

A court not found?

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1 Introduction

It is no secret that the African regional human rights system has severely underperformed its mandate and has not met the expectations of the people of the continent. The time of hushed criticisms of the weaknesses of the institutions, mechanisms and structures is long gone. Moreover, the African Charter system has routinely been subjected to stringent criticism due to its apparent inability to improve the situation.¹ However, Africans need and deserve well-functioning institutions. It is within this context that the African Union (AU) is heralded as offering some hope, since it has as its distinct purpose the integration of 'political, economic and *human rights* priorities'.²

Virtually simultaneously with the induction of the AU, the treaty establishing an African Court on Human and Peoples' Rights (African Court) was adopted and subsequently entered into force. The 11 judges were elected in January 2006 and accordingly assumed their positions. To date, the African Court has not commenced functioning in the material sense, yet four of the judges' terms come to an end in January 2008. Moreover, for practical and logistical reasons, it was

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¹ C Heyns 'The African regional human rights system: In need of reform?' (2001) 1 *African Human Rights Law Journal* 156.

² CA Odinkalu 'African states make human rights a priority in new treaty for African Union' (2001) 13 *Interights Bulletin* 90.

decided to merge the AU Court of Justice and the African Court on Human and Peoples' Rights. The merger has not been without its controversies. Many of the pertinent issues which will dictate the future functioning of the merged court remain unresolved. In July 2006, the AU Summit decided that Ministers of Justice and Attorneys-General should meet to resolve the outstanding issues of *locus standi* and jurisdiction of the Court. The meeting, scheduled to take place in April 2007, has not yet taken place, leaving an unfortunate void in the ongoing debate on the prospective role and success of the Court.

The Organisation of African Unity (OAU) was conceived in Addis Ababa, Ethiopia, in 1963, as Africa's first inter-governmental organisation responsible primarily for economic development and integration. The OAU was designed as a regional intergovernmental organisation with the aim of promoting unity and solidarity among African states.³ The provisions of the OAU Charter reflect the overriding concerns of Africa in the late 1950s and 1960s, namely, to ensure the rapid decolonisation of Africa and resultant self-determination for those African peoples that were still being ruled by colonial masters,⁴ and to protect newly acquired statehood by stressing the sovereign equality of states⁵ and the principle of non-interference in internal affairs.⁶ The Charter's focus was thus on the protection of the state, rather than the individual.⁷ To the extent that the OAU had concern for the question of human rights, such concern was largely concentrated on the right of self-determination of peoples in the context of decolonisation and apartheid.⁸

In the early 1980s the OAU took a step beyond self-determination as its primary human rights focus, to support the adoption of the African Charter on Human and Peoples' Rights of 1981 (African Charter), also known as the Banjul Charter.⁹ The principal means of ensuring compliance with the African Charter was left to the African Commission on Human and Peoples' Rights (African Commission), which is a quasi-judicial enforcement mechanism established under article 30 of the African Charter, with the specific mandate to 'promote and protect human and peoples' rights in Africa'.

In 2000 the OAU underwent a transformation to become the African

³ On the OAU generally, see K Mathews 'The Organisation of African Unity' in D Mazzeo (ed) *African regional organisations* (1984) 49.

⁴ Preamble of the OAU Charter; art 3(3).

⁵ Art 3(1).

⁶ Arts 3(1) & 3(2).

⁷ See R Murray *Human rights in Africa: From the OAU to the African Union* (2004) 7.

⁸ Murray (n 7 above) 7 8.

⁹ The African Charter echoes, to some extent, the theme of the OAU, since art 19 provides that 'nothing shall justify the domination of a people by another'.

Union.¹⁰ The AU was established by the Constitutive Act of the AU, adopted at the 36th ordinary session of the Assembly of Heads of State and Government of the OAU on 11 July 2000 in Lomé, Togo.¹¹ The AU was formally inaugurated in Durban, South Africa, on 9 July 2002, and the Secretariat of the AU is based in Addis Ababa, Ethiopia.¹² By the time the AU was inaugurated, all 53 former OAU member states, except the Democratic Republic of Congo and Madagascar, had ratified the Constitutive Act and deposited instruments of ratification with the Secretary-General of the OAU.¹³ The Democratic Republic of Congo deposited its instrument of ratification on the day of the inauguration itself, while Madagascar only did so almost a year later, on 10 June 2003. To date Morocco is not a member.

A number of reasons led to the transition from the OAU to the AU.¹⁴ By the end of the 1980s, there was a widespread perception that the OAU was in serious need of reform. Most obviously, the original motivations for the OAU's creation — the pan-Africanist ideals of securing independence for African peoples and uniting against colonial subjugation — no longer sustained the organisation following the period of decolonisation that Africa witnessed in the 1960s, 1970s and into the 1980s.¹⁵ A new *raison d'être* was needed to unite the organisation. One goal, consistent with the OAU's nature as a pan-African body constituted to improve the lives of Africa's people, would have been to focus on securing peace amongst Africa's newly independent states. However, the OAU came increasingly to be criticised for its failure to respond to serious conflicts between member states.¹⁶ In addition, several of Africa's leaders, in the fight for independence, led their newly liberated nations into totalitarianism, with an ineffectual OAU doing little to put a stop to this African malaise.¹⁷ It did not help that the OAU found itself caught between superpower rivalries during the Cold War; these ideological clashes led to debilitation of the OAU as it failed to meaningfully respond to civil wars that were fueled by East/West interests (such as in Angola and Mozambique), and development and reform programmes

¹⁰ For a critical discussion of the AU, see H Richardson 'The danger of oligarchy within the Pan-Africanist authority of the African Union' (2003) 13 *Transnational Law and Contemporary Problems* 255.

¹¹ See Decision on the Establishment of the African Union, OAU Doc AHG/Dec 143 (XXXVI).

¹² The Secretariat is described as the 'Commission of the AU' — see Statutes of the Commission ASS/AU/2(I)-d — and is composed of a Chairperson, Deputy Chairperson and eight other commissioners.

¹³ South Africa ratified on 3 March 2001.

¹⁴ See generally CA Packer & D Rukare 'The new African Union and its Constitutive Act' (2002) 96 *American Journal of International Law* 365-369.

¹⁵ n 14 above, 366.

¹⁶ See Y El-Ayouty 'An OAU for the future: An assessment' in Y El-Ayouty (ed) *The Organisation of African Unity after thirty years* (1994) 180.

¹⁷ See Packer & Rukare (n 14 above) 367.

initiated by the OAU became symbolised by lofty words and promises at OAU conferences, but were rarely translated into meaningful action.¹⁸ Matters did not improve after the end of the Cold War, as the OAU suffered from under-funding by member states and an unwieldy Assembly structure in which the 53 members more often than not leaned towards preserving national interests and sovereignty at the expense of a true commitment to regional co-operation and finding 'African solutions for African problems'.¹⁹

Given these and other failures by the OAU, at the end of the twentieth century, African leaders chose to start afresh with the AU. The core objectives of the AU evidence a commitment by African leaders not only to tackle the key economic and social issues facing the continent, but also to improve the AU relative to the weakness that had come to cripple the OAU. These objectives include the promotion of sustainable development,²⁰ good governance, social justice, gender equality, and good health.²¹

Some criticise the AU for the fact that although it was intended to remedy the failures and inadequacies of the OAU structures regarding human rights, it is ironically becoming a symbol of those failures. In this paper we focus on the AU's talk of an African Court dedicated to human rights and on the recent decision by the AU to merge the proposed African Court on Human and Peoples' Rights with the African Court of Justice. Our goal is not merely to criticise, however, or to stand as disinterested cynics carping from the outside. Rather, we are concerned with the strategic importance and imperative necessity of greater clarity and direction from the AU regarding the proposed merger between the two courts. To achieve its purpose, this paper is composed of three interrelated parts. The first details the historical development of the OAU and now the AU and introduces the concept of the OAU's guarantees of respect for human rights on the continent. Part two highlights the provisions of the African Court Protocol, as read in conjunction with the latest developments, such as the introduction of a new Draft

¹⁸ As above.

¹⁹ See El-Ayouty (n 16 above) 179.

²⁰ This objective builds on earlier initiatives begun under the OAU for the development, mobilisation and utilisation of African human and material resources in an effort to achieve self-sufficiency for the continent. The framework was set in place by the OAU's adoption of the Lagos Plan of Action and Final Act in which the intention was expressed to create an African Economic Community. This intention came to be realised with the Abuja Treaty Establishing the African Economic Community, which entered into force in 1994. On the African Economic Community see K Danso 'The African Economic Community: Problems and prospects' (1995) 4th Quarter *Africa Today* 31.

²¹ See arts 3 & 4 of the Constitutive Act of the AU.

Protocol and Statute on the African Court of Justice and Human Rights.²² The third part examines the future prospects of the Court in light of the decision to merge the AU Court of Justice and the African Court on Human and Peoples' Rights. This aspect of the discussion emanates from the recent meeting of the Permanent Representatives' Committee, in terms of which consideration was (once again) given to the Draft Protocol on the Merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union.²³

2 From OAU to AU — The historical problems concerning the protection of human rights in Africa

The OAU was conceived as Africa's first inter-governmental organisation responsible primarily for economic development and integration. The Pan-African ideals that gave rise to the creation of the OAU emanated from the assumption that African states were strong and united against colonial subjugation and racism, having the common objective of working together to improve the lives of African *people*. As we pointed out in the introductory section of this article, the OAU's focus was on the protection of the state as the representative of the *people*, rather than the state as the protector of the *individual*.²⁴ Accordingly, to the extent that the OAU had concern for the question of human rights, such concern was largely related to the right of self-determination of peoples in the context of decolonisation and apartheid.²⁵

Viewed from the perspective of the OAU's theoretical commitments towards a respect for human rights, and its less than satisfactory performance, grievances were expressed concerning the OAU's (in)effectiveness. Consequently, the OAU, with its policy of 'non-interference' in the internal affairs of other African states, has been transformed into the much stronger AU which has a strategy of 'non-indifference' to the suffering of the citizens of the African continent when countries do not respect democracy, human rights and the need for peace. The AU officially assumed its role upon the entry into force of the Constitutive Act of the AU.²⁶

²² Executive Council Decision on the Merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union — EX CL/211 (VIII).

²³ This item was first placed on the agenda of the Permanent Representatives' Committee (PRC) and Legal Experts for purposes of their meeting held in January 2006 in Khartoum, Sudan, and thereafter, again for the meeting to be held from 16 to 19 May 2006 in Addis Ababa, Ethiopia.

²⁴ Murray (n 7 above) 7.

²⁵ Murray (n 7 above) 7 8.

²⁶ Constitutive Act of the African Union CAB/LEG/23 15, adopted in Lomé, Togo on 11 July 2000; entered into force on 26 May 2001.

The transition of the OAU to the AU must be understood against the backdrop of another African development: the New Partnership for Africa's Development (NEPAD). In January 2001, President Thabo Mbeki of South Africa unveiled a programme (then known as the Millennium African Recovery Programme, or MAP) for Africa's 'recovery' at the World Economic Forum meeting in Davos, Switzerland. During the 5th extraordinary OAU/Africa Economic Community (AEC) summit held in Sirte, Libya in March 2001, the MAP was integrated with the New Africa initiative presented by President Abdoulaye Wade of Senegal. The combined programme was subsequently renamed NEPAD.²⁷ NEPAD has been described as a 'holistic, comprehensive and integrated strategic framework for the socio-economic development of Africa, with a programme of action that embraces initiatives on peace and security, democracy and political governance, as well as economic and corporate governance'.²⁸ The importance of NEPAD is that it is 'an African-led, African-owned and African-managed initiative underpinned by an agreed set of principles to which the participating countries commit themselves'.²⁹ NEPAD was formally adopted as a programme of the OAU at a summit on 11 July 2001, and is a 'pledge by African leaders' to achieve certain goals.³⁰ In terms of NEPAD's founding document, African leaders 'recognise that failures of political and economic leadership in many African countries impede the coherent mobilisation of resources into productive areas of activity in order to attract and facilitate domestic and foreign investment'.³¹ To that end, various strategies are adopted in the document to which the leaders commit themselves, with the ultimate goal to 'consolidate democracy and sound economic management on the continent' and a 'pledge to promote peace and stability, democracy and sound economic management and people-centred development and to hold each other accountable in terms of the agreements outlined in the programme'.³² Implementation of NEPAD's commitments is undertaken through a Heads of State and

²⁷ See the NEPAD website at <http://www.nepad.org>

²⁸ See T Maluwa 'South Africa and Organisation of African Unity/African Union treaties: Assessing South Africa's participation in international law making in Africa, 1994—2004', revised version of a paper presented on 8 July 2004 in Pretoria, South Africa, at the 'Symposium on a Decade of Developments in International Law' organised by the Department of Foreign Affairs of South Africa (on file with author) 4 fn 10.

²⁹ As above.

³⁰ 'A new African initiative: Merger of the Millennium Partnership for the African Recovery Programme (MAP) and Omega Plan' July 2001 para 1.

³¹ n 30 above, para 34.

³² Para 73. NEPAD's monitoring mechanism has come to be known as the African Peer Review Mechanism. For details, see 'Objectives, standards, criteria and indicators for the African Peer Review Mechanism (APRM), NEPAD/HSGIC-03-2003/APRM/Guideline/OSCI, 9 March 2003. See also C Stals 'The African Peer Review Mechanism as an integral part of the New Partnership for Africa's Development' (2004) 4 *African Human Rights Law Journal* 130.

Government Implementation Committee, chaired by Nigeria and with Senegal and Algeria as Vice-Chairs. Seventeen other states, representing different geographical areas of Africa, make up the remainder of the 20-strong Committee.

A question worth asking is what the relationship is between NEPAD and the AU. It seems as though there had been early confusion about the position of NEPAD under the AU and concerns over duplication and competition.³³ The mainstay of NEPAD's plan for the promotion of democracy and human rights is its African Peer Review Mechanism (APRM), in terms of which African states hold each other accountable to agreed principles of good governance, based on best practice. With the creation of the AU, peer review is now placed under the direct control of the AU.³⁴

These developments are important, and on paper look impressive. What remains to be seen, however, is whether African states have the political will to mobilise the AU Peer Review Mechanism to act against errant member states who abuse human rights.³⁵ The advent of the AU has brought with it hope for better protection of human rights in Africa and has been heralded as the start of a new economic, political and judicial organisation for the African continent, which places human rights squarely on its agenda.

For human rights to be placed on the agenda is one thing. To have a principal judicial body dedicated to the protection of basic freedoms is quite another. In this paper we are particularly concerned with the creation of an African Court on Human and Peoples' Rights. The Court has been hailed as an important display by the AU of its commitment to human rights; the creation by it of a true enforcement arm of the African Charter. Before coming to a discussion of the African Court, it is necessary to sketch the background to the protection of human rights in Africa and to consider the work (and failings) of the African Commission under the continent's regional human rights instrument, the African Charter.

³³ See J Cilliers 'NEPAD's Peer Review Mechanism' (Pretoria: Institute for Security Studies Paper 64, November 2004) 3 <http://www.iss.co.za> (accessed 31 October 2007).

³⁴ As above. As a further sign of NEPAD's subsidiary role to that of the AU, the NEPAD secretariat, currently based in Pretoria, South Africa, will in future relocate to Addis Ababa, Ethiopia or will constitute a satellite office of the AU Commission. There is, however, ongoing confusion and flux between the various institutions within the NEPAD and CSSDCA processes. For critical comment, see A Lloyd & R Murray 'Institutions with responsibility for human rights protection under the African Union' (2004) 48 *Journal of African Law* 180-186.

³⁵ See further on the CSSDCA African Commission — The argument and recommendations, 11 May 2005 <http://www.commissionforafrica.org/english/report/introduction.html> (accessed 30 September 2007).

3 The African Commission on Human and Peoples' Rights

The African Commission is an organ of the (O)AU and has for two decades been the quasi-judicial body of the African Charter, responsible for implementing and enforcing the rights provisions in the African Charter. The African Commission began functioning on 2 November 1987 and is based in Banjul, The Gambia, West Africa. Over the past 20 years the attitude towards the African Commission have varied, albeit without significant praise. To some, with respect to the performance of the African Commission in general, the Commission is a disappointment. One of the most pronounced criticisms is that it lacks an effective tool to ensure compliance with the norms enshrined in the African Charter.³⁶

The African Commission is tasked with implementing and enforcing the Charter through its three primary mandates, namely, the protective mandate; the promotional mandate and the interpretive function.³⁷ Under the protective mandate, the African Charter permits the African Commission to consider complaints (communications) brought against state parties by individuals, non-governmental organisations (NGOs) or other states alleging violations of human rights. The African Commission seeks an amicable resolution and, should that fail, makes non-binding recommendations which the Assembly of Heads of State and Government should adopt.³⁸ It becomes apparent that those states which have perpetrated human rights violations have the power to lobby like-minded states to potentially veto the adoption of these recommendations, hence our particular criticism that human rights in Africa are at the behest of states. The effect of the omnipotence of states within the regional system is one of the common themes throughout this paper and serves to illustrate that fundamentally, within the African regional human rights system, political good-will and diplomacy between states have often placed a dampener on the protection of human rights.

Pursuant to the promotional mandate, the main purpose of the African Commission's promotional activities is the sensitisation of the public on human rights issues in an effort to enhance respect and recognition of the rights stipulated in the African Charter. One of the African Commission's successes, achieved through its interpretive mandate, has been the Commission's interpretation of the African Charter.

³⁶ VOO Nmehielle *The African human rights system, its laws, practices and institutions* (2001) 246.

³⁷ Arts 45(1), (2) & (3) of the African Charter prescribe the mandates of the African Commission.

³⁸ See F Viljoen & L Louw 'The status of the findings of the African Commission: From moral persuasion to legal obligation' (2004) 48 *Journal of African Law* 1 9-10.

These interpretations have become an important source of understanding and learning about the human rights obligations of African states that are party to the African Charter.³⁹

The AU has on numerous occasions endorsed the African Commission's role in attaining a culture of human rights on the continent. By way of illustration, during the 41st African Commission session, Julia Joiner declared (not for the first time) that the effective functioning of the African Commission is critical for the actualisation of the AU's human rights agenda.⁴⁰ However, the irony is that it is the AU itself which is responsible for ensuring that the Commission receives sufficient financial support in order to achieve its objectives, and yet, a lack of resources is routinely cited as the reason why the African Commission is failing to reach its true potential.

3.1 Impediments to the effective functioning of the African Commission

Serious impediments to the effective functioning of the African Commission are highlighted in this paper for the purpose of drawing a parallel between the commitment of the AU towards the African Commission and the African Court. The intention is to demonstrate that the novelty of establishing organs and mechanisms should not be allowed to wear off (as it seems to have done with respect to the African Commission). In this regard, the AU should be compelled to ensure that adequate resources are provided to render the African regional human rights system a meaningful and effective component of the overall regional framework.

Starting from the perspective of the African Commission's infrastructural impediments, and considering that the Commission is based in a country where electricity outages are the norm rather than the exception, it is clear that the capacity of the African Commission is severely impaired. Invariably, the internet does not function for days on end, or the telephone systems are out of order. This renders communication between the commissioners and the Commission as well as between NGOs and interested individuals highly problematic and frustrating, leading to delays in the sending and receipt of vital information concerning communications submitted to the Commission or about specific problems which may have arisen in a particular country. This seems incongruent with the very reason for the Commission's existence,

³⁹ As noted below, the African Commission was at first hesitant to commit itself to definitive interpretations of the rights in the African Charter, but over the years, a body of jurisprudence has developed which sustains the need for the Commission to prioritise its interpretive function.

⁴⁰ Her Excellency Mrs Julia Joiner, Commissioner for Political Affairs of the Commission of the African Union, during her keynote address at the opening of the 41st ordinary session of the African Commission, Accra, Ghana, 16 May 2007.

namely, to protect and promote human rights on the continent, without restraint or limitation.⁴¹

Although the excuse of 'insufficient funds' gives the African Commission a scapegoat for its mediocre performance, it is a very real concern. Consistently, members of the Commission lament the inadequacy of funds made available to the African Commission. According to the 18th Activity Report of the African Commission, 'the work of the African Commission was compromised due to lack of funding'.⁴² This does not reflect well on the importance which the AU attaches to the work of the African Commission and sends mixed signals to member states that ultimately, human rights are not a priority to the AU (and by unfair inference, neither to the African Commission).

It is noted that the headquarters of the African Commission are to be provided by the host country, but that for the last seven years, the African Commission has included the issue of the construction of the headquarters of the African Commission on its agenda for discussion at every session. On 24 October 2001, the Foundation Stone was laid, but it is presently hidden by overgrown grass and no further concrete progress has been made as far as the construction of the headquarters is concerned.⁴³

Of more dire concern is the fact that African Commission seminars and missions often do not take place as scheduled due to lack of funding.⁴⁴ In terms of article 41 of the African Charter, the AU Commission bears the operating costs of the African Commission, including provision of necessary staff, means and services. It appears that the AU has recently taken this provision to heart because in the aftermath of repeated complaints voiced by, amongst others, Chairperson Salimata

⁴¹ Even though not directly attributable to any fault on the part of the AU, the AU is indisputably aware of the frequent electricity outages in The Gambia and the consequent problems that this has caused for the proper functioning of the African Commission. To overcome the adverse effects of this problem, the AU purchased a generator for the African Commission, but fuel shortages have at times undermined the 'back-up' efficiency of the generator. See in this regard 'Solution to Guinea, Senegal, Gambia energy crisis in sight' http://www.gambianow.com/news/Open-Forum/Analysis/Solution_to_Guinea_Senegal_Gambia_energy_crisis_in_sight.html (accessed 13 October 2007).

⁴² 18th Activity Report of the African Commission on Human and Peoples' Rights, adopted during the 7th ordinary session of the African Union Executive Council, held from 28 June to 2 July 2005 in Sirte, Libya, EX.CL/199 (VII) para 58.

⁴³ Resolution of the Construction of the Headquarters of the African Commission on Human and Peoples' Rights (2001) ACHPR/Res 58 (XXX) 01. See, further, the 22nd Activity Report of the African Commission on Human and Peoples' Rights adopted during the 11th ordinary session of the Executive Council of the African Union Commission, held from 25 to 29 June 2007 in Accra, Ghana, EX CL/364(XI), in terms of which the construction of the headquarters is reflected under item 13(b) 27.

⁴⁴ See in this regard the 17th Annual Activity Report of the African Commission on Human and Peoples' Rights, para 46, where it is stated that 'the Seminar on Economic, Social and Cultural Rights scheduled to take place from 20 to 24 September 2003 in Cairo, Egypt, did not take place due to lack of funding'.

Sawodogo, about the lack of adequate funds, compounded by the fact that the Commission was not given a voice as far as its budget was concerned, a significant development transpired during the 41st ordinary session of the Commission where it was resolved that as from January 2008, the Commission will present its budget directly to the Permanent Representatives Committee and the Executive Council of the AU. Time will tell whether this development will enable the Commission to resolve its recurring financial problems.⁴⁵

3.2 Security of (employment) tenure

During the first six months of 2005, approximately 85%⁴⁶ of the members of staff of the African Commission left the Commission and sought alternate employment, primarily due to insecurity of tenure. On a practical level or in terms of productivity, the effect of any rapid turnover in staff is that years of accumulated experience are suddenly lost. In the context of the new staff members of the African Commission, many had to begin with virtually no guidance or direction. These adverse consequences are compounded by the fact that, within a period of two years, the African Commission has had no less than three Secretaries to the Commission.⁴⁷ The seriousness of this fact becomes exacerbated when one considers that the Secretary to the Commission is tasked with the overall obligation of ensuring the efficient operation of the African Commission.

Closely related to the issue of tenure, is the aspect of the appointment of the Secretary to the Commission and its staff. Accordingly, article 41 of the African Charter dictates that the Secretary-General of the (O)AU appoints the Secretary and staff of the Commission and that the (O)AU shall bear the costs of such staff and services. This raises the issue of the independence of staff. Despite the undertaking in article 41 that costs shall be borne by the (O)AU, it is noted hereunder that, in fact, this has not proved to be the case and assistance has routinely been rendered by Western donors.

⁴⁵ As per Henok Teferra, Legal Affairs General-Directorate, Ministry of Foreign Affairs, Ethiopia, who attended the 41st ordinary session of the African Commission on Human and Peoples' Rights in Accra, Ghana from 16 to 30 May 2007 and advised the authors of this development.

⁴⁶ The Secretary, the Senior Legal Officer for the Protection of Human and Peoples' Rights, as well as three legal officers, the Financial and Administrative Officer, the Documentalist/Librarian, and the Public Relations Officer all left within a very short space of time and were replaced by relatively inexperienced staff who were not well-acquainted with the procedures of the African Commission.

⁴⁷ Mr Germain Baricako held the position of Secretary for 12 years and after his transfer to the AU office in Sudan in December 2005, he was replaced by Ms Adwoa Coleman. As of May 2007, Dr Mary Maboreke has taken over as Secretary to the Commission.

3.3 Status of decisions and the problem of state non-compliance

Possibly the most significant distinction that can be made between the African Commission and the proposed African Court is the status of the decisions handed down. Essentially, the decisions handed down by the African Commission are not binding on state parties. They are merely 'recommendations' that have to be transmitted to the AU Assembly for endorsement.⁴⁸ It is only once these recommendations are published in the African Commission's Annual Activity Report and approved by the Assembly that they become final.⁴⁹ While the African Commission has stated on more than one occasion that it considers its decisions as an authoritative interpretation of the African Charter and thus binding on states,⁵⁰ it was only in November 2006 that the African Commission took a determined stance and adopted a Resolution on the Importance of Implementation of the Recommendations of the African Commission on Human and Peoples' Rights, during its 40th ordinary session. This resolution supplements the pressure that had formerly been placed on states to report on the measures that they had taken towards implementing decisions of the African Commission when they submit their state reports pursuant to article 62 of the African Charter.

3.4 Heavy reliance on foreign donors and (Western) institutions for financial and personnel support

It is a significant feature of the African Commission that there are numerous reputable international organisations, usually based in the United Kingdom, Canada or Scandinavian countries, which provide sizeable funds to the Commission for the payment of, *inter alia*, salaries for Commission staff, which second highly competent and qualified lawyers to assist the Commission in achieving its mandate, and which undertake intensive research into how the functioning of the Commission as a whole might be improved. Likewise, the African Commission has become synonymous with young European, American and Canadian interns who undertake a perfunctory six-month stint in The Gambia, to 'help Africa'. As altruistic and as valuable this is, it serves to confirm how deprived the Commission is of African graduates who

⁴⁸ See, however, Viljoen & Louw (n 38 above) 48, who argue that there is a movement towards decisions being viewed as legally binding, one reason being that under the new AU structures, when the Assembly adopts after consideration the Commission's Annual Activity Report, '[t]he Assembly, as "parent" institution, takes legal responsibility for the findings of the Commission by way of its act of "adoption"' (10).

⁴⁹ Notwithstanding the nomenclature ('final'), upon pronouncement alone the African Commission's findings are not considered final. They are merely 'recommendations' to the political body that had given life to the African Commission, the OAU/AU Assembly. These findings become 'final' only when they are contained in the African Commission's Annual Activity Report and approved by the Assembly.

⁵⁰ R Murray *The African Commission on Human and Peoples' Rights and international law* (2000) 54-55.

might similarly enhance their professional careers through an internship at the Commission and whose own home-grown experience might benefit the Commission's work on African soil. Viewed from the perspective of the African Court, it is conceivable that in order to attain its objectives, reliance will once again be placed on foreign donors, who are more than willing to provide financial, technical and human resources. Upon closer analysis, the extensive reliance on donors can be construed as the antithesis to the initial establishment of the OAU, namely independence and a strong emphasis on sovereignty.⁵¹

3.5 Communications and the decision-making process

By its very nature, the African Court is intended to interpret and apply the provisions of the African Charter and any other relevant human rights instrument in order to make a determination as to whether or not a violation has occurred. The expeditious consideration of complaints of allegations of human rights is always a priority. However, with respect to the African Commission, a very real concern is its tendency to defer consideration of matters from one session to the next for further consideration, 'to enable the commissioners to have time to prepare adequately so as to make a decision'. By way of illustration, during the 37th ordinary session of the African Commission, the Commission considered 47 communications. It took decisions on seizure on six communications and decisions on admissibility on 26 communications, with only *one* decision on the merits. It further considered 14 other communications and decided to defer them to the 38th ordinary session pending the submission of supplementary information⁵² or at the request of the parties. Likewise, during the 41st ordinary session of the African Commission, the Commission considered 73 communications, in terms of which it was seized with 10 new communications, declared eight admissible, finalised only one and considered requests for review on three, while it deferred *sine die* consideration of one, and deferred 50 to the 42nd ordinary session for further consideration.⁵³ It is unclear how the Commission proposes to consider the existing 50 as

⁵¹ Of course, given its current cash-strapped reality, it is hardly surprising that the African Commission has looked to (and thus become reliant on) Western donors. That is hardly the Commission's fault. If it is to be released from such reliance, its own regional parent, the AU, should perform a better job of caring for it by providing the requisite financial assistance.

⁵² The request for supplementary information by the African Commission can be construed as a convenient mechanism for deferring consideration of the communication while at the same time deflecting 'responsibility' from the Commission for being unable to manage its time effectively so as to consider all the communications that require consideration.

⁵³ 22nd Activity Report of the African Commission on Human and Peoples' Rights adopted during the 11th ordinary session of the Executive Council of the African Union Commission, held from 25 to 29 June 2007 in Accra, Ghana, EX CL/364(XI) May 2007.

well as any additional communications during the 42nd ordinary session.

3.6 The African Commission's continued relevance within the African Union

The extent to which the African Commission will play an integral role in the AU's overall strategy on human rights remains to be seen. The transition to the AU has not been accompanied by a review of the African Charter or the Commission's Rules of Procedure, which are now out of date with regard to the institutions that have been set up under the AU structures.⁵⁴

Already under the OAU, the African Commission suffered from a severe shortage of funds, with the Commission pointing out to the OAU in 1998 that it 'could not carry out quite a number of activities, despite their importance, owing to the paucity of the human, financial and material resources needed to ensure its smooth-running'.⁵⁵ As pointed out earlier, the Commission's financial situation does not appear to have been improved under the AU. A further difficulty was that the OAU organs, while being obliged under the African Charter to enforce the decisions of the Commission, did little to proactively ensure that member states comply with their state reporting obligations or with adverse decisions of the Commission following communications received by non-state parties.⁵⁶ There is accordingly an urgent need for the AU to consider how the Commission's position might be strengthened within the new structures of the AU, and for the Commission to urge the political organs of the AU to take its supervisory role under the African Charter seriously.⁵⁷ The debate is all the more necessary in order to clarify the relationship between the African Commission and the numerous other bodies that exist now in the AU with their own remit for human rights. There is furthermore a need to clarify the role of the Commission *vis-à-vis* the proposed African Court of Justice and Human Rights, a topic to which we return below.

⁵⁴ Murray (n 7 above) 52.

⁵⁵ Interim Report on the Activities of the African Commission on Human and Peoples' Rights, CM 2056 (LXVII) para 22, cited in Murray (n 7 above) 55.

⁵⁶ For a full discussion of the relationship between the OAU/AU and the African Commission, see Murray (n 7 above) 49-72.

⁵⁷ A promising step is the adoption by the Commission of the Resolution on the Creation of a Working Group on Specific Issues Relevant to the Work of the African Commission on Human and Peoples' Rights (done at the 37th session of the African Commission, held from 27 April to 11 May 2005 in Banjul, The Gambia). For text of the resolution, see http://www.achpr.org/english/resolutions/resolution82_en.html (accessed 30 September 2007); ACHPR /Res.77(XXXVII)05.

4 The call for an African Court on Human and Peoples' Rights

Given the difficulties referred to above regarding the work and institutional effectiveness of the African Commission, within the first decade of the African Commission's existence, commentators perceived that the viability of the African Charter (and by inference, the African regional human rights system) was placed in a particularly precarious position as a direct result of the absence of an effective African Court dedicated to the question of human rights.⁵⁸ This view had become so pronounced in Africa that during the summit of Heads of State and Government of the OAU, held in Tunis, Tunisia in June 1994,⁵⁹ the decision was taken to establish a Court on Human and Peoples' Rights, which would complement and reinforce the African Charter.⁶⁰ The Court would serve the purpose of attaining the objectives of the African Charter, which is to ensure the protection of human rights on the continent.⁶¹ The Court would come into being to 'complement the protective mandate' of the Commission.⁶²

The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights was eventually adopted on 10 June 1998 at the Summit of Heads of State and Government in Ouagadougou, Burkina Faso.⁶³ In December 2003, the Court's Protocol achieved the required 15th ratification for

⁵⁸ FN Adjetejey 'Religious and cultural rights: Reclaiming the African woman's individuality: The struggle between women's reproductive autonomy and African society and culture' (1995) 44 *American University Law Review* 1375.

⁵⁹ B Kioko 'The road to the African Court on Human and Peoples' Rights' in African Society of International and Comparative Law, Tenth Annual Conference (1998) 70. During the summit, the Assembly adopted a resolution in which the Secretary-General of the organisation was called upon to summon experts to meet in order to deliberate on the establishment of an African Court on Human Rights.

⁶⁰ See generally 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 in practice, 1986-2000* (2002) 305; G J Naldi & K Magliveras 'Reinforcing the African system of human rights: The Protocol on the Establishment of a Regional Court of Human and Peoples' Rights' (1998) 16 *Netherlands Quarterly of Human Rights* 431; JC Mubangizi & A O'Shea 'An African Court of Human and Peoples' Rights' (1999) 24 *South African Yearbook of International Law* 257; M Mutua 'The African Human Rights Court: A two-legged stool?' (1999) 21 *Human Rights Quarterly* 342.

⁶¹ Preamble, Protocol to the African Charter on Human and Peoples' Rights on the Establishment of a Court on Human and Peoples' Rights, OAU/CAB/LEG/66.5.

⁶² Art 2 of the Court's Protocol.

⁶³ OAU/LEG/MIN/AFCHRP/PROT (III).

the Protocol to become operative.⁶⁴ South Africa ratified the Protocol on 3 July 2002.⁶⁵

The adoption of the African Court Protocol was an acknowledgment of the general ineffectiveness of the African human rights mechanism as being composed of only a Commission, particularly when regard was had to the institutional mechanisms that exist in other regions.⁶⁶ The expectation was that the Court would strengthen the regional system and aid it in realising its human rights promises.

Immediately apparent from a reading of the Protocol that established the Court is that the African Court on Human and Peoples' Rights was intended to have the authority to hand down binding court judgments against states found guilty of violating human rights. In addition, the Court was empowered to order that compensation be paid to victims of human rights abuses. This was one of the most remarkable aspects of the Court, because it sent a strong statement that impunity would no longer be tolerated while, at the same time, affording victims of violations the opportunity to have their dignity restored by way of payment of damages. Moreover, article 28(2) of the Protocol confirmed that the decisions of the African Court would be final and neither subject to appeal nor to political confirmation.⁶⁷ In terms of article 30 of the Protocol, the consequence would have been that the Court's decisions would be unequivocally binding on state parties. State parties would not only 'undertake to comply with the judgments in any case to which they are parties', but would also be responsible to 'guarantee its execution'. Institutional or systematic control over enforcement was provided in that the Executive Council had to be notified of judgments and was obliged to monitor their execution on behalf of the Assembly (article 29(2)). Non-compliance may have resulted in an AU decision, which in turn may have lead to the imposition of sanctions as envisaged under the AU Constitutive Act.

⁶⁴ Countries that have ratified the Protocol include Algeria, Burkino Faso, Burundi, Comores, Côte d'Ivoire, The Gambia, Lesotho, Libya, Mali, Mauritania, Rwanda, Senegal, South Africa, Togo and Uganda. In terms of art 34(3) of the Protocol, the Protocol came into force on 25 January 2004, 30 days after Comoros became the 15th state to deposit its instrument of ratification with the Secretary-General of the African Union.

⁶⁵ See further NB Pityana 'Hurdles and pitfalls in international human rights law: The ratification process of the Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights' (2003) 28 *South African Yearbook of International Law* 110.

⁶⁶ Nmehielle (n 36 above) 259.

⁶⁷ However, the Draft Protocol on the Establishment of an African Court of Justice and Human Rights introduces the right to appeal a decision, incorporating the principles of a fair trial. The right to appeal is subject to certain strict criteria.

5 Yet another change: From the African Court on Human and Peoples' Rights to the African Court of Justice and Human Rights

Commentators unanimously agree that the time has come to accede to the demands of Africans who feel it indispensable that the victims of human rights violations, or their representatives, be afforded recourse to judicial process on demand.⁶⁸ The African Court on Human and Peoples' Rights was heralded as an important — if not the most important — development to ensure that these demands would be met. Yet much of the fanfare that accompanied news of the Court's creation has now been diminished by news that the Court will not have a continued independent existence, but will rather be conjoined with the proposed African Court of Justice so that the two stand together as a composite Court — the African Court of Justice and Human Rights.

At its conception, the AU intended to establish two separate judicial institutions, being the African Court on Human and Peoples' Rights (African Court) and the African Union Court of Justice (ACJ). The ACJ was intended to be the principal judicial organ of the AU with its primary role being the authoritative interpretation, application and implementation of the Constitutive Act of the AU and the various Protocols. Its mandate also included the adjudication of contentious matters between state parties to the Constitutive Act on any issues referred to it by mutual agreement between states. The ACJ was not originally conceived to have competency to interpret the African Charter, although cognisance could be taken of the Charter. The African Court, by contrast, would focus on violations of the African Charter and would be the principal judicial arm by which the Charter would be enforced.

However, during the 3rd ordinary session of the Assembly of Heads of State and Government of the AU, a decision was taken to integrate the African Court on Human and Peoples' Rights and the African Court of Justice.⁶⁹ The effect is that the African Court on Human and Peoples' Rights will be subsumed into the African Union Court of Justice, hence the name 'African Court of Justice and Human Rights'.⁷⁰

⁶⁸ Nmehielle (n 36 above) 250.

⁶⁹ Decision on the seats of the organs of the AU, Assembly/AU/Dec 45(III) as read with Decision on the merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union, Assembly/AU/Dec 83(V), (Assembly/AU/6 (V)), taken during the 5th ordinary session of the Assembly of the AU held in Sirte, Libya, from 4 to 5 July 2005.

⁷⁰ The merger decision contrasts with an earlier decision taken, after much debate, by a meeting of African Ministers of Justice which had been convened to finalise the Protocol on the Court of Justice of the African Union (see AU Doc Assembly/AU/Dec 45 (III)).

The decision taken by the Assembly of Heads of State and Government raises important legal and practical issues. Difficulties with the merger of the two courts thus abound. At the level of vision and rhetoric, the obvious criticism is that human rights violations in Africa and the abysmal failure of the regional organisation to respond thereto are reason enough to motivate the AU to establish a self-standing judicial organ dedicated to the protection and enforcement of the provisions of the African Charter. From a practical perspective, the most obvious is that the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights has already entered into force, whereas the Protocol on the African Union Court of Justice has not yet done so. The decision to merge the courts brings into focus the legality of amendments to the two instruments establishing the Courts. Regard is to be had to article 40(2) of the Vienna Convention on the Law of Treaties, which provides that any amending agreement does not bind any state already a party to the treaty which does not become a party to the amending agreement. The result would be the anomalous situation whereby state parties are party to differing treaties on the same subject, giving rise to legal uncertainty and insurmountable problems with respect to enforcement.

Moreover, amendments would necessarily entail that article 5 of the Constitutive Act of the AU — which states in paragraph 1(d) that 'the Court of Justice is an organ of the Union' — be amended accordingly in order to reflect the fact that the composite court will replace the Court of Justice of the AU as an organ of the AU.

In the circumstances, a new legal instrument — the Draft Protocol and Statute of the African Court of Justice and Human Rights — has been drafted relating to the establishment of the merged court comprising the African Human Rights Court and the African Court of Justice.⁷¹ The instrument was considered by the Executive Council of the AU during its 9th session held in Banjul, The Gambia from 25 to 29 June 2006.⁷²

6 The merged court: A preliminary appraisal⁷³

Those advocates hoping for a dedicated human rights court to act as the principal judicial organ in respect of the African Charter have thus

⁷¹ The Draft Protocol appears to have been proposed at a meeting of the PRC and Legal Experts on Legal Matters at a meeting on 16-19 May 2006 in Addis Ababa, Ethiopia. See EX CL/211 (VIII) Rev 1, Annex 11.

⁷² In this regard, see art 1 of the Draft Protocol on the Statute of the African Court of Justice and Human Rights, EX CL/253 (IX), Annex II Rev.

⁷³ The appraisal is limited to being a preliminary one for two reasons: First, the information publicly available in respect of the merged court is so scant and difficult to access that any discussion of the Protocol must *per force* be undertaken with caution, and second, it is difficult to assess what the legal status is of the proposed Protocol and thus whether the existing information is not liable to further change.

far been disappointed.⁷⁴ Their disappointment is not without good reason. Before considering critically the difficulties inherent in the merger, it is important to highlight the apparent advantages of combining into one judicial body the African Court on Human and Peoples' Rights and the African Court of Justice.

From a human rights perspective, possibly the most important development is that *locus standi* before the merged Court has been broadened to include individuals and relevant human rights organisations accredited to the AU or any of its organs. The instrument merging the Courts provides in article 30, read with article 31, that state parties to the Protocol, the African Commission, African national human rights institutions, individuals and relevant non-governmental organisations accredited to the AU or to its organs shall be eligible to submit cases to the Court.

This is an important improvement on the Protocol that established the African Court on Human and Peoples' Rights, which included the prohibitive and much maligned article 34(6), which reads as follows:

At the time of the ratification of this Protocol or any time thereafter, the state shall make a declaration accepting the competence of the Court to receive cases under article 5(3) of this Protocol. The Court shall not receive any petition under article 5(3) involving a state party which has not made such a declaration.

The requirement of the article 34(6) declaration can be seen as a major obstacle to the essential rationale for the establishment of an African Human Rights Court — to ensure access to justice for *all* victims of human rights violations on the continent. However, it must be noted that the requirement of the article 34(6) declaration is not fatal, due to the fact that article 5(1)(a) of the Protocol permits the African Commission to submit cases alleging violations of individuals' rights to the Court. Nevertheless, the provision remains rightly criticised for undermining the aspirations expressed in the Preamble to the Protocol, which sought to place the Protocol in the wider context of a natural progression in the achievement of the legitimate aspirations of the African people and drew a causal link between the objectives of the (O)AU, including freedom, equality and justice, and the establishment of the Court.⁷⁵ From a cursory reading, article 34(6) had the effect of reinforcing the contention that human rights are at the behest of states,

⁷⁴ As an example of such disappointment well articulated, see the African Commission on Human and Peoples' Rights Resolution on the Establishment of an Effective African Court on Human and Peoples' Rights adopted at the 37th session of the African Commission, held from 27 April to 11 May 2005 in Banjul, The Gambia (for text see http://www.achpr.org/english/resolutions/resolution81_en.html) and Amnesty International 'Open letter to the Chairman of the African Union (AU) seeking clarifications and assurances that the establishment of an effective African Court on Human and Peoples' Rights will not be delayed or undermined' IOR 63/008/2004, 5 August 2004.

⁷⁵ Naldi & Magliveras (n 60 above) 433.

because the ultimate prerogative lay with the state as to whether or not they would issue an article 34(6) declaration. By the time of the decision to merge the two courts, only one state had made the requisite declaration. That is a sad reflection on the commitment on the part of African states to respect and protect human rights. The worrying thing was that article 34(6) gave protective cover to recalcitrant governments — its message was clear: You need not take this Protocol or the Court seriously.

Aside from the improvement in *locus standi*, it is also important to note that there has been no undermining of the ability of the African Court of Justice and Human Rights to issue final and binding decisions which, importantly, may be backed by political sanction by the AU. It is trite that human rights protection is routinely viewed as being at the behest of states on the African continent. This is more than obvious from the failure of states responsible for human rights violations to implement the recommendations of the African Commission. What may be viewed then as a step in the right direction and a move away from vesting power in hypocritical states is the fact that the African Court of Justice and Human Rights (like the African Court) has the authority to issue final and binding decisions.⁷⁶ Moreover, the Executive Council of the AU will be tasked with the responsibility of monitoring the execution of the Court's decisions, on behalf of the AU Assembly.⁷⁷ In addition, the African Court of Justice and Human Rights may refer cases of non-compliance with its judgments to the AU Assembly, which shall decide upon measures to be taken to give effect to that judgment, and which may thereby impose sanctions by virtue of paragraph 2 of article 23(2) of the Constitutive Act.⁷⁸

Putting these positive aspects aside, there remain significant concerns about the merged Court and its ability, from an African Charter perspective, properly to do justice to the human rights of Africans. For one thing, the merger has been confused and confusing. For example, article 2 of the (original) Protocol to the African Court provided for a system of complementarity between the African Commission and the African Court, which has generally been interpreted to mean that the Court would complement and reinforce the Commission. That close symbiosis is not replicated in the Draft Protocol⁷⁹ that merges the African Court with the African Court of Justice, although the Commission is one of the eligible parties that are provided power to bring a case before the Court. However, in order for this referral power to work effectively, the Rules of Procedure of the African Commission have to

⁷⁶ Art 47(1) of the Draft Statute of the African Court of Justice and Human Rights, EX CL/211 (VIII), Annex II Rev 1. This is a replication of the provisions of arts 28(2) & 30 of the Protocol, which accorded the African Court the same powers.

⁷⁷ Art 44(6) Draft Statute (n 76 above).

⁷⁸ Arts 47(4) & (5).

⁷⁹ EX CL/211 (VIII).

be amended and brought into conformity with the Rules of Procedure of the African Court. At present, the Rules of Procedure of the merged Court are in the process of being written. Once these have been finalised, it is anticipated that a meeting will take place between the African Commission and the African Court in order to align the two sets of Rules of Procedure. However, the delays that have characterised the establishment of the African Court are indicative of a general malaise that has beset the idea of an African Human Rights Court — the lack of deliberate speed to implement the system and to ensure an up-and-running court as the judicial arm responsible for the enforcement of the African Charter. A significant amount of valuable time is being wasted while the system remains in limbo. The merger decision and its implications have simply prolonged the wait for an African Court dedicated to human rights.

Moreover, while 11 judges were originally selected to sit on the African Court on Human and Peoples' Rights, confusion sets in when one considers that article 3 (Composition) of the Draft Protocol of the merged Court requires that '[t]he Court shall consist of fifteen (15) judges who are nationals of states parties'. The Draft Protocol thus provides that '[t]he term of office of the judges of the African Court on Human and Peoples' Rights shall end following the election of the judges of the African Court of Justice and Human Rights', but that 'the judges shall remain in office until the newly elected judges of the African Court of Justice and Human Rights are sworn in'.⁸⁰ The judges of the African Court on Human and Peoples' Rights have been selected to an institution that is at best moribund, and, at worst (depending on the speed with which the Draft Protocol merging the Court comes into force) stillborn. This is not simply a waste of time and money; it is emblematic of a shambolic approach to the AU's human rights commitments.

The muddle and mess created by the merger could hardly be more apparent than from the transitional provisions in the Draft Protocol which reflect a noble but ultimately confusing effort on the part of the drafters to make sense of the merger of the two Courts, let alone ensure the workability of the final product. Aside from the attempt mentioned already to keep some transitional role open for the incumbent judges of the African Court on Human and Peoples' Rights, the Draft Protocol speaks about a transitional role for such a Court (as though it were already firmly in place with a well-established docket of cases that it were ploughing through). It provides in article 5:

Cases pending before the African Court on Human and Peoples' Rights, including those which have not been concluded before the entry into force of the present Protocol, shall be transferred to the Human Rights Section of the African Court of Justice and Human Rights.

⁸⁰ Art 4 Draft Protocol.

The only way to make sense of this provision is to read into it an acknowledgment (or worse, a prediction) on the part of the drafters, that the merged Court is unlikely to become a legal reality for some time. Presumably when the merger becomes at some future point a reality, then the provisions of article 7 of the Draft Protocol will become relevant. Article 7 provides as follows:

The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights shall remain in force for a transitional period not exceeding one (1) year or any other period determined by the Assembly, after entry into force of the present Protocol, to enable the African Court on Human and Peoples' Rights to take the necessary measures for the transfer of its prerogatives, assets, rights and obligations to the African Court of Justice and Human Rights.

The situation is far from satisfactory and it must be open to question how long it will take for the merged African Court of Justice and Human Rights to come into existence. In the interim, a heavily denuded African Court on Human and Peoples' Rights is expected to carry the hopes of human rights victims. This is obviously unsatisfactory, and not only because of the lack of clarity about the merger and the African Court on Human and Peoples' Rights' continued mandate. It is a court staffed by judges who know that they are presiding over a tribunal that, if it comes to hear any cases at all, is moribund from the start, and which is beset by inherent problems such as article 34(6) of the Protocol establishing an African Court on Human and Peoples' Rights. To be a judge of the African Court on Human and Peoples' Rights is to sit in an uneasy twilight zone. The real victims of this confused state of affairs, it hardly needs mention, are the African victims of human rights violations.

7 Conclusion — A court not found?

In attempting to complete this article, we were confronted with the almost impossible task of accessing relevant and official documentation regarding the merged Court. What should be a simple task of discerning what developments have in fact taken place in respect of the merger is made complicated by the lack of ready information available within the AU or its affiliated bodies. An example of this is the fact that the websites of both the AU and the African Commission are usually not updated regularly and there is very little continuity with regard to the information that is published. It has been over three years since the decision was taken to merge the AU Court of Justice and the African Court on Human and Peoples' Rights and yet, at the time of writing in November 2007, there is still no conclusive information on the single instrument which is to govern the proposed Court. As mentioned earlier, a document entitled 'Draft Protocol and Statute of the African Court of Justice and Human Rights' was tabled before the African Commission during its 39th ordinary session in May 2006, but

over one year later, there has been no further information forthcoming on the status of this Protocol, nor are we much closer to having an established and fully-functioning African Court on Human and Peoples' Rights as an interim measure. The AU website is even less helpful when it comes to sourcing up-to-date information concerning the African Court on Justice and Human Rights. The 'archives' only go back a few months and invariably, when one clicks on an icon to read further on the decisions of the AU Assembly of Heads of State and Government in respect of the proposed merged African Court, one is informed that 'the page cannot be found'.

It is imperative that the AU asserts itself firmly in respect of the merged Court. The confusion that abounds regarding the merger, the future work of the Court, the election of its judges, the relationship between the Court and the African Commission, to mention only the most obvious concerns, is prevalent and concerning. Without clarity, direction and meaningful public information, there is a real danger that the website's message becomes a precursor for something far more damning — that the Court itself 'cannot be found'.