

AFRICAN HUMAN RIGHTS LAW JOURNAL

Volume 2 No 2 2002



Editors

Christof Heyns
*Professor of human rights law and
Director, Centre for Human Rights,
University of Pretoria*

Frans Viljoen
*Editor-in-chief, Professor of law, Cen-
tre for Human Rights and Faculty of
Law, University of Pretoria*

Assistant editor

Annelize Nienaber
*Lecturer, Faculty of Law, University of
Pretoria*

Editorial assistant

Isabeau de Meyer
*Project Manager, Centre for Human
Rights, University of Pretoria*

Student editors

Evarist Baimu, Martin Nsibirwa,
Lirette Louw, Idi Gaparayi and
Morné van der Linde
*LLD candidates, Centre for Human
Rights, University of Pretoria*

International editorial advisory board

Gudmundur Alfredsson
*Professor of law and Director, Raoul
Wallenberg Institute for Human
Rights and Humanitarian Law, Lund,
Sweden*

Victor Dankwa
*Professor of law, University of Ghana
and Member, African Commission on
Human and Peoples' Rights*

John Dugard
*Professor of law, University of Leiden;
Member, International Law Commis-
sion and honorary professor, Centre
for Human Rights, University of
Pretoria*

Cees Flinterman
*Professor of human rights and
Director, Netherlands Institute of
Human Rights (SIM), University of
Utrecht*

Abdul G Koroma
Judge, International Court of Justice

Edward Kwakwa
*Assistant legal counsel, World Intel-
lectual Property Organisation*

Pius Langa
*Deputy Chief Justice, Constitutional
Court of South Africa*

Sandy Liebenberg
*Professor of law, Community Law
Centre, University of the Western
Cape*

Tiyanjana Maluwa
*Legal adviser, Office of the High
Commissioner for Human Rights and
honorary professor, Centre for
Human Rights, University of Pretoria*

Joe Oloka-Onyango
*Associate professor of law, Faculty of
Law, Makerere University, Uganda*

Geraldine van Bueren
*Professor of international human
rights law, University of London*

THIS JOURNAL SHOULD BE CITED AS (2002) 2 *AHRLJ*

African Human Rights Law Journal

As democratic practices and the protection of human rights struggle to become rooted in Africa, and an African Court of Human and Peoples' Rights is in the process of being established, the *African Human Rights Law Journal* has been launched. There is a more pressing need for a monitoring and reporting periodical in this field in Africa than ever before. The *Journal* aims to publish contributions dealing with human rights related topics of relevance to Africa, Africans and scholars of Africa. In the process, the *African Human Rights Law Journal* hopes to contribute towards an indigenous African jurisprudence. The *Journal* appears twice a year, in March and October.



The financial assistance of the European Union
is gratefully acknowledged.

First published 2001

© JUTA Law
PO Box 24299
Lansdowne
7779

This book is copyright under the Berne Convention. In terms of the Copyright Act 98 of 1978 no part of this book may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording or by any information storage and retrieval system, without permission in writing from the Publisher.

ISSN 1609-073X

Cover design: Colette Alves

Typeset in 10 on 12 pt Stone Sans by Wyvern Publications CC, Cape Town
Printed and bound by Creda Communications, Eliot Avenue, Eppindust 7460

CONTENTS

Editorial v

Articles

An African Human Rights Court: Reflections from the perspective of
the Inter-American system
by David Padilla 185

A comparison between the African and European Courts of Human
Rights
by Rachel Murray 195

The jurisdiction of the African Court of Human and Peoples' Rights
by Robert Wundeh Eno 223

The effect of an African Court on the domestic legal orders of African
states
by Kevin Hopkins 234

The future relationship between the African Court and the African
Commission
by Ibrahim Ali Badawi Elsheikh 252

The African Charter on Human and Peoples' Rights: Towards a more
effective reporting mechanism
by Kofi Quashigah 261

Recent developments

Human rights in NEPAD and its implications for the African human
rights system
by Evarist Baimu 301

The first meeting of the African Committee of Experts on the Rights
and Welfare of the Child
by Amanda Lloyd 320

A critical reflection on the 2002 presidential election in Zimbabwe
by Gabriel Shumba 327

AFRICAN HUMAN RIGHTS LAW JOURNAL

Editorial

The majority of contributions to this issue of the *African Human Rights Law Journal* are devoted to the to-be-established African Court on Human and Peoples' Rights. The Protocol providing for the creation of this Court was adopted in 1998. It is reprinted in C Heyns (ed) *Human rights law in Africa 1999* (2002) 279. Still, it has not received the required 15 ratifications to ensure its entry into force. Indeed, at the moment only six states (Burkina Faso, The Gambia, Mali, Senegal, South Africa and Uganda) have ratified the Protocol. (South Africa ratified the Protocol after the 31st session of the Commission had taken place.) As a contribution to the campaign to speed up the process of ratification, the Centre for Human Rights, University of Pretoria, organised a conference on aspects of the Protocol on the African Court during the NGO workshop preceding the African Commission's 31st session, held in Pretoria in May 2002. A number of articles in this issue were presented as papers at this conference.

When the Commission met, it adopted the following resolution on the African Court:

**RESOLUTION ON THE RATIFICATION OF THE PROTOCOL TO
THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS
ON THE ESTABLISHMENT OF AN AFRICAN COURT ON
HUMAN AND PEOPLES' RIGHTS**

The African Commission on Human and Peoples' Rights, meeting at its 31st ordinary session in Pretoria, South Africa, from 2 to 16 May 2002:

RECALLING that the Assembly of Heads of State and Government of the Organisation of African Unity (OAU) adopted the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights at its 19th ordinary session on 9 July 1998 in Ouagadougou, Burkina Faso;

NOTING with satisfaction that 26 states have signed the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights;

CONSIDERING that only five states have up to now ratified the said Protocol: Burkina Faso, The Gambia, Mali, Senegal and Uganda;

RECALLING that 15 ratifications or accessions are necessary for the entry into force of the Protocol on the Establishment of an African Court on Human and Peoples' Rights;

URGES all the OAU member states to ratify or accede as soon as possible to the Protocol on the Establishment of an African Court on Human and Peoples' Rights.

The concept of human rights currently enjoys unprecedented acceptance on the African continent. The challenge remains turning this potential into reality.

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

*David Padilla**

Fulbright Senior Specialist and Consultant on Human Rights; former Assistant Executive Secretary, Inter-American Commission on Human Rights

1 Introduction

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

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

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

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

* BA, MA, LL.M, MPA, JD (Detroit); dpadilla44@aol.com

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

2 Similarities and differences between the Americas and Africa

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

Moreover, the Americas, as well as the African continent, have been the scenes of numerous massive and gross human rights violations in the past, and in some countries these still continue to exist. In terms of international organisations, the Organisation of American States (OAS), in the Americas, and the Organisation of African Unity (OAU), now known as the African Union (AU), in Africa, have been relatively weak and under-funded institutions. In the field of human rights, both systems have evolved slowly and in piecemeal fashion over time. In the Americas, following World War II, there was an instrument to protect human rights, but no commission or supervisory body. That instrument is the American Declaration of the Rights and Duties of Man (American Declaration).² It was adopted in 1948 in Bogota, Colombia. The American Declaration contains a series of civil and political as well as social, economic and cultural rights, but provides no enforcement mechanism. The Inter-American Commission that now protects rights under the American Declaration was not created until 1960.³ It was not the product of a treaty, but a mere resolution of a meeting of foreign ministers of the American countries. In the case of Africa, the African Charter on Human and Peoples' Rights (African Charter) was adopted in 1981 and came into force in 1986, and presently has 53 state parties.

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

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

³ As above, 6–8.

⁴ As above, 8–9, 23–47.

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

3 Background to and features of an African Court

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

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

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

⁵ As above, 48.

⁶ As above, 11–13.

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

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

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

¹⁰ As above, arts 55 & 41.

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

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

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

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

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

¹¹ As above, art 55(3).

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

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

¹⁴ As above, arts 30 & 31.

¹⁵ As above, arts 12(2) & 14(3).

¹⁶ As above, arts 15(4) & 21(2).

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

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

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

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

4 Measures to ensure the prompt establishment of the African Court

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

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

¹⁷ As above, art 9.

¹⁸ As above, art 14(2).

¹⁹ As above, arts 5(3) & 34(6).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

²⁴ As above, art 4.

²⁵ As above, art 27(2).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 Conclusion

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

²⁹ As above, art 6(3).

A comparison between the African and European Courts of Human Rights

*Rachel Murray**

Lecturer in Law, Birkbeck College, University of London

1 Introduction

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

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

* LLB (Leicester), LLM (Bristol), PhD (West of England, Bristol); R.Murray@bbk.ac.uk

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

2 The relationship between a Commission and a Court

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

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

² Art 30 African Charter.

³ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Protocol on the African Court), OAU/LEG/MIN/AFCHPR/PROT (I) Rev 2, adopted June 1998.

⁴ Art 19 European Convention.

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

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

⁷ Preamble Protocol on the African Court.

⁸ Art 2 Protocol on the African Court.

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

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

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

2.1 Submission of cases to the Court

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

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

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

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

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

¹⁴ See eg art 2 Protocol on the African Court.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

²² Art 3(2) Protocol on the African Court.

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

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

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

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

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

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

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

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

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

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

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

2.1.2 *NGOs and individuals directly petitioning the Court*

During the drafting of the Protocol on the African Court, the ability of individuals and NGOs to have standing before it was the subject of much debate. The resulting provisions³² appear to some extent to reflect the previous position under the European Convention. Under the European Convention there was no initial power of individuals or NGOs to submit cases before the Court; they had to go through the Commission and rely on it to choose to submit the case. Protocol 9 amended the European Convention to enable individuals and NGOs who had already submitted cases to the Commission to submit a case also to the Court.³³ This was because it was felt that a system which gave rights to an individual but not the full power to enforce them, thus violating the principles of 'equality of arms', the right of access to a tribunal to defend rights and the participation of both parties in proceedings, which principles were not guaranteed by allowing the state to submit a case but not the individual.³⁴ The provision in the European system of a panel to review the case of an individual submitting a case to the Court, this being to check whether the Commission or the state would decide to submit the case anyway,³⁵ might be a useful tool for the African system.

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

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

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

³⁴ Explanatory Report to Protocol 9, as above, para 13.

³⁵ As above, para 21, in respect of art 5 of the Protocol.

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

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

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

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

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

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

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

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

³⁷ See for a discussion Merrills (n 16 above) 5.

³⁸ D Shelton *Remedies in international human rights law* (1999) 152.

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

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

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

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

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

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

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

⁴³ Merrills (n 16 above) 3.

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

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

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

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

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

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

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

⁴⁷ As above, 49.

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

⁴⁹ See also Clements (n 16 above) 270.

⁵⁰ Merrills (n 16 above) 51.

⁵¹ As above, 15.

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

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

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

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

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

3 Relationship between the Court and other bodies

Of increasing interest and importance has been the relationship of the African Commission, and the future Court, with the other organs within the Organization of African Unity (OAU)/African Union (AU). The Constitutive Act establishing the African Union mentions human rights in a number of its provisions,⁵⁹ although it was a point of concern that it did not expressly refer to the African Commission itself or the new Court. Attention has been paid to this defect by the Commission⁶⁰ and the AU, the latter now having asked the Commission to formulate for itself how it may fit within the Union.⁶¹ There exists the potential

⁵⁴ Christie (n 52 above) 550–551.

⁵⁵ As above.

⁵⁶ As above.

⁵⁷ As above.

⁵⁸ Merrills (n 16 above) 15–16.

⁵⁹ Eg arts 3 & 4 Constitutive Act.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Although there has been consistent reference to the European Convention as the standard which the EU employs,⁷⁰ this has recently been challenged by the development of an EU Charter on Fundamental Rights.⁷¹ This Charter was developed as a result of the need to deal with the lack of accountability of EU organs,⁷² the need to move from the EU dealing with human rights piecemeal to a more coherent and comprehensive approach⁷³ and 'to make their overriding importance and relevance more visible to the Union citizens'.⁷⁴ The Constitutive Act

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

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

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

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

⁷¹ Official Journal of EC, C364, 18 December 2000.

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

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

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

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

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

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

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

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

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

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

⁷⁷ See Drzemczewski (n 72 above) 21.

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

⁷⁹ Blackburn (n 68 above) 93–94.

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

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

or the African Court on Human and Peoples' Rights may be an issue (for example, for failing to take action in times of conflict) and certainly has its precedent in the European system.⁸² Given all OAU states are party to the African Charter, and given that the OAU was the body which established it, there is an argument for suggesting that the African Union could accede to the African Charter. Whether this could be the first time an international body has acceded to its own instrument, would depend on whether the OAU/AU could show itself to be an international organisation which has legal personality,⁸³ whether this would be permitted by treaty laws⁸⁴ and whether the African Charter itself would permit accession by organisations rather than states.⁸⁵

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

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

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

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

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

4 Relationship with national systems

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

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

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

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

⁸⁸ Art 53 European Convention.

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

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

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

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

5 Issues of standing and access

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

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

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

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

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

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

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

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

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

⁹³ *Klass v Germany*, as above, para 34.

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

⁹⁵ As above, art 4.

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

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

In terms of representation, the Protocol on the African Court refers to the ability, although not the obligation, for parties to 'be entitled to be represented by a legal representative of the party's choice'. Experience of the European Court would suggest that it is important to consider who may represent the individual. If the African Court were to require, for example, that the representative be a lawyer, it may face the difficulties already encountered by the European Court where⁹⁷

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

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

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

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

⁹⁸ Art 10 Protocol on the African Court.

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

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

¹⁰¹ Rule 34 Rules of the European Court.

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

An additional issue of access will be the length of time taken to complete the examination of a case. Criticism in this regard has been levelled towards the European Court,¹⁰² indeed it was a reason for the creation of a single body, given the four or five year wait before cases were decided.¹⁰³ Certainly, the power to give interim measures in this respect is important, available to the African Court in article 27 of the Protocol 'in cases of extreme gravity and urgency' and the European Court in Rule 39.¹⁰⁴ The European Court also has the power to speed up dealing with particular cases if necessary.¹⁰⁵

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

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

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

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

¹⁰⁵ Rule 41 Rules of the European Court.

¹⁰⁶ Leech (n 21 above) 15.

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

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

6 Remedies and enforcement

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

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

¹⁰⁸ Article 10 Protocol on the African Court.

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

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

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

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

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

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

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

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

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

Article 13 of the European Convention provides for a right to a remedy¹¹⁷ for the violation of the rights in the Convention.¹¹⁸ The European Court can provide just satisfaction under article 41¹¹⁹ of the Convention, which can include costs as well as compensation, although it has been noted that the previous court did not use this provision a great deal.¹²⁰ Where

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

¹¹⁵ Shelton (n 38 above) 153.

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

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

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

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

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

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

Compliance by states with European Court decisions has generally been good, resulting in, for example, changes to legislation, reversal of case law¹²² and agreement to provide payment to the victim as required by the Court.¹²³ The Committee of Ministers¹²⁴ supervises enforcement,¹²⁵ and adopts resolutions on whether states have complied with decisions of the Court. The Protocol on the African Court provides that state parties 'undertake to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution'.¹²⁶ The decision of the African Court is final, subject to the ability of the Court to review it in light of new evidence.¹²⁷ Enforcement is through submitting the case to the OAU states as well as the Commission and putting monitoring of its execution in the hands of the Council of Ministers on behalf of the Assembly.¹²⁸ Further, the annual report of the Court to the Assembly should indicate which states have not complied with its judgment.¹²⁹

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

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

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

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

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

¹²⁵ Art 46(2) Rules of the European Court.

¹²⁶ Art 30 Protocol on the African Court.

¹²⁷ Art 28 Protocol on the African Court.

¹²⁸ Art 29 Protocol on the African Court.

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

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

7 Wider role of a regional human rights court

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

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

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

¹³¹ Merrills (n 16 above) 12.

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

¹³³ Merrills (n 16 above) 16.

¹³⁴ As above, 17.

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

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

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

The African Court must also keep in mind its audience, 'no court can work successfully unless its decisions are accepted by those whom we may term its audience', and, as in the case of the European Court, this will include the public, parties, states, and wider human rights community.¹⁴¹ One difficulty for the African Court may be the lack of homogeneity among its audience. While this may now become a concern for the European Court with the increase in membership from particularly Eastern European states, part of its success has been attributed to its¹⁴²

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

¹³⁶ Merrills (n 16 above) 18.

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

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

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

¹⁴⁰ See Merrills (n 16 above) ch 9.

¹⁴¹ As above, 30.

¹⁴² As above.

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

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

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

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

The power of the Court to be of wider influence on these and other matters¹⁵⁰ will, however, depend on its integrity and that its 'membership and judgments . . . command universal respect by being of the highest quality and integrity'.¹⁵¹ In this respect the appointment procedures for judges and their independence are essential.¹⁵² This has been

¹⁴³ As above, 31.

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

¹⁴⁵ Merrills (n 16 above) 31–32.

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

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

¹⁴⁸ As above, 35.

¹⁴⁹ As above.

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

¹⁵¹ Blackburn (n 68 above) 83.

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

an ongoing concern in respect of the African Commission and although it has generally not been a problem in practice in Europe,¹⁵³ the process of nomination has also been questioned in respect of the European Court of Human Rights,¹⁵⁴ where there have been attempts to bolster the role of the Parliamentary Assembly¹⁵⁵ to avoid it just being a rubber stamp of the selection of the states.¹⁵⁶ The various provisions in the

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

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

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

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

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

Protocol on the African Court dealing with issues of independence¹⁵⁷ may not be enough to counter the problems associated with the fact that states still propose the candidates, the Assembly of Heads of State and Government will vote on them,¹⁵⁸ and the fact that the power to remove judges rests in the last instance with the Assembly of the OAU and not with the judges themselves.¹⁵⁹

8 Conclusion

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

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

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

¹⁵⁹ Art 19(3) Protocol on the African Court.

¹⁶⁰ Art 33 Protocol on the African Court.

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

¹⁶² As above.

The jurisdiction of the African Court on Human and Peoples' Rights

*Robert Wundeh Eno**

Executive Assistant to the Chairperson of the South African Human Rights Commission; PhD candidate and research fellow, University of the Witwatersrand

1 Background

International human rights law is a body of substantive and procedural rules that deals with the protection of internationally guaranteed rights of individuals against violations primarily by governments. Two branches, the so-called normative system and the international protection system, may be identified here. The normative system is a set of international rules recognising human rights, providing for their scope and contents, and giving criteria for their permissible restriction and derogation in times of emergency.¹ The international protection system is a set of rules establishing legal mechanisms for the monitoring and enforcement of state parties' obligations.

Human rights law in general is embodied in legal rules that derive, in part, from declarations and treaties. Human rights treaties (both general and specific in scope, and both universal and regional in reach) establish international enforcement systems designed to ensure that state parties comply with their obligations. These systems usually consist of a monitoring body or bodies, composed of a given number of experts acting in their personal capacities.² The body is endowed with a range of

* LLM (UNISA); reno@sahrc.org.za

¹ M Pinto 'Fragmentation or unification among international institutions: Human rights tribunals' (1999) 31 *New York University Journal of International Law and Politics* 833.

² The Human Rights Committee established to monitor the implementation of the International Covenant on Civil and Political Rights and the Protocols to the Covenant is composed of 18 independent experts who are supposed to be persons of high moral character and recognised competence in the field of human rights. The Committee convenes three times a year for sessions of three weeks' duration, normally in March at

functions, including the power to receive and consider individual petitions.³ Thus, treaty-based mechanisms provide a protection system, answering the call for more binding instruments that recognise human rights and define them with greater precision than is the case with instruments such as declarations.⁴

Human rights bodies have been established at national,⁵ regional⁶ and global⁷ levels. Nationally, the establishment of national human rights commissions has become fashionable over the past decade, especially in Africa and other emerging democracies. National institutions have become a key instrument for the domestic application and monitoring of the observance of international human rights norms and standards. They have the potential to contribute positively to the establishment of democracy, representative and accountable good governance and in the development and observance of human rights in society.

One of the most fundamental questions of law, human rights law inclusive, is whether a given mechanism (commission, committee or court) has jurisdiction to preside over a given case. A jurisdictional question may be broken down into three components:

- jurisdiction over the subject matter (competence *ratione materiae*);
- jurisdiction over the person (competence *ratione personae*); and
- jurisdiction to render the particular judgment sought.

Any mechanism possesses jurisdiction over matters only to the extent granted to it by the enabling act or legislation. The question of whether a given mechanism has the power to determine a jurisdictional question is decided and determined by that mechanism.

the United Nations (UN) headquarters in New York and in July and November at the UN office in Geneva. According to art 11(1) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, the Court shall consist of 11 judges, nationals of the member states of the OAU, elected in an individual capacity from among jurists of high moral character and of recognised practical, judicial or academic competence and experience in the field of human and peoples' rights.

³ Communications or complaints of human rights violations allegedly committed by states or organs of states submitted by individuals, groups of individuals, NGOs or other states.

⁴ Pinto (n 1 above) 833.

⁵ Such as the South African Human Rights Commission; the Commission on Human Rights and Administrative Justice of Ghana; and the Ugandan Human Rights Commission.

⁶ Such as the African Commission on Human and Peoples' Rights; the European Court on Human Rights; and the Inter-American Court on Human Rights.

⁷ Such as the UN Human Rights Committee; the Committee on the Rights of the Child; and the Committee Against Torture.

2 Jurisdiction of the African Court on Human and Peoples' Rights

In 1998 the Assembly of Heads of State and Government of the Organisation of African Unity (OAU) adopted a Protocol Establishing an African Court on Human and Peoples' Rights (Protocol on the African Court).⁸ The process of establishing the African Court on Human and Peoples' Rights (African Court) was initiated at a summit of Heads of State and Government of the OAU in Tunis, Tunisia in June 1994, when a resolution adopted at this summit requested the Secretary-General of the OAU to convene a meeting of government experts to examine ways of enhancing the efficiency of the African Commission on Human and Peoples' Rights (African Commission) and to consider in particular the question of the establishment of an African Court.⁹

The Protocol on the African Court provides for three heads of jurisdiction for the African Court, namely contentious (adjudicatory), advisory¹⁰ and conciliatory.¹¹ The jurisdictional provisions of the Protocol on the African Court are very important as they determine who will have access to the court, under what conditions, and what types of violations can be entertained by the African Court.

3 Contentious jurisdiction

This can be examined under two broad headings: subject matter jurisdiction, that is the type of cases the African Court can entertain, and personal jurisdiction, that is, who can file a complaint with the African Court.

3.1 Subject matter jurisdiction

Under articles 3 and 7 of the Protocol on the African Court, the Court has jurisdiction to adjudicate disputes brought against a state party to the Protocol on the African Court in which it is alleged that the state has

⁸ See OAU Doc OAU/LEG/EXP/AFCHPR/PROT (III).

⁹ The OAU in adopting the African Charter flatly rejected the inclusion of a human rights court in the African regional human rights system. It did so despite the inclusion of a court in both the European and Inter American systems at the time, and despite early calls for the establishment of such a court prior to the adoption of the African Charter. Indeed, as early as 1961, at an International Court of Justice (ICJ) Conference on the Rule of Law organised in Lagos, there was a call for the establishment of a court with appropriate jurisdiction to safeguard human rights on the continent.

¹⁰ Art 4(1) Protocol on the African Court.

¹¹ Art 9 of the Protocol on the African Court, which provides that the African Court may try to reach an amicable settlement in a case pending before it in accordance with the provisions of the African Charter.

violated the African Charter on Human and Peoples' Rights (African Charter) or any other human rights instrument that the state has ratified.

In terms of article 3(1) of the Protocol on the African Court, the jurisdiction of the African Court shall extend to 'all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the states concerned'. When read together with article 7, which provides that 'the Court shall apply the provisions of the Charter and any other relevant human rights instruments ratified by the states concerned', one can easily conclude that the jurisdiction of the African Court is wider than that of the other regional human rights courts. Article 7 of the Protocol on the African Court goes much further than article 60 of the African Charter, which urges the African Commission simply to:

[d]raw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity,¹² the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialised Agencies of the United Nations of which the parties to the present Charter are members.

Indeed, the African Commission may not interpret or apply any human rights instrument other than the African Charter under its contentious jurisdiction. While the Charter may be interpreted drawing inspiration from other international human rights instruments, all cases must be decided with reference to the African Charter.¹³ The same is true of the European Court of Human Rights (European Court) and the Inter-American Court of Human Rights (Inter-American Court), whose direct subject matter jurisdiction is limited to the conventions under which they were created.¹⁴

Under the Protocol on the African Court, the Court will exercise direct jurisdiction over all human rights instruments 'ratified by the states concerned'. Presumably, this extends to all regional, sub-regional, bilateral and multilateral and international treaties.¹⁵ The Court must therefore not limit itself to the African Charter, but can refer to other

¹² The OAU has been replaced by the African Union. It must be stated that the Constitutive Act of the African Union upholds many human rights principles not recognised in the OAU Charter.

¹³ See art 45(2) of the African Charter, which provides that the functions of the Commission shall be to 'ensure the protection of human and peoples' rights under conditions laid down by the present Charter'.

¹⁴ This does not, however, mean that the regional instruments cannot look towards each other's decisions and those of other human rights agencies to find solutions to questions of human rights within their respective regions.

¹⁵ NJ Udombana 'Towards the African Court on Human and Peoples' Rights: Better late than never' (2000) 3 *Yale Human Rights and Development Law Journal* 45.

treaties ratified by the states, including UN treaties, bilateral and multi-lateral treaties at regional and sub-regional level. This is particularly important and encouraging because a person whose rights are not adequately protected in the African Charter can easily hold the state concerned accountable by invoking another treaty to which that state is a party — either at UN level or sub-regional level.

Thus, for example, a perception and fear has been expressed that the African Charter does not adequately protect women's rights. Rather than rely on the Charter, an aggrieved woman or women's group could bring a case to the African Court under another international treaty that better protects her rights.¹⁶ The same could be true where a state party to the African Charter tried to invoke a claw-back clause to justify a breach of internationally protected rights. The victim could simply invoke a treaty protecting the same rights, such as the ICCPR, that did not include a similar claw-back clause.¹⁷

Some human rights commentators have argued that if this interpretation is correct and followed by the African Court, it will cause 'jurisprudential chaos'¹⁸ and would signal the end of 'even the pretence that there is something unique about human rights in Africa', a point that has been argued so passionately over the years.¹⁹ It will mean that all human rights treaties ratified by a state party to the Protocol on the African Court in the past will become justiciable, and future ratifications will have the same consequence. States might be deterred not only from ratification of the Protocol, but also from ratification of other human rights treaties.²⁰ Heyns makes the point that:²¹

[I]n one fell swoop, Africa will have jumped from a region without a court, to a region where all human rights treaties, whether they are of UN, OAU or other origin, are enforced by a regional court, even though the UN itself does not enforce them through a court of law. It would be highly unusual for an institution from one system (AU) to enforce the treaties of another system (UN).

However, Udombana expresses the view that these fears are 'unfounded' and adds that the African Court's discretionary jurisdiction over cases filed by individuals and NGOs will limit the numbers of cases that actually reach the Court to a manageable number, ensuring that those with the greatest merit are heard.²²

While it is true that a broad interpretation would open a Pandora's box and may flood the African Court with a lot of cases, it is also

¹⁶ Udombana (n 15 above).

¹⁷ Udombana (n 15 above).

¹⁸ C Heyns 'The African regional human rights system: In need of reform?' (2001) 2 *African Human Rights Law Journal* 167.

¹⁹ As above.

²⁰ As above.

²¹ As above.

²² As above.

important for the Court to have this wide jurisdiction. The ratification of an international treaty should be a voluntary exercise by states, because a state makes a commitment to be bound by the provisions of the treaty. If the jurisdiction of the African Court would scare any country from ratifying a particular treaty, it means that country is not committed to the promotion and protection of human rights. This broad jurisdiction would in a way serve as a test to those countries that have adopted sophisticated strategies to beat international human rights mechanisms to escape scrutiny. Many African states have been known to ratify international human rights treaties either because of internal or external pressure or for international public relations. The broad jurisdiction of the Court would also expose those states that took ratification as a public relations exercise.

Therefore, rather than limit the jurisdiction of the African Court to only African human rights documents, it would be better to adopt this broad interpretation and instead clearly define the relationship between the African Commission and the African Court. The African Charter should be revised to remove protective functions from the African Commission and to vest them exclusively with the African Court. The Commission should only be charged with promotional functions, the most of which should be state reporting and dialogue with NGOs and government institutions, advocacy and the incorporation of human rights norms into state policies and domestic legislation.²³ In this way the 'jurisprudential chaos' feared by some commentators would be averted.

This arrangement will enable the African Commission to apply itself effectively to communications submitted to it and make proper representations to the African Court where necessary. If the Commission is given only a promotional function, it might have the opportunity to engage more meaningfully with amicable settlements of complaints, thus screening the number of cases that may eventually get to the Court.

The Protocol on the African Charter does not seem to impose a mandatory jurisdiction on the African Court, that is, requiring it to hear every admissible case. This should allow the Court to avoid overload and to hear only those cases which have the potential to advance human rights protection in a meaningful way.

While certain entities are entitled to submit cases to it, the African Court has a discretion under the admissibility clause to consider or transfer cases to the African Commission.²⁴ This discretion is essential if one considers the purposes of adjudication that the court ought to carve

²³ M Mutua 'The African human rights system — A critical evaluation' <http://www.undp.org/hdro/papers/backpapers/2000/MUTUA.PDF> (accessed 16 June 2002).

²⁴ Art 6(3) Protocol on the African Court.

out for itself to become effective, relevant and visible in the struggle against the culture of impunity and human rights violations.²⁵

Since the Protocol on the African Court enshrines the principle of exclusivity of competence, it is left to be seen how this will be reconciled with sub-regional human rights courts such as those established or to be established within the aegis of the Economic Community of West African States (ECOWAS) and the Southern African Development Community (SADC). Furthermore, it is to be seen what effect the exercise by the African Court of its interpretative powers will have on the quasi-judicial function of the African Commission to interpret the provisions of the African Charter.²⁶

3.2 Personal jurisdiction: Who may file a complaint with the African Court

The provisions of article 5 refer to the African Court's competence in dealing with persons that can appear before the Court or submit matters to the Court. This comprises two types of jurisdiction: compulsory (automatic) and optional.

As regards the Court's compulsory jurisdiction, article 5(1) states that the following are entitled to submit cases to the Court:

- a. the African Commission;
- b. the state party which has lodged a complaint to the African Commission;
- c. the state party against whom the complaint has been lodged at the African Commission;
- d. the state party whose citizen is a victim of a human rights violation;
- e. African intergovernmental organisations.

Matters may also be referred to the African Court by a state party acting as a third party intervener, if it considers that it has an interest in a case in which it was initially not involved.²⁷

For other claimants, such as individuals and NGOs, the Protocol on the African Court, in articles 5(3) and 34(6), provides for an optional jurisdiction.²⁸ The discretion to allow direct access to the African Court

²⁵ Mutua (n 23 above).

²⁶ It has been argued by some human rights commentators that should the court adopt a very broad interpretation that will include all other treaties ratified by state parties, its decisions would most invariably be contradicting those of the African Commission because the two institutions would be applying different standards: The one, the African Commission restricted to the African Charter; and the other, the African Court, given a universal mandate.

²⁷ Art 5(2) Protocol on the African Court. This practice is similar to what obtains at the ICJ.

²⁸ Art 5(3) of the Protocol on the African Court provides that the African Court may entitle relevant non-governmental organisations (NGOs) with observer status before the African Commission, and individuals to institute cases directly before it, in accordance with art 34(6) of this Protocol.

by individuals and NGOs lies jointly with the target state and the Court. In order for the Court to hear a case filed by an individual or NGO, the state must in the first place have made an express declaration accepting the Court's jurisdiction to hear such a case. As article 34(6) provides:

[A]t 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.

In the second place, the Court has a discretion to grant or deny access at will. The requirement of a separate declaration in the case of individual and NGO communications is in line with the procedural law of other human rights systems.²⁹ This is the general practice at the UN and other regional human rights instruments. Prior to the coming into force of Protocol 11 to the European Convention, articles 25(1) and 46(1) required the High Contracting Parties to make separate declarations to allow the European Commission and the European Court respectively to entertain communications from individuals and NGOs. In the case of the Inter-American Court, individuals, groups of individuals and NGOs legally recognised by the OAS are only entitled to submit cases to the Inter-American Commission, which, if the case arises, at the end of the proceedings, transmits them to the Inter-American Court for judgment. Individuals and NGOs do not have direct access to the Inter-American Court.

However, with the adoption and entry into force of Protocol 11 to the European Convention, the European human rights system made considerable progress in protecting the rights of the individual. The European Court is assigned a compulsory competence to examine petitions from individuals who have been victims of human rights violations.³⁰

It would appear from the foregoing that in cases where there is a two-tier enforcement mechanism, the requirement of a separate declaration to access the court becomes necessary.³¹ In the Inter-American and African systems, no special declaration is required to access the Commissions. The Commissions could therefore be seen as a necessary barrier to weed out frivolous and unnecessary communications that might find their way to the courts if direct access were allowed.

²⁹ Art 41 ICCPR; art 21(1) CAT; arts 25(1) & 46(1) European Convention; art 44 (1) American Convention on Human Rights.

³⁰ Art 34 of Protocol 11 to the European Convention provides that 'the Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.'

³¹ This, however, cannot be the case within the UN system where there is no court.

While the limitation under article 5(3) of the Protocol on the African Court may be necessary to bring states on board to ratify the Protocol, it is nevertheless disappointing and a terrible blow to the standing and reputation of the African Court.³² After all, it is individuals and NGOs, and not the African Commission, regional intergovernmental organisations or state parties who would be the primary beneficiaries and users of the African Court. The Court is not an institution for the protection of the rights of states. A human rights court exists primarily for protecting citizens against the state and other government agencies.³³

Article 5(3) of the Protocol on the African Court also restricts access only to 'relevant NGOs having observer status before the African Commission'. This is a unique and potentially dangerous restriction. Firstly, what constitutes a 'relevant NGO' is not known. Determination of a relevant NGO can be left to the African Commission and the Commission can consider only those NGOs that have been submitting their periodic reports to it. Secondly, those NGOs that do not have observer status before the Commission would not be able to access the Court. This provision is very restrictive when compared to what obtains in the Inter-American system. Under the Inter-American system, any NGO legally recognised in one or more member states of the OAS may lodge petitions with the Inter-American Commission.³⁴

It should therefore be possible for all NGOs to have access to the African Court, as not all NGOs dealing with human rights issues currently have observer status before the African Commission, and not all NGOs see the need to apply for such status.

In the meantime, however, it is very important for the African Commission to be strengthened and encouraged to work closely with NGOs so that the Commission can always be used as a reliable conduit for NGOs' access to the African Court. An effective Commission, enjoying the support and confidence of NGOs, would be able to adequately close the gap created by article 5(3).

4 Advisory jurisdiction

In addition to the contentious jurisdiction, the African Court is also endowed with advisory powers. In accordance with article 4, the Protocol on the African Court confers on the Court a discretionary competence to give advisory opinions 'on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission'. Like the submission of communications, the request for

³² Mutua (n 23 above) 28.

³³ As above.

³⁴ Art 44 American Convention.

an advisory opinion is not an *actio popularis* condition; rather it is limited to a member state of the OAU, the OAU, any of its organs, (it is submitted that this includes the African Commission), or any African organisation recognised by the OAU.

The African Court is vested with a broader jurisdiction than other regional bodies in terms of who may submit requests for an advisory opinion. It also has the broadest jurisdiction of the three regional bodies in terms of subject matter. Under the Inter-American system, only OAS member states and OAS organs have the right to seek such opinion and in the European system, only the Committee of Ministers has this power.³⁵

It is not clear in the Protocol on the African Court whether NGOs having observer status before the African Commission can request an advisory opinion from the African Court. However, one can deduce that NGOs with observer status before the Commission are *ipso facto* organisations recognised by the OAU in terms of article 4(1) of the Protocol, if the African Commission is regarded as an organ of the OAU and follows rules recognised by the OAU in granting such status. Alternatively, one can argue that since article 5(3) does not give these NGOs direct access to the African Court, it is doubtful whether it will entertain submissions for advisory opinions from them, especially on matters relating to countries that have not made a declaration in terms of article 34(6) of the Protocol.

The power of the African Court to render advisory opinions is purely discretionary. No guidelines are established in the Protocol on the African Court for determining either when to exercise or when to decline to exercise this jurisdiction.³⁶ In this regard, the Court can, and should, adopt a liberal approach because in general, the advisory opinions are not binding. In practice, however, the opinions of the Court could serve as a reference for a dynamic and progressive interpretation of the African Charter and other human rights treaties. It may also significantly impact on the domestic application of the Charter and other international human rights principles.³⁷

³⁵ Art 47(1) Revised European Convention on Human Rights.

³⁶ Udombana (n 15 above). The European Court, by contrast, is prohibited from exercising its advisory powers over any question relating to the content or scope of the rights or freedoms defined in the European Convention, or with any other question that the European Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the European Convention. The idea underlying this limitation seems to be to force all parties involved to use the proper hard and fast judicial channels in order to get answers to any questions concerning the interpretation of the substantive provisions of the European Convention.

³⁷ As above.

5 Conclusion

From the foregoing, it can be concluded that while the African Court shares a lot of similarities with other regional human rights courts, it also exhibits some unique features in an attempt to bring the African human rights system in conformity with universal standards. Whether these features will enhance the credibility of the Court and promote the African human rights regime remains to be seen.

The real effectiveness of the African Court, however, does not depend solely on how broad the jurisdiction of the Court is, but rather will depend on how creative its judges will be in interpreting their mandate and jurisdiction. If the Court takes a conservative approach to these issues, there is little hope that it will be any more effective than the African Commission in protecting human rights in the continent.

By contrast, if the African Court takes a liberal and creative approach to interpreting its mandate under the Protocol on the African Court, the Court has the potential to take the lead on many innovative trends in regional and international human rights protection.

This is particularly true in regard to the Court's jurisdiction over persons and subject matter. Should the Court, for example, interpret articles 34(6) and 5(3) of the Protocol narrowly, it could effectively foreclose NGO and individual access to the Court. Likewise, a narrow interpretation of its jurisdiction to entertain contentious petitions concerning 'other human rights treaties' would significantly restrict its power to vindicate a wide variety of human rights violations in the continent.

There is therefore a strong need for a broad and creative interpretation of the Protocol on the African Court, especially articles 5(3) and 34(6) by the Court, to avoid injustices based on formalisms and technicalities in the textual language of the Protocol. A strong interpretive role by the Court is needed to overcome these hurdles to implementation of the Protocol and to a strong and effective role for the Court in the protection of human rights in Africa.³⁸

³⁸ Udombana (n 15 above) 57.

The effect of an African Court on the domestic legal orders of African states

*Kevin Hopkins**

Lecturer in International Law, University of the Witwatersrand

1 Introduction

Africa's dismal human rights record is well documented. The African Commission on Human and Peoples' Rights (African Commission) has also proved to be largely inadequate and ineffective in ensuring the protection of human rights on the African continent.¹ This is mostly because the African Commission can only report on human rights violations and make recommendations to the Assembly of Heads of State and Government of the Organisation of African Unity (OAU)/African Union (AU). Most critics believe that if the African Commission is complemented by an African Court on Human and Peoples' Rights (African Court), then the latter may be just what is needed to 'give teeth' to the African human rights system.

After much debate, spanning four decades and a multitude of different fora, a Protocol on the Establishment of an African Court on Human and Peoples' Rights (Protocol on the African Court or Protocol) was

* BA LLB (Rhodes), LLM (Wits); HopkinsK@law.wits.ac.za

¹ The African Commission was established by the African Charter on Human and Peoples' Rights (African Charter) and it was established under the auspices of the Organisation of African Unity (OAU). Its mandate is to promote and protect human rights, as stated in art 45 of the African Charter. It does this by receiving and acting upon written communications of human rights violations from state parties to the African Charter. Written communications are made in accordance with art 47 of the African Charter.

eventually adopted by the OAU Assembly.² The Protocol is now open for ratification. It will only enter into force once there are 15 ratifications.³ There is need for an African Court and this African Court will strengthen the overall system of human rights promotion and protection on the continent.

However, the creation of a supra-national legal system does not come without its own set of peculiar problems — the most obvious of which is created by the international law principle of state sovereignty. It is the principle of state sovereignty which entitles states to exercise their legislative, executive, and judicial functions, largely unfettered, in their own municipal territories. This principle is at odds with the idea that states can in fact be obliged to regulate their municipal laws under the instruction of a supra-national legal order. It is essentially this tension that is the focus of this paper.

The success of an African Court is mostly dependent on the willingness of states to embrace, with a real sense of obligation, the core values of the African human rights system that it is intended to serve. This is a two-dimensional obligation: First, it necessitates that states incorporate the provisions of the African Charter on Human and Peoples' Rights (African Charter) into their own municipal law and ensure (through their own municipal courts) compliance with it. Second, it necessitates that states accept and obey the judgments of the African Court notwithstanding apparent ideological conflict that may exist between their own jurisprudence and that of the African Court.⁴

² The idea of an African Court was first debated at the 1961 Law of Lagos Conference. However, it was not until 1994 that the OAU Assembly actually adopted a formal resolution at its 30th session, requesting that the Secretary-General of the OAU convene a meeting for this exact purpose. There were various subsequent discussions which culminated in the adoption of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Protocol on the African Court) in Burkina Faso in June 1998.

³ As at 31 July 2002 there were six ratifications — Sénégal, Burkina Faso, The Gambia, Mali, Uganda and South Africa.

⁴ The difficult question here is: Exactly how interventionist should the African Court be? From a political perspective, the African Court probably needs to be fairly circumspect, but much of its effectiveness will be lost if it does not make brave and bold decisions. On the other hand, if the African Court is too interventionist, then many African states may be reluctant to ratify the Protocol on the African Court for fear that their own domestic legal orders may be turned upside-down. Suggestions on this rather important question will be made during the course of this paper.

2 Incorporating the African Charter and the Protocol into the domestic law of states

The relationship between international law and municipal law is a controversial (and difficult) issue. It has long troubled both theorists and courts, mainly because international lawyers have for some time been divided on which of two main approaches to adopt — monism or dualism.⁵

The monists see all law as a unified body of rules. Because of this single conception of law, and since international law is law, monists regard international law as automatically forming part of the same legal structure that includes municipal law. For them, international law is incorporated directly into municipal law without any specific act of adoption. State judges, argue monists, are consequently obliged to apply the rules of international law in their municipal courts.

Dualists, in contradistinction, see international law and municipal law as completely different legal systems. For a dualist, the question of which legal system ought to govern a dispute is relative and dependent on both the nature of the dispute and the forum in which the matter arises (ie whether the adjudicating body is a municipal court or an international tribunal). Dualists accord international law primacy over municipal law in the international arena, for example, where the dispute is one between states; and similarly municipal law enjoys primacy in domestic disputes. The two legal orders are thus, for a dualist, quite distinct and separate — both in their application and purpose. For this reason, a dualist will never see international law as being applicable in a municipal court unless there has first been a specific act of adoption.

Maluwa writes that 'most scholars agree that the monist and dualist theories are relevant only in the specific context of customary international law'.⁶ It thus seems as though, in his opinion, since the African Charter and the Protocol are both treaties, it makes little difference in the final analysis as to which of the two theories one ought to apply. He clearly feels that this debate is not as relevant as the question of how municipal courts ought to apply international law in solving a legal

⁵ Most standard international law textbooks contain some literature on this long-standing debate. See eg J Dugard *International law: A South African perspective* (2000) 43–44; D Harris *Cases and materials on international law* (1998) 68–71; R Wallace *International law* (1997) 36–37; M Shaw *International law* (1997) 100–102. For a more detailed analysis of the debate, see A Aust *Modern treaty law and practice* (2000) 146–161.

⁶ T Maluwa 'The incorporation of international law and its interpretational role in municipal legal systems in Africa: An exploratory survey' (1998) 23 *South African Yearbook of International Law* 50.

problem.⁷ Perhaps one should be a little less convinced as to the irrelevance of the debate. Ratification of the African Charter and the Protocol (as treaties) means that states party to these instruments agree to uphold certain fundamental human rights. In essence the undertaking is given at the level of 'states'. But the undertaking of a state to abide by the provisions of a human rights instrument does not necessarily help a judge in that state's municipal court to solve a legal problem. The judge still needs to know when to apply the relevant international law and how to apply it in the context of the dispute. This would most certainly require a measure of incorporation. It is unclear as to how states should incorporate these human rights provisions into their law. Neither the African Charter nor the Protocol instructs state parties on how they ought to do this. There is certainly no formal act of incorporation required by the African system, given that issues of incorporation are largely determined by the domestic legal orders of states, rather than by international law itself.

Article 1 of the African Charter provides that state parties to the Charter 'shall recognise the rights, duties and freedoms' enshrined therein and that they 'shall undertake to adopt legislation or any other measures to give them effect'. There is nothing at all in the Protocol on the African Court that instructs states to incorporate it. It seems that, as a consequence of ratifying the Charter, states must do no more than give effect to the rights catalogued in it. They are free to decide for themselves on how they wish to go about doing this.

It also seems that, in the specific context of this paper, issues of incorporation raise two separate considerations: first, the state's obligation to other African state parties to the African human rights system; and second, the obligation of judges to apply the minimum standards prescribed under this system in the municipal courts of the state parties. These considerations are often merged into one but clearly they are distinct — the former deals with the state's duty to the African community whilst the latter deals with the state's duty to those subject to its municipal jurisdiction. The former obligation (owed to the African community) extends no further than the state affording recognition to the rights contained in the provisions of the instrument; whilst the latter obligation (owed to subjects in its municipal jurisdiction) requires that the states actually give content to the right. It is clear from this that the content given to the right can not be done in a vacuum and as such the ambit of its protection will be heavily influenced by the domestic context

⁷ This problem does not arise in South Africa because the South African Constitution Act 108 of 1996 specifically provides for the incorporation of both treaties and customary international law into the South African municipal legal order. But the incorporating provisions found in the South African Constitution are virtually unparalleled in Africa and for this reason the monist/dualist debate is by no means irrelevant.

in which that right operates. It is crucial that the African Court give serious contextual consideration to the domestic situation when evaluating a particular state's level of compliance.

3 The domestic effects of the African Court's jurisprudence on African states

The first point to make here is that by ratifying the Protocol, states accept the general jurisdiction of the African Court in respect of inter-state disputes, matters referred to the African Court by the African Commission, and also with respect to advisory opinions. The advisory jurisdiction, in particular, could make a very useful contribution to the development of a human rights culture in Africa. A state could foreseeably, by way of example, request an opinion from the African Court on the compatibility of its own municipal law with African human rights law. This is an obvious (and positive) effect that the African Court's jurisprudence can potentially have on the development of human rights in Africa.⁸

The second point to make is that article 30 of the Protocol provides that state parties 'undertake to comply with the judgment in any case to which they are parties within the time stipulated by the African Court and to guarantee its execution'. The ability of the system to bring about change depends on how binding the judgments of the African Court are. Apart from article 30, there does not seem to be any specific recourse provided for in the Protocol where a delinquent state deliberately refuses to comply with the African Court's judgment. Consequently, the effectiveness of the system seems to be largely dependent on the willingness of states to comply with its decisions. The execution of the judgment is founded on the undertaking of the states party to the Protocol.⁹

The statement, to the effect that Africa is a continent with a largely dismal human rights record, is a generalisation and for this reason it is horribly incomplete without the qualification that there are in fact a number of states in Africa that are demonstrating a firm commitment to

⁸ Art 4(1) of the Protocol empowers the African Court to 'provide an opinion on any legal matter relating to the Charter or any African human rights instrument'. Most permanent international courts (although, strangely, not the International Criminal Court) possess this advisory jurisdiction. One hopes that art 4(1) will be used in much the same way as advisory opinions have been used in the International Court of Justice, where their use has greatly contributed to the development of international law.

⁹ Although it is not strictly speaking an enforcement mechanism, art 31 of the Protocol states that the Court is to list (by specifically naming) those states that have not complied with its judgments. This list will be published as part of its annual report to the OAU. This is a kind of 'shaming' tactic aimed at embarrassing states that do not comply with the court order. This may help in some cases to ensure compliance, although there are arguably some tyrannical and despotic African leaders that have such little regard for the approval of the international community that embarrassment seems extremely unlikely.

upholding human rights in their own domestic legal orders.¹⁰ There are still a number of African states that continue to show little or no concern at all for human rights. It is this exact dichotomy that seems to be the source of an unfounded paranoia. The paranoia suggests that there is a very real danger that the African Court will not be able to match the high standard of human rights protection offered in some municipal jurisdictions (such as Benin or South Africa). The fear is that the African Court will settle for a standard in line with the African Charter, but nevertheless somewhat lower than the standard set in the more sophisticated constitutions of some of the more 'human rights friendly' states. The paranoia feeds off the logic that we can all anticipate disastrous consequences if the African Court is allowed to second-guess the decisions of municipal courts that have adequate domestic human rights systems in place.

This paper will deal with the unnecessary concern and indicate why perhaps this fear is misdirected. But first it is important to understand that the anticipated problem is mostly prevalent where there are conflicting ideologies.

4 The possibility of conflicting ideologies

This difficult question arises when a state party to both the African Charter and the Protocol develops an ideological conflict opposed to the jurisprudence of the African Court. A common example that is frequently used in the literature is that of Islamic law which apparently stands in contrast (and clear opposition to) the Universal Declaration of Human Rights (Universal Declaration) specifically, and the larger emerging body of human rights doctrine generally.¹¹ The question then becomes one of which of the two competing ideologies ought to prevail. Thus, the conflict of ideologies manifests between the municipal law of the state on the one hand, and the state's international human rights obligations on the other. The first point that needs to be made is that this conflict is in fact a paradox. While it is seen as problematic and therefore undesirable that states should have a conflict between their own municipal law and their obligations to the African community at large, it is equally true that without this conflict there would be no cause to revisit and reform their (non-compliant) municipal law.

¹⁰ South Africa, with her relatively new, yet extremely progressive Bill of Rights, is probably the best example of this. It is widely recognised that the protection of human rights in South Africa is mostly unprecedented and stands as a proud example to the rest of the world of a municipal law system that can work.

¹¹ The Universal Declaration of Human Rights specifically guarantees in art 18 the freedom to choose one's religion, and in art 16 the freedom to choose one's spouse. Both of these rights are severely curtailed by a strict interpretation of Islam.

The problem inherent in the conflict of ideologies can occur in two different ways — one is simple, the other one is rather more complex. The 'simple' conflict occurs where the state party has a municipal legal order that simply does not comply with the minimum standards prescribed under the African human rights system. The 'complex' conflict occurs where the state believes that it is in fact complying with these standards, even though the interpretation of a particular right in the African Charter given by its own municipal court is at odds with the jurisprudence of the African Court. By way of example: the African Court may pronounce on the meaning of gender equality, but what then of the cultural context and consequent meaning assigned to this concept in different African societies. For example, gender equality means one thing in traditional African customary societies, but it means quite another in states that follow a Western tradition.

The duty to comply may at first blush point to a single universal standard of human rights. The problem is thus a complex one because it may require that in the case of an ideological conflict arising, some states will be required to compromise aspects of their culture, tradition and sometimes even their religion if they are to conform to this single universal standard. It is difficult to see how this can realistically happen in Africa, and for this reason the ideal is probably to find a solution that is slightly more tolerant of diversity and less prescriptive of a single 'imposed' norm. This is the Herculean challenge that the African Court will need to confront. A sensible African Court may wish to learn from the European system and save itself the unnecessary growing pains of reinventing the wheel.

5 Lessons from the European system and possible solutions for the African Court

Initially, there were very few meaningful lessons that could be learned from the European system on solving the problem of conflicting African ideologies. This is mainly because of the perception that Africa is a far more diverse continent than Europe, suffering from a dire lack of consensus on what ought to constitute the single uniform human rights norm acceptable to all people, cultures, and states. But, as André Stemmet points out, the European system is also extremely diverse:¹²

[T]he Council of Europe comprises states with Catholic, Protestant, Orthodox and Muslim traditions. Since the end of the Cold War in Europe in 1990, a number of Eastern European states with no tradition of democracy and human rights have joined the system. Turkey has experienced three *coups*

¹² A Stemmet 'A future African Court for Human and Peoples' Rights and domestic human rights norms' (1998) 23 *South African Yearbook of International Law* 233.

d'état in as many decades, and as a very nationalistic state, places a strong emphasis on sovereignty. Turkey and neighbouring Greece, which has also not been spared the fate of a military takeover, have been on the brink of war over border disputes a number of times in the past decades. Russia is, political instability aside, currently experiencing an economic crisis of unprecedented proportions. The success of the European Court and the European Commission in developing mechanisms to apply the Convention in such diverse states and find the delicate balances that can sustain progress towards the development of uniform standards of human rights protection, will serve as inspiration for a human rights court in Africa to rise to the challenge.

In the European system the possible conflict of ideology has been minimised at the interpretation stage of the rights analysis. Judges in the European Court of Human Rights (European Court) frequently make use of the general principles of law applicable in the relevant municipal state when interpreting the scope and ambit of provisions in the European Convention. Two closely related doctrines have emerged for interpretative purposes — the twin principles of subsidiarity and the margin of appreciation. It seems wholly feasible that an African Court could similarly make use of the same two doctrines, with some variation, given that the African Charter does make reference, in article 61, to the 'general principles of law recognised by African states' as being a subsidiary means of establishing what law to consider when resolving disputes. Thus the article refers directly to consideration that the African Court may give to the municipal laws of individual African states.¹³

The principle of subsidiarity, in the European context, is concerned with the distribution of power between the national authority of member states and the supra-national authority of the European Convention on Human Rights (European Convention). Under this principle, the initial responsibility of enforcing human rights falls upon member states before the responsibility is shifted to the European Court. In other words, the European Court has a subsidiary role, limited in practice to little more than a review of the enforcement methods employed by the state in its own domestic legal order. From this it is clear that states and their municipal courts have an obligation, as the first point of reference, to do all that is necessary to ensure and guarantee the protection of human rights within their territories. This will obviously be done by applying their own municipal law in their own municipal courts. Only when a state's domestic legal order fails the human rights system, can the supra-national European Court step in with its review process — which entails a review of the offending conduct against the standard expected by the European human rights system.

¹³ The African Court shall, in terms of art 7 of the Protocol, apply the provisions of the African Charter (and any other human rights instrument ratified by the states concerned). Art 61 of the Charter, as described in the text, is thus of relevance.

It is interesting to note that, because the initial responsibility rests on member states, such states are given a fair amount of freedom to decide on how it is that they wish to discharge their duty. This makes complete sense since it is clearly the municipal courts that are best placed to decide on the contextual and historical interpretation of rights — therein lies the connection between the doctrine of subsidiarity on the one hand and the debate on a culturally relative theory of rights interpretation on the other. States must therefore be given a fairly broad margin of appreciation when it comes to implementing and applying these human rights standards in their own municipal courts. For this reason it seems fair to say that the margin of appreciation, which is a logical consequence of the doctrine of subsidiarity, is an interpretative tool used to reconcile the diverse understanding of human rights held by a diverse group of people. As one commentator has said:¹⁴

In the European system, comprising states with widely divergent legal traditions and factual situations, the discretion that a state is allowed rests on its direct and continuous knowledge of its society, its needs, resources, economic and political situation, local practices, and fine balances that need to be struck between competing and sometimes conflicting forces that shape a society. It follows that when the European Court sits in judgment on a state's actions, it has to take into account the legal and factual situations in the state, with the result that the standards of protection may vary in time and place.

It is nevertheless evident from the European system that although a fairly wide margin of appreciation is given to states, it is by no means a boundless margin. Two of the cases from the European Court that possibly best illustrate the workings and limits of the doctrine are *Handyside*¹⁵ and *Dudgeon*.¹⁶ These two cases seem to work well alongside each other for two reasons: First, because they both deal with the issue of public morals,¹⁷ and second, because the former is an illustration of where the margin of appreciation was applied so as to permit what was in effect a fairly restrictive state practice, whilst in the latter case the restrictive state practice was deemed to be impermissible on the basis that the margin of appreciation was not a boundless discretion.

In *Handyside* the European Court clearly expressed the flexibility of the 'moral' concept. The case dealt with the freedom of expression — which is protected by article 10 of the European Convention. In dispute was a publication called *The Little Red Schoolbook* which had been written

¹⁴ Stemmet (n 12 above) 242.

¹⁵ *Handyside v UK* ECHR (7 December 1976) Ser A 24.

¹⁶ *Dudgeon v UK* ECHR (22 October 1981) Ser A 45.

¹⁷ According to R Koering-Jouline 'Public morals' in M Delmas-Marty (ed) *The European Convention for the Protection of Human Rights: International protection versus national restrictions* (1992) 84, the European Court allows the widest margin of appreciation in relation to disputes involving the concept of morals. She attributes this to the fact that moral standards vary according to time and space.

by two Danish authors. The book was intended for school children and it contained a variety of material including a substantial (and controversial) chapter on sex. The book was subsequently banned in England and the publisher claimed that the banning order violated his rights to the freedom of expression contained in article 10 of the European Convention. The case is a good illustration on how the margin of appreciation was made available to the English authorities. The European Court explained its application of the doctrine as follows:¹⁸

It is not possible to find in the domestic law of the various contracting states a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them.

The European Court decided, on the facts, that it was satisfied that the national authorities were entitled to regard the book as morally pernicious. Merrills is of the view that the judgment is a good one and that the European Court was correct in applying a wide margin of appreciation quite simply because there was no clear pre-existing standard of uniformity on the subject.¹⁹ One of the compelling reasons for applying a significant margin of appreciation seems to be if there are clear differences of opinion amongst states on what ought to be acceptable. From this it is evident that the European Court has the ability to vary the margin of appreciation that states have, depending on the degree of uniformity of opinion or lack thereof.

The *Dudgeon* case illustrates how the European Court can conversely restrict the margin of appreciation in an effort to disallow boundless or unlimited margins — after all the purpose of a regional human rights system is the attainment of an effective and uniform respect for human rights law. The *Dudgeon* case concerned the rights of the Northern Irish authorities to enforce legislation that criminalised homosexuality. The applicant claimed that (i) the criminal law in Northern Ireland constituted an unjustified interference with his right to respect for private life as contained in article 8 of the European Convention and (ii) he had been the victim of discrimination within the meaning of article 14 of the European Convention because in Northern Ireland he was subject to greater restrictions than other male homosexuals in other parts of the United Kingdom. The European Court found that there were 'profound differences of attitude and public opinion between Northern Ireland and

¹⁸ *Handyside* (n 15 above) para 48.

¹⁹ JG Merrills *The development of international law by the European Court of Human Rights* (1988) 146–147.

Great Britain as regards questions of morality' and that 'Irish society was more conservative and placed greater emphasis on religious factors, as was illustrated by more restrictive laws even in the field of heterosexual conduct'. Yet, despite these findings, the European Court nevertheless held that the restrictions in the Irish criminal law were disproportionate to the aims that the legislation sought to achieve. In the words of the European Court:²⁰

[I]n consequence of an increased tolerance of homosexual behaviour to the extent that in the great majority of the member states of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of member states.

In another case to come before the European Court, it was similarly held that:²¹

The Court cannot agree that the state's discretion in the field of the protection of morals is unfettered and unreviewable. It acknowledges that the national authorities enjoy a wide margin of appreciation in matters of morals however, this power of appreciation is not unlimited. It is for the Court, in this field also, to supervise whether a restriction is compatible with the Convention.

According to Delmas-Marty, there is a link between the legitimate aim of the national state's domestic law (as invoked by the government of the defendant-member state) on the one hand; and the presence of a common denominator between the domestic legal orders of the member states on the other.²² From this it is evident that the width of the margin of appreciation can conceivably vary a great deal. This is because different states may enact infringing legislation for different reasons, and the extent of uniformity of opinion may also differ — depending on the right, the claim, the state and the context (political and social) in which the infringement occurs. These factors combine to influence the court on whether or not it should afford the national government a wide or narrow margin of appreciation.

The doctrine of subsidiarity and its corollary, the margin of appreciation, seem to be geared towards cultivating a tolerant human rights system in a diverse community of nations. It should, for these reasons, be able to comprehend (and take into account) cultural relativity on the one hand whilst nevertheless being committed to reaching a 'uniform' minimum standard of human rights protection on the other. This should

²⁰ *Dudgeon* (n 16 above) para 60.

²¹ *Open Door Counselling and Dublin Well Woman v Ireland* ECHR (29 October 1992) Ser A 246 para 68; also reported in (1992) 15 European Human Rights Reports 244.

²² M Delmas-Marty 'The richness of underlying legal reasoning' in M Delmas-Marty (ed) *The European Convention for the Protection of Human Rights: International protection versus national restrictions* (1992) 337.

mean that all conduct should meet a minimum standard of behaviour acceptable to all of humanity and not that all people must behave in the same way.²³

But some paranoia remains. Phrased as a question, one might ask: What guarantee does a state have that the African Court, in the review process, will not do more damage than good by applying a lower level of protection, or else a type of protection that is simply inappropriate given the historical and social domestic context of the state? This paranoia might be misdirected. This is predominantly because the problem can be overcome by properly (and carefully) applying the lessons taken from the European system. In the final analysis it is states with a higher standard of human rights protection which will be largely unaffected by the jurisprudence of the African Court. There are at least two reasons for this: First, the African Court is not intended to function as an appeal court from the municipal courts of states; and second, the African Court should be aimed not at achieving uniformity on the continent, but rather at ensuring that states govern their territories with adherence to a basic minimum standard acceptable to the African system — notwithstanding the problem of conflicting ideologies.²⁴ In any event, very few cases are likely to be submitted to and will therefore eventually reach the African Court.

The point on the unfounded paranoia is best made by using two examples from the South African context.

6 Applying the lessons to defeat the paranoia

The two examples from the South African constitutional context have been selected, primarily because South Africa provides us with a very useful case study of a state that is generally considered to have all of its proverbial human rights 'ducks in a row'. South Africa ratified the Protocol on the African Court on 3 July 2002. The first example, involving the constitutional protection of property, is relatively easy to reconcile, even though South Africa's level of protection afforded to her citizens in her own Constitution is arguably at odds with that offered to African people in terms of the African Charter. Yet, despite the varied levels of protection, there is nothing to suggest that the African Court would find

²³ Merrills (n 19 above) 146 states that 'the [supra-national] court's function is not to decree uniformity wherever there are national differences, but to ensure that fundamental values are respected'.

²⁴ Obviously states that offer protection at a lower level than the African Charter will be significantly affected by the jurisprudence of the African Court. These states will need to rework their domestic legal orders so as to ensure their compliance with the regional African human rights regime. This is consistent with the very purpose of creating an African Court.

reason to meddle. This is especially so if the African Court applies the doctrine of subsidiarity and the margin of appreciation. The second example, involving issues of gender equality, is somewhat more difficult. An explanation will be given as to why it is unlikely that an African Court would want to intervene. The point of these two examples is to demonstrate that if the African Court does follow a similar path to the European Court then states like South Africa have little to fear — even when it comes to deciding difficult cases.

6.1 The easy case: Protecting property

A number of democracies, like Canada and New Zealand, have no express provisions in their constitutions safe-guarding the protection of private property from interference from the state. South Africa does. Section 25 of the South African Constitution provides, *inter alia*, that:

- (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
- (2) Property may be expropriated only in terms of law of general application —
 - (a) for a public purpose or in the public interest; and
 - (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
- (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including —
 - (a) the current use of the property;
 - (b) the history of the acquisition and use of the property;
 - (c) the market value of the property;
 - (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
 - (e) the purpose of the expropriation.

The property clause in the South African Constitution is a political compromise. According to De Waal, Currie and Erasmus, section 25 represents the mid-way between two contending ideologies. The clause was clearly intended to protect existing property rights on the one hand while, on the other, permitting legislative programmes aimed at correcting apartheid's imbalances in the distribution of land and wealth.²⁵

Given the provisions of section 25(3), it is obvious that the extent of compensation for expropriated property was intended to be justifiably lower than market value where the acquisition was historically linked to the injustice of apartheid. For example, where a white farmer, during the apartheid years, acquired his land through the forced removals of black people, outrageously high state subsidy, and the soft loans of the

²⁵ J de Waal, I Currie & G Erasmus *The Bill of Rights handbook* (2001) 410–411.

apartheid government, then very little compensation is easily explained under the provisions of South African municipal law. It is very difficult to see anyone arguing that this compensation formula is unfair or else unreasonable — certainly not anyone that has a sound understanding of the oppressive domestic context from which the South African Constitution emerged. This is true notwithstanding the fact that this context is unique to South Africa. By implication, it is necessary (when assessing legislative restrictions by the South African government) to interpret the property right in the African Charter not universally, but contextually — therein lies the value of the doctrine of subsidiarity and the margin of appreciation.²⁶

6.2 The hard case: Gender equality

Most systems that seek to promote and protect fundamental rights regard the right not to be discriminated against as one of the core rights — so much so that other rights are often organised around it. The idea that all people are equal seems to animate the very essence of the human rights process. Discrimination is one of the first evils to manifest itself in a society controlled by a regime that violates human rights. And so regional human rights systems generally hold the right to equality or equal treatment as central to their object and purport. Notwithstanding this, equality jurisprudence is predictably a controversial topic in the literature. The African Charter is in itself fairly short in its description of the right to equality. Article 3 states that '[e]very individual shall be equal before the law. Every individual shall be entitled to equal protection of the law.'

As already pointed out, in terms of article 3 of the Protocol on the African Court, the African Court is competent to apply not only the African Charter but also any other human rights treaty or convention ratified by the state parties. Since the African Charter is to be applied by the African Court, and since articles 60 and 61 of the African Charter provide for the resolution of disputes by having regard to international human rights law, the African Court will be able to draw from a wealth of international human rights law governing the prohibition of discrimination.

On the issue of gender discrimination, the African Charter endorses the provisions of the leading human rights instrument on the right that women have to equal treatment — the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). It has as its purpose the elimination of all discriminatory behaviour against

²⁶ The property right in the African Charter is in any event not very clear. Art 14 states that 'the right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.'

women.²⁷ CEDAW was opened for signature in 1979 and came into force in 1981. Now, a little over two decades later, more than 150 states have ratified it. CEDAW obliges states to ensure that their municipal legal systems guarantee equal rights to women in all spheres of life. Article 1 of the CEDAW defines 'discrimination against women' as:

[A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

South Africa ratified CEDAW in 1995. Thus South Africa has agreed to the provisions of article 2 which enjoins states to 'abolish or modify existing laws, regulations, practices and customs which constitute discrimination against women'. This obligation is reiterated in article 24 where states undertake to 'adopt all the necessary measures' at a municipal level to achieve the realisation of these rights.

Writing as far back as 1995, Fayzee Kathree expressed her optimism that the (then) new South African Constitution was to be welcomed because it would defeat the clear gender inequality that has come to be institutionalised in African customary law.²⁸ She must have been very disappointed when she read the judgment of the Transvaal Province, some two years later, in the case that tested the constitutionality of the African customary law practice of primogeniture.²⁹ The crisp question in that case was whether the custom of primogeniture (which effectively prevents women from being able to inherit property in traditional patriarchal societies) was unconstitutional on the grounds that it unfairly discriminated against women by virtue of their gender. In terms of the Black Administration Act, the estates of black people were administered under the traditional rules of customary succession³⁰ (as opposed to civil marriages, which were governed by the Intestate Succession Act.³¹ The question in the *Mthembu* case was whether this rule amounts to unfair discrimination. Section 8 of the South African interim Constitution provided that '[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex . . .'.³²

²⁷ Art 18(3) of the Charter instructs that states 'shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions'.

²⁸ F Kathree 'Convention on the Elimination of All Forms of Discrimination Against Women' (1995) 11 *South African Journal on Human Rights* 436-437.

²⁹ *Mthembu v Letsela* (1997) 2 SA 936 (T).

³⁰ The Black Administration Act 38 of 1927.

³¹ The Intestate Succession Act 81 of 1987.

³² The equality clause is now contained in sec 9 of the final Constitution (Act 108 of 1996).

The South African municipal court accepted that the custom of primogeniture was discriminatory in that it did differentiate between men and women. But the court said that in interpreting the equality right, discrimination *per se* was not enough to constitute an infringement — the discrimination had to be unfair. The court was not prepared to find that the customary rule unfairly discriminates against women. The court said that the unfairness of the discrimination rested upon whether it was likely to impair the dignity of African women within the relevant social context. This is consistent with the equality jurisprudence of the South African Constitutional Court. In dealing with this issue, Le Roux J said that:

If one accepts the duty to provide sustenance, maintenance and shelter as a necessary corollary of the system of primogeniture I find it difficult to equate this form of differentiation between men and women with the concept of 'unfair discrimination' as used in s 8 of the [interim] Constitution. In view of the manifest acknowledgment of customary law as a system existing parallel to common law by the Constitution and the freedom granted to persons to choose this system as governing their relationships, I cannot accept the submission that the succession rule is necessarily in conflict with s 8. There are other instances where a rule differentiates between men and women, but which no right-minded person considers to be unfairly discriminatory . . . It follows that even if this rule is *prima facie* discriminatory on grounds of sex or gender, this presumption has been refuted by the concomitant duty of support.

The Court thus found that the custom was not unfair in the way that it discriminated against women because traditional African customary law had other ways to safeguard women from losing their dignity in the absence of being able to inherit.³³

Those who believe in the universality of human rights will no doubt be appalled by this decision. Universalists would predictably argue that before South Africa can claim to adhere to international human rights standards, it must first refrain from its continued acceptance of African customary law practices that stand in contrast thereto.³⁴ But applying the lessons from the European system — using the principles of subsidiarity and the margin of appreciation — an African Court may in fact be able to produce a more culturally tolerant approach to human rights interpretation which is to be preferred to the more rigid universalist approach.

These twin principles of interpretation would most certainly encourage an African Court to give careful consideration to the reasons

³³ This is effectively because even though she may not inherit property herself, she will never be left destitute because the male heir under African customary law has a duty to support the widow.

³⁴ This position seems remarkably similar to the one taken by universalists on aspects of Islam that apparently stand in stark contrast to the Universal Declaration, as referred to earlier in this paper (n 11 above).

employed by the South African court in arriving at its decision. These tools of interpretation effectively accept that municipal courts, like the South African courts, have the initial obligation to protect human rights. South African courts do not necessarily have a free hand in doing this because they must, in so doing, give effect to the rights in the African Charter. But the right to equality in the African Charter is somewhat thin on substance, and for this reason the margin of appreciation doctrine entrusts municipal courts to give substance to the right. Substance is given by having regard to the domestic state's³⁵

direct and continuous knowledge of its society, its needs, resources, economic and political situation, local practices, and fine balances that need to be struck between competing and sometimes conflicting forces that shape [its] society.

As in the European system, an African Court is entitled to review this process. If this was to be done, in the context of the hard case under discussion, it would become clear from the equality jurisprudence propounded in the South African Constitutional Court, that South Africa is certainly grappling with this very complex issue. Given the historical context of the country's difficult past, and the fact that apartheid systematically discriminated against black people in all aspects of social life, the municipal courts in South Africa are sensitive in the way that they approach such matters. It would simply be inappropriate and damaging to racial reconciliation if our courts were to, at this delicate stage of our new democracy, display a typically Eurocentric intolerance to black customs and traditions.

The big lesson from the European system is that, without doubt, municipal courts are best placed to make these kinds of difficult decisions. A supra-national court should not intervene unless it is patently clear that the state concerned is repudiating its obligations to the African community by displaying a willful intent not to uphold the basic provisions in the African Charter. In other words, the real consideration ought to be whether South Africa derogated from the core content of the right that all people have to be treated equally? It does not seem to have done so in the *Mthembu* case despite the unique interpretation given to the right. The municipal court was careful to consider (and engage with) the indigenous custom, the ambit of equality jurisprudence and the historical considerations relevant to some of the tough racially sensitive criteria confronting judicial reform in South Africa. For these reasons, perhaps the South African process would not fall foul of a future African Court's review.³⁶

³⁵ See Stemmet (n 12 above) 242. See also the quoted extract from the *Handyside* case (n 15 above).

³⁶ It should nevertheless be pointed out in further confirmation of South Africa's commitment to human rights (and to rebut any thoughts that she is repudiating her human rights obligations), that shortly after the *Mthembu* case, in May 1998, the South African Law Commission launched a special project to look into this issue. But,

7 Conclusion

The African Court cannot function on its own. It will make little or no meaningful difference to the promotion and protection of human rights on the continent unless it works closely with, and complements the work of the African Commission. State parties should incorporate the provisions of the African Charter into their own municipal laws and ensure compliance through their own municipal courts. State parties should also be willing to accept and comply with the decisions of the African Court. The future African Court should be reluctant to introduce a universalist style of rights interpretation, and should seriously ponder the extent to which it should play an interventionist role.

before the normal consultation process could run its course, the Department of Justice submitted a Bill to the National Assembly proposing, in essence, the abolition of the African customary law of succession. The Bill provided that all deceased estates should be wound up in the same way — it terms of the Intestate Succession Act. But, when traditional leaders became aware that customary law was about to be radically changed, they protested and the Bill was withdrawn. The topic has now been returned to the Law Commission, and the Project Committee is to publish a discussion paper. Things will once again proceed as they ought to have before the Department of Justice jumped the gun.

The future relationship between the African Court and the African Commission

*Ibrahim Ali Badawi Elsheikh**

Member of the African Commission on Human and Peoples' Rights

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

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

* The views expressed in this paper are personal views.

¹ For a brief history and review of the Protocol, see IA Badawi Elsheikh 'Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights: Introductory note' (1997) 9 *African Journal of International and Comparative Law* 953–961. During my own presidency of the African Commission (November 1993), I proposed to include an item on the Draft Agenda of the 15th session of the Commission on the possibility of establishing an African Court of Human Rights. By that time, a number of NGOs, in particular the International Court of Justice (ICJ) had already advocated for this idea. The actual journey of the Protocol started with the OAU Assembly Resolution 230/30 in June 1994 and proceeded until its adoption by the Assembly of the OAU in June 1998.

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

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

1 Introduction

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

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

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

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

⁴ Art 30 African Charter.

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

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

2 The protective mandate

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

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

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

Article 8 of the Protocol stipulates as follows:

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

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

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

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

⁹ Art 52 African Charter.

¹⁰ Art 55 African Charter.

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

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

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

¹¹ 8–11 December 1997.

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

¹³ 12 December 1997, Addis Ababa, Ethiopia.

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

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

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

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

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

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

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

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

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

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

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

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

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

3 Interpretations and advisory opinions

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

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

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

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

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

²⁴ Art 45 African Charter.

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

4 Rules of procedure

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

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

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

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

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

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

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

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

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

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

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

²⁷ Osterdahl (n 22 above) 150.

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

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

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

6 Conclusion

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

²⁹ Art 30 Protocol.

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

The African Charter on Human and Peoples' Rights: Towards a more effective reporting mechanism

*Kofi Quashigah**

Professor of Law, University of Ghana

1 Introduction

State reporting is a means of ensuring the observance of human rights at the international level as well as ensuring a government's accountability to its own people and the international community. Unfortunately, however, a review of the process under the African Charter on Human and Peoples' Rights (African Charter or Charter) does not depict a very bright picture. This paper therefore argues that, having regard to the nature of the reporting system and the extent of authority that is invested in the African Commission on Human and Peoples' Rights (African Commission or Commission), there is an obvious need for the African Commission to adopt measures that lend increased seriousness to the reporting system and encourage and compel states to respond to their reporting obligations. As will be argued subsequently, the establishment of the African Union (AU) offers a unique opportunity for the introduction of a more effective reporting mechanism.

The African Commission was created by the Organisation of African Unity (OAU).¹ As was stated by Badawi Elsheikh, the African Commission is not a political organ of the OAU.² To him, the legal character of the

* LLB (Ghana), LLM PhD (Nigeria, Nsukka); kquashigah2001@yahoo.com. A more extensive, earlier version of this article was published as Occasional Paper 13, Centre for Human Rights, University of Pretoria (2002). On state reporting under the African Charter, see G Mugwanya 'Examination of state reports by the African Commission: A critical appraisal' (2001) 1 *African Human Rights Law Journal* 268.

¹ See art 30 African Charter.

² I Badawi Elsheikh 'The African Commission on Human and Peoples' Rights' (1989) 7 *Netherlands Quarterly of Human Rights* 283.

provisions of the African Charter, the independent status of the African Commission as well as the independence of its members qualify it to be described as a quasi-judicial body.³ These notwithstanding, the fact of the matter is that the Commission is required by the African Charter to work in close relationship with the Assembly of Heads of State and Government of the OAU, a political entity. The Commission has a rather complex character and is therefore described as a *sui generis* body.⁴ This character of the Commission makes it versatile and, therefore, with some finesse and tenacity it should be in a position to operate as an independent body but in effective collaboration with the various organs of the OAU, and now the AU.

These opinions stand even in the face of article 30 of the African Charter, which states that 'the Commission shall be *established within the Organisation of African Unity* to promote human and peoples' rights and ensure their protection in Africa'.⁵ This should not subject the Commission to the unqualified control of the Assembly of Heads of State and Government of the OAU. The extent to which the OAU can affect the independence of the Commission is clearly stated in the Charter in article 59(1): '[A]ll measures taken within the provisions of the present Charter shall remain confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide.' This obviously was intended to protect the interests of those who wield political authority. The provisions of the Charter are a reflection of the conservative environment in which they were drafted.⁶ It is in this respect that a liberal and functional interpretation of the African Charter and the Constitutive Act of the African Union is urged in this work as a necessity for a more effective realisation of state reporting under the Charter.

2 Mandate of the African Commission

The mandate of the Commission as set out in article 45 of the African Charter may be itemised as follows:

- to promote human and peoples' rights;
- to protect human and peoples' rights;
- to interpret provisions of the African Charter;
- any other tasks that may be referred to the Commission by the OAU.

³ As above.

⁴ As above.

⁵ My emphasis.

⁶ See Proceedings of the Conference on the African Commission on Human and Peoples' Rights, 24–26 June 1991 convened by the Fund For Peace, published by Friedrich Naumann Stiftung (1991) 11.

The function of examining state reports was not assigned specifically to the Commission by the Charter. Article 62 of the Charter provides that:

Each state party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter.

Clearly the African Commission was not mentioned as the recipient of the reports, neither was anything said about what treatment should be given to reports once submitted. At its 3rd session in 1988, the African Commission considered article 62 and concluded that the Charter did not specifically entrust it with the task of considering periodic reports of the states parties. The Commission thereupon recommended to the Assembly of Heads of State and Government to specifically assign it with this mandate, enabling it to consider and indicate the general orientation as regards the form and substance of the reports.

At its 24th ordinary session, the Assembly of Heads of State and Government of the OAU approved the Commission's recommendations, thereby entrusting the Commission with the task of examining the periodic reports.⁷ At the same time the Assembly of Heads of State and Government authorised the Commission to prepare and deliver general guidelines on the form and contents of periodic reports. This delegation of authority to the Commission could be justified under article 45(4) of the Charter, which permits the OAU to assign additional functions to the Commission.

While the Commission was right in claiming what normally in the scheme of things belongs to institutions of its kind, the Commission unwittingly, perhaps, limited its own scope and therefore the effectiveness of the reporting system under the Charter. The recommendation, which was proposed and accepted by the Assembly of Heads of State and Government, simply requested that the Commission be entrusted with the task of 'examining' the periodic reports. Nothing is specifically stated in relation to what is to be done with the conclusions or observations arising from the 'examination', as is the case for instance under the European Social Charter system.

The 1988 Rules of Procedure of the African Commission did not cure these defects either.⁸ Whatever force or implementation 'push' that can be implied from the Rules can best be described as an observation to the

⁷ Second Annual Activity Report of the African Commission on Human and Peoples' Rights, para 31; reprinted in (1990) 11 *Human Rights Law Journal* 390-394.

⁸ Even though the Commission adopted the above-mentioned Recommendations at its 3rd session held between 18 and 28 April 1988, its Rules of Procedure, which it had already adopted on 13 February 1988, had elaborate provisions on the reports to be submitted by state parties under art 62 of the African Charter. The Commission took this step possibly because it rightly perceived that it was the only institution that is logically anticipated to perform the function of examination of the reports.

particular state, followed by a report to the states parties. The relevant Rules provided that:

Rule 85: Examination of Information contained in Reports.

3. If, following the consideration of the reports, and the information submitted by a State party to the Charter, the Commission decides that the State has not discharged its obligations under the Charter, it may address all general observations to the State concerned as it may deem necessary.

Rule 86: Adjournment and Transmission of the Reports.

1. The Commission shall, through the Secretary-General, communicate to States parties to the Charter for comments, its general observations made following the consideration of the reports and the information submitted by States parties to the Charter. The Commission may, where necessary, fix a time limit for the submission of the comments by the States parties to the Charter.
2. The Commission may also transmit to the Assembly, the observations mentioned in paragraph 1 of this Rule, accompanied by copies of the reports to the Charter as well as the comments supplied by the latter, if possible.

The outlined method of dealing with reports, as found in the Rules, is not a system that will work with African governments that are noted for their scant regard and respect for human rights. In formulating the Rules, the Commission should have taken the opportunity to put in place a more effective monitoring mechanism, such as under the European Social Charter system.

In order to assist the states in their reporting, the Commission at its 4th ordinary session in October 1991 adopted the 'General Guidelines for National Periodic Reports'.⁹ This set of guidelines is a very detailed document that seeks to explain what is expected in the report as regards to each right guaranteed in the Charter. A careful examination of the guidelines while considering the low level of human rights expertise generally available among African government officials, indicates to even the uninformed observer that these guidelines are more likely to confuse than to guide. Subsequently a less detailed — but equally unhelpful — set of guidelines was adopted.¹⁰ A more basic reporting guideline is attempted later in this article.

⁹ Second Annual Activity Report of the African Commission on Human and Peoples' Rights, Annex XII.

¹⁰ See F Viljoen 'State reporting under the African Charter on Human and Peoples' Rights: A boost from the south' (1999) 44 *Journal of African Law* 110-112.

3 General basis and philosophy of the reporting mechanism

Writing in respect of the United Nations International Covenant on Economic, Social and Cultural Rights (ICESCR), Leckie bluntly asserts that '[t]he analysis of state reports remains the most important means of monitoring compliance with this instrument at the international level'.¹¹ Badawi Elsheikh, a former Chair of the African Commission, expressed his belief that 'the reporting procedure is the backbone of the mission of the Commission. Through it, the Commission would be able to monitor the implementation of the Charter and engage state parties in a process of dynamic implementation.'¹² The African Commission itself recognised the importance of the reporting process and therefore emphasised its role in the Mauritius Plan of Action (1996–2001) as follows:¹³

Periodic reports play a promotional and a protective role. The dialogue initiated by the Commission with governments will most certainly result in an improvement of national legislation or practice related to human rights . . . Public discussions of periodic reports also provide an opportunity for NGOs to make their contribution to the process of dialogue.

Additionally:¹⁴ 'A full debate of situations revealing a good human rights performance is also useful, both because of its educational effect and relevance to the evolution of human rights law in general.'

Following Van Dijk and Van Hoof, the benefits of reporting to the human rights system may be summarised as follows:¹⁵

- All the contracting states can be controlled.
- Resistance to supervision may be less because all the states are equally subject to examination.
- Because of the possibility of comparison, a more balanced picture may be obtained of the state of affairs with respect to the implementation of the treaty in question within the whole group of contracting states.
- It permits a comprehensive overview of all the rights guaranteed as against the selective examination of individual rights under the complaint procedure.

¹¹ S Leckie 'The appearance of the Netherlands before the UN Committee on Economic, Social and Cultural Rights' (1989) 7 *Netherlands Quarterly of Human Rights* 308.

¹² I Badawi Elsheikh 'The African Commission on Human and Peoples' Rights: Prospects and problems' (1989) 7 *Netherlands Quarterly of Human Rights* 281.

¹³ Para 28 Mauritius Plan of Action (1996–2001) of the African Commission on Human and Peoples' Rights.

¹⁴ *Making reporting procedure under the International Covenant on Civil and Political Rights more effective* (Report by the Norwegian Institute of Human Rights) (1991) 7.

¹⁵ See P van Dijk & GJH van Hoof *Theory and practice of the European Convention on Human Rights* (1990) 208–209.

- It makes possible continuity in the supervision process as against the *ad hoc* character of the complaint system.¹⁶

Under the UN Human Rights Committee process, it has been argued by some that 'a state's duties are limited to what can be derived from the Covenant's explicit terms'.¹⁷ From an examination of the International Covenant on Civil and Political Rights (ICCPR) process, however, three types of state duties have been identified:¹⁸ Duties imposed directly by the Covenant under article 40; duties imposed by the Committee acting under its own competence; and duties undertaken by the state representatives while meeting with the Committee during the consideration of a state report.

Having regard to the rather sketchy and incomplete manner in which article 62 of the African Charter was formulated, there exists a need, even more than could be felt in respect of the ICCPR, for the evolution by the Commission of what can be described as additional, implied or inherent duties on the part of states in the performance of their reporting obligations.

The nature of article 62 is bound to give the impression that state reporting is a formal submission by a country of its assessment of its own performance and nothing more. Even the ICESCR, with its more detailed provision on the handling of the report when submitted was, nevertheless, regarded by the states as requiring the reports as a matter of mere formality. Hence the need for the Committee on Economic, Social and Cultural Rights to clearly spell out the objectives of state reporting to serve as a guide to states.

These objectives may be summarised as follows: A first objective is to ensure that a comprehensive review is undertaken with respect to national legislation, administrative rules and procedures, and practices, in an effort to ensure the fullest possible conformity with the Covenant. A second objective is to ensure that the state party monitors the actual situation with respect to each of the rights on a regular basis and is thus aware of the extent to which the various rights are being enjoyed by all individuals within its territory or under its jurisdiction. A third objective of the reporting process is to enable a government to demonstrate that principled policy-making has in fact been undertaken. A fourth objective is to facilitate public scrutiny of government policies with respect to the rights in question and to encourage the involvement of the relevant sectors of society in the formulation, implementation and review of the relevant policies. A fifth objective is to provide a basis on which the state party itself, as well as the Committee, can effectively evaluate the extent to which progress has been made towards the realisation of the obligations contained in the Covenant. A sixth objective is to enable the state

¹⁶ As above, 209.

¹⁷ As above.

¹⁸ n 18 above, 26.

party itself to develop a better understanding of the problems and shortcomings encountered in an effort to realise progressively the full range of economic, social and cultural rights.¹⁹ A seventh objective is to enable the Committee, and the state parties as a whole, to facilitate exchange of information and to develop a better understanding of the common problems faced by states and a fuller appreciation of the type of measures which might be taken to promote effective utilisation of each of the rights contained in the Covenant. This part of the process also enables the Committee to identify the most appropriate means by which the international community might assist states, in accordance with articles 22 and 23 of the Covenant.²⁰

Irrespective of these laudable objectives, many states do not appreciate the importance of putting together and submitting their state reports as and when due. The first report under the African Charter was submitted by Libya in January 1990.²¹ Generally, the rate of reporting is anything but encouraging. As at 9 March 1992, only eight state parties had submitted their initial reports in accordance with article 62.²² Frustrated over the issue of delayed reports, the African Commission, in its 5th Annual Report, recommended to the Assembly of Heads of State and Government of the OAU to adopt a resolution on overdue reports that was drafted by the Commission.²³ At its 29th ordinary session in Cairo from 28 to 30 June 1993, the Assembly of Heads of State and Government adopted a resolution that *inter alia*:²⁴

- (2) Urges the States Parties to the African Charter on Human and Peoples' Rights which have not yet submitted their reports to submit them as soon as possible;
- (3) Requests that States should report not only on the legislative or other measures taken to give effect to each of the rights and freedoms recognized and guaranteed by the African Charter on Human and Peoples' Rights but also on the problems encountered in giving effect to these rights and freedoms;
- (4) Recommends that the States in their periodic reports give information on the implementation of the right to development;
- (5) Encourages States Parties which encounter difficulties in preparing and

¹⁹ The same may be said of the civil and political rights, but only that the notion of progressive realisation might not apply in this case.

²⁰ These two articles do not have their equivalents in the African Charter; nevertheless, the process whereby the African Commission can also adopt the practice is discussed below.

²¹ Third Annual Activity Report of the African Commission on Human and Peoples' Rights, para 23.

²² Fifth Annual Activity Report of the African Commission on Human and Peoples' Rights, para 11.

²³ Fifth Annual Activity Report of the African Commission on Human and Peoples' Rights, Annex VII.

²⁴ AHG/Res (XXVIII).

submitting their periodic reports to seek help as soon as possible from the African Commission on Human and Peoples' Rights which will arrange for assistance in this task through its own or other resources.

This method of mere adoption of resolutions will not be enough to change the ingrained negative attitudes of African governments to human rights reporting.

As at 30 March 2000, the state of reporting under the African Charter was appalling.²⁵ Out of a total of 53 countries, 24 had never submitted a report as at that date and only 12 had no overdue reports. The reporting mechanism requires the existence of the political will by states to report regularly, and with commitment to details and substance.²⁶

The non-coercive nature of the reporting procedure is in itself a potential reason for lack of commitment to the reporting process. It is a system that is based 'essentially on self-criticism and good faith'.²⁷ Unfortunately, commitment to human rights is yet to be fully ingrained into the psyche of African governments.

A more radical system of sanctions and monitoring involving the Executive Council of the African Union and the Pan-African Parliament would be a more effective and meaningful approach.

4 Comparative international experiences of state reporting

The United Nations (UN) and European human rights systems in particular have had some degree of experience in the reporting process. The new AU system is structured along the European Union system. The experience of the European Union organs in their involvement in the report monitoring process could therefore provide some guide in our assessment of the potential inherent in the new AU.

4.1 Reporting experience under the UN

Various reporting mechanisms exist under the UN system. The first is the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) adopted in 1965. Others include the ICESCR (1966); the ICCPR (1966); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1979); the Convention

²⁵ See Status of Submission of Periodic Reports to the African Commission on Human and Peoples' Rights (as at 30 March 2000) Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights, Annex III.

²⁶ See C Heyns & F Viljoen 'The impact of the United Nations human rights treaties on the domestic level' (2001) 23 *Human Rights Quarterly* 508.

²⁷ J Crawford 'The UN human rights treaty system: A system in crisis' in P Alston & J Crawford (eds) *The future of UN human rights treaty monitoring* (2000) 1-7.

Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (1984); and the Convention on the Rights of the Child (CRC) (1989). In all cases, the state parties are required to submit reports on measures they have taken to implement the particular convention to the Secretary-General of the UN. The Secretary-General in turn makes them available to the particular committee created by the treaty in question.

The particular committee examines the reports and makes suggestions and general recommendations. Such suggestions and general recommendations are then reported to the General Assembly. Different approaches are followed in respect of other UN bodies.

Under the ICCPR the UN Human Rights Committee receives state reports from the Secretary-General of the UN. After consultations with the Committee, the Secretary-General may transmit parts of the reports to the specialised agencies of the UN. Upon completion of its study of a report, the Committee transmits its comments to the state concerned and also to the Economic and Social Council (ECOSOC).

The reporting examination process under the Convention on the Elimination of All Forms of Racial Discrimination is equally terse. The Secretary-General receives the report for the Committee, after which the Committee examines it and reports to the General Assembly.²⁸

The trend under the Convention on the Elimination of Discrimination Against Women²⁹ and the Convention Against Torture follows a similar pattern.³⁰

Article 22 of the ICESCR provides as follows:

The Economic and Social Council may bring to the attention of other organs of the United Nations, their subsidiary organs and specialized agencies concerned with furnishing technical assistance any matters arising out of the reports referred to in this part of the present Covenant which may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant.

The Committee on Economic, Social and Cultural Rights interpreted article 22 so as to include 'virtually all United Nations organs and agencies involved in any aspect of international development co-operation'.³¹

Even though the African Charter does not contain a direct equivalent of article 22 of the ICESCR, a liberal interpretation of article 45(1)(c) of the African Charter should be enough to give similar authority to the Commission to involve the various organs and agencies of the AU.

²⁸ See art 9.

²⁹ See arts 18 & 21.

³⁰ See arts 19 & 20.

³¹ General Comment 2 contained in document E/1990/23.

4.2 Reporting experience under the European system

The reporting procedure under the European Convention on Human Rights as it appears in article 57 is very narrow:

On receipt of a request from the Secretary-General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of this Convention.

The article 57 provision gives the Secretary-General the leeway to decide the human rights issues state parties should report upon at a particular point in time. In 1964, therefore, the contracting parties were requested to report on 'how their laws, their case-law and their administration practice give effect to the fundamental rights and freedoms guaranteed by the Convention and its Protocol'.³² In 1970 the Secretary-General requested reports on article 5(5) only, while a 1975 request focused on articles 8, 9, 10 and 11. The 1983 inquiries were in respect of children and young persons placed in care or in institutions following a decision of the administrative or judicial authorities, and also article 6(1).

It is worth noting that, as a rule, answers supplied to the questions posed by the Secretary-General are published.³³ The fact of publication has been described as an element of sanction for those state parties that have violated the Convention.³⁴

Taking into account the problem of the African Commission's lack of resources and its consequent lack of adequate time for consideration of reports, one is tempted to suggest the article 57 reporting mechanism as a method that could be incorporated into the African system. This approach should enable the African Commission to decide on thematic issues for particular years or periods and to request reports on these. The African Commission should be able to adopt that measure without recourse to an amendment of article 62 because that article does not prescribe that the report must cover all of the rights guaranteed in the Charter. All that needs to be done would be an amendment of the Rules of Procedure of the Commission.

Also, under the European Convention, when the reporting system uncovers serious violations, the Secretary-General could bring such serious violation to the notice of the Committee of Ministers, hoping that the Committee will proceed under article 8 of the Statute of the Council of Europe.³⁵

The ever existent, although remote, possibility of expulsion from the Council of Europe provides some modicum of compulsion within the

³² Council of Europe *European Convention on Human Rights — Collected texts* (1987) 235.

³³ Van Dijk & Van Hoof (n 15 above) 211.

³⁴ As above.

³⁵ As above, 212.

European system. The relevant article 8 of the Statute of the Council of Europe provides that:

Any Member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such Member does not comply with this request, the Committee may decide that it has ceased to be a Member of the Council as from such date as the Committee may determine.

The article 3 mentioned therein provides that:

Every Member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realization of the aim of the Council as specified in Chapter I.

The fear of expulsion from the AU is perhaps one of the sanctions that could eventually compel African states to honour their obligations under the African Charter. Even though the Constitutive Act of the African Union did not go as far as the Statute of the Council of Europe in its prescription of expulsion as a sanction, it is argued that a pro-human rights interpretation of article 23(2) of the Constitutive Act of the African Union will achieve similar results. This article provides that

. . . any Member State that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transport and other measures of a political and economic nature to be determined by the Assembly.

Under the European Social Charter system, state reports must be sent to national trade union and employer bodies for comments. These comments, together with the reports, are then submitted to the Secretary-General of the Council of Europe.³⁶ The European Social Charter has two supervisory committees — the European Committee of Social Rights and the Governmental Committee. The supervisory mechanism under the European Social Charter operates as follows: The European Committee of Social Rights (formerly the Committee of Independent Experts), made up of seven experts on labour law and social matters, first examines the national report. Their conclusions and the reports are then forwarded to the Governmental Committee which consists of civil servants representing the contracting state parties. This Committee forwards its own report together with an opinion obtained from the Parliamentary Committee to the Committee of Ministers.³⁷ The Parliamentary Committee and the Committee of Ministers are institutions established within the European Union system.

³⁶ K Boyle 'Europe: The Council of Europe, the OSCE and the European Union' in H Hannum (ed) *Guide to international human rights practice* (1999) 153.

³⁷ See A Drzemczewski 'The work of the Council of Europe's Directorate of Human Rights' (1990) 11 *Human Rights Law Journal* 89 110.

The Committee of Ministers, basing itself on the three documents, makes specific recommendations to state parties. Although the recommendations are not legally binding, they have over the years resulted in changes in legislation and practices.³⁸ The Governmental Committee receives the reports of the contracting state parties and the conclusions of the Committee of Experts. These are submitted to its sub-committee known as the Government Social Committee for further examination.³⁹ The sub-committee is composed of one representative of each of the contracting parties. It has the mandate to invite representatives of international organisations of employers and international trade union organisations. In addition, it can consult no more than two representatives of international non-governmental organisations (NGOs), having consultative status with the Council of Europe.⁴⁰

In 1991, a new protocol, the Turin Protocol, opened for signature. It contained measures aimed at improving the effectiveness of the Charter, particularly the functioning of its supervisory machinery. The major aspects of the Turin Protocol, compared to the original Charter, are the following: The reporting state has a right of reply on the comments that the national NGOs make on the state's report. The Secretary-General has to forward copies of the state reports to international NGOs that have consultative status with the Council of Europe and have particular competence in the matters governed by the Charter. The state reports and comments made thereon by the national and international NGOs are made available to the public on request. Unlike under the original procedure where the comments of the national NGOs are forwarded to the Secretary-General through the state party at the request of the national organisation, the position under the Turin Protocol requires the national NGOs to forward their comments to the Secretary-General to forward these comments together with the state reports to the European Committee of Social Rights.

The conclusions of the European Committee of Social Rights are made public and are communicated by the Secretary-General, not only to the Governmental Committee and Parliamentary Assembly, but also to the relevant national NGOs and to the equivalent international NGOs. The Governmental Committee prepares the decisions of the Committee of Ministers. Here also its report shall be made public. The Committee of Ministers adopts by a two-thirds majority of those voting, a resolution based on the report of the Governmental Committee. Of great significance is the provision that the Secretary-General then transmits to the Parliamentary Assembly the reports of the Committee of Independent Experts and of the Governmental Committee, as well as the resolution

³⁸ As above, 111.

³⁹ Art 27 European Social Charter.

⁴⁰ As above.

of the Committee of Ministers, with the intention that the Parliamentary Assembly would hold periodical plenary debates on the reports.

When compared to the original procedure, one issue that is significant is the clear intention to open the reporting mechanism to public scrutiny. This is further complemented by the express intention of subjecting the reports and comments to parliamentary debate. Public scrutiny is perhaps the most effective weapon in this supervisory mechanism and full resort is given hereto.

5 Factors inhibiting the effectiveness of the reporting mechanism under the African Charter

Various problems inhibiting the efficient performance of the African Commission in its report examination function have been identified and discussed by commentators. A brief rehash is undertaken here with the objective of laying the basis for understanding the nature of changes required in the reporting mechanism.

5.1 Limited legal framework providing for reporting

The reporting obligation as is found in article 62 of the African Charter is rather terse compared to, for example, the ICCPR provision in article 40. The ICCPR provides that:

- 1 The State Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect on the rights recognised herein and on the progress made in the enjoyment of those rights:
 - a) within one year of the entry into force of the present Covenant for the States Parties concerned;
 - b) thereafter whenever the Committee so requests.
- 2 All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.
- 3 The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialised agencies concerned copies of such parts of the reports as may fall within their field of competence.
- 4 The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with copies of the reports it has received from States Parties to the present Covenant.
- 5 The States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article.

While the ICCPR requires states to report on 'the measures' they have adopted, the African Charter requires state parties to 'report on the

legislative and other measures . . . ' This gives one the impression that a greater emphasis is being placed in the African system on 'legislative' measures adopted than anything else. It has in fact been reported that the Third Committee of the General Assembly of the UN had declared its preference for the word 'measures' rather than for a more specific formulation. That, it was argued, 'would afford States Parties greater freedom to report on the entire range of laws and practices ensuring compliance with the Covenant'.⁴¹ This nature of article 62 of the African Charter must have accounted partly for the unsatisfactory nature of the early reports submitted to the African Commission.

In addition, the African Charter provision falls short of indicating who should receive the reports and what should be done with them. The ICCPR provision is clear on these, as can be deduced from article 40. It is also explicit from the provisions of article 40(4) of the ICCPR that the authority to issue 'general comments' is specifically conferred on the Human Rights Committee. The African Commission, on the other hand, lacks the explicit authority to make 'general comments'. It was out of this realisation that the participants at a 1991 Conference on the African Commission recommended that the Commission should feel able to 'interpret articles 45(1)(b) and 60 of the Charter as providing the Commission with the mandate to perform the functional equivalent of the Human Rights Committee's general comments'.⁴² That was a fair implication and very essential for the improvement of the promotional effort.

5.2 Lack of political will and irregular submission of reports

The success of a reporting system, as can be inferred from the experience under the European Social Charter, requires strong in-built control systems to encourage states to honour their reporting obligations, but there is also the need to develop in the member states a realisation of the necessity, responsibility and benefits of reporting.

The irregular submission of reports or outright non-submission, are problems that the African Commission has always complained about. These are not problems that are peculiar to only the African Commission. In fact, apart from the submissions under the European Social Charter system, none of the other reporting systems has had an impeccable reporting routine. Harris describes the enviable record of the European Social Charter reporting system in the following terms:⁴³ '[A]lthough reports are commonly some months late and the information provided

⁴¹ D McGoldrick *The Human Rights Committee* (1994) 63.

⁴² n 6 above, 46.

⁴³ D Harris 'Lessons from the reporting system of the European Social Charter' in Alston & Crawford (n 27 above) 348.

is not always complete, there has never been a case of a state not submitting a report.'

According to Harris this positive state of affairs can be attributed to the following:⁴⁴

- The member states are generally better equipped administratively and financially to prepare national reports. They also possess greater experience of doing so.
- The Council of Europe is composed of a relatively small and homogeneous group of states whose representatives meet regularly for many Council of Europe purposes; the result is a strong collegiate sense of obligation to comply with the undertakings that go with Council membership.
- The Governmental Committee which is made up of civil servants representing their various countries plays a central role in the enforcement process. Its members who are at some level responsible for the submission of their state's national reports are subjected to questioning by their colleagues on matters of compliance with the reporting obligations. The consequence is that each member ensures that the requisite effort is put into the preparation and early submission of reports.
- The Governmental Committee has, on its own, developed a system of warnings for states that have failed to provide the European Committee of Social Rights with the information needed.

The lesson from this is clearly that if the reporting mechanism under the African system is to improve, there must necessarily be mechanisms that would encourage states to live up to their reporting obligations. The African Union Treaty offers an opportunity for these in-built mechanisms to be developed.

In their efforts to reduce the problems associated with the non-submission of reports, the UN Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Racial Discrimination have developed procedures that enable the examination of a country's situation even when no report has been submitted.⁴⁵ This approach would be worthy of consideration by the African Commission, especially when the machinery becomes available for it to have access to sufficient information from alternative sources such as country reports.

5.3 Additional or out of term reports

If the African Commission should adopt a liberal interpretation of article 46 of the Charter, it should be possible for it to adopt investigative measures, even including requests for out-of-term reports from states on

⁴⁴ As above.

⁴⁵ As above. See UN Doc HRI/MC/1995/2 7; UN Doc HRI/MC/1996/2 10-11.

particular human rights issues that it would want to investigate. It has been argued that 'the reticence by the African Commission to exploit the jurisdiction available under article 46 of its Charter has been an obstacle for its success'.⁴⁶ It is worth noting, however, that the Commission has been reported as taking steps under article 46 of the Charter to conduct fact-finding missions.⁴⁷

5.4 Lack of seriousness on the part of the Commission and state parties during the reporting process

A brief historical overview demonstrates that the reporting obligations under the African Charter are not taken seriously by either the Commission or the states. For example, the proceedings of the 18th ordinary session of the African Commission in 1995 shows that the agenda of the Commission at the session was very heavy. It covered protective, promotional and administrative matters; and all these were to be undertaken within a period of ten days.⁴⁸ With particular regard to state reporting, the picture is reported thus:⁴⁹

Out of four countries whose state reports under article 62 of the African Charter were scheduled to be examined during the 18th session, only Tunisia sent representatives. Mozambique, Mauritius and Seychelles once again failed to do so. The Commission had to remind a total of 28 countries to submit their initial state reports. Some of these reports are overdue for more than 12 years. Regarding the examination of the Tunisian report some shortcomings regarding the techniques applied by the Commission and the preparation of the discussion have to be observed. While the Tunisian report itself — the second the country has submitted to the Commission — was of high quality, the same cannot be said of its examination. The rapporteur and the commissioners have not been provided with copies of Tunisia's first report or with minutes of its discussion and other relevant documents and background material. The English-speaking commissioners could hardly participate in the discussion, as no English translation of the report could be provided to them. The commissioners rather restricted themselves to listening to the presentation of the Tunisian delegate and to exchanging opinions than posing concrete questions of substance and criticising governmental information or offering assistance and guidance for changes of the Tunisian legislation and administrative practice.

⁴⁶ R Murray 'Serious or massive violations under the African Charter on Human and Peoples' Rights: A comparison with the Inter-American and European mechanisms' (1999) 17 *Netherlands Quarterly of Human Rights* 124.

⁴⁷ See C Odinkalu *The individual complaints procedures of the African Commission on Human and Peoples' Rights: A preliminary assessment* (1998) 365; see extract in H Steiner & Ph Alston *International human rights in context: Law, politics, morals* (2000) 923–930.

⁴⁸ See S Malstrom & G Oberleitner '18th ordinary and 2nd extra-ordinary session of the African Commission on Human and Peoples' Rights' (1996) 14 *Netherlands Quarterly of Human Rights* 93.

⁴⁹ As above, 93–94.

It is reported that the UN Human Rights Committee spends approximately a day and a half in reviewing initial reports.⁵⁰ The African Commission at its 9th session in 1991 was recorded as having examined each report within a time period of one and a half hours.⁵¹ This, apart from psychologically undermining the seriousness with which states parties may take the whole process, will not permit a thorough examination to be done. The possible effect has been poignantly pointed out by Gaer — when reviews are reduced to only a few hours, the exercise becomes 'formulaic and ineffective'.⁵²

At the 21st ordinary session of the African Commission in 1997, the situation had not changed very much; the state reports of Sudan and Zimbabwe were available only in English, thus eliminating the non English-speaking commissioners from the examination process.⁵³ Seychelles, which had submitted its state report at the 18th session, again failed to send a representative.⁵⁴

At the 28th ordinary session of the African Commission in Cotonou, Benin in 2000, the reports of Namibia and Ghana were not examined because their representatives did not show up.⁵⁵ It is difficult to explain the absence of Ghana, taking into consideration the fact that Ghana is just a few hours away by road from Benin and just a few minutes by air.

In fact, at its 25th ordinary session in 1999,⁵⁶ the African Commission was compelled to issue a resolution concerning the Republic of Seychelles' refusal to present its initial report. The resolution noted that the Commission had since its 17th session invited the Seychelles to present its initial report which it had submitted in September 1994. The Commission noted that, despite repeated demands made to its government on several occasions, the government has refused to abide by the Commission's request, under the pretext that the resources to implement such an obligation were not provided by the state. The Commission considered this a breach of article 62 of the African Charter and therefore invited the OAU Assembly of Heads of State and Government to be held in Algiers in July 1999, 'to express their disapproval of such a persistent refusal that amounts to a deliberate violation of the Charter by the Republic of Seychelles'. It further requested the Conference 'to invite Seychelles to abide by the Charter and to consider the appropriate

⁵⁰ As above.

⁵¹ As above.

⁵² As above.

⁵³ See S Malstrom '21st ordinary session of the African Commission on Human and Peoples' Rights' (1997) 15 *Netherlands Quarterly of Human Rights* 382.

⁵⁴ As above.

⁵⁵ R Murray 'The African Commission on Human and Peoples' Rights' (2001) 19 *Netherlands Quarterly of Human Rights* 94.

⁵⁶ Held at Bujumbura, Burundi, 26 April to 5 May 1999.

measures to be taken against the Republic of Seychelles'. That strong position of the Commission notwithstanding, the Seychelles report could still not be examined at the 26th ordinary session of the Commission because no delegate was there to present it.⁵⁷

Even when representatives are sent by states, they are often unable to provide the required information in response to questions from the Commission.

Ghana was represented by its Charge d'Affairs in Ethiopia when the Commission examined her initial report in 1993.⁵⁸ The lack of expertise of the representative warranted the Commission to 'urge the government of Ghana and its representative to submit in writing additional information and response to questions which could not be answered'.⁵⁹

The Commission's own manner of treating the reports has also come up for comment. In its Final Communiqué of the 11th ordinary session, the Commission regretted the lack of conformity of state reports to the orders and questions put to them when they were compiling the report. Thereafter, instead of giving its recommendations, the Commission simply⁶⁰

hailed the usefulness and appropriateness of the constructive dialogue which had developed between the Commission and the states concerned, and thanked the governments of the Arab Republic of Egypt and of Tanzania for their reports and for their willingness to co-operate with the Commission.

No recommendations on the nature of the reports, nor on the substantive rights were given to serve as guides for other states.

The conclusion on the Zimbabwean report, examined at the 21st ordinary session just simplistically stated that 'after a fruitful debate, the Commission commended Zimbabwe for the good quality of the report'.⁶¹ In a similar vein, the conclusion on the report presented by Sudan recited that '[t]he presentation was followed by a discussion of the report to examine the human rights situation in that country and its compliance with the provisions of the Charter'.⁶² There is practically nothing of educational value in these conclusions for any state to benefit from. This lack of incisiveness in its conclusions and recommendations can lead to a reduction of the whole exercise into a rigmarole which the states would come to undertake just as a way of appeasing the

⁵⁷ See 26th ordinary session of the African Commission on Human and Peoples' Rights, 1–15 November 1999, Kigali, Rwanda.

⁵⁸ See Final Communiqué of the 14th ordinary session of the African Commission on Human and Peoples' Rights — ACHPR/FIN/COM(XIV).

⁵⁹ As above.

⁶⁰ Final Communiqué of the 11th ordinary session of the African Commission on Human and Peoples' Rights ACHPR/COMM/FIN(XI).

⁶¹ See Final Communiqué of the 21st ordinary session of the Commission — 2–11 November 1997, Banjul, The Gambia, DOC OS(XXII).

⁶² Malstrom (n 53 above) 382.

Commission. As was noted by Malstrom, if the whole reporting process and examination are not to be in vain, then 'it is absolutely crucial that the Commission starts to take the exercise more seriously'.⁶³

Cursory consideration of the reports by the Commission can derogate from the seriousness with which the state parties take their reporting obligations. If the reporting procedure is to be taken with seriousness, then the Commission must adopt a more critical examination and assessment attitude than is currently portrayed in the reports on the examinations, in the form of concluding observations.⁶⁴ This has to some extent been accomplished when the Commission recently, at its 29th session in 2001, started adopting concluding observations after the examination of state reports. These concluding observations, pointing out positive aspects, areas of concern, and making recommendations to state parties, were adopted in respect of the reports presented by Algeria, Congo, Ghana and Namibia. Unfortunately, this instance stands isolated, as the Commission has not adopted any subsequent concluding observations.

Mention may also be made of the suggestions by some concerning the two year reporting schedule as too short and likely to place some strain on the Commission in its examination of the reports.⁶⁵ As much as that fear might be justified, we should remind ourselves of the comment of Harris in reaction to a similar suggestion that the two-year reporting cycle of the European Social Charter be extended, that⁶⁶

[a] large part of the role of the supervisory organs is to remind the contracting parties of their obligations so that they will bring their law and practice into line with the Charter. *A conscience that speaks every two years is less easily ignored than one that will not come again for another six.* Although there would have been some reduction in the workload of the contracting parties, it would have been sufficient to have outweighed the harmful effect of an essentially six-year cycle.

5.5 Budgetary constraints and secretarial problems

Some of the problems mentioned above, such as the lack of adequate time to consider state reports and non-provision of state reports in all the approved languages, are linked to budgetary constraints and the resulting lack of secretarial support. Problems of finance have contributed to the Commission's inability to keep up with the onerous duty of

⁶³ As above, 182.

⁶⁴ See F Viljoen 'Examination of state reports at the 27th session of the African Commission on Human and Peoples' Rights: A critical analysis and proposals for reform' (2001) 16 *South African Journal on Human Rights* 576.

⁶⁵ See F Viljoen 'Review of the African Commission on Human Rights: 21 October 1986 to 1 January 1997' in C Heyns (ed) *Human rights law in Africa 1997* (1999) 102.

⁶⁶ D Harris *The European Social Charter* (1984) 211 (my emphasis).

examination of the reports. Writing on the same problem of lack of adequate resources in respect of the UN Committees, Crawford made the point that:⁶⁷

If the principle of state reporting and periodic review is right, as has been repeatedly asserted, then the first step must be to allow to all the committees the time, resource and staff to deal effectively with the backlog.

The consequent fall-outs resulting from resource constraints in the case of the UN human rights treaty systems committees, as enumerated by Crawford,⁶⁸ apply with even more force in the case of the African Commission. There are consequences in terms of secretariat/personnel constraints; general constraints affecting the effective functioning of the Commission, for example, limited periods of working sessions, inability to make documents available for circulation to those who need them, default in transcription and translation of reports; and the unavailability of easy access to modern communication technology such as e-mail and the internet. These problems exist at the UN level, but are more endemic at the African level.

Financial allocations for the OAU/AU have often declined rather than increased. This, of course, can be attributed to the existent difficulty of the Organisation to recover the total amount of budget contributions from members. The Commission, however, receives grants from organisations such as UN Centre for Human Rights, UNESCO, the EU, DANIDA and the Raoul Wallenberg Institute of Human Rights and Humanitarian Law.⁶⁹ Sufficient funding is paramount to the effective operation of the Commission.

6 Improving the efficiency of the Commission

6.1 Benefits of NGO participation in the reporting process

The important role of NGOs in the reporting process has been stated as follows by Gaer:⁷⁰

In order to undertake probing questioning, Commission members must read documentation from NGOs which have often prepared material specifically in response to the government report. Such critiques are recognised as invaluable and have been cited repeatedly by Commission members as essential to the conduct of the reviews. The willingness of the Commission members to review and absorb the material and pose questions based on it is the key factor in whether reviews are serious.

⁶⁷ Alston & Crawford (n 27 above) 6.

⁶⁸ As above.

⁶⁹ As above.

⁷⁰ F Gaer 'Examination of periodic state reports' in *Proceedings of the Conference on the African Commission on Human and Peoples' Rights*, 24–26 June 1991, convened by the Fund for Peace, published by Friedrich Naumann Stiftung (1991) 37.

The benefit of the 'shadow' or alternate reports to the reporting system is that they provide the requisite information that will enable the African Commission to engage in constructive dialogue with state representatives when the periodic reports are considered.

Experience at the UN level has also shown that reports are better prepared where the state encouraged inputs from NGOs and also when there is widespread dissemination of the report, making it possible for the public to give comments thereon.⁷¹

Article 23 of the European Social Charter imposes on governments an obligation to send their periodic reports to national organisations of employers and trade unions. These organisations have the right to comment on the report, and the government has a duty to forward the comments to the monitoring bodies. It is not beyond conjecture that the African Commission would be in the position to adopt into its procedures similar processes as pertains under the European Social Charter system in its dealings with the NGOs.

A strong NGO involvement should not be limited to only the preparation and presentation of reports; NGOs can play the very important role of ensuring that the recommendations are in fact respected by the government. This very important role of NGOs comes into sharp focus when we recollect that the Commission is logistically limited to monitor compliance with its recommendations.

The national human rights institutions that have been granted affiliate status with the Commission will have to put the necessary pressure on their governments to supply their reports as and when due.

If the NGOs and national human rights institutions perform their functions as required of them to the Commission, a more effective monitoring system could be guaranteed.

6.2 Follow-up

The Commission should take conscious steps to propose specific recommendations for promotional and technical assistance.⁷² Technical assistance may take the form of making inputs into relevant draft legislation, pushing for the establishment of national human rights institutions and co-ordinating with NGOs to secure the performance of the recommendations arising from the examination of state reports.

⁷¹ See para 5 of General Comment 1 of the Committee on Economic, Social and Cultural Rights, contained in Document E/1988/22.

⁷² See also Gaer (n 70 above) 38.

7 Integrating the African Union structures into the reporting mechanism

The success of the reporting mechanism will hinge to a great extent on the publicity and possibility of sanctions that are incorporated within it. The African Union system offers the opportunity for that publicity and some degree of sanction through its various organs.

The exposure of non-compliant states to the public may be effective because, from all indications, African governments are never comfortable when given adverse publicity in respect to their human rights records. That clearly explains the inclusion of article 59 of the African Charter which introduces confidentiality into the deliberations of the African Commission. The vehemence with which African governments defend public accusations of human rights abuse is also indicative of the embarrassing nature of their exposure to the public.

At the 73rd ordinary session of the Council of Ministers of the OAU held in Tripoli, Libya in 2001, the Togo delegation, for instance, raised the issue on a report of Amnesty International relating to its country during the 1998 presidential elections. The Amnesty report had alleged that hundreds of people had been killed in connection with the 1998 presidential elections. The Togolese delegation rejected the Amnesty International report.⁷³

7.1 Example of the Inter-American experience

The experience of the Inter-American Commission may be a useful guide in any suggested involvement of the political organs of the African Union. A conscious effort was made by the Inter-American Commission in the preparation of the country reports to involve the political organs of the OAS.⁷⁴ This stemmed from the realisation that political pressure is often a very essential enforcement mechanism in human rights issues.

It is argued that the involvement of the political organs was to serve two different purposes:⁷⁵

- 1 To bring documented gross abuse of human rights to the attention of states and non-governmental organisations.
- 2 To submit the investigated incidence of gross abuse of human rights to a governmental forum that should discuss it with a view to passing resolutions and recommendations to the state concerned. This could go with the putting in place of monitoring measures to ensure compliance.

⁷³ See R Murray 'The Organization of African Unity' (2001) 19 *Netherlands Quarterly of Human Rights* 202.

⁷⁴ See C Medina 'The role of country reports in the Inter-American system of human rights' (1997) 15 *Netherlands Quarterly of Human Rights* 458 468.

⁷⁵ As above.

The OAS experience is that the first objective has been achieved in the fact of public discussion of the reports; the second objective has not materialised. The failure of the second objective flows from what one might describe as the attitude of the states to refrain, though not expressly, from putting the particular state under discussion on the carpet. The approach to the discussion has been described by Medina as follows:⁷⁶

Debate on country reports often takes the form of a dialogue between the member of the Commission presenting the report and the representative of the state concerned. The latter usually defends the government by attacking the Commission and accusing it of missing its supervisory powers. The rest of the states' representatives express their support for the general work of the Commission, or for the state which has attacked it, but refuse to deal with the issues in the country report which is supposedly being under consideration. States neither refer to the facts in the report or the Commission's assessment thereof, nor debate the possible solution to the violations allegedly committed by the state subject to the report.

This attitude is very typical of African leaders. Any involvement of the political organs of the African Union must therefore be such as would leave the African leaders with no choice other than to effectively participate in the process.

Taking into account the generally known nonchalant attitude of African governments to human rights issues, a loose reporting mechanism as operates under the UN system will definitely not achieve any results. A more detailed and serious mechanism as is found under the European Social Charter reporting system will be much more effective in the African circumstance. The European system has put in place a remarkably well structured supervisory system relating to the reports submitted under the European Social Charter. This is unlike the African system, which is banal. In fact, the nature of article 62 clearly shows that the reporting system was not intended to be of any serious consequence.

7.2 The African Union and the African Charter

Even though article 30 of the African Charter asserts that the African Commission is created within the OAU, the new Constitutive Act did not in any of its 33 articles directly make reference to the African Commission. Article 3 of the AU Treaty, however, mentions among its objectives the promotion and protection of human and peoples' rights in accordance with the African Charter and other relevant human rights instruments.⁷⁷ The underlying conceptual and philosophical basis of the African Union and the African Economic Community (AEC)⁷⁸

⁷⁶ As above.

⁷⁷ See art 3(h) Constitutive Act of the AU.

⁷⁸ Established under the Abuja Treaty, 1991, reprinted in (1991) 3 *African Journal of International and Comparative Law* 792.

shows a strong commitment to the promotion and protection of human rights. They are meant to complement each other as developmental organisations. According to the Secretary-General of the OAU:⁷⁹ 'The cardinal motivation behind the establishment of the African Union was the desire to deepen and enhance the cohesion, solidarity and integration of the countries and peoples of Africa.' According to him:⁸⁰ 'The concept of an African Union stemmed from the desire of the Member States to accelerate the process of implementing the Abuja Treaty.'

The two treaties are aimed at integrated political, economic, social and cultural development, and the promotion and protection of human rights. Among the stated principles of the AEC Treaty are the human rights principles of:⁸¹

- (f) peaceful settlement of disputes among member states, active co-operation between neighbouring countries and promotion of a peaceful environment as a pre-requisite for economic development;
- (g) recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights; and
- (h) accountability, economic justice and popular participation in development.

In a similar tone, the relevant portions of the Constitutive Act of the African Union provide as follows:⁸²

- (l) promotion of gender equality;
- (m) respect for democratic principles, human rights, the rule of law and good governance;
- (n) promotion of social justice to ensure balanced economic development;
- (o) respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities;
- (p) condemnation and rejection of unconstitutional changes of governments.

These principles link up with the rights specifically stated in the African Charter.

The OAU established the African Charter and the member states undertook to recognise the rights, duties and freedoms enshrined in the Charter and also to adopt legislative and other measures to give effect to them.⁸³ To revisit a point made earlier, the African Commission, which is the principal organ under the African Charter, is not strictly speaking an organ of the OAU. Even though it is 'established within the Organisation of African Unity',⁸⁴ it is not an organ of the OAU; it is a non-political and

⁷⁹ Report of the Secretary-General on the Implementation of the Sirte Decision on the African Union (EAHG/Dec. 1(V)).

⁸⁰ As above.

⁸¹ Art 3.

⁸² Art 4 Constitutive Act of the AU.

⁸³ See art 1 African Charter.

⁸⁴ Art 30 African Charter.

independent institution. That notwithstanding, it is designed to collaborate with the Assembly of Heads of State and Government in the execution of its function to promote and protect human rights in Africa. Articles 45(4) and 59 are very clear in this respect. In addition to the functions specifically mentioned in the Charter, article 45(4) of the Charter provides that the Commission shall 'perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government'. Article 59 further emphasises that:

- (1) All measures taken within the provisions of the present Chapter shall remain confidential until such time as the Assembly of Heads of State and Government shall otherwise decide.
- (2) The report on the activities of the Commission shall be published by its Chairman after it has been considered by the Assembly of Heads of State and Government.

Clearly, therefore, the African Commission was created to operate within the structure of the OAU.

7.3 The African Union as successor to the OAU: Implications

With the intended demise of the OAU and the institutionalisation of the AU in its place, the issue of succession becomes relevant. Without doubt, the AU is the legal successor to the OAU. By article 33 of the AU Treaty, the Constitutive Act of the African Union 'shall replace the Charter of the Organisation of African Unity'.

The Assembly of the African Union, which shall be composed of the Heads of State and Government or their duly accredited representatives, is obviously the successor to the Assembly of Heads of State and Government of the OAU. The African Commission will be within its authority to expect the co-operation of the Assembly of the AU in the discharge of its duties. As a corollary, the Assembly of the AU must co-operate fully with the African Commission, if it is to carry out the very important objectives of the AU and the AEC in relation to the promotion and protection of human and peoples' rights, as guaranteed in the African Charter.

Further, in keeping with the provisions of article 45(1)(c) of the African Charter, which requires the African Commission to 'co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights', the African Commission will have to work with the various organs of the African Union and therefore also the AEC in the performance of its duty to promote and protect human and peoples' rights. The relevant organs of the African Union in this respect are:

- (a) the Assembly of the Union;
- (b) the Executive Council;
- (c) the Pan-African Parliament;
- (d) the Court of Justice;

- (e) the Commission;
- (f) the Permanent Representatives Committee;
- (g) the Specialised Technical Committees;
- (h) the Economic, Social and Cultural Council;
- (i) the Financial Institutions.

These organs of the African Union must, in keeping with the principles and objectives of the Constitutive Act of the African Union, co-operate with the African Commission if they do not want to be seen to be failing in their duty to work for the realisation of the objectives of the African Union and the AEC.

Of particular relevance in the process of reporting should be the Assembly of the African Union, the Executive Council, the Pan-African Parliament, the Specialised Technical Committees and the Economic, Social and Cultural Council.

If the Commission acts with ingenuity, it should be in a position to introduce these organs into the system of ensuring that member states meet their reporting obligations regularly and also adopt measures in line with the recommendations of the Commission on the reports. A rather innocuous but far-reaching provision which could be given a liberal interpretation to achieve the said objective is article 45(1)(c) of the African Charter, which calls on the Commission in the course of the performance of its functions to 'co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights'. This is a general provision which, if given a liberal interpretation, should cover any collaboration with any institution of the African Union for the promotion and protection of human rights. By the nature of their objectives and functions, the Council of Ministers and the Pan-African Parliament should be institutions with the inherent interest in the promotion and protection of human rights in Africa.

7.4 The Assembly of the AU

The Assembly, which is composed of Heads of State and Government of the African Union, is the supreme organ of the Union.⁸⁵ Among its powers and functions are:

- to receive, consider and take decisions on reports and recommendations from the other organs of the Union;⁸⁶ and
- to monitor the implementation of policies and decisions of the Union as well as to ensure compliance of all member states.⁸⁷

⁸⁵ See art 6(1) & (2) Constitutive Act of the African Union.

⁸⁶ Art 9(1)(b) Constitutive Act of the AU.

⁸⁷ Art 9(1)(b) & (e) Constitutive Act of the AU.

As argued above, one of the functions of the Assembly of the Union will be to receive reports on the activities of the African Commission as stated for instance in Rule 84(2) of the Rules of Procedure of the African Commission. Rule 84(2) provides that:

If, after the reminder referred to in paragraph 1 of this Rule, a state party to the Charter does not submit the report or additional information requested pursuant to Rules 81 and 85 of the Rules of Procedure, the Commission shall point it out in its yearly report to the Assembly.

The Assembly has the duty to work for the promotion and protection of human and peoples' rights as is stated in the principles and objectives of the Constitutive Act of the African Union. It will be failing in its responsibilities if it does not 'consider and take decisions' on the report as is expected by article 9. It would be failing, if it does not, in addition, monitor the implementation of the decisions and ensure compliance by the affected member state.⁸⁸ Failure to respect any decision of the Assembly on a matter relating to the promotion and protection of human rights would be such grievous breach against the principles and objectives of the African Union as should warrant the sanctions of the Assembly under article 23(2).⁸⁹

Article 23(2) holds the main key to the infusion of the necessary bite into the reporting system. The article provides that:⁹⁰

. . . any Member State that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transport and communications links with other Member States, *and other measures of political and economic nature to be determined by the Assembly.*

This power of the Assembly to sanction could be compared to article 8 of the EU Treaty that confers authority on the European Council of Ministers to sanction non-complying member states.

It is possible to argue that since the requirement of the provision of an initial report and regular reports at two yearly intervals are specific requirements of the African Charter, failure on the part of any state party to produce these reports as and when due is a breach of the Charter provisions. In that case it becomes the duty of the Assembly of Heads of State and Government of the AU to supervise conformity. The argument was made in respect of the UN Human Rights Committee that:⁹¹

[S]ince the initial report within one year of the entry into force of the covenant for the State Party concerned is a direct treaty obligation under article 40(1)(a), . . . it is not the Committee, but the meeting of States Parties, that

⁸⁸ See arts 9(1)(b) & (e) Constitutive Act of the AU.

⁸⁹ Art 23(2) of the Constitutive Act of the AU permits the Assembly to impose sanctions on any member who fails to comply with the decisions and policies of the Union. See also art 5 AEC Treaty.

⁹⁰ My emphasis.

⁹¹ n 14 above, 6.

is competent to remind defaulting States of their unquestionable international obligations.

While this may represent the purely legal situation, it should not be beyond the implied authority of the Commission to demand these reports from defaulting state parties. The Commission should be able to demand the reports even though it has no legal authority to impose sanctions for failure. On the other hand, the full responsibility of ensuring compliance should rest with the Assembly of Heads of State and Government which should, when necessary exercise the power of compulsion.

In the words of Umozurike:⁹² 'The Charter is a commitment to sister African states that those rights and obligations will be respected in every state in the spirit of African brotherhood.'

If, indeed, the Charter is such a commitment from each individual member state to the generality of states of the AU, then the generality has the right and the responsibility to ensure that the obligations are respected. The AU generally, and its organs in particular, by their nature possess the capacity to ensure compliance to the obligation and must be seen to be performing that function.

These functions and powers of the Assembly of the Union are latent and must be invigorated by the influence of the Commission. Perhaps it is in the realisation of this fact that the African Commission, meeting at its 29th ordinary session in Tripoli, Libya in 2001, took the decision to set up a three-member working group of the Commission with a mandate to initiate an in-depth discussion on all the implications of the entry into force of the Constitutive Act of the African Union and the African Commission.

7.5 The Pan-African Parliament

The Pan-African Parliament is one of the principal organs of the African Union⁹³ and the AEC.⁹⁴ In accordance with article 17(2) of the Constitutive Act of the African Union and article 14(2) of the AEC Treaty, a protocol has now been put in place defining the composition, functions, powers and organisation of the Pan-African Parliament.⁹⁵ An

⁹² Umozurike, the then Chairman of the African Commission, in his address to the 26th Session of the Assembly of Heads of State and Government of the OAU (9–11 July 1990); see Third Annual Activity Report of the African Commission on Human and Peoples' Rights, Annex V.

⁹³ Arts 5(c) & 17 Constitutive Act of the African Union.

⁹⁴ Arts 7(c) & 14 AEC Treaty.

⁹⁵ The Protocol to the Treaty Establishing the African Economic Community relating to the Pan-African Parliament was adopted by the 5th Extraordinary Summit of the OAU in Sirte, Libya on 2 March 2001. By art 22 of the Protocol, it shall come into force 30 days after the deposit of instruments of ratification by a simple majority of the member states.

analysis of the objectives, functions and powers of the Pan-African Parliament will show human rights very high on the list of concerns of the Pan-African Parliament. The first objective for instance is wide enough to encompass the function to promote and protect human rights as guaranteed under the African Charter. The said provision reads that the Pan-African Parliament shall 'facilitate the effective implementation of the policies and objectives of the OAU/AEC and, ultimately, of the African Union'.⁹⁶

With respect to the African Union, the relevant objectives that complement the principles already mentioned above, include:⁹⁷

- (f) to promote peace, security, and stability on the continent;
- (g) to promote democratic principles and institutions, popular participation and good governance;
- (h) to promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments.

The Pan-African Parliament will therefore have the all-important responsibility of monitoring the promotion and protection of human rights in Africa. The functions and powers under article 11 of the Protocol are wide enough to enable it perform similar functions carried out by the European Parliament in respect of the state reporting process of the European Social Charter. Articles 11(1), (4), (6) and (9) of the Protocol on the functions and powers are worth consideration. These provide as follows:

- (1) It may examine, discuss or express an opinion on any matter, either on its own initiative or at the request of the Assembly or other policy organs and make any recommendations it may deem fit relating to, *inter alia*, matters pertaining to respect of human rights, the consolidation of democratic institutions and the culture of democracy, as well as the promotion of good governance and the rule of law.
- (4) It may make recommendations aimed at contributing to the attainment of the objectives of the OAU/AEC.
- (6) It may promote the programmes and objectives of the OAU/AEC, in the constituencies of the Member States.
- (9) It may perform such other functions as it deems appropriate to achieve the objectives set out in article 3 of this Protocol.

In its specific content as well as general, the functions of the Pan-African Parliament are broad enough to confer the authority on it to operate like the European Parliament and perhaps even more, in respect of the monitoring of the state reporting process by African states.

⁹⁶ See art 3(1) Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament.

⁹⁷ Art 3(1) Constitutive Act of the African Union.

Even though the Pan-African Parliament does not as of now possess the power of sanctions as does the Assembly of the African Union, the most potent regulatory mechanism at its disposal would be the element of publicity and the pressure that it can bring to bear on non-conformist governments through the members representing the particular state in the Pan-African Parliament. The power to 'examine, discuss or express an opinion on any matter, either on its own initiative or at the request of the Assembly' makes it feasible for the African Commission to develop a working relationship with the Pan-African Parliament without having to obtain an amendment of the African Charter. All that needs to be done is to simply amend the Rules of Procedure of the African Commission and thereby create a working relationship with the Pan-African Parliament.

7.6 The Specialised Technical Committees

The Specialised Technical Committees, anticipated by both the Constitutive Act of the African Union and the AEC Treaty, will become relevant in the reporting process as already anticipated under Rule 82 of the Rules of Procedure of the African Commission. The Rule, which deals with the mode of transmission of the reports, provides that the Secretary may after consultation with the Commission communicate to the specialised institutions concerned, copies of all parts of the reports which may relate to their areas of competence, produced by member states of these institutions. The Commission may then invite the specialised institutions to which the Secretary has communicated parts of the report, to submit observations relating to these parts within a time limit that it may specify.

The specialised institutions should, under the new system, include the Economic, Social and Cultural Council of the African Union. It is to be composed of different social and professional groups of the member states of the Union.⁹⁸ In addition, Specialised Technical Committees are created under both the African Union and the AEC systems.

These committees are to be composed of representatives of each member state, preferably of Ministers or senior officials responsible for sectors falling within their respective areas of competence.⁹⁹ Among their functions is the mandate to 'submit to the Executive Council, either on its own initiative or at the request of the Executive Council, reports and recommendations on the implementation of the provisions of this Act'.¹⁰⁰ This function could be of relevance to the state reporting process. As obtains under the European and the UN systems, if state reports are made available to these specialised committees, their specialist

⁹⁸ See art 22 Constitutive Act of the African Union.

⁹⁹ Art 14(3) Constitutive Act of the African Union & art 25(3) AEC Treaty.

¹⁰⁰ Art 15(d) Constitutive Act of the African Union & art 26(d) AEC Treaty.

comments on the reports will definitely be of assistance in understanding the problems relating to implementation of the provisions of the African Charter.

The reference to specialised institutions in Rule 82 of the Rules of Procedure of the African Commission must be a reference to the various ministerial conferences established by the Assembly of the OAU to deal with specific sectoral issues. These include the OAU Labour and Social Affairs Commission, which is tripartite in nature (comprising governments, employers and workers) and is organised jointly with the ILO; the Conference of Ministers of Health (organised jointly with Economic Commission for Africa and United Nations Industrial Development Organisation) and the FAO Regional Conference for Africa.¹⁰¹ It is expected that the AU Specialised Technical Committees would be rationalised along the lines of these other bodies.

Under the ICESCR, recognition is given to the fact of the enormity of the duty to compile the state report; provision is therefore made in article 2 paragraph 1 and articles 22 and 23 of the Covenant for international assistance and co-operation.

From the tone of those provisions, the opportunity exists for some positive steps being taken by the international institutions to provide some assistance to a reporting state in certain respects. In fact, the Committee on Economic Social and Cultural Rights in its General Comment 1 clearly encourages states that¹⁰²

if the state party concludes that it does not have the capacity to undertake the monitoring process . . . it may note this in its report to the Committee and indicate the nature and extent of any international assistance that it may need.

This hope of assistance may at least in theory serve as some encouragement to the states in meeting their obligations. The suggestion in the case of the African reporting system is that even though the African Charter does not expressly stipulate the provision of such assistance as is envisaged in the ICESCR provisions, it should nevertheless be possible for the African Commission, in collaboration with some institutions of the African Union and other African inter-governmental organisations, to put in place similar means of assistance.

The ICCPR and the ICESCR provide that the specific Committees could transmit state parties' reports to specialised agencies of the UN. The objective herein is to put the expertise and resources of the specialised agencies at the disposal of the reporting states the advantage inherent in this is that the states have the incentive to report.

¹⁰¹ See Report of the Secretary-General on the Implementation of the Sirte Decision on the African Union (EAHG/DEC. 1(V)).

¹⁰² See Document E/1989/22.

The UN Convention on the Rights of the Child empowers the Committee on the Rights of the Child to transmit to the specialised agencies, UNICEF and other competent bodies any reports that contain a request or indicated a need.¹⁰³ The Committee on the Rights of the Child goes further in its Rules to provide that it may request information on technical advice or assistance provided and the progress achieved.¹⁰⁴ The African Commission was not given this similar authority in the African Charter itself, and neither did its own rules of procedure attempt to appropriate this function to itself.

Even if the African Commission were to possess those powers, the specialised agencies of the OAU might not, by themselves alone, be resourced to meet the demands that might be passed on through those reports. Nevertheless, a report to them will help to encourage the reporting states to some extent. In addition, it would not be beyond conjecture to advocate that the African Commission should find it within its general mandate of promoting human rights to make reports to the specialised agencies of the UN; after all, the African system is not in competition with the UN system, it is a complement to it.¹⁰⁵

7.7 Incorporation of the relevant organs of the African Union into the state reporting mechanism

The African Charter might become inoperative if the Constitutive Act of the African Union is not interpreted wide enough to create a working relationship with the relevant organs of the African Union.

The Secretary-General of the OAU had, in a reaction to the non-inclusion of the Mechanism for Conflict Prevention, Management and Resolution¹⁰⁶ into the African Union system, suggested its inclusion by means of a declaration. He gave the example of the same instrument which was in 1993 adopted by the mechanism of declaration. According to him, it was incorporated in 1993 through a declaration that was adopted by the Assembly with the clear intention that it would be a legally binding instrument to be considered as an integral part of the OAU Charter.¹⁰⁷ He accordingly suggested that the same mechanism could be adopted again in order to make the mechanism an integral part of the Constitutive Act, without going through the cumbersome and lengthy procedures of treaty review and amendment.

Following from the above experience, it is not far-fetched to suggest that a proposal should emanate from the African Commission to the

¹⁰³ See art 45 Convention on the Rights of the Child.

¹⁰⁴ See Rule 74.

¹⁰⁵ See art 60 African Charter.

¹⁰⁶ This was established in 1993 by the Cairo Declaration.

¹⁰⁷ See Report of the Secretary-General on the Implementation of Sirte Decision on the African Union (EAHG/DEC 1(V)) CM/2210(LXXIV) para 39.

Assembly of Heads of State and Government of the African Union requesting the latter to adopt a declaration to incorporate the relevant organs of the African Union in the operational mechanism of the African Commission. A declaration of that nature will be in line with the general letter and spirit of the Constitutive Act of the African Union.

The established methodologies adopted in the interpretation of international law instruments take into account the text, content, object and purpose of the instrument. The 'golden rule' of interpretation in international law is found in article 31, paragraph 1 of the Vienna Convention on the Law of Treaties, 1969:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.

In its interpretation of the European Convention on Human Rights, the European Court placed emphasis on the teleological approach.¹⁰⁸ This notion of a liberal interpretation rather than a restrictive interpretation better suits the object and purpose of the African Union treaty and the African Charter, especially as they deal with human rights issues. Only an interpretation that will improve the promotion and protection of human rights should be allowed to hold sway.

The objectives and principles of the African Union support the promotion and protection of human rights as provided for under the African Charter. Any interpretation to be adopted in respect of the Constitutive Act of the African Union and the African Charter must be one that should make possible the realisation of maximum effectiveness of the principles and objectives of both instruments. By the general principles of interpretation, it is possible to graft the African Charter onto the Constitutive Act of the African Union and thereby enable the African Commission to enhance its effectiveness by utilising the organs created under the African Union. The African Commission can achieve that without necessarily subjecting itself to the control of those organs. If anything at all, the African Commission will rather be assisting those organs to achieve one of the objectives of their creation which is, the promotion and protection of human and peoples' rights as are guaranteed in the African Charter.

8 Suggested state reporting process under the AU system

Arising from an analysis of the new African Union and the African Charter, it is possible to construct a workable reporting mechanism that would

¹⁰⁸ See D Harris *The European Social Charter* (1984) 12.

incorporate within its structure the importance of publicity and some degree of political pressure from the relevant organs of the AU. The following process is suggested:

- 1 As a first step the African Commission would enlist the help of the Pan-African Parliament to put political pressure on the states that delay or fail to submit reports. Persistent pressure from the Pan-African Parliament and exposure to the public should make states meet their obligations of submitting regular reports to the Secretary of the African Commission.
- 2 The reporting states would send a copy of their reports to relevant local NGOs that have observer status with the African Commission. Upon receipt of the report the local NGOs would review the report and send their comments thereon to the Secretary to the African Commission. The Secretary would submit a copy of the NGO comments to the reporting state. This should enable the state representative to prepare enough for the subsequent dialogue with the African Commission on the report.
- 3 The Secretary to the Commission would make the reports available to the relevant International NGOs that have observer status with the African Commission.
- 4 The Secretary would transmit the state reports together with the NGO comments to the African Commission.
- 5 The African Commission would examine the report and enter into dialogue with the representative of the reporting state.
- 6 Thereafter the Commission transmits relevant portions of the report to the specialised agencies of the African Union.
- 7 The Commission would transmit the state report together with its own observations and recommendations thereon to the Pan-African Parliament.
- 8 The Pan-African Parliament will consider the state report together with the observations and recommendations of the African Commission. It may adopt some of the recommendations of the African Commission.
- 9 The recommendations of the Pan-African Parliament would be forwarded to the Assembly of Heads of State and Government of the AU. The Assembly would debate these recommendations and adopt those that the state concerned shall be made to rectify or ensure that it is respected.
- 10 The decision of the Assembly of Heads of State and Government would be sent to the Pan-African Parliament, which shall through political pressure ensure that the state government concerned conforms. Where necessary the Pan-African Parliament should draw the attention of the Assembly to the need to exercise the ultimate sanctions inherent in Article 23 of the Constitutive Act of the AU.

This suggested report examination process takes from the experiences of the European Social Charter process and the new African Union. It is, however, based on the belief in the ability of a determined Commission to use for its advantage the structures of the new African Union, especially the Pan-African Parliament.

9 Suggested report form

The fact of inadequate reporting has been identified.¹⁰⁹ The problem of inadequate reporting is not limited to only the African Commission; the experience at the UN Human Rights Committee was that earlier reports turned to be rather brief. It was, however, observed that after a comprehensive review of the reports by the Committee, countries return with more comprehensive subsequent reports. The example was given of Rwanda, which had submitted a two-paged report to the Committee in 1979. Its report for the second review in 1987 was 33 pages long.¹¹⁰

The UN Human Rights Committee from time to time issues general comments designed to guide government officials involved in the country report drafting process.¹¹¹ According to Pocar:¹¹²

These guidelines are intended to provide guidance to States parties in their reporting activities and to avoid general and incomplete presentations. They are further designed to ensure that reports are presented in a uniform manner and that they offer a complete picture of the situation in each State regarding the implementation of the rights contained in the Covenant.

General comment No 2 and the 1991 UN Manual on Human Rights Reporting provide a comprehensive reporting code as a guide for the state reporting officer. The general comments depict the educational role that the UN Human Rights Committee had undertaken with the objective of ensuring that the reporting system produces the best of reports. Article 40(4) of the ICCPR provides the basis of the authority of the Committee to issue general comments.

Reports under the European Social Charter are prepared in accordance with a Report Form adopted for the purpose by the Committee of Ministers. This form was designed by the Committee of Ministers in exercise of the authority conferred on it by Article 21 of the European

¹⁰⁹ See, eg P Tigere 'State reporting to the African Commission: The case of Zimbabwe' (1994) 38 *Journal of African Law* 64.

¹¹⁰ See Gaer (n 70 above) 36.

¹¹¹ See M O'Flaherty 'The reporting obligation under article 40 of the International Covenant on Civil and Political Rights: Lessons to be learned from consideration by the Human Rights Committee of Ireland's first report' (1994) 16 *Human Rights Quarterly* 517.

¹¹² F Pocar 'The International Covenant on Civil and Political Rights' in United Nations *Manual on human rights reporting* (1991) 80.

Social Charter. The African Charter does not mention any such form. However, nothing prevents the African Commission from creating such a form if it will improve the quality of reporting.

In response to a question on why some countries had not, as at 1991, yet ratified the African Charter, the reason was given to include a lack of personnel qualified enough to seriously review the Charter and to educate the government about the ramifications and benefits of subscription to its principles.¹¹³ This fact underscores the basic problem of lack of adequately qualified persons to undertake effective reporting.

The general opinion on the first reporting guidelines adopted by the African Commission may be summed up as being that:¹¹⁴

[t]he guidelines are too lengthy (25 pages) and too detailed in some parts while too vague in others. They are particularly confusing because they do not discuss rights in the order in which they appear in the Charter.

The first reporting guideline in respect of article 26 of the Charter provides an illustration:

The Article requires the State to take steps to guarantee the independence of the judiciary with regards to the following:

- (a) Establishment of a legal educational system designed to protect human and peoples' rights and respect for the rule of law;
- (b) A legal educational system directed at training independently-minded lawyers;
- (c) Appointment of judges to be based purely on merit and qualifications;
- (d) Judges to be assured tenure of office and not to be lightly removed save for misconduct after a recommendation by a special commission appointed for the purpose of investigating the misconduct;
- (e) Encourage formation of institutions charged with the responsibility to promote and protect rights guaranteed by the Charter.

These guidelines are in the nature of general comments that may be a bit difficult for direct answers to be provided.

The African Commission has amended the reporting guideline, reducing it to a two-page document that lists 11 points that states should consider in the compilation of their reports.¹¹⁵

The reporting format should be one that does not make reporting too arduous but rather comfortable for government officials in their reporting process. The suggested report form should give opportunity to the states to make general comments on the changes in the law and practice on the improvement of the rights generally. The suggested questions that follow, in respect of articles 5, 6 and 7 of the Charter, have been

¹¹³ Proceedings of the Conference on the African Commission on Human and Peoples' Rights, 24–26 June 1991 (n 6 above) 11.

¹¹⁴ As above, 47. For a general discourse on the defects of the guidelines, see E Ankumah *The African Commission on Human and Peoples' Rights: Practice and procedure* (1996).

¹¹⁵ Viljoen (n 10 above) 112–113. See Amendment of the General Guidelines for the Preparation of Periodic Reports by States Parties DOC/OS/27(XXIII).

formulated, taking into account some of the questions put to countries by the Commission at report examination stages and also the Commission's interpretation of the Charter provisions in its decisions on complaints filed with it. These suggested questions serve as illustrations, and have been elaborated for all articles, but are not all published here for considerations of space.

Article 5

- Whether there has been any inspection of prisons during the coverage period of the report. If any, attach a copy of the report. If not, indicate measures taken during the coverage period of the report to guarantee the protection of the human rights of prisoners.¹¹⁶
- Whether there have been any cases of torture or other inhuman treatment in prisons, police cells, military or paramilitary cells generally during the coverage period of this report. If yes, how many, and has any law enforcement officer involved been prosecuted or disciplined in respect of each such incident?
- Whether there have been any reported incidence of torture, cruel, inhuman or degrading punishment and treatment by any of the security agencies in the country and what remedies were provided if, any.
- Are there any forms of slavery existing in your country? If yes, what measures have been put in place to stop the practice?

Article 6

- Whether there have been any reported incidence of arbitrary arrests of individuals and what remedies were provided in each case.
- Whether the laws of your country guarantee that a person arrested shall be informed at the time of the arrest, in a language that he or she understands of the reason for the arrest and the charge against him or her.¹¹⁷
- Are there any political detainees in your country?
- Was there any state of emergency declared during the coverage period of this report?¹¹⁸ If yes, what was the reason for the declaration of the state of emergency? How promptly were those detained under the emergency brought to trial? What was the procedure that governed their trial? Were such detainees afforded the right to counsel? Had they any right of appeal?

¹¹⁶ See Resolution on Prisons in Africa, adopted by the African Commission at its 17th ordinary session held from 13 to 22 March 1995, Lome, Togo, Eighth Annual Activity Report of the African Commission on Human and Peoples' Rights, Annex VI.

¹¹⁷ Resolution on the Right to Trial, adopted at the 11th ordinary session from 2 to 9 March 1992 in Tunis, Tunisia, Fifth Annual Activity Report of the African Commission on Human and Peoples' Rights, Annex IV.

- Whether the laws of your country make provision for compensation to victims of unwarranted detention. If yes, has anybody unlawfully detained been awarded some compensation during the coverage period of this report?

Article 7

Article 7(1)(a)

- Whether the laws of your country prohibit detention without trial.
- Whether the laws of your country guarantee equal access of all before the courts of law.¹¹⁹
- Whether the laws of your country guarantee to persons convicted of an offence the right of appeal to a higher court.¹²⁰

Article 7(1)(b)

- Whether the laws of your country guarantee for anyone charged with a criminal offence the presumption of innocence until proven guilty by a competent court.¹²¹

Article 7(1)(c)

- Whether the laws of your country guarantee to an accused person adequate time and facility for the preparation of his or her defence.¹²²
- Whether the laws of your country guarantee to an accused person the right to be represented by counsel of his or her choice or where he or she cannot afford it, to representation by counsel provided by the state.¹²³
- Whether there are any institutions that provide free legal aid when necessary.

¹¹⁸ Question from the African Commission at the examination of a report by Egypt, reproduced in A Danielsen *State reporting under the African Charter*, Danish Centre for Human Rights (1994) 75.

¹¹⁹ Resolution on the Right to Trial (n 117 above).

¹²⁰ See Communication 75/92, *Katangese Peoples' Congress v Zaire*, Eighth Annual Activity Report of the African Commission on Human and Peoples' Rights, Annex IV.

¹²¹ See Communication 75/92, *Katangese Peoples' Congress v Zaire*, Eighth Annual Activity Report of the African Commission on Human and Peoples' Rights, Annex IV. See also question from the African Commission at the examination of a draft report by Ghana, reproduced in Danielsen (n 118 above) 78.

¹²² n 120 above.

¹²³ See Communication 64/92, 68/92, 78/92, *Achutan (on behalf of Aleke Banda), Amnesty International (on Behalf of Orton and Vera Chirwa) Amnesty International (on Behalf of Orton and Vera Chirwa) v Malawi*, Eighth Annual Activity Report of the African Commission on Human and Peoples' Rights, Annex IV.

Article 7(1)(d)

- Whether the laws of your country guarantee trial within a reasonable time and the grant of bail for a person arrested or detained.¹²⁴
- Whether there have been any reported cases of detention without trial for any period beyond that permitted by the law. If any, what steps have been taken to address it and to prevent future recurrence?¹²⁵
- Whether there have been any reported complaints about the lack of impartiality of a court of law. If any, what was the basis of the complaint and what steps have been taken to correct it?¹²⁶
- Whether the laws of your country guarantee the right to the accused person to examine or have examined the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witness against him or her.¹²⁷
- Whether the laws of your country guarantee the free assistance of an interpreter if he or she cannot speak the language used in court.¹²⁸

Article 7(2)

- Whether there has been any law that seeks to retroactively prohibit any act that constitutes a legally punishable offence.¹²⁹

10 Conclusion

The main objective of this work is to examine the extent to which the effectiveness of the African Commission can be enhanced by incorporating its monitoring functions into the AU structure.

The African Commission should be very aware of its own history and realise that it was a grudge creation, and that if it does not wrestle power for itself, nobody, at least not the Heads of State and Government of Africa, will give it power. Fortunately it has the authority to interpret the provisions of the African Charter. It also has very wide powers as conferred in article 60 of the Charter.

¹²⁴ n 120 above.

¹²⁵ Communications 147/95 & 149/96, *Jawara v The Gambia*, Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights, Annex V.

¹²⁶ See Communication 87/93, *Constitutional Rights Project (in respect of Zamani Lakwot and six others) v Nigeria*, Eighth Annual Activity Report of the African Commission on Human and Peoples' Rights, Annex IV.

¹²⁷ n 120 above.

¹²⁸ As above.

¹²⁹ n 125 above.

The reporting procedure need not be perceived as a process that has its scope only within the ambit of the African Charter; it must of necessity be understood as an integral part of the African system of human rights. In this respect, the relevant institutions of the African Union, the African Economic Community, the African Convention on the Rights and Welfare of the Child and, of course, the African Charter itself should be utilised to achieve a more effective working of the reporting mechanism.

Human rights in NEPAD and its implications for the African human rights system

*Evarist Baimu**

LLD candidate and research associate, Centre for Human Rights, Faculty of Law, University of Pretoria

1 Introduction

This article examines the human rights component of Africa's contemporary development blueprint — the New Partnership for Africa's Development (NEPAD).¹ It focuses on the emerging structures and mechanisms under the NEPAD framework to address human rights challenges on the continent. The main aim is to highlight the dangers and opportunities that are presented by adoption of NEPAD, particularly by its human rights institutional framework. Some of the new institutions could add value to the African human rights system in terms of increased protection of human rights. However, NEPAD-driven proliferation of human rights institutions could lead to diversion of attention and resources allocated to the existing human rights institutions. In an effort to bring an orderly evolution of new human rights institutions, the article proposes the creation of a dual African human rights system, hinged on the political-orientated Constitutive Act-based human rights regime and the rule-orientated African Charter-based human rights regime.

* LLB (Dar es Salaam), LLM (Pretoria); ebaimu@postino.up.ac.za. An earlier version of this article appeared as Occasional Paper No 15 of the Centre for Human Rights, University of Pretoria. I am grateful to Professors Christof Heyns and Frans Viljoen of the University of Pretoria for their useful comments on earlier versions of the article.

¹ The NEPAD document is available on the internet at <http://www.nepad.org/AA0010101.pdf> (accessed 1 July 2002). The NEPAD website <http://www.nepad.org> also contains other NEPAD texts such as the communiqués, legal instruments and reports.

The article is divided into five main parts. The first part gives a historical backdrop to NEPAD. An overview of the substance and institutional framework of NEPAD follows under part two. Next, the NEPAD provisions with human rights content are scrutinised and analysed. NEPAD and its evolving institutions are then placed within the African human rights system and the African Union (AU) framework. Proposals are then made with the view of consolidating, rationalising and harmonising the evolving and existing human rights mechanisms and structures under NEPAD and the AU.

2 Background of NEPAD

The NEPAD document started off as the Millennium Africa Recovery Plan (MAP) conceived by Presidents Mbeki of South Africa, Obasanjo of Nigeria and Bouteflika of Algeria in the year 2000.² MAP merged with the OMEGA plan developed by President Wade of Senegal to form the New African Initiative (NAI) in July 2001. The title NAI was later changed to NEPAD in October 2001.³

The MAP document had its immediate origins in the Organisation of African Unity (OAU) Summit held in Togo in July 2000. This summit mandated Presidents Mbeki of South Africa, Obasanjo of Nigeria and Bouteflika of Algeria to engage the countries in the north with a view to developing a partnership for the renaissance of the continent.⁴ Going in tandem with these promotional efforts was the development of a document named MAP, outlining the terms of the partnership.⁵ Around the same time, the newly elected president of Senegal, Wade, conceived a plan titled OMEGA.⁶

The MAP and OMEGA plans were presented respectively by Presidents Obasanjo and Wade during the fifth Extraordinary Summit of the OAU

² Although for the purpose of this paper the historical background is chronologically set to 2000, its background could be traced further back at least to the 1970s with efforts within the Economic Commission for Africa to come up with programmes to address challenges of development in Africa. See J Ohiorhenuan 'NEPAD and dialectics of African underdevelopment' (2002) 7 *New Agenda* 9-10.

³ Para 5(b) of the Communiqué issued at the end of the first meeting of the HSIC, Abuja, Nigeria, 23 October 2001.

⁴ Para 321 of the OAU Secretary-General Report (2001). Pursuant to this mandate, the three leaders relentlessly engaged the industrialised countries in the north and multi-lateral organisations on the partnership at various fora. For example, the three leaders made a presentation on the MAP at the World Economic Forum in Davos in January 2001.

⁵ The Economic Commission for Africa (ECA) was to be given a mandate to develop a document to operationalise MAP by the Conference of the African Ministers of Finance. The ECA document is known as New Global Compact with Africa. Para 325 of the OAU Secretary General Report (2001).

⁶ Para 323 of the OAU Secretary-General Report (2001).

held in Sirte, Libya from 1 to 2 March 2001.⁷ Recognising the synergies and complementarities between the two plans on continent-wide development, the Sirte Summit recommended the integration of the two initiatives. The decision to have a single, co-ordinated African plan was grounded on the need to avoid confusing Africa's partners, diffusing the focus, eroding capacity, splitting resources and undermining the credibility of the plans.⁸ The result of this merger, which was finalised on 3 July 2001, was NAI. The NAI was approved by the 37th OAU Assembly of Heads of State and Government held in Lusaka in July 2001.⁹ The NAI had to be reorganised and edited to clear repetition and inconsistencies emanating from the hasty merger of the MAP and OMEGA plans. The finalisation of the NAI document was achieved on 23 October 2001, when its name was also changed to NEPAD.¹⁰

3 Unzipping NEPAD: Content and institutional framework of NEPAD

NEPAD constitutes a framework on the basis of which Africa as a continent intends to interact with the rest of the world, particularly the industrialised countries and the multi-lateral global institutions such as the World Bank, the International Monetary Fund and the United Nations (UN).¹¹ Its main objective is to place African countries individually and collectively on a path of sustainable growth and development and by so doing to put a stop to the escalating marginalisation of the continent.¹² Unlike prior analogous endeavours, NEPAD is an initiative conceived, owned and led by Africans themselves.¹³ It is also an initiative that puts emphasis on a new partnership with the industrialised countries and with multilateral organisations based on mutual commitments and obligations.¹⁴

3.1 Précis of the content of NEPAD document

Apart from the introduction and conclusion, the NEPAD document is divided into six parts. Part one is the introduction. Part two places Africa

⁷ Para 318 of the OAU Secretary-General Report (2001).

⁸ As above.

⁹ See OAU Declaration on the New African Initiative [MAP and OMEGA] 37th ordinary session of the Assembly of the Heads of State and Government of the OAU, July 2001 Lusaka, Zambia, OAU Doc AHG/Decl 1 (XXXVII) para 9.

¹⁰ n 3 above, particularly paras 5(a) & b.

¹¹ Para 48 NEPAD document.

¹² Para 67 NEPAD document.

¹³ Para 60 NEPAD document.

¹⁴ Ohirohenuan (n 2 above) 10.

in its global context and provides a historical analysis of Africa's under-development. Part three attempts to make a case why NEPAD is poised to succeed while similar programmes undertaken in the past, failed. Part four is an appeal to the peoples of Africa to mobilise in support of the implementation of NEPAD.

Part five, containing the Programme of Action, is the core of NEPAD. This part is also the largest. It encompasses more than half of all the provisions of the NEPAD document (115 paragraphs of the total 207). Part five is divided into three main sub-parts. Sub-part A highlights the conditions for sustainable development in Africa. These are peace, security and political governance initiatives, economic and political governance initiatives and sub-regional and regional approaches to development. Sub-part B identifies the sectoral priorities for achieving sustainable development. These include bridging the infrastructure gap, investing in people, developing agriculture, protecting the environment and the role of culture as well as science and technology. Sub-part C outlines ways of mobilising resources for sustainable development.

Part six underlines the partnership nature of NEPAD. Part seven deals with the implementation of NEPAD. Part eight is the conclusion.

3.2 NEPAD's institutional framework

The institutional framework for the implementation of NEPAD is three-tiered, comprising the Heads of State and Government Implementation Committee (HSIC), the Steering Committee and the Secretariat.

The HSIC consists of Heads of State of the five states who have been the initiators of NEPAD, as well as 15 other states.¹⁵ The AU Chairperson and the Head of the AU Commission are *ex officio* members of the HSIC. The HSIC has a Chairperson and two Vice-Chairpersons.¹⁶ The HSIC meets every four months.¹⁷ Its mandate is to set policies, priorities and the Programme of Action of NEPAD.¹⁸ The HSIC has to report annually to the AU Assembly of Heads of State and Government.

¹⁵ Para 202 NEPAD document. The five NEPAD initiators are Algeria, Egypt, Nigeria, Senegal and South Africa. Initially, 10 other states, namely Cameroon, Gabon, São Tomé and Príncipe, Ethiopia, Mauritius, Rwanda, Tunisia, Botswana, Mozambique and Mali were added to the five NEPAD promoters. During the Durban summit, the AU Assembly decided to add five more countries to the HSIC. See AU 'Declaration on the implementation of the New Partnership for Africa's Development (NEPAD)' first ordinary session of the Assembly of Heads of State and Government of the AU 9–10 July 2002, Durban, South Africa, AU Doc ASS/AU/Decl 1 (I) para 14.

¹⁶ Currently President Obasanjo chairs the Implementation Committee with President Wade and Bouteflika serving as Vice-Chairpersons. Para 5(d) of the Communiqué issued at the end of the first meeting of the HSIC, Abuja, Nigeria, 23 October 2001.

¹⁷ As above.

¹⁸ Ohiorhenuan (n 2 above) 13.

The Steering Committee comprises two personal representatives of each of the Heads of States of the five NEPAD initiators and one personal representative of the 15 non-initiating NEPAD members. The AU Commission participates in the Steering Committee meetings. The functions of the Steering Committee include developing terms of reference of identified programmes and projects, developing a strategic plan for marketing NEPAD at national, sub-regional, regional and international levels as well as supervising the Secretariat.¹⁹

The Secretariat is located in Midrand, South Africa.²⁰ It handles the co-ordination and liaison responsibilities as well as administrative and logistical functions. As it is composed of a very small core staff, the Secretariat outsources work on technical details to the lead agencies and experts from the continent.

In addition to the above institutions, five task teams have been established. The task teams are responsible for identifying and preparing implementable projects and programmes under NEPAD.²¹ Furthermore, there are five subcommittees, each of which is co-ordinated by one of the five NEPAD initiating states.²²

4 Human rights in NEPAD: Content and institutional framework

4.1 Human rights provisions in NEPAD

Ensuring democracy, human rights and good governance is a central feature of NEPAD. NEPAD seeks to address Africa's underdevelopment and marginalisation through a number of ways, including promoting and protecting democracy and human rights in African countries and sub-regions, as well as developing clear standards of accountability, transparency and participatory governance at the national and sub-national level.²³ NEPAD acknowledges that African leaders have learnt from their own experiences that peace, security, democracy, good governance, human rights and sound economic management are conditions for development.²⁴ In this regard, African leaders pledge to

¹⁹ n 3 above, para 5(f).

²⁰ As above, para 5(e).

²¹ The Task Teams and their lead agencies are as follows: Capacity-building on peace and security (AU); Economic and corporate governance (ECA); Infrastructure (Africa Development Bank); Central banks and financial standards (Africa Development Bank); Agriculture and market access (AU). See n 3 above, para 5(g) i–v.

²² The subcommittees and their co-ordinators are as follows: Peace, Security, Democracy and Political Governance (South Africa); Economic and Corporate Governance/Banking and Financial Standards/Capital Flows (Nigeria); Market access and Agriculture (Egypt); Human Resource Development (Algeria); Infrastructure (Senegal).

²³ Para 49 NEPAD document.

²⁴ Para 71 NEPAD document.

work both individually and collectively to promote these principles, not only in their countries, but also in their sub-regions and the whole continent.²⁵

This pledge is given concrete expression under the sub-heading entitled 'democracy and political governance initiative'. The purpose of this initiative is to contribute to the strengthening of the political and administrative framework of participating countries in line with the principles of democracy, transparency, accountability, integrity, respect for human rights and promotion of the rule of law.²⁶ The NEPAD document reiterates that development is impossible in the absence of true democracy, respect for human rights, peace and good governance. The focus on human rights and conflict prevention is one of the key features setting NEPAD apart from previous development programmes developed in the continent.

NEPAD states²⁷ will undertake a series of commitments towards meeting basic standards of good governance and democratic behaviour while giving support to one another.²⁸ The NEPAD states will also be expected to show leadership in supporting and building institutions and initiatives to safeguard these commitments.²⁹ In addition, to ensure that states adhere to their commitments, these commitments are to be institutionalised through the NEPAD leadership.³⁰ The NEPAD Heads of State Forum will monitor and assess the progress made by African countries in meeting their commitments towards achieving good governance and social reforms.³¹ The Forum will also provide a platform for sharing experiences with a view to fostering good governance and democratic practices.³²

4.2 Evolving human rights structures under the NEPAD framework

NEPAD is working toward the setting up of structures and mechanisms to administer, among others, its human rights component (democracy and political governance initiative). Already, a subcommittee on peace

²⁵ As above.

²⁶ Para 80 NEPAD document.

²⁷ Although NEPAD is a project of the AU, participation in its mechanisms and projects such as the African Peer Review Mechanism is open to only those states that voluntarily accede to its instruments.

²⁸ Para 82 NEPAD document. To build capacity in meeting the commitments, the NEPAD leadership will undertake a process of capacity building initiatives. See para 83 of the NEPAD document.

²⁹ Para 84 NEPAD document. These institutions are to be created and strengthened at the national, sub-regional and continental levels.

³⁰ Para 81 NEPAD document.

³¹ Para 84 NEPAD document.

³² As above.

and security has been established.³³ In addition, there has been a proposal for the establishment of the post of a commissioner to be responsible for democracy, human rights and good governance.³⁴

But perhaps the mechanism under the NEPAD process that is likely to have the most far-reaching implications is the independent mechanism of peer review, the African Peer Review Mechanism (APRM). The proposal for the establishment of the APRM was first made during the first HSIC meeting held in Abuja on 23 October 2001.³⁵ The APRM is an instrument voluntarily acceded to by African members of the African Union for the purpose of self-monitoring.³⁶ The mandate of the APRM is to ensure that the policies and practices of participating states conform to the agreed political, economic and corporate governance values, codes and standards contained in the Declaration of Democracy, Political, Economic and Corporate Governance (Declaration on Governance).³⁷ The African leaders reaffirmed the commitment to the principles and core values contained in the Declaration on Governance during the first summit of the AU held in Durban in July 2002.³⁸

The APRM is intended to 'foster the adoption of policies, standards and practices that will lead to political stability, high economic growth, sustainable development and accelerated regional integration of the African continent'.³⁹ In the words of President Mbeki, one of the NEPAD architects, the provisions of the APRM are 'aimed at foreseeing problems and working to prevent their spread — rather than just censuring and punishing when things go wrong'.⁴⁰ The HSIC has approved the establishment of the APRM and has recommended that the proposed Secretariat of the APRM be located in the UN Economic Commission for Africa in Addis Ababa, Ethiopia.⁴¹ The establishment of the APRM has received the AU's backing. The recently held first session of the Assembly

³³ n 3 above, para 7. The members of the subcommittee are Algeria, Gabon, Mali and Mauritius with South Africa as its Chairperson.

³⁴ See para 12 of the Communiqué issued at the end of the Second Meeting of the HSIC in Abuja, Nigeria, 26 March 2002.

³⁵ n 3 above, para 6.

³⁶ Para 9 of Communiqué issued at the end of the third meeting of the HSIC in Rome, Italy, 11 June 2002.

³⁷ See para 2 'The African Peer Review Mechanism' 10 June 2002. Available on the internet at <http://www.nepad.org/Doc006.pdf> (accessed 9 July 2002). The Declaration on Governance is available on the internet at <http://www.nepad.org/Doc004.pdf> (accessed 9 July 2002).

³⁸ See AU 'Declaration on the implementation of the New Partnership for Africa's Development (NEPAD)' 1st ordinary session of the Assembly of Heads of State and Government of the AU 9–10 July 2002, Durban, South Africa, AU Doc ASS/AU/Decl 1 (I) para 11.

³⁹ n 36 above, para 9.

⁴⁰ See T Mbeki 'Africa's new realism' *New York Times* (24 June 2002).

⁴¹ n 36 above, para 9.

of the Heads of State and Government of the AU encouraged all AU members to adopt the Declaration on Governance and accede to the APRM.⁴²

4.3 Critique of human rights in NEPAD

The virtues of NEPAD have been outlined in various fora. It is said to be an African document, authored by Africans on their own initiative. It attempts to link up with other efforts to achieve Africa's development. Thus, for example, the NEPAD document adopts the goals set in the UN Millennium Declaration, including cutting poverty by half and achieving universal primary education by the year 2015, both of which have implications for human rights, particularly socio-economic rights.⁴³

On the other hand, criticism has been levelled against various aspects of NEPAD. In this article I will focus my critique on those aspects that relate to human rights. These could be divided into four: the process, the content, the strategy and the institutional framework.

First, the process leading towards the adoption of NEPAD has been criticised as being a top-down programme that was formulated with little consultation of civil society, the representative organs, such as parliaments, and the African peoples in general.⁴⁴ While the NEPAD document calls for the involvement of the people in development, the process on which the document itself was arrived at did not involve the people.⁴⁵ More pertinent from a human rights perspective, African human rights institutions such as the African Commission on Human and Peoples' Rights (African Commission) were not involved. This backtracks from the progressive stance of people-centred development which was initiated with the recognition of the right to development in the African Charter on Human and Peoples' Rights (African Charter) and further reinforced with the adoption of the African Charter for Popular Participation in Development and Transformation in 1990. The initial document should have served as the draft to be discussed in the cabinet meetings, parliaments, civil society workshops, academic discourses and among the general populace on the continent. The discussion would have embellished the document, assisted in spreading its message and

⁴² n 38 above.

⁴³ Para 68 NEPAD document.

⁴⁴ S Matthews & H Solomon 'Prospects for African development in light of the New Partnership for Africa's Development (NEPAD)' *African Institute Briefing Paper* No 3/2002.

⁴⁵ Although the NEPAD document claims to be African-owned development programme, perhaps that assertion should have qualified as African leaders-owned development programme. This is reflected not just in the document itself (see for instance para 53), but also in the process towards its creation, which was essentially centred on leaders.

ensured ownership by the main stakeholders in its success, the African peoples themselves.

Second, while the initiative might be African, its human rights content is largely Eurocentric in perspective, especially in its overly strong focus on civil and political rights. The 'African human rights fingerprint' is conspicuously missing in its content. The Eurocentricity of NEPAD is evident in the placement of human rights issues under democracy and political governance initiative. This serves to reinforce the European conception by laying emphasis on civil and political rights, but failing to mention socio-economic rights. It would seem that the protection of human rights within the framework of NEPAD is not for the sake of African peoples, but in exchange for investments and aid from the West.⁴⁶ Therefore, if there are any benefits in human rights terms to the African peoples, this is just incidental to the main aim of protecting human rights in order to attract investments and aid.

The language of good governance could explain why Western governments seem to be quite enthusiastic about NEPAD. It serves their interests well without necessarily serving the interests of the vulnerable groups on the continent. In other words, the NEPAD human rights conception is in line with the quest by Western governments for an optimal political environment for multinational corporations. The benefits to the African people of such protection, if any, would be by 'trickle down effect'. The threat posed to human rights by such a conception is well captured by Upendra Baxi, who argues:⁴⁷

I believe that the paradigm of the Universal Declaration of Human Rights is being steadily supplanted by a trade-related, market-friendly, human rights paradigm. This new paradigm reverses the notion that universal human rights are designed for the dignity and well being of human beings and insists, instead, upon the promotion and protection of the collective rights of global capital in ways that 'justify' corporate well being and dignity over that of human persons.

There is a clear and present danger that NEPAD might provide a mechanism for the superimposition of such a paradigm in the human rights discourse in the continent to the detriment of vulnerable groups in Africa, unless concerted efforts are made to prevent it. This can only be done if the NEPAD document explicitly draws on the African regional human rights documents, such as the African Charter as well as the African Charter for Popular Participation in Development and Transformation. Furthermore, its implementation also ought to be informed by the standards with the African imprint found in these instruments.

⁴⁶ This view is implicit in the editorial by the *New York Times*: 'NEPAD resembles Mr Bush's plan for directing increased American foreign aid to countries following enlightened policies.' See 'African Opportunity' *New York Times* (6 June 2002).

⁴⁷ U Baxi 'Voices of suffering and the future of human rights' (1998) 8 (2) *Transnational Law and Contemporary Problems* 125.

Third, the NEPAD document makes use of human rights language in a very cosmetic fashion. There is nothing in the NEPAD document about integrating human rights in the development programme. Yet, the efforts to develop a human rights approach to development are so relevant now.⁴⁸ The formulation of a new continent-wide development programme such as NEPAD provides a good opportunity to adopt the human rights approach. This opportunity is being wasted.

The merits of a human rights approach to development are best summarised by the Committee on Economic, Social and Cultural Rights which has stated:⁴⁹

[A]nti-poverty strategies are likely to be more effective, inclusive, equitable and meaningful to those living in poverty if they are based on international human rights.

The UN has been doing a lot of work in integrating human rights in development activities and could assist African countries in doing the same within the NEPAD framework. But without interest and push from African states themselves, which could strategically be expressed in the NEPAD document, this opportunity will be missed.⁵⁰

Fourth, NEPAD identifies the need to strengthen the domestic political and administrative framework.⁵¹ In my view, the NEPAD document ought to have also identified the need to strengthen collective, multi-lateral, regional African institutions of human rights, notably the African Commission. It is noted that proposals have been made for the creation of a new human rights structure under NEPAD to reinforce the human rights provisions in NEPAD. However, as will be demonstrated below, the founders of NEPAD do not appear to have put sufficient thought in to the functioning of the emerging human rights framework under NEPAD and how it will relate to the existing African human rights system, and more importantly how the new structures will be funded.

Ultimately, the relevance of NEPAD to the human rights discourse in Africa hinges mainly on the fact that it has human rights provisions in its

⁴⁸ For more information on the human rights approach to development, see M Nowak *et al* 'Human rights and poverty reduction strategies' (28 February 2002) available on the internet at http://www.undg.org/documents/369-Human_Rights_and_Poverty_Reduction_Strategies_Discussion_paper_prepared_for_the_UN_Office_of_the_High_Commissioner_for_Human_Rights.doc (accessed 23 March 2002).

⁴⁹ CESCR 'Statement on poverty and the International Covenant on Economic, Social and Cultural Rights' (10 May 2001) UN Doc E/C 12/2001/10 para 13.

⁵⁰ It should be noted that NEPAD had generated a strong interest and support from the UN system. However, in their discussion on how to provide system wide support for Africa and NEPAD, the Heads of UN agencies agreed that 'the UN system, in following up on NEPAD and in relating to Africa's leadership, should be in "responsive" rather than "activist" mode'. See Summary of Conclusions of the Administrative Committee on Co-ordination at its Second Regular Session of 2001 UN Doc ACC/2001/5 (9 November 2001) para 9.

⁵¹ Para 80 NEPAD document.

founding document. While an expression of commitment to human rights is indeed laudable, its utility can only be realised if such commitment is reinforced by proper strategies and concrete action. These would include, for example, adopting a human rights approach to development and creating effective institutions for giving effect to its vision of promoting and protecting human rights. The issue of institutional framework raises the point on how NEPAD fits into the larger institutional framework of the AU and the African human rights system. This is the subject of the next part of this paper.

5 NEPAD in the context of the AU and the African human rights system

The development of NEPAD should be seen in the light of another historic development in Africa's legal and political scene over recent years: the metamorphosis of the OAU into the AU.⁵² NEPAD operates under the rubric of the OAU/AU. However, there is some ambiguity as to whether NEPAD is subsidiary to the AU or whether the two are in co-equal relationship. This ambiguity manifested itself best in the Declaration emanating from the second meeting of the HSIC held in March 2002 in Abuja.

In the meeting, HSIC declared that NEPAD is a mandated initiative of the AU.⁵³ At the same time, it called for greater co-operation and co-ordination between the AU and NEPAD Secretariats. Ohiorhenuan articulates the view that the statement that NEPAD is a mandated initiative suggests its subordinate relationship with the AU.⁵⁴ Conversely, the urge for co-ordination between the two suggests somewhat more egalitarian relations.⁵⁵ This writer holds the position that NEPAD is part and parcel of the AU structure and is subsidiary to the AU. The following arguments are advanced in support of this view:

First, the history of the NEPAD process reveals clear links with the AU predecessor, the OAU. The ideas behind NEPAD were conceived, developed and consolidated within the rubric of the OAU. NEPAD was approved at the highest level of the OAU, the predecessor of the AU, as the development blueprint for the AU.⁵⁶

⁵² For an examination of the transformation of the OAU into the AU, see S Gutto 'The reform and renewal of the African regional human rights and peoples' rights system' (2001) 2 *African Human Rights Law Journal* 175, 181–184; K Magliveras & G Naldi 'The African Union — A new dawn for Africa?' (2002) 51 *International and Comparative Law Quarterly* 415; E Baimu 'The African Union: Hope for better protection of human rights in Africa?' (2001) 2 *African Human Rights Law Journal* 299 305–310.

⁵³ n 34 above, para 20.

⁵⁴ Ohiorhenuan (n 2 above) 15.

⁵⁵ As above.

⁵⁶ n 9 above, para 10.

Second, NEPAD's institutional framework derives its legitimacy from the OAU/AU since the central institution in the NEPAD framework, the HSIC, was set up by the OAU Assembly.⁵⁷ The OAU Assembly decision setting up the HSIC confers on the HSIC the responsibility to 'ensure a continuous follow-up on the initiative, particularly the establishment of management institutions for the NAI (NEPAD)'.⁵⁸

Third, in terms of lines of accountability, NEPAD's HSIC has to report to the OAU/AU Summit, which also provides guidance as to how the NEPAD process should progress.⁵⁹ There are also mechanisms in place for participation of the OAU/AU institutions in the NEPAD processes. The OAU/AU Chairperson and Secretary-General are *ex officio* members of the HSIC. Apart from that, the OAU/AU Secretariat participates in NEPAD's Steering Committee meetings.

The above analysis establishes the location of NEPAD within the AU, and the delegation of power to NEPAD's central institution, the HSIC, to set up institutions for managing NEPAD. This fuels the concern that if this power is not exercised judiciously, it might lead to proliferation and duplication of, among others, African structures and mechanisms for the promotion and protection of human rights.

Africa has a regional human rights system, operating under the auspices of the AU.⁶⁰ In addition, the Constitutive Act of the AU has human rights provisions, which could provide a basis for the creation of mechanisms and structures for the promotion and protection of human

⁵⁷ As above, para 12.

⁵⁸ n 9 above, para 12. This mandate was renewed for one year during the recent AU summit. The AU Assembly mandated NEPAD's HSIC and Steering Committee to continue the vital task of further elaborating the NEPAD framework and ensuring the implementation of NEPAD Initial Action Plan until reviewed at the 2nd Assembly of Heads of State and Government of the African Union in Maputo, Mozambique, in 2003; see AU 'Declaration on the implementation of the New Partnership for Africa's Development (NEPAD)' 1st ordinary session of the Assembly of Heads of State and Government of the AU 9–10 July 2002, Durban, South Africa, AU Doc ASS/AU/Decl 1 (I) para 13.

⁵⁹ Thus, the Chairperson of the HSIC submitted a report describing the developments in the NEPAD process since July 2001 during the recent OAU Assembly of the Heads of State and Government. The Assembly endorsed NEPAD's Progress Report as well as the Initial Action Plan; See n 38 above, paras 3 & 8.

⁶⁰ The AU Assembly of the Heads of State and Government decided, in their recent summit, that the African Commission on Human and Peoples' Rights and the African Committee of Experts on Rights and Welfare of the Child, the two institutions under the African human rights system, shall henceforth operate within the framework of the African Union; see AU 'Decision on the interim period' AU Doc ASS/AU/Dec1 (I). For more information on the African human rights system, see C Heyns & F Viljoen 'An overview of international protection of human rights in Africa' (1999) 15 *South African Journal on Human Rights* 425; see also R Murray *The African Commission on Human and Peoples' Rights and international law* (2000).

rights.⁶¹ Since the HSIC has powers to create institutions for managing NEPAD, whose components include human rights aspects, it is conceivable that human rights mechanisms and institutions could be set up under the auspices of NEPAD. The above state of affairs poses a danger of proliferation and duplication of human rights mechanisms and structures in Africa. Indeed, there have been three types of developments towards proliferation and duplication of human rights structures and mechanisms.

In the first instance, structures have been developed under the auspices of NEPAD, which mirror existing structures within the AU. The Abuja meeting in October 2001 decided to set up a Subcommittee on Peace and Security to focus on conflict management, prevention and resolution in Africa.⁶² Given that the AU already has the Central Organ for Conflict Prevention, Management and Resolution⁶³ as one of its organs, the probability of the mandates of the two organs overlapping is very high.⁶⁴

In the second instance, some proposals have been made under the auspices of NEPAD for the establishment of the structures within the AU whose mandate could potentially rival that of the existing OAU/AU structures. For instance, a proposal has been made to establish, within

⁶¹ Some of the human rights provisions in the Constitutive Act of the AU include arts 3(f), 3(g), 3(h), 4(h), 4(l), 4(m), 4(n), 4(o) & 4(p). The Constitutive Act is reproduced in (2001) 2 *African Human Rights Law Journal* 315 and (2000) 12 *African Journal of International and Comparative Law* 629.

⁶² n 3 above, para 7. This is despite explicit recognition in the NEPAD document that at the Lusaka Summit the AU had started taking measures in reviving the organs responsible for conflict prevention and resolution. See para 78 of the NEPAD document.

⁶³ The Central Organ of the Mechanism for Conflict Prevention, Management and Resolution (CO) has been incorporated as one of the organs of the AU in accordance with art 5(2) of the Constitutive Act of the AU; see paras 8(a) & (b) of 'Decision on the implementation of Sirte Summit Decision on the African Union' OAU Doc AHG/Dec 1 (XXXVII). The recently held Assembly of Heads of State and Government of the AU adopted a Protocol on the Establishment of the Peace and Security Council of the AU. When the Protocol enters into force, after the requisite number of ratifications has been attained, the Peace and Security Council shall replace the CO. However, pending the entry into force of the Protocol, the CO and its founding document, the Cairo Declaration, shall remain valid. See AU 'Decision on the establishment of the Peace and Security Council of the African Union' AU Doc Ass/AU/Dec 3 (I), para 4.

⁶⁴ An example of the overlapping of the mandate is seen in the mandate given to the subcommittee to 'enhance capacity to conduct thorough, inclusive, strategic assessments of situations in the regions affected by conflicts'; n 34 above, para 7(a). This mandate is bound to overlap with that of the Mechanism for Conflict Prevention, Management and Resolution whose primary objective is to anticipate and prevent conflicts and, in instances where conflicts have occurred, to understand peace-making and peace-building functions in order to facilitate the resolution of these conflicts; see para 15 of the Declaration of the Assembly of the Heads of State and Government on the Establishment within the OAU of a Mechanism for Conflict Prevention, Management and Resolution, 28–30 June 1993, Cairo, Egypt (AHG/Decl.3 (XXIX)).

the AU, the portfolio of a commissioner to be responsible for democracy, human rights and good governance.⁶⁵ It is likely that the mandate of such an office will overlap with that of the African Commission, unless conscious efforts are made to prevent this.

Thirdly, some mechanisms have been created within the AU without sufficient thought as to how these new mechanisms could interface with the existing institutions and mechanisms under the African human rights system. Thus, while the APRM has no equivalent in the AU framework, its development in isolation from human rights mechanisms developed under the OAU/AU should be a source of concern.⁶⁶ Sufficient care ought to be taken, when fleshing out the mandate and functions of this mechanism, to avoid overlaps with the mandate and functions of the African Commission. In the same vein, attempts should be made to create linkages and synergies between the APRM and the African Commission.⁶⁷

The three examples given above indicate at worst a trend towards duplication and at best a trend towards unnecessary and wasteful proliferation of human rights institutions on the continent. There is at least one example within the African system of human rights of duplica-

⁶⁵ n 34 above, para 12. A similar proposal for the establishment of the post of the Office of the High Commissioner for Human Rights has been made by two African scholars; see A Abbas & M Baderin 'Towards effective collective security and human rights protection in Africa: An assessment of the Constitutive Act of the new African Union' (2002) *Netherlands International Law Review* 1 36.

⁶⁶ The development of the APRM, and indeed of both the Constitutive Act of the AU and the NEPAD document, has been done without the participation of the African Commission. See para 20 of the adopted full report on the proceedings of a conference on 'Human rights, the African Union and the New Partnership for Africa's Development' *African Regional Dialogue* 1. Available on the internet at <http://www.unhchr.ch/html/menu6/Africadialog1.htm> (accessed 3 May 2002). As an afterthought, during their recent summit in Durban, South Africa, the OAU Assembly of Heads of State and Government called upon the African Commission to prepare a report proposing ways and means of strengthening the African system for the promotion and protection of human and peoples' rights within the African Union and submit it at next year's AU session. See OAU 'Decision on the Fifteenth Annual Activity Report of the African Commission on Human and People's Rights' 38th ordinary session of the Assembly of Heads of State and Government of the OAU, 8 July 2002, Durban, South Africa, AHG/Dec 171 (XXXVIII) para 2.

⁶⁷ The trends so far do not offer much hope of this linkage happening. For example, the only linkage between APRM and the African Commission is the formal and public tabling of the report of the review team to key regional structures including the African Commission. This is to be done at the final stage of the reviewing process, six months after the consideration of the report by the Heads of State and Government of the NEPAD participating states. See para 25 'The African Peer Review Mechanism' 10 June 2002. Available on the internet at <http://www.nepad.org/Doc006.pdf> (accessed 9 July 2002). In my view, this is a cosmetic linkage, since the Commission could in any case access it easily on its own, as the report would then be in public domain. A truly effective linkage would have been achieved by creating an environment that would enable the African Commission to feed in the initial stages of the review process, particularly in relation to the component of political governance.

tion and proliferation of human rights bodies. The African Charter on the Rights and Welfare of the Child (African Children's Charter), which was adopted nine years after the adoption of the African Charter, provided for the establishment of a supervisory body, the African Committee of Experts on the Rights of Welfare of the Child (African Children's Committee).⁶⁸ As the mandate and functions of this new body bear a striking resemblance to that of the African Commission, there was an articulated view against its establishment and instead a proposal was made to amend the African Children's Charter to allow the African Commission to fulfil the functions designated to the African Children's Committee.⁶⁹ This proposal has not been heeded, and the African Children's Committee has already been established, adding yet another body whose functions could as well be handled effectively by existing institutions.⁷⁰

It is also crucially important not to forget that the AU envisages the establishment of more institutions than those that operated under the OAU.⁷¹ Thus, even without the addition of new institutions under the auspices of NEPAD, there will be more African institutions scrambling for the AU's meagre resources in the near future than those operational at present.⁷² Magliveras and Naldi put their finger on the issue when they warn that '[t]he number of organs in the Union appear to be very large and in the long run it could not only result in the cumbersome operation

⁶⁸ OAU Doc CAB/LEG/24 9/49 adopted on 11 July 1990 and entered into force on 29 November 1999.

⁶⁹ One of the proponents of this view is Viljoen, whose arguments against the establishment of the African Children's Committee are the similarity of functions and mandate between the African Commission and the Committee, the need to avoid the diversion of resources from existing regional human rights institutions, the fact that the African Commission has been functioning reasonably well after initial inertia, and the need to avoid proliferation of state reporting. See F Viljoen 'The African Charter on the Rights and Welfare of the Child' in C J Davel (ed) *Introduction to child law in South Africa* (2000) 214-227.

⁷⁰ See generally 'Decision on the report of the African Committee on the Rights and Welfare of the Child' 38th ordinary session of the Assembly of Heads of State and Government of the OAU, 8 July 2002, Durban, South Africa, OAU Doc AHG/Dec 172 (XXXVIII).

⁷¹ The novel institutions in this regard include the Pan-African Parliament, the Court of Justice, the Economic, Social and Cultural Council, Permanent Representative Committee and Financial Institutions. However, one should note that the first three institutions in the list above were to be established under the African Economic Community, a regional body that was operating side by side with the OAU. To these institutions one could add the proposed one African army that will secure peace and stability in the AU. See generally AU 'Resolutions on the establishment of the African Army' 1st ordinary session of the Assembly of Heads of State and Government of the AU, 8 July 2002, Durban, South Africa, AU Doc. ASS/AU/Dec 4 (I)

⁷² According to Solomon, the operational costs for the OAU were US \$9 million per annum, while the operational costs for the AU are conservatively estimated at US \$30 million per annum. See H Solomon 'Beyond the pageantry: A critical commentary of the African Union' *Africa Institute Briefing Paper* No 12 (2002).

of the Union but also present a financial burden'.⁷³ There is clearly a need to consider the financial implications of establishing new institutions. This is made all the more necessary by unbecoming behaviour of many states in Africa not to pay their dues to the African regional body on time.⁷⁴

The creation of more institutions and mechanisms at the regional level is also likely to present problems to African states regarding how to allocate resources and personnel to deal with obligations arising from their involvement in these institutions and mechanisms. For example, the APRM is to develop a review procedure, which is similar to the state reporting under the African Charter, thus adding yet another reporting burden on the bureaucracies in the African states.

The problem of proliferation of international institutions is by no means unique to Africa. The international community is currently grappling with the phenomenal proliferation of international tribunals in recent years.⁷⁵ However, in under-resourced Africa it should be a source of major concern, since underfunding and understaffing plague the existing human rights institution on the continent. Both the African Commission and its parent institution, the OAU/AU, are currently under a severe shortage of human and financial resources, which restricts their effective functioning. Indeed, Africa has failed miserably to provide adequate resources and to focus its attention on one human rights institution currently in operation, the Africa Commission. How it will cope with several others that will be established in the future is beyond comprehension.

6 Rationalising human rights institutions under the AU: Proposal for the creation of a dual African human rights system

Human rights structures and mechanisms established under NEPAD and the AU will have a similar regional focus and will operate under the auspices of a common international organisation, the AU. They are also likely to operate on the basis of the treaties, standards and regulations that are at least compatible with, if not similar to, one another. This

⁷³ Magliveras & Naldi (n 52 above) 419.

⁷⁴ The failure of member states to pay their dues explains lack of financial resources in the OAU. For example, as of June 2002, the OAU owed US \$54.53 million by 45 of its 54 members. See B Ankomah 'African Union in danger of being stillborn' *New African* issue 408 (June 2002) 18.

⁷⁵ The issue of proliferation of international tribunals was exhaustively addressed in a symposium with the title 'The proliferation of international tribunals: Piecing together the puzzle'. Some of the papers and reports of the symposium are found in (1999) 31 *New York University Journal of International Law and Politics* 679 *et seq.*

presents ample opportunities for synergies between these two sets of structures and mechanisms.⁷⁶ However, this potential will remain untapped unless there is a determined drive to develop strategies for co-operation and co-ordination among these structures and mechanisms.

One strategy that could facilitate the tapping of this synergy potential is the creation of a dual process within the AU: a legal process and a political process akin to the treaty-based and charter-based human rights procedures in the UN system. The UN treaty-based procedures refer to the specific committees of independent experts formally established through the principal UN human rights treaties.⁷⁷ These 'treaty bodies' monitor the implementation of the individual conventions by the state parties. The UN charter-based procedures, on the other hand, are independent and *ad hoc* systems of fact-finding outside the treaty framework, which derive their legitimacy from the UN Charter. In other words, these are procedures established by mandates emanating not from treaties but from resolutions of relevant UN legislative organs, such as the Commission for Human Rights or the General Assembly.

It is proposed that the structure of the UN system of human rights could be replicated in an African regional setting. The current African human rights system, which is founded on the African Charter and other African human rights instruments, should be the African Charter-based procedures, the equivalent of the UN treaty-based procedures. The proposed new mechanisms under NEPAD, particularly the APRM, should be part of the Constitutive Act-based mechanism (the equivalent of the UN charter-based mechanism), since it will be founded on the provisions of the Constitutive Act of the AU. The two procedures should complement one another rather than compete with one another. Duplicity will be avoided on account of the complementary nature of the two procedures. The African Charter-based mechanism will be primarily a legal procedure, while the Constitutive Act-based mechanism will be primarily a political process.

There should be a close co-operation and co-ordination between the two proposed procedures. There are legal and pragmatic grounds for

⁷⁶ Some of the ideas presented in this part, especially those related to synergy, are borrowed from Rosendal's excellent work on overlapping international regimes. In her work, Rosendal relies on the theories from the fields of institutionalism and international relations to develop an analytical framework for overlapping international institutions and applies this framework in relation to the two conventions dealing with the issue of biodiversity. The analytical framework she develops is clearly relevant to the subject matter of this article. See GK Rosendal 'Impacts of overlapping international regimes: The case of biodiversity' (2001) 7 *Global Governance* 95, especially 96–102.

⁷⁷ For more information on the UN treaty-based and charter-based procedures, see generally A Pennegard 'Overview over human rights — the regime of the UN' in G Alfredsson *et al* (eds) *International human rights monitoring mechanisms: Essays in honour of Jakob Th Moller* (2001) 19.

such co-operation. First, as stated above, both sets of procedures will operate under the auspices of one institution, the AU. Second, the Constitutive Act and the NEPAD provisions, which will constitute the Constitutive Act-based procedures, underpin the socio-economic rights, right to peace and right to development provisions of the African Charter, an instrument on which the African Charter-based procedure is founded.⁷⁸ Finally, on a pragmatic level, the alternative to co-ordination in co-operation is not that appealing: considerable double work, splitting of resources, diffusion of focus and erosion of capacity.

Under the proposed arrangement, it is to be expected that there will be a clear demarcation between the two procedures. However, it should also be recognised that there will be instances when boundaries between the two procedures will be blurred. Furthermore, in most cases, seeking synergies and symbiotic linkages between them will enhance the effectiveness of the two procedures. In this regard, ways and means will have to be explored as to how the two processes jointly pursue the common goal of a peaceful, stable and developed Africa. This is particularly the case in relation to issues such as conflict prevention efforts, which will invariably call for both political and legal approaches if optimum results are to be attained.

Ultimately, proper and sufficient thought prior to the creation of new institutions would contribute immensely to avoiding the problem of proliferation and duplication of human rights institutions. I propose the following criteria that ought to be considered before setting up a new human rights structure or mechanism under either NEPAD or the AU: First, what is the added value of the new structure? Second, what kind of legal, financial and administrative implications will the new structure have on states? Third, should the new structure be placed under the African Charter-based procedure or the Constitutive Act-based procedure? Finally, how will the new structure interface with the existing structures and mechanisms?

7 Conclusion

There is no denying that NEPAD holds a promise of unravelling the complex web of conflicts, diseases and poverty entangling the African continent at the moment. Besides espousing a philosophy of African ownership in the conception, management and implementation of development plans, NEPAD looks set to avoid pitfalls that doomed

⁷⁸ See para 11 of the Executive summary of the General Report of a conference on 'Human rights, the African Union and the New Partnership for Africa's Development' African Regional Dialogue 1. Available on the internet at <http://www.unhchr.ch/html/menu6/Africadialog1.htm> (accessed 3 May 2002).

previous regional development plans by synchronising itself with contemporaneous development endeavours on the continent, such as the UN Millennium Declaration.⁷⁹ A coherent strategy emanating from this wholesome and integrated approach offers some hope of progress.

However, in addition to this approach, there should be concerted efforts to link up NEPAD with African regional institutions of human rights. The AU is set to establish more institutions than those functioning at present in a period when international organisations all over the world, particularly in Africa, are struggling to meet their financial needs. This paper has highlighted the growing trends towards duplication and proliferation of human rights mechanisms under NEPAD and the AU, and has proposed a cautious approach towards creating new human rights institutions. The creation of a dual complementary set of mechanisms similar to the charter-based and treaty-based mechanisms under the UN system of human rights has been proposed as a way of curtailing the duplication and proliferation of human rights institutions in Africa. There should be a shift of focus from the creation of new institutions to a consideration of ways in which the existing institutions, better funded and resourced, can be made to work towards contributing to overall AU and NEPAD objectives. New institutions should only be created in instances where they will have clear added value.

During their annual meeting held from 8 to 10 July 2002, the OAU/AU Heads of State and Government called upon the African Commission to prepare a report proposing ways and means of strengthening the African system for the promotion and protection of human and peoples' rights within the AU and to submit it in next year's AU session.⁸⁰ In preparing its report, the African Commission might wish to reflect on how the new and old structures and mechanisms of the African regional human rights *system* could be *systematised* within the AU in a more consolidated, rational and harmonised manner. Hopefully, ideas expressed in this paper might assist in this vital reflection.

⁷⁹ For example, NEPAD adopts, in paragraph 68, the International Development Goals agreed under the UN Millennium Declaration. The lists of Millennium Development Goals are available on the internet at <http://www.developmentgoals.org> (accessed 1 July 2002).

⁸⁰ Para 2 Decision on the Fifth Annual Activity Report of the African Commission on Human and People's Rights — AHG/Dec 171 (XXXVIII) 38th ordinary session of the Assembly of Heads of State and Government of the OAU, 8 July 2002, Durban, South Africa.

The first meeting of the African Committee of Experts on the Rights and Welfare of the Child

*Amanda Lloyd**

Visiting Lecturer in Law and PhD Candidate, University of the West of England, Bristol

1 Introduction

Despite being the youngest of all the regional mechanisms, the African regional human rights system has become the most forward-thinking in the area of child rights and welfare. Following the adoption of the African Charter on the Rights and Welfare of the Child (African Children's Charter or Children's Charter) at the 26th ordinary session of the Assembly of Heads of State and Government (OAU Assembly) on 11 July 1990 in Addis Ababa, Ethiopia, and its subsequent entry into force on 29 November 1999,¹ the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) met for the first time between 29 April 2002 and 2 May 2002 at the OAU headquarters in Addis Ababa, Ethiopia, bringing the African Children's Charter to life. Currently 27 states have ratified this treaty.

Article 37(3) of the Children's Charter provides that the first meeting be convened within six months of the election of the African Children's Committee and take place at the OAU/AU headquarters in Addis Ababa, Ethiopia. Article 36(1) requires state parties to nominate candidates at least six months before the elections. During the first year since the Children's Charter entered into force only five names were proposed by

* LLB (Hons) (UWE, Bristol), LLM (UWE, Bristol); Amanda2.Lloyd@uwe.ac.uk. I am grateful to the University of the West of England who provided funding for me to attend the African Children's Committee's first meeting in Addis Ababa, Ethiopia.

¹ After receiving the requisite 15 state signatures, as required by art 47(3) of the Children's Charter.

the relevant ministries and put forward to take on the role of the African Children's Committee. This has added to the complications of the African Children's Committee's first meeting. The 37th OAU Assembly on 10 July 2001 in Lusaka, Zambia, nominated 12 candidates and eleven were thereafter elected by secret ballot. The African Children's Committee comprises seven francophone and four anglophone members, of which five are male and six are female.² Thus, according to article 37(3) of the Children's Charter, the first meeting should have taken place in January 2002, six months before the elections. Therefore, the first meeting was almost four months late.

The tardiness of the meeting was due to the number of other meetings taking place within the OAU/AU and problems relating to scheduling the meeting.³ This is evidenced through the numerous occasions on which the proposed date was changed. In addition, the requirements for the translation and preparation of documents, the work associated with the transition of the OAU to the African Union, the summit in Lusaka and the preparation of the Statutes of the Commission were further explanations for the delay. The actual scheduling of the first meeting was also unfortunate, as it overlapped with the African Commission on Human and Peoples' Rights' 31st session taking place from 2 May 2002 in South Africa, preventing full participation of observers and other representatives and causing no senior OAU personnel to formally open the first meeting.

It may be assumed that the workload of the AU, the African Children's Committee members and the other AU organs will not significantly change in the future. These could potentially prove fatal for the African Children's Committee and the work of this newly formed body. The planned grand opening ceremony of the African Children's Committee was cancelled, as those required to participate were involved with other, and one can only assume more 'important', meetings. Due to the impromptu nature of the first meeting, there was no media presence. If the perceived lack of interest continues, this may endanger the credibility of the African Children's Committee and the work of its members.

Additional problems associated with the African Children's Committee's first meeting included a severe lack of communication between the

² Cameroon: Rodolphe Soh, four year term of office; Guinea: Dirus Dialé Dore, two year term of office; Kenya: Justice Joyce Aluoch, four year term of office; Lesotho: Karabou K Mohau, two year term of office; Rwanda: Straton Nsanzabaganwa, four year term of office; Senegal: Dior Fall Sow, five year term of office; South Africa: Prof Lulu Juliet Tshiwula, four year term of office; Chad: Nanitom Motoyam, four year term of office; Togo: Suzanne Aho, two year term of office; Uganda: Dr Rebecca M Nyonyintono, two year term of office; and Mauritius: Louis Pierre Robert Ahnee, four year term of office.

³ These reasons were elaborated at the first meeting during the opening speech to the African Children's Committee by the Director of Community Affairs on 29 April 2002.

OAU Secretariat and the African Children's Committee members. The date of the meeting was poorly communicated and was changed at a very late stage. Documents were either not sent out or were sent out late, or in the wrong language. Incorrect air tickets were sent. Agendas and other documentation were only sent a couple of days before the commencement of the meeting. Fortunately, the various African embassies stepped in to improve the channel of communication between members of the African Children's Committee and the OAU. In order to prevent these logistical problems in the future, it is imperative that the Secretariat to the African Children's Committee be established as quickly as possible.

2 Contents and format of the first meeting

2.1 General observations

Naturally, the first meeting was inaugural and commenced with the African Children's Committee members taking their oaths of office. Officers were elected, as required by article 38(2) of the Children's Charter. Ten of the 11 members were present for the first meeting,⁴ as well as representatives of the United Nations agencies,⁵ NGOs⁶ and other organisations.⁷

Ambassador Habib Doutoum, the OAU Assistant Secretary-General in charge of Policy and Programme Co-ordination, opened the meeting by welcoming the African Children's Committee members and conveying the greetings of the OAU to them. He stressed the special place of the child within the African family and reiterated the sentiments contained in the Preamble of the Children's Charter. He also assured the African Children's Committee of the full support and collaboration of the OAU Secretariat in discharging its duties.

2.2 Collaboration

The Head of Population, Health, Labour and Social Affairs of the OAU expressed the Secretariat's appreciation to the collaborating partners, such as the International Labour Organisation (ILO), who assisted in one way or another in the implementation of the various activities on children and in particular those who assisted in the establishment of the African Children's Committee and the convening of the first meeting. She

⁴ Louis Pierre Robert Ahnee, the member from Mauritius, was absent. According to Rule 38 of the Rules of Procedure, at least seven members of the African Children's Committee must be present in order for there to be a quorum.

⁵ UNICEF, UNHCR, UNAIDS, UNFPA, WHO and ILO.

⁶ Save the Children (Sweden), Amnesty International and the ICRC.

⁷ Eg University of the West of England.

briefed the African Children's Committee members on the activities undertaken by the OAU Secretariat regarding children's matters.

2.3 Report by the Special Committee on Children in Situations of Armed Conflict

The Chairperson of the Special Committee on Children in Situations of Armed Conflict, Hajat Mukwaya, was unable to attend the meeting, so the Rapporteur of the African Children's Committee briefed the Committee on the work of the Special Committee. The Special Committee was established to follow up the recommendations emanating from the Conference on Children in Situations of Armed Conflict, held in June 1997 in Addis Ababa, on the understanding that once the African Children's Committee was elected and inaugurated, the Special Committee would cease to exist. The Special Committee was constituted in 1997, comprised of five OAU member states,⁸ and worked in co-operation with Save the Children (Sweden), Save the Children (UK), the African Network for the Protection Against Child Abuse and Neglect (ANPACAN) Regional Office and ANPACAN's Ugandan Chapter. The Committee achieved good results, such as successfully lobbying OAU member states to ratify the Children's Charter,⁹ producing and distributing copies of the Children's Charter in English and French, producing a databank, handbook and child-friendly copies of the Children's Charter, to enable children to become advocates for their own cause.

However, the Special Committee was unable to complete all of its work, and handed over the pending issues to the African Children's Committee. The African Children's Committee needs to continue to lobby OAU member states to ensure that ministries handling children's issues are visible and are adequately funded and to ensure that the Children's Charter is ratified by the remaining 26 OAU member states. The African Children's Committee members should also ensure that reservations to provisions of the Children's Charter are not entertained, especially those impacting on its fundamental provisions.¹⁰ The African Children's Committee also has the responsibility of ensuring that the theme of the Day of the African Child¹¹ is communicated to member states in good time. Furthermore, it was recommended that member states implement the provisions of the various instruments on children at the national level and harmonise their legislation accordingly.

⁸ Burkina Faso, South Africa, Togo, Uganda and Zimbabwe.

⁹ At the time of the 1997 Conference, only seven OAU member states had ratified the Children's Charter.

¹⁰ See the reservations made by Egypt.

¹¹ Held annually on 16 June, Resolution CM/RES 1 290.

2.4 Consideration of the Draft Rules of Procedure

The OAU Acting Legal Counsel presented the Draft Rules of Procedure and stated that the OAU Secretariat had taken advantage of the existing Rules of Procedure of the African Commission as well as those of the United Nations Committee on the Rights of the Child. The African Children's Committee reviewed and revised the Draft Rules and they were adopted as amended on 2 May 2002. The Rules of Procedure will be reviewed again at the second session of the African Children's Committee.

2.5 Consideration of the Draft Guidelines for the initial reports of state parties

The OAU Acting Legal Counsel presented the Draft Guidelines and explicitly referred to article 43 of the Children's Charter, calling on member states to implement the provisions of the Children's Charter. The Draft Guidelines were considered chapter by chapter and subsequently adopted as amended on 2 May 2002, with a view to reconsideration at the second session.

2.6 Elaboration of the African Children's Committee's programme of work

The OAU Acting Legal Counsel proposed that the African Children's Committee consider activities to be carried out until its next meeting, as well as the frequency and periodicity of meetings and designate focal points for each of the OAU five regions. The African Children's Committee members collectively identified the following issues as requiring priority attention. The list is neither exhaustive nor hierarchical, but includes the following:

- children in armed conflicts
- child labour
- child trafficking
- sexual abuse and exploitation of children
- orphans affected and infected by HIV/AIDS
- children's right to education
- the formulation of a National Plan for Children
- resource mobilisation.

2.7 Programme of work until the year-end

The Children's Committee's first year ends in July 2002. It was decided that immediate action should be taken to appoint a temporary Secretary for the Committee.

It was decided that the OAU Secretariat should write to all member states informing them that the African Children's Committee has met

and informing them of the outcome of the meeting. Member states which have not yet done so, should be urged to ratify the Children's Charter.

The Day of the African Child will be the primary focus of the African Children's Committee. The theme for the day is 'Popularisation of the African Charter on the Rights and Welfare of the Child'. Members should ensure that this day is celebrated at the national level in collaboration with governments and other partners.

Each member agreed to inform the relevant ministries about the meeting and to hold press conferences to popularise the existence and contents of the Children's Charter. They further agreed to participate at the local and national levels in all activities affecting children, acting as the eyes and ears of the Committee.

2.8 Programme of work for the African Children's Committee's second year

A programme of work to be achieved by July 2003 was established. The Rules of Procedure and the Guidelines are tabled for a second reading. The exercise of mobilising extra-budgetary resources will be carried out to enable the African Children's Committee to implement its activities. The African Children's Committee decided to establish links with the United Nations Committee on the Rights of the Child and the African Commission on Human and Peoples' Rights.

3 Budgetary considerations

The AU will allocate budgetary provisions for the Secretariat and the meetings of the African Children's Committee. The headquarters of the African Children's Committee is to be based at the AU. Consequently this is where the meetings will ordinarily be held. If a member state would like to host the meeting at any time, that member state must bear the excess cost and financial implications.

In addition it was proposed that the African Children's Committee should have its own website in order to facilitate its work. Save the Children (Sweden) pledged to finance the design and initial set-up costs of the website, but the OAU will cover the maintenance and upkeep of the website.

4 Collaboration with other partners

The African Children's Committee agreed to establish co-operation with United Nations Agencies, NGOs, community-based organisations and other relevant organisations. The Chairperson of the African Children's

Committee is to write to the executive directors of all the agencies and heads of other institutions and organisations with whom the African Children's Committee will collaborate. At the second session the African Children's Committee will discuss the need to collaborate with the African Commission on Human and Peoples' Rights.

Furthermore, the AU regional offices will more closely collaborate with the African Children's Committee to prevent problems affecting the second session and to enhance communication.

5 The date and venue of the second meeting

No firm date was set for the second session, yet it was agreed that the session would take place between September and October 2002, in accordance with Rule 2(1) of the Rules of Procedure. The second session should convene at the OAU/AU headquarters in Addis Ababa. However, there was an intervention by the member from Kenya who is keen for her government to host the next session. No formal decision was taken during the meeting, but the session is expected to take place in Addis Ababa.

A critical reflection on the 2002 presidential election in Zimbabwe

*Gabriel Shumba**

LLM candidate, University Pretoria

1 General introduction

1.1 Introduction

Zimbabwe held a crucial presidential election from 9 to 11 March 2002. This election was momentous because it was preceded by cataclysmic events in the country's post-colonial history. Because the election attracted such singular international attention, the question of sovereignty, never raised before in the context of the way in which elections are conducted, became a topical issue in Zimbabwe and other countries. Furthermore, fears regarding human rights abuses that had characterised the 2000 parliamentary elections paled into insignificance by comparison.¹

This article is a critical examination of the presidential election in the light of international human rights standards guiding electoral practices. It also measures the election against democratic norms prevailing in the global environment. It is envisaged that this contribution will help scholars and political scientists studying electoral institutions to contextualise the event and appraise it against the democratic ethic that Africa is aspiring towards. Afterwards, the model of the election may either be accepted or rejected as a contribution towards the improvement of domestic or regional systems.² The limitation of this paper is the fact that during the election, the writer was merely an unaccredited observer. As

* LLB (Hons) (Zimbabwe); gabmrech@yahoo.com

¹ Allegations from different corners were made regarding human rights abuses before and after the 2000 parliamentary election. See eg Amnesty International 'Zimbabwe: Terror tactics in the run-up to the parliamentary elections' June 2000; The Law Society of Zimbabwe *Rule of law* (2000) 5 *The Law Society of Zimbabwe Magazine*; B Raftopoulos 'Politics in Zimbabwe — 2001: Confronting the crisis' (2001); paper presented at the 'Crisis in Zimbabwe Conference' in Harare, 4 August 2001 (on file with author).

² Individual aspects of the election may be dealt with likewise.

such, it was not possible to gain access to polling stations or to formally interview the main actors. Thus, much reliance was placed on information from the Zimbabwe Human Rights NGO Forum (ZHRF or the Forum), newspaper reports, the Internet and reports from international groups.³

1.2 The importance of elections

While the reasons for the international community's interest in the Zimbabwean election may not have been entirely selfless, many of the concerns raised by the international community were justified.⁴

It is now axiomatic that free and fair elections are one of the fundamental prerequisites for any democratic transition.⁵ Indeed, some scholars go as far as to say that 'the notion of democracy, involving the two aspects of 'free and fair elections' and 'good governance' has become established as a global norm'.⁶ It is admitted that the notion of democracy and all its collaborators, such as the rule of law and good governance, have not yet found universal acceptance, let alone interpretation.⁷ Nonetheless, it cannot be gainsaid that 'the notion of democracy, involving the two aspects of 'free and fair elections' and good governance, has become established in the course of the 1990's'.⁸

Among other things, governance in the modern sense recognises that the will of the people should determine the way in which they are ruled.⁹ The 2002 Zimbabwean election was expected to reflect the will of the majority of the people, since citizens have a right to determine their own existence and to choose who should preside over their day-to-day lives in their pursuit of fulfilment and happiness.¹⁰

³ The forum comprises 12 non-governmental organisations (NGOs) working in the field of human rights.

⁴ The ruling party, ZANU PF, and its associates argued that American and European interests, especially those of the British, were actuated not because of any concern for democracy, but because of a 'satanic conspiracy' to return white supremacy and prevent the land redistribution exercise in which prime land belonging to white commercial farmers was being acquired, reportedly for redistribution to landless blacks. See generally *Parliamentary Debates* 28, 4:4128–9 (29 January 2002) and 28, 46:4136 (29 January 2002).

⁵ R Dahl 'Draft notes' (1990) paper presented to the AID seminar on economic growth and political democracy: Linkages and political implications' as quoted in L Diamond *Globalisation of democracy: Trends, types, causes and prospects* (1995) 17.

⁶ International Institute for Democracy and Electoral Assistance (IDEA) (1996) *Democracy Forum: Report of the Democracy Forum* (12–14 June 1996) 2.

⁷ JA Wiseman *The new struggle for democracy in Africa* (1996) 7–8.

⁸ IDEA (n 6 above).

⁹ United Nations General Assembly Resolution (UNGA) 46/137 of 17 December 1991.

¹⁰ Art 21(3) Universal Declaration of Human Rights (Universal Declaration): 'The will of the people shall be the basis of the authority of government'.

1.3 The notion of free and fair elections

Free and fair elections are a human right.¹¹ Indeed, the elements of freedom and fairness pervade all international and regional legal instruments dealing with elections.¹² Elections should be free and fair so that the rights and interests of the governed are protected.¹³

The right of individuals to determine their own fate will remain a sham if they are not granted the necessary environment in which to exercise it freely and without unnecessary impediments. Thus, state parties (in this case Zimbabwe) are bound to hold genuine and periodic elections 'guaranteeing the free expression of the will of the electors'.¹⁴ They are also bound to ensure that representatives are 'freely-chosen'.¹⁵ Apart from protecting the individual, these requirements are also designed to give legitimacy to the political system and to enhance democracy. In this respect they are a motivation to contribute to the development process.¹⁶

It should also be observed that the requirement of freeness protects the voters not only at the time of voting, but also during the pre-election period.¹⁷ As a consequence, the principle of free elections is closely linked to the fundamental freedoms of thought, conscience and religion, expression, association as well as assembly and freedom from discrimination.¹⁸ These essential freedoms are also protected in the African Charter on Human and Peoples' Rights (African Charter).¹⁹

Finally, the idea of freedom in the electoral process contemplates a political environment that is not manipulative. It envisages a situation where there exists freedom of the media to operate without undue influence or hindrance. Feltoe sets out some of the circumstances that could negate the freeness and fairness of an election:

- Campaigning by a political party is prevented or seriously obstructed.
- Voters are intimidated or bribed.

¹¹ G Totemeyer & D Kadima *SADC observer handbook* (2000) 3.

¹² Among which see 'United Nations framework for strengthening the rule of law' <http://www.arts.mcgill.ca/programmes/polisc/unsco-ruleoflaw.html> (accessed 15 July 2002); also art 21 of the Universal Declaration and art 25(a) of the International Covenant on Civil and Political Rights (ICCPR).

¹³ 'Context and objectives of UN electoral assistance' <http://www.un.org/Depts/dpa/ead/website5.htm> (accessed 13 August 2002).

¹⁴ Art 25(b) ICCPR.

¹⁵ Art 13 African Charter; art 23(1)(a) American Convention; art 21(1) Universal Declaration; art 25(a) ICCPR.

¹⁶ Part 1 African Charter for Popular Participation in Development and Transformation (African Charter for Development).

¹⁷ Generally see GS Goodwin Gill *Free and fair elections: International law and practice* (1994).

¹⁸ M Nowak *CCPR Commentary* (1993) 449.

¹⁹ Arts 2, 8, 9, 10, & 11.

- The electoral laws give an unfair advantage to one of the political parties contesting the election.²⁰
- There is rigging of the election.²¹

It follows from the above that the notion of freedom in elections is a prerequisite for democracy and that it denotes an environment wherein voters have the freedom

to participate in elections the way they want without fearing adverse effects on their own or families' safety, welfare or general dignity, and without coercion and restrictions.²²

Fairness means that the rules of the game are clearly spelled out for all contesting parties to know what is at stake. They must also be held in respect to the principles of universal and equal suffrage, paying attention to the right to equality.²³

1.4 The international and regional instruments governing elections

Many conventions, declarations and protocols provide for free, fair and genuine elections. The International Covenant on Civil and Political Rights (ICCPR) makes provision for open elections, just as the Convention on the Elimination of All Forms of Racial Discrimination (CERD).²⁴ Zimbabwe is a party to these two conventions.²⁵ It has also ratified the African Charter.²⁶

²⁰ Transparency establishing the legal ground rules 'in an inclusive and open manner' is necessary: The Organisation for Security and Co-operation in Europe (OSCE) *The ODIHR election observation handbook* (1999) 7.

²¹ G Feltoe 'An unfair contest: The presidential elections in Zimbabwe' (2002) 6 *Zimbabwe Human Rights Bulletin* 81. Electoral fraud vitiates or even perverts the will of the people.

²² Elklit 'Free and fair' in International Institute for Democracy and Electoral Assistance (IDEA) *Democracy Forum: Report of the Democracy Forum 12-14 June 1996* (1996) 18. Thus the requirement for the secrecy of the ballot.

²³ Any restriction to the right to vote should be a reasonable one, not discriminatory: See UNGA resolution 46/137 of 17 December 1991 and Preamble as well as art 25(b) of the ICCPR. Restrictions on the grounds of residency were upheld by the European Commission on Human Rights in Application 7566/76, 9 *Decisions and Reports* 121. Citizenship is another ground. In Communication 211/98, *Legal Resources Foundation v Zambia*, the African Commission on Human and Peoples' Rights held that discrimination in the exercise of these rights has caused 'violence and social and economic instability' and should therefore not be justified. Equality of suffrage means no vote should carry more weight than others; Nowak (n 18 above) 449.

²⁴ Arts 5 & 25. See also art 1 Convention on the Political Rights of Women (CPRW).

²⁵ C Heyns (ed) *Human rights law in Africa 1996* (1996) 2. In the regional sphere, the African Charter on Human and Peoples' Rights (African Charter), the American Declaration of the Rights and Duties of Man (American Declaration), the American Convention on Human Rights (American Convention) and the European Convention on Human Rights Protocol 1 (European Convention) make provision for this right: arts 13, 20, 23 & 3 respectively.

²⁶ As above, 5.

For the purposes of this paper, it suffices to say that all the instruments cited above make provision for regular (or periodic), genuine (or free and fair) elections, mostly by secret ballot. However, it is interesting to note that unlike the European and American Conventions, the African Charter is silent on the issue of secrecy of the ballot. It is also remarkable that of the regional instruments, it is only the American Convention that makes a direct reference to the question of suffrage.²⁷ The African Charter may also be compared to the American Convention, which adds a right to be elected.²⁸

Evaluated against international and regional instruments, the African Charter 'stands out as meagre and without substantial legal content' with regard to the right to vote. Moreover, the right is to be exercised 'in accordance with the provisions of national laws'. It may be noted, however, that there is no clear check or limitation on the import or operation of national legislation, leaving wide discretion to the individual state.²⁹ This leads us to examine the extent to which sovereignty, as contested by the government of Zimbabwe, can preclude international interest in domestic elections.

1.5 Sovereignty and elections

A state party to the international instruments setting out the rules and standards for the conduct of elections has some modicum of discretion and latitude to conduct elections within the parameters of its own laws.³⁰ The United Nations (UN) recognised sovereignty in its resolution on 'Respect for the principles of national sovereignty and non-interference in the internal affairs of states in their electoral processes'.³¹

Although they are held within the limitations of domestic law and practice, elections must be held in an environment that caters for the exercise of fundamental freedoms in accordance with international law. It seems indisputable that the principle of sovereignty should give way to the principles of accountability, the observance of international norms and human rights.³² Sovereignty should never become a sanctuary for dictatorship and human rights violations.

²⁷ Art 23(1)(b).

²⁸ As above.

²⁹ L Lindholt *Questioning the universality of human rights: The African Charter on Human and Peoples' rights in Botswana, Malawi and Mozambique* (1997) 156.

³⁰ The principle of sovereignty has been codified in, among others, art 2 of the UN Charter.

³¹ UNGA Res 46/130 of 17 December 1991; see also UNGA Res 47/130 of 18 December 1992 and UNGA Res 48/124 of 20 December 1993.

³² It is admitted, though, that there is a lack of consensus on what issues the international community has the right to intervene; see generally M Heinberg (ed) *Subduing sovereignty: Sovereignty and the right to intervene* (1994). See also an article in Heinberg's book by JJ Holst 'Keeping a fractured peace' 136 in which Holst observes that 'Sovereignty may in fact be waning more rapidly than widely presumed . . .'.

2 Political and legal background

The struggle for democracy and human dignity has its roots in the colonial period of the country. Zimbabwe was formally colonised by the British in 1890. In 1893, the Anglo-Ndebele War was fought against the local Ndebele ethnic group in the Matebeleland region. This war was actuated by the dispossession of blacks of their land and cattle. Shortly thereafter, the Shona groups from Mashonaland joined the war and by 1896, the conflagration had become so widespread that it was called the First *Chimurenga* or War of Liberation. After the arrest and execution of the *Chimurenga* leaders, further dispossession and oppression followed, the upshot of which was that dissent spread commensurately.³³

As a result, the trade union movement gave birth to several opposition political parties. The Zimbabwe African Peoples Union (ZAPU) was formed in 1961 under the leadership of Joshua Nkomo. The Zimbabwe African National Union (ZANU) was formed in 1963 under the leadership of Ndabaningi Sithole.³⁴ As discontent increased with a political system premised on the notion of white supremacy, Smith announced a Unilateral Declaration of Independence (UDI) on 11 November 1965.³⁵ This move was designed to perpetuate minority rule and is largely seen as the precipitator of the bitter liberation struggle that was to follow: the Second *Chimurenga*.³⁶ The guerrilla war forced Smith to the negotiating table, culminating in the country's first majority vote in 1980. The ZANU (PF) won the elections and ushered in black majority rule.³⁷

Although the country has never been a *de jure* one-party state, the ruling party has completely dominated Zimbabwean politics since the Unity Accord with ZAPU in 1987. However, it seems to have been shocked out of its complacency when the Movement for Democratic Change (MDC), under the leadership of Morgan Tsvangirai, won nearly half the contested seats in the June 2000 parliamentary elections. Compounded by the fact that the government had suffered defeat when Zimbabweans rejected a government-sponsored draft Constitution at a referendum earlier in the year, the tone of official government speeches became ominous as the presidential election drew near.³⁸

³³ For aspects of the history of Zimbabwe, see the Zimbabwe government website at <http://www.gta.gov.zw>.

³⁴ President Mugabe, as the First Secretary of the party, subsequently led it.

³⁵ The system was segregationist and the franchise was only extended incrementally until equal and universal suffrage was obtained at independence in 1980.

³⁶ G Shumba *et al* 'Report on the presidential election in Zimbabwe' (2002) 4, paper researched under the guidance of staff members of the Centre for Human Rights, University of Pretoria.

³⁷ As above, 5. ZANU (PF) won 116 out of the 120 contested seats.

³⁸ These speeches are extensively captured by the Forum in (generally) ZHRF (2002) *Human rights and Zimbabwe's presidential election: March 2002*.

2.1 The legal system for the elections

In evaluating an election, recourse should be had to the domestic legal system, in particular, electoral law and the Constitution. The Constitution of Zimbabwe provides for fundamental human rights.³⁹ These include political rights, such as freedom of conscience, expression, assembly and association, movement and protection from discrimination.⁴⁰ Other freedoms include the right to life, the right to protection from inhumane treatment and the right to protection from arbitrary search or entry.⁴¹

The Constitution also provides for the election of the president in accordance with the electoral law.⁴² To be elected to presidency, one must be a citizen by birth or descent and should have attained forty years of age and be ordinarily resident in Zimbabwe.⁴³ The tenure of the office of the president is limited to six years. It is, however, notable that the Constitution is silent on the duration of the term of office of the incumbent president in the event of his or her being re-elected.

Section 61 of the Constitution provides for the establishment of an Electoral Supervisory Commission (ESC). It may be observed that, although the Constitution makes provision for the registration of voters,⁴⁴ it does not guarantee that those entitled to be registered will actually be registered as voters. It also does not grant the right not to be prevented from casting the ballot.

The Electoral Act provides for regulations and procedures governing parliamentary and presidential elections.⁴⁵ It makes provision for the appointment of an Electoral Directorate (ED), the functions of which include 'giving instructions and making recommendations' for 'ensuring that elections are conducted efficiently, properly, freely and fairly'.⁴⁶ It also regulates the procedure and conditions of service of the Electoral Supervisory Commission and the Registrar-General of Elections (RG), as well as the registration of voters. The Act also provides for the functions of the RG, who is subject to the direction of the ED.⁴⁷

³⁹ Ch 3.

⁴⁰ Secs 19–23.

⁴¹ Secs 12, 15 & 17.

⁴² Ch 4.

⁴³ Sec 28(1)(a)–(c).

⁴⁴ Schedule 3, sec 3.

⁴⁵ Ch 2:01.

⁴⁶ Sec 4(1)(c) of the Act.

⁴⁷ Sec 15(2) & (3) of the Act.

2.2 The Election Directorate (ED)

The ED consists of a chairman, appointed by the President, the Registrar-General and not fewer than two, nor more than ten other members. The Minister of Justice, Legal and Parliamentary Affairs appoints the ten others. Any other person assigned for the administration of the Act in terms of section 3 may also assume the Minister's responsibility.⁴⁸ It would seem that the composition of the ED does not augur well for guaranteeing free and fair elections. Ultimately, the President appoints members in one way or another. In practice, it has often been shown that the ED's partiality in handling contentious elections is suspect.⁴⁹

The ED was chaired by Mariyawanda Nzuwa (appointed by President Robert Mugabe) and the Registrar-General (Tobaiwa Mudede) *ex officio*. Who exactly comprised the ED's other members in March 2002 was not made clear. The Police Commissioner sat together with the ED Chairperson and the Registrar-General at the table from which the results were announced.⁵⁰

2.3 The Electoral Supervisory Commission (ESC)

An Electoral Supervisory Commission (ESC) is established in terms of section 61 of the Constitution. The President, in consultation with the Judicial Service Commission, appoints a Chairperson and two other members.⁵¹ Two other members are again 'appointed by the President after consultation with the Speaker'.⁵² It should be noted that albeit the President must consult, he or she is not required to adopt recommendations. The President also decides the tenure of office of the commissioners.⁵³ Furthermore, members hold office 'on such conditions as the President may fix' and may be removed by the President.⁵⁴ Thus, the impartiality of the ESC remains suspect. Although the Constitution provides for its independence, practice has also generated suspicions that the ESC panders to political considerations.⁵⁵

⁴⁸ Sec 4(2)(a)-(c).

⁴⁹ See generally AP Cheater 'Human rights and Zimbabwe's June 2000 election' (2001).

⁵⁰ As above.

⁵¹ Sec 61(1)(a).

⁵² Sec 61(1)(b).

⁵³ Sec 7(1) Electoral Act.

⁵⁴ Secs 7(3) & 10 Electoral Act.

⁵⁵ Sec 61(6). Generally, <http://www.mdczimbabwe.com> (accessed 27 July 2002). In 2000, the United Parties resolved to boycott the election until amendments were made to the Electoral Act and the Registrar-General was precluded from conducting voter registration. See A Cheater 'Human rights in Zimbabwe January-June 2000: A baseline report' in Zimbabwe Lawyers for Human Rights (ZLHR) (2000) 3 *Zimbabwe Human Rights Bulletin* 66.

Together with the Registrar-General, the ESC is responsible for conducting presidential and parliamentary elections. Neither the Electoral Act nor the Constitution specifically grants the ESC a mandate to conduct elections for presidency.

The ESC appeared to be inadequately geared to discharge its constitutional mandate as only four of the requisite five ESC members were appointed.⁵⁶ As Chairperson, the President appointed retired army colonel and ex-combatant lawyer, Sobusa Gula-Ndebele.⁵⁷ In turn, the Chairperson of the ESC appointed as Director of Elections Brigadier Douglas Nyikayaramba.⁵⁸ Seventy-two Zimbabwe National Army officers were reportedly seconded to the ESC. One thousand and eighty election supervisors and 22 000 election monitors were recruited from mostly the Ministries of Defence, Home Affairs and Education.⁵⁹ It would appear that the selection of electoral officers was not transparent and inclusive. A balance could have been attained by including people from other sectors of the national spectrum, to give the impression of independence.

2.4 Changes to the electoral law

The President used his wide powers under the Electoral Act (three times)⁶⁰ to promulgate laws that were detrimental to the opposition.⁶¹ One such law was the General Laws Amendment Act (GLAA).⁶² The GLAA made extensive amendments to the Electoral Act. It was described by the opposition as 'undemocratic and contrary to the SADC Parliamentary Forum Norms and Standards for Elections in the SADC Region'.⁶³ The Minister of Justice, Legal and Parliamentary Affairs, described the amendments as designed 'to kick out from our politics the influence of foreign money and foreign interests' and to prevent private organisations from conducting voter education.⁶⁴

Also contentious was a provision in the GLAA which empowered the Registrar-General to change voters' registration particulars without informing them.⁶⁵ It was feared that it facilitated rigging the roll by moving

⁵⁶ Zimbabwe Human Rights NGO Forum 'Human rights and Zimbabwe's presidential elections' <http://www.hrforumzim.com> (accessed 17 June 2002).

⁵⁷ He took over after Peter Hatendi resigned in protest over funding and other inadequacies.

⁵⁸ *The Zimbabwe Independent* (14 February 2002).

⁵⁹ *The Financial Gazette* (31 January 2002).

⁶⁰ Statutory Instruments 41D, 42B & 42E of 2002.

⁶¹ Sec 158 gives the President powers to make statutory instruments that he or she 'considers necessary or desirable to ensure that any election is properly and efficiently conducted and to deal with any matter or situation . . . '.

⁶² Act 2 of 2002.

⁶³ *Parliamentary Debates* 28, 35:3135.

⁶⁴ ZHRF (n 56 above).

⁶⁵ Sec 34(1).

voters between constituencies without their knowledge, or even throwing them off the roll altogether. After the Supreme Court nullified the GLAA,⁶⁶ an Electoral Amendment bill was introduced, carrying identical provisions.⁶⁷

2.5 Evaluation

It may be observed that the electoral institutions for the election were not independent, at least not in principle. International standards of transparency, freeness and fairness can usually only be enforced when, among others, the selection of electoral officers and the setting up of institutions are seen to be unbiased. Changes to the electoral law that fly in the face of court judgments may only have one purpose — to favour the ruling party at the detriment of the opposition.⁶⁸ However, this should not be considered in isolation when arriving at a conclusion on the freeness of the elections.

3 The events before the election

3.1 Voter education

Unlike the 2000 parliamentary election, the government outlawed the provision of voter education by civil society and made it a preserve of the ESC. The ESC, however, could delegate its responsibility and supply material to anyone it granted the permission to carry out voter education.⁶⁹ The GLAA also banned foreign contributions or donations for the purposes of voter education to anyone, except to the Electoral Supervisory Commission.⁷⁰ This restricted the participation of civil society in voter education and deprived voters of their freedom of information. This provision was not as illogical as it may seem, considering that the ESC was short on resources. Since education is power, it may be argued that the government had a reason to want the electorate ignorant in the face of mounting economic problems and what promised to be a stiff election.

It is worth noting, however, that these provisions were largely ignored, as the Zimbabwe Election Support Network (ZESN) and others continued to distribute pamphlets.⁷¹ Thus, although the GLAA had the

⁶⁶ Supreme Court Judgment SC 10/02.

⁶⁷ Act 20 of 2002.

⁶⁸ In Lesotho, electoral laws were only changed to facilitate the smooth running of elections in view of the compromises made by the contestants.

⁶⁹ General Laws Amendment Act 2002 secs 14D(4) & (6).

⁷⁰ Sec 14D(5).

⁷¹ Commonwealth Observer Group (COG) 'Zimbabwe presidential election: 9–11 March 2002' <http://www.thecommonwealth.org/activities/democ.html> (accessed 21 September 2002).

potential to, and indeed prejudiced voters, the effect was not fatal in terms of voter education.⁷²

3.2 Voter registration

On 31 January 2002, the nomination day for the presidential election, the ESC announced that 5 479 100 people were registered on the voters' roll.⁷³ The official government newspaper, *The Herald*, announced that of those registered, 3,2 million were urban and 2,2 million rural.⁷⁴ (The government altered the figure later to reflect 3,2 million rural and 2,2 million urban. This is significant, because the ruling party believed its support base were the rural areas).⁷⁵

It is alleged that the office of the Registrar-General declined to make public the number of voters registered in each constituency, on the grounds that the information was confidential.⁷⁶ Furthermore, the RG is also alleged to have refused to release the final roll used in the election.⁷⁷ This caused disquiet within the opposition, as it was argued that the roll could be used to manipulate the outcome of the vote. Some commentators claimed that this anomaly reflected the fact that the roll had not been updated, leaving 'a vast reservoir of fictional voters who can then be mobilised at will when the going gets tough'.⁷⁸ This secrecy was hardly in the spirit of transparency and has the potential to vitiate the fairness of an election, contrary to international expectations.

3.3 Complaints with regard to registration

The Human Rights Forum observes that the right to vote and the right to equality were compromised. It also observed that the effects of the GLAA and other subsequent laws was to disenfranchise Zimbabwean citizens of foreign descent and those previously entitled to postal votes. Moreover, procedural complexities also resulted in most people being deprived of their right to register and therefore their right to vote.

Disenfranchisement occasioned by failure to secure national identification was particularly rampant among women married under customary law and among the youth. Chiefs and headmen (under the pay of the ruling party) became a conduit for securing national identity

⁷² It may also be noted that the Civic Alliance for Social and Economic (CASEP) and the Legal Projects Centre (LPC) continued to educate people on their rights in spite of the GLAA.

⁷³ The Forum reports that the MDC claimed to have uncovered 524 duplications and 107 deceased voters still registered on the roll.

⁷⁴ *The Herald* (12 March 2002).

⁷⁵ *The Herald* (11 March 2002).

⁷⁶ *The Daily News* (10 March 2002).

⁷⁷ *The Herald* (7 March 2002).

⁷⁸ *The Daily News* (2 April 2002).

cards for the purposes of registration. Tendai Shumba, of Magunje (Hurungwe district) failed to secure a national identity card, reportedly because she did not take a letter of recommendation from ZANU-PF officials.⁷⁹ It is reported that numerous roadblocks were set up by ZANU (PF) supporters to dispossess people of their identity cards where they could not prove membership to the ruling party. The Forum also reports that about 1 300 national identity cards had been reportedly stolen in the districts of Mutoko, Tsholotsho, Nkayi, Bulilimangwe South, Kwekwe and Buhera North by the time of voting. Such extensive disenfranchisement impacted on the freeness and fairness of the election.

Other 'stringent' provisions that may be said to have contributed to the disenfranchisement of voters were the proof of residence requirements in the GLAA.⁸⁰ Many people in the urban areas (touted to be the opposition MDC stronghold) were either homeless or could not obtain proof of residence. Many expatriates intending to come to Zimbabwe to vote were likewise disenfranchised.⁸¹ About 22 000 prisoners in jail could not vote, although there is no legal impediment for those on remand or those serving six months or below. In contrast, all prisoners were allowed to vote at independence.

Students were also among those to suffer disenfranchisement. Those who had been registered at tertiary institutions found that they could not vote as the Ministry of Higher Education gave instructions that the institutions remain closed during the election. Students attempting to vote at polling stations near their institutions were reportedly turned away.⁸² Amendments that were introduced to the Citizenship Act⁸³ were also used to disenfranchise a majority of the electorate who held dual citizenship. There were also allegations of procedural irregularities such as registration after the roll had been closed or by the underaged.⁸⁴

Although it is difficult (if not impossible) to verify all allegations, some of these complaints must have a basis in fact. It would seem that most were founded as the government did little to counter them. Violations and wilful manipulation of the law are difficult to dispute. Such a scenario offends against the standards for elections as contemplated in the international instruments referred to already.⁸⁵

⁷⁹ *The Daily News* (7 March 2002).

⁸⁰ Secs 3(e)–(f) thereof. It is generally felt that the GLAA placed 'unreasonable' demands on the electorate.

⁸¹ *The Zimbabwe Standard* (10 March 2002).

⁸² *The Daily News* (2 March 2002), quoting the Zimbabwe National Students Union (ZINASU).

⁸³ Ch 4:01.

⁸⁴ See generally The Zimbabwe Human Rights Forum <http://www.hrforumzim.com/special-inhrru/Election.htm> (accessed 30 July 2002).

⁸⁵ See also Southern African Development Community (SADC) Parliamentary Forum (2001) *Norms and Standards for Elections in the SADC region*. Zimbabwe is a member of SADC.

4 The elections and fundamental freedoms

4.1 Freedom of expression and information

The right to freedom of expression is protected by the Zimbabwean Constitution.⁸⁶ As was the case in Lesotho, the state-controlled media devoted most of their coverage to the ruling party. In Zimbabwe, however, the situation was more serious. To begin with, the media was clearly polarised between the independent press and the state-controlled one.⁸⁷ The former seemed to favour the opposition, although most of them strove for balance. The government-controlled media was, however, glaringly partisan. For example, not a single state-controlled newspaper, radio or television ran any advertisement for the opposition when the private press would advertise the ruling party.⁸⁸

The state-controlled media often invented stories to paint the opposition in a bad light.⁸⁹ In fact, the Zimbabwe Broadcasting Corporation (ZBC) was subsequently accused of not adhering to basic standards of journalism in their support for the ruling party.⁹⁰ The Media Monitoring Project issued a report of the television news bulletins between 1 December and 7 March 2002. It observed that 94% bulletins favoured ZANU (PF), while the remainder was negatively slanted against the opposition.⁹¹

Incidents of violence against media houses and personnel were not uncommon during the Zimbabwean election. Offices and printing houses of *The Daily News* were bombed several times by suspected ruling party supporters. Independent publications were 'banned' from such areas as Bindura, Karoi and Masvingo, all strongholds of the ruling party.⁹² Vendors of these publications were invariably assaulted or tortured.

The law was also used to make it difficult for the media to freely inform the populace. Laws such as the Public Order and Security Act (POSA),⁹³ as well as the Access to Information and Protection of Privacy Bill (now

⁸⁶ Sec 20. See also art 19 Universal Declaration and art 19 ICCPR.

⁸⁷ Generally see Media Monitoring Project (MMP): (2001) *Election 2000: The media war*; MMP; MMP (2000) *A duty to inform: A report on Zimbabwe's publicly owned media — January–May 1999*; Article 19; MMP (2001) *A question of balance*; MMP, and R Saunders (1999) *A history of the media in Zimbabwe*.

⁸⁸ Zimbabwe Human Rights NGO Forum *Human rights and Zimbabwe's presidential election: March 2002* (2002) 15.

⁸⁹ Feltoe (n 21 above) 83–84. Also see the stories run by the *Sunday Mail* (24 February 2002) & (3 March 2002) as well as *The Herald* (11 February 2002).

⁹⁰ Commonwealth Observer Group (2002) *Zimbabwe presidential election 9–11 March 2002*: COG 33.

⁹¹ Quoted in ZHRF (n 88 above) 18.

⁹² *The Daily News* (25 January 2002).

⁹³ Ch 11:17.

an Act) were often used to arrest journalists for publishing 'false statements which are peddled internationally'.⁹⁴

It may be observed that ruling party supporters deliberately violated the rights of media personnel as well as the electorate. Opposition parties were denied coverage in the state-owned media. As if that was not enough, laws were introduced to curtail the right of expression as well as its attendant right to receive information. Where the playing field is not level, elections cannot be said to be genuine, free and fair.

4.2 Freedom of association and assembly

The Zimbabwean Constitution protects these two freedoms.⁹⁵ In *John D Ouko v Kenya* the African Commission held freedom of association sacrosanct.⁹⁶ The African Commission affirmed freedom of assembly as a fundamental political right in *Sir Dawda K Jawara v The Gambia*.⁹⁷ However, these freedoms seem to have been trampled upon during the Zimbabwean election.

The introduction of POSA heralded the acceleration of a series of violations.⁹⁸ Summarised, POSA made it illegal to hold political meetings without advance notice and the permission of the police. It also prohibited statements likely to cause 'ridicule' to the President. A month after POSA came into operation, 42 people had been arrested under the Act. The Forum notes that none of them were supporters of the ruling party.⁹⁹

While President Mugabe addressed 50 major rallies, Tsvangirai could only address eight, as the police mostly refused to grant permission on the grounds that they feared for public security.¹⁰⁰ In White City Stadium in Bulawayo, the police fired teargas to disperse MDC supporters after clashes with ZANU (PF) sympathisers who invaded the stadium.¹⁰¹ Subsequently, the MDC had to obtain an injunction against the police.¹⁰² There were also reports that the police asked for national identity cards

⁹⁴ P Chinamasa, as recorded in *Parliamentary Debates* 28, 39:3547 (24 January 2002).

⁹⁵ Sec 21. See also art 20 Universal Declaration and arts 21 & 22 ICCPR.

⁹⁶ Communication 232/99, Fourteenth Annual Activity Report of the African Commission on Human and Peoples' Rights, Annex V.

⁹⁷ Communication 149/96, Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights, Annex V.

⁹⁸ Ch 11:17. Violations included freedom of association, see eg South African Parliamentary Observer Mission (SAPOM) (2002) Zimbabwe Presidential Elections 9–11 March 2002 9. Although the group held (amid disagreements) that the election was 'a credible expression of the will of the people', their observations seem to controvert the conclusion.

⁹⁹ ZHRF (n 88 above) 23.

¹⁰⁰ As above.

¹⁰¹ *The Daily News* (1 February 2002).

¹⁰² *The Financial Gazette* (21 February 2002).

before allowing people to attend rallies addressed by MDC. Those without cards were allegedly turned away.¹⁰³

4.3 Freedom from violence and intimidation

Political violence impedes the elector's ability to participate freely in the electoral process. Electors may either be deterred from voting or may be unduly influenced in their choice.¹⁰⁴ Violence was the most outstanding occurrence in the Zimbabwean election. It appeared to have been in most instances incited by the ruling party. Although the opposition MDC was the principal target, civil society and churches were not spared either. I must, however, mention that the opposition itself was not above perpetrating violence.¹⁰⁵ Nonetheless, the ruling party employed the full weight of the 'war veterans' in order to win the election.

Political violence at such a scale had never been experienced before the 2000 constitutional referendum and parliamentary election.¹⁰⁶ Inflammatory statements from the leadership of the ruling party worsened the violence. President Mugabe was quoted boasting that his party had several 'degrees in violence'. He also urged his supporters to wage 'a real war' on the MDC.¹⁰⁷ 'The war is going to be physical', he said.¹⁰⁸

Following an appeal by SADC, he eventually made an appeal for an end to violence, arguing that it was drawing international attention.¹⁰⁹ After the European Union (EU) and the Commonwealth mounted the pressure, the President made further calls for an end to violence.¹¹⁰ The governor for Manicaland is also reported to have called for a peaceful campaign.¹¹¹ These pleas did nothing to stop the tide as party youths trained under the national youth service, known as the 'green bombers' for their military-style uniforms, continued to set up roadblocks and terrorise people. The 'war veterans' and the 'green bombers' also set up terror 'bases' where victims would be tortured or 're-educated'.¹¹²

¹⁰³ *The Daily News* (4 February 2002).

¹⁰⁴ Commonwealth (n 90 above) 7.

¹⁰⁵ As above.

¹⁰⁶ Evidence of the massive violence and intimidation came to light in the cases following the disputed 2000 Parliamentary Elections. See for instance *Mutoko South Election Petition* HH 68/2001; *Hurungwe East Election Petition* and *Silas Matamisa v Phillip Chiyangwa and Registrar General of elections* HH 48/2001. See also S Moyo 'The rule of law in Zimbabwe' (2001) Paper presented to the Canadian Bar Association Annual General Meeting which is on file with the author.

¹⁰⁷ *The Financial Gazette* (10 January 2002).

¹⁰⁸ *The Daily News* (26 January 2002).

¹⁰⁹ *The Daily News* (19 January 2002).

¹¹⁰ *The Herald & The Daily News* (30 January 2002).

¹¹¹ *The Zimbabwe Standard* (27 January 2002).

¹¹² *The Zimbabwe Independent* (1 March 2002).

Several deaths and disappearances were reported.¹¹³ In the Midlands, a MDC supporter was allegedly beheaded with a spade. Another victim had the letters MDC carved with a knife on his back.¹¹⁴ Gang rapes against suspected opposition supporters were not uncommon.¹¹⁵ In stark contrast, Tsvangirai appealed for reason and resort to the law.¹¹⁶

Tsvangirai's faith in the rule of law was, however, misplaced, as the Zimbabwe Republic Police (ZRP) was clearly partisan in enforcing the law.¹¹⁷ In fact, it has been said that 'sympathising with the opposition became a sure way of having normal life disrupted by the law enforcement agents'.¹¹⁸ In the Chivi District, police fired live bullets and hurled teargas at Tsvangirai's convoy after he had stopped to greet supporters lining the roadside.¹¹⁹ This was not the first or last time for the police to harass him or his supporters.¹²⁰

5 Polling and post-election events

Although there were incidents of gross human rights abuses in the run-up to the election, it is encouraging that the days of the election were generally peaceful.¹²¹ However, police fired teargas in Kuwadzana, Harare, to dispel voters who had become impatient with the slow pace of the process. A large number of people were unable to vote in the MDC strongholds of Harare and Chitungwiza as a result of the reduction of polling stations in urban areas. This reduction amounted to about 30% to 40%.¹²²

Even though verification and counting were delayed, the process was conducted smoothly and according to procedure. Notwithstanding this, irregularities prior to this time had marred the whole process. For example, it is reported that the uniformed forces' voting was done in

¹¹³ The ZHRF catalogues a total of 56 reported politically motivated deaths, (n 90 above) 97-100.

¹¹⁴ Commonwealth (n 90 above).

¹¹⁵ As above. Such mindless violence is still continuing at the time of writing.

¹¹⁶ *The Zimbabwe Independent* (8 February 2002) & *The Daily News* (11 February 2002).

¹¹⁷ This has been going on since the constitutional referendum in which the government's sponsored Draft Constitution was rejected. See for example *The Human Rights Observer* 'Deterioration of the rule of law in Zimbabwe'; Norwegian Election Observation Mission (2002) *Presidential Elections in Zimbabwe 2002, Preliminary Report Issued on 12 March 2002* 3 and G Feltoe 'The onslaught against the rule of law in Zimbabwe' (2001) Paper presented to the South African Institute of International Affairs, Johannesburg and is on file with the author.

¹¹⁸ Zimbabwe Human Rights Association (ZIMRIGHTS) (2002) *Zimbabwe Presidential Elections 2002 Report* 3.

¹¹⁹ *The Daily News* (23 February 2002).

¹²⁰ *The Daily News* (7 & 8 February 2002).

¹²¹ This writer was an unofficial observer on behalf of the Centre for Human Rights, University of Pretoria.

¹²² Commonwealth (n 90 above) 16.

the presence of senior officers and was therefore not secret and subject to influence.¹²³ Numerous MDC agents were kidnapped, injured or arrested or had their cars stoned or taken away, making it impossible to supervise the process.¹²⁴ In Kuwadzana, 'war veterans' allegedly assaulted and dispersed voters whilst wielding guns.¹²⁵ It is not surprising, therefore, that the outcome of the election has not been accepted by the main opposition party, which has filed suit. More importantly, the European Union and the United States have imposed targeted sanctions against senior members of the ruling party.

6 What went wrong?

6.1 The electoral system

In analysing the Zimbabwean anomaly, it is fitting to make a brief comparison with other countries. Lesotho (2002) and Ghana (2000) were remarkable for the peacefulness of their elections. In Lesotho, it has been mooted that this was because of the new electoral system that was introduced.¹²⁶

Zimbabwe uses the First Past the Post (FPP) or 'winner takes all' electoral arrangement. It cannot be denied that the choice of a political model is important. Apart from the fact that this has an impact on the 'representativity, legitimacy and stability of the government born of it',¹²⁷ the choice of a model is also important in that it shapes the limitations and expectations of the contestants and as such steers their conduct in respect of human rights. For example, in the FPP system the stakes are high in the sense that the loser loses everything. Knowing this, parties and individuals are liable to use unethical and unlawful means to win the election. However, since elections have been held relatively peacefully (in Ghana for instance) using the FPP system, the choice of an electoral model should not be overemphasised. Even in Lesotho where a new model was introduced, it must not be forgotten that it was used on a limited scale. There are other vital considerations to be taken into account.

6.2 The lack of transparency in Zimbabwe

Perhaps the most serious cause of violence in Zimbabwe was the lack of openness that accompanied the electoral process. For instance, the

¹²³ ZIMRIGHTS (n 118 above) 5.

¹²⁴ Feltoe (n 21 above) 92.

¹²⁵ *The Daily News* (11 March 2002).

¹²⁶ The Mixed Member Proportional Representation system.

¹²⁷ NL Mahao 'Electoral system and legitimacy of representation' (2000) 10 *Lesotho Law Journal* 245. See also SN Ndengwa 'The relevance of the electoral system: A simulation of the 1992 Kenyan election' (1997) 2 *African Journal of Political Science* 14.

registration process reopened three times amid claims by the opposition that there was insufficient publicity of the event.¹²⁸ Electoral laws that had been the hallmark of past elections were often changed willy-nilly. At times the courts struck down certain laws, but nevertheless, the same provisions would be returned in the form of other laws.¹²⁹ In instances such as these, it is likely that both the electorate and the contestants may be forced to unlawful means out of sheer frustration or even to complement an apparently anarchical process.

The refusal to grant accreditation to both domestic and foreign observers perceived as unfriendly by the Zimbabwean government worsened the situation.¹³⁰ It also seemed to give credence to the idea that the process was flawed.¹³¹

Also important is the fact that in Lesotho, the 'rules of the game' were clearly defined. The opposition had been included in the negotiations surrounding the post-1998 electoral preparations. This was in sharp contrast to the 'ostracising' of the opposition in Zimbabwe. Thus, because of the inclusiveness of the developments in Lesotho, rather than the new electoral system, the election went smoothly.

6.3 The advent of a strong opposition in Zimbabwe

It could be contented that the Zimbabwean election was strikingly different for the reason that there had now emerged a strong official opposition. Zimbabwe's ruling party had a history of dominance and complacency that made it appear invincible. Although ZANU (PF) seems to have a history of violence against political opponents,¹³² in 2002 the fear of loss was palpable, as evidenced in the actions of the ruling party.¹³³ This apprehension could only lead to desperate measures that would be an indictment to the whole election.

It should further be noted that Zimbabwe has a very big middle class, a student movement and civil society so strong that consciousness was high. Because of unparalleled economic woes, largely the result of

¹²⁸ Commonwealth (n 90 above).

¹²⁹ For example, the General Laws Amendment Act was struck down by the courts to be returned barely two weeks later in the form of the Electoral Amendment Bill (No 4 of 2002).

¹³⁰ The local Zimbabwe Election Support Network (ZESN) applied to field 12 500 observers but was only allowed 500. The 23-strong delegation of NGOs from South Africa was refused accreditation. The EU pulled out after its delegation head had also been denied observer status.

¹³¹ Compared to the Lesotho 2002 and Ghana 2000 elections.

¹³² International Human Rights Law Group Zimbabwe: *Report on the 1985 General Elections*; R Sunders *Never the same again: Zimbabwe's growth towards democracy* (2000) Edwina Spicer Productions and ZESN (2001) Bikita West 2001 Parliamentary By-Election Report 13–14 January 2001: ZESN 20–24.

¹³³ Most statements by senior personnel in the government were astonishingly unstate-manlike.

corruption and economic structural adjustment policies, students, urbanites and the middle class were the most poignant victims of the economic downturn. This could only increase strife, as demonstrations became an almost daily phenomenon. Believing it was under a siege of coup-like proportions, the ruling party increased its strong-arm tactics.

6.4 The land question

Although no African state could be said to be liberated from problems regarding land issues, in Zimbabwe for various reasons the clamour took on a serious tone in the run-up to the elections. The liberation struggle (one of the most bitter in the struggle for the decolonisation of Africa) was principally premised on the land question.

The Lancaster House Constitution, which was negotiated in 1979, made it well nigh impossible for the new black government to expedite the process of redistribution.¹³⁴ Thus, after the government had failed to win support to solve the land issue through what many perceived to be an unrepresentative, unjust and discriminatory constitutional overhaul, it mounted what was dubbed a 'racist campaign' against white farmers. These farmers were accused of having sponsored the rejection of the draft Constitution in collaboration with the MDC, who were also called 'puppets' of Western influence and 'Rhodies'.¹³⁵

This gospel of hate found its mark and spawned ruling party militants in the form of 'war veterans' and most unemployed youths who were willing to go to extremes to advance the Third *Chimurega*. Thus, although other countries have their own land crises, the demagoguery surrounding the issue in Zimbabwe contributed to violence.¹³⁶

7 Conclusion

Following from the above, it is my submission that the 2002 Zimbabwean presidential election was neither genuine and legitimate, nor free and fair. The Zimbabwean process violated all the norms and standards, international or regional, expected in an election. It is sad, therefore, that some observers opted to see no evil, hear no evil and speak no evil.¹³⁷

¹³⁴ J Herbst 'The dilemmas of land policy in Zimbabwe' in S Baynham *State politics in Zimbabwe* (1990) 131.

¹³⁵ Zimbabwe was formerly Rhodesia under colonial rule.

¹³⁶ South Africa, Kenya and Namibia are some of the countries where the land question has manifested itself recently.

¹³⁷ These include the Namibian, Kenyan and Tanzanian Government Observer Teams, the COMESA Observer Team, the OAU Observer Mission, the African Heads of (Diplomatic) Mission and the SADC Ministerial Task Force.

It is hoped that it is not a misplaced sense of brotherhood or an 'old-boy network of African strongmen' as Philip Gourevitch calls it,¹³⁸ that makes African leaders stick together in the face of wanton human rights violations. Now is the time to come up with clear, binding and enforceable human rights protection protocols and mechanisms. For the sake of progress and development, the continent should be courageous enough to admit, condemn and rectify its shortfalls. Where praise is due, as in the case of the election in Lesotho, it must be generously accorded. By the same token, where intervention is necessary, as was the case in Zimbabwe, the international community should not hesitate to do so.

¹³⁸ P Gourevitch *We wish to inform you that tomorrow we will be killed with our families: Stories from Rwanda* (1998) 254.

AFRICAN HUMAN RIGHTS LAW JOURNAL GUIDE FOR CONTRIBUTORS

Contributions should preferably be e-mailed to

fviljoen@hakuna.up.ac.za

but may also be posted to:

The Editors
African Human Rights Law Journal
Centre for Human Rights
Faculty of Law
University of Pretoria
Pretoria
South Africa
0002

All correspondence, books for review and other communications should be sent to the same address.

The editors will consider only material that complies with the following requirements:

- The submission must be original.
- The submission should not already have been published elsewhere.
- Papers should average between 5 000 and 10 000 words (including footnotes) in length.
- If the manuscript is not sent by e-mail, it should be submitted as hard copy and in electronic format (MS Word).
- The manuscript should be typed in Arial, 12 point (footnotes 10 point), 1½ spacing.
- Authors of contributions are to supply their university degrees, professional qualifications and professional or academic status.
- Footnotes must be numbered consecutively. Footnote numbers should be in superscript without any surrounding brackets.

The manuscript will be submitted to a referee for evaluation. The editors reserve the right to change manuscripts to make them conform with the house style, to improve accuracy, to eliminate mistakes and ambiguity, and to bring the manuscript in line with the tenets of plain legal language.

The following general style pointers should be followed:

- First reference to books: eg UO Umozurike *The African Charter on Human and Peoples' Rights* (1997) 21.
- First reference to journal articles: eg C Anyangwe 'Obligations of states parties to the African Charter on Human and Peoples' Rights' (1998) 10 *African Journal of International and Comparative Law* 625.
- Subsequent references to footnote in which first reference was made: eg Patel & Watters (n 34 above) 243.
- Use UK English.

- Proper nouns used in the body of the article are written out in full the first time they are used, but abbreviated the next time, eg the United Nations (UN).
- Words such as 'article' and 'section' are written out in full in the text. Where possible, abbreviations should be used in footnotes, eg ch; para; paras; art; arts; sec; secs. No full stops should be used.
- Words in a foreign language should be *italicised*.
- Numbering should be done as follows:
 - 1
 - 2
 - 3.1
 - 3.2.1
- Smart single quotes should be used; if something is quoted within a quotation, double quotation marks should be used for that section.
- Quotations longer than thirty words should be indented and in 10 point, in which case no quotation marks are necessary.
- The names of authors should be written as follows: FH Anant.
- Where more than one author are involved, use '&': eg FH Anant & SCH Mahlangu.
- Dates should be written as follows (in text and footnotes): 28 November 2001.
- Numbers up to ten are written out in full; from 11 use numerals.
- Capitals are not used for generic terms — 'constitution', but when a specific country's constitution is referred to, capitals are used — 'Constitution'.
- Official titles are capitalised: eg 'the President of the Constitutional Court'.
- Refer to the *Journal* for additional aspects of house style.

2002 SUBSCRIPTIONS

Subscription enquiries and orders to:
JUTA Client Services, JUTA Law, PO Box 24299, Lansdowne 7779, South Africa
Telephone: (021) 797 5111
Fax: (021) 761 5861
E-mail: cserv@juta.co.za

SOUTH AFRICA

R396,00 (14 % VAT included) plus R76,00 postage and packaging: R472,00

REST OF AFRICA

R347,36 plus R100,00 surface postage and packaging: R447,36
R347,36 plus R218,00 airmail postage and packaging: R565,36

REST OF THE WORLD

R347,36 plus R120,00 surface postage and packaging: R467,36
R347,36 plus R290,00 airmail postage and packaging: R637,36

**THE CENTRE FOR HUMAN RIGHTS
UNIVERSITY OF PRETORIA**

The Centre for Human Rights, founded in 1986, is part of the Faculty of Law of the University of Pretoria. The main focus of the Centre is human rights law in Africa.

For full information on the Centre, see www.up.ac.za/chr or contact

The Director
Centre for Human Rights
Faculty of Law, University of Pretoria
Pretoria 0002, South Africa
Tel: (27) 012 420 3810/3034
Fax: (27) 012 362 5125
chr@postino.up.ac.za

Staff

Christof Heyns

Director of the Centre for Human Rights; Professor of Human Rights Law in the Faculty of Law

Norman Taku

Assistant Deputy Director

Shane Stoffels

Financial Manager

Jan Bezuidenhout

Project Manager: SASVO

Joelene Chetty

Project Manager: Gender Unit

Isabeau de Meyer

Project Manager: LLM; Administrator

Gill Jacot Guillarmod

Senior Programme Manager; Liaison Officer

Lirette Louw

Project Manager: HIV/AIDS in Southern Africa

Morné van der Linde

Project Manager: Pretoria Good Governance Academy; Research Associate

Carole Viljoen

Project Manager: Integrated Bar Project; Administrator

Sam Ndayishimye

Project Officer: LLM and Moot

Melton Netshimbo

Project Officer: Gender Unit

Martin Nsibirwa

Project Officer: LLM and Moot; Research Associate

Sarita Pienaar-Erasmus

Deputy Financial Manager

Charmaine Pillay

Deputy Financial Manager

Meriam Maboya

Financial Officer

Michelo Hansungule

Raoul Wallenberg Institute Visiting Professor of Human Rights Law

Frans Viljoen

Director of Academic Programmes; Professor of Law in the Faculty of Law

Stu Woolman

Research Associate; Senior Lecturer in the Faculty of Law

Rose Lee

Student Assistant

Evarist Baimu

Research Associate

Projects

Master's Programme (LLM) in Human Rights and Democratisation in Africa

Master's Programme (LLM) in Trade and Investment Law in Africa

Master's Programme (LLM) in Human Rights and Constitutional Practice

African Human Rights Moot Court Competition

Integrated Bar Project (IBP)

Human Rights Law in Africa Series

African Human Rights Law Journal

Gender Unit

Pretoria Good Governance Academy

HIV/AIDS and Human Rights in SADC Research Project

Socio-Economic Rights Research Project

Database on Human Rights in Africa

Constitutional Law of South Africa

Southern African Student Volunteers (SASVO)

**CHART OF RATIFICATIONS:
OAU/AU HUMAN RIGHTS TREATIES**
Position as at 31 July 2002

	African Charter on Human and Peoples' Rights	OAU Convention Governing the Specific Aspects of Refugee Problems in Africa	African Charter on the Rights and Welfare of the Child	Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights
COUNTRY	Ratified/ Acceded	Ratified/ Acceded	Ratified/ Acceded	Ratified/ Acceded
Algeria	01/03/87	24/05/74		
Angola	02/03/90	30/04/81	11/04/92	
Benin	20/01/86	26/02/73	17/04/97	
Botswana	17/07/86	04/05/95	10/07/01	
Burkina Faso	06/07/84	19/03/74	08/06/92	31/12/98
Burundi	28/07/89	31/10/75		
Cameroon	20/06/89	07/09/85	05/09/97	
Cape Verde	02/06/87	16/02/89	20/07/93	
Central African Republic	26/04/86	23/07/70		
Chad	09/10/86	12/08/81	30/03/00	
Comoros	01/06/86			
Congo	09/12/82	16/01/71		
Côte d'Ivoire	06/01/92	26/02/98		
Democratic Republic of Congo	20/07/87	14/02/73		
Djibouti	11/11/91			
Egypt	20/03/84	12/06/80	09/05/01	
Equatorial Guinea	07/04/86	08/09/80		
Eritrea	14/01/99		22/12/99	
Ethiopia	15/06/98	15/10/73		
Gabon	20/02/86	21/03/86		
The Gambia	08/06/83	12/11/80	14/12/00	30/06/99
Ghana	24/01/89	19/06/75		
Guinea	16/02/82	18/10/72	27/05/99	
Guinea-Bissau	04/12/85	27/06/89		
Kenya	23/01/92	23/06/92	25/07/00	
Lesotho	10/02/92	18/11/88	27/09/99	
Liberia	04/08/82	01/10/71		
Libya	19/07/86	25/04/81	23/09/00	
Madagascar	09/03/92			

(2002) 2 AFRICAN HUMAN RIGHTS LAW JOURNAL

	African Charter on Human and Peoples' Rights	OAU Convention Governing the Specific Aspects of Refugee Problems in Africa	African Charter on the Rights and Welfare of the Child	Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights
COUNTRY	Ratified/ Acceded	Ratified/ Acceded	Ratified/ Acceded	Ratified/ Acceded
Malawi	17/11/89	04/11/87	16/09/99	
Mali	21/12/81	10/10/81	03/06/98	10/05/00
Mauritania	14/06/86	22/07/72		
Mauritius	19/06/92		14/02/92	
Morocco		13/05/74		
Mozambique	22/02/89	22/02/89	15/07/98	
Namibia	30/07/92			
Niger	15/07/86	16/09/71	11/12/96	
Nigeria	22/06/83	23/05/86		
Rwanda	15/07/83	19/11/79	11/05/01	
Sahrawi Arab Democratic Republic	02/05/86			
São Tomé and Príncipe	23/05/86			
Senegal	13/08/82	01/04/71	29/09/98	29/09/98
Seychelles	13/04/92	11/09/80	13/02/92	
Sierra Leone	21/09/83	28/12/87	13/05/02	
Somalia	31/07/85			
South Africa	09/07/96	15/12/95	07/01/00	03/07/02
Sudan	18/02/86	24/12/72		
Swaziland	15/09/95	16/01/89		
Tanzania	18/02/84	10/01/75		
Togo	05/11/82	10/04/70	05/05/98	
Tunisia	16/03/83	17/11/89		
Uganda	10/05/86	24/07/87	17/08/94	16/02/01
Zambia	10/01/84	30/07/73		
Zimbabwe	30/05/86	28/09/85	19/01/95	
TOTAL NUMBER OF STATE PARTIES	53	45	27	6