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

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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

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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] regional[6] and global[7] 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.

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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), advisory[10] 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, bi-lateral and multilateral and international treaties.[15] The Court must therefore not limit itself to the African Charter, but can refer to other

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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 multilateral 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

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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

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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

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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.

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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]

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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.