

# A comparison between the African and European Courts of Human Rights

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## 1 Introduction

When comparing the African Court on Human and Peoples' Rights with the European Court of Human Rights, I am wary of giving the impression that the European model is the one that should be followed. The two courts emanate from different histories and have to deal with different issues and problems.

This paper does not provide an article-by-article comparison between the Protocol Establishing the African Court and the European Convention on Human Rights (European Convention), but touches upon a number of issues which have been, or will be, of significance in the African context and which the European system has already experienced. So, for example, just as it has been said that adequate funding, the need for rights to be grounded in domestic systems, and the status and quality of judges joining the Court are issues that the European system has to bear in mind to ensure its future success,<sup>1</sup> the same can be said to apply to the African system.

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<sup>1</sup> A Drzemczewski 'The European Human Rights Convention: Protocol No 11 — Entry into force and first year of application' (2000) 21 *Human Rights Law Journal* 8.

## 2 The relationship between a Commission and a Court

While the African Charter on Human and Peoples' Rights (African Charter or Charter) provides for a single body, the African Commission on Human and Peoples' Rights (African Commission),<sup>2</sup> to enforce the rights in the instrument, a Court having only recently been established,<sup>3</sup> the European Convention on Human Rights (European Convention) originally created a European Commission and a European Court of Human Rights.<sup>4</sup> For over 30 years they functioned together, until November 1998 when, as a result of the acceptance by all member states to the European Convention of Protocol 11,<sup>5</sup> the Commission and Court were disbanded and a sole body, a full-time permanent court, was created. Although there were similarities with the previous court, many changes were made in respect of the new court, including structure, standing and enforcement.<sup>6</sup>

The relationship between the African Commission and the Court is referred to in the Protocol as the need for the Court to 'enhance the efficiency of the African Commission' and to 'complement and reinforce' its functions,<sup>7</sup> specifically its protective mandate.<sup>8</sup> However, this needs further clarification.<sup>9</sup> It is thus instructive to examine the relationship between the previous Commission and Court under the European system in this respect, particularly given that the flaws with this system were responsible in part for the need to create a single court. (This is not to suggest, however, that the African system should also aim towards a

<sup>2</sup> Art 30 African Charter.

<sup>3</sup> 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), OAU/LEG/MIN/AFCHPR/PROT (I) Rev 2, adopted June 1998.

<sup>4</sup> Art 19 European Convention.

<sup>5</sup> Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, Strasbourg, 11 V 1994 (*European Treaty Series* No 155).

<sup>6</sup> The new European Court of Human Rights sits in various committees and chambers. There is a three-member committee to deal with unanimous inadmissible decisions or strike them out. Most cases are dealt with by a seven-member Chamber, art 27 European Convention. The Court is divided into four Chambers and there is a judge of the state concerned in the Chamber in each case. The Court can sit as a Grand Chamber of 17 judges, but only in exceptional cases, art 43 European Convention, and this it is perceived as being for the most important cases. The plenary court of all judges meets once a year, art 26 European Convention.

<sup>7</sup> Preamble Protocol on the African Court.

<sup>8</sup> Art 2 Protocol on the African Court.

<sup>9</sup> The African Commission has been suggesting for several years that it should have an extraordinary session to examine the Rules of Procedure of the new Court and the relationship between it and the Commission. This has yet to take place.

single judicial body.)<sup>10</sup> The European Commission was initially seen as protecting the Court from being 'inundated with frivolous litigation and its facilities exploited for political ends';<sup>11</sup> indeed, it was suggested that a court might not be appropriate at the stage when the Convention was adopted.<sup>12</sup> I will concentrate at this stage of the paper on the powers of the previous Court and how these related to the European Commission.

At present the African Charter provides for the African Commission to have a promotional and protective mandate.<sup>13</sup> From the wording of the Protocol on the Court, it would appear that the Commission would continue with sole responsibility for the promotional function, sharing the protective mandate and the power to examine communications with the Court.<sup>14</sup> In respect of the latter, it is necessary to examine when cases will be dealt with by these two bodies and what the relationship between them will be.

## 2.1 Submission of cases to the Court

Article 5 of the Protocol on the African Court provides that the African Commission, states which have lodged a complaint to the Commission, states against whom a complaint had been lodged, or whose citizen is

<sup>10</sup> See in respect of the European system, N Bratza & M O'Boyle 'Opinion: The legacy of the Commission to the new Court under the Eleventh Protocol' (1997) 3 *European Human Rights Law Review* 211–228.

<sup>11</sup> Explanatory Report to Protocol 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby Strasbourg, 11 V 1994 (*European Treaty Series* No 155) para 7.

<sup>12</sup> 'It being argued that it would not correspond to a real need of the member states', Explanatory Report to Protocol 11, as above, para 8. The eventual need to have only one Court and no Commission was seen as necessary for 'improving the efficiency and shortening the time taken for individual applications, at minimum cost', given the increased number of cases and parties to the Convention and the subsequent delay in hearing cases; para 4.

<sup>13</sup> Art 45 of the African Charter reads: 'The functions of the Commission shall be: (1) to promote human and peoples' rights and in particular: (a) to collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organise seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights and, should the case arise, give its views or make recommendations to governments; (b) to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African governments may base their legislation; (c) to co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights; (2) ensure the protection of human and peoples' rights under the conditions laid down by the present Charter; (3) interpret all the provisions of the present Charter at the request of a state party, an institution of the OAU or an African organisation recognised by the OAU; (4) perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government.'

<sup>14</sup> See eg art 2 Protocol on the African Court.

a victim of a violation, and African inter-governmental organisations can submit cases to the Court. Article 5(3) gives the power to individuals or 'relevant non-governmental organisations (NGOs) with observer status before the Commission' to submit cases 'directly before it'. However, this latter power is only available when the state has made an additional declaration of the Court's jurisdiction under article 34(6) of the Protocol.

### 2.1.1 *Where the Commission submits a case to the Court*

Article 8 of the Protocol on the African Court requires that Rules of the Court should indicate when cases should be brought before it 'bearing in mind the complementarity between the Commission and the Court'.<sup>15</sup> This would appear to suggest that the African Court will only consider cases which have already been considered by the Commission, thus following the approach of the previous European organs. Prior to the adoption of Protocol 11 to the European Convention, the European Commission looked at admissibility, would try to reach a friendly settlement, and then reported if there was a breach. It would send the case to the Committee of Ministers to be enforced, or it could choose to submit the case to the Court, if the state concerned had accepted its jurisdiction.

There was a presumption in this system that the European Commission, rather than the Court, would have primary responsibility for fact-finding.<sup>16</sup> Thus, while both the European and African Courts have the power to undertake fact-finding investigations,<sup>17</sup> and the decisions of the Commissions are not binding on the Courts, enabling them to adopt different decisions, it was only rarely that the previous European Court undertook visits or called witnesses, basing the majority of its decisions on written evidence.<sup>18</sup> This delegation of responsibility between a Commission that deals with disputes of facts and a Court which

<sup>15</sup> Art 29(1) of the Protocol on the African Court requires that the decision on a case be notified to the Commission, among others.

<sup>16</sup> JG Merrills *The development of international law by the European Court of Human Rights* (1993) 10; note also *Stocké v Germany* ECHR (19 March 1991) Ser A 199. Indeed, it has been noted that 'the loss of the Commission means there is now no 'separate' fact-finding institution upon which the Court can place reliance'; L Clements 'Striking the right balance: The new Rules of Procedure for the European Court of Human Rights' (1999) 3 *European Human Rights Law Review* 267.

<sup>17</sup> The African Court has the power to hear submissions, hold an inquiry if necessary and receive written and oral evidence including experts. It 'shall make its decision on the basis of such evidence'; art 26 of the Protocol on the African Court.

<sup>18</sup> For example, in *Ireland v UK* ECHR (18 January 1987) Ser A 25, the European Court heard witnesses in relation to detention of IRA suspects.

looks at cases of disputes of law,<sup>19</sup> might be useful for the African system.<sup>20</sup>

Both the African Commission and African Court should also note that the costs of doing so are borne by the Council of Europe or the parties, but rarely the applicant. Similarly, the European Court has also suggested that if the state does not supply the documents required, help an investigation or prevent witnesses from going to the Court, this may have a bearing on whether the allegations are believed or not.<sup>21</sup>

Further, that the African Court has the power to choose which cases it will examine,<sup>22</sup> suggests that it could also elect to deal with only the most important legal issues.<sup>23</sup> The European experience illustrates that cases raising serious or gross violations might be dealt with by a court. However, there is a question whether an international court is best placed to deal with such cases or 'political disputes', rather than individual cases. Certainly, the European Court, it has been said,<sup>24</sup>

seems at its best when dealing with individualised complaints of violations of the rights it protects. The paucity of inter-state cases shows that this method of dispute resolution offered by the Convention is not the remedy of first choice by states in situations where human rights issues are raised. Human rights violations often go hand in hand with political disputes, but their judicial settlement can challenge the organs of international systems. If states are reluctant to raise such issues before the Strasbourg organs, individuals are less inhibited.

Indeed, of those inter-state cases submitted to the European Court, very few resulted in a judgment, instead they have been 'characterised by considerable efforts at fact-finding and a preference for the political decision-making mechanisms offered by the Convention'.<sup>25</sup>

<sup>19</sup> 'It would be thought unusual for a case such as *Marckx*, which raised important questions concerning the scope of article 8, not to be referred to the Court, while numerous examples can be found of cases where an issue which has already been considered by the Court is not referred again'; Merrills (n 16 above) 4.

<sup>20</sup> Drzemczewski notes that before the new Court, there appeared to have been an increase in cases which disputed the basic facts, so making it necessary for the Court perhaps to deal in fact-finding; n 1 above 8. See also for discussion P Mahoney 'Speculating on the future of the reformed European Court of Human Rights' (1999) 20 *Human Rights Law Journal* 1-4; P Mahoney 'Short commentary on the Rules of Court: Some of the main points' (1998) 19 *Human Rights Law Journal* 267-268.

<sup>21</sup> *Timurtaş v Turkey* No 23531/94, 13 June 2000, paras 6-67; P Leech *Taking a case to the European Court of Human Rights* (2001) 40-41.

<sup>22</sup> Art 3(2) Protocol on the African Court.

<sup>23</sup> See M wa Mutua 'The African Human Rights Court: A two-legged stool?' (1999) 21 *Human Rights Quarterly* 342-356.

<sup>24</sup> RCA White 'Tackling political disputes through individual application' (1998) 1 *European Human Rights Law Review* 61.

<sup>25</sup> As above, 64. In addition, 'it has been suggested that the Commission may be expected to prefer the Committee of Ministers to the Court, where a case has particularly serious implications. Were a state versus state case, for example, to involve

The African Commission and Court will also have to consider how friendly settlement will be dealt with. The African Court, as had the European Commission and previous European Court,<sup>26</sup> has powers to reach a friendly settlement between the parties to the case.<sup>27</sup> Friendly settlement is not necessarily an inappropriate task for a judicial body,<sup>28</sup> but there is 'the further dilemma of conferring both negotiatory and adjudicatory powers on a single body, a blending of function that has caused disquiet in Western concepts of adjudication but is more common in other systems of law'.<sup>29</sup> There was a presumption in the European system that friendly settlement would be undertaken by the European Commission rather than the Court. Both organs, however, must take account of the wider public interest.<sup>30</sup> Where the African

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allegations of such gross violations of the Convention that a finding of guilt might lead to expulsion from the Council of Europe, it is possible that this would be so. Without more evidence, however, this can be no more than speculation.' Merrills (n 16 above) 4–5.

<sup>26</sup> Rule 49(2) of previous Rules of the European Court provided that 'when the Chamber is informed of a friendly settlement, arrangement or other fact of a kind to provide a solution to the matter, it may, after consulting if necessary the parties, the Delegates of the Commission and the applicant, strike the case out of the list'.

<sup>27</sup> Art 9 of the Protocol on the African Court provides that it has the power to try to reach an amicable settlement in cases pending before it.

<sup>28</sup> E McWhinney *Judicial settlement of international disputes: Jurisdiction, justiciability and judicial law-making on the contemporary international court* (1991) 7.

<sup>29</sup> C Chinkin 'Alternative dispute resolution under international law' in M Evans (ed) *Remedies in international law: The institutional dilemma* (1998) 128–129. As she further noted at 129, '[t]he replacement of the European Commission on Human Rights by a single-tiered judicial process when Protocol 11 to the European Convention was implemented, does not mean that settlement will no longer be attempted. The first instance Chamber of the newly constituted permanent Court can put itself at the disposal of the parties for the purpose of friendly settlement.' The present European Court's role in friendly settlement has been described as 'little more than a post box. If proposals are made by either party, they will be sent on to the other party for comment. However, if no such proposals are put forward, the Court will usually take no further action to encourage settlement. Only in very rare cases will the Court actively become involved in facilitating settlement in a more proactive way.' See Leech (n 21 above) 43. The proceedings are confidential and not used in the subsequent process in the Court.

<sup>30</sup> Chinkin further notes, 'a treaty is a public prescription of agreed international standards in the performance of which non-parties have an interest as well as parties. Obligations to decrease emissions damaging the ozone layer, or to respect human rights, are owed *erga omnes*, not just to the complainant in the particular instance, or even just to other states, parties or non-parties. The concept of amicable solution or friendly settlement, reached through compromise and legitimated by the institutional framework, suggests a bilateralism that might not satisfy others' perceptions of what those obligations should entail. A mediated agreement typically incorporates enough of the interests of both disputants for them to be able to accept it, that is it presents a win/win solution. However, a mediated agreement may not take account of the interests of third parties, or of the international community at large.' As above, 130. See also *Can v Austria* ECHR (30 September 1985) Ser A 96; Merrills (n 16 above) 60. The reference in art 9 of the Protocol on the African Court that any friendly settlement must be made 'in accordance with the provisions of the Charter' suggests that some wider human rights consideration must be taken into account.

Court does pursue a friendly settlement, a previous practice of the European Commission may assist its African counterpart. There, the European Commission gave its opinion on whether there was a violation (in confidence) to try to help the process.<sup>31</sup>

### 2.1.2 *NGOs and individuals directly petitioning the Court*

During the drafting of the Protocol on the African Court, the ability of individuals and NGOs to have standing before it was the subject of much debate. The resulting provisions<sup>32</sup> appear to some extent to reflect the previous position under the European Convention. Under the European Convention there was no initial power of individuals or NGOs to submit cases before the Court; they had to go through the Commission and rely on it to choose to submit the case. Protocol 9 amended the European Convention to enable individuals and NGOs who had already submitted cases to the Commission to submit a case also to the Court.<sup>33</sup> This was because it was felt that a system which gave rights to an individual but not the full power to enforce them, thus violating the principles of 'equality of arms', the right of access to a tribunal to defend rights and the participation of both parties in proceedings, which principles were not guaranteed by allowing the state to submit a case but not the individual.<sup>34</sup> The provision in the European system of a panel to review the case of an individual submitting a case to the Court, this being to check whether the Commission or the state would decide to submit the case anyway,<sup>35</sup> might be a useful tool for the African system.

<sup>31</sup> 'Parties to an admissible complaint not only received the Commission's highly influential final report on the merits, but were also (to aid the friendly settlement process) occasionally privy to an informal 'provisional' opinion. There is no doubt that such informal opinions have proved exceedingly effective in convincing respondent states to engage in the friendly settlement process.' Clements (n 16 above) 269. This was not continued by the new European single Court; Leech (n 21 above) 43.

<sup>32</sup> Art 5 of the Protocol on the African Court provides that the Commission, a state which lodged a complaint with the Commission, the state against which a complaint was lodged to the Commission, the state whose citizen is a victim of a violation and African inter-governmental organisations, can submit cases to the Court. Art 5(3) enables 'relevant' NGOs with observer status before the Commission as well as individuals to submit cases 'directly before it', as long as the state involved has made a declaration under art 34(6), stating that it accepts the jurisdiction of the Court in this respect.

<sup>33</sup> The reasons for providing this were that 'the interests of the individual would always be defended either by the Commission, in cases where the latter decided to seek a decision of the Court, or by a state in such cases as those listed under paragraphs (b) and (c) of article 48'; *Collected edition of the 'travaux préparatoires' of the European Convention on Human Rights*, Volume IV, at 44; Explanatory Report to Protocol 9 to the Convention for the Protection of Human Rights and Fundamental Freedoms (*European Treaty Series* No 140), Rome, 10 January 1994.

<sup>34</sup> Explanatory Report to Protocol 9, as above, para 13.

<sup>35</sup> As above, para 21, in respect of art 5 of the Protocol.

While the restrictive provisions of the Protocol on the African Court render it unlikely, certainly initially, that many states will permit individuals or NGOs to directly petition the Court, this means that most, if not all, cases will have to pass through the Commission first. As Julia Harrington notes in this respect:<sup>36</sup>

Embedded in this system is the necessity that the Commission work actively and effectively, or else the stream of potential cases that might eventually come before the Court will be choked off at source. The relationship between the Court and the Commission becomes of paramount importance.

### 2.1.3 *The role of the Commission once a case is before the Court*

Where the African Commission submits a case to the Court under article 5(1), it may be instructive to compare its European counterpart's subsequent role in the Court proceedings. Before the European Court, the European Commission's role was limited. It could appoint one of its members as a delegate to appear before the Court, and although the Commission was not a party to the proceedings, it could advise the Court on issues of evidence, interim measures, and could comment on its own findings, and the Court's findings on the merits and issues of just satisfaction.<sup>37</sup> Its role was to act 'in the public interest', not for the applicant as such.<sup>38</sup> In this respect, as has been described by Sir Humphrey Waldock:<sup>39</sup>

The Commission . . . does not understand its function before the Court to be to defend the interests of the individual as such. The Commission's function is that stated in article 19, namely to ensure the observance of the engagements undertaken by the contracting parties in the Convention; when it refers a case to the Court, it does so in order that the Court may give a decision as to whether or not the Convention has been violated. The Commission will, if it is true, have expressed an opinion on that point, in the report transmitted to the Ministers. But that opinion has the character not of a legal decision, but of an expert opinion to provide the basis for a legally binding decision either by the Ministers or by the Court. The function of the Commission before the Court, as we understand it, is not litigious; it is ministerial. It is not our function to defend before the Court, either the case of the individual as such, or our own opinion simply as such. Our function, we believe, is to place before you all the elements of the case relevant for the determination of the case by the Court.

### 2.1.4 *The Court's approach to findings of the Commission*

Of issue will be how the African Court deals with any previous findings of the Commission. Consistency between organs is an important issue

<sup>36</sup> J Harrington 'The African Court on Human and Peoples' Rights' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights. The system at work* (2002) 322.

<sup>37</sup> See for a discussion Merrills (n 16 above) 5.

<sup>38</sup> D Shelton *Remedies in international human rights law* (1999) 152.

<sup>39</sup> *Lawless v Ireland* ECHR (1 July 1961) Ser A 3, paras 261–262.

and may be helped by ensuring some members or former members of the African Commission are elected to the Court. Certainly in the transition from the European Commission and Court to a single court, this was the case and is said to have helped ensure some uniformity and transfer of knowledge.<sup>40</sup>

It would appear that where the European Commission made a finding of inadmissibility, the Court would always accept this.<sup>41</sup> In addition, where the Commission had submitted the case before the Court its own decision on admissibility, it was said, 'determines the object of the case brought before the Court'.<sup>42</sup> Thus, 'the Commission has the task of identifying the subject matter of each case for Convention purposes and its ruling is regarded as definitive'.<sup>43</sup> Thus, in one case on interception of communications, it has been noted that the reason why 'the scope of the case before the Court does not extend to interception of communications in general', was because of the issues which were brought before the Court by the Commission.<sup>44</sup> Thus, the European Court 'was indicating that the treatment of the case by the Commission required it to confine its attention to one aspect of a much broader subject. In other cases the effect has been to restrict the Court's consideration to particular articles of the Convention on which the Commission has held an application admissible, while leaving out of account others on which it has reached the opposite conclusion'.<sup>45</sup>

In this respect, the decisions of the African Commission at the admissibility stage may be of particular importance to the African Court because, as has been noted before the European system, this 'has the effect of directing attention to certain aspects, while removing others from consideration. Even more important, it is effectively the Commission which decides whether a case can be considered by the Court at all. The Court cannot choose its cases, but may decide only those which have been referred to it, and although there is nothing to prevent a state

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<sup>40</sup> Members of the new European Court came mostly from those who had not sat on either the old Court or Commission and so relied very heavily on them for assistance; A Mowbray *Cases and materials on the European Convention on Human Rights* (2001) 27.

<sup>41</sup> Clements (n 16 above) 267. So, if the Commission held the case to be inadmissible, so the Court would respect this decision; *Le Compte, Van Leuven and De Meyere v Belgium* ECHR (23 June 1981) Ser A 43.

<sup>42</sup> *Ireland v United Kingdom* ECHR (18 January 1978) Ser A 25, para 157.

<sup>43</sup> Merrills (n 16 above) 3.

<sup>44</sup> *Malone v UK* ECHR (13 July 1981) Ser A 82, para 63.

<sup>45</sup> Merrills (n 16 above) 3, citing *Barthold v Germany* ECHR (25 March 1985) Ser A 90, para 61.

from making a reference, it is the Commission's decisions that are important in practice'.<sup>46</sup>

However, in some cases the European Court has held that it did have the power to review decisions on admissibility, even if already decided by the Commission.<sup>47</sup> Whether it is the role of the Court to interpret and apply the Convention and the task of the Commission to 'sift' cases, or that the Commission's powers should be distinct from the Court, is open to interpretation, as is apparent from dissenting opinions in the European Court.<sup>48</sup>

The European Court held that all admissibility questions had to be at least raised before the Commission first, and not come to the Court for the first time.<sup>49</sup> The result of this ruling, Merrills argues, is that 'the Court has not so much usurped the functions of the Commission, as reserved for itself the right to be the ultimate arbiter of the Convention's scope. As a result, its decisions cover a much wider range of legal issues than if the narrower view of its competence had prevailed'.<sup>50</sup>

Although it has been said of the European system 'on many matters the two organs reach the same conclusion',<sup>51</sup> as the decisions of the Commission were not binding on the Court, there were occasions where it disagreed with its decision.<sup>52</sup> Certain trends have been identified in respect of the relationship between the European Commission and Court on findings of violations.<sup>53</sup> For example, 'where the Court reversed a

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<sup>46</sup> As above, 4. He does note, however, that with Protocol 9 and the ability of individuals to refer cases to the Court, this may change, although this still required the case to have been declared admissible and considered by the Commission. Note that the Protocol on the African Court permits the Court to ask for the Commission's advice on issues of admissibility and to transfer cases to the Commission if it chooses; arts 6(1) & (3) respectively. As Julia Harrington notes, 'these provisions seem inappropriate for communications referred by the Commission and thus, presumably, already found admissible and fully considered. Thus, these provisions must be intended to apply to communications brought by states or by whatever NGOs are eligible, directly to the Court under Articles 5(1)(b), (c), (d) and (e), 5(3) and 34(6)'. Harrington (n 36 above) 322.

<sup>47</sup> As above, 49.

<sup>48</sup> *De Wilde, Ooms and Versyp v Belgium* ECHR (18 June 1971) Ser A 12, para 48.

<sup>49</sup> See also Clements (n 16 above) 270.

<sup>50</sup> Merrills (n 16 above) 51.

<sup>51</sup> As above, 15.

<sup>52</sup> It has been noted that the previous European Court had a higher rate of changing findings of the Commission than the new Court (in the transitional period) and 'this could be explained by the tendency of the new Court in its early days to be more ready to accept the opinion of the Commission where one had been given since in the majority of cases coming before it the new Court was considering both admissibility and merits for the first time'; I Christie 'Divergent views of the European Commission and Court of Human Rights' (2001) 5 *European Human Rights Law Review* 550.

<sup>53</sup> As above, 550–551. See also Merrills (n 16 above) 15.

finding of the Commission it tended to replace an opinion that there had been a violation of the Convention with a finding that there had not'.<sup>54</sup> In addition:<sup>55</sup>

In many of those cases where the Court reversed a finding of a breach concerned political, moral or social issues the Court has tended to be more conservative than the Commission. Put in terms of Convention jurisprudence the Court has given the state a wider margin of appreciation in these sensitive areas than the Commission was prepared to. This may have been partly due to the composition of the Court when compared with the Commission or simply because of the natural tendency of a tribunal which knows it is not the court of final instance to be more interventionist.

These differences in views, however, reinforce the idea that the European Convention is, as is the African Charter, a living instrument, there may not be obvious breaches of it and that it is open to different interpretations.<sup>56</sup> Indeed, many decisions of the European Commission and Court were in fact reached by consensus.<sup>57</sup> Certainly, the role of the Commission cannot be underestimated and it is clear that in the European system 'many developments in the Court's jurisprudence originate with the Commission',<sup>58</sup> the Commission in fact also considered many more cases than reached the Court. This may well be the case with the African system and certainly underlines the need for the African Commission to be strengthened as part of support for the African Court.

### 3 Relationship between the Court and other bodies

Of increasing interest and importance has been the relationship of the African Commission, and the future Court, with the other organs within the Organization of African Unity (OAU)/African Union (AU). The Constitutive Act establishing the African Union mentions human rights in a number of its provisions,<sup>59</sup> although it was a point of concern that it did not expressly refer to the African Commission itself or the new Court. Attention has been paid to this defect by the Commission<sup>60</sup> and the AU, the latter now having asked the Commission to formulate for itself how it may fit within the Union.<sup>61</sup> There exists the potential

<sup>54</sup> Christie (n 52 above) 550–551.

<sup>55</sup> As above.

<sup>56</sup> As above.

<sup>57</sup> As above.

<sup>58</sup> Merrills (n 16 above) 15–16.

<sup>59</sup> Eg arts 3 & 4 Constitutive Act.

<sup>60</sup> See R Murray 'Report of the 2000 and 2001 sessions of the African Commission on Human and Peoples' Rights' *Human Rights Law Journal*, forthcoming.

<sup>61</sup> The Commission should 'pursue reflection on the strengthening of the African system for the promotion and protection of human and peoples' rights to enable it to effectively meet the needs of the African populations within the context of the African

for human rights to play an increasing role in the African Union and its institutions. Indeed, there are strong arguments for advocating a more human rights-centred approach to much of the work of OAU/AU organs, beyond just focusing on these being the mandate of the African Commission and the new Court.

Although under a separate treaty system, the European Union (EU) has also developed jurisprudence and increased its attention to human rights issues, in particular to the Council of Europe's European Convention.<sup>62</sup> There are some relevant comparisons to be made in this respect. Of particular interest is a comparison of the role of the future African Court of Human and Peoples' Rights with the soon to be established a Court of Justice of the African Union (ACJ).<sup>63</sup> Already there has been confusion expressed by states as to whether they are one and the same thing. Certainly, unless this issue is clarified, it may have an impact on the willingness of states to ratify the Protocol on the human rights Court. Further, this also raises issues about access to justice by individuals and others whose rights have been violated, an issue which requires consideration not just by the African Court on Human and Peoples' Rights, but also by the Court of Justice of the African Union.<sup>64</sup>

Here it is instructive to examine the relationship of the European Court of Human Rights with the European Union organs, in particular the European Court of Justice.<sup>65</sup> Indeed, this is particularly useful given that it has been suggested that the African Union was modelled on the EU.<sup>66</sup> There are a number of issues in this respect.

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Union, and submit a report thereon as early as possible.' *Decision on the Fourteenth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 37th ordinary session of the Assembly of Heads of State and Government, 9–11 July, Lusaka, Zambia, AHG/Dec 162 (XXXVI) para 2. The Commission has yet to do this fully.

<sup>62</sup> See generally P Alston (ed) *The EU and human rights* (1999).

<sup>63</sup> Art 18 Constitutive Act. Its mandate is to be defined by a protocol to the Constitutive Act.

<sup>64</sup> As Harlow noted in relation to access to European institutions, C Harlow 'Access to justice as a human right: The European Convention and the European Union' in Alston (n 62 above) 187–213.

<sup>65</sup> See, in general, 'The protection of human rights in the 21st century: Towards greater complementarity within and between European regional organisations' Conference held at Dublin Castle, 3–4 March 2000, in the context of Ireland's Presidency of the Council of Europe, Selected Papers, (2000) 21 *Human Rights Law Journal*.

<sup>66</sup> See eg OA Babarinde 'Analyzing the proposed African Economic Community: Lessons from the experience of the European Union' paper for the Third ECSA-World Conference on 'The European Union in a changing world', sponsored by the European Commission, D-G X, Brussels, Belgium, 19–20 September 1996, <http://www.ecsanet.org/conferences/babarinde.htm>.

### 3.1 Overlapping role of ECJ/ACJ and European Court of Human Rights/African Court of Human and Peoples' Rights

The European Court of Justice (ECJ) of the EU has used the European Convention in cases before it to interpret EU treaties and rule on the actions of EU bodies.<sup>67</sup> This is particularly useful as EU law has primacy over national law, and so states are required to comply directly with European Convention provisions where the ECJ has used them as interpreting EU law.<sup>68</sup> This does not mean there has not been disagreement between Luxembourg and Strasbourg over interpretation of the European Convention, with the ECJ varying in its application of the Convention, it having 'left human rights questions undecided, faced open conflict, or adopted a constructive approach'.<sup>69</sup>

### 3.2 Responsibility of EU/AU themselves to comply and what standards to apply

Although there has been consistent reference to the European Convention as the standard which the EU employs,<sup>70</sup> this has recently been challenged by the development of an EU Charter on Fundamental Rights.<sup>71</sup> This Charter was developed as a result of the need to deal with the lack of accountability of EU organs,<sup>72</sup> the need to move from the EU dealing with human rights piecemeal to a more coherent and comprehensive approach<sup>73</sup> and 'to make their overriding importance and relevance more visible to the Union citizens'.<sup>74</sup> The Constitutive Act

<sup>67</sup> See generally N Grief & L Betten *EC law and human rights* (1998); Alston (n 62 above).

<sup>68</sup> R Blackburn 'Current developments, assessment and prospects' in R Blackburn & J Polakiewicz (eds) *Fundamental rights in Europe. The European Convention on Human Rights and its member states, 1950–2000* (2001) 90.

<sup>69</sup> D Spielmann 'Human rights case law in the Strasbourg and Luxembourg Courts: Conflicts, inconsistencies and complementarities' in Alston (n 62 above) 776.

<sup>70</sup> Single European Act 1986, Preamble; Treaty on the European Union, 1992, art 6(2); Treaty of Amsterdam, art 6(1); Declaration by European Parliament 5 April 1977; *Resolution and Declaration of the European Parliament, 12 April 1989*, Doc A2-3/89. Note that art 52(2) of the EU Charter states in respect of its relationship with the ECHR: 'Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'

<sup>71</sup> Official Journal of EC, C364, 18 December 2000.

<sup>72</sup> P Drzemczewski 'The Council of Europe's position with respect to the EU Charter of Fundamental Rights' (2001) 22 *Human Rights Law Journal* 14–32.

<sup>73</sup> P Alston & J Weiler 'An 'even closer union' in need of a human rights policy: The European Union and human rights' in Alston (n 62 above) 3–66.

<sup>74</sup> European Council of Cologne 3–4 June 1999, Annex IV; (1999) 20 *Human Rights Law Journal* 503. It has been stressed that any document the EU developed should in no way undermine or threaten the importance or place of the European Convention; Blackburn (n 68 above) 96.

would appear to refer to the African Charter as at least one of the primary documents. After the ECJ ruled that the EC could not accede to the European Convention at that time,<sup>75</sup> it was decided to concentrate on developing some form of internal process for more coherent consideration of human rights.<sup>76</sup> In the drafting of the EU Charter on Fundamental Rights, active participation came from representatives of the Council of Europe, including the European Court of Human Rights.<sup>77</sup> The resulting documents have different fields of application, as Krüger and Polakiewicz note:<sup>78</sup>

The European Convention is applicable in each of its 41 parties, whilst the CFR concerns primarily the Union institutions and, to a lesser degree, the member states but only when implementing Union law. Similarly, different judicial organs (may) review the two catalogues, the European Court of Human Rights for the ECHR and — potentially — the ECJ for the Charter.

It is presumed, therefore, that the African Charter, given that it was adopted under the auspices of the OAU, will be the benchmark used by the African Union in its own relationships, foreign policy and throughout its own institutions. As Blackburn notes in respect of the European situation:<sup>79</sup>

The protection of human rights has come to play a leading role in international relations and is directly relevant to the work conducted under the EU pillar of foreign and defence affairs. It is highly advantageous, therefore, for the EU to possess its own document on human rights standards, agreed to by all its member states, to facilitate the closer integration of all its foreign policy work. If it insists upon a particular set of moral standards for other countries, without which it will refuse to conduct or allow normal relations, then the EU must clearly show its own commitment to those same standards.

As the reasons for the EU itself formally acceding to the European Convention,<sup>80</sup> an issue which was put on hold after a ruling by the ECJ,<sup>81</sup> may not have been totally resolved by the adoption of the EU Charter, the discussion still continues. It is worth considering similar issues before the African organs. The possibility, for example, for individuals to challenge actions of the OAU/AU organs themselves for violations of provisions of the African Charter before either the African Court of Justice

<sup>75</sup> Drzemczewski (n 72 above) 29 argues that the reasons are much less obvious today.

<sup>76</sup> As above, 19; C Dorau & P Jacobi 'The debate over a 'European Constitution': Is it solely a German concern?' (2000) 6 *European Public Law* 413–428.

<sup>77</sup> See Drzemczewski (n 72 above) 21.

<sup>78</sup> HC Krüger & J Polakiewicz, 'Proposals for a coherent human rights protection system in Europe' (2001) 22 *Human Rights Law Journal* 1–24.

<sup>79</sup> Blackburn (n 68 above) 93–94.

<sup>80</sup> As above, 96–99; House of Lords Select Committee *Report on the European Union, EU Charter of Fundamental Rights*, HL [1999–2000], HMSO, London, 2000.

<sup>81</sup> See ECJ Opinion 2/94, 28 March 1996, [1996] ECR I-1759. Nowadays, it is suggested that the reasons for failing to do so are more to do with lack of political will than perhaps legal obstructions; see Drzemczewski (n 72 above) 31.

or the African Court on Human and Peoples' Rights may be an issue (for example, for failing to take action in times of conflict) and certainly has its precedent in the European system.<sup>82</sup> Given all OAU states are party to the African Charter, and given that the OAU was the body which established it, there is an argument for suggesting that the African Union could accede to the African Charter. Whether this could be the first time an international body has acceded to its own instrument, would depend on whether the OAU/AU could show itself to be an international organisation which has legal personality,<sup>83</sup> whether this would be permitted by treaty laws<sup>84</sup> and whether the African Charter itself would permit accession by organisations rather than states.<sup>85</sup>

<sup>82</sup> 'The European Court of Human Rights case law is evolving as it appears to be seduced by the idea that states may, in certain circumstances, shoulder collectively the "blame" for EU fundamental rights violations. Instead of considering inadmissible cases that challenge states' implementation of EC legislation — when no discretion is left to the state — the European Court of Human Rights checks the extent to which protection afforded by EC legislation and its implementation is sufficient and effective: it considers itself competent to examine the merits, with the state(s) concerned being potentially jointly and severally liable under the Convention.' Drzemczewski (n 72 above) 29. See also *Senator Lines v 15 Member States of the EU* (2000) 21 *Human Rights Law Journal* 112–118.

<sup>83</sup> The author would like to thank Prof Malcolm Evans for his insightful comments on this question. As the *Reparations for Injuries Suffered in the Service of the United Nations* Advisory Opinion of the ICJ (11 April 1949) (1949) ICJ Reports 174 provided, the UN was not created just 'for harmonising the actions of nations in the attainment of these common ends', but the Charter provided it 'with organs and has given it special tasks', including imposing obligations on its member states to assist the organisation and carry out the decisions of its bodies, enabling it to conclude treaties and 'occupies a position in certain respects in detachment from its members and which is under a duty to remind them, if need be, of certain obligations'. Bowett notes that 'it is permissible to presume that most organisations created by a multilateral inter-governmental agreement will, so far as they are endowed with functions on the international plane, possess some measure of international personality in addition to the personality within the system of municipal law of the members'; P Sands & P Klein *Bowett's law of international institutions* (2001) 339. See also T Maluwa *International law in post-colonial Africa* (1999).

<sup>84</sup> Art 6 of the Vienna Convention on the Law of Treaties Between States and International Organisations, 1986, provides that the 'capacity of an international organisation to conclude treaties is governed by the rules of that organisation'. Art 24 of the OAU Charter provides that it is open to 'all independent African sovereign states', and art 27 of the Constitutive Act of the African Union provides similarly. However, this could be amended, if necessary.

<sup>85</sup> See <http://stars.coe.int>; Parliamentary Assembly of the Council of Europe, Resolution 1068 (1995) on accession of EC to ECHR. Art 63 of the African Charter mentions only that it is open to member states of the OAU to ratify or accept the Charter. In addition, a previous finding of the African Commission that a complaint against the OAU was irreceivable could also support this; Communication 12/88, *Mohamed El Nekheily v OAU*, Seventh Annual Activity Report of the African Commission on Human and Peoples' Rights, Annex IX. However, the fact that the latter decision was adopted at an early stage in the Commission's history may suggest that it was not confident enough to consider the possibility.

What it all stresses is the need for the African Charter and its institutions to be examined in light of the AU and for an entire revision of the human rights protection under the whole AU structure to be streamlined and dealt with more comprehensively. Just as has been argued in respect of the EU and human rights protection in Europe as a whole,<sup>86</sup> there is a need for a more coherent approach to human rights in Africa.

#### 4 Relationship with national systems

Although the African Court may have been seen by some as being able to solve the many problems of the African human rights system, this is clearly unrealistic. What has consistently been stressed by commentators on the European system, and the organs themselves, is the need for regional bodies to focus on ensuring rights are enforced at the national level. The principle of subsidiarity is apparent in both the European and African instruments:<sup>87</sup> The provision for rights in the Convention/Charter are not limited, so states can provide better protection if possible.<sup>88</sup> The documents are not a list of rules but standards, with choice being given to states on interpretation and the Court being there to ensure compliance. Applicants have to exhaust domestic remedies. The doctrine of the margin of appreciation has been developed. Thus, 'to ensure universality, the principle of subsidiarity should mean the effective protection of universal human rights by national courts as well as by national legislatures and administrations, rather than a very weak form of [European] judicial supervision'.<sup>89</sup>

One task of the African Court should therefore be to strengthen the national systems. As Lord Lester commented in relation to Europe:<sup>90</sup>

<sup>86</sup> See eg 'New instruments and institutions for enhancing the protection of human rights in Europe?' in Alston (n 62 above) 871–800; Krüger & Polakiewicz (n 78 above) 1–13.

<sup>87</sup> See for a discussion 'Understanding the Convention' in *Human rights practice* (2000) ch 1.

<sup>88</sup> Art 53 European Convention.

<sup>89</sup> Lord Lester of Herne Hill 'Universality versus subsidiarity: A reply' (1998) 1 *European Human Rights Law Review* 75.

<sup>90</sup> As above, 74. The same points have been echoed by others, for example, by members of the Court itself: 'the continuing steep rise in the number of applications to the Court is putting even the new system under pressure. What can be done? There can be no doubt that the Council of Europe's member states have a vital role to play. To reduce the Court's workload, firm political commitment is needed to ensure the Convention is respected at national level. Governments, legislators and the judiciary in member states need to work together to enforce the Convention and all its articles and protocols.' President Wildhaber *Press Release* 21 June 1999. It has also been said that there has been a failure to treat art 13 and the right to a remedy properly: 'That provision is almost dead as a means of security effective national remedies' (1996) *Public Law* 5–10; Lord Lester of Herne Hill (n 89 above) 74, although he does mention that there has been a 'welcome shift' in art 13 jurisprudence recently; n 8 above.

The Commission and the Court have fallen victim to the success of the Convention system. They are choking on a caseload with which they are unable to deal within a reasonable time. I suggested that the Court contributes to its own excessive burdens by failing to require domestic incorporation of the European Convention rights and by not interpreting articles 6 or 13 to give a powerful incentive to states to provide effective domestic remedies. That would have reduced the Strasbourg caseload and strengthened the effective national protection of human rights across Europe.

The African Court would do well to take such concerns on board, concentrating on ensuring that the African Charter is incorporated at national level. Further, the African Court and its Commission should also consider how wide a margin of appreciation they give to states. As Lord Lester has argued, the European Court's provision of considerable discretion to states has allowed 'a variable geometry of human rights and the unequal protection of the human rights of the people of Europe'.<sup>91</sup>

## 5 Issues of standing and access

If states accept the jurisdiction of the African Court to hear cases directly from individuals and NGOs, it is likely that the African Court will adopt the procedure of the African Commission and allow non-victims to submit cases and applications *actio popularis*.<sup>92</sup> In determining issues of standing the comments of the European Court should be borne in mind, namely that 'the effectiveness of the Convention implies in such circumstances some possibility of having access to the Convention. The procedural provisions of the Convention must, in view of the fact that the Convention and its institutions were set up to protect the individual,

<sup>91</sup> Lord Lester of Herne Hill (n 89 above) 75. See, further, P Mahoney 'Marvellous richness of diversity or invidious cultural relativism?' (1998) 19 *Human Rights Law Journal* 1–5; and other articles in the same special issue of the journal: 'The doctrine of the margin of appreciation under the European Convention on Human Rights: Its legitimacy in theory and application in practice' (1998) 19 *Human Rights Law Journal* 1–36.

<sup>92</sup> Although the European Court has perhaps interpreted the Convention to allow it indirectly. For example, in one case applicants argued that laws relating to surveillance violated the Convention, even though they could not actually say they had been victims of such; *Klass v Germany* ECHR (6 September 1978) Ser A 23, para 34. The Court held that as the legislation could be applied to anyone of the public, the applicants had a claim. This was further clarified in *Marckx* where it held that if the applicants 'run the risk of being directly affected by it', then they had standing; *Marckx v Belgium* ECHR (13 June 1979) Ser A 31, para 27. If, however, it looks like an isolated case, then the Court may not consider it, it would appear to have to have wider implications: 'The Court sees itself as much more than a provider or remedies for isolated complaints. In the interest of the effectiveness of the Convention as a whole it is prepared to use individual applications as an opportunity to make points which it considers need to be made and interprets the concept of 'victim' accordingly'; Merrills (n 16 above) 55–56.

be applied in a manner which serves to make the system of individual applications efficacious.<sup>93</sup>

Various forms of protection have been developed for those submitting applications to the European Court, such as the requirements that they have immunity from legal proceedings in respect of what they say or submit before or to the Court,<sup>94</sup> that states undertake not to hinder free movement of persons to the Court, and states readmit someone who travelled to the Court and started from that country.<sup>95</sup> It is important that the African Court ensure similar protection through article 10(3) of the Protocol and the requirement that 'any person, witness or representative of the parties, who appears before the Court, shall enjoy protection and all facilities, in accordance with international law, necessary for the discharging of their functions, tasks and duties in relation to the Court'.

It is also essential, however, in determining how the Court will operate, that there is a consideration of the reform of the functioning of the African Commission in its receipt and handling of cases. This will require not just an examination of the procedural requirements, but also a reflection on the implications of differences which could be met by a Commission and a Court. As Clements notes in respect of the European system:

The old Commission and Court rule reflected the very different *modus operandi* of those two institutions. Given the large number of complaints considered by the Commission, which had been introduced by non-lawyers, its Rules of Procedure reflected this situation by adopting a relatively relaxed and informal approach,

namely that it allowed them to present cases themselves or through someone else who did not have to be a lawyer. The previous Rules of the European Court were much stricter, requiring the individual to be represented by a lawyer, although there was a power of the Court to allow the individual to represent themselves. As Clements notes:<sup>96</sup>

The rigidity of these requirements reflected the reality of the applicant's position. By the time the Court was seized of a complaint, the essential Convention arguments had been distilled by the Commission, the friendly settlement process had passed and all that was required by the Court were formal pleadings and a modicum of advocacy.

<sup>93</sup> *Klass v Germany*, as above, para 34.

<sup>94</sup> *European Agreement Relating to Persons Participating in the Proceedings of the European Court of Human Rights*, Strasbourg, 5 III 1996, art 2.

<sup>95</sup> As above, art 4.

<sup>96</sup> As above, 268. In addition, Clements notes that the European Court used to deal mainly with cases that were controversial and so in that respect oral hearings were necessary. He questions whether oral hearings are always necessary when the Court has to deal with all cases now; at 270.

The African Commission and Court must also consider how their procedures will impact on each other.

In terms of representation, the Protocol on the African Court refers to the ability, although not the obligation, for parties to 'be entitled to be represented by a legal representative of the party's choice'. Experience of the European Court would suggest that it is important to consider who may represent the individual. If the African Court were to require, for example, that the representative be a lawyer, it may face the difficulties already encountered by the European Court where<sup>97</sup>

in Western Europe there is a problem that an impecunious applicant can only obtain legal representation if a lawyer can be found who is prepared to act out of the goodness of his or her heart. Council of Europe Legal Aid (even if available) is so low in Western European terms as to exclude the possibility of representation for economic motives. In Eastern and Central Europe there is the problem of too few lawyers with sufficient practical experience of Strasbourg procedures and/or prepared to act.

In addition, with the provision of free legal representation before the African Court 'where the interests of justice so require',<sup>98</sup> it is hoped that it will continue the flexible approach of the African Commission in this regard in allowing complainant to represent themselves if they wish.

To ensure that the Court works to its maximum capacity and therefore has the ability to contribute to the development of human rights law in Africa and more widely, it is essential, as noted above, that it is supplied with a regular list of cases. In this respect, ease of access is important. Although the matter of individuals being able to access the Court directly is limited by the Protocol at present, once a state has accepted standing, it is important that no further obstacles are in the way of an applicant petitioning the Court. This requires practical considerations such as whether the African Court will, as its Commission appears to have done and as does the European Court, accept applications in writing, by e-mail or fax, rather than on an official application form.<sup>99</sup> It also necessitates examination of the languages in which cases can be submitted and proceedings undertaken.<sup>100</sup> Languages of the European Court are English and French, and while applications can be submitted in any of the official languages of the states, they may be required to use official languages of the Court during the proceedings.<sup>101</sup> Where translation has

<sup>97</sup> As above, 269. The new European Court does not require representation by a lawyer, but if they are legally qualified, then that lawyer has to have qualifications to practice in a state and be resident there.

<sup>98</sup> Art 10 Protocol on the African Court.

<sup>99</sup> Note that the European Court has application forms but will initially also accept complaints by letter, although applicants are then required to fill out an application form.

<sup>100</sup> Art 25 of the Constitutive Act provides that '[t]he working languages of the Union and all its institutions shall be, if possible, African languages, Arabic, English, French and Portuguese'.

<sup>101</sup> Rule 34 Rules of the European Court.

been a difficulty of the African Commission, even into Arabic and Portuguese, such considerations are likely to be faced by the Court.

An additional issue of access will be the length of time taken to complete the examination of a case. Criticism in this regard has been levelled towards the European Court,<sup>102</sup> indeed it was a reason for the creation of a single body, given the four or five year wait before cases were decided.<sup>103</sup> Certainly, the power to give interim measures in this respect is important, available to the African Court in article 27 of the Protocol 'in cases of extreme gravity and urgency' and the European Court in Rule 39.<sup>104</sup> The European Court also has the power to speed up dealing with particular cases if necessary.<sup>105</sup>

What is also likely to be of concern to an applicant to the African Court is the issue of costs. While the Court Protocol in the African system provides for 'free legal representation', there is no indication of who will bear the costs of such, other than the general requirement in article 32 that 'expenses of the Court, emoluments and allowances for judge and the budget of its registry shall be determined and borne by the OAU'. It is possible that the African Court may continue to employ the approach of the Commission in asking NGOs to represent individuals who have no legal support. How these organisations, who may also not have the financial capability of supporting a complainant throughout the entire process *pro bono*, will be reimbursed, is not clear. It is hoped that the approach of the European Court in respect of costs will be followed in some respect. Thus costs incurred by a European government cannot be claimed back against the applicant, a factor which has been described as extremely important in terms of access to the Court.<sup>106</sup> Costs resulting from the applicants, if they are successful, can be claimed back from the government under article 41 if the Court rules this, but only to a reasonable amount. There is also no fee to be paid to lodge a case with the European Court. Some legal aid is available but this is very limited

<sup>102</sup> D Shelton 'Ensuring justice with deliberate speed: Case management in the European Court of Human Rights and the United States Courts of Appeals' (2000) 21 *Human Rights Law Journal* 337-348.

<sup>103</sup> It has been noted that initially the new single court in Strasbourg had 6 000 cases pending that it had to deal with and that it would simply not be possible for a single court to deal with such a massive number of cases, it would be necessary to have sub-regional bodies; see Clements (n 16 above) 266; S Trechel 'The European Court of Human Rights — Organisation and procedure — Reports and proceedings' Colloquium, Potsdam, 19-20 September 1997 171-173.

<sup>104</sup> Although there were no express powers available to the old Court, it interpreted the European Convention as permitting it to do so. *Cruz Varas and Others v Sweden* ECHR (20 March 1991) Ser A 201, para 5. The power was rarely used.

<sup>105</sup> Rule 41 Rules of the European Court.

<sup>106</sup> Leech (n 21 above) 15.

and means-tested at state level, applying national standards.<sup>107</sup> Given the limited legal aid available in African states, it would be worth the African Court considering whether it can make more generous provision than its European counterpart.

Whereas the African Commission's complaints process has been conducted in private and little information is available on the procedure other than through those who have experienced it, it is welcoming that the Protocol on the African Court provides that proceedings will generally be held in public, unless the Court decides otherwise.<sup>108</sup> In the European context, this has meant not only that hearings are public, but also that, after a case is registered, all documents are public.<sup>109</sup> The term 'all proceedings' in article 10 of the Protocol on the African Court could be interpreted broadly to refer to documents as well.<sup>110</sup>

## 6 Remedies and enforcement

The Protocol on the African Court provides in article 27 that if a violation is found, the Court 'shall make the appropriate orders to remedy the violation, including the payment of fair compensation or reparation'.<sup>111</sup> It has been said that this 'provision is broader than all the current mandates to afford remedies to victims of human rights abuse'<sup>112</sup> and it is hoped that the African Court will emphasise this element of its power. This has not been the practice of the African Commission, which has been inconsistent in its approach, in some cases stressing a number of actions the state must take in response to a violation,<sup>113</sup> in others noting

<sup>107</sup> Where given, however, travel expenses will also be provided. It is still possible, even if the applicant cannot qualify for legal aid through the national system, to obtain it at the European Court on the basis that they will not be able to pay the costs of the case otherwise.

<sup>108</sup> Article 10 Protocol on the African Court.

<sup>109</sup> Unless there is a friendly settlement taking place or the Court decides otherwise; Rule 33 of the Rules of the European Court.

<sup>110</sup> Rule 33(3) of the Rules of the European Court makes specific mention of documents being accessible to the public.

<sup>111</sup> For the importance of having a remedy, see Shelton (n 38 above).

<sup>112</sup> As above, 177, in respect of an earlier draft of the Protocol on the African Court, although it remained unchanged in the final Protocol.

<sup>113</sup> See eg Communications 54/91, 61/91, 98/93, 164/97–196/97 & 210/98, *Malawi African Association, Amnesty International, Ms Sarr Diop, Union Inter africaine des Droits de l'Homme and RADDHO, Collectif des Veuves et Ayants-Droit, Association Mauritanienne des Droits de l'Homme v Mauritania*, Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights, Addendum.

nothing at all.<sup>114</sup> There is hope that the African Court will not feel similarly constrained. As Shelton noted in respect of the European Convention:<sup>115</sup>

The Commission's restrictive view of its role led it to take a somewhat passive role on the issue of remedies . . . In later years, the Commission's increasing workload led it to be less rather than more involved in Court proceedings.

It is also important that the African Court, and indeed, the Commission as well, consider the issue of remedies seriously, given the role it can play in bolstering the national system of protection:<sup>116</sup>

The international guarantee of a remedy implies that a wrongdoing state has the primary duty to afford redress to the victim of a violation. The role of international tribunals is subsidiary and only becomes necessary and possible when the state has failed to afford the required relief. However, the role of the international tribunal is important to the integrity of the human rights system and victims of violations, particularly when the state deliberately and consistently denies remedies, creating a culture of impunity.

Article 13 of the European Convention provides for a right to a remedy<sup>117</sup> for the violation of the rights in the Convention.<sup>118</sup> The European Court can provide just satisfaction under article 41<sup>119</sup> of the Convention, which can include costs as well as compensation, although it has been noted that the previous court did not use this provision a great deal.<sup>120</sup> Where

<sup>114</sup> See eg Communication 212/98, *Amnesty International v Zambia*, Twelfth Annual Activity Report of the African Commission on Human and Peoples' Rights, Annex V.

<sup>115</sup> Shelton (n 38 above) 153.

<sup>116</sup> As above, 15. For example, in respect of the *Klass* case it has been said that the European Court 'noted Article 13, read literally, seems to say that a person is entitled to a national remedy only if a "violation" has occurred; but a person cannot establish a violation before a national authority unless he or she is first able to lodge with such an authority a complaint to that effect. Thus, according to the Court, article 13 guarantees an effective remedy "to everyone who claims that his rights and freedoms under the Convention have been violated" '; as above, 23-24.

<sup>117</sup> Art 13 of the European Convention reads: 'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.'

<sup>118</sup> This has been affirmed by the Committee of Ministers, Recommendation No R(84) 15 on Public Liability, 18 September 1984.

<sup>119</sup> Art 41 reads: 'If the Court finds that there has been a violation of the Convention or the Protocol thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.'

<sup>120</sup> As Shelton notes, 'The narrow interpretation of article 50 given by the Court in its first case, hampered the evolution of remedies in the European system. The approach developed in that case was followed consistently, though often criticised. It left the Court with little flexibility. The Court gave unnecessarily important weight to the words "if necessary", setting stringent requirements of a causal link between the violation and the injury and rarely affording relief that corresponded to the harm done. In numerous cases it found that the judgment alone afforded just satisfaction for the moral injury. There was no indication of concern for deterrence, although that was traditionally a focus of "satisfaction" in the law of state responsibility for injury to aliens.' Shelton (n 38 above) 155.

the European Commission, however, had ordered payment of compensation, the Committee of Ministers generally adopted its findings.<sup>121</sup>

Compliance by states with European Court decisions has generally been good, resulting in, for example, changes to legislation, reversal of case law<sup>122</sup> and agreement to provide payment to the victim as required by the Court.<sup>123</sup> The Committee of Ministers<sup>124</sup> supervises enforcement,<sup>125</sup> and adopts resolutions on whether states have complied with decisions of the Court. The Protocol on the African Court provides that state parties 'undertake to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution'.<sup>126</sup> The decision of the African Court is final, subject to the ability of the Court to review it in light of new evidence.<sup>127</sup> Enforcement is through submitting the case to the OAU states as well as the Commission and putting monitoring of its execution in the hands of the Council of Ministers on behalf of the Assembly.<sup>128</sup> Further, the annual report of the Court to the Assembly should indicate which states have not complied with its judgment.<sup>129</sup>

It would appear that it has been important in the European context for complainants to stress that their violations are not once-off events, but symptoms of a wider practice in order to effect changes in legislation or policy.<sup>130</sup> This may be a useful tactic to be employed by NGOs and others petitioning the African Court and Commission.

<sup>121</sup> In addition, the Committee 'never ruled that the finding of a violation constitutes in itself sufficient just satisfaction. The Commission never proposed this solution because it contrasted the open, fully litigated hearings of the Court with the closed proceedings before the Commission and Committee of Ministers, finding that the absence of a full hearing with the applicant present necessarily undermined the adequacy of a declaratory remedy.' As above, 158–159.

<sup>122</sup> 'The decisions of the European Court are routinely complied with by European governments. As a matter of fact, the system has been so effective in the last decade that the Court has for all practical purposes become Western Europe's constitutional court.' T Buergenthal & D Shelton *Protecting human rights in the Americas* (1996) 34.

<sup>123</sup> Effects of Judgments or Cases 1959–1998, 11 June 1998. Payment must be made within three months of the decision and interest is added if they fail to do so.

<sup>124</sup> The Committee of Ministers is composed of ministers of foreign affairs of member states, meeting twice a year.

<sup>125</sup> Art 46(2) Rules of the European Court.

<sup>126</sup> Art 30 Protocol on the African Court.

<sup>127</sup> Art 28 Protocol on the African Court.

<sup>128</sup> Art 29 Protocol on the African Court.

<sup>129</sup> Art 31 Protocol on the African Court, perhaps giving the impression that the Court will retain some role in its enforcement itself.

<sup>130</sup> Leech (n 21 above) 59–60; *Robins v UK* (1998) 26 European Human Rights Reports 527.

## 7 Wider role of a regional human rights court

The African Court should, however, see its role as being wider than merely changing domestic law in African states, as the European Court did, 'judgments have this wider significance because the Court consistently seeks to justify its decisions in terms which treat its existing case law as authoritative'.<sup>131</sup> Judgments of such regional courts are a 'repository of legal experience to which it is convenient to adhere; because they embody what the Court has considered in the past to be good law; because respect for decisions given in the past makes for certainty and stability, which are of essence of the orderly administration of justice; and (a minor and not invariably accurate consideration) because judges are naturally reluctant, in the absence of compelling reasons to the contrary, to admit that they were previously in the wrong'.<sup>132</sup>

In order to ensure its place among the eminent judicial bodies, however, the African system must think strategically about how it will operate and what cases it will accept. Thus, it is essential that it receives neither too few nor too many cases: 'a court which is scarcely used cannot make much of a mark. A full docket, on the other hand, though not the only requirement, provides a tribunal with a series of opportunities to display its potential'.<sup>133</sup> Although the European Court of Human Rights had sufficient case law to generate world-wide respected jurisprudence, there is a question whether the overload of cases now will start to undermine its reputation.

As has been seen, the role of the African Commission will be important in terms of the types of cases that are submitted to it as this in turn may affect the Court's integrity. If 'the Court's work should involve legal subject-matter capable of general application', then this may enable it to develop rules that would have application beyond the African system. This certainly has been the case with the manner in which the European Court has dealt with the domestic remedies rule.<sup>134</sup> In addition, the willingness of the Court (and Commission) to continue examining a case if it raises important human rights issues, even though the complainant chooses to withdraw, is also an issue.<sup>135</sup> In this respect, a feature of the African Charter which the African Court can exploit to advance its international position, lies in its unique provisions. That the African Charter

<sup>131</sup> Merrills (n 16 above) 12.

<sup>132</sup> H Lauterpacht *The development of international law by the International Court* (1958) 14.

<sup>133</sup> Merrills (n 16 above) 16.

<sup>134</sup> As above, 17.

<sup>135</sup> For example, the Commission under the European Convention could continue with the case before the Court even where the individual withdrew, thus emphasising the idea that cases have a wider public interest; C Gray *Judicial remedies in international law* (1987) 151.

contains rights such as economic, social and cultural rights, peoples' rights and individual duties, which bodies such as the European Court do not have the power to deal with, should be seized upon and developed by the African Court. In this respect, it has a much wider 'potential contribution to what may be termed the law of human rights, meaning the substantive obligations which states are increasingly assuming in other regional conventions and general international law'.<sup>136</sup> As the Commission has started to do, so the African Court should build upon its jurisprudence in respect of the more unusual provisions of the Charter.

As in the European system, judgments by the African Court will be given as a single decision, with the possibility of dissenting opinions to be attached.<sup>137</sup> Certainly this does not appear to have resulted in 'a torrent of idiosyncratic views' in the European Court.<sup>138</sup> As the African Commission has done in concluding some of its decisions with reference to jurisprudence and documents of other international bodies, such as the UN Human Rights Committee, so too may the African Court.<sup>139</sup> The European Court has also used international law in its decisions.<sup>140</sup>

The African Court must also keep in mind its audience, 'no court can work successfully unless its decisions are accepted by those whom we may term its audience', and, as in the case of the European Court, this will include the public, parties, states, and wider human rights community.<sup>141</sup> One difficulty for the African Court may be the lack of homogeneity among its audience. While this may now become a concern for the European Court with the increase in membership from particularly Eastern European states, part of its success has been attributed to its<sup>142</sup>

relatively homogeneous audience, all of whom can be assumed to subscribe both to the idea of human rights and to most of the specific concepts involved. Moreover this outlook is shared by the judges. In terms of writing persuasive judgments all this means that the Court starts with an enormous

<sup>136</sup> Merrills (n 16 above) 18.

<sup>137</sup> Art 28 of the Protocol on the African Court provides that 'if the judgment of the court does not represent, in whole or in part, the unanimous decision of the judges, any judge shall be entitled to deliver a separate or dissenting opinion'.

<sup>138</sup> There in fact being 'greater judicial reticence and certainly less disagreement. Separate opinions are fewer and much shorter and where several judges wish to make the same point, joint opinions are very common'; Merrills (n 16 above) 41.

<sup>139</sup> Indeed, art 3 states that 'the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the states concerned'. In addition, art 7 provides that 'the Court shall apply the provision of the Charter and any other relevant human rights instruments ratified by the states concerned'.

<sup>140</sup> See Merrills (n 16 above) ch 9.

<sup>141</sup> As above, 30.

<sup>142</sup> As above.

advantage. Not only is there likely to be substantial agreement within the Court on many matters, but also in justifying its conclusions, the Court can appeal to a common set of cultural values.

A lack of common values means that it is more difficult to rely on vague notions to support decisions, a method used by the European Court.<sup>143</sup> Thus, although the European Court has stressed that the Convention is a living instrument, when considering the extent of the state's margin of appreciation, factors such as whether there is a common European consensus on, for example, moral matters, has come into play.<sup>144</sup>

Thus, in order to be persuasive, the African Court, and its Commission, may have to resort to other methods to convince its audience of its decision. Mechanisms adopted by the European Court, such as indicating both sides of the argument, giving several reasons for its decision rather than just one, dealing with all points raised,<sup>145</sup> and examining issues of admissibility and jurisdiction fully and properly are essential for its own legitimacy,<sup>146</sup> and which have been evident to some extent in jurisprudence of the African Commission, may prove useful for the African Court.

Similarly, the European experience has shown that it would also be important for a court to give full reasoning for its decisions, not only for the satisfaction of the states, but also because the Convention itself is rather broad.<sup>147</sup> The European Court has done this by relying in its decisions on not only precedent but also international law and general principles and other values,<sup>148</sup> in addition, by going beyond a literal approach to have 'regard to the object and purpose of the agreement, the impact of social change and many other factors, including the preparatory work'.<sup>149</sup>

The power of the Court to be of wider influence on these and other matters<sup>150</sup> will, however, depend on its integrity and that its 'membership and judgments . . . command universal respect by being of the highest quality and integrity'.<sup>151</sup> In this respect the appointment procedures for judges and their independence are essential.<sup>152</sup> This has been

<sup>143</sup> As above, 31.

<sup>144</sup> See eg the special issue 'The doctrine of the margin of appreciation' (n 91 above).

<sup>145</sup> Merrills (n 16 above) 31–32.

<sup>146</sup> As above, 33, citing *Axen v Germany* ECHR (8 December 1983) Ser A 72, para 24.

<sup>147</sup> Indeed, because the whole point of a court is that it gives reasoned decisions; as above, 34.

<sup>148</sup> As above, 35.

<sup>149</sup> As above.

<sup>150</sup> For example, treaty interpretation and general issues of state responsibility; as above, 21.

<sup>151</sup> Blackburn (n 68 above) 83.

<sup>152</sup> Art 21(2) of the European Convention provides that judges of the European Court will sit in their individual capacity, and 21(3): 'During their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office; all questions arising from the

an ongoing concern in respect of the African Commission and although it has generally not been a problem in practice in Europe,<sup>153</sup> the process of nomination has also been questioned in respect of the European Court of Human Rights,<sup>154</sup> where there have been attempts to bolster the role of the Parliamentary Assembly<sup>155</sup> to avoid it just being a rubber stamp of the selection of the states.<sup>156</sup> The various provisions in the

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application of this paragraph shall be decided by the Court.' This is also reaffirmed by Rule 4 of the Rules of Court: 'A judge may not exercise his functions while he is a member of a Government or while he holds a post or exercises a profession which is incompatible with his independence and impartiality. In case of need the plenary shall decide.' Note that the 1977 Resolution of Parliamentary Assembly of the Council of Europe asked members not to vote for someone 'who, by nature of their functions, are dependant on government', unless they resigned this when elected; Resolution 655 (1977).

<sup>153</sup> Merrills notes in relation to independence of judges at the European Court that 'candidates for the Court tend to be members of their national judiciary or professors of law, while a smaller number are practising lawyers, politicians or former government officials. In practice, there seems to be no difficulty in maintaining the calibre of the bench and some very distinguished individuals have been, or are, members of the Court'; n 16 above, 7.

<sup>154</sup> 'The procedures presently laid down and followed by member states and the Council itself for selecting and appointing judges of the Court of Human Rights are widely believed to be in need of re-evaluation and improvement.' Blackburn (n 68 above) 83.

<sup>155</sup> The Parliamentary Assembly is composed of groups of representatives from the national parliaments of states, with the size of the delegation depending on the population of the state.

<sup>156</sup> The number of judges of the European Court is equal to the number of member states, presently 42 states. The process of appointing judges to the European Court begins by the nomination of three persons by the state, which will rank them in order of preference. The final choice of nominations is made by the Parliamentary Assembly, but prior to 1997 this in practice meant little more than rubber stamping the choice of the states as no information was given to the Assembly on each person. This was greatly criticised; see, eg, House of Lords, 13 July 1998, col 81 (Lord Hardy). Now the Parliamentary Assembly has a subcommittee on Legal Affairs and Human Rights which examines each person, their CV and interviews them, and gives a report to the Assembly with its recommendations. Blackburn notes: 'This, then, for the first time genuinely involved the Parliamentary Assembly in the selection process, an important step away from the Court's composition being determined as an inter-governmental matter and towards a more collective European form of decision-making. The constitutional role of the Assembly with respect to the Court must be to protect the integrity and high quality of its judges as a collective body, a task of great importance given the great judicial, indeed quasi-judicial power which the Court now possesses to alter the domestic law of member states across the continent of Europe.' However, the process is still criticised as it depends on how judges are nominated at the national level, and in some respects this might still be a political appointment. Blackburn has suggested a number of ways to solve such problems, including the Council of Europe developing some framework for selecting for each state, and giving the Parliamentary Assembly some task to supervise the nomination at the national level; n 68 above, 85 & 87-88.

Protocol on the African Court dealing with issues of independence<sup>157</sup> may not be enough to counter the problems associated with the fact that states still propose the candidates, the Assembly of Heads of State and Government will vote on them,<sup>158</sup> and the fact that the power to remove judges rests in the last instance with the Assembly of the OAU and not with the judges themselves.<sup>159</sup>

## 8 Conclusion

In addition to the many specific procedural issues where the African Court could draw from the European institutions' experience, an examination of the European organs stresses that at this stage of development, in particular, it would be dangerous to look at the African Court in isolation. As the European system has shown, the Court must be viewed within the context of its relationship with the African Commission, in particular.<sup>160</sup> It is clear that the role of the Commission is essential to the success of the Court.<sup>161</sup> In addition, those working within the African system must go further and ensure that the Court is examined more generally within the African Union. As has been stated in relation to the European system, 'although our concern is the work of the Court, to see its activity in perspective, it must be thought of as a component of an institutional system . . .'.<sup>162</sup>

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<sup>157</sup> There is the requirement that judges act in their individual capacity in art 11 of the Protocol on the African Court, as well as prohibiting them from sitting on cases in which they previously took part, art 17 of the Protocol on the African Court. In addition, art 18 of the Protocol on the Court reads: 'The position of the judge of the court is incompatible with any activity that might interfere with the independence or impartiality of such a judge or the demands of the office.'

<sup>158</sup> Arts 12(1), 13 & 14 Protocol on the African Court.

<sup>159</sup> Art 19(3) Protocol on the African Court.

<sup>160</sup> Art 33 Protocol on the African Court.

<sup>161</sup> As Merrills has noted in respect of the European system: 'The point to grasp, however, is that in these cases, as elsewhere, the Court's field of operations is determined by the decisions of the Commission.' n 16 above 4-5.

<sup>162</sup> As above.