

## Observations on the Rules of the African Court on Human and Peoples' Rights

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### Summary

*The African Court on Human and Peoples' Rights was established by the 1998 Protocol to the African Charter on Human and Peoples' Rights. On 2 June 2010, its Rules of Court came into force. Rules of procedure are designed to supplement and fill in any gaps in the parent treaty. They are an essential part of the workings of many international bodies, including judicial organs. These Rules, which have a bearing on important aspects of the Court's functioning, are discussed in this article. The article does not undertake an exhaustive analysis of the whole set of Rules; it focuses on those Rules that may help to clarify or not, as the case may be, any obscurities or difficulties associated with the parent Protocol. The contribution covers the Rules pertaining to the composition of the African Human Rights Court; the Court's contentious procedure; and the Court's advisory opinions mandate. In the discussion, the Court's Rules are linked to those of the African Commission on Human and Peoples' Rights. The analysis concludes that the Rules of Court of the African Human Rights Court largely correspond to those of other regional courts. Although there are gaps and omissions, the Court has embarked on a process of addressing these issues through its jurisprudence, although at times raising questions of its own.*

**Key words:** *African Court on Human and Peoples' Rights; African Commission on Human and Peoples' Rights; Rules of Court; Rules of Procedure; interpretation and application of Rules of Court*

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## 1 Introduction

The Protocol on the Establishment of an African Court on Human and Peoples' Rights (Protocol) was adopted by the Organisation of African Unity (OAU) in 1998<sup>1</sup> and entered into force on 25 January 2004.<sup>2</sup> As of 16 April 2014, the Protocol has been ratified by 27 member states.<sup>3</sup> The African Court on Human and Peoples' Rights (African Court), together with the African Commission on Human and Peoples' Rights (African Commission), established under article 30 of the African Charter on Human and Peoples' Rights (African Charter),<sup>4</sup> is meant to form a comprehensive continental supervisory mechanism with the mandate to examine whether contracting parties give effect to their obligations and to pronounce on claims of human rights violations perpetrated by states.<sup>5</sup> The African Court technically has been in existence for ten years at the time of writing, but became operational

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- 1 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted by the Assembly of Heads of State and Government, 34th ordinary session, Ouagadougou, Burkina Faso, 8-10 June 1998, <http://au.int>, reproduced in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2013) 41. Note that mention in the Protocol of the OAU should now be taken to refer to the African Union (AU).
  - 2 Upon ratification by 15 states, see art 34(3) Protocol. For analysis, see F Viljoen *International human rights law in Africa* (2012) 410-466; GW Mugwanya *Human rights in Africa: Enhancing human rights through the African regional human rights system* (2003) 315-336; VO Nmeihelle *The African human system: Its laws, practice and institutions* (2001) 259-308; J Harrington 'The African Court on Human and Peoples' Rights' in MD Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2000* (2002) 305-334; N Krisch 'The establishment of an African Court on Human and Peoples' Rights' (1998) 58 *Heidelberg Journal of International Law* 713; GJ Naldi & KD Magliveras 'Reinforcing the African system of human rights: The Protocol on the Establishment of a Regional Court on Human and Peoples' Rights' (1998) 16 *Netherlands Quarterly on Human Rights* 431; NJ Udombana 'Toward the African Court on Human and Peoples' Rights: Better late than never' (2000) 3 *Yale Human Rights and Development Law Journal* 45. The Court has its own website, <http://www.african-court.org>. Its judgments are available at [http://www.african-court.org/en/cases/judgments\\_and\\_orders/](http://www.african-court.org/en/cases/judgments_and_orders/). Basic facts on the Court can be found at the following website: [http://www.aict-ctia.org/courts\\_conti/achpr/achpr\\_home.html](http://www.aict-ctia.org/courts_conti/achpr/achpr_home.html) (accessed 31 July 2014).
  - 3 Algeria, Burkina Faso, Burundi, Comoros, Congo, Côte d'Ivoire, Gabon, The Gambia, Ghana, Kenya, Libya, Lesotho, Malawi, Mali, Mauritania, Mauritius, Mozambique, Niger, Nigeria, Rwanda, Senegal, South Africa, Tanzania, Togo, Tunisia and Uganda.
  - 4 Adopted in 1981, the African Charter entered into force in 1986, 1520 UNTS 217, reprinted in (1982) 21 *International Legal Materials* 58, and Heyns & Killander (n 1 above) 29. All AU member states, with the exception of South Sudan, are contracting parties to the African Charter.
  - 5 Art 2 of the Protocol states that the Court shall complement the African Commission's protective mandate. The Commission is a quasi-judicial organ with powers akin to those of the UN Human Rights Committee. Rule 3 of the Rules of Procedure of the African Commission on Human and Peoples' Rights (Rules) describes it as 'an autonomous treaty body working within the framework of the African Union to promote human and peoples' rights and ensure their protection in Africa', [http://www.achpr.org/files/instruments/rules-of-procedure-2010/rules\\_of\\_procedure\\_2010\\_en.pdf](http://www.achpr.org/files/instruments/rules-of-procedure-2010/rules_of_procedure_2010_en.pdf), reproduced in Heyns & Killander (n 1 above) 182.

only relatively recently, and it is now dealing with a significant number of applications and has given its first judgments.<sup>6</sup> A number of commentators considered that the Protocol was deficient in certain regards, containing ambiguities of language and *lacunae*, but that any such difficulties would most probably be remedied by the Court's Rules of Procedure.<sup>7</sup> Rules of Procedure are designed to supplement the Protocol and may be said 'to provide such indications as are indispensable for litigant parties' and 'to inform those who are responsible for the conduct of a case before the Court what steps have to be taken, and when and how'.<sup>8</sup> Pursuant to the wide powers conferred upon it by article 33 of the Protocol, the African Court and the African Commission set to work on drafting a harmonised set of Rules and, on 2 June 2010, the Court's Rules of Procedure (Rules of Court) came into force.<sup>9</sup> The purpose of the present article is to consider those Rules of Court that invite attention; it is not intended as a full treatment of the whole set of Rules. Some are dealt with only cursorily or are not touched on at all; the discussion is limited to those salient Rules of Court that may help to clarify the problems associated with the parent Protocol or, indeed, any remaining difficulties.

## 2 Overview of the African Court's Rules of Procedure

The constitution of the Court is covered by Part I (Rules of Court 2-19), while Part II deals with the Registry (Rules of Court 20-25). Issues concerning the jurisdiction of the Court, including its contentious procedure and its advisory procedure, are governed by Parts III-V

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The Rules were adopted in May 2010. In *Good v Botswana* (2010) AHRLR 43 (ACHPR 2010) paras 53-55, the African Commission dismissed Botswana's submission that the Commission had ceased to exist along with the OAU on the ground that only the termination of the African Charter could affect the Commission's existence. The continuing operation of the African Charter amounted to an acceptance of the Commission's jurisdiction. Furthermore, as a body working within the framework of the OAU, the Commission devolved to the AU. On the Commission's mandate, see Viljoen (n 2 above) 216-19 310-417; EA Ankumah *The African Commission on Human and Peoples' Rights: Practice and procedure* (1996) 20-21; K Magliveras & G Naldi *The African Union* (2009) paras 318-33.

6 The Court handed down its first judgment on 15 December 2009 in the case of *Michelot Yogogombaye v Republic of Senegal* App 001/2008. Its first case on the merits was that of *Tankanyika Law Society and The Legal and Human Rights Law Centre and Reverend Christopher Mtikila v Tanzania* App 009 & 011/2011 (14 June 2013),

7 See, eg, Naldi & Magliveras (n 2 above).

8 Quoted in MO Hudson *The Permanent Court of International Justice 1920-1942* (1943) 271. According to one distinguished authority, the Rules of Court, as extensions of the parent statutes, are possessed of binding force; S Rosenne 'Some reflections on the 1978 Revised Rules of the International Court of Justice' (1981) 19 *Columbia Journal of Transnational Law* 235 236. Rule 44(B) of the European Court of Human Rights (European Court) <http://www.echr.coe.int> suggests that the Rules are considered binding.

9 Rule of Court 76. The Rules of Court are available at <http://www.african-court.org> (accessed 31 July 2014).

(Rules of Court 26, 27-67, 68-73) while final miscellaneous issues are dealt with by Part VI (Rules of Court 74-76). The official and working languages of the Court are those of the African Union (AU).<sup>10</sup> The Court meets four times a year, each session lasting a fortnight,<sup>11</sup> but extraordinary sessions may also be convened.<sup>12</sup> It is reiterated that its jurisdiction extends to cases and disputes concerning the interpretation and application of the African Charter; the Protocol<sup>13</sup> and any other relevant human rights instrument that a state party has ratified;<sup>14</sup> advisory opinions on any legal matter relating to the African Charter or other relevant human rights instrument, which must not relate to a pending application before the Commission;<sup>15</sup> the promotion of amicable settlements;<sup>16</sup> the interpretation of its own judgments;<sup>17</sup> and the revision of its own judgments.<sup>18</sup> The fact that the African Court is granted jurisdiction over other human rights instruments is worthy of comment. Its pioneering character sets it apart from its American and European counterparts which by contrast have a limited competence.<sup>19</sup> It is potentially sweeping in scope and has been described as bestowing upon the Court an 'almost unlimited substantive jurisdiction'.<sup>20</sup> In interpreting the applicable law, the Court has relied on article 60 of the African Charter to take account of 'instruments' which are not in fact treaties but which nevertheless play a central role in the corpus of human rights law, such as the Universal Declaration of Human Rights 1948 (Universal Declaration).<sup>21</sup> The Rules of Court reaffirm that it is for the Court to determine its own

10 Rule of Court 18(1)-(2). Compare art 25 of the Constitutive Act of the African Union 2000, 2158 UNTS 3, reprinted in Heyns & Killander (n 1 above) 4, and art 32 of the Statute.

11 Rule of Court 14(1).

12 Rule of Court 15(1).

13 Which extends to provisional measures, *In the Matter of the African Commission on Human and Peoples' Rights v Libyan Arab Jamahiriya (Provisional Measures)* Application 002/2013 (25 March 2013) para 11.

14 Rule of Court 26(1)(a). Compare art 3(1) of the Protocol. In *Emmanuel Joseph Uko & Others v Republic of South Africa* App 004/2012 (30 March 2012), eg, the applicant claimed violations of the International Covenant on Civil and Political Rights 1966, 999 UNTS 171 (ICCPR).

15 Rule of Court 26(1)(b). Compare art 4(1) of the Protocol.

16 Rule of Court 26(1)(c). Compare art 9 of the Protocol.

17 Rule of Court 26(1)(d). Compare art 28(4) of the Protocol.

18 Rule of Court 26(1)(e). Compare art 28(3) of the Protocol.

19 Art 32(1) European Convention on Human Rights 1950 (as amended), CETS 194, <http://www.conventions.coe.int> (accessed 31 July 2014) (European Convention). The Inter-American Court of Human Rights can give advisory or interpretative rulings on such treaties only, Art 64(1) American Convention on Human Rights 1969, 1144 UNTS 123, <http://www.oas.org/juridico/english/treaties> (American Convention), and art 60 of its Rules of Procedure, <http://www.corteidh.or.cr> (accessed 31 July 2014). Compare 'Other treaties' subject to the consultative jurisdiction of the Court (Art 64 of the American Convention on Human Rights), Advisory Opinion, [1982] (Ser A) No 1.

20 Harrington (n 2 above) 318.

21 *Frank David Omary & Others v Tanzania* App 001/2012 (28 March 2014) paras 71-77.

jurisdiction if its competence is challenged.<sup>22</sup> This power corresponds to a fundamental principle of international law, namely, 'the inherent power of a tribunal to interpret the text establishing its jurisdiction'.<sup>23</sup> The procedure in contentious cases consists primarily of written proceedings, and oral proceedings only if considered necessary.<sup>24</sup> Cases are heard in open court,<sup>25</sup> although it may decide, at its own initiative or at the request of the parties, that they be held *in camera* in the interests of public morality, public safety or public order.<sup>26</sup> A safeguard exists in that the Court must provide a reasoned explanation based on the listed grounds for its decision.<sup>27</sup> At any stage of the pleadings, the Court may order the joinder of interrelated cases and pleadings if considered appropriate.<sup>28</sup> The use of the phrase 'any stage of the pleadings' rather than 'proceedings' may suggest that the Court enjoys a narrower discretion in this field. Following the conclusion of the hearings, the Court deliberates in private<sup>29</sup> and then delivers its judgment, which must be taken by majority,<sup>30</sup> in open Court.<sup>31</sup> Moreover, judgments must be reasoned,<sup>32</sup> and separate and dissenting opinions may be attached.<sup>33</sup> The Court's judgments are final and not subject to appeal.<sup>34</sup> They are also binding on the parties.<sup>35</sup> It is interesting to note that in an innovative move the Court

22 Rule of Court 26(2); *Femi Falana v African Union* App 001/2011 (26 June 2012) para 57. Compare art 3(2) of the Protocol.

23 See the *Nottebohm case (Liechtenstein v Guatemala) (Preliminary Objection)* [1953] ICJ Rep 111, 119. Compare art 36(6) of the Statute of the International Court of Justice (ICJ), <http://www.icj-cij.org> (accessed 31 July 2014), art 32(2) European Convention. On the approach of the Inter-American Court, see, eg, *Constitutional Court v Peru (Competence)* [1999] (Ser A) No 55 and, further, JM Pasqualucci *The practice and procedure of the Inter-American Court of Human Rights* (2003) 33-36.

24 Rule of Court 27(1). The Court may put questions to the parties; Rule of Court 47(1).

25 Rule of Court 43(1). Compare art 10(1) of the Protocol.

26 Rule of Court 43(2). Both the Inter-American Court and the European Court indicate that this should happen only in 'exceptional circumstances'; art 24(1) Inter-American Court Statute, <http://www.corteidh.or.cr>; art 14(1) Inter-American Court Rules of Procedure, and European Court Rule 63(1) which, according to European Court Rule 63(2), includes grounds such as the interests of morals, public order or national security, the interests of juveniles or protection of the private life of the parties.

27 Rule of Court 43(3).

28 Rule of Court 54. This was so in *Tankanyika Law Society and The Legal and Human Rights Law Centre and Reverend Christopher Mtikila v Tanzania* App 009 & 011/2011 (22 September 2011), where the subject matter and the defendants were the same in both cases. Compare art 28(1) of the Inter-American Court Rules.

29 Rules of Court 59(1) & 60(1).

30 Rule of Court 60(3). Compare art 28(2) of the Protocol.

31 Rule of Court 61(3). Compare art 28(5) of the Protocol.

32 Rule of Court 61(1). Compare art 28(6) of the Protocol.

33 Rule of Court 60(5). Compare art 28(7) of the Protocol. Judge Ouguergouz has already made extensive use of this privilege; see, eg, *Michelot Yogogombaye v Senegal* (n 6 above).

34 Rule of Court 61(4). Compare art 28(2) of the Protocol.

35 Rule of Court 61(5). Compare art 30 of the Protocol, according to which state parties to a case 'undertake to comply with the judgment ... and to guarantee its execution'.

is required to render its judgment within 90 days of having completed its deliberations.<sup>36</sup> This seems a sensible expectation in the context of the protection of human rights. It is common knowledge that the European system underwent reform because the original system found it ever more difficult to cope with the increasing workload and the length of time it was taking to deal with cases.<sup>37</sup> However, the snag that may emerge is that the deliberations may be inordinately lengthy. In *Mtikila v Tanzania*, a year elapsed between the hearings and the judgment.<sup>38</sup> It is incumbent on the President of the Court to set reasonable time limits for deliberations in its internal judicial practices.

It seems implicit in the Rules of Court that corrections may be made to insignificant errors or omissions in judgments or opinions.<sup>39</sup>

Rule of Court 30 states that each party will bear its own costs unless the Court decides otherwise.<sup>40</sup> However, article 10(2) of the Protocol and Rule of Court 31 make provision for the possibility of free legal representation in the interests of justice. Given the lack of means in many parts of Africa, this circumstance may ensure that justice is not denied but it will only prove effective if proper funding is forthcoming.

The Rules of Court contain a reaffirmation of the principle *pacta sunt servanda* in that state parties to a case are under an obligation to co-operate with the Court so that all notices, communications and summonses addressed to persons in their territory or under their jurisdiction are executed.<sup>41</sup> This is also true for any proceeding that the Court holds in the territory of a state party to a case.<sup>42</sup> This duty extends also to other states.<sup>43</sup> Given a real fear of retribution for challenging state authorities, the Court, in providing some protection for applicants, witnesses or legal representatives,<sup>44</sup> is seeking to preserve the integrity of the proceedings. A state that fails to protect such individuals could ultimately be found to be in breach of its treaty obligations.

The Protocol is silent on the publication of judgments, but the Rules make provision for the publication of the Court's judgments, advisory

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36 Rule of Court 59(2). Compare art 28(1) of the Protocol.

37 See DJ Harris *et al* Harris, O'Boyle and Warbrick: *Law of the European Convention on Human Rights* (2009) 34-36.

38 *Mtikila v Tanzania* (n 6 above).

39 Rule of Court 25(2)(i).

40 See *Michelot Yogogombaye v Senegal* (n 6 above) paras 41-45.

41 Rule of Court 32(1). See art 24 of the Inter-American Court Rules; see Pasqualucci (n 23 above) 187-188. Art 34 of the European Convention may have a broader scope; Harris *et al* (n 37 above) 820-821.

42 Rule of Court 32(2).

43 Rule of Court 32(3).

44 See art 50 of the Inter-American Court Rules in relation to witnesses and expert witnesses.

opinions, orders, and so on.<sup>45</sup> These are available on the Court's website.

The Court has the sole power to effect revisions to its Rules.<sup>46</sup> However, in order to ensure a harmonious working association, the Court must consult the African Commission with regard to any changes to the Rules of Court and any issues of procedure governing their relationship.<sup>47</sup> It may be that only the Court or individual judges may initiate amendments, but the wording of Rule of Court 74(2) may not in fact be so limiting since it fails to specify from whom a proposal for amendment should emanate. It may therefore be open to member states<sup>48</sup> or the Commission to suggest proposals for change for the Court's consideration.

### 3 Composition of the African Court

The Court is composed of 11 judges<sup>49</sup> and cases are heard by the full Court. Neither the Protocol nor the Rules of Court make provision for the creation of chambers.<sup>50</sup> This is a situation that may need to be revisited should the Court attract a heavy workload.

The procedure set out in the Protocol for the election of judges raised an important issue in that article 14(3) thereof calls for 'adequate gender representation' on the bench. Even though this progressive formulation arguably constitutes an improvement on other comparable bodies,<sup>51</sup> it does not spell out how this 'adequate representation' is to be achieved, nor whether any minimum numbers are desirable. Disappointingly, the Rules of Court do not elucidate the matter. Rule 13 states, *inter alia*, that '[t]he members of the Court shall pursue, to the greatest extent possible, a policy aimed at securing a balanced representation of gender'. There is an element of

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45 Rules of Court 25(2)(i) & 65.

46 Rule of Court 74(1). A proposed amendment requires the support of a minimum of seven judges to be adopted, Rules of Court 74(5) & 75.

47 Rule of Court 29(2); Rule of Commission 115(4).

48 State parties may submit proposals for amendments to the Protocol; art 35(1) Protocol.

49 Art 11(1) Protocol.

50 See arts 26-29 of the ICJ Statute. See JG Merrills *International dispute settlement* (1998) 140-145.

51 Note European Court Rule 14 which seeks to secure a 'balanced representation of the sexes', and see *Certain legal questions concerning the lists of candidates for the election of judges to the European Court of Human Rights*, Advisory Opinion of 2008, <http://www.echr.coe.int/ENG/Judgments.htm> (accessed 31 July 2014), where the European Court expressed the view that flexibility was necessary. However, art 5(2) of the Statute of the African Court of Justice and Human Rights specifies 'equitable gender representation', which arguably sets a more demanding requirement. The Statute is annexed to the as yet unratified Protocol on the Statute of the African Court of Justice and Human Rights 2008, <http://au.int>, which aims to replace the current Court. See GJ Naldi & KD Magliveras 'The African Court of Justice and Human Rights: A judicial curate's egg' (2012) 9 *International Organisations Law Review* 383.

discretion, therefore, and there does not appear to be any absolute guarantees that any of the judgeships will necessarily be filled by women.<sup>52</sup>

Similar considerations apply in relation to the direction to the Assembly contained in article 14(2) of the Protocol, that Africa's main regions and their principal legal traditions be represented on the Court. As has been seen, Rule of Court 13 simply requires a policy to this end.<sup>53</sup>

According to article 18 of the Protocol, the function of a judge is incompatible with any activity that might interfere with his or her independence or impartiality or the demands of the office. Exactly what activities come within the scope of a prohibited activity was left to the Rules of Court to determine. Rule of Court 5(2) specifically lists political, diplomatic or administrative positions or function as government legal advisers at the national level, but the use of the adverb 'in particular' indicates that other occupations are not excluded.<sup>54</sup>

Regarding suspension or removal from office under article 19 of the Protocol, Rule of Court 7 requires that the judge in question be informed in writing by the President of the Court. The impugned judge will be able to defend himself or herself at a specially-convened private session of the Court and a decision will be reached by the rest of the Court at a further special private session. The decision will be communicated to the Chairperson of the AU Commission.<sup>55</sup>

In order to avoid any semblance of partiality, article 22 of the Protocol does not allow a judge who is a national of a state that is a party to a case to hear it.<sup>56</sup> Additionally, a judge is also prohibited from hearing a case concerning the state that elected him or her.<sup>57</sup>

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52 Although two of the current judges are women, Justice Akuffo, President of the Court, and Justice Thompson, <http://www.african-court.org/en/index.php/about-the-court-judges> (accessed 31 July 2014).

53 Art 3(3) of the Statute is more specific, stating that, where possible, each geographical region of Africa is to be represented by three judges except for the Western Region which will have four judges. As at June 2014, the judges hail from Algeria, Burundi, Côte d'Ivoire, Ghana, Kenya, Malawi, Nigeria, Senegal, South Africa, Tanzania and Togo, <http://www.african-court.org/en/index.php/about-the-court/judges/> (accessed 31 July 2014). See European Court Rule 25(2).

54 See art 16(1) of the ICJ Rules, <http://www.icj-cij.org>. The specification in art 15(4) Protocol that all judges, save for the President, are part-time could act as a deterrent to potential candidates.

55 A negative decision can be reversed by the Assembly; see art 19(2) of the Protocol.

56 See also Rule of Court 8(2). In consequence, Judge El Hadj Guissé, a national of Senegal, recused himself from hearing the case of *Michelot Yogogombaye v Senegal* (n 6 above). See also, eg, *Association Juriste d'Afrique pour la Bonne Gouvernance v Ivory Coast* App 006/2011 (16 June 2011). According to European Court Rule 13, judges are prevented from presiding in cases involving a contracting party of which they are nationals. Other jurisdictions do not have such concerns; see art 31(1) of the ICJ Statute and art 55(1) of the American Convention.

57 Rule of Court 8(3). Presumably this refers to a state party that nominated the judge.

The Rules seek to avoid conflicts of interest by requiring a judge who has had previous involvement or a personal interest with a case to recuse himself or herself.<sup>58</sup> However, the Rules do not stop there and proceed to set a higher threshold. Thus, a judge who has expressed public pronouncements, through the media or academic writings perhaps, or *for any other reason* that may undermine or lead his or her impartiality and independence to be questioned, is disqualified from the case.<sup>59</sup> Unlike some other jurisdictions, the President of the Court is not given the power to exclude a judge from a case.<sup>60</sup> No provision is made for replacing a judge in such circumstances with an interim or substitute judge.<sup>61</sup>

## 4 Contentious procedure

### 4.1 Overview

According to article 2 of the Protocol, the Court is to complement the protective mandate of the Commission in accordance with the terms of the African Charter.<sup>62</sup> The Rules seek to address some of the questions left unanswered by this provision. Thus, the two bodies are to meet at least once a year or whenever considered necessary in order to ensure a good working relationship between them.<sup>63</sup> This should help ensure that any duplication between the two bodies is minimised.

Article 5 of the Protocol and Rule of Court 33 define the Court's jurisdiction *ratione personae*. The initial observation to be made is that the category of persons entitled to submit cases to the Court is extensive, considerably broader than other regional systems, and includes, under article 5(1) of the Protocol, the African Commission, state parties, African intergovernmental organisations (IGOs), the regional economic communities (RECs), for instance. The jurisdiction of the Court to entertain applications from these entities is automatic. The Commission may initiate a case directly before the Court in accordance with article 5(1)(a) of the Protocol and Rule of Court 33(1)(a), and includes requests for provisional measures of protection.<sup>64</sup> Alternatively, it may refer a communication to the Court at any stage of the examination.<sup>65</sup> In addition, it may refer any decision on a communication that a state has not complied with or

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58 Rule of Court 8(4)(a)-(b). Compare art 19(1) of the Inter-American Court Statute and European Court Rule 28(2).

59 Rule of Court 8(4)(c)-(d) (my emphasis).

60 Art 14(2) of the Statute. Compare art 19(3) of the Inter-American Court Statute.

61 See art 19(4) of the Inter-American Court Statute and European Court Rule 29(1)(a)-(b).

62 See also Rule of Commission 114(1).

63 Rule of Court 29(1)(a); Rule of Commission 115(1).

64 *African Commission on Human and Peoples' Rights v Libya* (n 13 above) para 13.

65 Rule of Commission 118(4).

will not comply with.<sup>66</sup> The Commission may similarly refer instances of non-compliance with provisional measures of protection.<sup>67</sup> However, Rule 29(6) of Court Rules provides that a communication before the Commission must be withdrawn if the case submitted to the Court relates to issues in that communication. This is an expression of the *lis pendens* principle. By the same token, the Commission cannot consider any communication that relates to a case pending before the Court unless it has been withdrawn from the Court's jurisdiction.<sup>68</sup> The application must be accompanied by the Commission's report and other documents.<sup>69</sup> The Court may hear the commissioners<sup>70</sup> or the individual or non-governmental organisation (NGO) that initiated the communication to the Commission in accordance with Rule 45.<sup>71</sup> In such a situation, the Court has considerable latitude in hearing from the latter persons in assisting it in its judicial functions. This is an important consideration because, as discussed below, the African system has adopted an optional scheme so that the right of an individual or NGO to seize the Court directly is limited, dependent on a state party explicitly recognising, by means of a declaration, individual applications.<sup>72</sup> Failing such an eventuality, individuals must rely on the Commission bringing an action at its discretion and they cannot compel it to do so.<sup>73</sup> Cases referred to the Court can include those of serious or massive violations of human rights under article 58 of the African Charter perpetrated by a state party to the Protocol.<sup>74</sup>

State parties which have lodged a complaint to the African Commission, and state parties against which a complaint has been lodged at the Commission, also have standing to submit cases to the Court.<sup>75</sup> So do state parties whose national is a victim, an expression of the diplomatic protection principle.<sup>76</sup>

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66 Rule of Commission 118(1).

67 Rule of Commission 118(2).

68 Rule of Commission 123.

69 Rule of Court 29(3)(a). Compare also Rule of Commission 121.

70 Rule of Court 29(3)(b). Compare also Rule of Commission 120.

71 Rule of Court 29(3)(c).

72 Arts 5(3) & 34(6) Protocol.

73 For a comparison with the Inter-American system, see Pasqualucci (n 23 above) 19.

74 Rules of Commission 84(2) & 118(3). See *In the Matter of the African Commission on Human and Peoples' Rights v Libyan Arab People's Jamahiriya (Provisional Measures)* App 004/2011 (3 March 2011). Judge Ouguergouz has suggested that such cases are eminently suited for transfer by the Court to the Commission under Art 6(3) of the Protocol where the former lacks jurisdiction; see his dissenting opinion in *Ekollo Moundi Alexandre v Republic of Cameroon and Federal Republic of Nigeria* App 008/2011 (23 September 2011) paras 27-28.

75 Arts 5(1)(b) & (c) Protocol; Rule of Court 33(1)(b) & (c).

76 Art 5(1)(d) Protocol; Rule of Court 33(1)(d). Compare art 36(1) European Court, which allows a state party to intervene in a case where the applicant is a national of that party.

The Court must initially satisfy itself that it has jurisdiction and that the application is admissible. The Court therefore needs to ensure that it has jurisdiction *ratione personae*, in that the complaint impleads a contracting party, and only states may be respondents,<sup>77</sup> and that the applicants have *locus standi*, or that it possesses jurisdiction *ratione materiae*, in that it can only consider allegations of violations of rights protected by the African Charter, and jurisdiction *ratione temporis*.

These issues have been judicially considered in a number of cases. In *Youseff Ababou v Kingdom of Morocco*, the Court clearly lacked jurisdiction because not only was Morocco not a party to the Protocol, but not even a member of the AU.<sup>78</sup> In *Femi Falana v African Union*<sup>79</sup> and *Atabong Denis Atemnkeng v African Union*,<sup>80</sup> the applicants sought to implead the AU itself. The Court held that the AU could not be sued because it was not a party to the Protocol,<sup>81</sup> nor could it be; as only states had that capacity.<sup>82</sup> Neither could responsibility be attributed to the AU as it could not be considered a representative of the member states but a legal person in its own right.<sup>83</sup> The Court's conclusions are in keeping with relevant European jurisprudence,<sup>84</sup> but in principle international law does not preclude an international organisation from becoming a party to a human rights treaty.<sup>85</sup>

It is also essential that the state must in addition have made a declaration recognising the right of individual petition.<sup>86</sup> In its first case, *Michelot Yogogombaye v Senegal*,<sup>87</sup> it was necessary that for the Court to exercise jurisdiction, the state party, Senegal, must have deposited a separate optional declaration under article 34(6) of the Protocol, and Rule of Court 33(1)(f), accepting the competence of the Court to receive applications directly from individuals. However, given that Senegal had made no such declaration, the Court manifestly lacked jurisdiction and was unable to entertain the case.<sup>88</sup> Intriguingly, it has been argued that article 34(6) of the Protocol, in

77 Separate Opinion by Judge Mutsinzi, *Femi Falana v African Union* (n 22 above), a situation implicit in the Rules of Court.

78 App 007/2011 (2 September 2011) para 12.

79 n 22 above.

80 App 014/2011 (15 March 2013).

81 *Femi Falana v African Union* (n 22 above) para 70; *Atabong Denis Atemnkeng v African Union* (n 78 above) paras 38-40.

82 *Femi Falana v African Union* (n 22 above) paras 67 & 69-71.

83 *Femi Falana v African Union* (n 22 above) paras 68 & 71.

84 *Harris et al* (n 37 above) 789-790.

85 Consequently, art 17 of the Fourteenth Protocol European Convention CETS 194 allows the European Union to accede to the European Convention.

86 Six states have made this declaration: Burkina Faso, Ghana, Malawi, Mali, Rwanda and Tanzania. See *Tanganyika Law Society et al v Tanzania* (n 6 above) para 86,

87 *Michelot Yogogombaye v Senegal* (n 6 above) paras 35-37.

88 *Michelot Yogogombaye v Senegal* (n 6 above) paras 37-39. See also *Soufiane Ababou v Algeria* App 002/2011 (16 June 2011) paras 5-11; *Daniel Amare and Mulugeta Amare v Republic of Mozambique and Mozambique Airlines* App 005/2011 (16 June 2011) paras 6-8; and *Alexandre v Cameroon and Nigeria* (n 74 above) paras 5-9.

restricting access to the Court, is in breach of the right of access to justice and is therefore incompatible with the African Charter and should be declared null and void.<sup>89</sup> However, as Judge Ouguergouz has observed, the fundamental principle governing this question is that of consent.<sup>90</sup> If such radical proposals gained acceptance, it would in all likelihood be self-defeating as it would mean that the Court's jurisdiction became compulsory and the likely result would be that states would seek to disencumber themselves from their human rights obligations. This view is out of step with the sovereignty-based conception of international law prevailing in Africa. It needs to be recalled that the European system was initially of an optional nature and that the current African system is designed to encourage and facilitate the acceptance of declarations.

Judge Ouguergouz advanced a possible solution to this problem, the principle of *forum prorogatum*, or prorogated jurisdiction.<sup>91</sup> Unlike the other regional systems, the African system does not make specific provision for this step,<sup>92</sup> but this is not a material consideration given the universal acceptance of this general principle of law.<sup>93</sup>

Jurisdiction active legitimation was at issue in *Association Juriste d'Afrique pour la Bonne Gouvernance v Ivory Coast*, where the applicant NGO did not have observer status with the Commission as required by article 5(3) of the Protocol.<sup>94</sup>

In relation to substantive jurisdiction *ratione materiae*, in *Efoua Mbozo'o Samuel v Pan African Parliament* the Court found that it lacked jurisdiction on the ground that the application was based exclusively on a breach of employment contract.<sup>95</sup> Neither is the Court a court of appeal.<sup>96</sup> But it is important to note that no formal prescribed form of submission of a communication is required. This was a fact highlighted in *Frank David Omary and Others v Tanzania* where the Court held that, notwithstanding the requirement of Rule of Court 34(4) that the application must specify the alleged violations,

89 *Atabong Denis Atemnkeng v African Union* (n 78 above) joint dissenting opinions of President Akuffo, and Justices Ngoepe and Thompson. See also their joint dissenting opinions in *Femi Falana v African Union* (n 22 above).

90 *Michelot Yogogombaye v Senegal* (n 6 above), separate opinion of Judge Ouguergouz paras 21-23.

91 *Michelot Yogogombaye v Senegal* (n 6 above) paras 31-32.

92 See art 62(2) of the American Convention; art 48 of the original European Convention, ETS 5; see P van Dijk & GJH van Hoof *Theory and practice of the European Convention on Human Rights* (1990) 139-141.

93 RL Bledsoe & BA Boczek *International law dictionary* (1987) 289-290.

94 *Association Juriste d'Afrique pour la Bonne Gouvernance v Ivory Coast* (n 56 above) paras 7-9. See also *National Convention of Teachers Trade Union v Republic of Gabon* App 012/2011 (15 December 2011). See *Mtikila v Tanzania* (n 6 above) para 86, where the Court found it had jurisdiction because the state had made the required declaration.

95 App 010/2011 (30 September 2011) para 6. However, see Judge Ouguergouz's dissenting opinion, para 12.

96 *Ernest Francis Mtingwi v Malawi* App 001/2013 (15 March 2013). See Harris *et al* (n 37 above) 14-15.

it was not necessary that the exact articles of the African Charter be indicated. The application referred to the Universal Declaration and the Court held that it sufficed that the rights in question were also guaranteed by the African Charter.<sup>97</sup> This flexibility is important in the African context.<sup>98</sup>

The question of admissibility *ratione temporis* was considered in *Mtikila v Tanzania* where the respondent argued that the Court did not have jurisdiction because the alleged violation occurred before the Protocol had entered into force. Dismissing this challenge to its jurisdiction, the Court found that the rights in question were protected by the African Charter which had been in force in Tanzania at the material time. Moreover, the alleged violation was of a continuing nature which continued when the Protocol was ratified and the optional declaration made.<sup>99</sup> The continuing effects doctrine has been similarly applied in other jurisdictions.<sup>100</sup>

Article 6(2) of the Protocol states that the Court shall rule on the admissibility of cases taking account of article 56 of the African Charter, which govern the conditions of admissibility to be satisfied by communications submitted by individuals and NGOs to the Commission.<sup>101</sup> Rule of Court 39(1) further requires the Court to take into consideration article 50 of the African Charter which is a reference to the exhaustion of local remedies in the context of interstate cases. Rule of Court 40 makes it clear that applications *must* satisfy the hurdles of admissibility, the conditions of which are materially identical to those listed in article 56 with the exception of sub-rule (6), which makes the necessary adjustment in that the case must be filed within a reasonable period from the time local remedies

97 *Omary v Tanzania* (n 21 above) paras 71-77. However, by way of contrast, the wording of art 2 of the Optional Protocol ICCPR 1966, 999 UNTS 171 limits the rights to those 'enumerated' in ICCPR.

98 And is also observed in the American system; Pasqualucci (n 23 above) 125. But European Court Rule 47(1)(e) requires a 'succinct statement of the alleged violation(s)' of the European Convention. In international law, matters of form do not have the same importance as in municipal law; *Mavrommatis Palestine Concessions (Greece v Great Britain)* (Jurisdiction) PCIJ Rep Ser A No 2.

99 *Mtikila v Tanzania* (n 6 above) para 84.

100 *Harris et al* (n 37 above) 802; A Conte & R Burchill *Defining civil and political rights: The jurisprudence of the United Nations Human Rights Committee* (2009) 28-29.

101 There are seven cumulative admissibility requirements, or 'conjunctive, meaning that, if any one of them is absent, the communication will be declared inadmissible', Commission Rule 106; *Article 19 v Eritrea* (2007) AHRLR 73 (ACHPR 2007) para 43; *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe* (2009) AHRLR 235 (ACHPR 2009) para 81. All seven conditions must generally be fulfilled, *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR 2006) para 36. See generally Magliveras & Naldi (n 5 above) paras 334-348; F Viljoen 'Communications under the African Charter: Procedure and admissibility' in Evans & Murray (n 2 above) 76 92-128. Conditions, or hurdles, of admissibility are a feature common to all human rights systems. See generally *Harris et al* (n 37 above) 757-810; Pasqualucci (n 23 above) 123-35; Conte & Burchill (n 100 above) 19-34.

were exhausted,<sup>102</sup> or from the date set by the Court as being the commencement of the time limit within which it shall be seized of the matter. The Court has endorsed the Commission's jurisprudence on this issue.<sup>103</sup>

The Court will dismiss applications without merit (manifestly ill-founded), giving reasons for its decision.<sup>104</sup> It has been argued to the contrary that in such circumstances the application should not be 'considered judicially by the Court', but should be 'dismissed *de plano* by a simple letter from the Registry',<sup>105</sup> that is, in a summary judgment, although, as has been observed, the Court is obligated to give its reasons.

Judge Ouguergouz has accused the Court of confusing the questions of jurisdiction and admissibility. He claims that the Court has engaged in judicial consideration of cases even though it plainly lacks jurisdiction, for example, as a result of the states concerned not having made the required declarations.<sup>106</sup> Again, he has argued that such applications should be dismissed in a summary judgment.<sup>107</sup> It might be of little comfort to Judge Ouguergouz to know that such a distinction was not strictly observed under the European system either.<sup>108</sup>

A curious aspect of article 6(1) of the Protocol is the power conferred on the Court to request an opinion from the Commission while it decides on the admissibility of a case under article 5(3). The Commission is obliged to respond promptly and under Rule of Court 29(4) the Court will indicate the time limit within which it wishes to receive the Commission's opinion. For its part, the Commission will consider the matter in light of the conditions of admissibility.<sup>109</sup> Unfortunately, no guidance is given as to the sort of circumstances that might prompt the Court to invoke this provision.

Another unusual provision of the Protocol is article 6(3) according to which the Court has the discretion of referring a case to the Commission. The Rules of Court make a passing reference to this

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102 In *Mtikila v Tanzania* (n 6 above) para 83, the Court found that one year was not an unreasonable period of time.

103 *Mtikila v Tanzania* (n 6 above) para 82.

104 Rule of Court 38. See *Amare v Mozambique and Mozambique Airlines* (n 88 above) para 8.

105 See, eg, Judge Ouguergouz, separate opinion in *Michelot Yogogombaye v Senegal* (n 6 above), and his dissenting opinion in *Alexandre v Cameroon and Nigeria* (n 74 above) para 7, which he justified on grounds of time and resources. This practice is applied by the European Court; *Harris et al* (n 37 above) 785.

106 See, eg, separate opinion of Judge Ouguergouz in *Uko v South Africa* (n 14 above). See, generally, M Shaw *International law* (2008) 1071-1072.

107 See, eg, his separate opinion in *Amir Adam Timan v Sudan* App No 005/2012 (30 March 2012); *Baghdadi Ali Mahmoudi v Tunisia* App No 007/2012 (30 March 2012).

108 Van Dijk & Van Hoof (n 92 above) 67-68 133,

109 Rule of Commission 119(1). According to Judge Ouguergouz, it is a condition precedent that the Court should determine that it has jurisdiction over the case, *Alexandre v Cameroon and Nigeria* (n 74 above), dissenting opinion, para 17.

procedure,<sup>110</sup> but again no indication is given as to what may motivate the Court to take such a step. However, the Court's case law is providing some insights as to the circumstances when such a course of action seems called for. In instances where the Court has found that it does not have jurisdiction because a complainant under article 5(3) of the Protocol lacks standing, either because a state party has not made a declaration under article 34(6) of the Protocol or an NGO does not have observer status with the Commission, in light of the claims made, it has transferred them to the Commission.<sup>111</sup> The Court appears to be guided by a desire to avoid a denial of justice.

This emergent practice has attracted strong disapproval from Judge Ouguergouz, who has argued that it 'is not founded in law' and that the Court has 'deviated from the original purpose of that provision'.<sup>112</sup> Implicit in his criticism is the opinion that the issues of jurisdiction and admissibility have not been determined correctly.<sup>113</sup> In his view, this procedure 'applies primarily to the consideration of the admissibility of a case over which the jurisdiction of the Court has already been established'.<sup>114</sup> Judge Ouguergouz additionally contends that the principle of legal certainty demands that clear reasoned objective criteria should guide the Court in its practice of referrals to the Commission, since the current policy was haphazard and unpredictable and was in danger of becoming 'systematic'.<sup>115</sup> He is of the opinion that the Court could play 'the role of an "early warning mechanism" for the Commission' and that this procedure should be reserved for cases displaying 'exceptional circumstances', such as those envisaged by article 58 of the African Charter.<sup>116</sup> He sees no reason why the Court could not use its discretion to transfer cases over which it has jurisdiction to the Commission to rule on the merits.<sup>117</sup> He advocates such a policy in order to lessen the workload on the Court.<sup>118</sup> His suggestions seem eminently sensible if the Court seeks to avoid the fate of the European Court where the backlog of cases runs into the thousands.

The Rules of Commission envisage a role for the Court in the implementation of the African Commission's decisions. Thus, where a state party to the Protocol has not complied with or will not comply with a Commission decision in an inter-state or individual communication, the Commission may refer the matter to the Court

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110 Rule of Court 29(5)(a).

111 *Amare v Mozambique and Mozambique Airlines* (n 88 above) para 9; *Alexandre v Cameroon and Nigeria* (n 74 above) para 11; *Association Juriste d'Afrique pour la Bonne Gouvernance v Ivory Coast* (n 56 above) para 10.

112 *Alexandre v Cameroon and Nigeria* (n 74 above), dissenting opinion of Judge Ouguergouz, paras 12 & 20.

113 *Alexandre v Cameroon and Nigeria* (n 74 above) paras 14-19.

114 *Alexandre v Cameroon and Nigeria* para 13.

115 *Alexandre v Cameroon and Nigeria* paras 21-26.

116 *Alexandre v Cameroon and Nigeria* paras 22-29.

117 *Alexandre v Cameroon and Nigeria* paras 31-33.

118 *Alexandre v Cameroon and Nigeria* para 35.

for the adoption of appropriate measures for implementation of the decision.<sup>119</sup> This may encourage better compliance, but whether the Court can execute the Commission's decisions is open to debate. As is discussed later, the Court itself has no powers of enforcement; that is a role reserved for the Assembly.

#### 4.2 Evidence and witnesses

Article 26(1) of the Protocol obliges the Court to hear submissions by all parties and, if necessary, to hold an enquiry. Rule of Court 45(3) gives the Court the discretion to conduct an enquiry at any time during the proceedings by one or more of the judges, to carry out visits to scenes or to gather evidence in any other manner.<sup>120</sup> Considering the often unco-operative and obstructive behaviour of impugned states in such circumstances, the Court's ability to visit scenes or to conduct enquiries is of considerable importance in marshalling the facts and attempting to ascertain the truth.

By virtue of article 26(2) of the Protocol, the Court may receive written and oral evidence, including expert testimony.<sup>121</sup> Rule of Court 45(1) establishes that evidence may be obtained by the Court *proprio motu*, at the request of a party or the Commission. No new evidence may be submitted by the parties after the closure of pleadings save with the leave of the Court.<sup>122</sup> That the Court has a wide discretion as to the evidence and witnesses it will admit is confirmed by the Rules of Court. Hence, Rule 45(1) states that the Court may 'obtain any evidence which in its opinion may provide clarification of the facts of a case'. To this end, it can 'decide to hear as a witness or expert or in any other capacity any person whose evidence, assertions or statements it deems likely to assist it'. Moreover, according to Rule 45(2), the Court 'may ask any person or institution of its choice to obtain information, express an opinion or submit a report to it on any specific point'. *Amici curiae* would therefore seem to be allowed and the effective protection of human rights in Africa could only be enhanced if the Court were to allow representations from a broad category of *amici curiae*, especially NGOs.<sup>123</sup> It is evident, although not set out in explicit terms, that parties may object to a witness or expert, given that Rule of Court 46(5) authorises the Court to rule on any such challenge. It would seem preferable to have followed the detailed guidance provided by the Rules of the Inter-American Court of Human Rights (Inter-American Court).<sup>124</sup>

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119 Rule of Commission 118(1).

120 Compare art 44(4) of the Inter-American Court Rules.

121 On the ICJ's powers relating to evidence, see K Highet 'Evidence the court, and the Nicaragua case' (1987) 81 *American Journal of International Law* 1.

122 Rule of Court 50.

123 See Pasqualucci (n 23 above) 214-215.

124 Arts 44-49 Inter-American Court Rules.

Questions may be put by the Court to witnesses, experts or other persons appearing before it.<sup>125</sup> They may be examined, cross-examined and re-examined by the parties and the Commission.<sup>126</sup> No provision is made either in the Protocol or the Rules for the failure of witnesses to appear, for contempt of court or for the possibility of perjury. It is interesting to note that in similar circumstances, the Inter-American Court can call upon states to impose sanctions against such persons.<sup>127</sup>

### 4.3 Interim measures of protection

Under article 27(2) of the Protocol, the Court can adopt interim, or provisional, measures of protection in cases of 'extreme gravity and urgency', and 'to avoid irreparable harm to persons'.<sup>128</sup> They are 'a consequence of the right to protection under the [African] Charter'.<sup>129</sup> They are also designed to preserve the *status quo ante* pending the determination of the case.<sup>130</sup> The Court found that 'circumstances ... of great urgency', relating especially to the rights to life and physical integrity during unrest unleashed by the revolution in Libya in early 2011, compelled it to order such measures.<sup>131</sup> In *African Commission on Human and Peoples' Rights v Kenya*, the disturbing circumstances included the enjoyment of cultural rights, the right to property and the right to economic, social and cultural development.<sup>132</sup> This ability is supplemented by Rule of Court 51(1) which refers to 'the interest of the parties', no doubt corresponding to the preservation of their respective rights,<sup>133</sup> or 'of justice', thus conferring upon the Court a sweeping discretion. The Court has also taken notice of prejudice to the substantive matter before it.<sup>134</sup> In cases of extreme urgency, an extraordinary session of the Court may

125 Rule of Court 47(1).

126 Rule of Court 47(2).

127 Art 51 Inter-American Court Rules. The whole question of evidence was highly contentious in *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v USA)* [1986] ICJ Reports 14; see Highet (n 121 above) 33-46. This proved even more so when evidence subsequently emerged casting doubt on the veracity of some of Nicaragua's evidence before the ICJ. See S Rosenne *The World Court: What it is and how it works* (1995) 152-153.

128 *African Commission on Human and Peoples' Rights v Libya* (n 13 above) para 17. See art 63(2) of the American Convention; art 25 of the Inter-American Court Rules; and European Court Rule 39(1). See Pasqualucci (n 23 above) 298-308; Harris *et al* (n 37 above) 842-846. Note that under Rule of Commission 98(1), the Commission is authorised to indicate interim measures to 'prevent irreparable harm to the victim ... as urgently as the situation demands'.

129 *African Commission on Human and Peoples' Rights v Libya* (n 13 above) para 13.

130 *In the Matter African Commission on Human and Peoples' Rights v Republic of Kenya (Provisional Measures)* App 006/2012 (15 March 2013) para 23.

131 *African Commission on Human and Peoples' Rights v Libya* (n 74 above) paras 22-23. See also *African Commission on Human and Peoples' Rights v Libya* (n 13 above).

132 *African Commission on Human and Peoples' Rights v Kenya* (n 130 above) para 20.

133 See art 43(1) of the ICJ Statute.

134 *African Commission on Human and Peoples' Rights v Kenya* (n 130 above) para 22.

be convened to decide on measures to be taken.<sup>135</sup> In its practice the Court has on occasion given the respondent states but a brief period of time, 15 days, to comply with its orders.<sup>136</sup>

According to Rule of Court 51(1), interim measures can be given at the request of a party to the case, the Commission<sup>137</sup> or the Court of its own accord.<sup>138</sup> The Court has taken the latter step on a couple of occasions.<sup>139</sup> The fact that the Court can order any measures 'it deems necessary' suggests that they could be 'in whole or in part other than those requested'.<sup>140</sup> In fact, the Court has ordered specific measures to be adopted.<sup>141</sup> The Court need not satisfy itself that it has jurisdiction on the merits, but simply that *prima facie* jurisdiction exists.<sup>142</sup> This it can do by establishing that the applicant is an entity entitled to submit a case to the Court and that the respondent has ratified the African Charter and the Protocol.<sup>143</sup> There is certainly no need to engage in prior consideration of the substantive issues in the case.<sup>144</sup> The Court has stated that a decision on interim measures does not prejudice the question of jurisdiction, the admissibility or merits of the case.<sup>145</sup> The Court's practice has established that a request for interim measures can be submitted to the Court at the same time as the institution of proceedings,<sup>146</sup> but can they also be

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135 Rule of Court 51(2).

136 *African Commission on Human and Peoples' Rights v Libya* (n 13 above) para 20(5); *African Commission on Human and Peoples' Rights v Kenya* (n 130 above) para 25(2).

137 See also Rule of Commission 118(2) & (3). See *African Commission on Human and Peoples' Rights v Libya* (n 74 above) para 2; *African Commission on Human and Peoples' Rights v Kenya* (n 130 above) para 9.

138 It is interesting to note that in *African Commission on Human and Peoples' Rights v Libya* (n 13 above) paras 9-12, the Court ordered measures *proprio motu*. See also *African Commission on Human and Peoples' Rights v Libya (Provisional Measures)* (n 74 above) para 18.

139 As above.

140 Compare art 75(2) of the ICJ Rules. On a few limited occasions, the ICJ has indicated provisional measures against both parties; see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)(Provisional Measures)* [2008] ICJ Reports.

141 *African Commission on Human and Peoples' Rights v Libya* (n 13 above) para 20.

142 *African Commission on Human and Peoples' Rights v Kenya* (n 130 above) para. 16; *African Commission on Human and Peoples' Rights v Libya* (n 74 above) para 10. The ICJ's established practice is that, as long as *prima facie* jurisdiction is apparent, it will entertain the request for interim measures, even if it emerges subsequently that it lacks jurisdiction. See *Military and Paramilitary Activities in and against Nicaragua (Provisional Measures)* [1984] ICJ Reports 169; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro) (Provisional Measures)* [1993] ICJ Reports 3; *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)*, *Provisional Measures* [2000] ICJ Reports 182. It will decline to act if it manifestly lacks jurisdiction; *Fisheries Jurisdiction Cases (United Kingdom, Federal Republic of Germany v Iceland)* [1972] ICJ Reports 12.

143 *African Commission on Human and Peoples' Rights v Libya* (n 13 above) para 17.

144 *African Commission on Human and Peoples' Rights v Kenya* (n 130 above) para 19.

145 *African Commission on Human and Peoples' Rights v Kenya* (n 130 above) para 24; *African Commission on Human and Peoples' Rights v Libya* (n 74 above) para 19.

146 *African Commission on Human and Peoples' Rights v Libya* (n 74 above).

submitted at any time of the proceedings pending final decision?<sup>147</sup> However, a number of questions remain unaddressed. No mention is made of the duration of the measures, but this must be dependent on all the circumstances of the case. Can states request the Court to revoke interim measures adopted by the Commission? Furthermore, no explicit provision is made for the revocation or modification of interim measures.<sup>148</sup>

However, a surprising omission is any explicit guidance as to the question whether interim measures are legally binding, an issue that the drafters of the Rules must have been aware of in light of significant recent developments in other jurisdictions establishing that interim measures have binding effect.<sup>149</sup> The language of the relevant provisions of the Rules is unclear on this point;<sup>150</sup> the use of the verb 'prescribe' in Rule of Court 51(1) is capable of being interpreted as an order or a recommendation. Further favouring the sense of a legal duty is the fact that the Court itself has issued 'orders' to the respondents.<sup>151</sup> However, to the contrary is the Court's obligation to 'make all such recommendations as it deems appropriate' in instances of non-compliance by states in its Annual Report to the Assembly under article 31 of the Protocol and Rule of Court 51(4), which suggests that the final decision on such matters rests with the Assembly. The Court should follow the international trend and it could do worse than adopt the Commission's approach, declaring that a contracting party that has failed to abide by its indication of interim measures is in breach of the principle of *pacta sunt servanda* enshrined in article 1 of the African Charter.<sup>152</sup>

147 Compare art 73(1) of the ICJ Rules. Rule of Commission 98(1) specifies that a request for provisional measures can be made at any time after the receipt of a communication but before a determination on the merits.

148 Compare art 76 of the ICJ Rules.

149 *LaGrand case (Germany v United States of America)* [2001] ICJ Reports 466, paras 99-103; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Reports 1, paras 452 & 468 (ICJ); *Constitutional Court v Peru (Provisional Measures)* [2000] (Ser E) No 3 (Inter-American Court); *Piandiong, Morillos and Bulan v The Philippines* Communication 869/1999, UN Doc CCPR/C/70/D/869/1999 (19 October 2000) (UN Human Rights Committee); *Mamatkulov and Abdurasulovic v Turkey* 41 EHRR 494. See, generally, GJ Naldi 'Interim measures in the Human Rights Committee' (2004) 53 *International and Comparative Law Quarterly* 445. The practice of the Commission is inconclusive, refraining from a definitive answer. See generally GJ Naldi 'Interim measures of protection in the practice of the African Commission on Human and Peoples' Rights' (2002) 2 *African Journal of Human Rights* 1.

150 Rule 61(5) states that 'judgments' have a legally binding effect on the parties.

151 *African Commission on Human and Peoples' Rights v Libya* (n 13 above) para 25; *African Commission on Human and Peoples' Rights v Libya* (n 74 above) para 20.

152 *International Pen & Others (on behalf of Saro-Wiwa)* (2000) AHRLR 212 (ACHPR 1998). See further Naldi 'Interim measures in the practice of the African Commission' (n 149 above) 6-8.

#### 4.4 Preliminary objections

The important subject of preliminary objections to the Court's jurisdiction, absent as such from the Protocol,<sup>153</sup> is governed by Rule of Court 52.<sup>154</sup> Preliminary objections may take many forms and it would be invidious to attempt a definition, which the Rule prudently avoids. A preliminary objection is admissible only when proceedings are begun through an application,<sup>155</sup> and must be raised by the objector before it files its first set of pleadings.<sup>156</sup> As a rule, objections will not operate so as to suspend the proceedings on the merits.<sup>157</sup> Objections may be decided upon separately by the Court in what would be a preliminary judgment, or the issue may be joined to the merits.<sup>158</sup> The Court's practice to date follows the latter route.<sup>159</sup> The Court's rulings on preliminary objections must be reasoned.<sup>160</sup> The fact that under Rule of Court 39(1), the Court must at the outset satisfy itself that it has jurisdiction and that the application is admissible, would suggest that the party entering an objection has to make a compelling case to convince the Court.

That preliminary objections to advisory proceedings are permissible is implied by virtue of the fact that Rule of Court 72 assimilates the advisory procedure to contentious procedure. Furthermore, it is an accepted practice for states to raise objections to the advisory jurisdiction of the ICJ in specific instances.<sup>161</sup>

#### 4.5 Execution of judgments

According to article 30 of the Protocol, state parties to a case must not only comply with the judgment within the time stipulated by the Court, but must also guarantee its execution.<sup>162</sup> Rule of Court 61(5) makes it emphatically clear that the Court's judgments are binding on the parties, a fundamental point that was not expressly spelt out in the parent Protocol. As is true with other international judicial entities,

153 Although art 3(2) of the Protocol would appear to envisage this procedure by envisaging challenges to the Court's jurisdiction.

154 See *Michelot Yogogombaye v Senegal* (n 6 above) para 38. Compare art 79 of the ICJ Rules; art 36 of the Inter-American Court Rules.

155 Rule of Court 52(1).

156 Rule of Court 52(2).

157 Rule of Court 52(3). Compare art 36(3) of the Inter-American Court Rules.

158 Rule of Court 52(3). Compare art 36(6) of the Inter-American Court Rules.

159 See, eg, *Michelot Yogogombaye v Senegal* (n 6 above) para 12; *Mtikila v Tanzania* (n 6 above) paras 79-88.

160 Rule of Court 52(7); *Mtikila v Tanzania* (n 6 above) paras 79-88.

161 Eg, Spain in the *Western Sahara* case (Advisory Opinion) [1975] ICJ Reports 14; Israel in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* case (Advisory Opinion) [2004] ICJ Reports 136. See European Court Rules 84(2) and 86 which give contracting parties the right to make written and oral submissions to the European Court. See also art 62(3) of the Inter-American Court Rules in accordance with which 'any interested party' may be authorised or invited to submit a written opinion.

162 Compare art 94(1) of the UN Charter, art 68(1) of the American Convention and art 46 of the European Convention.

the Court itself has no power to enforce its judgments. The wording of article 46(4) of the Protocol leaves no doubt that, should a party fail to comply with a judgment, the Court must refer it to the Assembly for a decision. The actual task of monitoring the execution of the judgments is delegated to the Executive Council.<sup>163</sup>

#### 4.6 Intervention

Article 5(2) of the Protocol allows a state party which has an interest in a case to request the Court to join, effectively, to intervene. Worthy of note is that this provision simply requires third parties to demonstrate an *interest*, rather than the usual *legal* interest,<sup>164</sup> but it is not apparent whether this heralds a more relaxed requirement. However, Rule of Court 53(2)(a) reverts to the traditional position by inserting the adjective 'legal'. There is no guidance as to what the nature of the 'legal interest' might be and what degree of interest would be required, but the Court could choose to be guided by the practice of other tribunals.<sup>165</sup> For example, ICJ practice under article 62 of its Statute demonstrates that it has applied a very strict policy in this area,<sup>166</sup> and under article 63, in instances where the interpretation of a treaty is at issue, any other party to it may seek to claim such a right.<sup>167</sup> Whether such a situation would provide sufficient grounds remains to be seen. Third parties must additionally state the precise object of the intervention and the basis of jurisdiction that exist between them and the parties to the case.<sup>168</sup> This is contrary to the recent practice of the ICJ where a 'jurisdictional link' by the intervening party is not required.<sup>169</sup> The decision whether to grant a request for intervention naturally rests with the Court; in effect, the views of the applicant or the parties to the case cannot bind the Court in respect of this issue.<sup>170</sup>

163 Rule of Court 64(2).

164 Compare art 62 of the ICJ Statute.

165 Under art 36(2) of the European Convention intervention is permissible in cases where a national of a contracting party is an applicant, or must be in the interest of the proper administration of justice. See further Harris *et al* (n 37 above) 853-856.

166 See C Chinkin 'Third party intervention before the International Court of Justice' (1986) 80 *American Journal of International Law* 495. Art 81(2)(a) of the ICJ Rules requires the intervening state to set out the interest of a legal nature that will be affected; and see *Indonesia/Malaysia (Philippines Intervening)* [2001] ICJ Reports 575, where the ICJ explained the meaning of an 'interest of a legal nature'. For the factors that will persuade the ICJ to accept a request for intervention, see *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras) (Nicaragua Intervening)* [1990] ICJ Reports 92.

167 *SS Wimbledon (Poland intervener)* PCIJ Rep Ser A No 1 12.

168 Rule of Court 53(2)(b) & (c).

169 *Land and Maritime Boundary (Cameroon v Nigeria) (Equatorial Guinea Intervening)* [1999] ICJ Reports 1029. See Shaw (n 106 above) 1099-1100.

170 *Continental Shelf (Tunisia v Libya) (Malta Intervening)* [1981] ICJ Reports 3. The state seeking to intervene has the burden of proof; *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras) (Nicaragua Intervening)* [1990] ICJ Reports 92 117.

#### 4.7 Non-appearance

The Protocol is silent on the problem of non-appearing parties, but this issue is addressed by Rule of Court 55. The Court is thereby authorised to proceed with the case and give its judgment at the request of the other party.<sup>171</sup> However, the Court must first satisfy itself that it has jurisdiction, that the claim is well founded in fact and in law, that the case is admissible and that due notice was given to the defaulting party. Since Rule 55 has similarities with article 53 of the ICJ Statute,<sup>172</sup> it remains to be seen whether the Court will follow the ICJ's practice in considering legal arguments that the absent party might have submitted in support of its case had it chosen to appear.<sup>173</sup>

#### 4.8 Reparations

The Court is empowered by virtue of article 27(1) of the Protocol to make appropriate orders aimed at remedying a violation of human rights, including the payment of fair compensation or reparation to the victims.<sup>174</sup> Rule of Court 34(5) requires applicants to submit a request for reparation in the application commencing proceedings and allows them to submit a request for the amount of the reparation. The Court will rule on the request for reparation either in the judgment or in a separate decision.<sup>175</sup>

What exactly constitutes 'fair compensation' or 'reparation' remains undefined,<sup>176</sup> but this situation seems sensible in order to give the Court sufficient flexibility to order suitable remedies. Awards of a pecuniary nature are clearly envisaged because of the use of the noun 'amount' in Rule of Court 34(5) and by definition 'fair compensation' must include awards of a pecuniary nature,<sup>177</sup> but it should be emphasised that these are only options. The concept of 'reparation' seems broad enough to encompass restitution in kind, which could be covered by and implied in the general wording of the provisions and

171 In a human rights system, the American example might seem preferable. See art 27(1) of the Inter-American Court Rules whereby the Court shall, *proprio motu*, take whatever measures are necessary to complete consideration of the case.

172 See, generally, Rosenne (n 127 above) 95-96.

173 See, eg, *US Diplomatic and Consular Staff in Tehran case (United States of America v Iran)* [1980] ICJ Reports 3; *Fisheries Jurisdiction cases* [1974] ICJ Reports 3.

174 On how the African Commission has handled the issue of reparations, see G Naldi 'Reparations in the practice of the African Commission on Human and Peoples' Rights' (2001) 14 *Leiden Journal of International Law* 681.

175 Rule of Court 63. See *Mtikila v Tanzania* (n 6 above) para 126(4).

176 However, see UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN General Assembly Resolution 60/147 (2005). The African Commission has often required the payment of 'adequate compensation'. See, eg, *Egyptian Initiative for Personal Rights and Interights v Egypt I* (2011) AHRLR 42 (ACHPR 2011).

177 Monetary compensation was awarded in *Egyptian Initiative for Personal Rights and Interights v Egypt II* (2000) AHRLR 72 (ACHPR 1995).

could even extend to ordering consequential measures requiring states to take certain positive steps.<sup>178</sup> The practice of the Inter-American Court on reparations, which provides ample examples of the extensive nature and forms that remedies could take, should guide the Court accordingly.<sup>179</sup>

#### 4.9 Out-of-court and amicable settlement

Rule of Court 56 caters for the possibility of the parties settling their dispute amicably out of court.<sup>180</sup> The agreement to settle in this instance must be mutual.<sup>181</sup> A settlement may be reached at any time before the Court renders judgment. The Court will then deliver a judgment limited to a brief statement of the facts and the solution adopted.<sup>182</sup> Notwithstanding such an agreement, the Court may decide to proceed with the case.<sup>183</sup> Although the rationale for doing so is not explained, it is likely to be for reasons regarding the good administration of justice or for upholding human rights.<sup>184</sup>

Both article 9 of the Protocol and the Rules of Court envisage a proactive role, which is discretionary, for the Court in helping to reach amicable or friendly settlements.<sup>185</sup> It may therefore contact the parties and take suitable measures to facilitate an amicable settlement based on respect for human and peoples' rights.<sup>186</sup> Other procedural issues are identical in every material respect to those described in the previous paragraph.

The applicant can discontinue a case by informing the Registrar to that effect.<sup>187</sup> However, the respondent's consent to discontinue is

178 According to the UN Basic Principles on the Right to a Remedy, reparation includes restitution, rehabilitation and satisfaction. It is interesting to note that the African Commission has adopted a similar practice of issuing 'recommendations' to states in its communications. See, eg, *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009).

179 The Inter-American Court has interpreted its mandate under art 63(1) of the American Convention expansively. In a series of cases, the Inter-American Court has ordered a diverse range of measures. See Pasqualucci (n 23 above) 230-290. For a critical account, see D Shelton 'Reparations in the Inter-American system' in DJ Harris & S Livingstone *The Inter-American system of human rights* (1998) 151.

180 Compare art 88 of the ICJ Rules; art 53 Inter-American Court Rules; art 39 of the European Convention.

181 See art 88(1) of the ICJ Rules which allows for discontinuance either jointly or separately. See Rosenne (n 127 above) 150.

182 Rule of Court 56(2). Compare art 39(3) of the European Convention.

183 Rule of Court 56(3). Compare art 54 of the Inter-American Court Rules.

184 By analogy with Rule of Court 57(1). Compare also art 54 of the Inter-American Court Rules; art 37(1) of the European Convention.

185 Rules of Court 26(1)(c) & 57. It should be observed that the African Commission already performs this function pursuant to art 52 of the African Charter and Rule of Commission 97. Such a procedure can be found in the European system; art 38(1)(b) of the European Convention and European Court Rule 62, whereas art 48(1)(f) of the American Convention entrusts this role to the Inter-American Commission on Human Rights.

186 Rule of Court 57(1).

187 Rule of Court 58. Compare art 89(1) of the ICJ Rules; art 52 of the Inter-American Court Rules; art 37 of the European Convention.

required if it has already taken measures to proceed with the case.<sup>188</sup> Unlike the European Court, the African Court is not explicitly empowered to strike out cases from its list at any stage of the proceedings.<sup>189</sup> No provision is made for restoring a case to the Court's list, even if circumstances appear to so dictate.<sup>190</sup>

#### 4.10 Interpretation

Article 28(4) of the Protocol states without further elaboration that the Court may interpret its own decisions. This simple instruction is supplemented by the Rules of Court. Under Rule 66(1), the Court is competent to interpret a judgment on application by any party.<sup>191</sup> Significantly, the Court's power in this regard is narrow, limited 'for the purpose of *executing a judgment*'.<sup>192</sup> The rationale seems to be in order 'to prevent a new dispute being submitted to the Court in the guise of a request to interpret an earlier judgment'.<sup>193</sup> A deadline of 12 months from the date of judgment is set unless the interests of justice dictate otherwise.<sup>194</sup>

It is interesting to note that, while the Protocol refers to 'decisions', the corresponding Rule of Court employs the noun 'judgment'. It should not be assumed that the two terms are identical,<sup>195</sup> but it is not clear whether the use of the different nouns is supposed to make a substantive procedural distinction.

#### 4.11 Revision of decisions

Pursuant to article 28(3) of the Protocol, the Court has the capacity to review its decisions at the request of a party in the light of new evidence.<sup>196</sup> According to Rule of Court 67(1), the new evidence must not have been known at the time to the party. Unlike the ICJ

188 Compare art 89(2) of the ICJ Rules. According to Rosenne (n 127 above) 150, the reason for obtaining the respondent's consent is in case it has submitted a counterclaim which it wishes to see decided by the Court.

189 Art 37(1) of the European Convention. See Harris *et al* (n 37 above) 833-835.

190 Compare art 37(2) of the European Convention.

191 See art 60 of the ICJ Statute; art 67 of the American Convention and European Court Rule 79. According to the Inter-American Court, the purpose of this procedure involves 'not only precisely defining the text of the operative parts of the judgment, but also specifying its scope, meaning and purpose, based on the considerations of the judgment'; *Velasquez Rodriguez v Honduras (Interpretation of the Compensatory Damages)* [1990] (Ser C) No 9 para 26.

192 An application for interpretation does not stay the execution of a judgment unless the Court decides otherwise; Rule of Court 66(5) (my emphasis).

193 Rosenne (n 127 above) 151. Rosenne was writing on the ICJ but his comment is equally valid with regard to the African Court.

194 European Court Rule 79(1) also sets a deadline of one year, but art 67 of the Inter-American Court Rules is stricter: only 90 days.

195 Hudson (n 8 above) 583-584. See also *Alexandre v Cameroon and Nigeria* (n 74 above) dissenting opinion of Judge Ouguergouz, paras 3-4.

196 See European Court Rule 80 which refers to 'a fact'. An application for revision does not stay the execution of a judgment unless the Court decides otherwise; Rule of Court 67(5).

Statute, there is no explicit requirement that the new facts should have played a decisive factor in the case.<sup>197</sup> A limitation period of no more than six months of the new facts' discovery is imposed.

It should be observed once more that the Protocol refers to 'decisions', while the corresponding Rule refers to 'judgment'.

## 5 Advisory opinions

The advisory procedure of the Court is governed by Part V of the Rules of Court and, with the necessary adjustments, corresponds to the contentious procedure.<sup>198</sup> According to article 4(1) of the Protocol and Rule of Court 68(1), advisory opinions can be sought by a member state,<sup>199</sup> the AU,<sup>200</sup> or any African organisation recognised by the AU. Whether 'organisation' extends to NGOs remains to be decided, although they have submitted applications to the Court which are pending.<sup>201</sup> They must concern any legal matter relating to the African Charter or other relevant human rights instruments,<sup>202</sup> but must not relate to an application pending before the African Commission.<sup>203</sup> The Court therefore declined a request for an opinion in Pan-African Lawyers' Union and Southern African Litigation Centre on this ground. In view of the fact that the advisory jurisdiction is discretionary, no indication is given as to what circumstances may induce the Court to decline to exercise this jurisdiction. The ICJ is of the view that it may do so for 'compelling reasons'.<sup>204</sup> The jurisprudence of the Inter-American Court suggests that a request for an advisory jurisdiction may be rejected in circumstances where the Court's contentious jurisdiction may be undermined, where the protective system would be impaired or where the question is wholly academic, amongst others.<sup>205</sup> It may be considered prudent to leave such matters to the discretion of the Court.

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197 Compare art 61 of the ICJ Statute.

198 Rule of Court 72.

199 It is curious that a state need not be a party to the Protocol. In May 2012 Mali submitted a request for an opinion, subsequently withdrawn; Request 001/2011 by the Republic of Mali (3 March 2013).

200 Or any of its organs, This extends to the African Commission, Rule of Commission 117.

201 See, eg, Request 002/2012 by Pan-African Lawyers' Union and Southern African Litigation Centre (15 March 2013).

202 Rules of Court 68(1) & (2).

203 Rule of Court 68(3).

204 *Legality of the Threat or Use of Nuclear Weapons Case (Advisory Opinion)* [1996] ICJ Reports 226 235.

205 See, eg, *'Other Treaties' Subject to the Consultative Jurisdiction of the Court (Art 64 of the American Convention on Human Rights) (Advisory Opinion)* [1982] (Ser A) No 1; *Judicial Guarantees in States of Emergency (Articles 27(2), 25 and 8 of the American Convention on Human Rights) (Advisory Opinion)* [1987] (Ser A) No 9.

The Rules of Court make it clear that advisory proceedings consist of written<sup>206</sup> and, if necessary, oral stages.<sup>207</sup> Rule of Court 70(2) allows any other state party to enter written submissions on any of the issues raised in the request for an opinion. The same holds true for any other 'interested entity' authorised by the Court. Such entities would appear to be entities such as AU organs and African organisations recognised by the AU, as mentioned in article 4(1) of the Protocol and Rule 68(1). However, it is interesting to observe that the Inter-American Court permits NGOs and individuals to submit briefs in advisory proceedings,<sup>208</sup> and it is submitted that in the interests of justice the Court should be prepared to accept such persons as 'interested entities'.

Opinions must be read in open court unless circumstances dictate otherwise, so that an opinion may be delivered in closed session.<sup>209</sup> It is to be hoped that in the latter situation the opinion is published and made public in due course in keeping with basic notions of justice, openness and transparency. On the other hand, on those occasions when secrecy may be considered necessary, it is to be hoped that this will be the case only for the most compelling reasons. Regrettably, the Rules are silent as to whether a 'secret opinion' could be made public at some future stage or whether it would remain 'secret' in perpetuity, or which body would be entitled ultimately to take a decision on if and whether the opinion is made public

## 6 Conclusion

On the whole, the Rules of Court complement the Protocol in a satisfactory manner. They cannot be said to have any radical features that distinguish them from those of other regional human rights systems. This is not to say that the Rules, including the Rules of the African Commission, are perfect. The wording sometimes lacks clarity, there are gaps and omissions, and they sometimes make ambiguous provisions of the Protocol no clearer, but these are minor criticisms that will no doubt be addressed by the Court in its practice directions or guidelines<sup>210</sup> or, indeed, its jurisprudence. In fact, the Court has already embarked on this route, stating that it has inherent powers in the interests of justice to fill *lacunae* in the Rules.<sup>211</sup> Of course, in light

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206 Rule of Court 70.

207 Rule of Court 71.

208 Art 62(3) of the Inter-American Court Rules. See Pasqualucci (n 23 above) 74-75.

209 Rule of Court 73(1). This is a manifest difference with the ICJ and other regional human rights systems. Compare Art 67 of the ICJ Statute; art 24(3) of the Inter-American Court Statute.

210 Rule of Court 19.

211 *In the Matter of the African Commission on Human and Peoples' Rights v Libyan People's Arab Jamahiriya (Order)* App 004/2011 (16 June 2011) paras 8-9, relating to the extension of time limits for the submission of names and addresses of representatives, and *In the Matter of the African Commission on Human and Peoples'*

of experience, the Court may decide at some future stage that the Rules require amending.<sup>212</sup> At the same time, it should also be observed that the Court's jurisprudence is raising questions of its own.

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*Rights v Libyan People's Arab Jamahiriya (Order)* App 004/2011 (2 September 2011) paras 12-13, relating to the setting and extending of time limits for the submission of pleadings.

212 See Rule of Court 74.