

SALC Handbook Series

# Justice for all: Realising the Promise of the Protocol establishing the African Court on Human and Peoples' Rights





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## **Realising the Promise of the Protocol establishing the African Court on Human and Peoples' Rights**

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The Southern Africa Litigation Centre (SALC), established in 2005, aims to provide support—both technical and financial—to human rights and public interest initiatives undertaken by domestic lawyers in southern Africa. SALC works in Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mozambique, Namibia, Swaziland, Zambia and Zimbabwe. Its model is to work in conjunction with domestic lawyers in each jurisdiction who are litigating public interest cases involving human rights or the rule of law. SALC supports these lawyers in a variety of ways, including, as appropriate, providing legal research and drafting legal documents, training and mentoring, and monetary support. While SALC aims primarily to provide support on a specific case-by-case basis, its objectives also include the provision of training and the facilitation of legal networks within the region.

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# ABBREVIATIONS

<b>AMU</b>	Arab Maghreb Union
<b>ACJ</b>	African Court of Justice
<b>APRM</b>	African Peer Review Mechanism
<b>AU</b>	African Union
<b>CEN-SAD</b>	Community of Sahel-Saharan States
<b>COMESA</b>	Common Market for Eastern and Southern Africa
<b>EAC</b>	East African Community
<b>ECCAS</b>	Economic Community of Central African States
<b>ECOWAS</b>	Economic Community of West African States
<b>ECOSOCC</b>	Economic, Social and Cultural Council
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>IGAD</b>	The Intergovernmental Authority on Development
<b>IACtHR</b>	Inter-American Court of Human Rights
<b>NGO</b>	Non-Governmental Organisations
<b>OAU</b>	Organisation of African Unity
<b>PAP</b>	Pan-African Parliament
<b>PSC</b>	Peace and Security Council
<b>SADC</b>	Southern African Development Community
<b>UDHR</b>	Universal Declaration of Human Rights
<b>VCLT</b>	Vienna Convention on the Law of Treaties

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# 1 Introduction

## 1.1 Overview of the Protection of Human Rights in Africa

The African regional system for the promotion and protection of human rights, like other systems in other regions of the world, is complementary to human rights protection at the domestic level. The Organisation of African Unity (OAU), the first African-wide umbrella body established on the 25th of May 1963 with the adoption of the OAU Charter by thirty two African states in Addis Ababa, Ethiopia, emphasised exclusive domestic jurisdiction and non-interference in the domestic affairs of member states. The OAU, however, did not provide for a human rights system in its 1963 Charter. Instead, the key aim of the OAU was to promote and forge intergovernmental relations on the continent and to serve as a mechanism to encourage a spirit of solidarity among African states. In 1981, the OAU adopted the African Charter on Human and Peoples' Rights (African Charter)<sup>1</sup> and this was to serve as the main regional human rights treaty for Africa.<sup>2</sup> The African Charter entered into force in 1986 and has since been ratified by all fifty-four members of the African Union. In a bid to update its foundational treaty in line with the more democratic political landscape, and to focus more on economic integration with the adoption of the AU Constitutive Act<sup>3</sup> (Constitutive Act), the OAU in 2000, transformed itself into the African Union (AU).<sup>4</sup> On the 9th of July 2002, the OAU was formally replaced by the AU. Unlike the OAU, where human rights remained under the rubric of the African Commission, the AU, through the Constitutive Act, has expressly ensured that human rights are mainstreamed throughout its organs, activities, and programmes.<sup>5</sup> The Constitutive Act provides

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1 African Charter on Human and Peoples' Rights, adopted 27 June 1981, entered into force 21 Oct. 1986, O.A.U. Doc. CAB/LEG/67/3 Rev. 5.

2 ST Ebobrah 'The Admissibility of Cases Before The African Court on Human And Peoples' Rights: Who Should Do What?' (2009) 3 *Malawi Law Journal* 87 88.

3 The Constitutive Act of the African Union (AU Constitutive Act) adopted in July 2000 and entered into force in May 2001.

4 F Viljoen 'The Africa Regional Human Rights System' in C Krause and M Scheinini *International Protection of Human Rights: A Textbook* 505.

5 B Gawanas 'The African Union: Concepts and implementation mechanisms relating to human rights' in N Bösl and J Diescho (eds) *Human Rights in Africa Legal Perspectives on their Protection and Promotion* (2009) 139-140.

Africa with a continental legal framework for the promotion and protection of human rights. In the spirit of the Constitutive Act, the AU has adopted an institutional focus on human rights, and explicitly emphasises the importance of human rights in all AU activities and programmes.<sup>6</sup> The AU's Constitutive Act gives more prominence to human rights concerns than the OAU Charter. Although the principle of non-interference by states in each other's domestic affairs is retained, it is significantly watered down by enshrining commitment to, and respect for, human rights, democratic principles, the rule of law, and good governance.<sup>7</sup> Significantly, the Constitutive Act affirms the right of AU member states to intervene in a fellow member State as a collective to address gross human rights violations such as war crimes, genocide, and crimes against humanity.<sup>8</sup>

At the normative level, regional instruments and principles have been adopted under the auspices of the AU/OAU to strengthen the legal framework for the protection and promotion of human rights on the African continent. These include the African Charter,<sup>9</sup> the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Rights Protocol),<sup>10</sup> the Protocol on the Establishment of the African Court on Human and People's Rights ('African Court Protocol' or 'Court Protocol'),<sup>11</sup> the Charter on Democracy, Governance and Elections adopted in 2007 and the African Charter on the Rights and Welfare of the Child adopted in 1990.<sup>12</sup>

The African Charter is the main instrument for the promotion and protection of human rights in Africa. Its institutional arm, the African Commission on Human and Peoples' Rights ('African Commission' or 'Commission'), established under article 30 of the African Charter, became operational in 1987. To effectively enforce these instruments, various bodies were established with an express human rights mandate such as the African Commission, the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee), the African Court on Human and Peoples' Rights,<sup>13</sup> the African Court of Justice and the African Court of Justice and Human Rights.<sup>14</sup> Furthermore, as the AU continues to adopt human rights instruments and strengthen

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6 B Gawanas *The African Union* 155.

7 See article 4 (m) of the AU Constitutive Act.

8 Article 4 (h) of the AU Constitutive Act.

9 African Charter on Human and Peoples' Rights, adopted 27 June 1981, entered into force 21 Oct. 1986, O.A.U. Doc. CAB/LEG/67/3 Rev. 5, hereinafter the African Charter or the Charter.

10 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2000) CAB/LEG/66.6.

11 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights .

12 African Charter on the Rights and Welfare of the Child (1990) OAU Doc CAB/LEG/24.9/49.

13 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted June 1998, entered into force Jan. 2004, OAU Doc OAU/LEG/EXP/AFCHPR/PROT (III).

14 Protocol on the Statute of the African Court of Justice and Human Rights, 11th Sess., Assembly/AU/Dec.193 207 (XI) (June 30<sup>th</sup> July 1, 2008).

existing institutions, it has enriched the African human rights protection system and provided an enabling environment within which human rights promotion and protection can be pursued. Amongst these mechanisms are the Pan-African Parliament (PAP), the Economic, Social and Cultural Council (ECOSOCC), the Peace and Security Council (PSC) and the African Peer Review Mechanism (APRM).<sup>15</sup> The following section discusses some of the institutional mechanisms for the enforcement of human rights under the African system for the protection of human rights.

## 1.2 Human Rights Enforcement Mechanisms under the African System

### 1.2.1 The African Commission

The African Commission is provided for under article 30 of the African Charter and was inaugurated in 1987. The African Commission represents the first major African human rights institution, acting as the monitoring organ of the African Charter. The African Commission was established by the African Charter as part of its measures to promote and protect human rights in Africa. The African Commission has both promotional and protective mandates in the realm of human rights in Africa.<sup>16</sup> Prior to the adoption of the Constitutive Act, the African Commission was the only body that victims of human rights violations could turn to for potential relief.<sup>17</sup> There was no judicial forum on the African continent to handle the numerous conflicts and disputes between states, and between individuals and their states.

The African Charter contains an enforcement mechanism for all human rights recognised in its text. An individual complaints mechanism provides for the submission of communications to the African Commission concerning any alleged violations of the protected rights. The Commission is also empowered to examine state reports<sup>18</sup> and interpret the provisions of the African Charter.<sup>19</sup> The individual complaints mechanism, reporting and advisory procedures mandate of the African Commission have aided in the justiciability of socio-economic rights by elaborating the scope and content of the relevant provisions of the African Charter.<sup>20</sup>

The protective mandate of the African Commission is mainly exercised through the

<sup>15</sup> Gawanas *The African Union* 139-140.

<sup>16</sup> See articles 30 & 45 of the African Charter.

<sup>17</sup> M Hansungule *African Courts and the African Commission on Human and Peoples' Rights in N Bösl and J Diescho (eds) Human Rights in Africa Legal Perspectives on their Protection and Promotion* (2009) 232-270.

<sup>18</sup> See art. 62 of the African Charter.

<sup>19</sup> See art. 45(3) of the African Charter.

<sup>20</sup> SA Yeshanew *The Justiciability of Economic, Social and Cultural Rights in the African Regional System Human Rights System* (2011) 151.

consideration of inter-state and individual communications. Such communications are based primarily on allegations of human rights violations protected in the African Charter, though it must be noted that the African Commission has a broader subject matter jurisdiction. Communications alleging violations of rights may be brought to the African Commission for any alleged breaches of the provisions of the African Charter, the African Women's Protocol and other relevant human instruments which may be invoked, based on articles 18(3), 60 and 61 of the African Charter.

### 1.2.2 African Committee of Experts on the Rights and Welfare of the Child

The African Children's Charter provides for its own supervisory body, the African Children's Committee. The African Children's Committee can receive individual and inter-State communications and has a mandate to examine State reports and may undertake fact-finding missions. Emphasis is also placed on the promotional mandate of the African Children's Committee. By ratifying the African Children's Charter, states accept the competence of the African Children's Charter to receive individual and inter-State complaints for any alleged violations of that instrument.<sup>21</sup>

The African Children's Committee handed down its first decision in March 2011, in the *Nubian Children's* case.<sup>22</sup> The case dealt with the position of children of Nubian descent in Kenya. Despite being in the country for generations, Kenyans of Nubian descent are mostly economically disempowered and often experience difficulties in obtaining Kenyan nationality. Problems of acquiring nationality are particularly acute for children and formed the main subject matter of the communication. The African Children's Committee found that the failure of the Kenyan government to grant nationality to the Nubian children violated their right to acquire nationality protected under article 6 of African Children's Charter. According to the African Children's Committee, the Kenyan government allowed children to become stateless by not ensuring that children born on its territory, who are not granted nationality in another state, acquire its nationality thereby breaching the African Children's Charter. The African Children's Committee further held that the difficulties imposed on this particular group of children amounted to unjustifiable discrimination against these children, presumably on the basis of their ethnicity and social origin.<sup>23</sup>

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21 See art.44 of the African Children's Charter.

22 *Institute For Human Rights and Development In Africa (IHRDA) and Open Society Justice Initiative on Behalf of Children of Nubian Descent in Kenya v The Government Of Kenya, Decision: No 002/Com/002/2009.*

23 Para 55-57.

### 1.2.3 African Court of Justice and Human Rights

The AU Constitutive Act provided for the establishment of a judicial organ, the Court of Justice, alongside the African Court, which was already established under the OAU to complement the protective mandate of the African Commission.<sup>24</sup> The AU Assembly adopted the Protocol establishing the African Court of Justice on 11 July 2003. Although the Protocol establishing the African Court of Justice entered into force on 11 February 2009, this Court will never be established. The AU Assembly decided, long after the Protocol of the African Court of Justice had been adopted, that there had to be a merger between the two judicial institutions into the African Court of Justice and Human Rights. The decision to merge the two courts was based on the need to rationalise the existence of the two courts and to make them cost effective. The African Court set up under the African Charter, was devised to deal with allegations of human rights violations against AU members. The Court of Justice, instituted under the AU Constitutive Act, was expected to deal mainly with contentious matters of an economic and political nature. The mandate of the Court of Justice related to disputes about the common policies of the AU,<sup>25</sup> and issues arising from political and socio-economic integration. Although the jurisdiction of the Court of Justice did not explicitly include human rights issues within the Court's writ, the possibility of overlap could not be discounted. On 1 July 2008, the AU Assembly adopted the Protocol on the Statute of the African Court of Justice and Human Rights (Merger Protocol), merging the two courts, the African Court on Human and Peoples' Rights and the African Court of Justice. Viljoen is of the view that the merger of the two courts is an illustration of the AU conflating the legal-political and economic aspects of integration.<sup>26</sup> The Merger Protocol is not yet in force and will enter into force thirty days after the deposit of the instruments of ratification by fifteen member states. To date, seven (7) states have ratified the Merger Protocol, namely Libya, Mali, Burkina Faso, Congo, Benin, Rwanda, and Cote d'Ivoire. Once in force, the African Court of Justice and Human Rights will replace and abrogate both the African Court protocol and the African Court of Justice protocol.

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24 Viljoen *International Human Rights Law in Africa* (2012) 205.

25 Article 9(1)(a) of the AU Constitutive Act.

26 Viljoen *International Human Rights* 448.

### 1.3 Background to the Protocol on the Establishment of an African Court on Human and Peoples' Rights

Two decades after the African Charter entered into force, the African Court on Human and Peoples' Rights ('African Court' or 'Court') was inaugurated to complement the African Commission in the promotion and protection of human rights in Africa. In the wake of serious human rights violations and atrocities across Africa which peaked in the 1980s and 1990s, debate on the establishment of a regional human rights court to strengthen the emerging African human rights system intensified.<sup>27</sup> The movement towards the establishment of an African human rights court may be traced back to 1961, when African jurists assembled in Lagos, Nigeria, for an African "Conference on the Rule of Law" (Conference).<sup>28</sup> The Conference adopted a resolution, subsequently known as "The Law of Lagos", urging African governments to explore the possibility of an African Convention on Human Rights and the establishment of a court.<sup>29</sup> These efforts, however, did not come to fruition as the OAU Charter, adopted in 1963, did not contain any human rights framework or institutions. The issue of judicial enforcement mechanisms was raised again during the deliberations immediately preceding the adoption of the African Charter in 1981.<sup>30</sup> It took almost a decade after the adoption of the African Charter before the adoption of a protocol establishing an African human rights court.

In 1995, government legal experts meeting in Cape Town adopted the first draft protocol of the African Court (Cape Town Draft).<sup>31</sup> Of particular note is that the Cape Town Draft provided for direct access to the Court by individuals as an automatic consequence of ratification by their state. However, the AU Council of Ministers, after deliberating on the draft, referred it back to a further meeting of government legal experts. In 1997, a meeting of government legal experts took place in Nouakchott, Mauritania, where a second draft was adopted (Nouakchott Draft), which amended the Cape Town Draft in material respects.<sup>32</sup>

First, the number of ratifications required for the entry into force of the African Court Protocol was increased from 11 to 15.<sup>33</sup> Second, the Nouakchott Draft made state acceptance of the Court's competence to receive petitions directly from individuals

27 E de Wet, *The Protection Mechanism Under the African Charter and the Protocol on the African Court on Human and Peoples' Rights*, in G Alfredsson, J Grimheden, BG Ramcharan & A de Zayas (eds) *International Human Rights Monitoring Mechanisms: Essays In Honour Of Jakob TH. Moeller* (2001) 713, 724.

28 F Viljoen *International Human Rights Law in Africa* 411.

29 International Commission of Jurists *African Conference on the Rule of Law* (1961) 411.

30 Viljoen *International Human Rights Law in Africa* 411.

31 See GJ Naldi & K Magliveras *The Proposed African Court of Human and Peoples' Rights: Evaluation and Comparison* (1996) 8 *African Journal of International and Comparative Law* 944.

32 Viljoen *International Human Rights Law in Africa* 412.

33 Cape Town Draft, article 31(3); Nouakchott Draft article 33(3).

dependent on an optional declaration, rather than an automatic consequence of ratification.<sup>34</sup> A third meeting of government legal experts and diplomats took place in Addis Ababa, Ethiopia, culminating in the adoption of the Addis Ababa Draft, which retained both the changes effected by the Nouakchott Draft. The OAU Assembly endorsed the Addis Ababa Draft without any further amendments.

The defining moment was the adoption by the OAU Assembly on 9 June 1998 in Ouagadougou, Burkina Faso, of the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights (Court Protocol).<sup>35</sup> This historical event should also be contextualised in the developments of the time. According to Viljoen, the end of the Cold War resulted in a flourish of new international judicial mechanisms linking the adoption of the Court Protocol to a global trend.<sup>36</sup>

The Court Protocol entered into force on 25th January 2004 after the required number of states ratified it. As of April 2014, a total number of twenty-six states have ratified the Court Protocol. The first set of 11 judges of the African Court was elected on 22 January 2006 at the Eighth Ordinary Session of the Executive Council of the African Union. The Court had its first meeting in July 2006 and its second meeting in September 2006.

The African Court has its seat in Arusha, Tanzania, where the International Criminal Tribunal for Rwanda has been located since 1995. In terms of the "Host Agreement between the Government of Tanzania, and the AU on the seat of the African Court on Human and Peoples' Rights in Arusha, Tanzania",<sup>37</sup> the government of Tanzania guarantees the "inviolability" of the Court's archives and records and undertakes to provide security to the court and respect the judges' official diplomatic immunity.

### 1.3.1 Rules of the African Court

The Rules of Court of the African Court<sup>38</sup> were adopted by the African Court on 2 June 2010 at Arusha, Tanzania in accordance with article 33 of the Court Protocol. Article 33 of the Court Protocol empowers the Court, in consultation with the African Commission where appropriate, to draw up its own rules and determine its own procedures. The Rules of Court are divided into five parts. Part I deals with members of the Court, Office of the President of the Court and Vice President of the Court, and the internal functioning of the Court. Part II provides for the rules relating to the Office of the

34 Cape Town Draft, art 6(1); Nouakchott Draft art 6(5).

35 See B Kioko *The Road to the African Court on Human and Peoples' Rights* (1998) 10 *African Society of International and Comparative Law - Proceedings of the Tenth Annual Conference*, Addis Ababa 70.

36 Viljoen *International Human Rights Law in Africa* 412.

37 Adopted on 31st August 2007.

38 See Rules of the African Court on Human and Peoples' Rights (2010).

Registry, whereas Part III provides for the rules relating to the Jurisdiction of the Court. Part IV provides for relevant rules governing contentious proceedings, relations between the African Court and the African Commission, the conduct of written proceedings, the conduct of oral proceedings, procedures such as interim measures, preliminary objections, applications for intervention and rules relating to judgments of the Court. Part V provides for the relevant rules relating to the Advisory Jurisdiction of the Court and procedures for requesting an advisory opinion from the Court. The specific contents of the various rules will be discussed below where relevant. It is however, important to note that the Rules of Court are linked to the various provisions of the Court Protocol and should accordingly be read together.

## 2 Relationship between the African Court and the African Commission

The very idea of establishing an African Court was to strengthen the nascent African human rights system and to complement and reinforce the protective mandate of the African Commission.<sup>39</sup> The African Court thus represents a promise to strengthen the African human rights system's protective functions. The African Court has contentious jurisdiction in all cases and disputes submitted to it concerning the interpretation and application of the African Charter and other applicable human rights instruments. Additionally, the African Court has advisory jurisdiction on any legal matter relating to the African Charter or any other relevant human rights instruments.<sup>40</sup> In exercising its jurisdiction, a system of complementarity between the African Court and the African Commission is provided for by the Court Protocol and the respective rules of the two institutions. While acknowledging the progress made by the African Commission in promoting and protecting human and peoples' rights on the African continent since its inauguration in 1987, the drafters of the Court Protocol stated that the African Court has a mandate to complement and enhance the mission of the African Commission.<sup>41</sup>

Article 2 of the Court Protocol provides that the Court shall “complement the protective mandate of the African Commission on Human and Peoples’ Rights ... conferred upon it by the African Charter on Human and Peoples’ Rights.” This complementarity is reflected in the relationship between the African Court and the African Commission specified in their respective rules of procedure. The relationship between the African Court and the African Commission is governed by the Court Protocol, Rule 29 of the Court's Rules of Procedure and Part IV of the Rules of Procedure of the African Commission. The Court Protocol provides that the African Commission, State parties and African intergovernmental organisations have direct access to the Court.<sup>42</sup> In contrast, individuals and relevant Non-Governmental Organisations (NGOs) with observer status before the African Commission may only initiate cases directly before

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39 See preamble to the Court Protocol. See also D Juma “Provisional Measures under the African Human Rights System: The African Court's Order Against Libya” (2012) 20 *Wisconsin International Law Journal* 344-348.

40 See African Protocol, articles 3 & 4.

41 See Preamble to the African Court Protocol.

42 See African Court Protocol, art. 5(1).

the Court where a State makes a declaration accepting the competence of the Court to receive such cases.<sup>43</sup> The qualified access of individuals and non-governmental organisations to the Court means that the African Commission is currently the main forum for such entities to access a pathway to the Court.

## 2.1 Referral of cases to the African Court by the African Commission

The African Commission is able to bring a case to the African Court involving a violation of the rights of the African Charter by a state party to the Court Protocol. As for the referral of cases to the African Court by the Commission, there are different stages at which such referrals could be effected. The first category comprises cases in which the African Commission has taken a decision with respect to an inter-state or individual communication under the African Charter, and the African Commission considers that the state has not complied or is unwilling to comply with its recommendations in respect of the communication.<sup>44</sup> The second type of referrals to the African Court are those cases in which the Commission has adopted provisional measures against a state party to the African Court Protocol and the Commission considers that the State has not sufficiently adhered with such requested provisional measures.<sup>45</sup> This procedure may be instituted immediately after a communication is filed at the Commission pending a decision on the merits.<sup>46</sup> The third category of referrals may be made following a determination by the Commission that a situation constitutes serious or massive violations of human rights as provided for under article 58 of the African Charter.<sup>47</sup> This is the procedure in terms of which the African Commission referred the *Libyan* case, discussed below, to the African Court.<sup>48</sup> Such a procedure provides a forum for cooperation between the African Court and the African Commission in situations of serious or massive human rights violations, “with the former providing protective functions, backstopped by the latter’s promotional activities.”<sup>49</sup>

The capacity of the African Commission to take cases to the African Court is important, as it may ensure recourse for individuals and NGOs who have no opportunity to appeal directly to the African Court. This is particularly the case where the respondent state has not made an article 34(6) declaration. Individuals or NGOs may file a communication to

43 See articles 5(3) & 34(6) of the African Court Protocol.

44 African Commission on Human and Peoples’ Rights, Rules of Procedure of The African Commission on Human and Peoples’ Rights (2010) [hereinafter Rules of the Commission], rules 118(1) & 112(2).

45 See *Rules of the African Commission* r118(2).

46 See *Rules of the African Commission* r98(1).

47 See *Rules of the African Commission* r84(1).

48 See section 4.3 below.

49 Juma “Provisional Measures” 352.

the African Commission in the hope that the African Commission subsequently refers that case to the African Court in the absence of a satisfactory resolution before the African Commission. Thus, the African Commission may serve as a conduit to the African Court when the respondent state has not made the requisite declaration in terms of article 34 (6) of the Court Protocol that allows direct access to the African Court by individuals and NGOs. If one considers that states are reluctant to allow direct access to the African Court by individuals and NGOs, the African Commission could be the focal point for referral of communications to the African Court. The African Commission's role will thus be crucial in the functioning of the African Court.

Another relationship between the two bodies is the fact that only NGOs with observer status with the African Commission can have direct access to the Court if the respondent state has lodged the necessary article 34 (6) declaration. Moreover, before ruling on the admissibility of a complaint, the African Court may seek the opinion of the African Commission, which shall give that opinion as soon as possible.<sup>50</sup>

## 2.2 Referral of cases to the Commission by the Court

The Court may also decide not to hear the case before it and refer it back to the Commission.<sup>51</sup> Significantly, the Court may request the Commission to provide an advisory opinion on a case before it. A good working relationship between the Court and the Commission will therefore be crucial for the effectiveness of the Court and the fulfilment of its mandate. The Court is competent to request the opinion of the Commission on the admissibility of a case instituted by an individual or a NGO that has observer status before the Commission.<sup>52</sup> Under article 6(3) of the Court Protocol, the Court may consider a case or transfer it to the Commission upon the Court's, or the Commission's determination of the admissibility inquiry.<sup>53</sup> According to Juma, the power of the Court to refer cases to the African Commission can discourage forum-shopping by petitioners.<sup>54</sup> Significantly, such a practice could also standardise admissibility norms and procedures as well as provide a cooperative mechanism for sharing out of cases between the Court and the Commission.<sup>55</sup>

50 See article 6(1) of the Court Protocol.

51 See article 6(3) of the Court Protocol.

52 See Court Protocol, articles. 5(3), 6(1) & 34(6) & *Rules of the Court*, r. 33(1)(f).

53 See Rules of the Commission r. 89 & 107.

54 See Juma "Provisional Measures" 354.

55 See Juma "Provisional Measures" 354.

## 2.3 Consultations between the African Court and the African Commission

Consultations are an important element of complementarity between the Court and the Commission.<sup>56</sup> The Court Protocol and the procedures of the Court and the Commission acknowledge this imperative and mandate consultations in a number of areas. Rule 29(1) (b) of the Rules of Court provides that the Court shall meet with the African Commission at least once a year and whenever necessary to ensure a good working relationship between the two institutions. Significantly, the African Court is obliged to consult the Commission, as appropriate, on any amendment of its rules, and any issues of procedure governing the relationship between the two institutions.<sup>57</sup> At the operational level, the bureaus of the Commission and the African Court “shall meet at least once a year, and as often as necessary to ensure a good working relationship between the two institutions.”<sup>58</sup> There is also an interface for complementarity between the Court and the Commission where cases pending before the latter are submitted to the Court by state parties that had lodged a complaint to the Commission, or against which the complaint had been lodged at the Commission in accordance with article 5(1) (b) and (c) of the Court Protocol.<sup>59</sup>

## 2.4 Cooperation relating to Advisory Opinions

The Court Protocol empowers the Court to provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments at the request of a member state of the AU, any of its organs, or any African organisation recognised by the AU.<sup>60</sup> The Commission is technically an organ of the AU and is thus competent to refer a request for an advisory opinion to the Court.<sup>61</sup> It is also important to note that the Court may not issue an advisory opinion on a subject matter that is being examined by the Commission.<sup>62</sup> The Commission may also appear as an interested party in respect of an advisory opinion pending before the Court.<sup>63</sup> Additionally, where the Commission is requested to provide an advisory opinion, it shall immediately inform the President of the Court.<sup>64</sup> The significance of these provisions relating to advisory opinions is that they provide safeguards against duplication or potential conflict in the

<sup>56</sup> See Juma “Provisional Measures” 355.

<sup>57</sup> See Article 33 of the Court Protocol and Rule 29(2) of the Rules of Court.

<sup>58</sup> See Rules of the Commission, r115(4).

<sup>59</sup> See Rules of the Court, r33(1)(b).

<sup>60</sup> See Court Protocol, art. 4.

<sup>61</sup> Juma “Provisional Measures” 355-356.

<sup>62</sup> See article 4 of the Court Protocol.

<sup>63</sup> See Rules of the Court, r 70(2).

<sup>64</sup> Rules of the Commission, r 116(1).

advisory practice of the Court and Commission.<sup>65</sup> Importantly, the above cooperative measures help in preventing forum shopping, “where contentious or other issues before the Commission may be disguised in the form of requests for advisory opinions to the Court.”<sup>66</sup>

## 2.5 Composition of the Court

The Court consists of eleven judges elected for a term of six years, renewable once. The judges, however, remain in office until replaced. If that date is scheduled for after a case which has already been the subject of a hearing, the judge concerned shall continue to serve until the completion of that case.<sup>67</sup> In contrast to the European Court of Human Rights, each state party is not represented on the Court. The composition of the Court is governed by two main guidelines. First, the personal attributes of the designated judges and second, the need for gender and geographic representation. Judges must be nationals of member states of the AU, 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. The Court cannot include more than one judge of the same nationality.<sup>68</sup> Significantly, there must be adequate gender representation and representation of geographical areas, and Africa’s principal legal traditions.<sup>69</sup> The judges, except the president of the Court, serve their judicial functions on a part-time basis subject to amendments by the Conference of Heads of State and Government of the AU.<sup>70</sup> The issue of employment of full-time judges was discussed by the drafters of the Court Protocol, and it was noted that if this option were adopted, the number of judges would, for financial reasons, be reduced to seven from the current eleven.

### 2.5.1 Appointment of Judges

State parties to the Court Protocol may each propose up to three candidates, at least two of whom shall be nationals of that state. The Court Protocol explicitly states that due consideration shall be given to adequate gender representation in the nomination process.<sup>71</sup> As noted above, the candidates must be chosen among the “jurists of high moral character and of recognised practical, judicial or academic competence and

65 See Juma “Provisional Measures” 356.

66 See Juma “Provisional Measures” 356.

67 See Rules of the Court, r 2(2).

68 See article 11(1) of the African Court Protocol.

69 See article 14 (2) of the Court Protocol.

70 See article 15 (4) of the Court Protocol.

71 See article 12(1) & (2) and article 14(3).

experience in the field of human and peoples' rights".<sup>72</sup> Additionally, state parties are obliged to ensure adequate gender representation among the judges.<sup>73</sup> According to article 14(2) of the Court Protocol, states parties must also ensure that the composition of judges balance the geographical distribution and representation of the major legal systems (civil law, common law, Islamic rights and customs, and African customary law). To ensure the successful implementation of these criteria, the AU Commission, in a *verbale note* in April 2004, enjoined states parties to "encourage the participation of civil society, including the judiciary and other bodies of the State, bar associations, academic organisations, and human rights and women's groups, in the process of selecting candidates."<sup>74</sup>

While only those states that have ratified the Protocol can submit candidates for judges, all member states of the African Union have the right to vote.<sup>75</sup> The method decided by the African Union to elect judges must guarantee the same criteria of representativeness as those required for the process of nomination of candidates at the national level - a fair balance between men and women; composition that is geographically equitable; and adequate representation of the different legal systems. In its note of 5 April 2004, the AU Commission proposed that the geographical composition requirement would be operationalised as follows: west Africa (*three judges*) central Africa (*two judges*) east Africa (*two judges*); southern Africa (*two judges*) and north Africa (*two judges*). The Court Protocol provides that the judges of the Court shall be elected by secret ballot by the Assembly of Heads of State and Government of the AU from the list of nominations submitted in accordance with article 13(2) of the Court Protocol. In practice, the Executive Council of the AU (the decision making body composed of foreign ministers of member states) elects judges from among the candidates nominated by states parties. The results must then be endorsed by the Conference of Heads of State and Government of the AU.<sup>76</sup> It is important that NGOs monitor the process of nominating candidates for the post of judge by states and the process of electing judges by the AU so that they meet strict criteria set by the Protocol and specified in the AU's *verbale note*.<sup>77</sup> The nomination and election of the first judges of the Court revealed several shortcomings, including: lack of participation or consultation of civil society in the nomination process of candidates for the position of judge by states; only eight candidates, among the list of 21 submitted by states, enjoyed a verifiable experience in the field of human rights. In addition there was an absence of

<sup>72</sup> See article 11 (1) of the Court Protocol.

<sup>73</sup> See article 12(2) of the Court Protocol.

<sup>74</sup> See International Federation for Human Rights *The African Court on Human and Peoples' Rights Towards The African Court of Justice and Human Rights* (2010) 42.

<sup>75</sup> Article 14(1) of the Court Protocol.

<sup>76</sup> See International Federation for Human Rights *The African Court on Human and Peoples' Rights Towards The African Court of Justice and Human Rights* (2010) 43.

<sup>77</sup> *Id* at 43.

an equitable gender distribution. Only two women, among eleven judges, were elected by the Conference of Heads of State of the AU meeting in Khartoum in January 2006.<sup>78</sup> The current judges of the Court are; the Court President, Justice Sophia A. B. Akuffo (Ghana), the Court Vice-President, Judge Bernard Makgabo Ngoepe (South Africa), Justice Gérard Niyungeko (Burundi), Justice Fatsah Ouguergouz (Algeria), Justice Augustino S.L. Ramadhani (Tanzania), Justice Duncan Tambala (Malawi), Justice Elsie Nwanwuri Thompson (Nigeria), Justice Sylvain Ore (Cote d'Ivoire), Justice El Hadji Guisse (Senegal), Justice Ben Kioko (Kenya), and Justice Kimelabalou Aba (Togo).

### 2.5.2 Independence of the Judges

Judicial independence of the judges of the Court is guaranteed under articles 17 to 19 of the Court Protocol. Article 17 of the Court Protocol provides that “[t]he independence of the judges shall be fully ensured in accordance with international law.” Judges cannot sit in a case in which they were previously involved in any capacity, be it as an agent, adviser, lawyer of a party, a member of any national or international tribunal or commission of inquiry.<sup>79</sup> However, the African Court differs from the other two regional courts on one point: a judge will not sit in a case involving the state of which he or she has nationality or the state that nominated him or her.<sup>80</sup> In the Inter-American system, the state concerned may appoint an ad hoc judge to hear the case if it has no permanent judges serving on the Court. In the European system, the judge from the state in question will automatically participate in the case. During their terms, judges enjoy privileges and immunities accorded under international law to diplomatic staff. They cannot at any time, even after the end of their term, be prosecuted because of votes or opinions issued in the exercise of their judicial functions with the Court.<sup>81</sup> In accordance with the terms of article 18 of the Protocol, during their term in office, no members of the Court shall participate in any other activity of a nature that will compromise the independence and impartiality of such a judge or the demands of the office.<sup>82</sup> The functions of judges are incompatible with any other activities which affect the requirements of independence and impartiality. This means that a judge cannot simultaneously be minister, secretary of state or a diplomatic representative of a state.<sup>83</sup> Additionally, a procedure for suspension or revocation is considered if a judge ceases to meet these requirements.<sup>84</sup>

78 Id at 44.

79 See article 17(2) of the Court Protocol.

80 See article 22 of the Court Protocol.

81 See article 17(3) & (4) of the Court Protocol.

82 See *Rules of the African Court* r 5(1).

83 See article 18 of the Court Protocol.

84 See article 19 (1) of the Court Protocol.

## 2.6 The Court Registry and its Functions

Article 24 of the Court Protocol provides for the establishment of the Registry of the Court. The Court is enjoined by the Court Protocol to appoint its own registrar and other staff of the registry from among nationals of member states of the AU.<sup>85</sup> The court's Rules of Procedure provided for a detailed procedure on the appointment of the registry staff. The Court Registry is comprised of a registrar, the deputy registrar, and such other staff as the Court may require for the effective exercise of its functions.<sup>86</sup> Given the importance of the office of the Court Registrar for the smooth and effective functioning of the Court, the Rules of Procedure provides for the minimum eligibility criteria for appointment to that office. The Registrar of the Court must be a person of the highest moral standing and shall possess the necessary legal, administrative and linguistic knowledge and experience for the discharge of the functions linked to the post.<sup>87</sup>

### 2.6.1 Functions of the Court Registrar

The Rules of Procedure of the Court provide for a detailed list of the duties of the court registrar. These include keeping a general list of all cases, entered and numbered in the order in which the documents instituting proceedings or requesting an advisory opinion are received in the Registry; transmitting to the parties copies of all pleadings; be present, in person or by a qualified representative, at the sittings of the Court, and be responsible for the preparation of minutes of such sittings; and have custody of the seal, the official stamp and all the records and archives of the Court.<sup>88</sup> The Registrar is also responsible for the printing and publication of the Court's judgments, advisory opinions and orders, the pleadings and statements, and minutes of public sittings in each case. The registrar's responsibilities also entail communicating to the government of the country in which the Court is sitting, and any other governments which may be concerned.<sup>89</sup> The Registrar is expected to transmit documents to the judges of the Court, states parties to the Protocol and to the Chairperson of the African Union Commission as well as other organs of the African Union where required; prepare the draft budget of the Court; and be responsible for the sound management of all accounts as well as financial administration in accordance with the applicable financial rules of the African Union and the financial regulations of the Court.<sup>90</sup> The Registrar is also expected to assist in maintaining relations between the Court and the departments

<sup>85</sup> See article 24 of the Court Protocol.

<sup>86</sup> See rule 20(1) of the Rules of Court.

<sup>87</sup> Rules of the Court, r21(2).

<sup>88</sup> See Rules of the Court, r25.

<sup>89</sup> See Rules of the Court, r25.

<sup>90</sup> See Rules of the Court, r25.

of the African Union Commission as well as those of the other organs of the African Union; and ensure that information concerning the Court and its activities is made accessible to governments, the highest national courts of justice and the media.<sup>91</sup> In the exercise of his/her functions, the Registrar works under the direction and supervision of the President of the Court and is answerable to the Court.<sup>92</sup>

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91 See *Rules of the Court*, r25.

92 See *Rules of the Court*, r (25)(4).

## 3 Jurisdiction of the Court

### 3.1 Subject matter (ratione materiae) Jurisdiction

The jurisdiction of the African Court *ratione materiae* is set out in article 3 of the Court Protocol. Article 3(1) of the Court Protocol provides 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.” Article 3(2) provides that “in the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.” The provision is quite broad as it extends to all cases and disputes, on human rights issues, concerning the interpretation and application of the African Charter, the Protocol and other relevant human rights instruments ratified by the state concerned.<sup>93</sup>

The Court’s jurisdiction to deal with an application brought against a state party and originating directly from an individual or non-governmental organisation (NGO) is mainly governed by articles 3(1) and 5(3) of the Court Protocol. This jurisdiction must be considered both at the personal level (*ratione personae*) and the material (*ratione materiae*), temporal (*ratione temporis*) and geographical (*ratione loci*) levels.<sup>94</sup> Article 3 of the Court Protocol, dealing with “Jurisdiction” delineates the Court’s substantive jurisdiction to include the African Charter, the Court Protocol and “any other relevant human rights instruments ratified by the states concerned.” The extended jurisdiction of the Court relates to the subject matter of cases and not only to the use of these instruments as interpretative guides.<sup>95</sup> With its subject matter jurisdiction going beyond the African Charter, the Court has a much broader substantive jurisdiction than other regional human rights tribunals such as the European Court of Human Rights and the Inter-American Court of Human Rights. The provision relating to the Court’s subject matter jurisdiction in contentious cases (IACtHR) seems to be broad to include all other human rights instruments. However, there are certain limits to this extension in the

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<sup>93</sup> See *Mkandawire v Malawi* Application 003/2011 para 34.

<sup>94</sup> See Separate opinion of Justice Fatsah Ouguergouz in *Tanganyika Law Society and Another v Tanzania* Application No. 009/2011 and Application No. 011/2011 para 5.

<sup>95</sup> Article 3(1) of the Court Protocol covers both interpretation and application.

qualifiers “relevant”, “ratified”, “human rights”, and “by the State concerned.”<sup>96</sup> The most important qualifier is “ratified” meaning that, the instruments referred to are treaties and not non-binding instruments such as declarations and other soft law instruments.<sup>97</sup> Thus, these human rights treaties first of all refer to other African human rights treaties such as the 1969 OAU/AU Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention), the African Children’s Charter and the African Women’s Protocol. The door is thus opened for the Court to adjudicate on UN human rights treaties to which AU members are party.<sup>98</sup>

In its recent decision in *Tanganyika Law Society and Another v Tanzania*,<sup>99</sup> the applicants had also relied on articles 3 and 25 of the International Covenant on Civil and Political Rights (ICCPR) and article 21 (1) of the Universal Declaration of Human Rights (UDHR) over and above the provisions of the African Charter in substantiating their case of human rights violations by the respondent state.<sup>100</sup> The Court noted that it is empowered to interpret the above instruments through the avenue of article 3(1) of the Court Protocol<sup>101</sup> which provides 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”. The Court proceeded, however, to state that it was not necessary in this case to consider the application of these treaties as it had considered the alleged violations under the relevant provisions of the African Charter.<sup>102</sup>

In his separate opinion in *Tanganyika Law Society and Another v Tanzania*, Justice Fatsah Ouguergouz persuasively elaborated on the proper application of article 3(1) relating to the invocation of “other relevant human rights instruments ratified by the state concerned.”<sup>103</sup> According to Justice Ouguergouz, the above provision directs reference to three requirements: the instrument in question must be an international treaty, hence the requirement that it be ratified by the state concerned; this international treaty must “relate to human rights”; and it must have been ratified by the state concerned.<sup>104</sup> Even if the above requirements are met, Justice Ouguergouz further noted that the Court would again have had to ensure that the said treaty is “relevant” to the treatment of the matter.<sup>105</sup>

96 See also Viljoen *International Human Rights Law in Africa* 435.

97 *Id.* at 435.

98 See C Heyns *The African Regional Human Rights System: In need of Reform?* (2001) 1 *African Human Rights Law Journal* 167.

99 *Tanganyika Law Society and The Legal and Human Rights Centre v. The United Republic of Tanzania Application No. 009/2011 and Application No. 011/2011* (Consolidated).

100 *Tanganyika Law Society and Another v Tanzania*, *Id.* at para 121.

101 *Tanganyika Law Society and Another v Tanzania*, *Id.* at para 122.

102 *Id.* at Para 123.

103 See separate opinion of Justice Fatsah Ouguergouz in *Tanganyika Law Society and Another v Tanzania* para 14.

104 *Id.* Para 14.

105 *Id.* Para 14.

### 3.2 Temporal Jurisdiction and Continuous Violations

As a general rule of international law, treaties do not apply in a retroactive manner. The customary international law principle of non-retroactivity is enshrined in article 28 of the Vienna Convention on the Law of Treaties (VCLT).<sup>106</sup> Article 28 of VCLT provides that “[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party”.

The implications of the non-retroactivity rule means that the Court lacks temporal jurisdiction in respect of “any act or fact which took place, or any situation which ceases to exist before the date of entry into force” of the Court Protocol for a particular state party. According to Viljoen, for all the states parties to the Court Protocol, the critical date is the date of the deposit of the instrument of ratification.<sup>107</sup> According to the latter approach, only events subsequent to this date would fall within the Court’s jurisdiction. When the declaration under article 34(6) is made some time after the acceptance of the Court Protocol, the question arises whether the Court’s jurisdiction over direct access cases begins only on the later date that is the date of the deposit of the declaration. Viljoen is of the view that the determining moment for direct access is the date of initial ratification and not the date on which the instrument of declaration was deposited.<sup>108</sup> This is because the state would have already accepted the Court’s jurisdiction when it deposits its instrument of ratification. Accordingly, its declaration merely changes the modality of accessing the Court, and should not have an effect on the jurisdiction that has been established through ratification.<sup>109</sup>

International human rights law has established the concept of “continuous violations” as an exception to the rule against retroactivity.<sup>110</sup> This exception relates to violations that began before the critical date (date of ratification of a treaty or filing of a declaration accepting the competence of the Court), but continue thereafter. A slightly different exception to the rule would be for the Court to exercise jurisdiction when the violations occurred before the critical date, but its effects - which themselves constitute violations of the relevant treaty law - continue thereafter. The Court has embraced the “continuing violation approach” in its decisions in *Tanganyika Law Society and Another v Tanzania*,<sup>111</sup>

106 Vienna Convention on the Law of Treaties (1969) UN Doc A/Conf.39/27.

107 Viljoen *International Human Rights Law in Africa* 439.

108 Viljoen *International Human Rights Law in Africa* 439.

109 Viljoen *International Human Rights Law in Africa* 439.

110 Viljoen *International Human Rights Law in Africa* 439.

111 *Tanganyika Law Society and Another v Tanzania* Application No. 009/2011 and Application No. 011/2011 para 84.

and *Mkandawire v Malawi*.<sup>112</sup> In *Mkandawire v Malawi*,<sup>113</sup> on its admissibility enquiry, the Court endorsed the continuing violation principle, stating that

*[r]egarding ratione temporis jurisdiction, even though the facts giving rise to the application arose before the Respondent filed the declaration, the Court has already made a finding that the alleged violation is continuing. Taking all the above into consideration, the Court does have jurisdiction to deal with this matter.*<sup>114</sup>

In the *Tanganyika Law Society* case, the African Court appears to have gone against rules of international law and the grain of international judicial practice by ruling that the case was admissible. This is despite the fact that at the time the alleged human rights breach occurred, the Court Protocol had not entered into force, and Tanzania had, therefore, not made a declaration authorising the Court to have competence to hear cases from individuals and NGOs. Rather, the Court put much emphasis on the fact that at the time of the alleged human rights breaches, Tanzania was already a state party to the African Charter. The Court proceeded to add the principle of continuous violation into the mix, thereby confusing Court observers on where the court stands on the issue. This comes out clearly where the Court stated that:

“By the time of the alleged violation, the Respondent had already ratified the Charter and was therefore bound by it, the Charter was operational, and there was therefore already a duty on the Respondent as at the time of the alleged violation to protect those rights. At the time the Protocol was ratified by the Respondent and when it came into operation in respect of the Respondent, the alleged violation was continuing and is still continuing: independent candidates are still not allowed to stand for the position of President or to contest Parliamentary and Local Government elections. Furthermore, the alleged violations continued beyond the time the Respondent made the declaration in terms of Article 34(6) of the Protocol.”<sup>115</sup>

In another recent decision of the Court in *Mkandawire v Malawi*,<sup>116</sup> the respondent state, Malawi, also raised a preliminary objection against admissibility of the case, arguing that the alleged human rights infraction took place in 1999, whereas the Court Protocol came into operation in respect of Malawi only after the latter ratified the Court Protocol on 9 October 2008. The Court took a different view, stating that:

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112 *Mkandawire v Malawi* Application 003/2011 para 69.

113 *Id* at para 69.

114 *Id* at para 36.

115 *Id* at para 84.

116 *Id* at para 84.

“The Charter came into operation on 21 October, 1986 and the Respondent ratified the Charter in 1989. It is the view of the Court, therefore, that at the time of the alleged violation of the Applicant’s rights in 1999, the Charter was already binding on the Respondent; the latter was under the duty to protect the Applicant’s rights alleged to have been violated. Furthermore, the Court notes that the Applicant’s case is that the alleged violation of his rights under Articles 7 and 15 is continuing. For the above reasons, the preliminary objection raised by the Respondent cannot succeed.”<sup>117</sup>

It is, however, noteworthy that some of the members of the Court took a different view on the way the majority handled the issue of temporal jurisdiction. In his separate opinion in the case of *Tanganyika Law Society v Tanzania*, Justice Fatsah Ouguerouz argued that:

“On the basis of the non-retroactivity of treaties, a well-established principle in international law, the Court cannot be seized of allegations of violations of human and people’s rights by an individual or by a nongovernmental organization unless such alleged violations occurred after the entry into force for the State concerned, not only of the African Charter but also of the Protocol and more important, of the optional declaration; Article 34 (6) of the Protocol does not suffer any ambiguity in this regard since it provides that ‘the Court shall not receive any petition under Article 5 (3) involving a State Party which has not made such a declaration.’”

Similarly, in *Mkandawire v Malawi*, the respondent state raised an objection on the *ratione temporis* jurisdiction of the Court, drawn from the fact that the alleged violation of articles 7 and 15 of the African Charter occurred before the entry into force of the Court Protocol, with regard to Malawi, on the 9th of October 2008. In a joint dissenting opinion of Justices Gerard Niyungeko and El Hadji Guisse, the two judges stated that:

“The first reason advanced by the Court (the prior ratification of the Charter) is incomprehensible and confusing, within the context of the specific objection raised by the Respondent. In fact, whereas the objection by the Respondent State is based, as far as it was concerned, on the date of entry into force of the Protocol to establish the Court, the Court’s response is to invoke the date of entry into force of the (African) Charter which was not an issue for the Respondent State. And one does not quite see what the Court draws as conclusion from the date of entry into force of the Charter, regarding the Respondent State’s argument of non-retroactivity of the Optional Protocol. In our opinion, the Court ought to have been unequivocal on this point and should have indicated that although Respondent State was already bound by the Charter, the Court lacks temporal jurisdiction with respect to it as long as the Protocol conferring

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117 *Id* at para 32.

jurisdiction on it is yet to become operational, unless of course the argument of the alleged continuing violation is invoked.<sup>118</sup>

### Case Study: *Tanganyika Law Society and Another v Tanzania*

*The gist of the applicants' case was that the Eleventh Constitutional Amendment passed by the Tanzanian National Assembly on 2 December 1994 and assented to by the President of the United Republic of Tanzania on 17 January 1995, violated their rights protected under Articles 2, 10 and 13(1) of the Charter as it bars independent candidates from contesting presidential, parliamentary as well as local government elections.*

*The applicants argued that the prohibition constitutes discrimination against independent candidates. Secondly, that it violates the right to freedom of association and also the right to participate in public or government affairs in one's country. One could not enjoy the exercise of one's political rights unless one belonged to a political party; the applicants, therefore argued that there is no freedom of association.<sup>119</sup> The Court ruled that the respondent's rights had been breached, stating that any law that requires the citizen to be part of a political party before she can become a presidential, parliamentary, or local government election candidate is an unnecessary fetter that denies to the citizen the right of direct participation, and amounts to a violation.<sup>120</sup> The Court further stated that the restriction on the exercise of the right through the prohibition on independent candidature is not proportionate to the alleged aim of fostering national unity and solidarity.<sup>121</sup> The Court, therefore, found that there had been a violation of the right to participate freely in the government of one's country since for one to participate in presidential, parliamentary or local government elections in Tanzania one must belong to a political party. Accordingly, Tanzanians are thus prevented from freely participating in the government of their country directly or through freely chosen representatives.<sup>122</sup> The Court ruled that by requiring individuals to belong to, and to be sponsored by a political party in seeking election in the presidential, parliamentary, and local government posts, the respondent state had violated the right to freedom of association. This is because individuals are compelled to join or form an association before seeking these elective positions.<sup>123</sup>*

118 See *Mkandawire v Malawi*, *Joint dissenting opinion* of Justices Gerard Niyungeko and EL Hadji Guisse Paras 7-8.

119 *Tanganyika Law Society and Another and v Tanzania* para 89.

120 *Id* at para 109.

121 *Id* at para 107.

122 *Id* at para 111.

123 *Id* at para 114.

### 3.3 Advisory Jurisdiction of the Court

The Court may give an advisory opinion on any legal matter concerning the African Charter or any other relevant instrument on human rights. Even if an advisory opinion is not binding on the party requesting it, it may have a profound persuasive force and may serve as a mechanism for elaborating states parties' obligations outside of contentious proceedings. While a judgment in a contentious case provides an outcome to the dispute between and only binds parties to the case, the impact of an advisory opinion may have a much wider impact than the parties to the proceedings in a contentious case.<sup>124</sup> Article 4(1) of the Court Protocol provides that “[a]t the request of a member State of the AU, the AU, any of its organs, or any African organisation recognised by the AU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments.” According to the Protocol, the Court may receive a request for an advisory opinion on the condition that the object of this opinion does not relate to a request pending before the Commission.<sup>125</sup> Upon receipt of a request for an advisory opinion, the Court is obliged to send a copy to the Commission. The Court must also inform the states parties and any other interested entity who can submit written comments on the points raised by the request. If it so decides, the Court can also conduct a hearing in accordance with its rules.<sup>126</sup> Any request for an advisory opinion must specify the provisions of the African Charter or of any other international human rights instrument in respect of which the advisory opinion is being sought, the circumstances giving rise to the request as well as furnish the names and addresses of the representatives of the entities making the request.<sup>127</sup>

#### 3.3.1 Entities eligible to request Advisory Opinions

Three categories of entities can request advisory opinions in terms of the Court Protocol. These are AU member states; the AU and its organs; and African organisations, and thus claim standing before the African Court. All AU member states may make such a request as there is no requirement that the requesting state must have ratified the Court Protocol, thereby opening this aspect of the jurisdiction to non-state parties to the Court Protocol.<sup>128</sup> The AU and any of its organs may also request advisory opinions from the Court. Although the Commission is not listed as an AU organ, it has been recognised as a “functionary AU organ” and should be allowed standing in this category.<sup>129</sup>

124 See Viljoen *International Human Rights Law in Africa* 446.

125 See article 4 (1) of Court Protocol.

126 See *Court Rules of Procedure* r70 & 71.

127 See *Court Rules of Procedure* r 68(2).

128 See Viljoen *International Human Rights Law in Africa* 447.

129 See Viljoen *International Human Rights Law in Africa* 447.

Any “African organisation recognised by the AU” may also request an advisory opinion from the Court. The question that arises is to the identity of bodies that qualify as “African organisations”. This is because in other provisions of the Court Protocol, the terms “African intergovernmental organisation” and “NGOs with observer status before the Commission” have been used.<sup>130</sup> The word “organisation” is a generic term and encompasses both intergovernmental and non-governmental organisations.<sup>131</sup> Viljoen is of the view that since the organisations are qualified as “African”, “African” should be interpreted broadly as denoting, not only, organisations based in African states but also those with a predominantly African management structure or membership base, even if they are located outside the African continent.<sup>132</sup> However, it is important that the “organisation” must be recognised by the AU. Viljoen has suggested that all African NGOs that enjoy observer status with the African Commission, a form of recognition by the AU, qualify, and so should civil society organisations represented on the AU Economic, Social and Cultural Council, and regional economic communities such as SADC, EAC, COMESA, and ECOWAS.<sup>133</sup>

## 3.4 Accessing the African Court

### 3.4.1 General conditions of accessibility

Admissibility is usually the first hurdle that complainants must overcome for their cases to be adjudicated before the African Court. To be admitted before Court, the standard requirements set out in article 56 of the African Charter as well as article 5 of the Court Protocol must be satisfied. The right of access to the Court is granted by article 5 (1) to the African Commission; the state which has lodged a complaint to the Commission; the state party against which the complaint has been lodged at the Commission; the state party whose citizen is a victim of a human rights violation; and African intergovernmental organisations. The application must be directed against a state party which has made a declaration under article 34 (6) of the Court Protocol authorising direct access for individuals and NGOs with Observer Status before the Commission. The application must be submitted by an individual, an NGO, or their representatives. The application can be brought forward by anyone hence the applicant does not necessarily have to be the victim or a member of the victim’s family in order to bring an application before the Court. The application can also be submitted by any NGO with observer status before the African Commission. The NGO does not

<sup>130</sup> See African Court Protocol art. 5(3)(e) & (3).

<sup>131</sup> See Viljoen *International Human Rights Law in Africa* 447.

<sup>132</sup> *Id* 447.

<sup>133</sup> *Id* 447.

necessarily need to have a specific interest in the case nor does it need to be the victim of the alleged human rights violation in order for the case to be declared admissible. It is also significant to note that the applicant does not need to be a national of the state against which the case is being brought to Court. The application must involve allegations of human rights abuses which fall within the jurisdiction of the respondent state and must have occurred after the ratification of the Protocol by the state against whom the application is being brought. It must, however, be noted that with regard to the Court's *ratione temporis* jurisdiction, even though the facts giving rise to the application arose before the respondent state filed the declaration accepting the competency of the Court to receive complaints from individuals or NGOs, the Court can still exercise jurisdiction if the alleged violation is continuing beyond the critical date.<sup>134</sup> Any application which does not adhere to these conditions is inadmissible to the Court.<sup>135</sup>

### 3.4.2 Entities Competent to Submit Communications to the Court

In terms of article 5 (1) of the Court Protocol, the following entities may submit contentious cases to the African Court: (a) the African Commission; (b) the state party which has lodged a complaint to the African Commission; (c) the state party against which a complaint has been lodged at the African Commission; (d) the state whose citizen is the victim of human rights violations; and (e) African intergovernmental organisations. In addition, article 5 (3) provides that “[t]he court may entitle relevant NGOs with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34 (6) of this Protocol.”

Article 34 (6) of the Court Protocol 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.”*

#### 3.4.2.1 Referral of the Case by the African Commission after Finalising the Communication

The African Commission may submit a case to the Court after disposing of a case by finding on the merits.<sup>136</sup> The African Commission's referral of such a case is triggered by the non-compliance with its recommendations by the state concerned. Within six months of being informed of an adverse finding against it by the African Commission, a state must inform the Commission of measures it has taken or is taking to implement

<sup>134</sup> See *Mkandawire v Malawi* para 36.

<sup>135</sup> Article 3(1) of the Court Protocol.

<sup>136</sup> See *Court Rules of Procedure*, r 118(1).

the Commission's finding. If a state complies with the Commission's recommendations, the issue ends there. If the Commission considers that a state has not complied or is unwilling to do so, it may refer the case to the Court. The credibility of such a system of referral is dependent on the Commission's competence to establish the relevant facts concerning state compliance accurately and reliably.<sup>137</sup>

### 3.4.2.2 Referral by the Commission before Finalising the Communication

The Court Protocol does not explicitly require the Commission to make a finding on the admissibility or merits of the case before submitting it to the Court. The Rules of the Commission provide that the Commission may refer a matter "at any stage" of its examination.<sup>138</sup> The Commission has discretion to decide whether or not it is necessary to do so. This route is very different from direct individual access in respect of states that have made a declaration in terms of article 34(6) because it is the Commission, and not the individual, that takes the decision to submit the case to the Court. According to Viljoen, this possibility should be used in urgent cases, enabling a binding judicial decision to be reached without exhausting the lengthy process before the Commission.<sup>139</sup> A further implication is that the Commission may submit a case after it has dealt with it partially, for example, after it has made a finding on fact, a finding on admissibility or after unsuccessfully trying to reach an amicable settlement.<sup>140</sup> The African Court Rules of Procedure provide for one particular instance of a case before the Commission that may be referred to the Court. If a State to which the Commission has directed a request for provisional measures in the Commission's view fails to give effect to these measures, it may refer the matter to the Court.<sup>141</sup> A State to which such a request is made must, within fifteen days of being informed of such request, report back to the Commission on the measures it has taken to implement the request. The Court may decide on the provisional measures and then refer back the case to the Commission to adjudicate on the merits or the Court may proceed to adjudicate on the case.<sup>142</sup>

### 3.4.2.3 Referral of a case involving serious or massive violations of human rights

The Commission may submit a case to the Court if it considers that the situation reveals a situation of serious or massive violation of human rights.<sup>143</sup> A case of serious or massive violations of human rights envisaged here should be understood as one not

137 Viljoen *International Human Rights Law in Africa* 427.

138 See *African Commission Rules of Procedure*, R118(4).

139 Viljoen *International Human Rights Law in Africa* 428.

140 See RW Eno 'The Jurisdiction of the African Court on Human and Peoples' Rights (2002) 2 *African Human Rights Law Journal* 223 228.

141 See *African Commission on Human and Peoples' Rights Rules of Procedure*, r118(2).

142 Viljoen *International Human Rights Law in Africa* 428.

143 *African Commission Rules of Procedure*, r118(3).

arising from a formally instituted and thus pending communication before the Commission.<sup>144</sup> The Commission may on its own initiative, or on the basis of information provided by NGOs or obtained from any other credible source, submit a case of massive or serious violations of human rights to the Court. This possibility allows the Court's jurisdiction to be triggered in matters of extreme gravity and urgency in which no formal communication has been submitted to the Commission.

In the case of *African Commission v Libya*, the Commission referred the matter to the Court after it had received successive complaints against Libya which in its view constituted "serious and widespread violations" of human rights in breach of the provisions of the African Charter. In February 2011, three non-governmental organisations, the Egyptian Initiative for Personal Rights, Human Rights Watch and INTERIGHTS submitted a request for provisional measures to the African Commission against Libya for massive human rights violations. Although the Commission noted and condemned the human rights violations in Libya, it did not request any provisional measures, but instead passed a resolution in March 2011 which called on the responsibility of the AU to take all the necessary political and legal measures for the protection of the Libyan population.<sup>145</sup> Additionally, the Commission instituted proceedings before the African Court against the Libyan State for "serious and massive violations of human rights guaranteed under the African Charter."<sup>146</sup> The Court immediately informed Libya, the AU organs, states parties and the complainants of the application, noting that the matter was of "extreme gravity and urgency."<sup>147</sup> In March 2011, the African Court issued an order for provisional measures against Libya, *proprio motu*.<sup>148</sup>

### 3.4.3 Direct Access to the Court

Article 5 (3) of the Court Protocol provides that the Court may entitle individuals to submit cases directly before it. A state declaration under article 34 (6) of the Court Protocol allows individuals or groups to submit a claim directly to the Court without going through the Commission. Article 34 (6) provides for the declaration to be made anytime subsequent to a state ratification of the Court Protocol. The standing of individuals under the African Charter, as developed by the Commission, has dispensed with the victim requirement and is, therefore, wide enough and allows a broad range of

144 Viljoen *International Human Rights Law in Africa* 428.

145 See the Commission's resolution at its 9th extra-ordinary session held in Banjul, The Gambia, from 23 February to 3 March 2011, ACHPR, *Resolution on the Human Rights Situation in the Great Socialist Peoples' Libyan Arab Jamahiriya*, ACHPR/RES.181 (EXT.OS/IX) (Mar. 1, 2011).

146 *In re African Commission on Human and Peoples' Rights v. Great Socialist Peoples' Republic of Libyan Arab Jamahiriya*, Application No. 004/2011, *Order for Provisional Measures*.

147 *Id* at para 8.

148 *Id* at para 9 and 10.

individuals, groups of individuals and NGOs to lodge communications. As far as cases instituted directly before the Court are concerned, the Court Protocol does not restrict access to victims and should not be interpreted as restricting access to victims.<sup>149</sup> This could be contrasted with the victim requirement of the International Covenant on Civil and Political Rights (ICCPR) or the European Convention on Human Rights. It must, however, be noted that direct access to the Court is restricted to NGOs with observer status before the Commission as discussed above. It is unclear why this restriction has been adopted since the same does not apply in respect of cases brought to the Commission<sup>150</sup>. In one of the cases decided by the Court to date,<sup>151</sup> the Court declined to consider a case against Cote d'Ivoire because the NGO that brought the petition, *Association Juristes d'Afrique pour la Bonne Gouvernance*, did not have observer status with the Commission. Article 5(3) of the Court Protocol provides that the Court may entitle individuals to submit cases directly before it. In December 2009, the Court delivered its first judgement in the case of *Yogogombaye v Senegal*.<sup>152</sup> The issue to be determined was whether the Court had jurisdiction to deal with a case brought against Senegal submitted directly to the Court. Senegal is a State party to the African Charter and the Court Protocol. The Court ruled that it had no jurisdiction to hear that case submitted before it by an individual as Senegal had not made the necessary declaration under article 34(6) of the Court Protocol.

#### 3.4.3.1 State party whose citizen is a victim of a human rights violation (article 5(1) (d) of the African Protocol)

Article 5(1) (d) of the Court Protocol provides for the possibility of a state party to that instrument to submit a case to the Court when one of its citizens “is a victim of a human rights violation.”<sup>153</sup> The provision opens the door for a state to submit cases directly to the Court if the rights of its citizen, in its opinion, are violated by another state. Such a state has, therefore, the standing and legal interest arising out of the injury to itself and its nationals, to bring a claim against the alleged offending state before the Court.

#### 3.4.3.2 African Intergovernmental Organisations

African Intergovernmental Organisations may also submit cases to the Court. This provision contemplates that any intergovernmental organisation established by African states may submit a case to the Court alleging violation of a provision of the African Charter or any other relevant human rights instrument ratified by the state concerned.

149 Viljoen *International Human Rights Law in Africa* 430.

150 See Court Protocol article 5(3).

151 See *Association des Juristes d'Afrique pour la Bonne Gouvernance v Republic of Cote d'Ivoire* Application No 006/2011.

152 *Yogogombaye v Senegal*, Application 1/2008.

153 Article 5(1)(d) of the Court Protocol.

One such organisation is the African Committee of Experts on the Rights and Welfare of the African Child (African Children’s Committee), the treaty monitoring body established under the African Charter on the Rights and Welfare of the Child (African Children’s Charter). After it has finalised a case, the African Children’s Committee has the competence to refer a case to the Court, similar to a provision under the African Charter which enables the Commission to do the same. Other intergovernmental organisations falling under this category would include the African Union (AU) and the various regional economic communities recognised by the AU such as the Southern African Development Community (SADC), the Arab Maghreb Union (AMU), the Community of Sahel-Saharan States (CEN-SAD), the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC), the Economic Community of Central African States (ECCAS), the Economic Community of West African States (ECOWAS) and the Intergovernmental Authority on Development (IGAD).<sup>154</sup>

### *3.4.3.3 Individuals and NGOs (Articles 5 (3) and 34 (6) of the African Protocol)*

The qualified standing of individuals and NGOs to submit cases to the Court must be considered retrogressive. The provisions on access to the Court of individuals and NGOs are to be contrasted with provisions relating to automatic access of states parties to the African Court, as well as the unrestricted access of individuals and NGOs to the African Commission. This qualified access to the Court leaves aggrieved individuals hostage to the state, and scuttles the generous provisions on access to the African Commission under the African Charter.<sup>155</sup> The qualified provisions on access for individuals and NGOs are likely to undermine the effectiveness of the Court in protecting human rights on the continent if individuals and NGOs cannot access the judicial mechanism.<sup>156</sup>

### **3.4.4 Specific Conditions for Admissibility of Applications**

The application must, further to the general conditions of admissibility above, satisfy certain particular conditions in order to be admissible before the Court. Article 6 of the Court Protocol refers to article 56 of the African Charter, thus making admissibility conditions the same for both bodies. The requirements for admissibility under the Charter are relevant to the extent that they are also the conditions for admissibility before the African Court. The only difference is the possibility that article 6 leaves it open for the Court to request the opinion of the Commission on the admissibility of cases or to transfer them to the Commission.<sup>157</sup> These are provided under article 6 of

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<sup>154</sup> Viljoen *International Human Rights Law in Africa* 434.

<sup>155</sup> D Juma “Access to the African Court on Human and Peoples’ Rights: A Case of the Poacher turned Gamekeeper” (2007) 4 *Essex Human Rights Review* 1 15.

<sup>156</sup> Juma “Gamekeeper” 15.

<sup>157</sup> See articles 6(1) & 6(3).

the Court Protocol which refers to the provisions of article 56 of the African Charter on the conditions of admissibility of communications before the Commission. The criteria are further reproduced under Rule 40 of the Rules of the African Court. Since article 6 (2) of the Court Protocol refers to article 56 of the Charter, the specific conditions of admissibility of an application of an individual or NGO are identical before the Commission and the Court. These conditions, especially the requirement to exhaust domestic remedies, have been examined in several cases before the Commission and the latter has, in a number of cases, elaborated the article 56 admissibility criteria.

Rule 40 of the Court's Rules of Procedure provides that:

*Pursuant to the provisions of article 56 of the Charter to which article 6(2) of the Protocol refers, applications to the Court shall comply with the following conditions:*

- (1) disclose the identity of the Applicant notwithstanding the latter's request for anonymity;*
- (2) comply with the Constitutive Act and the Charter;*
- (3) not contain any disparaging or insulting language;*
- (4) not based exclusively on news disseminated through the mass media;*
- (5) be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;*
- (6) be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and*
- (7) not raise any matter or issues previously settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African union, the provisions of the Charter or any legal instrument of the African Union.*

#### **3.4.4.1 The communication should indicate the author(s) name even if the latter request anonymity (art. 56 (1))**

Article 56 (1) of the African Charter provides that the identity of the author of a communication must indicate the author(s) or complainant's name even if the latter requests anonymity. The requirement is simply that the author's identity should be known but not necessarily that the author should be the victim of the alleged violation.<sup>158</sup> The author need not give reasons for wanting to be anonymous. If the author is an NGO, the names of the representatives of the NGO must be furnished. If there is no name or address on the petition documents, the petition will not be

158 Ouguergouz, *The African Charter on Human and Peoples' Right* (The Hague: Martinus Nijhoff Publishers, 2003) 592.

considered.

This condition may also be relevant to bar applications that are lodged for purely political or propagandist reasons.<sup>159</sup> In communications lodged before the Commission, the issue of anonymity of a communication was elaborated by that body. This gives indications as to how the Court is likely to deal with similar issues relating to the identity of the complainants. With respect to NGOs, the Commission has taken the view that article 56 (1) is satisfied if the complaint “bears ... the name of one of the organisation’s representatives.”<sup>160</sup> It is, however, important to note that the Charter expressly provides for a situation where an applicant may request his identity to be kept secret during the proceedings. In *Diomesi and Others v Guinea*,<sup>161</sup> the Commission interpreted this requirement to mean that the authors must give their full identity. In *Bariga v Nigeria*,<sup>162</sup> the Commission further interpreted this requirement as entailing that the complainant must include contact details for ease of communication.

#### 3.4.4.2 *It is compatible with the Constitutive Act of the African Union and the African Charter on Human and Peoples’ Rights*

Litigants must ensure that their communications conform to the provisions and spirit of the African Charter and the AU Constitutive Act. According to article 56 (2) of the African Charter, the application must invoke provisions of the African Charter allegedly violated to be admissible. The Court Protocol also regards the applications based on the violation of an international instrument protecting human rights ratified by the State concerned as admissible.<sup>163</sup> In *Tanganyika Law Society and Another v Tanzania*, the applicants, in addition to the provisions of the African Charter, invoked articles 3 and 25 of the International Covenant on Civil and Political Rights (ICCPR) and article 21 (1) of the Universal Declaration of Human Rights (UDHR).<sup>164</sup> The Court noted that it has jurisdiction to interpret the above treaties by virtue of article 3 (1) of the Court Protocol. The Court, however, considered it unnecessary in this case to consider the application of these treaties after it heard the alleged violations under the relevant provisions of the African Charter.<sup>165</sup>

159 ST Ebobrah “The Admissibility of Cases Before the African Court on Human and Peoples’ Rights: Who Should Do What?” (2009) 3 *Malawi Law Journal* 87 93.

160 *Interights v Eritrea and Ethiopia* (2003) AHRLR 74 (ACHPR 2003).

161 *Diomesi and Others v Guinea*, *Communication* 70/92.

162 *Bariga v Nigeria*, *Communication* 57/91.

163 See article 3(1) of the African Court Protocol.

164 See *Tanganyika Law Society and Another v Tanzania* para 92.

165 See *Id* para 123.

### 3.4.4.3 *It is not written in disparaging or insulting language against the State concerned and its institutions or the African Union (art.56(3)).*

The African Charter prohibits the use of disparaging or insulting language in communications. This requirement seeks to ensure respect for states parties and their institutions as well as the African Union.<sup>166</sup> In the case of *Ligue camerounaise des droits de l'Homme v Cameroon*,<sup>167</sup> the African Commission declared the case inadmissible because of the use of expressions such as “regime of torture” and “barbaric government”. This kind of insulting language makes a communication inadmissible, independently of the gravity of the facts denounced. In *Bakweri Land Claims v Cameroon*,<sup>168</sup> however, the Commission rejected the respondent state’s objection that “the communication cast such suspicions and aspersions on the Cameroonian judicial system and hence could be considered insulting under article 56 (3) of the African Charter.” In another communication in the case of *Ilesanmi v Nigeria*,<sup>169</sup> part of the objection raised by the respondent state was that the complaint to the Commission was written in “unbecoming language to unjustly and baselessly vilify leaders.” The Commission noted that to be considered “disparaging” and “insulting”, the offending words must be aimed at undermining the integrity and status of the institution, and bring it to disrepute. In declaring the communication inadmissible, the Commission elaborated that while it has a mandate to protect the rights of individuals under the African human rights system; it also has a duty “to ensure that those institutions established within State parties to facilitate the enjoyment of these rights are also respected by the individuals.”

### 3.4.4.4 *It is not based exclusively on news disseminated through the mass media*

This requirement is set out in article 56 (4) of the African Charter. It aims at preventing complaints based on generalised allegations or even false information without the applicants verifying whether or not the allegations are true. This provision serves as a filter mechanism to prevent situations where a person or body without any personal knowledge of the facts file a communication before the Commission.<sup>170</sup> In the case of *Sir Dawda K. Jawara v Gambia*,<sup>171</sup> the respondent state argued against the admissibility of the communication, arguing that it was based exclusively on information disseminated by the media. In light of the circumstances of that particular case, the

166 See S Gumede “Bringing Communications before the African Commission on Human and Peoples’ Rights” (2003) 3 *African Human Rights Law Journal* 130.

167 Communication 65/92.

168 *Bakweri Land Claims v Cameroon* (2004) AHRLR 43 (ACHPR 2004).

169 (2005) AHRLR 48 (ACHPR 2005).

170 Ebobrah Admissibility 96.

171 *Sir Dawda K. Jawara v Gambia Communication* 147/95 and 149/96.

Commission ruled that:

*while it is little suitable to rely exclusively on news disseminated by mass media, it would be also as detrimental that the Commission reject a communication because some of its aspects are based on information transmitted by mass media. This is related to the use of the term “exclusively” in the Charter. There is no doubt that the mass media remain the most important or even sometimes the only source of information. The genocide in Rwanda, human rights violations in Burundi, Zaire and Congo, only to mention a few, were revealed by mass media.<sup>172</sup>*

According to the Commission, the issue, therefore, is not whether the information comes from mass media, but rather if the information in question is correct. Consequently, “it is about the petitioner verifying the veracity of his allegations and whether he could do so in the circumstances in which he finds himself.<sup>173</sup>

### 3.4.5 All domestic remedies have been exhausted (art.56(5))

The rule of exhaustion of domestic remedies is the cornerstone of the protective mandate of the African Court and the Commission. As noted above, any application to the Court must satisfy the requirements of article 6 (2) of the Court Protocol, read together with article 56 (5) of the African Charter, that is, the applicant must have exhausted local remedies.<sup>174</sup> Article 6 (2) of the Court Protocol provides that the “court shall rule on the admissibility of cases taking into account the provisions of article 56 of the Charter.” Article 56 (5) of the African Charter requires the exhaustion of “local remedies, if any, unless it is obvious that this procedure is unduly prolonged.” This requirement is reiterated in rule 40 of the Rules of Court. The exhaustion of domestic remedies entails that a case regarding the violation of a human right must go through all the levels of national jurisdiction before it is brought to the Court. The requirement to exhaust available domestic remedies is based on the principle that the full and effective implementation of human rights imperatives is the primary responsibility of states.<sup>175</sup> The jurisprudence from regional and international judicial and quasi-judicial mechanisms have elaborated that in order to fall within the scope of the exhaustion rule, a remedy must be available in practice, adequate to provide relief for the harm suffered and effective for the remedy sought by the complainant in the particular circumstances of the case.<sup>176</sup> In addition to its conventional basis in human rights instruments, the requirement that remedies be exhausted at the local/domestic level

<sup>172</sup> *Id. Sir Dawda K. Jawara v Gambia Communication 147/95 and 149/96.*

<sup>173</sup> *Id. Sir Dawda K. Jawara v Gambia Communication 147/95 and 149/96.*

<sup>174</sup> See also *Mkandawire v Malawi* para 36.

<sup>175</sup> DJ Sullivan “Overview Of The Rule Requiring The Exhaustion Of Domestic Remedies Under The Optional Protocol To CEDAW” (2008) 3.

<sup>176</sup> Inter-American Court of Human Rights, *Velasquez Rodriguez Case, Judgment of July 29, 1988* (Se C), No. 4, para 64.

before a claim may be brought at the international level is a rule of customary international law.<sup>177</sup> The commentary on article 44 (b) of the International Law Commission's Articles on State Responsibility, on the exhaustion rule, explains that:

“[t]he mere existence on paper of remedies under the internal law of a State does not impose a requirement to make use of those remedies in every case. In particular there is no requirement to use a remedy which offers no possibility of redressing the situation, for instance, where it is clear from the outset that the law which the local court would apply can lead only to the rejection of any appeal.”<sup>178</sup>

In its recent judgments in the cases of *Tanganyika Law Society & Another v Tanzania* and *Mkandawire v Malawi*, the Court elaborated in detail the meaning and effect of the requirement to exhaust domestic remedies. In *Mkandawire v Malawi*, the Court explained that the requirement to exhaust local remedies is fundamental in the interaction between state parties to both the Court Protocol and the African Charter, and their national courts, on the one hand, and the Court, on the other hand. Accordingly, state parties ratify the Court Protocol on the understanding that local remedies would first be exhausted before recourse to the Court, hence the requirement for making a declaration in terms of article 34 (6) of the Court Protocol.<sup>179</sup>

The Court further explained in *Mkandawire* that by exhaustion of local remedies, the Court is referring primarily to judicial remedies,<sup>180</sup> confirming its earlier pronouncement in the *Tanganyika Law Society* case where it held that “[t]he term local remedies is understood in human rights jurisprudence to refer primarily to judicial remedies as these are the most effective means of redressing human rights violations.”<sup>181</sup> According to the Court, judicial remedies are the ones that meet the criteria of availability, effectiveness and sufficiency.<sup>182</sup> The Court further elaborated on the insufficiency of political processes, noting that:

“The parliamentary process, which the Respondent states should also exhaust is a political process and is not an available, effective and sufficient remedy because it is not freely accessible to each and every individual; it is discretionary and may be abandoned anytime; moreover, the outcome thereof depends on the will of the majority. No matter how democratic the parliamentary process will be, it cannot be equated to an independent judicial process for the vindication of the rights under the Charter.”<sup>183</sup>

177 Sullivan “Overview” 3.

178 J Crawford “The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries” (2002) 265.

179 See *Mkandawire v Malawi* para 37.

180 *Id* at para 38.

181 *Id* at para 82(1). *Tanganyika Law Society and Another vs Tanzania* para 82(3).

182 See *id* at para 82(3). *Tanganyika Law Society and Another v Tanzania* para 82 (1).

183 See *Tanganyika Law Society & Another v Tanzania* para 82(3).

In the *Tanganyika Law Society* case, the Court ruled the application admissible, finding that the applicants had exhausted local remedies as envisaged by article 6 (2) of the Court Protocol read together with article 56 (5) of the African Charter.<sup>184</sup> This was contrary to Tanzania’s argument that the applicants had not exhausted domestic remedies. In *Mkandawire*, the Court declared the application inadmissible in terms of article 6 (2) of the Court Protocol, read with article 56 (5) of the African Charter, ruling that the applicant had failed to exhaust domestic remedies.<sup>185</sup>

The African Commission, which has the same admissibility criteria as the Court, has ruled on several occasions on the requirement of the exhaustion of domestic remedies and elaborated on its scope. In the case of *Free Legal Assistance Group and Others v Zaïre*,<sup>186</sup> the Commission explained that the rule of exhaustion of domestic remedies is predicated on the principle that the sState “should be informed of human rights violations in order to have the opportunity to remedy them before being called before an international institution.”

It is also significant to note that if the victim of the human rights violation has not appealed against a decision in the time limit fixed by the law, the Commission has ruled the communication as inadmissible. It is, therefore, important to be aware of all the domestic rules of procedure in order to make sure that all the judicial processes have been explored, in the period of time granted, before lodging a complaint with the Court. In *Cudjoe v Ghana*,<sup>187</sup> the applicant invoked the abusive termination of his employment contract at the Ghana embassy in Guinea. The Commission considered it was not sufficient that the plaintiff lodged a complaint before the Commission of Human Rights of Ghana. The submission of his case to this non-judicial national human rights institution should have been followed by an action in courts, and since that had not been the case, the communication to the Commission was declared inadmissible.

### 3.4.5.1 Exceptions to the rule requiring exhaustion of domestic remedies

When the African Court considers that the domestic remedies are: inapplicable or inefficient, that is, if they do not offer any chance of success; unavailable, that is, when the applicant faces obstacles to use them; or discretionary - the requirement of their exhaustion is no longer necessary for the application to be declared admissible before the Court. Three major criteria could be deduced in determining the domestic remedies exhaustion rule, namely: the remedy must be available, effective, and sufficient.<sup>188</sup> Some

184 See *id.* *Tanganyika Law Society & Another v Tanzania* para 82(3).

185 See *Mkandawire v Malawi* para 41.

186 *Free Legal Assistance Group, Lawyers’ Committee for Human Rights, Union Interafricaine des Droits de l’Homme, Les Témoins de Jéhovah v Zaïre Communications* 25/89, 47/90, 56/91, 100/93.

187 *Alfred B. Cudjoe v. Ghana*, Communication 221/98.

188 *Sir Dawda K. Jawara v The Gambia Communication Nos 147195, 147/96 (Consolidated Communications)*.

of the exceptions are discussed below.

### 3.4.5.2 Violations are serious and massive

The first category of cases subject to this exception concern serious and massive human rights violations. The four communications filed before the Commission by several NGOs against Zaire (now the Democratic Republic of Congo) between 1989 and 1993 reported a high number of cases of arbitrary arrests, torture and extrajudicial killings. The Commission declared the communications admissible, noting that:

*The Commission never considered that the requirement of exhaustion of domestic remedies was to be applied strictly when it is neither practical nor advisable that the plaintiff submits his case to national tribunals in the case of each violation. This is the case in the present communications in view of the extent and diversity of the human rights violations.*<sup>189</sup>

This would mean that in cases of serious and massive human rights violations, the exhaustion of domestic remedies will always be regarded as inapplicable. In the case of *Civil Liberties Organisation v Nigeria*,<sup>190</sup> the complainant alleged that the normal application of law had been seriously curtailed because of the state of emergency declared by the respondent State. The Commission declared the communication admissible due to the political situation in Nigeria and proclaimed that in such a case, “the procedure of domestic remedies would take too much time, but would also fail to produce any result”.<sup>191</sup>

### 3.4.5.3 Existence of derogation clauses prevents recourse to judicial mechanisms

In the case of the existence of derogation clauses or decrees usurping the jurisdiction of the courts from examining decrees and decisions of the executive, the Commission considered that such clauses rendered domestic remedies “inexistent, inefficient or illegal.”<sup>192</sup> It was in particular the case in Nigeria in the 1990s, where the military government adopted a series of derogation clauses which ousted the jurisdiction of the courts thereby undermining the judicial enforcement of human rights at the domestic level.<sup>193</sup>

189 *Free Legal Assistance Group, Lawyers’ Committee for Human Rights, Union Interafricaine des Droits de l’Homme, Les Témoins de Jéhovah v. Zaïre*, Communications 25/89, 47/90, 56/91, 100/93.

190 *Civil Liberties Organisation v. Nigeria*, Communication 129/94.

191 *Id. Civil Liberties Organisation v. Nigeria*, Communication 129/94.

192 Communications 137/94, 139/94, 154/96 and 161/97, *International PEN, Constitutional Rights, Interights in the name of Ken Saro-Wiwa Jr. and Civil Liberties Organisation v. Nigeria*.

193 *The Constitutional Rights Project v. Nigeria*, Communication 87/93,.

### 3.4.5.4 *The exhaustion of domestic remedies is not “logical”*

An applicant is not obliged to exhaust domestic remedies when it does not make sense to do so. For instance, the Commission considered that a plaintiff who had fled from a prison in Ghana to the Ivory Coast, and claimed that his detention was illegal, did not have to return to his country of origin to submit his case to Ghanaian courts. The Commission declared the communication admissible.<sup>194</sup>

In *Purohit and Moore v The Gambia*,<sup>195</sup> the African Commission considered that in this case, which dealt with the conditions of detention and treatment of mental patients in The Gambia, the existing remedies were not realistic and, therefore, inefficient for this category of persons. Consequently the communication was, therefore, declared admissible. The Commission noted that:

*The general provisions set out by law which could offer a remedy to any person adversely affected by the fault of others are accessible for the rich and those in a position to afford the services of private counsel. However, it cannot be affirmed as a general truth that there is no domestic remedies in the country, but they exist for those who can afford to use them.*

### 3.4.5.5 *Domestic remedies are inefficient or inaccessible*

In the cases where the victim of a human rights violation was forced to flee from his country, the Commission considered that he did not have to exhaust domestic remedies. In the case of *Rights International v Nigeria*, a student had been arrested and tortured in a military detention camp in Nigeria. In this case, the Commission found that the student was not in a position to make use of any domestic remedy, after he had fled to the Republic of Benin out of fear for his life, and was granted refugee status by the United States of America.<sup>196</sup>

### 3.4.5.6 *The domestic procedures are unduly prolonged*

According to article 56 (5) of the African Charter, the requirement of exhaustion of domestic remedies does not apply if such proceedings are unduly prolonged though the Commission has not defined the time period constituting undue prolongation. In the case of *Kenya Human Rights Commission v Kenya*, a period of one year and 10 months was not considered as an undue prolongation.<sup>197</sup> In the case of *Odjouriby Cossi Paul v Benin*, the Commission held that the fact that the case had been pending on a national level for three years was considered to be an abnormal length of procedure, hence the case was admissible. In the case of *Liesbeth Zegveld et Mussie Ephrem v Eritrea*, the Commission ruled that the case was admissible after eighteen months of detention

<sup>194</sup> *Alhassan Abubakar v. Ghana*, Communication 103/93.

<sup>195</sup> *Purohit and Moore v. Gambia*, Communication 241/01.

<sup>196</sup> *Rights International v. Nigeria* Communication 215/98.

<sup>197</sup> *Kenya Human Rights Commission v. Kenya*, Communication 135/94.

without judicial proceedings.

#### **3.4.5.7 *The application is admissible if the same matter has not been adjudicated by another international institution (res judicata)***

The African Charter provides in article 56 (7) that a communication will only be admissible if it does not deal “with cases which have been settled by the states involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organisation of African Unity (presently the AU) or the provisions of the present Charter.” If the same case is submitted to another international institution, the case before the Court becomes inadmissible. The accumulation of procedures cannot be admitted since it would transform one international instrument of protection of human rights into an institution of re-examination or appeal of another. It would also encourage forum-shopping. This is why the *Amnesty international v Tunisia*<sup>198</sup> case was declared inadmissible by the Commission, as the case was already undergoing examination in accordance with article 1503 special procedure of the United Nations.

#### **3.4.5.8 *Be submitted within reasonable time (article 56 (6))***

The African Charter provides in article 56 (6) that communications have to be submitted “within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized with the matter.” This provision does not seem to stipulate a time limit for the submission of communications and would certainly give the Court the discretion to determine what amounts to a “reasonable time.” The Commission has had opportunities to interpret article 56 (6) in communications filed with it. In *Rabah v Mauritania*,<sup>199</sup> Commissioner Yasir Sid Ahmed ElHassan, in his dissenting opinion on the admissibility of the communication, held that six years between the submission of the communication to the Commission and the delivery of judgment by the Supreme Court of Mauritania constituted an unreasonable period.

### **3.5 Declaration under article 34 (6) of the Court Protocol**

Article 34 (6) in accordance with article 5 (3) of the Court Protocol provide that the Court shall be competent in considering communications from individuals once the state party concerned has made a declaration accepting such competence. Article 34 (6) of the Court Protocol on “ratification” provides that:

<sup>198</sup> See *Amnesty international v Tunisia communication 69/92*.

<sup>199</sup> *Rabah v Mauritania* (2004) AHRLR 78 (ACHPR 2004).

*At the time of 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 which has not made such a declaration.*

Article 5 (3) provides that:

*The Court may entitle relevant Non-Governmental Organisations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34(6) of this Protocol.*

To date, only seven states have made a declaration allowing such direct access from a total of 26 state parties to the Court Protocol.

The following member states have deposited a declaration in conformity with Article 34(6):

**Burkina Faso:** *The Court shall be competent to receive cases from individuals and NGOs with observer status within the African Commission on Human and Peoples' Rights. (signed: 14/07/1998 deposited: 28/07/1998);*

**Malawi:** *Accepts the competence of the Court to receive cases under Article 5(3) of the Protocol. (signed: 09/09/2008 deposited: 09/10/2008);*

**Mali:** *Accepts the competence of the Court to receive cases in accordance with Article 5 (3) of the Protocol. (signed: 05/02/2010 deposited: 19/02/2010);*

**Tanzania:** *The Court may entitle Non-Governmental Organizations (NGOs) with observer status before the Commission and individuals to institute cases directly before it in accordance with Article 34 (6) of the Protocol. However, without prejudice to Article 5 (3) of the aforesaid Protocol, such entitlement is only to be granted to such NGOs and Individuals once all domestic legal remedies have been exhausted and in adherence to the Constitution of the United Republic of Tanzania. (signed: 09/03/2010 deposited: 29/03/2010);*

**Ghana:** *Accepts the competence of the Court to receive cases against the Republic of Ghana under Article 5 (3) of the Protocol. (signed: 09/02/2011 Deposited: 10/03/2011);*

**Rwanda:** *Declares that the African Court on Human and Peoples' Rights may receive petitions involving the Republic of Rwanda, filed by Non-Governmental Organisations (NGOs) with observer status before the African Commission of Human and Peoples' Rights and individuals, subject to the reservation that all local remedies will have been exhausted before*

*the competent organs and jurisdictions of the Republic of Rwanda.*  
(signed: 22/01/2013 deposited: 06/02/2013);

**Côte d'Ivoire:** *Declares to accept the jurisdiction of the Court to receive applications by individuals and Non-Governmental Organisations (NGOS) with observer status with the African Human and Peoples' Rights Commission. (signed: 19/06/2013 deposited: 23/07/2013)*

Source: [www.african-court.org](http://www.african-court.org)

### Case study: *Michelot Yogogombaye v Republic of Senegal*

On December 15, 2009, the Court rendered its historic first judgment in the case of *Michelot Yogogombaye v Republic of Senegal*.<sup>200</sup> The applicant, Michelot Yogogombaye, is a Chadian living in Switzerland. On August 11, 2008, he initiated proceedings against Senegal, seeking an order to prevent Senegalese authorities from prosecuting former President Hisssein Habre. Habre, who ruled Chad for eight years, and sought asylum in Senegal, a neighbouring West African country, after he was deposed in December 1990.<sup>201</sup> He is allegedly responsible for ordering the torture and deaths of up to forty thousand Chadians during his eight years in office. Yogogombaye sought to establish the Court's jurisdiction over the case. He claimed that Senegal, as a member of the AU and as party to the Court Protocol, had filed a declaration pursuant to article 34 (6) of the Court Protocol allowing the Court to hear human rights petitions initiated by individuals.<sup>202</sup> Senegal argued that, contrary to the applicant's claims, it had not filed the article 34 (6) declaration accepting the Court's jurisdiction over cases directly initiated by individuals.<sup>203</sup> Accordingly, it requested that the Court declare the case inadmissible because the applicant lacked standing to institute a complaint.<sup>204</sup> It explained that, to hear a case initiated directly by an individual against a State party, the requirements of articles 5 (3) and 34 (6) of the Court Protocol must be met.<sup>205</sup> Article 5 (3) provides that the "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 article 34 (6) of this Protocol."<sup>206</sup> These two provisions, read together, confirm that direct individual access to the Court is subject to a precondition: the respondent State must have deposited an article 34 (6) declaration vesting the Court with

200 *Michelot Yogogombaye v. Republic of Senegal* App. No. 001/2008.

201 *Id* at para 18.

202 *Id* at para 17.

203 *Id* at para 25.

204 *Id* at para 28.

205 *Id* at para 31.

206 *Id* at para 32.

*jurisdiction to hear such cases.<sup>207</sup> To resolve the issue, the Court had requested the chair of the AU Commission, the depository of the treaty, to provide it with the list of African states parties that had accepted the Court's competence over direct individual complaints. That list confirmed Senegal's position that it had not submitted an article 34 (6) declaration. Consequently, the Court ruled that it lacked jurisdiction to hear Yogogombaye's application.<sup>208</sup>*

This lack of sufficient optional declarations under article 34(6) is one of the main limitations in the African system for the protection of human rights as only a few states are willing to permit individuals or NGOs direct access to the Court.<sup>209</sup> If states parties to the Court Protocol do not make the necessary article 34 (6) declarations, the protective work of the Court will be largely limited. What is significant about the African human rights system, however, is that unlike other regional courts such as the European Court of Human Rights or the IACtHR, individuals and NGOs do not have to demonstrate that they are direct victims of human rights violations in order to submit cases.<sup>210</sup> Once a state has made an article 34 (6) declaration, any individual or NGO with observer status before the African Commission may refer a case to the Court in order to challenge human rights violations perpetrated by the state in the absence of appropriate domestic remedies as discussed above. The ability of the Court to receive individual communications is, therefore, fundamental to ensuring that the Court is able to play a credible role in the fight against impunity, and in the protection and enforcement of human rights on the African continent.<sup>211</sup> It could be argued that the limitations imposed by article 34 (6) could be interpreted as an effective and necessary method of controlling floodgates and preventing the Court from becoming swamped with cases. It should be noted, however, that the requirement of article 34 (6) declaration can be interpreted as a violation of an individual's right to justice and a contravention of the purpose of the court, that is, the protection of individuals and groups of individuals from human rights abuses by states.<sup>212</sup> Although the Court was established to complement the protective mandate of the Commission, it is ironic that individuals and NGOs, the primary intended users of the protective function, are not automatically entitled to petition before the Court.<sup>213</sup>

<sup>207</sup> *Id* at para 34.

<sup>208</sup> *Id* at para 37.

<sup>209</sup> LC Mgimba & SJ Waters *Jurisprudential Analysis of the African Court on Human and Peoples' Rights: From 2004-2010* (2013) 9.

<sup>210</sup> See article 35 of the European Convention of Human Rights article 47 of the American Convention of Human Rights.

<sup>211</sup> Mgimba & Waters *Jurisprudential Analysis* 10.

<sup>212</sup> Mgimba & Waters *Jurisprudential Analysis* 10.

<sup>213</sup> 10.

## 4 Proceedings before the African Court

### 4.1 Legal Representation

The African human rights system does not explicitly provide for free legal representation of individuals bringing cases to the Court or the Commission. The Court Protocol provides that all parties to a case are allowed to choose their legal representation.<sup>214</sup> It also says that “free legal representation may be provided where the interests of justice so require”.<sup>215</sup> This is especially applicable in cases in which the parties do not have the financial means to engage the services of a lawyer.

Additionally, article 10 (2) of the Court Protocol provides that “[a]ny party to a case shall be entitled to be represented by a legal representative of the party’s choice. Free legal representation may be provided where the interests of justice so require.” The above position is buttressed by rule 28 of the Rules of Court, which provides that “[e]very party to a case shall be entitled to be represented or to be assisted by legal counsel and/or by any other person of the party’s choice.”

The above provisions constitute a great improvement unlike the Commission that does not offer legal aid for parties submitting communications to it. It must, however, be noted that the Court Protocol only says that its legal assistance “may be provided.” This does not entail a right for the applicant to legal aid or representation, but a mere possibility. Rule 31 of the Rules of Court further provides that “[p]ursuant to article 10 (2) of the Protocol, the Court may, in the interest of justice and within the limits of the financial resources available, decide to provide free legal representation and/or legal assistance to any party.” In one of the Court’s most recent decisions, it became clear that generally there is no right to legal representation, and at the time, the Court did not have a legal aid policy in place which it has since adopted and is fully discussed below. An excerpt from the Court’s judgment in *Tanganyika Law Society and Another v Tanzania* case<sup>216</sup> clearly

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214 Article 10 (2) of the Court Protocol.

215 See article 10 (2) of the Court Protocol.

216 See *Tanganyika Law Society and Another v Tanzania*.

illustrates the absence of a right to legal aid or representation for the purposes of litigating before the Court. The Court recounted that:

*On 25 May 2012, the Registry received an electronic mail from Counsel for the 2nd Applicant that they would all attend the public hearing. He also advised the Registrar that he would be making a request for legal aid. The request was subsequently made by a letter dated 1 June 2012 applying for legal aid to facilitate the trip of the 2nd Applicant and two of his Counsel to attend the public hearing. The Registrar informed Counsel that the Court could not grant the requested legal aid as the Court had no legal aid policy in place (emphasis added).<sup>217</sup>*

### 4.11 African Court Legal Aid Policy 2013-2014

The African Court recently adopted a *Legal Aid Policy for 2013-2014* managed by the Registrar of the Court under supervision of the court president.<sup>218</sup> The Legal Aid Policy is based on article 10 (2) of the Court Protocol which provides that “[a]ny party to a case shall be entitled to be represented by a legal representative of the party’s choice. Free legal representation may be provided where the interests of justice so require.” Rule 31 of the Rules of Court also provides for instances when legal assistance will be provided. It states that “the Court may, in the interest of justice and within the limits of the financial resources available, decide to provide free legal representation and/or legal assistance to any party.”

The above provisions provided the legal basis for the Court to promulgate a Legal Aid Policy in respect of the Court’s legal aid scheme. The Legal Aid Policy provides for eligibility criteria for legal assistance. The Legal Aid Policy provides that only individuals and groups of individuals qualify for legal aid assistance.<sup>219</sup> On the face of it, it means that NGOs are not eligible for legal aid. The additional eligibility criteria include indigence, equality of arms, and the “interest of justice” criterion. The categories of expenses that will be supported include travel expenses, legal representation, witness expenses (including expert witnesses), and daily subsistence allowances. Legal aid may be provided once an application is filed with the Court Registry. An applicant can make a request for legal aid at the same time he or she files an application or any time thereafter, by filling out the Application for Legal Aid Form. The Legal Aid Policy also explains that the scheme will be funded through AU member states’ assessed contributions, voluntary contributions from AU member states, and cooperating partners’ voluntary contributions.<sup>220</sup>

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<sup>217</sup> *Id* at para 45.

<sup>218</sup> See African Court Legal Aid Policy at <http://www.african-court.org> (African Court Legal Aid Policy).

<sup>219</sup> African Court Legal Aid Policy.

<sup>220</sup> African Court Legal Aid Policy.

## 4.2 Amicable Settlement under the Auspices of the Court

The Court Protocol provides that the Court may try to reach an amicable settlement in a case pending before it in accordance with the provisions of the African Charter.<sup>221</sup> In that regard, the Court may contact the parties and take appropriate measures to facilitate amicable settlement of the disputes.<sup>222</sup> It is important to note that any negotiations entered into with a view to reaching an amicable settlement are conducted in a confidential manner and without prejudice to the parties' case in the proceedings before the Court. In that regard, no written or oral communication, or any offer of concessions made as part of such negotiations is to be referred to in the proceedings before the Court.<sup>223</sup> In the event of an amicable settlement of a case, the Court is enjoined to render a judgment which shall be limited to a brief statement of the facts and of the solution adopted. It is, however, important to note that the Court retains the discretion to proceed with the hearing of the application notwithstanding the notice of amicable settlement.<sup>224</sup>

## 4.3 Provisional Measures

Provisional measures by regional human rights courts present an important protective mechanism for preventing, stopping, or remedying human rights violations in grave, urgent, or similar situations.<sup>225</sup> In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court is empowered to adopt such provisional measures as it deems necessary.<sup>226</sup>

The ability to prescribe provisional measures in the adjudication of human rights claims is important. For any adjudicative body to be effective, it should be able to take urgent action to prevent irreparable damage from continuing. In cases of extreme gravity and urgency, the Court Protocol enjoins the Court to adopt provisional measures if they are necessary to avoid irreparable harm to persons. As the Court's competence is not explicitly restricted to cases pending before it, the Court may issue such orders in respect to communications before the Commission that are not instituted as cases before the Court. In the *Libyan Provisional Measures*<sup>227</sup> case, referred to it by the African

221 Article 9 of the Court Protocol.

222 *Rules of Court*, r57(1).

223 *Rules of Court*, r57(2).

224 See *Rules of Court*, r57(4).

225 JM Pasqualucci "Interim Measures in International Human Rights: Evolution and Harmonization" (2005) 38 *Vanderbilt Journal of Transnational Law* 1 7.

226 See article 27(2) of the Court Protocol.

227 *In re African Commission on Human and Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya*, Application No. 004/2011, Order for Provisional Measures.

Commission without expressly requesting provisional measures, the Court held that it was empowered on its own initiative to order provisional measures.

In February 2011, the wave of civilian uprising, witnessed across North Africa and the Middle East, metamorphosed into an armed conflict in Libya.<sup>228</sup> The government of Libya responded with brutal force against civilian protesters, in contravention of international human rights and humanitarian law thus prompting international action. In February 2011, three non-governmental organisations, the Egyptian Initiative for Personal Rights, Human Rights Watch and INTERIGHTS submitted a request for provisional measures to the African Commission. While noting and condemning the human rights violations in Libya, the Commission did not request any provisional measures, but instead passed a resolution in March 2011 calling on the responsibility of the African Union to take all the necessary political and legal measures for the protection of the Libyan population.<sup>229</sup> The African Commission also instituted proceedings before the African Court against Libya for “serious and massive violations of human rights guaranteed under the African Charter.”<sup>230</sup> The Court immediately informed Libya, the AU organs, state parties, and the complainants of the application, noting that the matter was of “extreme gravity and urgency.”<sup>231</sup> The Court thus issued the first provisional order since its establishment, hence providing a precedent in the adoption of provisional measures in grave human rights situations.

The first element in the issuance of a provisional order is the existence of prima facie jurisdiction, which provides room for sufficient flexibility in the exercise of the Court’s discretion.<sup>232</sup> The Court’s standard suggests that an order for provisional measures may be made pending determination of admissibility or jurisdiction on the merits of a case. The question of jurisdiction, therefore, would be whether the state concerned is party to the African Charter and the Protocol establishing the Court, and the competence of the party to institute or refer the case to the Court. The second element is the requirement for “extreme gravity and urgency”,<sup>233</sup> “imminent risk”,<sup>234</sup> and “risk of irreparable harm”.<sup>235</sup>

Based on the facts provided to it by the African Commission, including facts contained in a statement by the AU Peace and Security Council and in a UN Security Council

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228 See S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011).

229 See the Commission’s resolution at its 9th extra-ordinary session held in Banjul, The Gambia, from 23 February to 3 March 2011, ACHPR, Resolution on the Human Rights Situation in the Great Socialist Peoples’ Libyan Arab Jamahiriya, ACHPR/RES.181 (EXT.OS/IX) (Mar. 1, 2011).

230 *In re African Commission on Human and Peoples’ Rights v. Great Socialist People’s Republic of Libyan Arab Jamahiriya, Application No. 004/2011, Order for Provisional Measures.*

231 *Id* at para 8.

232 *African Commission v Libya* para 15.

233 *Id* at para 22 and 24.

234 *Id* at para 13.

235 *Id* at para 20 and 22.

resolution, the Court held that the required conditions of extremity and necessity were met, and ordered that Libya must immediately refrain from actions resulting in loss of life or violation of physical integrity.

The Court is obliged to notify the African Commission and the AU Assembly, the Executive Council, and the African Union Commission of any measures ordered.<sup>236</sup> These measures, as well as the Court's recommendations in cases of non-compliance by states, must also be included in the Court's annual report to the AU Assembly.<sup>237</sup> Clearly, a role for the Court in following up, the Court may invite the parties to provide it with information "on any issue relating to implementation" of the preliminary measures.<sup>238</sup> In stating that the conflict in Libya made it necessary for it to order provisional measures "without written pleadings or oral hearings" or "without any proceedings,"<sup>239</sup> it seems that the Court has adopted a purposive interpretation of its protective mandate, opening its doors for such requests in the future. The measures also provide a venue for the construction of a system of collective enforcement given that parties to the case and AU organs must be notified of the provisional measures at the time of adoption of the order,<sup>240</sup> whereas the Court must submit its annual reports to the AU, with recommendations in the event of non-compliance with these measures by the State concerned.<sup>241</sup>

#### 4.4 Judgments of the Court

Under the Court Protocol, seven judges make up a quorum. A judge may not hear cases involving the state of which he or she is a national. In the case of *Mkandawire v Malawi*,<sup>242</sup> a case involving Malawi as the respondent state, Judge Duncan Tambala, a member of the Court and a national of Malawi, did not hear the application in accordance with article 22 of the Court Protocol and Rule 8 (2) of the Rules of Court. In the case of *Tanganyika v Tanzania*,<sup>243</sup> Judge Augustino Ramadhani, a member of the Court and a national of Tanzania, did not hear the application in accordance with article 22 of the Court Protocol and Rule 8 (2) of the Rules of Court as the case involved Tanzania as the respondent state. The judges would deliberate over the case after the public hearing.

The Court Protocol provides for the Court to render its judgment within 90 days after

236 See Rules of the African Court, r51(3).

237 See Rules of the African Court, r51(4).

238 See Rules of the African Court, r51(5).

239 See *African Commission v Libya*, Application No. 004/2011, paras 13 and 23.

240 Rules of the Court, r. 51(3).

241 Rules of Court, 51(3).

242 *Mkandawire v Malawi*.

243 *Tanganyika Law Society and Another v Tanzania Application*.

completing its deliberations.<sup>244</sup> However, the deliberations of the Court are held in camera and remain confidential. Only those judges who are members of the panel that hear the case participate in the deliberations of the Court.<sup>245</sup> The judgment of the Court decided by a majority shall be final and is not subject to appeal. It is however, important to note that the Court may review its decision in the light of new evidence under conditions to be set out in the Rules of Procedure.<sup>246</sup> Additionally, the Court may, upon application, interpret its own decision.<sup>247</sup> The judgment of the Court must be read in open Court, with the necessary notification given to the parties to the case in question. Significantly, the Court must give reasons for the judgment that it hands down. If the judgment of the Court does not represent, in whole or in part, the unanimous decision of the judges, any judge is entitled to deliver a separate or dissenting opinion.<sup>248</sup>

### 4.4.1 Application for Interpretation of a Judgment

Article 28 (4) of the Court Protocol provides for the Court to interpret its own judgment. Any party to a case may, for the purpose of executing a judgment, apply to the Court for interpretation of the judgment. The Rules of Court provide for a time period of twelve months from the date the judgment was delivered for such an application for interpretation to be filed with the Court unless the Court, in the interest of justice, decides otherwise.<sup>249</sup> The application for interpretation of a judgment must state clearly the point or points in the operative provisions of the judgment on which interpretation is required. The application for interpretation of a judgment must be transmitted to any other parties who are affected by the judgment and such parties may submit written comments. The Rules of the Court provide that when considering an application for interpretation of a judgment, the Court shall be composed of the same judges who delivered judgment on the substantive case. However, where it is not possible for any judge who was part of the panel that handed down the judgment to participate in the interpretation proceedings, such judge shall be replaced.<sup>250</sup>

### 4.4.2 Request for Review of a Judgment

The Court Protocol provides for a framework for the court to review its decision in the light of new evidence.<sup>251</sup> Any party to a case that was decided by the Court may apply to the Court to review its judgment in the event of the discovery of evidence, which was

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244 Article 28(1) of the Court Protocol.

245 See *Rules of the Court*, r60.

246 Court Protocol, article 28(3).

247 Court Protocol, article 28(4).

248 Court Protocol, article 28(7).

249 *Rules of the Court*, r 66(1).

250 *Rules of the Court*, r 66(4).

251 See article 28 (3) of the Court Protocol.

not within the knowledge of the party at the time the judgment was delivered. An application for review must be filed with the Court Registry within six (6) months after that party acquired knowledge of the evidence so discovered.<sup>252</sup> It is also important that the application for review specify the judgment in respect of which revision is requested, and must be accompanied by copies of all relevant supporting documents.<sup>253</sup> If the application is declared admissible, the Court must determine the time limit for all future proceedings on the substance of the application after consultation with all the parties.<sup>254</sup> However, it is important to note that an application for review shall not stay the execution of a judgment unless the Court decides otherwise.<sup>255</sup>

## 4.5 Remedies

The Court Protocol provides that should the Court find that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.<sup>256</sup> Rule 63 of the Rules of Court allows the Court to “rule on the request for the reparation, submitted in accordance with Rule 34 (5) of these Rules, by the same decision establishing the violation of a human and peoples' right or, if the circumstances so require, by a separate decision.”

The Court's wide remedial competence allows it a broad discretion to choose from a range of remedies, which, according to Viljoen is akin to that afforded under the IACtHR.<sup>257</sup> The IACtHR has adopted a wide spectrum of remedial steps which could serve as a guide for the Court. The IACtHR has awarded reparations to victims and extended these to a group of people falling within the category of “next of kin” It has also ordered injunctive relief by, for example, ordering that a victim be freed or retried. In addition, the IACtHR has ordered violating states to remedy the consequences of the violation, for instance by investigating the facts giving rise to a violation; punishing those responsible; amending, adopting, or repealing domestic law or judicial decisions; ordering the state to refrain from a particular course of action; and demanding that the state issue an apology.<sup>258</sup> Applications to the Court must contain a request for reparation. Ordinarily, the Court will deal with the merits in a single decision and, if required, make the appropriate remedial order. In formulating an appropriate remedial order, the Court should keep in mind the enforceability of its orders. Orders should,

252 See Rules of the Court, r67(1).

253 See Rules of the Court, r67(2).

254 See Rules of the Court, r67(4).

255 See Rules of the Court, r67(5).

256 See article 27(1) of the Court Protocol.

257 Viljoen *International Protection of Human Rights in Africa* 445.

258 Viljoen *International Protection of Human Rights in Africa* 445.

therefore, be specific, clear, and directed as the circumstances allow, in order to reduce debates about compliance in the follow-up phase. In a recent decision of the Court in *Tanganyika Law Society and Another v Tanzania*, the respondent State was directed to take constitutional, legislative, and all other necessary measures within a reasonable time to remedy the violations found by the Court, and to inform the Court of the measures taken.<sup>259</sup>

### 4 6 Execution of Judgments

In terms of article 30 of the Court Protocol, states parties to that instrument undertake to comply with the Court judgment in any case to which they are parties within the time stipulated by the Court, and to guarantee its execution. Depending on the remedy ordered, compliance may take numerous forms and may require a combination of legal and political action. Although the AU Assembly is ultimately responsible for ensuring that states comply with judgments, it is the Executive Council that is tasked with following up on the implementation of the judgment on a continuous basis. In line with other regional systems, the Executive Council should put the issue of implementation by a particular state on its agenda until the respondent state complies with the Court decision. In the process, the Council may take a decision reiterating the states' obligation to abide by the Court's imposition of sanctions and other measures of a political and economic nature as determined by the AU Assembly.<sup>260</sup> In fulfilling its duty to report annually to the AU Assembly about its activities, including non-compliance by states, the Court should cooperate closely with the Executive Council.<sup>261</sup> The Court retains a judicial role in the enforcement process, as it is mandated to "interpret" its own orders if called upon to do so for the purpose of executing a judgment.<sup>262</sup>

### 4 7 Merger between the African Court and the African Court of Justice and Human Rights

When the African Economic Community was founded in 1991, a Court of Justice was envisaged as one of its institutions.<sup>263</sup> The AU Constitutive Act did not provide much detail about the nature of the Court of Justice, since it was envisaged that a separate detailed protocol defining its statute, composition, and functions would be adopted in the future.<sup>264</sup> A protocol of the African Court of Justice of the African Union (ACJ

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259 See *Tanganyika Law Society and Another v Tanzania*, para 126 Order 3.

260 Viljoen *International Human Rights Law in Africa* 446.

261 Viljoen *International Human Rights Law in Africa* 446.

262 Viljoen *International Human Rights Law in Africa* 446.

263 See article 18 of the AU Constitutive Act.

264 See article 18(2) of the AU Constitutive Act.

Protocol) was adopted in 2003.<sup>265</sup> The African Court of Justice was mandated to administer matters of interpretation arising from the implementation of the AU Constitutive Act.<sup>266</sup> A decision was taken to merge the African Court with the Court of Justice of the African Union – resulting in the adoption on 1 July 2008 of a Protocol on the Statute of the African Court of Justice and Human Rights (Merger Protocol) establishing the African Court of Justice and Human Rights. This decision was motivated primarily by economic reasons, holding that the AU would not have the resources to establish and operate two separate courts. The Merger Protocol will come into force 30 days after the deposit of the fifteenth ratification document by a state.<sup>267</sup> Once the Protocol on the African Court of Justice and Human Rights is in force, the African Court on Human and Peoples' Rights and the Court of Justice will merge into one Court: the African Court of Justice and Human Rights. The Merger Protocol will replace the African Court Protocol a year after the entry into force of the former.<sup>268</sup> The Merged Court shall have a Human Rights Section competent to hear all cases relating to human and peoples' rights and a General Section competent to hear all other cases falling within the jurisdiction of the Court.<sup>269</sup> The African Court on Human and Peoples' Rights will be institutionally replaced by the Merger Court but the latter's human rights section will carry on the work of the Court.<sup>270</sup> It must however be noted that when the Merger Court, begins to operate, the adjudication of cases relating to human and peoples' rights and other cases that fall within the jurisdiction of the General Section may not be a simple matter as some cases might give rise to issues falling within the jurisdiction of both Sections. Such issues shall be solved through consideration by the full court under article 18 of the Merger Court or through the formation of a Chamber by the two sections under article 19 of the Merger Protocol.

The Merger Protocol stipulates that once it is in force, the Court Protocol will remain temporarily in force for a period not exceeding one year or any other period as determined by the Conference of Heads of State and Government.<sup>271</sup> This transition period should enable the Court to take appropriate measures for the transfer of its prerogatives, properties, rights and obligations to the African Court of Justice and Human Rights. Once the Merger Protocol is in force, and the transition period for the Court is over, with hearings of pending cases before the Court concluded, the African Court of Justice and Human Rights will then exist fully in its own right as the new premier pan-African judicial institution.

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265 The AU Assembly adopted the Protocol of the African Court of Justice of the African Union on 11th July 2003.

266 See article 26 of the Constitutive Act.

267 See art. 9 of the Merger Protocol.

268 See Merger Protocol articles 1 & 7.

269 See Merger Court Protocol, articles 16-19 & 28.

270 See article 5 of the Merger Protocol.

271 See article 7 of the Merger Protocol.

## 5 Ratification of the Court Protocol and the Role of Civil Society

The importance of African Union (AU) member states ratifying the Court Protocol and making the necessary declaration under article 34(6) of the Court Protocol, which allows individuals or groups to submit petitions directly to the African Court cannot be overstated. As of April 2014, only seven AU member states had made a declaration allowing such direct individual access to the African Court from a total of 26 states parties to the Court Protocol. These are Burkina Faso, Malawi, Mali, Tanzania, Ghana, Rwanda and Côte d'Ivoire. To ensure the utilisation and impact of the African Court as a regional human rights enforcement institution, there is need for regional universal acceptance of the African Court's jurisdiction through ratification of the Court Protocol.<sup>272</sup> In that regard, fervent efforts should be undertaken to persuade African states that have not yet ratified the Court Protocol to do so. Failure by African states to ratify the Court Protocol would mean that, the African regional human rights system would operate differently for different states, thereby undermining the development of common institutions and norms.<sup>273</sup> The qualified provisions on access for individuals and NGOs are likely to undermine the effectiveness of the Court in protecting human rights on the continent if individuals and NGOs cannot access the judicial mechanism.

As discussed above, the Court Protocol endeavours to accommodate considerations of political sovereignty by making direct access to the African Court optional, rather than compulsory.<sup>274</sup> The provisions on direct access to the African Court have been one of the most debated issues. Although NGOs have played a very critical role in the work of the African Commission, it is noticeable that individuals and NGOs do not have direct access to the African Court.<sup>275</sup> When it comes to the right of recourse for NGOs with observer status before the African Commission and individuals, state parties must sign a declaration to that effect in terms of article 34 (6) of the Protocol.<sup>276</sup> Under the Court Protocol, states do not automatically accept the right of individuals and NGOs to bring

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272 Viljoen *International Human Rights Law in Africa* 457.

273 Viljoen *International Human Rights Law in Africa* 457.

274 See 3.4.3 above.

275 For a discussion on direct access to the African Court see 3.4.3 above.

276 See article 5(3) of the Court Protocol.

cases directly to the African Court, but are required to make an optional declaration indicating their acceptance of that possibility. Article 34(6), in accordance with article 5 (3) of the Court Protocol, provides that the Court shall be competent in considering communications from NGOs and individuals once the state party concerned has made a declaration accepting such competence. A state declaration under article 34 (6) of the Court Protocol thus allows individuals or groups to submit a claim directly to the African Court without going through the African Commission.

The restrictive nature of accessing the African Court is similar to that of the IACtHR. In the case of the IACtHR, states must give consent, either unconditionally or on condition of reciprocity, for a specific period or for specific cases, by way of a declaration presented to the Secretary General of the Organisation of American States. The IACtHR thus may only hear cases where the state involved has ratified the American Convention on Human Rights and has accepted that Court's optional jurisdiction. This significantly restricts access to the IACtHR. Moreover, unlike in the case of the European Court on Human Rights (European Court), individuals cannot directly access the IACtHR to seek redress for the violation of their rights. They must file their complaints with the Inter-American Commission, which, in turn, seeks redress on their behalf. Under the European system for the protection of human rights, states' consent to the European Court's jurisdiction is implicit in the ratification of the European Convention on Human Rights and its relevant protocols. It is also significant to note that the jurisdiction of the European Court has been recognised by all 47 member states of the Council of Europe. The above should serve as an inspiration to African states to ratify the Court Protocol and make the necessary article 34(6) declaration.

Admittedly, there are factors that may inhibit the enthusiasm of AU member states' acceptance of the African Court's jurisdiction. In the European or Inter-American system for the protection of human rights, it has now become widely established that states parties to the European Convention and American Convention on Human Rights undertake to abide by the decisions of the judicial organs under those systems, and that the orders of the courts are observed. However, the mechanism of extraterritorial jurisdiction is a concept that has not yet received wide acceptance in Africa. The establishment of the African Court represents an inroad into a state party's exercise of judicial sovereignty and may even impact its legislative and executive sovereignty. State sovereignty, supported by the principle of non-interference in the domestic affairs of member states, is frequently invoked as a barrier against international adjudication of internal affairs.<sup>277</sup> Reliance on national sovereignty, linked to apprehension about the African Court's potential disruption of national legal orders as well as reluctance by states to use judicial settlements inter-se means it might take some time before the

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277 Viljoen *International Human Rights Law in Africa* 457.

states submit themselves to the jurisdiction of the African Court.

It must be noted, however, that by ratifying the African Charter, the Court Protocol and other international and regional human rights instruments, states have waived exclusive jurisdiction on matters regulated by the treaties they have ratified.<sup>278</sup> In any event, all African states have, as parties to the African Charter, already accepted the competence of the African Commission to decide inter-state and individual complaints, and many of them have accepted the optional complaints, mechanisms provided under a plethora of UN treaties and other AU treaties such as the Women's Protocol and the African Children's Charter.<sup>279</sup> Significantly, in an age where the protection of human rights has become accepted as an integral part of governance, the very notion of state sovereignty has taken on a different meaning. In any case, it is now generally accepted that "sovereignty is no longer the sovereign but the people and that its purpose is to ensure that individuals prosper and that their rights are realised".<sup>280</sup> The process of interpreting and giving meaning to human rights norms is a dialogic process which includes a range of national and international actors.<sup>281</sup> Such a process is not confined to national boundaries but must incorporate the normative and institutional developments within international human rights law.<sup>282</sup> This is one of the positive features of globalisation, where the interpretation accorded to human rights norms can be influenced by cross-cultural dialogue extending across national frontiers.<sup>283</sup>

A major concern is whether ratification of the Court Protocol and the submission of the article 34 (6) declaration would subject African states to a flood of complaints and investigations. It is significant to note that the Court Protocol contains strict admissibility requirements – by reference to the admissibility criteria provided under article 56 of the African Charter.<sup>284</sup> The Court Protocol further restricts complaints to those that have exhausted domestic remedies and have some merit. The requirement to exhaust domestic remedies enshrined in the African Charter is qualified in two respects in that all available domestic remedies must be attempted and their application must not be unreasonably prolonged. Other restrictive features of article 58 of the African Charter provided as a valve to filter out cases submitted before the African Court are the requirements that any application should comply with the AU Constitutive Act; not be based exclusively on news disseminated through the mass media; be filed within a reasonable time from the date local remedies were exhausted; and not raise issues previously settled by the parties in accordance with the Principles

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278 Viljoen *International Human Rights Law in Africa* 457.

279 Viljoen *International Human Rights Law in Africa* 457.

280 Viljoen *International Human Rights Law in Africa* 458.

281 Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 101.

282 Liebenberg *Socio-Economic Rights* 118.

283 Liebenberg *Socio-Economic Rights* 101.

284 See article 6 of the Court Protocol, which refers to article 56 of the African Charter.

of the UN, the Constitutive Act of the African Union, the African Charter or any instrument of the African Union.<sup>285</sup> Furthermore, the experience of other UN human rights treaty bodies with quasi-judicial adjudicative procedures has not seen a flood of complaints.

## 5.1 Advocacy Activities to Publicise the African Court

Conscious of the need to sensitise African states and populations about the African Court, the African Court has embarked on sensitisation campaigns to publicise the existence of the Court and its activities. National awareness raising seminars and discussions with senior government officials are held in selected states.<sup>286</sup> First, awareness raising conferences are held in states that have made the article 34 (6) declarations, in order to stimulate the submission of cases. Second, selected states that have not made article 34 (6) declarations are targeted for visits to persuade these states to make such declarations. Third, the Court uses AU summits to encourage non-state parties to ratify the Court Protocol.<sup>287</sup>

The African Commission has, to date, adopted four resolutions in which it has urged member states of the African Union to both ratify the Court Protocol as well as make the necessary article 34 (6) declaration. In a resolution adopted in October 1998, the African Commission noted “*the serious and troubling state of human rights in Africa, especially, in zones of conflict, and taking into account the need to guarantee and protect human rights by an effective, independent and impartial African Court, which would perfectly complement the mission of the African Commission*.”<sup>288</sup> The African Commission, therefore, appealed to the AU member states “to activate the appropriate constitutional procedures in order for them to sign and ratify the protocol on the African Court of Human and Peoples’ Rights within the shortest possible time.”<sup>289</sup> In 2002, the African Commission adopted a second resolution urging all the AU member states to ratify or accede as soon as possible to the Court Protocol.<sup>290</sup>

In subsequent resolutions, the African Commission has noted “the importance of an effective and accessible human rights African Court to the protection of human rights on the continent and complementarity of the Commission’s mandate,” and that “non-

285 See article 56 of the African Charter.

286 Viljoen *International Human Rights Law in Africa* 457.

287 Viljoen *International Human Rights Law in Africa* 457.

288 See African Commission ACHPR/Res.29 (XXIV) 98 adopted at the African Commission on Human and Peoples’ Rights, meeting at its 24th Ordinary Session from 22 - 30 October 1998 in Banjul, The Gambia.

289 See African Commission ACHPR/Res.29 (XXIV) 98 adopted at the African Commission on Human and Peoples’ Rights, meeting at its 24th Ordinary Session from 22 - 30 October 1998 in Banjul, The Gambia.

290 See African Commission resolution ACHPR/Res.60 (XXXI) 02 adopted at the African Commission on Human and Peoples’ Rights, meeting at its 31st Ordinary Session in Pretoria, South Africa, from 2nd to 16th May 2002.

ratification of the Court Protocol, and the reluctance of states to make the Declaration, impede the protection of human rights in Africa”.<sup>291</sup> The African Commission thus urged AU member states not only to ratify the Court Protocol but also “to make the Declaration under Article 34 (6) of the Court Protocol in order to give due recognition and competence to the African Court to receive petitions directly, from individuals and NGOs”.<sup>292</sup>

### 5.2 The Way Forward: Recommendations to States and Civil Society Organisations

A coalition of civil society organisations, the Coalition for an Effective African Court on Human and Peoples’ Rights (the Coalition) has, over the years been actively involved in advocacy activities to publicise the work of the African Court and to persuade African States to ratify the Court Protocol and make the necessary article 34 (6) declaration. The Coalition is a network of NGOs, independent national human rights institutions and individuals, formed during the first conference for the promotion of the Court Protocol in 2002.<sup>293</sup> The Coalition aims at an effective and independent African Court in order to provide redress to victims of human rights violations and strengthen the human rights protection system in Africa and at the domestic level. Included in the objectives of the Coalition are to have full ratification of the Court Protocol by all member States of the African Union; enhance transparency in the nomination and election of judges; provide a platform for sustainable civil society participation in the creation of the African Court; provide technical support to the AU and the African Court; develop capacity for litigation; publicise developments on the African Court becoming functional; and promote direct access by individuals to take cases directly to the African Court.<sup>294</sup> One of the Coalition’s key objectives is to promote the rights of individuals and organisations to refer matters directly to the African Court by encouraging States to make the declaration as stipulated in article 34 (6) of the Court Protocol. As of April 2014, the Coalition had 230 members from central Africa, east Africa, north Africa, southern Africa, west Africa and international members from various parts of the

291 See African Commission Resolution 226 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 adopted at the 52nd Ordinary Session of the African Commission on Human and Peoples’ Rights in Yamoussoukro, Cote d’Ivoire, 9 to 22 October 2012.

292 See African Commission Resolution 226. See also African Commission Resolutions ACHPR/Res.74 (XXXVII) 05, and ACHPR/Res.177 ( CLXXVII) 10 underscoring the importance of Africa states ratifying the Court Protocol and the necessary , to make the declaration under article 34 (6) of the Court Protocol in order to give due recognition and Competence to the African Court to receive petitions directly, from individuals and NGOs.

293 For more information on the Coalition for an Effective African Court on Human and Peoples’ Rights, see [http://www.africancourtcoalition.org/index.php?option=com\\_content&view=category&layout=blog&id=33&Itemid=46&lang=en](http://www.africancourtcoalition.org/index.php?option=com_content&view=category&layout=blog&id=33&Itemid=46&lang=en).

294 See Coalition for an Effective African Court on Human and Peoples’ Rights Annual Report (2008) available at [http://www.africancourtcoalition.org/images/docs/annual-reports/2008\\_acc\\_annual\\_report.pdf](http://www.africancourtcoalition.org/images/docs/annual-reports/2008_acc_annual_report.pdf).

world, mainly western Europe.

The work of the Coalition should, therefore, be a blue print for other civil society organisations to play a role in publicising the work of the African Court; advocating for states to ratify the Court Protocol and make the article 34(6) declaration as well as assisting individuals and groups from those states that have ratified the Court Protocol and made the article 34(6) declaration, to file complaints before the African Court. Members of the Coalition also meet with government representatives and participate in parallel civil society events on raising awareness on the African human rights system. The Coalition conducts advocacy and lobbying on key issues relating to the African Court at the African Union and at the domestic level. Both states and civil society organisations can play an important role in contributing to the efficiency, integrity, and credibility of the African system for the protection of human rights.

### 5.2.1 Recommendations to AU Member States:

- a. Ensure full ratification of the Protocol establishing the African Court by the 54 member states of the AU;
- b. Make the necessary declaration in terms of article 34 (6) of the Protocol to promote direct access to the Court by individuals and NGOs;
- c. Enhance transparency in the nomination and election of judges; guarantee the transparency of the process of electing judges by the African Court, making sure there is a fair gender balance, a geographical balance, and representation of the different legal systems among the judges;
- d. Provide a platform for sustainable participation by NGOs and individuals in the work of the African Court;
- e. Provide technical support to the African Court and ensure that the African Court has an adequate operating budget;
- f. Develop capacity for litigation by contributing funds to the legal aid scheme of the African Court to assist indigent litigants with travel expenses; legal representation; witness expenses (including expert witnesses); and daily subsistence allowances; and
- g. Implement judgments of the African Court and ensure both provisional measures and judgments of the Court are executed.

### 5.2.2 Recommendations for Civil Society Organisations

- a. Civil society organisations should ensure the effectiveness of the African Court through advocacy missions, information documentation and dissemination,

- trainings, education, research, lobbying, and networking;
- b. Promote the ratification of the African Court by all member States of the AU through lobbying governments both at the domestic and international levels, such as summits of the AU or African Commission; SADC; ECOWAS; EAC; and other *fora*;
  - c. Persuade African states on the need and importance of making the article 34 (6) declaration of the Court Protocol in terms of access to justice and making the African Court effective and credible;
  - d. More African civil society organisations should seek observer status with the African Union and its relevant organs such as the African Commission. This would enable CSOs to use the sessions of the AU and African Commission to conduct advocacy, organise discussions on the African Court, and publicise the work of the Court and its importance for the enforcement of human rights on the continent.
  - e. Civil society organisations should engage states in the nominations process of African Court judges, monitoring the enforcement of judgments, and any other aspects relating to the functioning of the African Court; this includes making sure there is a fair gender balance, a geographical balance, and representation of the different legal systems among the judges;
  - f. Civil society organisations must publicise the decisions of the African Court, especially on the way they can influence national case law;
  - g. Civil society organisations must play a role to support victims of human rights abuses by filing applications to the African Court in their name or on behalf of victims. CSOs should help individuals and victims throughout the process through informing them of their rights and, if required, afford them legal assistance; and
  - h. Civil society organisations must monitor the execution of judgments of the African Court by the states concerned. They must ensure both provisional measures and judgments of the Court are executed timeously.

## 6 Conclusion

This Handbook sought to, and has shown that the African regional system for the promotion and protection of human rights, like other systems in other regions of the world, is complementary to human rights protection at the domestic level. The adoption of the African Charter in 1981, which serves as the key regional human rights treaty for Africa, paved the way and provided the impetus for the promotion and protection of human rights in Africa. Its institutional arm, the African Commission, inaugurated in 1987, reflected a bid by the bureaucrats to update the foundational treaty in line with the more democratic political landscape, and to focus more on economic integration, with the adoption of the AU Constitutive Act and the transformation of the OAU into the AU.

This Handbook has shown that the AU, through the Constitutive Act, has expressly ensured that human rights are mainstreamed throughout its organs, activities, and programmes. In the spirit of the Constitutive Act, the AU has adopted an institutional focus on human rights, and explicitly emphasises the mainstreaming of human rights in all AU activities and programmes. At the normative level, regional instruments and principles have been adopted under the auspices of the AU/OAU to strengthen the legal framework for the protection and promotion of human rights on the African continent. These include the African Children's Charter, the African Women's Rights Protocol, the African Court Protocol, and the Charter on Democracy, Governance and Elections. This Handbook also highlighted the various bodies that have been established with an express human rights mandate, such as the African Children's Committee of Experts, the African Court on Human and Peoples' Rights, the African Court of Justice, and the African Court of Justice and Human Rights, among others.

The defining moment, as illustrated in this Handbook, was the adoption by the OAU Assembly, on the 9th of June 1998, of a Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights which entered into force on the 25th January 2004. This historical event should also be contextualised in the developments of the time as the end of the Cold War resulted in a flourish of new international judicial mechanisms, linking the adoption of the Court Protocol to a global trend.

It was shown that the very idea of establishing an African Court was to strengthen the nascent African human rights system and to complement and reinforce the protective functions of the Commission. The Court thus represents a promise to strengthen the African human rights system's protective functions. As illustrated above, the African Court has contentious jurisdiction in all cases, and disputes submitted to it concerning the interpretation and application of the African Charter and other applicable human rights instruments. Additionally, the Court has advisory jurisdiction on any legal matter relating to the African Charter or any other relevant human rights instruments.

An important strand is the system of complementarity between the Court and the Commission provided for by the Court Protocol and the respective rules of the two institutions as discussed in this Handbook. This complementarity is reflected in the relationship between the Court and the Commission specified in their respective rules of procedure.

This Handbook also discussed the composition of the Court and the appointment process for judges to the Court. It was emphasised that individuals and NGOs should monitor the process of nominating candidates for the post of judge by states and the process of electing judges by the AU so that they meet strict criteria set by the Court Protocol. The nomination and election of the first judges of the Court revealed several shortcomings, including the lack of participation or consultation of civil society in the nomination process of candidates for the position of judge by states parties.

International human rights law has established the concept of continuous violations as an exception to the rule against retroactivity. As illustrated above, this exception relates to violations that began before the critical date (date of ratification of a treaty or filing of a declaration accepting the competence of the Court), but continue thereafter. It was demonstrated that the Court has adopted a purposive approach in its interpretation of states human rights obligations by embracing the continuing violation approach in its recent decisions in *Tanganyika Law Society and Another v Tanzania* and *Mkandawire v Malawi*.

It was discussed above that although the Court was established to complement the protective mandate of the Commission, it is ironic that individuals and NGOs, the primary intended users of the protective function, are not automatically entitled to petition before the Court. Article 5 (3) of the Court Protocol provides that the Court may entitle individuals to submit cases directly before it. In that regard, a State declaration under article 34 (6) of the Court Protocol allows individuals or groups to submit a claim directly to the Court without going through the Commission. This Handbook demonstrated that the standing of individuals under the African Charter, as developed by the Commission has dispensed with the victim requirement and therefore wide

enough and allows a broad range of individuals, groups of individuals, and NGOs to lodge communications.

However, to date, only seven states have made a declaration allowing such direct access from a total of 26 state parties to the Court Protocol. As pointed out in the *Yogogombaye v Senegal* case, the Court ruled that it had no jurisdiction to hear a case submitted before it by an individual as Senegal had not made the necessary declaration under article 34 (6) of the Court Protocol. This lack of sufficient optional declarations under article 34 (6) is one of the main limitations in the African system for the protection of human rights as only a few States are willing to permit individuals or NGOs direct access to the Court. If states parties to the Court Protocol do not make the necessary article 34 (6) declarations, the protective work of the Court will be largely limited. The limitations imposed by article 34 (6) could be interpreted as an effective and necessary method of controlling floodgates and preventing the Court being swamped with cases. It should be noted, however, that the requirement of an article 34 (6) declaration can be interpreted as a violation of an individual's right to justice and a contravention of the purpose of the court, namely the protection of individuals and groups of individuals from human rights abuses by states. Although the Court was established to complement the protective mandate of the Commission, it is ironic that individuals and NGOs, the primary intended users of the protective function, are not automatically entitled to petition the Court. The ability of the Court to receive individual communications is, therefore, fundamental in ensuring that the Court is able to play a credible role in the fight against impunity and the protection and enforcement of human rights on the African continent. African States are therefore urged to ratify the Court Protocol and make the relevant article 34(6) declaration.



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