THE CHALLENGES FACING AFRICAN COURT OF HUMAN AND PEOPLES' RIGHTS

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Introduction

The idea for the creation of the African Court of Human and Peoples' Rights (the Court) was first raised in 1961, in the Law of Lagos Resolution[1]. But it was not until 1998 that the Assembly of Heads of State and Government of the OAU (the Assembly) adopted the Protocol to establish the Court[2] which came into force on the 25th of January 2004. After some delay caused to the actual establishment of the Court due to the integration of the African Court of Human and Peoples' Rights and the Court of Justice of the African Union[3], the 4th AU Summit in January 2006 saw the election of the eleven judges.

The rationale of the Court is to strengthen the regional human rights protection system, as it has always been the view that the regional system is weak and ineffective for it has always lacked an institution capable of producing enforceable decisions, mainly because the African Commission of Human and Peoples' Rights (the Commission) can only make recommendations. To provide the African human rights regime "with its missing link",[5] the Protocol not only has vested the Court with the power to render binding and

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[1] "The Law of Lagos" Resolution in M. Hamalengwa and others (eds) *The International Law of Human Rights in Africa* (The Hague: Martinus Nijhoff Pub., 1988) on 37 see Declaration 4

[2] Protocol to the African Charter of Human and Peoples' Rights on the Establishment of the African Court of Human and Peoples' Rights (the Protocol), Ouagadougou, 1998. It came into force in 2004 upon the ratification by the 15th Member State. At present 23 African states have ratified the Protocol including: Algeria, Burkina Faso, Burundi, Comoros, Côte d'Ivoire , Gabon, Gambia, Ghana, Kenya, Libya, Lesotho, Mali, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Rwanda, South Africa, Senegal, Tanzania, Togo and Uganda

[3] Decision on the Seats of the Organs of the African Union, Assembly/AU/Dec. 45 (III) Rev 1 produced at the 3rd Ordinary Session of the AU states "…that the African Court on Human and Peoples' Rights and the Court of Justice should be integrated into on court"

[4] C. E. Welch, *Protecting Human Rights in Africa: Roles and Strategies of Non-Governmental Organizations*, (Philadelphia, University of Pennsylvanian Press, 1995) Ch. 5 pg. 151

[5] B. Kioko, "The African Union and the Implementation of the Decision of the African Court on Human and Peoples' Rights" 15 *Interights Bulletin*, Vol. 1 (2005), 7-9

enforceable decisions[6], it has also made provisions for the Court to exercise a relatively wide jurisdiction, as long as the Court functions in such a way as to complement and reinforce the Commission as per Article 2 of the Protocol.

The Court is vested with three heads of jurisdiction: a) contentious, b) advisory and c) conciliatory and even these heads of jurisdiction are given relatively wide scope. The inclusion of the advisory[7] and (to a lesser extent) the conciliatory jurisdictions[8] within the Courts powers will ensure that the Court will be able to, over time, develop a persuasive or even authoritative status vis-à-vis member states. The reason is that the advisory jurisdiction under Article 4 provides the Court the option of a 'soft' method of promoting respect for human rights [9] which has the potential to win the acceptance of African states than a 'hard' method of condemning violations, which runs the risk of rousing a negative stance of state parties against the Court. Nevertheless, for the Court to be truly effective as a mechanism to protect human rights as opposed to simply promoting it, the Court also needs and has the power to condemn violations and order appropriate remedies[10] under its contentious jurisdiction. This jurisdiction extends to all cases and disputes submitted to it concerning the interpretation and application of the Charter, the Protocol and any ratified human rights instrument[11] thus creating a forum where international human rights obligations (especially the Charter) will be enforced.

So, while the scope of the contentious jurisdiction (*ratione materiae*) of the Court is quite wide, the Court' *locus standi* provisions are comparatively restrictive thus limiting the jurisdiction of the Court in general. This is evident from the reading of Article 5 of the Protocol, which provides that the Commission, the state party that has lodged a complaint to the Commission, the state party against which the complaint has been lodged, a state party whose citizen is a victim of human rights violations and the African intergovernmental organisations (for matters under their jurisdiction) have compulsory standing. Access is also available in cases where individuals and non-governmental organisations (NGOs) with observer status before the Commission wish to make a complaint under Article 5(3). However, this is an optional access only, in the sense that the state party against whom the complaint is being made must have declared its acceptance of the competence of the Court to receive cases under Article 5(3).[12]

[6] Arts 28 - 31of the Protocol
[7] Article 4 of the Protocol
[8] Article 9 of the Protocol
[9] Ap van der Mei, "The Advisory Jurisdiction of the African Court of Human and peoples' Rights", 5 *African Human Rights Law Journal* (2005), 27-45
[10] Article 27(1) of the Protocol
[11] Article 3(1) of the Protocol
[12] As laid out in Art. 34(6) of the Protocol

From the short description of the Court's features, the most striking aspect highlighted by the Protocol is clearly the fact that the Court can only function as long as it does so within the African human rights protection framework that already exists. Although, it is foreseen that the human rights regime already in place and the Court will be mutually reinforcing, there is a risk that the system already in place can weaken the way the Court will operate once it is up and running. Thus the next sections will explore the Court's dependence on the existing structures and how they may potentially present challenges for the Court.

1. The Court and Its *Ratione materiae* Jurisdiction

Articles 3(1) and 7 of the Protocol give the Court a broad jurisdiction by allowing it to interpret and apply the African Charter of Human and Peoples' Rights (the Charter) as well as any other human rights instruments that have been ratified by the states concerned.[13] This innovative provision has been widely welcomed as it establishes a court which has the responsibility to hold states to all their human rights obligations and to establish continent-wide standards. To date, African states in general had shown a "willingness to subscribe formally to international and regional norms, while at the same time (violating) those undertakings with near impunity".[14] Although, the advantage of having a forum in which all these laws will be applied and enforced is an attractive proposition, there are two concerns that can be raised about the contentious jurisdiction of the court. Firstly, what will be the effect of the application of the Charter on the performance of the Court? And secondly what will be the effect of the application of all the human rights obligations of the states that have ratified the Protocol.

1.1- Application of the Charter

The African Court will interpret and apply the African Charter as a matter of course. This is as it has been ratified by all fifty-three African states.[15] Moreover, it is an appropriately African instrument, which very progressively gives due prominence to all three generations of rights, around

[13] This provision is broader in scope than the provisions of the other two regional human rights systems. This is as new Art 32(1) of the European Convention and the Art 62(3) of the American Convention limit the contentious jurisdiction of the Courts to the application of the Conventions and their Protocols.

[14] J. Allain & A. O'Shea, "African Disunity: Comparing Human Rights Law and Practice of North and South African States" 24 *Human Rights Law Quarterly* (2002), 86-125

[15] *ibid*

which the Court can establish norms that will be applicable to Africa as a whole, which will in turn contribute to a unified regional approach to human rights. Additionally, the Charter will be applicable as well as enforceable directly in a court for the first time, whereas in the past the Commission had applied the Charter but had failed to enforce any of its decisions or even gained substantive acceptance of its annual reports.[16] Apart from this, the Charter has been mentioned in very few cases in the domestic courts and in most of these instances, only as an interpretive aid as opposed to being a fully enforceable source of rights.[17]

However, despite the fact that the Charter will gain more important role in enforcing rights across the continent due to the Court, the Charter itself is a weak document. One of the major drawbacks of this otherwise innovative and comprehensive document is the fact that, although the Charter has provided for its own application by the Commission to fulfil its protective mandate, it has subsequently failed to provide the Commission with any power of enforcement.[18] Even more crucially, the Charter also has substantive weaknesses such as the extensive number of "clawback" clauses incorporated into the articles setting out the rights[19] as well as the potential of the abuse of the language of individuals' duties in articles 27-29 of the Charter.[20] It is these substantive weaknesses that will affect the Court's functions and therefore present a challenge to the Court.

In addition to allowing violations of fundamental human rights due to clawback clauses, the Charter can also potentially contribute towards the actual violations of human rights. This is due to the incorporation of individuals' duties towards the state and the family in the Charter in Articles 27 to 29. These "duties" have raised concerns generally over the hypothetical possibility of the prioritisation of the states' rights over individual rights to

[16] Over the years, the OAU/AU Assembly and Summit of African leaders adopted the Commission's reports without much discussion but at the 3rd Ordinary Session of the AU Assembly, the Commission's Annual Activity report was not adopted at all. This shows that the work of the Commission was either accepted for a formalistic show of adherence to the Commission or was rejected.

[17] F. Viljoen, "Application of the African Charter on Human and Peoples' Rights by Domestic Courts in Africa" 43 *Journal of African Law* (1999), 1-17

[18] C. E. Welch, supra note 4

[19] M. Mutua, "The African Human Rights Court: A Two-Legged Stool?" 21 *Human Rights Quarterly* (1999), 342-363 and M. Mutua, "The African Human Rights System: A Critical Evaluation", *Human Development Reports* (2000), Background Paper sponsored by UNDP at: http://hdr.undp.org/docs/publications/background_papers/MUTUA.PDF

[20] C. E. Welch, supra note 4, pp 150-152

the disadvantage of the individuals' freedoms.[21] However, the more trenchant and specific critique is made in light of the treatment of rights of women in the Charter.

The duties the Charter envisages in its formulation of peoples' right are the duties one individual owes to another individual as well as to his/her community and state as well as the duties the states bear towards their respective subjects.[22] Concerns about the potential abuse of the language of duties in light of women's rights have been raised as the Charter provides that a state is to contribute to family life as the "custodians of moral and traditional values".[23] Commentators such as Claude Welch have pointed out that this may potentially have an unintended negative effect in that when interpreted narrowly within a conservative court/forum, this provision could result in the entrenchment of patriarchal norms, cultural practices and institutions that are harmful to women within the regional framework.[24] Thus in this instance, the challenge for the African Court is to ensure that the judges exercise a progressive attitude towards women's rights and interpret the language of duties in connection with article 18(3) which is intended to ensure the elimination of discrimination against women as well as the protection of women as stipulated in other international declarations and conventions.[25]

1.2- Application of all other Human Rights Obligations

From the analysis above, it becomes clear that the substantive weaknesses of the Charter will require the Court to apply the Charter in conjunction with other sources of international human rights obligations as the Charter cannot offer any enforceable protection in view of certain rights. This must have become obvious to the drafters of the Protocol as well, as they had the foresight to extend the contentious jurisdiction of the regional court far beyond the boundaries expected of regional courts[26] and gave the Court the jurisdiction to interpret and apply "any other relevant Human Rights instrument ratified by the state concerned".[27]

This can give the Court a wide base of tools ranging from United Nations documents to regional as well as sub-regional documents that can be applied

[21] The inclusion of the duties of individuals towards the state has not resulted in any actual human rights violations as per Mutua (supra note 19) or Welch (supra note 4)

[22] Art. 27(1) of the Charter

[23] Art 17(3) of the Charter

[24] C. E. Welch, "Human Rights and African Women: A Comparison of Protection Under Two Major Treaties" 15 *Human Rights Quarterly* (1993), 548-574

[25] This might be a reference to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979

[26] For e.g.. the European Court of Human Rights applies the European Convention

[27] Article 3(1) of the Protocol

by the Courts to protect human rights as African states have tended up to now to ratify a great many international human rights treaties.[28] The only limit placed upon the potential application of all these available tools is the requirement that the state in question should have ratified any or all of these documents.

The potential width of the jurisdiction of the Court, although quite impressive and advantageous for the Court in one way, may however present the Court with two possible challenges. The first challenge will arise out of the potential overlapping of jurisdictions of the Court and the host of sub-regional bodies that have proliferated under the AU umbrella. This will be analysed in the next section. The second problem arises from the fact that Africa is a big continent with fifty-three states that have different legal systems and diverse patterns of ratification of international treaties. Commentators regularly focus on the disunity/diversity that exists within the continent when it comes to the treaties they ratify or the reservation they make to the treaties [29] and this disunity is similarly true for the twenty-three states that have ratified the Protocol.

Most of the twenty-three states have consistently ratified many of the Conventions sponsored by the United Nations[30] as well as some of the African human rights treaties[31], although there are incidences of states not ratifying specific conventions. The overall effect of the disunity in the ratifications will have the effect of creating a system in which the Court will not be able to use the same instruments for similar cases from different states and the interpretation of rights may, as a consequence, differ. This will mean that the Court will find it harder to establish any general or continent-wide norms.[32] Moreover, there is the issue that as more African states ratify the Protocol and accept the jurisdiction of the Court, the erratic pattern the other states have ratified human rights instruments will exacerbate this problem. In

[28] In R.W. Eno, "The Jurisdiction of the African Court on Human and Peoples' Rights" 2 *African Human Rights Law Journal* (2002), 223-233, the author discusses the fact that many African states ratify a great many treaties due to internal and external pressures and for international public relations reasons

[29] J. Allain and C. O'Shea, supra note 14

[30] All 22 states have ratified the ICCPR, CEDAW and the CRC (although the last two are subject to reservations by Algeria and Libya)

[31] For e.g. the OAU Convention Governing the specific Aspects of the Refugee Problems in Africa, The African Charters on the Rights and Welfare of the Child and The African Charter on Human and Peoples' Rights on the Rights of Women in Africa

[32] Although this is difficult in any system, for example, see the ECHR issues and the arguments about margins of appreciation given to states in P. Mahoney, "Marvellous Richness of Diversity or Invidious Cultural Relativism" 19 *Human Rights Law Journal* (1998), pgs 1-5

addition to the problems caused by the different patterns of ratification of human rights treaties, some of the ratifications by these twenty two states have been limited in scope by effective reservations.[33]

These problems will damage the Court's standing as a source of general norms which other courts can follow as the Court will seem to be applying Human Rights instruments inconsistently and possibly producing inconsistent judgements. Moreover, there is a possibility that more states will start to utilise their right to place reservations on their international duties which will further exacerbate the problems to be encountered by the Court.[34]

2. The Court and other Courts and Institutions

2.1- The Challenge posed by Sub-Regional Courts

The broad jurisdiction of the Court as provided for in Art. 3(1) will raise another set of problems as it is not clear whether or not the Court's jurisdiction should extend to interpreting and applying sub-regional economic treaties such as the African Economic Community (AEC) Treaty, the Common Market for Eastern and Southern Africa (COMESA) Treaty, the East African Community (EAC) Treaty, Economic Community of West African States (ECOWAS) Treaty and the Southern African Development Community (SADC) Treaty. These treaties are not human rights instruments as such, but include human rights concerns or references to the African Charter,[35] which are integrated into the treaty as "part of the overall objectives of the organisation or as principles underlying their action". [36]

If the Court, in deciding the parameters of its own jurisdiction as allowed by the Protocol,[37] chooses to apply these instruments as result of their human rights dimensions, not only will this contribute to the problems caused by the

[33] In J. Allain & A. O'Shea, supra note 14 the authors discuss the fact that some reservations may not be effective. For example Lesotho's reservation to CEDAW is "meaningless" as the Constitution of the State includes provisions against sexual discrimination and thus it is unlikely that compliance with CEDAW would conflict with the Constitution.

[34] Note that the Vienna Convention on the Law of Treaties of 1969 limits the states' right to do so. Additionally, the African Commission's jurisprudence has not suffered unduly from any reservation made by states as it is not common practice by most African states to actually utilize reservations as explained by Allain and O'Shea, i*bid*

[35] Article 6(d) of the EAC Treaty, Article 6 of the COMESA Treaty and Article 4(g) of the ECOWAS Treaty

[36] N. J. Udombana "Protecting Human Rights In Africa through Supra-national Courts" 15 *Interights Bulletin*, Vol. 1 (2005), 13-15 (on 13)

[37] Article 3(1) allows the Court to interpret and apply the Protocol itself and article 3(2) indicates that the Court has the power to rule on or decide a dispute over its jurisdiction.

incoherent ways states ratify treaties (as discussed in the previous section) but the problem of overlapping jurisdictions and contradictory decisions will also emerge as these treaties have made provisions for their own judicial institutions to interpret and apply their treaties. In fact, this problem of overlapping jurisdictions may emerge regardless of the Court's decision to apply the treaties or not. This will result from the fact that all the treaties have made provisions extending their courts' jurisdiction to applying and interpreting the African Charter. So, whatever the Court decides, there is a possibility of overlapping jurisdictions where several courts find themselves operating in the same space concurrently.

Having a multiplicity of courts certainly has its advantages as a single court is likely to be weighed down with an unmanageable caseload and does suggest that there is more political will among the African States to be bound by international instruments than there was at the end of the 1990's. However, the existence of these numerous courts adjudicating on the basis of the same instruments can have its disadvantages too. In the case of a specific violation in a country which has ratified the Protocol and also belongs to one of the regional intergovernmental organisations which has its own court, both the Court and one of the regional economic community (REC) courts will have the competence to interpret the Charter and the treaties of the intergovernmental agencies (assuming the Court has decided to interpret and apply the REC treaties). This may result in differing/contradicting standards of human right protection being produced by the courts which will create confusion as to which judgement to apply as the Protocol has in no way provided for the Court's primacy in any situation. This damages the standing of the Court, as ideally, there should not be any avenue of doubt as to the applicability of the Court's judgements, especially in matters surrounding the interpretation of the African Charter.

This challenge for the Court is further enhanced when considering the fact that the Protocol's failure to establish for the superiority of the Court's competence also extends to situations where the treaties establishing the REC courts have been provided with exclusivity clauses, establishing these courts primacy in any disputes concerning the application and interpretation of the sub-regional/REC treaties.[38]

Another consideration is that as there are so many courts at the regional and sub-regional levels, there is the opportunity for the same case to be brought

[38] G. Naldi and K. Magliveras , "Reinforcing the African System of Human Rights: The Protocol on the Establishment of a Regional Court of Human Rights" 16 *Netherlands Quarterly of Human Rights* (1998), p 431

to several different forums with slight alteration to the presentation of the case[39]. Alternatively, there is the possibility that the parties concerned belong to various groups and may choose to present the case in one forum but not another as it would be more convenient for that one party.[40]

2.2 The African Court of Justice

The African Union's Court of Justice (ACJ) is another regional court that has the potential of creating challenges for the Court. Originally, some of the challenges it may have presented would have been similar to the ones created by having so many other courts. However, in July 2004, during the 3rd Ordinary Session of the AU, the Assembly of the AU decided to integrate the ACJ and the African Court of Human and Peoples' Rights due to a lack of financial resources for two new separate institutions[41]. This was a wise decision as it is questionable whether African states have the "material wherewithal to operate two supra national judicial institutions".[42] This merger poses an additional advantage in that all problems of overlapping and concurrent jurisdiction and possible contradictory decisions will be avoided. Nevertheless, this merger in itself may actually present the Court with one of the greatest challenges to date.

To implement this merger, it has been suggested the Court will be made into a subsidiary branch of the ACJ which after the merger will be renamed the Court of Justice and Human Rights of the African Union.[43] This merger was clarified by the Draft Protocol on the Integration of the African Court on Human and Peoples Rights and the Court of Justice of the African Union (draft merger document) where it was explained that the ACJ would become the "principal judicial organ of the African Union" (Art. 2(2)) and "the Court

[39] C. A. Odinkalu raised this point in a Presentation titled: "Complementarity, Competition or Contradiction: The Relationship between the African Court on Human and Peoples' Rights and Regional Economic Courts in East and Southern Africa", Conference of East and Southern African States on the Protocol Establishing the African Court on Human and Peoples' Rights, Gaborone, Botswana, 9-10 December 2003

[40] This is called forum-shopping in the United States of America, when plaintiffs bring the same case to the court which will be most favourable to their case, which has negative aspects on the concepts of justice and fairness.

[41] Decision on the Merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union, Doc. EX/CL/162 (VI)

[42] N.J. Udombana, "An African Human Rights Court and an African Union Court: A Needful Duality or a Needless Duplication" 28 *Brooklyn Journal of International Law* (2003), 811-866

[43] Draft Protocol on the Integration of the African Court on Human and Peoples Rights and the Court of Justice of the African Union , EX.CL/195 (VII), Art. 2(1)

shall be constituted by a Specialised Human and Peoples' Rights Judicial Division" (Art. 2(3)) which will be one of the "special chambers" that the Protocol Establishing the ACJ[44] has made provisions for.

Many NGO's and academics have been against the merger as they argue this would mean that the Court would lose its independence from the AU and possible from the political concerns of the member states as well as lose its specialised nature.[45] The second set of concerns was raised with regards to the differences that exist between the two institutions, such as the different levels of expertise of the judges as well as the different competences of the courts (even if there are areas of overlapping jurisdiction).[46] However, the draft merger document has addressed this issue somewhat as it includes provisions for at least seven of the judges to have a higher level of expertise in human rights laws as per Art.3(1) of the draft merger document

All the concerns or advantages aside, the two courts have not yet been integrated and both institutions are developing at their own respective paces and thus they are in different phases of establishment. This is due to the decision taken during the 5th Ordinary Session in July 2005, in Sirte, Libya, where the assembly decided to establish the African Court of Human and Peoples' Rights immediately and not wait for the merger document to be ratified or for the protocol document establishing the ACJ into force.[47] Once the ACJ protocol and/or the draft merger document comes into force (whichever comes first), it is likely that the merging process will take place and this may not be an easy task for the African Union or the African human rights system in general.

3. The Commission and the Court

The one institution that will have the greatest effect on the Court is the African Commission on Human and Peoples' Rights due to Article 5 of the Protocol, which provides that the only groups who have automatic access to the Court are African states, African Intergovernmental organizations as well

[44] Draft Protocol Relating to the Statute, Composition and Functions of the Court of Justice of the African Union, CAB/LEG/23.20/45/VOL/II (2003) (the Draft Protocol of the ACJ)

[45] C. A. Odinkalu, "Judicial Nomination Procedure for the African Court on Human and Peoples' Rights" 15 *Interights Bulletin*, Vol. 1 (2005), 28-30 (on 29)

[46] Amnesty International Press Release, "African Union: Assembly's Decision Should not Undermine the African Court", AI Index: IOR 30/020/2004 (Public), 9 August 2004

[47] Coalition of an Effective African Court on Human and Peoples' Rights, "About the African Court", http://www.africancourtcoalition.org/editorial.asp?page_id=16 (accessed 27/5/07)

as the Commission. It is generally the view that states normally will not use their standing to bring other states to the Court[48] just as the African intergovernmental organisations won't use their standing in a significant way as these bodies tend to have their own courts. It therefore remains for the Commission to bring the majority (if not all) of the cases to the Court. The Commission's influence on the Court is further strengthened by Article 8, which states that there should be complementarity between the Commission and the Court as the reason the Court was founded in the first place was to reinforce the protective mandate of the Commission as well as to improve the image of human rights and the Commission in Africa.

These two provisions, read in conjunction, may be interpreted as meaning that the Commission and the Court will exist as a two-tiered system, where cases must be considered first by the Commission and then by the Court. This will be similar to the way the European system used to function before the establishment of the single permanent court[49] as well as being similar to the way the Inter-American system functions.[50]

If the African system, like the Inter-American system or the old European system chooses to accept the image of the Commission and the Court as being part of a two-tiered system acting within a single regional human rights regime, the African Court will have to decide whether the Court will ultimately accept the Commission's decisions about the admissibility of cases as well as to what extent the Court will adopt the Commission's findings and decisions/recommendations. In other words, the Court will have to decide as to the extent and intensity of the independence of the Court from the influence of the Commission.

In deciding its Rules of Procedures, the Court can apply Article 6[51] to its full extent so that when a case is presented to the Court, (even by the Commission), despite the fact that the Commission has already decided on the admissibility of the case on the basis of the same Charter provision (Article 56), the Court can repeat the procedure. Likewise, the Court can choose to maintain

[48] According to Judge Piza Escalante of the Inter-American Court of Human Rights in the case of *Vivianna Gallardoet al, v Costa*, No. G 101/81, Judgement of November 13, 1981, 20 I.L.M. 1424 (1981); Human Rights Law Journal 328 (1981)

[49] R. Murray, "A Comparison Between the African and European Courts of Human Rights" 2 *African Human Rights Law Journal* (2002), 195-222 (on 201))

[50] D. Padilla, "An African Human Rights Court: Reflections from the Perspective of the Inter-American System", 2 *African Human Rights Law Journal* (2002), 185-194, and A. E. Dulitzky, "The Relationship between the African Commission and the African Court: Lessons from the Inter-American System" *15 Interights Bulletin* Vol. 1 (2005)

[51] Article 6 of the Protocol

its relative independence and get involved in fact-finding procedures,[52] without having to accept the findings of the Commission.

This higher level of independence of the Court may present the Court with the advantage of not being burdened with the "severe image problems… associated"[53] with the Commission, as it is possible that the Court will be judged deficient due to the image of the Commission. The additional advantage of keeping the Court independent of any of the Commission's decisions and findings will lie in the fact that the Court's procedures, as laid out in Articles 27-30, provide for more depth and formality in the Court inquiries and judgments than can be provided for by the less legally structured Commission[54] whose procedures suffer from several defects. Critics of the Commission often point out the Commission's procedural defects which have tended to include problems such as delays in between the final hearing and dissemination of the findings[55] (which are also not disseminated widely enough).[56]

Moreover, the fact that the Commission tended not to give very long or any properly reasoned decisions,[57] and has in the past been known to issue decisions without the full facts of cases[58] further strengthen the argument for keeping the two institutions separate. However, in recent years, the Commission has improved its reports by presenting much longer and much more de-

[52] As provided for by Article 26 of the Protocol

[53] M. Mutua, supra note 19, page 360

[54] J. Harrington "The African Court on Human and Peoples' Rights" in M.D. Evans and R. Murray (eds.), *The African Charter of Human and Peoples' Rights- System in Practice*, (Cambridge University Press, 2002)

[55] This is as Article 55 of the Charter places no time-constraints on the Commission to release its decision, which has in several cases means that the Commission could potentially spend up to several years to come to a decision (*ibid)*

[56] M. Mutua, supra note 19, points out that "The Commission arranges its decisions into sections dealing with facts…admissibility of evidence and the final conclusion. However, each of these sections is scant in both substance and reasoning"

[56] For e.g, J. Harrington, supra note 54, points out the case of Communication 59/91, *Embga Mekongo Louis v Cameroon, Eighth Activity Report* 1994-1995, Annex VI (Documents of the African Commission) which was a case where the Commission issued a decision without any information on the facts of the cases.

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tailed reasoned reports.[59] This improvement notwithstanding, some academics continue to argue that the Commission's reports are still not adequately improved enough for them to be a credit to the Court.[60] In addition, the Commission's reports are based on a quasi-judicial procedure, thus the resulting report may not be sufficiently compatible with the Court, which will require a higher level of legalism in its procedures. Furthermore, keeping the Court and the Commission's institutional identities somewhat separate will allow the Court to explore possible avenues of development (as was intended in the drafting of the protocol, which foresaw a conciliatory role for the Court[61]) as opposed to a simple system of being a forum for appeals for decisions taken by the Commission.

On the other hand, the Court's retention of so much independence might disadvantage the Court. The most obvious disadvantage of having the Court carrying out its own procedures of deciding the admissibility of cases and actually engaging in full fact-finding hearings is the fact that this may potentially mean that the Commission and the Court are engaged in carrying out identical functions. This duplication of labour will be a waste of financial resources, especially considering the fact that both institutions receive their limited budgets from the same source. This is a crucial point for African supra-national institutions, which tend to be underfinanced.[63] Similarly, the duplication of procedural requirements will also waste time, especially in view of the fact that both the Commission and the Charter will have to carry out the admissibility procedures in line with Article 56 of the African Charter. Moreover, the Commission has been deciding the admissibility of cases and engaging in full fact-finding mission for some time and its experiences in theses areas have reached a level of professionalism which can ultimately benefit the Court a great deal.

Finally, the overstatement of the Court's independence will disadvantage the Court as there is a risk that the Commission will not feel enough of a 'partnership' with the Court to co-operate in any way with the court. This

[59] C. A Odinkalu and C. Christensen, "The African Commission on Human and Peoples' Rights: The Development of its Non-State Communication Procedures", 20 *Human Rights Quarterly* (1998), 235f (on page 277)

[60] A. Motola, "Celebrating Two Decades if the African Charter on Human and Peoples' Rights", *Pambazuka News*, 22nd June 2006, as available on http://www.pambazuka.org/en/category/features/35337

[61] Article 9 of the Protocol

[62] C. E. Welch, supra note 4

[63] This problem actually afflicted the Inter-American System, as the Commission "avoided sending cases on (to the Court) by broadly interpreting its discretion as to which cases to submit…as a result the Court was precluded from exercising its contentious jurisdiction for almost a decade" as per A. E. Dulitzky, supra note 50

may result in a situation where the Commission may choose to function as it has always functioned and will, as a result, broadly interpret its discretion as to which case to submit to the court. [64]As a consequence, very few cases may be sent on to the Court by the Commission which will in effect mean that the Court will hear a small number of cases at best, or more likely, none at all. Furthermore, if the Commission chooses to continue exercising its full protective mandate, a situation of overlapping jurisdictions between the Court and the Commission will develop,[64] with all the potential problems such a situation implies, as discussed above.

Conclusion

In conclusion, it becomes apparent that the Court is being added onto a system which is going through a period of "considerable confusion and flux"[65] with many new institutions coming into being with little or no regard to any of the other institutions or to the already-established mechanisms while the older system remaining largely unchanged. This has created a system where there is/will be a lack of consistency and co-ordination in the way common (human rights) goals are approached in the different AU bodies.[66] This deficiency can affect the Court's operations adversely in several different ways.

Firstly, the lack of co-ordination, as illustrated by the potential situations of possible contradictory judgements, overlapping jurisdictions and duplication of labour between the Court and other AU institutions can lead to a great deal of uncertainty as to the position of the Court within the regional system, especially due to the fact that the Protocol fails to provide for the Court's primacy in all human rights matters. Secondly, the failure to clarify the relationship between the Court and the Commission, which is symptomatic of the lack of consolidation between the institutions, will result in a situation where an institution outside the Court's influence will have the power to decide whether the Court will hear any cases at all. This clearly shows that the Court will depend on the Commission, which has been to a large part condemned for its ineffectiveness.[67] Even if the defects of the Commission will not in reality affect the function of the Court, the image of the Court as a

[64] G. Naldi and K. Magliveras, supra note 38, pg. 434

[65] A. Lloyd and R. Murray, "Institutions With Responsibility For Human Rights Protection Under the African Union", 48 *Journal of African Law* Vol. 2 (2004), 165-186, at 184

[66] Lloyd and Murray *ibid* refer to the "need for co-ordination…from within the AU to ensure that human rights remain central to its agenda"

[67] Although, the Commission's findings have improved, see C. A Odinkalu and C. Christensen, supra note 57

body that is dependant on this much criticised institution can mean that the Court will not be able to inspire as much respect from the states which the Court will ideally require to establish itself as the most important human rights court on the continent.

Most of these problems can be solved by amending the Charter (removing clawback clauses etc.) as well as the Protocol (widening the standing provisions in response to current efforts to afford NGO's automatic standing). However, these amendments can only be made by African states just as it is a matter for the states to comply with the judgements. This will mean that unless the states are prepared to sacrifice some of their interests as well as some of their sovereignty for the good of the regional system, the Court will not be able to effectively and independently play a significant role in the enforcement of human rights. It will therefore be necessary for all the African States to display more political will and dedication to the human rights movement which will in short mean that long-standing African attitudes will have to change more than they already have. Commitment of African states to rule of law is expected to increase in the years to come so that they can be engrained in Africa's political culture. This will undoubtedly take some time. This is clearly manifested in the slow ratification pace of the Court's establishment protocol. Thus the expectation that the Court can immediately "cure" all the problems of the regional human rights system seems to be unachievable in the short term. ■