the protective mandate; interpretations and advisory opinions; rules of procedure; the African Union and the future of the African human rights system; and conclusion.

* The views expressed in this paper are personal views.

¹ For a brief history and review of the Protocol, see IA Badawi Elsheikh '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* 953–961. During my own presidency of the African Commission (November 1993), I proposed to include an item on the Draft Agenda of the 15th session of the Commission on the possibility of establishing an African Court of Human Rights. By that time, a number of NGOs, in particular the International Court of Justice (ICJ) had already advocated for this idea. The actual journey of the Protocol started with the OAU Assembly Resolution 230/30 in June 1994 and proceeded until its adoption by the Assembly of the OAU in June 1998.

² Art 34(3) of the Protocol stipulates that the Protocol will enter into force 30 days after 15 instruments of ratification or accession have been deposited. The OAU Secretary-General who is the depository of the Protocol has received to date only six ratifications (Mali, Burkina Faso, Senegal, The Gambia, Uganda and South Africa).

³ For details on the African Commission on Human and Peoples' Rights, see EA Ankumah *The African Commission on Human and Peoples' Rights: Practice and procedures* (1996).

1 Introduction

The importance of a meaningful future relationship between the Court and the Commission should be seen in the light of the common goal of both the Commission and the Court, as well as the actual experience of the Commission. The Commission has been established to 'promote human and peoples' rights and ensure their protection in Africa'.⁴ The establishment of an African Court has been seen as a particular means to enhance the efficiency of the African Commission.⁵ This relationship has been reflected in the Protocol on the African Court. The last paragraph of the Preamble to the Protocol indicates that the Court would 'complement and reinforce the functions of the African Commission on Human and Peoples' Rights'.

The efficiency of the Commission would be enhanced. This would be done through the Court complementing its protective mandate and providing opinions and interpretations on matters pertaining to the African Charter on Human and Peoples' Rights (African Charter or Charter) and other relevant human rights instruments, bearing in mind that its constitutive instrument is a protocol to the Charter and supplements its provisions. Successful functioning of the Court would depend, among other things, on a viable Commission which works hand in hand with the Court.

Such expectations would require close co-operation between the Commission and the Court as interdependent components of the African human rights system operating within the African Union.⁶

This co-operation would be incited, also, by the fact that the Court has been conceived as a means to strengthen the Commission and not to undermine its authority. Moreover, the limited resources, human and material, which have been available to the Commission, as it would most probably be the case with the Court, would pressure both the Court and the Commission to develop a productive relationship with the view to achieving what is expected of them.

⁴ Art 30 African Charter.

⁵ See AHG/Res 230 (XXX), 30th ordinary session of the Assembly of Heads of State and Government, Tunis, Tunisia, June 1994.

⁶ See the Constitutive Act of the African Union adopted by the 36th ordinary session of the Assembly of Heads of State and Government, 11 July 2000, Lomé, Togo. The African Union replaces the Organisation of African Unity. Art 3(h) of the Constitutive Act of the Union stipulates that the Union aims, among other things, at 'promoting and protecting human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments'.

2 The protective mandate

As far as the Commission is concerned, the provisions of the Protocol relevant to the protective mandate of the Court should be read 'particularly' in conjunction with article 2 of the Protocol, which provides that the Court shall complement the protective mandate of the African Commission as conferred upon it by the African Charter.

Thus, in interpreting, for example, articles 5(1)(b) and (c) of the Protocol, which allow a state party that has lodged a complaint at the Commission or a state party against whom the complaint has been lodged, to resort to the Court, the Court would not admit a case before the Commission has acted upon it, as the role of the Court would be that of appeal against the decision of the Commission.

The drafting history of article 8 of the Protocol on conditions for consideration of cases before the Court attests to such interpretation and the notion of complementarity between the Court and the Commission. The drafting of detailed rules of procedure of the Court concerning these conditions would take this into consideration. In this regard it is useful to recall this history.

Article 8 of the Protocol stipulates as follows:

The Rules of Procedure of the Court shall lay down the detailed conditions under which the Court shall consider cases brought before it, bearing in mind the complementarity between the Commission and the Court.

The core of this article, as was adopted by Governmental Legal Experts' Meetings in Cape Town, South Africa⁷ and Nouakchott, Mauritania,⁸ indicates that the Court shall not consider a matter brought before it in relation to article 47 of the African Charter, concerning interstate communications, until the Commission has prepared a report on it to the states concerned and the Assembly of Heads of State and Government in accordance with article 52 of the African Charter.⁹ The article also indicates that the Court may not consider a case originating under the provisions of article 55 of the Charter, in relation to other communications, unless the Commission has considered the matter and made a determination.¹⁰

⁷ 4–5 September 1995. See Draft (Cape Town) Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court, Document OAU/LEG/EXP/AFCHPR/PRO(1) Rev 1.

⁸ 11–14 April 1997. See Draft (Nouakchott) Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court, Document OAU/LEG/EXP/AFCHPR/PRO(2).

⁹ Art 52 African Charter.

¹⁰ Art 55 African Charter.

After having considered the text as adopted in Nouakchott, the third Governmental Legal Experts' Meeting in Addis Ababa, Ethiopia,¹¹ noted that the text as formulated 'had not catered for all cases envisaged to be brought before the Court'.¹² The meeting replaced it with a short text which leaves the details of the conditions under which the Court shall consider the cases brought before it to the rules of procedure. The Conference of Ministers of Justice/Attorneys-General on the Establishment of an African Court on Human and Peoples' Rights¹³ concurred with the above recommendation.¹⁴ Such formulation rightly takes into consideration that it is not only states who involve the Commission with their complaints who will have access to the Court, but that there are also others who can institute cases directly before the Court.¹⁵

In addition to the drafting history of article 8, the notion of complementarity is also introduced by the practice of the European and the Inter-American human rights systems which constituted an important source in working out the drafts of the Protocol on the African Court.¹⁶ Such formulation matches the notion of complementarity and the fact that the Court will not replace the Commission but rather complement it. However, such complementarity should not be a reason to take too much time when considering a case before the Commission before involving the Court. Therefore, the rules of procedure of the Court should impose a time limitation for its consideration of the case. Such time limitation should allow three months after the Commission has acknowledged the failure of efforts for a friendly settlement.¹⁷

The Commission, in turn, has to consider ways and means to expedite its examination of cases and consequently revise its rules of procedure.

¹¹ 8–11 December 1997.

¹² See para 19, Report of the Experts' Meeting OAU/LEG/EXP/AFCHPR/RPT(III) Rev 1, Third Governmental Legal Experts' Meeting (enlarged to include diplomats) on the Establishment of the African Court on Human and Peoples' Rights, 8–11 December 1997, Addis Ababa, Ethiopia.

¹³ 12 December 1997, Addis Ababa, Ethiopia.

¹⁴ See Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Document OAU/LEG/MIN/AFCHPR/PROT(1) Rev 2.

¹⁵ See art 5(3) of the Protocol in relation to the competence of the Court to receive cases from individuals and NGOs involving states which have made declarations accepting the competence of the Court to receive such cases in accordance with art 34(6).

¹⁶ See art 47 of the European Convention on Human Rights which indicates that the European Court (before its merger with the Commission) may only deal with a case after the Commission has acknowledged the failure of efforts for a friendly settlement. See also art 61(2) of the American Convention on Human Rights which points out that in order for the Court to hear a case, it is necessary that the procedures set forth in art 48 (examination of the case and trying friendly settlement) and in art 50 (not reaching a friendly settlement) are exhausted.

¹⁷ The Cape Town draft allowed a three-month limit after the submission of the report of the Commission to the Assembly of Heads of State and Government. The Nouakchott draft allowed a three-month limit after the decision of the Commission.

In any case, both the Court and the Commission should, in contemplating their rules of procedure, avoid situations of possible conflict between them. This spirit of complementarity between the Court and the Commission in the protective mandate is also apparent in articles 5 and 6 of the Protocol. The Commission and the Court have to work out, separately and jointly, the appropriate rules to realise an efficient complementarity.

Article 5(1)(a) of the Protocol entitles the Commission to submit cases to the Court. This provision opens a crucial avenue for the Commission to improve on the utility or effect of its protective mandate.¹⁸ The Commission has tried to improve its handling of this mandate through its working methods. However, it is clear that the functioning of the communication procedure has not been fully satisfactory: A limited number of individuals' and NGOs' communications were submitted to the Commission.¹⁹ It was only at the 30th session²⁰ that the Commission decided, for the first time, to consider a state complaint, that of the Democratic Republic of the Congo against Burundi, Rwanda and Uganda.²¹ The absence of consistent follow-ups on the recommendations of the Commission, whether in relation to individual complaints or in relation to the implementation of article 58(1) of the African Charter on special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights, is noteworthy.

It was, in particular, such a situation that made many call for the use of article 66 of the African Charter to adopt a protocol establishing an African Court to enhance the efficiency of the protective mandate under the African Charter.

Therefore the Commission should undertake a concrete evaluation of its experience in relation to the communications procedure. On the basis of such hard and fast evaluation, the Commission could revise its rules of procedure, defining the criteria for taking cases to the Court in relation, for example, to a state not complying with the decisions of the Commission or where a friendly settlement was not possible. The question would be how the Commission could effectively use article 5(1)(a) of the Protocol.

¹⁸ See arts 47 to 54 of the African Charter, on communications from states, and arts 55 to 59 on other communications.

¹⁹ The Secretariat of the Commission, in a leaflet issued on the 15th anniversary of the entry into force of the African Charter, put this number as 242 communications. See also paragraph C, the communication procedure, IA Badawi Elsheikh 'Preliminary remarks on the right to a fair trial under the African Charter on Human and Peoples' Rights' in 'The right to a fair trial' in D Wolfrum (ed) *Beiträge zum ausländischen öffentlichen Recht und Völkerrecht* (1997).

²⁰ 13–27 October 2001, Banjul, The Gambia.

²¹ See para 20 Final Communiqué of the 30th ordinary session of the African Commission on Human and Peoples' Rights.

Likewise, regarding the implementation of article 6 of the Protocol, questions arise on the admissibility of cases submitted directly to the Court by individuals and NGOs. The Court has to formulate clear guidelines as to when it would see fit to consider a case or when it would rather transfer it to the Commission.²² In this regard, it is predicted that the Court would possibly take into consideration the opinion of the Commission in a case where the Court has asked for such opinion under article 6(1) of the Protocol as well as any other information provided by the Commission in this regard. The co-operation between the Commission and the Court is needed to ensure complementarity and to avoid duplication between the Commission and the Court. The Commission has to respond swiftly to the request of the Court. It also has to provide the Court with relevant information on the case if such a case had also been submitted to the Commission.

3 Interpretations and advisory opinions

Both the Commission and the Court have the power to interpret the African Charter and other relevant human rights instruments.²³ Paragraph 1 of article 4 charted the way to avoid contradiction between the Commission and the Court, in pointing out that the subject matter of the request for an advisory opinion should not be related to 'a matter being examined by the Commission'.

However, the issue is not only a matter of avoiding duplication or contradiction between the Court and the Commission, but rather of maximising the use of all the juridical resources available to the African human rights system.

In this context, the Commission could consider seeking advisory opinions on the scope of some of the provisions of the African Charter with the view to maximising its role in supervising the implementation of the Charter and implementing its mandate in general.²⁴ This could relate, for example, to the extent and nature of the obligation of African states to ensure the enjoyment of the economic, social and cultural rights referred to in the Charter. The Commission may even consider the possibility of suspending consideration of a communication until it requests and receives an advisory opinion on issues affecting the consideration of the case.

²² See art 6(3) of the Protocol; I Osterdahl 'The jurisdiction *ratione materiae* of the African Court of Human and Peoples' Rights: A comparative critique' (1998) 7 *Revue Africaine des Droits de l'Homme* 134.

²³ See arts 45(3), 60 & 61 of the African Charter and art 4(1) of the Protocol.

²⁴ Art 45 African Charter.

The advisory opinions of the Court and the interpretations of the Commission, whether in the form of general comments or in any other form, concerning the provisions of the African Charter, if well publicised, would be useful to African states, especially in relation to domestic legislation, as well as to African and international civil society.

4 Rules of procedure

A successful relationship between the Court and the Commission would depend, largely, on how the rules of procedure of both the Court and the Commission would reflect the letter and spirit of the Charter and the Protocol in a working language designed to achieve the complementarity of these bodies with the view to ensuring respect for human rights.

Article 33 of the Protocol stipulates that the Court 'shall consult as appropriate with the Commission' when the Court draws up its rules of procedure. This would be imperative in relation to the articles of the Protocol which concern the direct relationship between the Court and the Commission such as article 5(1) (access of the Commission to the Court), article 6 (admissibility of cases) and article 8 (the detailed conditions under which the Court shall consider cases brought before it).

The Commission should, also, revise its rules of procedure²⁵ to, among other things, cater for the question of representation of the Commission before the Court in relation to the cases which the Commission would submit to the Court, the speedy response to a request from the Court for an opinion, admissibility of cases submitted to the Court, reducing the lengthy time span of considering cases before the Commission and the possibility of suspending consideration of a case pending when seeking an advisory opinion from the Court on the subject matter.

It would be convenient to start, as early as possible, an informal process of preparing working drafts of rules of procedure for both the Court and the Commission. Such drafts would take into consideration the actual experience of the African Commission, the practice of the Inter-American Commission on Human Rights and, naturally, the provisions of both the African Charter and the African Court. This process could be initiated by the African Commission in co-operation with the Secretariat of the African Union and competent NGOs such as the International Commission of Jurists (ICJ). Such working drafts would facilitate the task of the Court and the Commission of drawing up their rules of procedure when the time comes.

²⁵ The Rules of Procedure of the Commission were adopted at the second session in 1988, in accordance with art 42(2) and were amended at its 18th session held in Praia, Cape Verde, 6 October 1995.

5 The African Union and the future of the African human rights system

Streamlining the human rights structures and activities within the African Union would be as beneficial to the African human rights system as it would be to the future of the Union itself. This is all the more needed with the advent of the African Court and its expected relationship with the Executive Council of Ministers of the Union, on the one hand, and its relation with the African Commission on the other. The following are some suggestions in this regard.

Article 29(2) of the Protocol indicates that the Council shall monitor the execution of judgments of the Court on behalf of the Assembly of Heads of State and Government of the Union. Article 31 of the Protocol states that the Court will submit annual reports on its activities to the Assembly and that such reports shall specify, in particular, those cases in which a state has not complied with the Court's judgment. Meanwhile, the African Commission does not have a direct relation with the Council of Ministers. The reports of the Commission are submitted directly to the Assembly.²⁶ It would therefore be important to involve the Council of Ministers with the reports of the Commission to ensure proper follow-up on the work of both the Court and the Commission, given the complementarity between them, especially in the protective mandate. This suggestion could possibly be met through a resolution by the Assembly requesting the Secretary-General of the Union to communicate copies of the reports of the Commission to the Council of Ministers to enable the Council to make any appropriate recommendations to the Assembly when the latter discusses such reports. Such intercession would also help the substantive discussion of these reports by the Assembly, especially in the light of its heavy agenda and the short duration of its session.

The African Court 'may not reasonably be expected to function as a remedy for a less well performing Commission'.²⁷ Therefore the recommendations of the Grand Bay (Mauritius) Declaration and Plan of Action of the 'urgent need to provide the Commission with adequate human material and financial resources'²⁸ have to be met by the African Union.

The Secretariat of the African Union has to work out, as early as possible, financial estimates which could ensure effective functioning by the Court, so as to immunise the latter from the type of problems which

²⁶ Arts 52, 53, 54 & 58 African Charter.

²⁷ Osterdahl (n 22 above) 150.

²⁸ Para 23, Grand Bay (Mauritius) Declaration and Plan of Action, OAU First Ministerial Conference on Human Rights in Africa, 12-16 April 1999, Grand Bay Mauritius, Conf/HRA/DECL(1).

have been encountered by the African Commission and undoubtedly affected its work.

Finally, future strategies to ensure the promotion and protection of human rights have to keep in mind that the African human rights system, in terms of structures such as the Commission, the Committee on the Rights and Welfare of the Child, the Court, the Secretariat of the Union and the African civil society, have to work in a cohesive manner, as its components are mutually supportive.

6 Conclusion

The adoption of the Protocol Establishing an African Court on Human and Peoples' Rights provides a unique opportunity to make the African human rights system work in a more energetic way. The Protocol provides for judicial pronouncements which have to be complied with.²⁹ The protective role of the Court would most probably depend on cases that have been submitted to the Commission. The advisory jurisdiction of the Court has to take into consideration the competence of the Commission. This interaction and complementarity have to be reflected in the rules of procedure of both the Court and the Commission. Therefore it is important that the Commission and the Court consult each other with a view to harmonising their rules of procedure.³⁰

²⁹ Art 30 Protocol.

³⁰ See para C of the Report of the Experts' Meeting on the African Court on Human and Peoples' Rights, Ouagadougou, Burkina Faso, 7-9 December 1998, Doc/05 (XXVI) 12 6.