

**TAKING A CASE TO THE AFRICAN COURT OF HUMAN
AND PEOPLES' RIGHTS: Procedural Challenges and
the Court's Role in Addressing Them**

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Table of Contents

<u>ABSTRACT</u>	<u>2</u>
<u>ABBREVIATIONS</u>	<u>3</u>
<u>1 GENERAL BACKGROUND TO THE HUMAN RIGHTS COURT</u>	<u>4</u>
1.1 STATEMENT OF THE PROBLEM	4
1.2 RESEARCH METHODOLOGY	5
1.2.1 Legal Positivism:	5
1.2.2 Comparative Law Method:	6
1.3 THE AFRICAN HUMAN RIGHTS SYSTEM	7
1.4 THE AFRICAN COURT OF HUMAN AND PEOPLES' RIGHTS	10
1.5 THE PROCEDURE OF THE COURT	13
1.6 BASIC FRAMEWORK AND CENTRAL IDEA OF THE THESIS	15
<u>2 ACCESS TO THE COURT</u>	<u>19</u>
2.1 THE COMMISSION	19
2.2 THE STATE PARTY	23
2.2.1 Personal jurisdiction	24
2.2.2 Standing	30
2.3 AFRICAN INTER GOVERNMENTAL ORGANISATIONS	33
<u>3 OPTIONAL ACCESS AND ADMISSIBILITY</u>	<u>35</u>
3.1 OPTIONAL ACCESS TO INDIVIDUALS AND NGOs	35

3.1.1	Individual access	35
3.1.2	Non-governmental organisations	43
3.2	ADMISSIBILITY OF APPLICATIONS	45
<u>4</u>	<u>THE JURISDICTION OF THE COURT</u>	<u>49</u>
<u>5</u>	<u>CONCLUDING REMARKS</u>	<u>54</u>
<u>6</u>	<u>BIBLIOGRAPHY</u>	<u>59</u>

ABSTRACT

The Protocol on the African Court of Human and Peoples' Rights, adopted in 1998 and entered into force in 2004, is designed to reinforce the human rights protection that has been under the African Commission on Human and Peoples' Rights. The provisions of the Protocol are not clearly stipulated on points that deal with the salient procedural issues. This thesis explores the challenges that the Court will encounter in applying procedural rules and its role in addressing them. Of specific interest are the questions of which parties have the right of access to the Court, the right of individuals and NGOs to take a case to court, and related admissibility procedures. Further, the jurisdiction of the Court presents the Court with problems of definition.

As a result, the central idea of the thesis attempts to unearth the challenges that the Court will come across in interpreting the doubtful provisions. The thesis argues and concludes that it is possible for the Court to address these issues in a proper manner and suggests that it should be judicially active in its interpretation to safeguard the protection of human rights in Africa.

ABBREVIATIONS

ACHPR	African Commission on Human and Peoples' Rights
AU	African Union
ECHR	European Court of Human Rights
EU	European Union
IACHR	Inter-American Court of Human Rights
ICJ	International Committee of Jurists
NGOs	Non-Governmental Organisations
OAS	Organisation of American States
OAU	Organisation of African Unity
UN	United Nations

1 General Background to the Human Rights Court

1.1 STATEMENT OF THE PROBLEM

The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (here in after the Protocol) was adopted by the Assembly of Heads of State and Government of the Organisation of African Unity (OAU) in Ouagadougou in June 1998. The Protocol had to wait for more than half a decade before it took effect as it was pending the approval of member states. It came into effect on 25 January 2004 after ratification by fifteen nations of the African Union.¹ The Protocol has thirty-five provisions, some of which deal with the major procedural rules of the African Court of Human and Peoples' Rights (here in after the Court).

The main research problem of this paper orbits around the very notion of the Court's procedure, which is depicted in the Protocol. The central research idea of the thesis explores *the challenges to be faced by the Court in applying salient procedural rules and it proposes a potential technique that the Court should opt for, in deciding a doubtful case*. The two core questions the thesis addresses therefore are:

- (1) What are the challenges that the Court will encounter in applying procedural rules? and,
- (2) What are the remedial techniques available for the Court to safeguard the better protection of human rights?

The body of the paper does not treat these questions separately. Rather, the paper will examine the problems over the whole body of the thesis.

¹ International Freedom of Expression Exchange, "Africa Ratifies Human Rights Court" in < <http://www.ifex.org/en/content/view/full/56594/?PHPSESSID=37b8f676> >, visited April 24, 2006.

While answering the main research questions, naturally other subsidiary points should also be discussed. It is through elucidating subordinate questions that the thesis will highlight on the main problem. The following are but some of the issues that are considered. In all of these, the level of procedural safeguards and the role of the Court in the advancement of human rights protection will be explored.

- How does a state party accept the jurisdiction of the court?
- How does one have the right of access to the Court?
- How do individuals and NGOs access the Court?
- What are the procedural rules on admissibility?
- What are the sources of law for the court?
- What is the Court's jurisdiction?
- What should the Court (Judges) do to effectively safeguard the protection of human rights?

1.2 RESEARCH METHODOLOGY

This paper focuses on the major procedural rules that should be followed when taking a case to the Court. By its very nature, the discussion will hence exclude a substantive dealing on human rights. On the part dealing with jurisdiction, the discussion will focus mainly on contentious jurisdiction, though it will try to be comprehensive and introduce other forms of jurisdiction too. It will show the lacunae that the new court will be faced on some procedural issues. In doing so, the following research methodologies have been followed:

1.2.1 Legal Positivism:

Positivism: is the salient methodology that this research will be following. Legal positivism “summarises a range of theories that focus upon describing the law as it is backed up by effective sanctions, with reference to formal criteria, independently of moral

or ethical considerations.”² Thus, the paper will try to make analysis of the *de lege lata* instead of the *de lege ferenda* to reach into what the applicable law is. A tool that will be employed to elucidate the applicable law would be the 1969 Vienna Convention on the law of treaties. After finding the boundaries of the applicable law the paper will propose judicial activism, as a system that should be employed for an effective protection of human rights.

By using the positivist method, the analysis of the Court’s procedure requires a thorough study of several instruments. This does not indicate that other instruments will be eschewed; it only shows the level of emphasis. The instruments are

- the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, adopted on June 9, 1998.
- the African [Banjul] Charter on Human and Peoples' Rights, adopted on June 27, 1981.
- the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, July 11 - August 13, 2003.
- the Rules of Procedure of the African Commission on Human and Peoples' Rights, adopted on October 6, 1995.
- the Constitutive Act of the African Union: adopted in 2000 at the Lome Summit (Togo).

1.2.2 Comparative Law Method:

Comparative law is a method of the study of legal systems. The theory of comparative law research method puts in the forefront comparison itself, while comparative law is

² _____Symposium on Method in International Law: Appraising the Method of International Law: A Prospectus for Readers. (1999) 93 American J. Intl. Law p. 291. The symposium also describes New Haven School, International Legal Process, Critical Legal Studies, International law and international customs, Feminist Jurisprudence and Law and Economics as methods of research in international law.

frequently associated and even sometimes equated with a comparative study of different legal systems.³ This paper does not claim that there are legal systems established in the different regions within the human rights paradigm. As such, it will not attempt to fully employ the comparative law research method with all its technical meaning in the legal parlance.

As a result, the research will employ a comparative approach by making a comparison with the European and Inter-American Courts of Human Rights when it is convenient. These two Courts came in to the international plane as regional enforcement mechanisms decades ago. The experience and practical application of the law in the area of pre-trial procedure will be investigated with a view to elucidate the rules of the African Court. In addition, it will be employed to see the level of protection that the African Court is empowered by way of its procedure.

1.3 THE AFRICAN HUMAN RIGHTS SYSTEM

The African Human Rights system was created by the Organisation of the African Unity (here in after OAU) currently the African Union (here in after AU)⁴ for the promotion and protection of human rights. The organisation was not keen to human rights in its early days. It took decades for the organisation to consider human rights as its main agenda and reach to the point it is today.⁵

³ Djalil I. Kieckbaev: Comparative Law: Method, Science or Educational Discipline? (2003), ECLJ vol. 7. available in <<http://www.ejcl.org/73/art73-2.html>>, September 29, 2005.

⁴ The African Union is a successor of the Organisation of African Unity (OAU), which was established on May 25, 1963 by the then independent states of the continent. An Extraordinary Summit of the OAU held in Sirte, Libya on 9 September 1999 called for the establishment of an African Union in conformity with the ultimate objectives of the OAU Charter.

⁵ For analysis of the development of human rights in the Organisation of African Unity/African Union see, Rachel Murray, Human Rights in Africa: From the OAU to the African Union (Cambridge: Cambridge University Press, 2004)

The OAU Charter has not mentioned the term human rights with the exception of once mentioning the Universal Declaration of “Human Rights”.⁶ It stipulates the term under Article II(1)e where the Charter sets “the promotion of international cooperation with due regard to the United Nations Charter and the Universal Declaration of Human Rights”. Accordingly, human rights were relegated as secondary by putting too much emphasis on sovereignty, territorial integrity and independence.⁷

Be it as it may, the missing link in the OAU Charter was implanted to fill the lacunae when the Heads of State and Government of the OAU adopted the African Charter on Human and Peoples’ Rights (here in after the Charter).⁸ The normative framework of human rights is substantiated by the addition of the African Charter on the Rights and Welfare of the Child.⁹ Furthermore, the African Union summit in Maputo, Mozambique adopted the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa on July 11, 2003 to advance the rights of the women.¹⁰

After setting the normative standards, the three treaties provide for measures of safeguard by creating an institutional framework for the promotion and protection of the substantive rights. Article 30 of the Charter provides for the establishment of an African Commission on Human and Peoples’ Rights (here in after the Commission) within the OAU. The

⁶ Article 3(e) of the OAU charter. Freedom from colonialism is a human right. See Vincent Orlu Nmehielle, *The African human Rights System: Its Laws, Practice and Instruments*, The Hague/London/new York: Martinus Nijhoff Publishers. 2001. The notion of self determination and apartheid could also be considered as issues of human rights. See Rachel Murray, *Supra*, note 5. p. 7

⁷ See the Preamble of the Charter of the OAU. The OAU was known by many as the club of dictators for using sovereignty and non-interference as a shield for obligations in the violation of human rights. See also BBC News World Edition, “African Union to replace dictators’ club” <<http://news.bbc.co.uk/1/hi/world/africa/2115736.stm>> (visited 4 October 2005)

⁸ Vincent O. Nmheille, *Supra* note 6, P. 82.

⁹ African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), *adopted in July 1990 and entered into force November 29, 1999*.

¹⁰ The protocol will enter in force after it is ratified by fifteen states. As it stands now it needs two more states to ratify it.

promotion of human rights, the protection of human rights and the interpretation of the Charter are the three explicit mandates bestowed on the Commission.¹¹

The African Charter on the Rights and Welfare of the Child has established an African Committee of Experts on the Rights and Welfare of the Child to promote and protect the rights and welfare of the child.¹² Article 32 of the African Child Charter directly reproduces the African Commission's mandate defined under Article 45 of the African Human Rights Charter as a monitoring body. Apart from using the word Committee in place of the Commission, the new organ "in many respects duplicates the jurisdiction of the Commission".¹³ The protective mandate of the recent human rights instrument, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women, is predominantly entrusted to the respective states.¹⁴ The respective states have to submit periodic reports to the Commission as per Article 62 of the Human Rights Charter that indicates measures, inter alia, legislative measures undertaken for the full realization of the rights enshrined in the Women's Protocol.¹⁵

Accordingly, the African Commission is the pillar of human rights promotion and protection in Africa, yet the practice does not always warrant it. In fact, the Commission has been only a useful tool for the promotion of human rights, but a largely ineffective mechanism for the protection of human rights.¹⁶ The African Commission was purposely created with "ineffective powers to fulfill its mandate of human rights protection."¹⁷ The

¹¹ African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986, Article 45. The commission has also to perform "other tasks" as may be given to it by the Assembly of Heads of State and Government.

¹² The African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), *entered into force* Nov. 29, 1999, Article 32.

¹³ Curtis F.J. Doebbler "A Complex Ambiguity: The Relationship Between the African Commission on Human and Peoples' Rights and Other African Union Initiatives Affecting Respect for Human Rights", 13 *Transnat'l L. & Contemp. Probs.* 2003 P. 15

¹⁴ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women, adopted by the Second Ordinary Session of the Union, Maputo, 11 July 2003. Article 26(1)

¹⁵ *Supra* note 14.

¹⁶ Wolfgang Benedek "The African Charter and the African Commission on Human and Peoples' Rights: How to make it more effective" (1993) 11 *Netherlands Quarterly of a Human Rights* p. 25

¹⁷ University of Pretoria, Centre for Human Rights, "African Human Rights System" <http://www.chr.up.ac.za/centre_publications/ahrs/court.html#for> visited 28 September 2005.

fact that decisions are made unanimously and its decisions are mere recommendations without having any binding nature, are indicative of its ineffectiveness.¹⁸ The Charter under the protective mandate of the Commission was considered as a paper tiger, which vehemently forced some to look for an effective protective mechanism such as a Court.¹⁹ The growing sense of inadequacy of the protection under the African Human Rights Commission has eventually called for the re-consideration of the idea of the Court in 1994.²⁰

1.4 THE AFRICAN COURT OF HUMAN AND PEOPLES' RIGHTS

The Charter was concluded in 1981 in Banjul, Gambia, under the auspices of the OAU for the promotion and protection of human rights in Africa.²¹ The Charter is the youngest of the regional human rights instruments. It has had a chance to refer to the previous human rights treaties and include the protection mechanisms of the two regions. The European and the Inter-American systems have provided a Court as a protection mechanism.

However, the African Human rights Charter does not provide for the establishment of a Court unlike its counter parts. Instead, it has provided for the establishment of the African Commission on Human and Peoples' Rights. As such, it was a calculated move by the drafters not to provide for the establishment of a court in the Charter.²² The discussion to include a court as part of the protection mechanism in the Charter did not have a majority support for this was considered to have an adverse effect on the sovereignty of African

¹⁸ Supra note 17.

¹⁹ U. O. Umzurike, "The Protection of Human Rights Under the Banjul (African) Charter on Human and Peoples' Rights", 1 African J. of Int'l L. (1988) p. 82.

²⁰ Andreas O'shea "A critical reflection on the proposed African Court on Human and Peoples' Rights" (2001) African Human rights Law Journal p. 286.

²¹ The Charter is also known as the Banjul Charter after the place of its adoption

²² International Federation for Human Rights, "10 Keys to understand and use the African Court on Human and Peoples' Rights: A user's guide for victims of human rights violations in Africa and human rights defenders", <http://www.fidh.org/IMG/pdf/COUR_AF_ANGLcadre.pdf> visited, September 22,2005. The guide depicts that the question of the creation of a jurisdictional institution was raised and it was dismissed as pointless.

nations, which they were keen to preserve.²³ Thus the mandate of human rights protection along with promotion was entrusted to the African Commission on Human and Peoples' Rights. Seventeen years have passed since the adoption of the Charter, for the Court's Protocol to come in to the plane.

The adoption of the Protocol and its further ratification by fifteen states thereby making it enforceable breaks new ground for strengthening the African human rights system. The establishment of the Court is considered as a necessary prerequisite for the fulfillment of human rights in Africa by making the protection of human rights barely made under the Commission successful.²⁴ The very reason for the creation of the Court supports this assertion. The preamble of the Protocol reads that "the attainment of the objectives of the African Charter on Human and Peoples' Rights requires the establishment of an African Court on Human and Peoples' Rights to complement and reinforce the functions of the African Commission on Human and Peoples' Rights." Thus, it incorporates the fact that the Commission was not successful in fulfilling its protective mandate. The protective mandate of human rights was mainly the business of the African Human Rights Commission. However, under the new framework the Court will reinforce the protective mandate of the Commission. The Commission will continue to be the sole institution concerned with the promotion of human rights in Africa. The protective mandate is now to be shared with the Court. The relationship of the two organs is explicitly addressed in the Protocol, "the Court will complement the protective mandate of the Commission."²⁵ Yet the relationship that the two organs will have in the protection of human rights is not so clear.²⁶

As the establishment of the Court is not yet materialized, the Commission is still the sole institution for both the promotion and the protection of human rights on the continent. This situation militates against the very reason for the creation of the Court, which is the

²³ Supra note 19.

²⁴ Supra note 17.

²⁵ The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted in June 1998 in Ouagadougou, entered into force on 25th January 2004, Article 2.

²⁶ See Ibrahim Ali Badawi Elsheikh "The future relationship between the African Court and the African Commission" (2002) 2 African Human Rights Law Journal 2 p. 252-260

inadequate protection under the Commission. It has been long since the required ratification is fulfilled. The establishment of the Court has not yet been made practical. It is difficult to foresee when the Court will actually start to function, pending the political will of the AU and the high contracting parties. The decision of the African Heads of State to merge the African Court of Human and Peoples' Rights with the African Court of Justice should be mentioned as a hurdle in the process of the establishment. While the Court's institutionalisation as a separate and distinct institution from the African Court of Justice was pronouncedly decided²⁷, a latter decision overruled this one and brought the idea of merger on to the plane²⁸. One cannot be sure that the idea of merger is the sole reason for the delay; nonetheless one cannot also deny its causal relationship to some degree.

Despite that, it is worth mentioning some major developments with regard to the establishing process of the Court. The African Heads of State and Heads of Government summit held in Khartoum, in January 2006 has made an important stride on this. The AU assembly has decided on the appointment of judges of the Court made by the Executive Council of the AU.²⁹ Thus, two female and nine male judges from eleven countries have been appointed.³⁰ The assembly has also decided on the seat of the Court on a regional level. Previously, when the major AU institutions were assigned a location for headquarter; the Eastern Region of the continent was assigned to host the African Court of Justice. Although the Protocol under Article 25 puts that the seat of the Court will be in a place determined by the assembly from among states parties to the Protocol, there seems a little option with the merger of the Courts decided in advance. In principle it would have been possible for the seat of the Court to be in any quarter of the continent where there is accession to the treaty and subsequent decision by the assembly. The decision to merge the two Courts has made this situation qualified in a regional classification.

²⁷ Decision on the Draft Protocol of the Court of Justice, Doc. EX/CL/59 (111) / 58 (111), para 2

²⁸ Decision on the Merger of the African Court of Human and Peoples' Rights and the Court of Justice of the African Union, – Assembly/AU/6(V). Dec/83(V)

²⁹ Decision on the Election of Judges of the African Court of Human and Peoples' Rights – (Doc. EX.CL/241 (VIII)) Assembly/AU/Dec. 100 (VI)

³⁰ Supra note 27. See also Supra note 25, Article 11.

Moreover, the assembly has made this clear through its decision that the seat of the Court shall be in the eastern region.³¹ There are thirteen countries in the eastern Africa region which are Comoros, Djibouti, Eritrea, Ethiopia, Kenya, Madagascar, Mauritius, Rwanda, Seychelles, Somalia, Sudan, Tanzania and Uganda.³² There are twenty three countries that ratified and deposited the instrument of ratification with the AU and only the following six are from the eastern Africa region: Comoros, Kenya, Mauritius, Rwanda, Tanzania and Uganda.³³ By virtue of their ratification of the Court's Protocol, it is only these six countries that are eligible candidates for any decision on the seat of the Court of Justice and the Court of Human Rights.

While the Human Rights Court's relationship with the Commission and its merger with the Court of Justice are undeniably important and worthy of discussion, they are not the central themes in this research. That does not mean a discussion related to the main thesis of the research, that may call up on these issues will be relegated. Unavoidably, the paper will try to touch up on one or more of these issues with out directly addressing these concepts. Consequently, the paper will try to focus on the research questions that it tries to address as described here in above.

1.5 THE PROCEDURE OF THE COURT

Courts at all levels have specific rules of procedure that they follow. The rules of procedure are designed to make the proceeding civilised, orderly, economical and efficient. It goes without saying that the African Human Rights Court has one or will have one in this

³¹ Supra note 26.

³²Resolution on the Division of Africa into Five Regions. CM/Res. 464 (XXVI) See also AU Profile at < http://www.iss.co.za/af/RegOrg/unity_to_union/auprof.htm > visited 18 January 2006.

³³African Union, "List of Countries which have signed, ratified/ acceded to the African Union Convention on Protocol to the African Charter on Human and Peoples' on the Establishment of the African Court of Human and Peoples' Rights" in < <http://www.africa-union.org/root/au/Documents/Treaties/List/Protocol%20on%20the%20African%20Court%20on%20Human%20and%20Peoples%20Rights.pdf> > visited June 28, 2006

respect. Whilst, the detailed rules that emanate from the salient one's will be made available in the rules of procedure,³⁴ the general rules in connection with the Court's procedure are depicted in the Protocol.

These procedures are rules that should be followed without touching up on the merits of the case always³⁵. Thus, they involve issues related to access, admissibility, jurisdiction and judgment which purely focus on the Court's procedure. This paper is all about this and does not put itself to any substantive discussion in detail. It will be making a discussion on the major procedural rules that emanate from the Protocol. The discussion will primarily centre on the procedural issues that should be fulfilled before the Court indulges into the merit of the case, thus, it will exclude the discussion on procedures related to judgement.

There are three fundamental concerns that one should first look into considering a Courts procedure before it fully embarks on the substantive issues involved in a case. One should look (i) if the applicant has access to the Court, standing, (ii) if the case is accepted for consideration, admissibility and (iii) if the Court has the power to adjudicate it, jurisdiction. All are predominantly pre-trial issues, meaning that they should be considered primarily before the case is being tried. However, standing and admissibility are matters related to the acceptability of the case while jurisdiction is the Court's power to try it. A problem with one or more of these will make the trial ineffective, hence any argument against these procedural issues should always be presented first as a preliminary objection to the Court.

A number of relevant treaties are set forth in many international and regional human rights instruments for the protection of the rights of individuals and groups. The establishment of the OAU/AU was a milestone in fostering the international and regional initiatives for making a great many substantive rights protected in one way or another. Yet, it is seldom that individuals from Africa seek protection under these mechanisms. One of the reasons

³⁴ Supra note 25. The Protocol, in different places, indicates that the detailed rules for the implementation of the general rules are going to be included in the Rules of Procedure that the Court will design. See for Example Articles 8 & 10.

³⁵ It should be noted that some procedural issues such as admissibility involve substantive issues.

for this is the lack of procedural rules that are designed with a view to foster the protection of human rights.

The substantive rules that are endowed with a monitoring organ should be complemented with a procedure that allows the smooth functioning of the monitoring body. It should also be designed in a manner that advances the protection of human rights further. The existence of a Court by itself does not hence warrant that an individual person or an NGO has a right to present its communication. It does not warrant the acceptance of any communication made. It also does not secure that the Court has power to consider the case submitted to it as it pleases. There are some hurdles that should be passed as per the procedural rules of the Court.

1.6 BASIC FRAMEWORK AND CENTRAL IDEA OF THE THESIS

This paper will argue that there are too many gaps left in the Protocol related to the Court's procedure. The lacuna will be filled through the Court's Rules of Procedure³⁶ or its interpretation. The Court should not create a new obligation for the states by way of the rules of procedure or interpretation. It has to remain within its bounds in applying obligations that are express or implicit. Nevertheless, the Court is empowered to take decisions that could swing to limit or advance the protection of human rights based on the interpretation it will follow. A smooth application of the Vienna Convention on the Law of Treaties³⁷ may not at times help affirmatively as some gray areas will always be there.³⁸ Whenever that is possible, the paper will make an interpretative analysis which would

³⁶ Supra note 25, Article 33.

³⁷ Vienna Convention on the Law of Treaties, Signed at Vienna 23 May 1969, Entry into Force: 27 January 1980

³⁸ Paul Mahony writes "Some clauses are so closely defined that the scope for gap-filling through interpretation and, consequently, for evolution is minimal." Paul Mahony "Judicial Activism and Judicial self-Restraint in the European Court of Human Rights: Two sides of the Same Coin.", 11 Hum. Rts. L. J. (1990) p. 57.

make the effective protection of the rights progressive. Yet that is not always the case in the Court's procedure.

Different ways of interpretation of the Court's Protocol has been made by different writers and none of them can be said to be logically erroneous. It is in the middle of such doubt that the judge should locate his role in finding, and not making the law. The Court has to be involved in "a creative analysis of discovering rational and connected purposes, policies, and principles that are expressed, either implicitly or explicitly, in the law."³⁹ Thus a judicial activist role would be greatly demanded from the Court and its judges in drawing the rules of procedure, its interpretation and applying them to specific cases.

It should be noted once again, however, that the Court should not exceed its legitimate role of interpretation and transgress into the realm of policy-making.⁴⁰ The European Court of Human Rights for example has come up with two creative methods of interpretation to safeguard and enhance the rights guaranteed by the convention: the "living instrument" and the "practical and effective" doctrine.⁴¹ This way of interpretation has been applied by the European Court to safeguard substantive rights. In so doing the European Court "has generally struck a fair balance between judicial innovation and respect for the ultimate policy-making role of member States in determining the spectrum of rights guaranteed by the Convention".⁴²

Consequently, there is and will arise a need for the African Court to interpret the Charter and apply it to the very purpose it was meant for. "Lack of judicial activism in the interpretation of the African Charter" has been pointed out as one of the problems that affect the domestic impact of the African Human Rights System.⁴³ Thus the problem has

³⁹ Bojan Bugarcic, "Courts as Policy-Makers: Lessons from Transition" 42 Harv. Int'l L. J. (2001) p. 279

⁴⁰ Alastair Mowbray, "The Creativity of the European Court of Human Rights" 5 Human Rights Law Review (2005) p. 58

⁴¹ Supra note 40, pp. 60-78.

⁴² Supra note 40, p.79

⁴³ Pan African Judicial Colloquium: The African Human Rights System and the International Court. Johannesburg, South Africa, 19-20 November, 2004. A narrative Report p.11

been identified and there is a chance for the African Court to learn from the innovative interpretation of its European counterpart. As a result there should be no reason that the African Human Rights Court could not come up with ways of procedural interpretation that will uphold the protection of the rights in the Charter. Hence, a loose judicial activism that would be used to interpret a certain loophole in a manner that will promote the protection of human rights in Africa further will be recommended.

Paul Mahony's writing on the European Court of Human Rights summarises the need for judicial activism, albeit as part of making the law, in the following manner⁴⁴

The very indeterminacy of language has as a consequence that no legal text, however detailed, can have a wholly precise meaning or determinate range of application. The core meaning or central range of application may well be reasonably clear and settled but the borderline cases, those in the penumbra of doubt, will require the exercise of judicial discretion. In hard cases a court may well have to arbitrate between several quite plausible decisional alternatives. The existence of this judicial choice means that the judge cannot be regarded as having a purely neutral role as discoverer and enforcer of the law but as being an active participant in the law-making process.

Judicial activism in the sense of making new law is therefore inevitable, albeit confined to filling the interstices left in the fabric of the law by existing sources.

The writer of this paper is aware of the dangers of judicial activism in that it may make the Court unpredictable and ambivalent. Yet it is the writer's belief that human rights cases should be approached with more activism⁴⁵ but done so objectively. Thus there should be a limit to it that its application should be sought only when the conventional ways of judicial application are not going to help in clearing the confusion. On this note the former Chief Justice of India has to say the following:⁴⁶

Judicial Activism is a delicate exercise involving creativity. Great skill and dexterity is required for innovation. Judicial creativity is needed to fill the void occasioned by any gap in the law or inaction of any other functionary, and, thereby, to implement the Rule of Law, Diversion from the traditional course must be made only to the extent necessary to activate the concerned [] authorities to discharge

⁴⁴ Supra note 38.

⁴⁵ See supra note 39.

⁴⁶ Justice J. S. Verma "Protecting Human Rights Through the Judicial Process" Second Justice M. Hidayatullah Memorial Lecture in the National Human Rights Commission, New Delhi, India, 21 December 2002.

their duties and not to usurp their role. The credibility of the judicial process must not get eroded.....The need is to practise self-restraint and to innovate or forge new tools only when that is the requirement of public good and no other method is available.

As such this paper recommends the role of judicial activism only in cases where there is an extreme demand for doing justice and when the ‘traditional course’ of applying the law is not unequivocal. The structure depicted for the African Human Rights Court does not make one sceptical that the Court will abuse its power in applying activism.⁴⁷ In the light of the provided background, the subsequent chapters will deal with the subsidiary problems aforementioned.

⁴⁷ See Articles 11 and the following in the Protocol. The rules here provide the composition of the Court and its independence. The quality of the judges and the Court’s institutional structure (independence) are designed in such a way that any role of activism will not be abused by it.

2 ACCESS TO THE COURT

Access to the Court in relation to the judicatory power of the Court is granted to institutions and individuals based on two sets of arrangements: compulsory and optional. This Chapter will discuss the compulsory arrangement while the next will take on the optional one. The chapter describes the rules of the Protocol to highlight on problematic points in interpretation.

Paragraph 1 under article 5 of the Protocol lists institutions that are entitled to submit cases to the Court. These are:

- a. The Commission;
- b. The State Party which has lodged a complaint to the Commission;
- c. The State Party against which the complaint has been lodged at the commission;
- d. The State Party whose citizen is a victim of human rights violation;
- e. African Intergovernmental Organisations.

These institutions have the right to directly access the Court. For these entities, the right to access the Court is not dependent on any additional process apart from due ratification of the Protocol. Hence it is compulsory. But there still remains a question whether or not these bodies can access the Court directly or not. The institutions mentioned above can be broken down into three. As such only the Commission, the State Party and African Intergovernmental Organisations are automatically recognised to access the Court. The following sections will explain the form of access given to these institutions.

2.1 THE COMMISSION

The word Commission in the Protocol refers to the African Commission on Human and Peoples' Rights which was established by virtue of the African Human Rights Charter.⁴⁸ The existence of the Commission predated the coming in to being of the Court's Protocol. The Commission has been a quasi-judicial institution with a mandate to promote and protect the Charter. The creation of the Court is not, however, a power usurpation from the Commission. Article 2 of the Protocol defines the relationship between the two. It says the Court should "complement the protective mandate of the Commission." The relationship between the two is set out in the Protocol generally but not clearly. Therefore, a question would arise as to what will be the relationship of the two in handling cases. The rules of procedure⁴⁹ will detail how a case should be handled by the Court; it should also outline the complementary relationship that should exist between the two in connection with handling cases. One question that begs the answer is; when does the Commission submit a case to the Court?

The Commission, as it stands, is the lone institutional structure in Africa that monitors the African Charter. Under the Charter, the Commission is given power to consider communications from both individuals and States. The submission of Communications to the Commission is still, and will for the foreseeable future, continue to be the major stage that individuals could resort to.⁵⁰ The Commission's decision on the Communication's submitted to it is a mere recommendation.⁵¹ However, by its very nature the Court's decision is mandatory and the Commission would be very much encouraged to submit cases to the Court so that it can secure a binding decision.

While the access accorded to the Commission is beyond contest, there seems to be a difference in the view of writers on how the Commission would submit cases to the Court.

⁴⁸ Supra note 25 Article 2.

⁴⁹ Article 33 of the Protocol indicates that the Rules of Procedure will be drawn up by the Court in consultation with the Commission.

⁵⁰ Only one state has made the optional declaration for submission of a case to the African Human Rights Court.

⁵¹ Supra note 11, Article 45 (1)a

When comparing the African Court its European equivalent, Rachel Murray addresses the issue in the following manner:⁵²

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

This would mean that the Commission would first consider the case submitted to it by individuals or others allowed to submit to it under the existing procedure. After the deliberations are made, the Commission would aptly submit the case to the Court. This line of argument is not fully taken by all alike. Frans Viljoen summarises how the Commission could take a case to the Court and adds two more possibilities to the above one in the following manner.⁵³

Since the Protocol does not explicitly require that the African commission make findings on the admissibility and merits of a case before submitting it to the African Court, three possibilities present themselves. First, the African Commission may submit a case to the African Court without making any findings at all. Second, it could submit a case after making some findings, for example, after it had made a finding of fact, a finding on admissibility, or after unsuccessfully trying to negotiate a friendly settlement. Finally, the African Commission could submit a case to the African Court after its final disposition, i.e., a finding on the merits or a friendly settlement.

The access given to the Commission is a meaningful one considering the practical situation in Africa. Without the states allowing the individuals to take a case against them

⁵² Rachel Murray: A Comparison between the African and the European Courts of Human Rights; African Human Rights Law Journal. Vol 2 no 2 (2002) p.198. The italics is added for emphasis by the writer of this paper.

⁵³ Frans Viljoen, A Human Rights Court for Africa, and Africans. 30 Brook. J. Int’l L. (2004/2005) p. 25

in the Court, there will be no meaningful enforcement.⁵⁴ However, the right of access accorded to the Commission in a way rectifies this situation and saves the Protocol from being a mere white elephant project. As such, the Commission is expected to be the forearm that plays a pivotal role in the protection of individual rights in Africa, at least by taking cases to the Court.

A compromise should be sought on how the Commission could submit a case to the Court for reasons dealt here in below. A feasible working solution should be sought to the strong claims made by the writers mentioned here in above. The writer of this paper submits the following on how the Commission submits a case to the Court.

According to Murray, it appears that it is automatic for the Commission to submit a case after it first makes a consideration. It is understood that the view held here is that all cases that are submitted to the Commission will be automatically submitted to the Court. On the other hand, Viljoen asserts the Commission would submit a case to the Court in three situations. It could do so acting as a waterway, after making some findings or after a final disposition by it. While both views could not be left aside totally for sake of theoretical arguments, it does not seem to be as pragmatic as it appears.

As put by Murray, the rules of the Court should be designed with a strict allegiance to the complementary principle which is set out more than once in the Protocol.⁵⁵ If the Commission has to submit all cases, it may be taken that the Commission might even submit cases that are decided by it with no problem directed from the State. This analysis, if it is right, will make the Commission obsolete in its function with respect to States Parties to the Court's Protocol. Moreover, it would be meaningless for the Commission to

⁵⁴ The other option is for states to submit cases against another state. In the Inter-American Court of Human Rights there were only two cases submitted until 1990. See Frans Viljon *supra* note 53. See also Rachel Murray note 5. She quotes RCW White 'Tackling Political Disputes through individual application.' (1998) 1 European Human Rights Law Review 66 that states are reluctant to submit cases in the Strasburg Court. If individuals are not allowed due to the inhibition imposed by the states on them and if states do not submit cases for fear of the diplomatic and political consequences that the case might ensue, it would be difficult to see the feasibility of the Court in enforcing the rights.

⁵⁵ See the Preamble and Articles 2 and 8 of the Protocol.

submit a case which does not reasonably show any adverse behaviour from the part of the state in implementing the recommendation. Seconding that, the principle of complementarity would be affected negatively if there is a procedure that compels the Commission to submit all cases after a fact finding process which would take some time. Why would the Commission submit a case to the Court if there is no dispute on its recommendation?

It would be unrealistic for the Commission to submit a case which is already disposed. It would defy the function of the Commission if the Commission is set to submit all the cases that are brought to it. Doing so would not add anything to the principle of complementarity and mutual reinforcement. At the outset, the Commission should not submit any case that is totally disposed by it. It should deal with the cases that are submitted to it as it used to do, separately, with out considering the existence of the Court. After that, the Commission could submit cases that are disposed by it and on which there is reluctance on the part of the state to accept its recommendation. On this point the Commission would like to have a strong force on its decision by securing a binding decision. This approach would limit the number of cases that goes to the Court and contribute to the complementarity principle.

2.2 THE STATE PARTY

All member states of the African Union have now ratified the Charter, which is the parent instrument for human rights protection in Africa. Less than half of the members have ratified the additional Protocol on the establishment of the Court. As stated elsewhere the Commission has the mandate for both the protection and promotion of human rights. Its protective mandate is now shared by the Human Rights Court.⁵⁶ However, it should be noted that it is still the sole institute for the protection of the Charter in more than half of the countries of the continent.

⁵⁶ Supra note 52.

All states of the union can take cases against another state to the Commission by virtue of being a party to the human rights Charter. Article 5(1) b and c of the Protocol deal with the situation where the complaint is made by a state party. A State Party can lodge a complaint against another State Party since it is only states that can be defendants to the proceeding. A State Party which has ratified the Protocol can be brought to the Court on one or more of the violation of rights protected by the Charter and other relevant human rights instruments.

Thus, states that have already made an application and the ones against which an application was lodged at the Commission, do have a right to access the Court by presenting an application or presenting a defence to it.⁵⁷ A state also has a right to access the Court when its citizen is a victim of human rights violation.⁵⁸ When a state is called to defend a case in a Court it can object the authority of the Court by claiming that the Court does not have the power to look into the case because it lacks jurisdiction *ratione personae*.⁵⁹ A jurisdiction *ratione personae* is the equivalent of two principles: personal jurisdiction and standing.⁶⁰ A personal jurisdiction is the passive sense of *ratone personae* where a state can be brought as a respondent, on the other hand, standing is the active sense of the term that allows a state to have the *locus standi* of bringing a case in a court.⁶¹ Thus, a respondent state can defend itself by claiming that it cannot be brought as a defendant because the Court does not have the personal jurisdiction on it. It can also defend by claiming that the applicant state does not have a standing in the court.

2.2.1 Personal jurisdiction

⁵⁷ Supra note 25, Article 5(1)b and c

⁵⁸ Supra note 25, Article 5(1)d

⁵⁹ Jo M. Pasqualucci, *The Practice and Procedure of the Inter American Court of Human Rights*.(Cambridge: Cambridge University Press)2003, P. 97.

⁶⁰ Supra note 59..

⁶¹ Supra note 59.

The question that should be asked here is how a state can be required to stand as respondent. The Human Rights Court in Africa is a result of a supra-national arrangement i.e. a convention; there should be an unequivocal situation where the state has duly consented to the respective instrument. The consent of a state can be expressed in many ways: signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.⁶² As such, an African state can be brought before the African Court of Human Rights as a respondent only when that particular state has consented to the jurisdiction of that Court to adjudicate cases that involves violation of rights by that state.

The process of giving consent under the Protocol is clearly indicated under Article 34 of the Protocol. The Protocol is open for “signature and ratification or accession” by any State Party to the Charter.⁶³ This statement has two points to make. One, the process of providing consent by a state requires two stages; the first one is signature and the second one is ratification or accession. Two, those states that can sign and ratify or accede to the Protocol are those states that are parties to the Charter.

(I) Expression of Consent by States: Signature, ratification and accession are the primary rules that are required for a state to give its consent. The consent of a state to be bound by a treaty can be given in the form of a signature alone.⁶⁴ However, signature alone does not make the grade to deduce the consent of a state in the case of the Court’s Protocol. One can neither be sure if signature is a necessary prerequisite and what its effects are if not followed by ratification or accession to it. Definitely it cannot be considered as one that makes the state subject to the treaty’s jurisdiction. It can only be considered as the expression of the state’s interest and not consent. The representative in this case would sign the treaty subject to future ratification or accession by the state according to the procedures

⁶² Supra note 37, Article 11

⁶³ Supra note 25, Article 34 (1)

⁶⁴ Supra note 37, Article 12

of ratification that are regulated by that particular state.⁶⁵ Such a signature however entails an obligation on the state “to refrain from acts which would defeat the object or purpose of a treaty.”⁶⁶

The Protocol was adopted on 9 June 1998 and on the same day 33 states have put their signature to it.⁶⁷ At this time the treaty itself was not in force. By June 2006, out of the possible 53 African states, 47 have signed while 23 of them had ratified and deposited their instrument of ratification.⁶⁸ The signature by the qualified majority of states indicates that these states’ “desire to abide by the spirit of the treaty and will do nothing to undermine or subvert it.”⁶⁹ As such it imposes a negative obligation on the states that have signed the treaty. They might not be required to do something positively; nevertheless they should also refrain from doing some thing that would tamper with the object and purpose of the treaty. Hence, the subsequent requirement for binding the state completely should be fulfilled for it to be obligatory. Thus the provisions of the treaty are not going to be applicable to that particular state before the treaty is enforce on that state.

Consequently, the second requirement of ratification or accession should be made for a state to duly authorise the application of the treaty on it. By definition ratification and accession are equivalent in that both mean a process through which the state establishes on the international plane that it be bound by the treaty.⁷⁰ Ratification and accession generally require a deliberation by either the law making body or by the body authorised to approve the conclusion of such treaties. The first country that ratified the treaty on 29 September 1998 was Senegal.⁷¹ While the ratification or accession is a step forward to make the treaty

⁶⁵ Supra note 37, Article 7 and 14 (1) c

⁶⁶ Supra note 37, Article 18(a)

⁶⁷ Supra note 33.

⁶⁸ Supra note 33.

⁶⁹ N Barney Pityana, “The African Court on Human and Peoples’ Rights in Municipal Law”, paper presented in , Seminar for Eastern and Southern African States on the Ratification of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of the African Court on Human and Peoples’ Rights; Organised by Interights, London; Gaborone, Botswana, 9-12 December 2003. p. 2

⁷⁰ Supra note 37, Article 2(1)b.

⁷¹ Supra note 33.

binding it is not the final point. As the treaty is a new one not yet enforce, it does not bind one country even if such country fulfils all the requirements to make it binding on it. In connection with this, the Protocol makes some more requirements to be fulfilled. However one should take note of the fact that the negative obligations that are raised in connection with the states that signed the treaty are also applicable here until the treaty is in force.⁷²

A state that signed and ratified or acceded to the treaty does not bind itself immediately, at least in the case of the Court's Protocol. It would naturally be difficult for a state to know whether or not another state has ratified or acceded to a treaty. Such would be challenging when a problem that involves the treaty ensues among some states. That is why most, if not all, treaties have depositaries.⁷³ Accordingly the Secretary-General of the OAU/AU is the depositary for the additional Protocol; states shall deposit their instruments of ratification or accession to the office.⁷⁴ The deposit of the ratification or accession of the states consent is not often made on the same day as the place of the ratification and the place to deposit it might not be the same. For example, the first ratification made on the 29th day of September had to stay for a month, until October 30, 1999 to be deposited at the depositary. At first the fulfilments of all these do not even make the treaty fully binding on the state. A treaty is an agreement between states under international law; it often puts a minimum number of ratifications or deposit of ratifications for such a treaty to be in force. Before the coming into force of the treaty it is not possible to think the binding nature of the Protocol on a particular state with the fullest sense of the word. As such the Protocol on the establishment of the African Court has made a deposit of fifteen ratifications and a lapse of thirty days for the Protocol to take effect.⁷⁵ The deposit of the 15th ratification was made by Comoros on 26/12/2003, bringing the Protocol into effect only a month latter on 25/01/2004.⁷⁶

⁷² Supra note 37, Article 18 (b)

⁷³ Supra note 37, Article 77. One of the purposed of the depositaries is to communicate the coming into force of a treaty and also communicate the parties to it from time to time.

⁷⁴ Supra note 25, Article 34(2) The OAU is now substituted by the AU because the rights and obligations of the defunct organisation are now transferred to the AU.

⁷⁵ Supra note 25, Article 34(3).

⁷⁶.Supra note 33.

In a nutshell, the Protocol requires the following steps for states to be bound by the provisions of the treaty. First, the particular state has to sign the treaty through its representative. Second, such intention of the State should be supported by a ratification or accession from the state organ that is authorised to enter into such treaty. Third, a ratification or accession by a state should be deposited at the Secretary-General of the OAU/AU. At last, fifteen deposits and a thirty days expiry after the deposit of the last one will bring the document into effect. This will make the coming into existence of the document as part of the body of international law and binding on states.

Some states that would make a latter day deposit of their ratification or accession will be governed by other rules. Such states do not need to stay one month after the ratification is deposited. The document is already in force by then and they would be aware if they deposit their ratification or accession that the treaty would be immediately applicable. Thus, a state that makes a deposit of ratification of the Protocol would be bound by the provisions of the Protocol on the same day as the date of the deposit.

Nevertheless, it does not seem to be realistic to assume the applicability of the Protocol before the establishment of the Court. Although the deposit of fifteen ratifications and the lapse of thirty days brought the Protocol in force, it is difficult to see the application of the Protocol on the personal jurisdiction of a state. Thus, it would be difficult for anyone with a *locus standi* to bring a case against another state when the institution that will consider the case is not in place. Yet the fact that the treaty is in force paves the way for the enforcement of the treaty. The Protocol for the establishment of the Human Rights Court is now in force. It is not, however, possible for one country to bring a case against another for the simple reason that there is no Court physically available. However, as it paves the way for the implementation of the treaty, the judges of the Court are elected and the seat of the court is known at least on a regional level.

A State Party to the Protocol would then be bound by the Court's compulsory jurisdiction without being required to make a separate declaration on the subject. Acceptance of compulsory jurisdiction will allow others to bring cases against that particular state. This situation is summarised by Ouguergouz in the following manner;⁷⁷

Every State Party to the Protocol may be brought before the Court by the African commission, a state party or by an African inter governmental organization, without it needing to give its consent either by the prior deposit of a declaration of acceptance of the compulsory jurisdiction of the Court or in any other way: the jurisdiction of the Court is compulsory for it solely requires accession to the Protocol. In the Inter American system the jurisdiction of the Court is optional, this was also the case in the European system prior to the entry into force of Protocol No 11, which made this jurisdiction compulsory regardless of the status of the author of the complaint.

The acceptance of the Court's compulsory jurisdiction may be made on an *ad hoc* basis for the adjudication of a particular case based on an agreement.⁷⁸ The Protocol on the African Court of Human and Peoples' Rights however does not have such arrangement. Thus any member state can either be a party to the Court's Protocol or not. The Protocol by itself does not have an opt-out clause. A State Party that may want to do away with its international obligation should follow the procedure in the AU Constitutive Act. The Charter and hence the Protocol are treaties that are brought up with in the OAU/AU. It appears that a state should be a member of the AU to be a party to the treaties promulgated with in the union.⁷⁹ The other option is to give a notice for one year by following the rules of the Vienna Convention on the Law of Treaties.⁸⁰

⁷⁷ Fatsah Ouguergouz, *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa*. (2003) The Hague, London, New York, Martinus Nijhoff Publishers, p. 725

⁷⁸ American Convention on Human Rights, Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969, Article 63(3)

⁷⁹ See Supra note 11, the Preamble and Constitutive Act of the African Union, adopted at Lome, Togo, on the 11th day of July 2000, entered into force May 2001. Article 31.

⁸⁰ Supra note 37, Articles 65 and 67.

(II) States Parties to the Protocol: It is mentioned above that the Protocol is open for signature only for States Parties to the Charter.⁸¹ One should identify the Charter and the States that are parties to it so that the domain for the ratification of the Protocol is known. The Problem is worse when one considers the fact that the word Charter is used in both the African ‘Charter’ on Human and Peoples’ Rights and the ‘Charter’ of the Organisation of the African Unity. It might be difficult if the usage of the word, as in the preamble, had continued throughout the body of the Protocol. Even then the problem would have been solved because of the fact that all member states of the OAU/AU are also parties to the Human Rights Charter. One cannot be certain if a state will not opt out of the Human Rights Charter. For fear of such problem a saviour provision, article 2 of the Protocol, makes an assertion. It points out that the African Charter on Human and Peoples’ Rights is substituted with “the Charter” in the Protocol. As such the states that can be parties to the Protocol are those states that have ratified the African Charter on Human and Peoples’ Rights, which are also the states that were parties to the OAU and are now parties to the AU.

2.2.2 Standing

Standing means the State Party should have a legally acceptable position in the African Court of Human and Peoples’ Rights. The State Party has to make a due ratification for it to have a legal standing. If the state has ratified the Protocol it automatically has a standing in the Court; that means it can bring cases in the Court. The question is then, against whom or against which institutions? The only parties that can stand as a defendant in the Court are States. The states are the sole bodies enshrined with the obligation to enforce that international human rights law, and of course the African Human Rights Charter, are implemented accordingly. The failure to implement or establish a due mechanism for the fulfilment of the obligation entails state responsibility. For a stronger reason, the violation of one or more of the protected rights will bring the responsibility of the state into the

⁸¹ Supra note 25, Article 34 (1)

plane. A state may hence bring a case to remedy the violation of one or more of the protected rights.

As a result, it should be noted that when a state decides to take a case in the Court, it will certainly do it against another state. This might have a farther reaching consequence than it may look like. The political consequence that might ensue as a result of such an application is to be looked in the future. Yet one can undoubtedly say that the number of instances that such a case might be brought to the Court will not be a good deal. It is only a small number of cases that are brought against states to international tribunals.⁸² One could say there are reasons for this. Such an act might result in a conflicting situation between countries. On top of that a diplomatic solution is a better option in the case of states relationship than the purely legalistic approach.

We have looked seen that the states right of access to the Court can be fulfilled when a state has lodged a complaint against another or when there is a complaint lodged against it in the Commission. According to the Protocol, the states right of access does not seem to be limited to these two cases. Paragraph 1 c of Article 5 in the Protocol indicates that a state has a right of access to the Court when its citizens are victims of a human rights violation.

From the outset we can clear that a communication is going to be brought against another state. It is only states that can stand as defendants and if the country which is a citizen of the victim can access the court, it should be clear that it can not be against itself. If it is to bring a case against another state then it should be a party to the Protocol so that it can have a standing. This would make the provision superfluous. If a state has an established right to access the Court by virtue of being a party to the Protocol, why should it be entitled to have access again when its citizen is a victim of a rights violation? While an affirmative argument for the puzzle is possible, its strength does not seem to be plausible.

⁸² See Jo. M. Pascualucci, *The Practice and Procedure of the Inter –American Court of Human Rights*, Cambridge: Cambridge University Press, (2003) P. 103.

Consequently, one would ask what the purpose of the provision is going to be? There are two ways in which the state (which is a country of citizen to the victim) can be involved. First, when the individual victim has made an application to the Court, the victim's country of nationality may access the Court. In this case the country, under the jurisdiction of which the victim suffered a human rights violation, should have made a declaration accepting individual complaints for violations committed in that state. Second, when there is an inter-state complaint, the complaint can be brought by a state other than the victim's country of citizenship. In such a case the country of the victim's citizenship may have a right of access to the Court too. Such an access could be through making a request to join the applicant country by showing that it has interest in the case.⁸³ This way of access however does not help in comprehending the analysis. For a state party to submit a case to the Court it should always go through the Commission.⁸⁴ One exception to this rule is when the victim is a citizen of the country making the application to the Court.

A demonstration of the above dilemma through a hypothetical case may help to clear out some points. Assume a victim "V" is a citizen of country "C" and resides in country "R" where she/he faced a serious violation of his protected rights. Suppose also that all the countries are States Parties to the Charter while country "N" neighbouring both countries is a party to the Protocol too. We will now look at the riddle by changing the constant bases.

The defendant in this case is going to be country "R". The victim "V" cannot bring a case against "R" unless the country has made a declaration to accept the Court's power in such a case. Yet, both country "C" and country "N" can bring cases against "R" as an inter-state complaint case. Country "R" can only bring the case to the Court only after it took the case to the Commission. It is only when the Commission's recommendation is not welcomed by the violating state that this country should take the case to the Court. Adding to that, "N" cannot take a case directly to the Court for "V" is not its own citizen. Country "C" can have

⁸³ Supra note 25, Article 5(2)

⁸⁴ Supra note 25, Article 5(1)b

access to the Court in two instances. First, it can bring a case against “R” by itself without first taking a complaint to the Commission as the victim is its citizen.⁸⁵ Country “C” can also have access to the Court as an interested party after a case is brought by country “R”. This might be a result of two things. Firstly, “C” might be hesitant to bring a case against “R” for fear of its diplomatic relations. In this case after the case is brought by “N”, there could be a change in ideology or a change of regime in country “C” that pushes such a country to be concerned about the violation and request for *joinder*. Secondly, by the time the violation occurs, “C” might not be a state party to the additional Protocol. Thus, “C” might ratify the Protocol at a latter date and might need to be joined in the case as it was not legally possible for the state to do it before.

2.3 AFRICAN INTER GOVERNMENTAL ORGANISATIONS

African intergovernmental organisations are entitled to access the Court by submitting cases to the Court as are the Commission and State Parties to the Protocol.

Intergovernmental organisations are associations that have sovereign states as parties to its formation. The intergovernmental organisations are those already created and those that will be created. Thus the UN, AU, EU, OAS are some of the intergovernmental organisations. It is not all the intergovernmental organisations that are allowed to access the Court.⁸⁶ The prefix to the term intergovernmental organisations reads as ‘African’.⁸⁷ An African intergovernmental organisation means an organisation of the African states. This will right away exclude the consideration of some intergovernmental organisations which does not have African states as a member such as the EU and OAS.

The African Union would be the first institution that could be mentioned as a proper intergovernmental organisation.⁸⁸ The fact that the organisation is made up of only African

⁸⁵ See supra note 25, Article 5(1)c

⁸⁶ Supra note 25, Article 5(1)e

⁸⁷ Supra note 25, Article 5 (1)e

⁸⁸ Supra note 25, Article 5(1)e

states entitles it to be considered as such. Thus intergovernmental organisations which are made of African States are entitled to access the Court by taking a case. Apart from the AU, the New Partnership for Africa's Development, the African Development Bank, the African Development Fund, the African Regional Economic Associations and other regional organisations do also fall in the category. The intergovernmental organisations that are made of the states of the African Union are hence welcome to access the Court.

However, a question could be raised if an international organisation such as the UN or a regional organisation which includes a country such as Morocco, a country in Africa but not a member to the African Union would be allowed to take a case to the Court. Some international organisations such as the UN have African states as members. The wording in Article 5(1) e does not seem to allow such organisations. The prefix in the provision denotes only African states should be a member to the intergovernmental organisation. The UN for example has all African states as members to it plus other countries too. Thus it does not make the grades up to the requirement set under the Protocol to access the Court as an intergovernmental organisation.

The other puzzle that comes here is if intergovernmental organisations that have members which are not in the African Union can access the Court. Morocco is neither a state party to the African Union nor the African Human Rights Charter. The African Human Rights Charter and the Court's Protocol are made up under the auspicious of the African Union. As a result the usage of the word African in the Protocol should be construed to mean states that are members to the African Union.

3 OPTIONAL ACCESS AND ADMISSIBILITY

3.1 OPTIONAL ACCESS TO INDIVIDUALS AND NGOs

There have been two functioning regional Courts before the African Court's Protocol came into reality. The European Court of Human Rights and the Inter-American Court are not on the same plane when it comes to access by individuals and NGOs. The former has leapfrogged most international or regional tribunals by making access to individuals and NGOs compulsory.⁸⁹ On the contrary, the latter has made the Court inaccessible for individuals and citizens to bring a case directly before the Court. The African Protocol has taken a mid-way position with respect to individual and NGO access by making optional access a possibility in the Protocol.

3.1.1 Individual access

An individual may submit a communication to the African Commission of Human Rights. There is no explicit address made about individual complaints in the African Charter. Article 55 of the Charter uses the phrase 'other communications' to differentiate it from State communications.⁹⁰ Communications from individuals are accepted under the Charter automatically. The State does not need to make any additional declaration apart from mere

⁸⁹European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11 with Protocol numbers 1, 4, 6, 7, 12 and 13, available at, < <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf>> Visited on 26 February 2006., Article 34.

⁹⁰ Supra note 25, Article 47-54 of the Charter are rules on State Communications. And 'Other Communications' have been interpreted and applied by the Commission as complaints from individuals or NGOs.

ratification of the Charter to allow an individual access the Commission. Thus individuals, whether or not they are victims, are allowed to access the Commission without any restriction.⁹¹

In a stark contrast to the Charter, the access to the African Human Rights Court by individuals is limited through the additional Protocol.⁹² The issue of individual complaints was the subject of a heated debate in the drafting process of the Protocol.⁹³ As it stands, it takes more than just ratification for a state to allow individuals access the Court. Provisions under Article 5 and Article 36 of the Protocol make reference on how such a communication could be submitted. Article 5(3) of the Protocol indicates that the Court *may entitle individuals to institute cases* before the Court only when the conditions that are set under Article 34(6) are fulfilled.⁹⁴

Article 36 lays two-way restrictions on such complaints. First, the State has to make a declaration accepting the jurisdiction of the Court to receive individual complaints.⁹⁵ Second, when an application is forwarded to the Court against a particular state that has not provided the required declaration, the Court has to refuse receipt of it.⁹⁶ The two sentences under Article 34(6) have more or less the same meaning. It only shows the emphasis given to the expressed consent of a state in accepting the Court's power to consider complaints from individuals.⁹⁷ Thus it is, predominantly if not solely, the will of the states to allow individuals to access the Court.

The hurdle that is set under Article 34(6) on individual access is not something that should be welcomed ecstatically, however, it should not be considered as a hopeless case as states

⁹¹ Makau Mutua 'The African Human Rights Court: A two-legged stool?' (1999) 21 Human Rights Quarterly. P.346

⁹² Supra note 25, Articles 5(3) and 34(6).

⁹³ Rachel Murray 'A Comparison between the African and European Courts of Human Rightss' (2002) 2 African Human Rights Law Journal. P. 201

⁹⁴ Supra note 25, Article 5.

⁹⁵ Supra note 25, Article 36(4)

⁹⁶ Supra note 25, Article 36(4)

⁹⁷ It does not seem that there is a lee way for a case to be accepted by the Court if only one of the two statements were there.

may make a declaration at any time subsequently.⁹⁸ In fact, most international procedures under the UN and other international or regional tribunals have a restrictive approach in the case of individual access. Yet, it is regrettable that the provision does not indicate the current level of development on the subject.⁹⁹ At least the way the provision was designed should not have been as easy as it is, for states can do away with individual complaints mechanism by just being passive.¹⁰⁰ It is believed that optional complaints would call for a number of states to ratify the Protocol¹⁰¹ and it also respects the sovereignty of the potential states that could be a party to the Protocol.¹⁰² It should be noted that such a cautious compromise was really unnecessary¹⁰³ as the time for states to hide back in the shield of sovereignty for a human rights violation is long over due. It is a pity that the progressive rules of the African Charter that allow individuals unfettered access is held back in the Protocol. It is obvious that African states, which are often in the forefront when it comes to human rights violations, may look keen to reduce the number of cases brought against them by reducing the number of complaints, which is the efficient way of doing so.¹⁰⁴ Yet, the general attitude of African States was not an exclusive factor for the regressive nature of individual access to the Court compared to that of the African

⁹⁸ Frans Viljoen 'A Human Rights Court for Africa and Africans' (2004/2005) 30 *Brook. J. Int'l L.* 38. It should be noted that more than thirty African states that ratified the African Human Rights Charter have also ratified the First Optional Protocol of the International Covenant on Civil and Political Rights that allows individuals to submit complaints to the Human Rights Committee. See The United Nations Human Rights Treaties, "Status of Ratification: CCPR Optional Protocol" in <http://www.bayefsky.com/./pdf/ccpr_opt_ratif_table.pdf> visited April 12, 2006.

⁹⁹ The European Convention on Human Rights automatically allows individuals to submit cases to the Court.

¹⁰⁰ The provision should have been designed in a manner that requires states to work a little when they decide not to accept the individual complaints mechanism. It would have been better if ratification were to make an automatic acceptance of the Court's competence to consider individual complaints; and States were allowed to make a declaration not to accept it.

¹⁰¹ *Supra* note 91, p. 355.

¹⁰² *Supra* note 7.

¹⁰³ Nsongura J. Udombana 'An African Human Rights Court and An African Union Court: A Needed Dualism or A Needless Duplication?' (2002/2003) *Brook. J. Int'l L.* 28, p.830

¹⁰⁴ Julia Harrington 'The African Court on Human and Peoples' Rights' (2005) p. 320 from Malcolm D. Evans and Rachel Murray, (eds.) *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000.*

Charter.¹⁰⁵ The major explanation for this is just a ‘historical accident’¹⁰⁶ and that ‘drafters appeared to have been too timid, like a frightened beast shying at its own shadow’¹⁰⁷.

Be it as it may, the provision that resulted out of the drafters’ debate emulates the approach held under Article 25 of the previous European Convention on Human Rights.¹⁰⁸ Thus a separate declaratory statement accepting the competence of the Court should be there so that the Court is seized with a power to adjudicate an individual’s case. Generally, the declaration is made to accept the competence of the Court to consider cases against the state indefinitely i.e. at any time and on any case. However, the declaration that states may make in this instance could also be for the purpose of a specific case or a specific period.¹⁰⁹ Such specific declarations could be important in the protection of rights though states should generally be encouraged to make a declaration without qualification.¹¹⁰ While securing a declaration from African states is quite difficult¹¹¹, it is worrisome if there is another hurdle that should be crossed to access the Court.

A close reading of article 5(3) would tempt one to ask whether or not a declaration suffices for the purpose. Article 5(3) reads ‘*the Court may entitle.....individuals*’ which would put one in a dilemma and ponder the question whether or not there is additional requirement for the Court to consider after article 34(6) is fulfilled.¹¹² A plain reading of the provision seems to show that there is a pivotal role that the Court will play in the right of individual’s access once the relevant states have made a declaration. The usage of the phrase mentioned

¹⁰⁵ Supra note 104.

¹⁰⁶ Supra note 104.

¹⁰⁷ See supra note 103.

¹⁰⁸ Article 25 of the previous European Convention on Human Rights, Done at Strasbourg, this 20th day of January 1966.

¹⁰⁹ Viljoen describes that a case specific declaration needs as a prerequisite the interest of the individual; yet NGOs also could have an interest in such ratification. He informs that a period specific declaration should be discouraged for fear that it will invite regression and uncertainty. See also Article 46(2) of the previous ECHR. See also Article 62(2) of the Inter-American Convention on Human Rights.

¹¹⁰ The Protocol does not have an explicit rule on a limited declaration. As it is not prohibited one may take that it is allowed.

¹¹¹ Only Burkina Faso has made a declaration accepting the Court’s jurisdiction to date.

¹¹² Supra note 25, Articles 5(3) and 34(6).

in the first part of the italics note (i.e. ‘the Court may entitle’), does not put everybody in congruence as to what it means and needs a consideration.

Writing about the shortcomings of the African Human Rights Court on the limitation of access imposed by the Protocol, Mutua asserts that there is another condition on top of a declaration in the following manner;¹¹³

Individuals and NGOs cannot bring a suit against a State unless two conditions are met. First, the Court will have discretion to grant or deny such access. Second, at the time of ratification of the...Protocol or thereafter the state must have made a declaration accepting the jurisdiction of the Court to hear such cases.

The same line of thinking is also expounded by Udombana as follows.¹¹⁴

[T]he discretion to give individuals and NGOs standing lies jointly with the Court and the target State. On the one hand, the Court has discretion to grant or deny an individual and NGO standing at will. The language of the Protocol is: *Court may entitle [;]*...and, in order for a willing Court to hear a case filed by an individual or NGO, the state must have made an express declaration accepting the Court’s jurisdiction to hear such cases.

As it is described above, cumulative fulfilment of the two conditions is a prerequisite for an individual to have access to the Court. The order of the conditions should, nevertheless, be switched over. As such, the first requirement is that there should be ratification with a declaration to it. Then, the Court will be authorized to use its discretion.

The joint hurdle in the process is quite visible from a plain reading of the provision in the Protocol. As a result, it is not difficult to find writers who subscribe to the above thesis.¹¹⁵ However, Frans Viljoen puts a check to the above, apparently plain argument in the following manner;¹¹⁶

¹¹³ Supra note 91, p.355.

¹¹⁴ Supra note 103.

¹¹⁵ See for ex. Robert Wundeh Eno ‘The Jurisdiction of the African Court on Human and Peoples’ Rights’ (2002) Vol. 2 NO 2 African Human Rights Law Journal p. 229-230.

¹¹⁶ Supra note 98, p. 40

[the] discretionary language is rooted in the drafting history of the Protocol and was introduced when direct access was at the African Court's discretion. However, since direct access became subject to an optional State declaration, the drafters' failure to remove the language appears to be a mere oversight. Therefore, the provision should be interpreted to place authorization for direct access with in the sole domain of the state parties"

The same line of argument is also supported by Ouguergouz, one of the judges elected for the Court, who argues as follows.¹¹⁷

Attention should be drawn to a small ambiguity in Article 5(3). What indeed, is the meaning of the expression "The Court may entitle"? This form of words would suggest that the Court's jurisdiction is not automatic and that bringing a case before it depends upon its discretionary power. Yet the reference to Article 34 (6) confirms that the only condition on bringing a case in this way is the deposit of a declaration of acceptance of the jurisdiction of the Court by the State concerned.... Ultimately, there was no need to stipulate that the "Court may entitle" non-governmental organisations and individuals to institute cases directly before it; such permission falls within the sole domain of States parties to the Protocol.

These views that argue the discretionary power of the Court as an oversight are not with out support in the drafting history of the Protocol which is the basis for the assertion. According to the analysis, it appears that the inclusion of the phrase 'the Court may entitle' in the provision should be disregarded. Apparently it was included to put a check to a flood of cases when there was an automatic right of individuals to submit a case in the draft Protocols. Yet the phrase slipped into the final one though individual access is provided to be optional.

True that some of the draft Protocols, which were in place before the final Protocol, have put an automatic access to the Court. The International Committee of Jurists (ICJ) draft has put that 'the Court may, on exceptional grounds, authorise persons, non-governmental organisations and groups of individuals to bring cases before the Court' automatically.¹¹⁸ The Cape Town draft Protocol too has put that individuals should be allowed to access the

¹¹⁷ Supra note 77, p. 724.

¹¹⁸ See Article 20(1) of the International Committee of Jurists Draft Protocol on the ACtHPR.

Court automatically using the same wording mentioned under the ICJ draft Protocol.¹¹⁹ The Nouakchott draft Protocol uses same introductory words as the final draft and the final Protocol. It says ‘the Court may entitle NGOs with observer status before the Commission and individuals to institute directly before it, urgent cases or serious, systematic or massive violations of human rights.’¹²⁰ This draft Protocol has made the access by individuals optional by making a separate declaration as a requirement.¹²¹ Finally, the Addis Ababa draft Protocol, which is adopted latter, took similar notion with the Nouakchott draft to take up the optional approach of individual access.¹²²

Accordingly, it is indisputable that the two drafts, which were there until before the Nouakchott one, opted for a direct access by individuals without any need for a state to make a separate declaration. In such an arrangement, it is not difficult to imagine that it is proper for the Court to be seized with a discretionary power to decide which cases should be submitted. It would be possible for the Court to be flooded with a lot of cases at some time. A discretionary power in such a case would allow the Court to decide on which cases it should take and hence on the number and type of cases it may look. It is a last minute substitution that blew all and resulted in the current, apparently ambiguous, provision. Nevertheless, it is very difficult to aptly say that it was an inadvertent inclusion. Perhaps, the drafters, who happened to hold another view, in the last minute were also convinced that the discretionary power of the Court be still intact even though they knew the final Protocol has an optional approach to individual complaints.¹²³

¹¹⁹ See Article 6(1) of the Cape Town Draft Protocol on the ACtHPR.

¹²⁰ See Article 6(1) of the Nouakchott Draft Protocol on the ACtHPR.

¹²¹ See Article 6(5) of the Nouakchott Draft Protocol on the ACtHPR

¹²² The Addis Ababa draft Protocol (1997) and the Final Protocol (1998) are identical.

¹²³ The last draft was made in Addis Ababa in 1997 and it was adopted as the final Protocol in 1998.

The process which led the provision on the ‘discretionary power’ of the Court and the optional approach of the individual access to be adopted as it appears is described in the following manner;

“After a prolonged debate over two sessions, these articles were reformulated and submitted for consideration and adoption by the meeting. They were, thereafter, adopted by consensus on the strength of the commitment expressed by delegates toward ensuring that the Court be an effective instrument in the protection of human rights in Africa.”

See University of Pretoria, Centre for Human Rights, “Documents Leading up to the Establishment of the African Court” in

<http://www.chr.up.ac.za/centre_publications/hrla/references/DOCUMENTS%20LEADING%20UP%20TO

Consequently, the situation as to how this confusion should be cleared is not easy. While the points mentioned above asserting the inclusion of the phrase that empowers the Court with a discretionary power as unintentional may look logical, one cannot be certain that the Court will follow this line of argument. The terms of a treaty shall be interpreted in good faith by giving ordinary meaning to it in the light of its context, object and purpose.¹²⁴ It is difficult to apply this line of interpretation and claim that the addition of the phrase is not anticipated. A pure and simple reading along with general rules of treaty interpretation explains that the Court is empowered with a discretionary power of determining which cases it should consider. One can not totally do away with the phrase and argue that it does not have any meaning. The will of the drafters is expressed in the terms they use in the treaty and they have included it in the treaty as part of the adopted Protocol apparently after some discussion. This is a serious blow and one of the grave shortcomings that the new Protocol has come up with.

Nonetheless, one of the things that the drafters should be praised for is the fact that there is no victim requirement in the Protocol for submitting a case. The African human rights Court has leapfrogged its counter parts by not making the victim an inextricable requirement in the consideration of cases submitted by individuals. The European Court rules relating to capacity and standing are not restrictive, but their mandatory linkage to the requirement of victim makes the task cumbersome.¹²⁵ No additional declaration on the part of a state is required apart from ratification in Europe for an individual to access the Court.¹²⁶ The non existence of this limitation on the African Court may allow an individual who is not a victim to access the Court. It can rightly be argued that this might be the reason for the drafters to leave the discretionary power as it was, so that the Court would

[%20THE%20ESTABLISHMENT%20OF%20THE%20AFRICAN%20COURT%20p.170.doc](#)> visited 6 April, 2006.

¹²⁴ Supra note 37, Article 31.

¹²⁵ Philip Leach, Taking a Case to the European Court of Human Rights, Oxford: Oxford University Press, 2nd ed. (2005) p.114-115

¹²⁶ See supra note 34.

determine which cases it should consider. By way of which, the Court may make some consistent rules on how it should treat victims and non-victims.

Ultimately it is for the Court to decide whether or not it has a discretionary power. The positive aspect here is that the Court has a competence to ascertain its jurisdiction as it may determine whether or not it has jurisdiction.¹²⁷ Although research on it and scholarly writings will definitely have an impact on how the Court will exercise its power, the line of thinking the Court will follow is yet to be determined. The judges of the Court are the final arbiters on the issue and the quality and independence of judges will have a vibrant role in it.¹²⁸ The writer of this paper is optimistic that the judges will tend to interpret the provision for the benefit of the greater good.¹²⁹ The judges should be judicially active in their interpretations and foster the better protection of rights in Africa.

3.1.2 Non-governmental organisations

The discussion that was made here in above in connection with individual access also holds true for NGOs. The previous discussion on individuals centres on Article 5(3) and Article 34(6). These two provisions put the rules on how individuals and NGOs can have access to the Court and make reference to one another. The words individual and NGOs are used just once under Article 5(3) and they are connected by the conjunction ‘and’.¹³⁰ As a result, it should be well-known that the explanation on individual access is also an explanation for NGOs. It is for the sake of convenience in treating their peculiar traits that this discussion is made separately. Thus, the following analysis will not repeat on what has already been said, but will ponder on what type of NGOs are allowed to access the Court.

¹²⁷ Supra note 25, Article 3(2)

¹²⁸ Supra note 25, Articles 11 and 17.

¹²⁹ Supra note 25, Article 11 of the Protocol indicates that the judges are ‘jurists of high moral character and of recognised practical, judicial or academic competence and experience in the field of human and peoples’ rights’. It should be easy for this level of judges to have a position which will guarantee the better protection of rights in Africa.

¹³⁰ Supra note 25, Article 5 (3).

The African Human Rights Charter does not lay any restriction on the type of NGOs that may submit cases to the Commission.¹³¹ The Charter lays nothing that could prohibit NGOs from submitting cases to the Commission. While there has never been any restriction on the kind of NGOs that may submit cases to the Commission, the Court's Protocol has devised some limitation. Thus, after everything that qualifies an individual to access the Court is complete, there still is a condition on which NGOs should submit a case to the Court. The European Convention does not put any restriction on the type of NGO that may access the Court.¹³²

The type of NGOs that could access the Court are confined by the terms under Article 5(3). It is only those '*NGOs with observer status before the Commission*' that are given the mandate to access the Court. Like individuals, NGOs need not be a victim of a human rights violation to bring a case against a particular State. Yet, during the drafting process, some delegates actually wanted to confer the right only to African NGOs.¹³³ The final draft (the Protocol) does not show this and African or other international NGOs can access the Court. Nonetheless, only the NGOs that have been granted an observer status by the Commission are allowed to access the Court.¹³⁴

The access to NGOs is arguably limited by the prefix 'relevant'. Seconding that it appears companies and trade unions are not covered as parties having standing merely because they do not qualify as NGOs. In the European Court these entities have been allowed to access the Court in different circumstances.¹³⁵ It totally depends on whether these entities are

¹³¹ Article 55 is framed to show the type of Communication i.e. 'other communications' can be submitted by whoever wants to make the application.

¹³² No particular status is attached to the NGOs under Article 34 of the European Convention; however, it is encumbered with being a victim.

¹³³ Dr. Ibrahim Ali Badawi El.Sheikh, 'Draft Protocol to the African charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights: Introductory Note' (1997) African Journal of Int'l and Comparative Law. Vol. 9 P.947

¹³⁴ There are more than 300 NGOs, both African and International, which have the necessary observer status. See African Commission on Human and Peoples' Rights, "Directory of NGOs with observer status", <http://www.achpr.org/english/info/directory_ngo_en.html> Visited 24 January 2006.

¹³⁵ Supra note 125, p.116-117.

considered as NGOs with observer status primarily by the African Commission; which is unlikely.¹³⁶ Even if they are considered as NGOs, it is difficult to determine which NGOs are relevant and which are not relevant and the purpose of the prefix is ambiguous. The judges in the Court once again should interpret it progressively for the greater good in the protection of human rights. The Court should be judicially active here to bolster the protection of human rights in the continent.

3.2 ADMISSIBILITY OF APPLICATIONS

One of the procedural requirements that affect the consideration of a case in any court is the admissibility of a case. Admissibility means acceptability or the act of properly receiving a certain case and its consideration in a legal proceeding. The African Human Rights Courts criteria for admissibility are laid down under Article 6 of the additional Protocol. Article 6 of the Protocol, which is entitled ‘Admissibility of Cases’, is one of the provisions poorly drafted.¹³⁷ Hence, the uncertainties that arise from the vagueness of the provision are presumed to be cleared in the Rules of Procedure that the Court will make.¹³⁸

The African Charter on Human Rights deals with admissibility of cases in two provisions. It deals with it in connection with the two sets of groups that have access to the Commission. Thus there is a requirement in connection with communications from States and other Communications.¹³⁹ In the case of the former there is only one requirement laid down. The Commission should deal with the case after ascertaining that all the available local remedies are exhausted, unless there is a prolonged process of achieving this.¹⁴⁰ The criteria laid in connection with the second group of Communications are much more detailed and rigorous than the first one. In addition to the inclusion of the single

¹³⁶ No such entity has been considered as one having observer status by the African Commission.

¹³⁷ *Supra* note 77, P. 729

¹³⁸ *Supra* note 77, p.734

¹³⁹ *Supra* note 11, Articles 50 and 56.

¹⁴⁰ *Supra* note 11, Article 50.

requirement of State Communications as one¹⁴¹, the admissibility requirement for Other Communications lays six more criteria. This provision is specifically referred to in the Court's Protocol.

Article 6(1) of the Protocol deals with a general condition of admissibility and the second sub-article lays down specific criteria by way of referring to the Charter. The first sub-article makes a general reference to Article 5(3) by saying "The Court, when deciding on admissibility of a case instituted under article 5(3) of this Protocol ...". Article 5(3) is a provision that speaks how individuals and NGOs have access to the Court. As a result it is palpable to understand that the rules on admissibility are applicable when a case is lodged from an NGO with a duly authorized observer status or an individual entitled to submit a case before the Court.¹⁴²

There is no rule in the Protocol that regulates how cases submitted from entities other than the ones mentioned here can pass the admissibility test or even if there is one attached to them. The European Convention puts a general rule of admissibility for both individuals or NGOs and States.¹⁴³ The same is true in the case of the African Charter which puts exhaustion of local remedies as a general criterion of admissibility.¹⁴⁴ However, the provisions of the Protocol do not express anything to that effect with respect to entities other than NGOs and individuals. It leaves a big lacuna which unless filled, will result in the congestion of the Court and adversely affect the proper handling of cases in other institutions.

It would be naive to ascertain that there is no admissibility requirement on all 'persons' such as States in the African Court for example. Would the Court then consider an inter-state complaint which is being handled by another international tribunal or even by the Commission? An affirmative answer to this would leave the Court in a position where it

¹⁴¹ Supra note 11 Article 56(5).

¹⁴² Supra note 25, Articles 5(3) and 6(1).

¹⁴³ Supra note 89, Article 35(1); the next provision puts specific rules on the admissibility of cases from individuals and NGOs.

¹⁴⁴ Supra note 11, Article 50.

could find itself involved in the affairs of others or mar a proceeding in another tribunal. As a result, the fact that there is no expressed rule on admissibility does not mean that the Court is prohibited from considering one. At least it was not prohibited in the Protocol and at most it is necessary. It should only be attributed to a poor drafting of the Protocol, which on this case can be filled up through the Rules of Procedure.

Be that as it may, the Court rules on admissibility of a case, submitted to it, by taking into account the provisions of Article 56 of the Charter. This provision of the Charter sets forth the conditions for admissibility of Communications addressed to the African Commission on Human Rights.¹⁴⁵ The conditions of admissibility as put under Article 56 are the following.

The applicant must not be anonymous. There could be cases where an individual applicant may want to hide his identity for fear of persecution; however, this rule prohibits the lodging of applications for purely political and propagandistic reasons.¹⁴⁶ The application should be compatible with the AU act, the African Charter and of course with the Protocol; it should not be written in disparaging languages against AU, and should not be based on news discriminated through the mass media. The Communication should exhaust remedies which are *available, effective and sufficient*.¹⁴⁷

The Charter puts the exhaustion of local remedies requirement as a prerequisite for both State Communications and 'Other Communications'. The application should be submitted within a reasonable period of time after exhausting local remedies.¹⁴⁸ Thus any decision previously made could not be challenged after a lapse of a reasonable period. Finally, the Court should not accept a case which has been settled according to the UN Charter, the AU

¹⁴⁵ Supra note 25, Article 6(2); and Supra note 11, Article 56.

¹⁴⁶ Milena Petkovic, The admissibility conditions regarding procedures before the European Court of Human Rights (Det Juridiske fakultet: Universitetet Bergen) 2003. P. 14

¹⁴⁷ Henry Onoria, The African Commission on Human and Peoples' Rights and the exhaustion of local remedies under the African charter. African Human Rights Law Journal Vol 3 No 1 (2003) p. 1-24

¹⁴⁸ The equivalent requirement in the European Court sets a fixed six month date.

act, the provisions of the African Charter and its Protocols. This requirement of admissibility is a judicial security that makes decisions duly made *res judicata*.¹⁴⁹

These conditions will thus be applicable to cases which are brought before the Court predominantly on individual and NGO applications. As mentioned elsewhere, there is no specific requirement of 'victim' alluded to the admissibility issue. In deciding on admissibility, the Court is also entitled to request the opinion of the Commission before ruling on the admissibility of a case.¹⁵⁰ Apart from this, the provision on admissibility in the Protocol depicts that, the Court is free to 'consider a case or to transfer it to the Commission' irrespective of any decision that the Court may have on the basis of the specific criteria.¹⁵¹ There is no criterion provided as to the circumstances under which the Court may retain original jurisdiction or transfer the case to the Commission.¹⁵² Moreover, the rule does not describe when and how it should be done. Once more, the Rules of Procedure will hopefully deal with it in a detailed manner and fill the lacuna that is vivid in this provision. It will be up to the Court to make the Rules of Procedure which effectively fill the gaps in the Protocol and strive for an efficient and effective procedure.

¹⁴⁹ Supra note 77, p.613

¹⁵⁰ Supra note 25, Article 6 (1)

¹⁵¹ Supra note 25, Article 6 (3).

¹⁵² Nsongurua Udombana, the African regional human rights court modeling its rules of procedure, Academic Literature, Danish Centre for Human Rights (2002) P.97

4 THE JURISDICTION OF THE COURT

The term jurisdiction is synonymous to authority or power. But the question is power of what or authority over what? Jurisdiction “in its pure sense refers to the authority to declare the law or the legal position, i.e., to pronounce on rights and obligations.”¹⁵³ The issue of jurisdiction is a matter raised as a preliminary objection, hence it requires a solution before the court indulges on the merits of the case as is the case with admissibility.¹⁵⁴ Any Court that presides over a given case has to answer the issue of jurisdiction either implicitly or expressly. A denial of jurisdiction, however, should always be expressed.

The jurisdiction of a Court is delimited in the establishing instrument. The document may empower the court or the tribunal with a broad or narrow area of jurisdiction. Be it as it may, the question of jurisdiction under international courts¹⁵⁵ can be broken down into the following components.¹⁵⁶

- whether it has been properly established¹⁵⁷
- *La competence de la competence*; (to assume jurisdiction to determine jurisdiction)
- *Competence* (jurisdiction over the subject matter, jurisdiction over the person and jurisdiction to render the particular judgment)

¹⁵³ Chittharanjan F. Amerasinghe *Jurisdiction of International Tribunals* (2003) Kluwer Law International: The Hague, London, New York P.52

¹⁵⁴ Prosecutor V. Dusko Tadic; ICTY: Judicial Reports 1994-1995 at P. 365. The Court here was challenged with jurisdictional questions in the trial chamber. The appeal chamber has given an interlocutory decision over the following issues: a) illegal foundation of the International Tribunal; b) wrongful primacy of the International Tribunal over national courts; and c) lack of jurisdiction *ratione materiae*.

¹⁵⁵ Supra note 154. In the Tadic case the court declared that a narrow concept of jurisdiction may, perhaps, be warranted in a national context but not in international context. As such it asserted that the international tribunal has also the power to determine the validity of the international tribunal.

¹⁵⁶ The subordinate areas mentioned are taken from analysis of: Cornell Law School, “Jurisdiction: an overview” < <http://www.law.cornell.edu/topics/jurisdiction.html> >, visited on 24 February, 2006 and Chittharanjan F. Amerasinghe: Supra note 153. P 65

¹⁵⁷ Supra note 154

The jurisdiction of the African Court is articulated under three topics. First, the Court has contentious jurisdiction; it adjudicates disputes concerning the interpretation and application of the Charter, the Protocol and any other relevant human rights instrument ratified by the states concerned.¹⁵⁸ Second, it has advisory jurisdiction; it has a power to give advisory opinion to any state party to the African Union, the African Union, any of its organs, or any African organization recognized by the union on any legal matter related to human rights issues.¹⁵⁹ Third, the Court has conciliatory jurisdiction; it may try to reach an amicable settlement in a case pending before it in accordance with the provisions of the human rights Charter.¹⁶⁰

These three sets of jurisdiction are not specified under one title, and only the dispute settlement area has a title of the provision that reads “jurisdiction”.¹⁶¹ The two others have a title of “advisory opinion” and “amicable settlement”. This does not, however, make them the subject they are dealing with has got nothing to do with the issue of jurisdiction. Nevertheless, some eminent human rights commentators do not even discuss the third point as an issue of jurisdiction. Nmehielle, for example, discusses only contentious and advisory jurisdiction; and does not discuss about the issue of amicable settlement in his title that deals with “jurisdiction and access to court”.¹⁶² Udombana comparing the African Court with other regional courts noted that “the African Court is bestowed with both contentious and advisory jurisdiction”.¹⁶³ On the other hand, other prominent writers describe the power of the Court as a three level jurisdiction. Mugwanya describes the jurisdiction of the African Court as “invested with three heads of jurisdiction namely: contentious, conciliatory and advisory”.¹⁶⁴ Eno also writes that the protocol provides for the three jurisdictional heads of adjudication, advisory and conciliatory.¹⁶⁵

¹⁵⁸ Supra note 25, Article 3.

¹⁵⁹ Supra note 25, Article 4.

¹⁶⁰ Supra note 25, Article 9.

¹⁶¹ Supra note 25, Articles 4 and 9.

¹⁶² Vincent O. Orlu Nmehielle, Supra note 6, p. 263

¹⁶³ Nsongurua J. Udombana Supra note 103, p42

¹⁶⁴ George William Mugwanya: Human Rights in Africa: Enhancing Human Rights Through the African Regional Human Rights System, Transnational Publishers: Newyork, 2003 p.322

¹⁶⁵ Robert Wundeh Eno “The jurisdiction of the African Court of Human and Peoples’ Rights”(2002) 2 African Human Rights Law Journal 2 P. 225.

Most of the literature on the jurisdiction of the African human rights Court deals with what is called the ordinary jurisdiction of a court; its contentious or adjudicatory jurisdiction. Most of them discuss the broad scope of the Court's contentious subject matter jurisdiction.¹⁶⁶ It is considered as a strong arm of the Court for the protection and enforcement of human rights. The part of the Protocol that describes this very idea of broader scope of jurisdiction is not found in other regional systems of human rights and is sometimes called as innovative and very important as it is a mechanism to enforce the wider body of international treaty law.¹⁶⁷

Naldi and Magliveras describe article 3(1) of the Protocol that defines the contentious jurisdiction of the Court as one that extends power over any treaty which impinged on human rights in Africa.¹⁶⁸ Mugwanya in his analysis of the question, whether or not the Court's jurisdiction extends to treaties that are not principally human rights treaties but merely contain an additional human rights dimension, argues in the affirmative.¹⁶⁹ The same line of thinking is followed by Nmehielle. He argues that the broad scope of the Court's jurisdiction has the potential of extending over any treaty dealing with issues of human rights applicable in Africa, including those treaties which are not predominantly of human rights treaties but in one way or another mention human rights issues.¹⁷⁰

The broader scope of the human rights Court jurisdiction is not without challenge, though minimally. Heyns fiercely argues that the above argument brings the end of the pretence about the unique feature of human rights in Africa and "would amount to unconditional

¹⁶⁶ For the analysis of the broad jurisdiction, See NJ Udombana "Towards the African Court on Human and Peoples' Rights: Better late than never" (2000) 3 Yale Human Right and Development Law Journal 45

¹⁶⁷ See for example Vincent O. Orlu Nmehielle Supra note 6, p. 264. See also GJ Naldi & K. Magliveras "Reinforcing the African System of human rights: The Protocol on the Establishment of a Regional Court of Human and Peoples' Rights" 16 Netherlands Quarterly of Human Rights p. 435

¹⁶⁸ GJ Naldi & K. Magliveras Supra note 167, p. 435

¹⁶⁹ George William Mugwanya Supra note 164, p. 322. He mentions here the African Economic Commission Treaty, the Treaty of the Economic Community of West African States.

¹⁷⁰ Vincent O. Orlu Nmehielle Supra note 6, p. 264 The examples he mentioned include UN treaties on human rights and even treaties which come in to effect in the future such as, an African Convention against Torture.

surrender to globalization and universalism in its pervasive sense.”¹⁷¹ This approach will cause jurisprudential chaos and uncertainties by making all human right treaties justiceable; which might deter states not only from ratification of the Protocol, but also from ratification of any human rights treaty.¹⁷²

Heyns continues that the interpretation followed by the other group of writers is not warranted by a close reading of the protocol. He stresses that the word relevant in the phrase ‘other relevant treaties ratified by the state’ should be meticulously considered. As such he has submitted that¹⁷³

the only treaties that could be potentially ‘relevant’ for the purposes of this provision [Article 3(1) of the protocol] would be treaties that make express provision for adjudication by African Human Rights Court. Because there are no ‘other’ treaties in existence today that contain such a provision, article 3(1) should be understood to leave such a possibility open in the future, for example to cover the situation where a Protocol to the African Charter on women’s rights could make provision for applicants to approach the African Human Rights Court.

The Women’s Protocol which is designed to protect the rights of women to a greater level should not stand against the enforcement of human rights in general. The normative framework on human rights has already been achieved on the major human rights issues. The fact that there is a reference in the Women’s Protocol should be put as a reminder and a regulation that depicts the relationship between the Commission and the Court on the interpretation of the Women’s Protocol.¹⁷⁴ Would there be any difference if the Women’s Protocol was silent on this issue? The answer seems to be in the negative.

The two views on jurisdiction are contradictory in that one limits the Court’s jurisdiction to the application of those conventions that expressly empower the Court. While in the other, the Court is empowered to cover a broad range of human rights treaties. The issue of jurisdiction is a core item that identifies the Court’s real power in looking at the fulfillment of the objectives of the Court. The boundaries of human rights jurisdiction and its

¹⁷¹ Christof Heyns “The African Regional Human Rights System in need of Reform”(2001) 1 African Human Rights Law Journal 2 p.167.

¹⁷² Supra note 171, p.166-167

¹⁷³ Supra note 171, p.167

¹⁷⁴ Supra note 14, Articles 27 and 32.

implication will be finely tuned and practically witnessed once the Court starts functioning. The final arbiter on the issue is going to be the Court. It should be noted that the Court's interpretation of such provisions would hold back or strengthen the power of the Court in the protection of human rights. The Court should be judicially active in not limiting the power of the Court falling into a hairsplitting discussion on the interpretation of its provision. The object and purpose of the Protocol should be employed to broaden the protective mandate of the Court. It would be too difficult to totally fail the different arguments on the basis of argumentative logic. Both could be valid. It is in taking one of the possible arguments or making one of its own that the Court should be judicially active and put the broader protection of human rights as its basis for its decision. This line of argument is supported by the Protocol's preamble which states the Protocol's objective. As a result, the judges of the Court should not make their own law by way of interpretation, but by being with in the ambit of the law they should opt for and interpret it with a view that upholds the protection to greater level.

5 CONCLUDING REMARKS

The African Human Rights Commission has been the sole mechanism created to supervise states compliance under the African human rights system. The Commission has an elaborate mandate for the promotion of human rights. However, it does not have sufficient powers for the protection of human rights in the region. The Charter or any other binding instrument has not provided that the Commission makes an enforceable and binding decision. Besides making mere recommendations, it does not have a mechanism to track and follow the effect of its decisions and see to it that there is compliance by the states with its decision. That is part of the reason that necessitates the creation of the African Court of Human Rights which will start to function some time in the future.

The African Human Rights Court was created through Protocol which is already in force. Like any law, the Protocol has general rules which do not make one take extra effort to witness that there are lacunae in the provisions. This will be filled up and substantiated with the rules of procedure and the judgments. Both are tremendous jobs for the court judges to embark on. Furthermore, it is the Court's role in defining the Protocol that could narrow or broaden the protection bestowed in it. Thus the effect of the protection mechanism and state's compliance partly falls on the strength and activism of the Court.

The following are considerable gaps that should be addressed in both the Rules of Procedure and the judgments:

- (1) the institutions that can access the Court are known but the procedure to access or how they can access is not clearly dealt with.
- (2) the access accorded to individuals and NGO's is limited as it is an optional right of access. It is doubtful whether the Court has a say on who can access after a state makes a declaration for optional access.

- (3) the criteria for admissibility is vague and it is doubtful if there is one on the states and institutions that are accorded the right of access.
- (4) the jurisdiction of the Court is not clearly stipulated. Whether the Court's contentious jurisdiction encompasses the application of the whole body of human rights treaties is difficult to determine by just reading the provision.

These all are central to the Court's day to day activity and hence are not problems that the Court could function well without solving them properly. The way these problems are addressed should be of concern even before the Court is set to work. Ultimately, this lofty job in the protection of human rights falls on the judges of the Court. The judges of the Court should use the law and only the law in reaching a decision that would make the protection mechanism meaningful. The Court should not be bothered with ultra concerns that could demote the human rights protection to any level. Though it is too early to say that the African governments will interfere in the work of the Court and influence its decision, one cannot rule out the possibility.

However, the Court should not bow to any political influence that might be exerted from African governments but rather concentrate on the legal instruments that gave it power. The Protocol is designed in a pertinent manner; and by trusting the system one should not doubt they will bow to some kind of influence. The process of election and the independence of the judges coupled with the quality of the judges are the highest standard measures of safeguard in a judicial system. An individual that makes to the office of judgeship in the Court is supposed to have the highest standard traits that are expected in a judge as per the Protocol and manifested in the election process. As such, eleven judges from eleven countries have passed the litmus to assume their position once the Court is set up. The writer of this paper is confident that these judges of the continent will pass any challenge to ascertain an effective protection of human rights in Africa.

Two things are vividly presented here. First the Protocol that establishes the Court has got lacunae in different provisions, the interpretation of which could sway the protection

afforded in one way or another. Second, there are judges that are now elected in a system that guaranteed their independence and ensures their quality. These judges will be faced with setting up the ground work on the Court's procedure. The Court has first to make the Rules of Procedure and also verify it in individual cases through its interpretation. As such it is the judges who will fill up the gap in the procedural rules of the Protocol.

In doing so, the Court is not expected to make and cannot make a new law. It has to follow the rules of interpretation as set in the Vienna Convention on the Law of Treaties and the document it self. Nevertheless, as has been said in the body of the paper, this might not show the way out in a situation where the provision is very doubtful and vague as is the case in many of the procedural provisions emphasized in this paper. And yet, the Court has to decide such a sensitive case timely in a manner that proves its quality and independence. With this background, the paper recommends that the Court should be vibrant in its decisions and be judicially active when making a rule.

The judges will be in the middle of different, but validly pertinent, interpretations available on some cases or related to some of the provisions mentioned in the thesis. It is in these cases that the paper recommends the Court and the judges to be judicially active in upholding the broad perspective of human rights. The role of the Court is immense in ensuring that human rights are protected and in awarding remedies for violations. Its central role can be curbed back if the Court restrains itself in the process of making the Rules of Procedure and its interpretation of the provisions in applying it to specific cases. One should be confident on the high level judges and the system of their election, and hope that they would do what ever it takes to foster the human rights protection in the continent. For this, a proper role of judicial activism is expected from the judges in the process of setting up the Court's procedural rules. As a result, the African Human Rights Court will emerge as a pillar and efficient protection mechanism and a hope for Africa.

The protection of human rights in Africa is not a mere requirement of formality; it is a necessity that Africa has to work for, if its hope for prosperity, peace and stability is to

materialize. Africa's development can only stride if human rights are well promoted and protected. It appears that the development of human rights has been demonstrated through the various instruments not least the Court's Protocol. It is the Court's strength that will foment the development of human rights by protecting the norms expressed through the different regional and human rights instruments.

POSTSCRIPT

The AU has welcomed the launching of the Court in its recent summit¹⁷⁵ and has authorized the African Union Commission to convene a meeting of the Ministers of Justice on the Draft Protocol on the Statute of African Court of Justice and Human Rights.¹⁷⁶ The meeting will discuss the outstanding issues in the Draft Protocol and submit its recommendation to the AU Council in January 2007, when the next regular summit is to be held.¹⁷⁷ The AU has requested its members to give full support and ensure that the Court starts working as soon as possible and functions smoothly. This is a step forward by breaking the stalemate though it does not still tell when the Court will actually start to function.

At the summit, the over all progress in human rights is expressed by the UN Secretary-General, Kofi Annan, in the following manner:¹⁷⁸

[S]ome African leaders viewed human rights as a rich country's luxury for which Africa was not ready; that others treated it as an imposition, if not a plot, by the industrialized West....

I believe Africans have demonstrated that human rights are African rights."

The writer of this paper believes the Court will play a massive role in keeping the momentum by safeguarding the protection of human rights to a better level!

¹⁷⁵ 7th AU Summit, Banjul, the Gambia, 25 June-2 July 2006.

¹⁷⁶ Decision on the Draft Single Instrument on the Merger of the African Court of Human and Peoples' Rights and the Court of Justice of the African Union, Doc Ex, CI/253 (IX)

¹⁷⁷ Supra note 176.

¹⁷⁸ The Secretary-General Address to the African Union Summit, Banjul, 1 July 2006.

6 Bibliography

BOOKS

Amerasinghe, Chittharanjan F., *Jurisdiction of International Tribunals* (the Hague, London, New York, 2003)

Baah, Richard Amoako, *Human Rights in Africa: The Conflict of Implementation* (Lanham, Md. Oxford : University Press of America, 2000).

Davidson, Scott, *The Inter-American Court of Human Rights* (Aldershot: Dartmouth Publishing Company, 1992)

Documents of the African Commission on Human and Peoples' Rights (Oxford; Portland Oregon, 2001).

Evans, Malcolm & Rachel Murray (eds.), *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000* (Cambridge; New York: Cambridge University Press, 2000)

Hyden, Cohen, G. & W. Nagan (eds.), *Human Rights and Governance in Africa* (Gainesville, FL: University Press of Florida 1993).

Institute for Human Rights and Development, *Compilation of decisions on communications of the African Commission on Human and Peoples' Rights : extracted from the Commission's activity reports, 1994-2001 / Institute for Human Rights and Development* (Banjul, Gambia: Institute for Human Rights and Development in Africa, 2002).

International Commission of Jurists, *The participation of NGOs in the work of the African Commission on Human and Peoples' Rights: a compilation of basic documents* (Geneva, Switzerland: International Commission of Jurists, 1996).

Leach, Philip, *Taking a Case to the European Court of Human Rights* (Oxford: Oxford University Press, 2nd ed. 2005)

Mugwanya, George William, *Human Rights in Africa: Enhancing Human Rights Through the African Regional Human Rights System* (Ardsley, NY: Transnational Publishers, 2003).

Murray, Rachel, *The African Charter on Human and Peoples' Rights and International Law* (Oxford and Portland, Oregon: Hart Publishing, 2000).

Murray, Rachel, *Human Rights in Africa: From OAU to the African Union* (Cambridge, Cambridge University Press, 2004)

Orlu Nmehielle, Vincent O., *The African Human Rights System: Its Laws, Practice, and Institutions* (The Hague, London, New York: Martinus Nijhoff Publishers, 2001)

Osterdahl, Inger, *Implementing Human Rights in Africa: The African Commission on Human and Peoples' Rights and Individual Communications* (Uppsala: Iustus Forlag, 2002)

Ouguergouz, Fatsah, *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (The Hague, London, New York: Martinus Nijhoff Publishers, 2003)

Pasqualucci, Jo M., *The Practice and Procedure of the Inter-American Court of Human Rights*, (Cambridge: Cambridge University Press, 2003)

Reisman, W. Michael, *Jurisdiction in International Law* (Aldershot, Dartmouth, 1999)

Shan, Yuval, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford: Oxford University Press 2003)

Welch, Claude E. , *Protecting Human Rights in Africa: Strategies and Roles of Non-Governmental Organizations* (Philadelphia: University of Pennsylvania Press, 1995)

JOURNALS

Akinseye-George, Yemi, New Trends in African Human Rights Law: Prospects of an African Court of Human Rights, 10 *University of Miami International and Comparative Law Review* 159 (2001 / 2002).

Baimu, Evarist, the African Union: Hope for better Protection of Human Rights in Africa? 1 *African Human Rights Law Journal* 2 (2001)

Benedek, Wolfgang, "The African Charter and Commission on Human and Peoples' Rights: How to Make it More Effective", 1 *Netherlands Quarterly of Human Right* 25 (1993).

Bojan Bugarcic, "Courts as Policy-Makers: Lessons from Transition" 42 *Harv. Int'l L. J.* (2001)

Doebbler, Curtis. F. J., "A Complex Ambiguity: The Relationship Between the African Commission of Human and Peoples' Rights and Other African Union Initiatives Affecting Respect for Human Rights, 13 *Transnat'l L. & Contemp. Probs.* (2003)

Eno, Robert Wundeh, The Jurisdiction of the African Court of Human and Peoples' Rights, 2 *African Human rights Law Journal* 223 (2002)

El-Obaid, El-Obaid Ahmed & Kwadwo Appiagyei-Atua, Human Rights in Africa -- A New Perspective on Linking the Past to the Present, 41 *McGill Law Journal* 819 (August 1996).

Elsheikh, Ibrahim Ali Badawi, the Future Relationship between the African Commission and the African Court, 2 *African Human rights Law Journal* 252 (2002)

Essien, Udeme, The African Commission on Human and Peoples' Rights: Eleven Years After, 6 *State University of New York at Buffalo School of Law Review* 93 (2000).

Gutto, Shadrack, The Reform and Renewal of the African Regional Human and Peoples' Rights System, 1 *African Human Rights Law Journal* 2 (2001)

Heyns, Christof, The African Regional Human Rights System: The African Charter, 108 *Penn State Law Review* 679 (Winter 2004).

_____The African Regional Human Rights System,1 *African Human Rights Law Journal* 2 (2001)

Hopkins, Kevin, The Effect of an African Court on the Domestic Legal Orders of African States, 2 *African Human rights Law Journal* 234 (2002)

King-Hopkins, Kimberly D., Inter-American Commission on Human Rights: Is its Bark Worse Than its Bite in Resolving Human Rights Disputes? 35 *Tulsa Law Journal* 421 (Winter 2000).

Lippincott, Amy N., Is Uganda's "No-party" System Discriminatory against Women and a Violation of International Law?, 27 *Brooklyn Journal of International Law* 1137 (2002).

Lomo, Zachary A., The Struggle for Protection of the Rights of Refugees and IDPs in Africa: Making the Existing International Legal Regime Work, 18 *Berkeley Journal of International Law* 268 (2000).

Mahony, Paul, "Judicial Activism and Judicial self-Restraint in the European Court of Human Rights: Two sides of the Same Coin.", 11 *Hum. Rts. L. J.* (1990).

Mohamed, Abdelsalam A., Individual and NGO Participation in Human Rights Litigation Before the African Court of Human and Peoples' Rights: Lessons from the European and Inter-American Courts of Human Rights, 8 *DCL Journal of International Law* 377 (Summer, 1999).

Mowbray, Alastair, "The Creativity of the European Court of Human Rights" 5 *Human Rights Law Review* (2005)

Mugwanya, George William, Realizing Universal Human Rights Norms Through Regional Human Rights Mechanisms: Reinvigorating the African System, 10 *Indiana International & Comparative Law Review* 35 (1999).

Murray, Rachel, A Comparison Between the African and European Courts of Human Rights, 2 *African Human rights Law Journal* 195 (2002)

Mutua, Makau wa, Limitations on Religious Rights: Problematizing Religious Freedom in the African Context, 5 *Buffalo Human Rights Law Review* 75 (1999).

Odinkalu, Chidi Anselm, The Individual Complaints Procedures of the African Commission on Human and Peoples' Rights: A Preliminary Assessment, 8 *Transnational Law & Contemporary Problems* 359 (1998).

_____The role of Case and Complaints Procedures in the Reform of the African Regional Human Rights System, 1 *African Human Rights Law Journal* 2 (2001)

Oloka-Onyango, J., Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors, and the Struggle for Peoples' Rights in Africa, 18 *American University International Law Review* 851 (2003).

- The Plight of the Larger Half: Human Rights, Gender Violence and the Legal Status of Refugee and Internally Displaced Women in Africa, 24 *Denver Journal of International Law and Policy* 349 (1996).

Olz, Martin A., Non-governmental Organizations in Regional Human Rights Systems, 38 *Columbia Human Rights Law Review* 307 (1997).

Orlu Nmehielle, Vincent O., Towards an African Court of Human Rights: Structuring and the Court, 6 *Annual Survey of International & Comparative Law* 27 (2000).

O'shea, Andreas, A Critical reflection on the Proposed African Court of Human and Peoples' Rights, 1 *African Human Rights Law Journal* 2 (2001)

Pan African Judicial Colloquium: The African Human Rights System and the International Court. Johannesburg, South Africa, 19-20 November, 2004. A narrative Report.

Padilla, David, An African Human Rights Court: Reflections from the Perspective of the Inter-American System, 2 *African Human rights Law Journal* 185 (2002)

Pityana, N Barney "The African Court on Human and Peoples' Rights in Municipal Law", paper presented in , Seminar for Eastern and Southern African States on the Ratification of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights; Organised by Interights, London; Gaborone, Botswana, 9-12 December 2003

Udombana, Nsongurua J., An African Human Rights Court and an African Union Court: A Needful Duality or a Needless Duplication? 28 *Brooklyn Journal of International Law* 811 (2003).

- So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights, 97 *The American Journal International Law* 1 (January 2003).
- Can the Leopard Change Its Spots? The African Union Treaty and Human Rights, 17 *American University International Law Review* 1177 (2002).
- The Institutional Structure of the African Union: A Legal Analysis, 33 *California Western International Law Journal* 69 (Fall 2002).

- Toward the African Court on Human and Peoples' Rights: Better Late Than Never, *3 Yale Human Rights & Development Law Journal* 45 (2000).

Umzurike, U. O. "The Protection of Human Rights Under the Banjul (African) Charter on Human and Peoples' Rights", *1 African J. of Int'l L.* (1988)

Verma, Justice J. S., "Protecting Human Rights Through the Judicial Process" Second Justice M. Hidayatullah Memorial Lecture in the National Human Rights Commission, New Delhi, India, 21 December 2002

Viljon, Frans, "A Human Rights Court for Africa, and Africans". *30 Brook. J. Int'l L.* (2004/2005)

Welch, Claude E., The African Charter and Freedom of Expression in Africa, *4 Buffalo Human Rights Law Review* 103 (1998).

White, RCW, "Tackling Political Disputes through individual application." *1 European Human Rights Law Review* (1998).

LAWS

African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M.

African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), *entered into force* Nov. 29, 1999.

American Convention on Human Rights, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123 entered into force July 18, 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

Charter of the Organization of African Unity, 479 U.N.T.S. 39, *entered into force* Sept. 13, 1963.

Constitutive Act of the African Union, OAU Doc. CAB/LEG/23.15, *entered into force* May 26, 2001.

Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953, *as amended by* Protocols Nos 3, 5, 8, and 11 *which entered into force* on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 *respectively*.

Decision on the Draft Protocol of the Court of Justice of the African Union, Doc. EX/CL/59 (111) / 58 (111),

Decision on the Draft Single Instrument on the Merger of the African Court of Human and Peoples' Rights and the Court of Justice of the African Union, Doc Ex, CI/253 (IX)

Decision on the Election of Judges of the African Court of Human and Peoples' Rights – (Doc. EX.CL/241 (VIII)) Assembly/AU/Dec. 100 (VI)

Decision on the Merger of the African Court of Human and Peoples' Rights and the Court of Justice of the African Union, – Assembly/AU/6(V). Dec/83(V)

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III).

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, July 11, 2003.

Resolution on the Division of Africa into Five Regions. OAU Doc. CM/Res. 464 (XXVI)

Rules of Procedure of the African Commission on Human and Peoples' Rights, *adopted on* October 6, 1995.

The Vienna Convention on the Law of Treaties (VCLT), adopted on May 22, 1969.

URL

African Commission on Human and Peoples' Rights data base <http://www.achpr.org/>

African Commission on Human and Peoples' Rights, May 27, 2002, 96 *The American Journal International Law* 937 (October, 2002)

<<http://www.umn.edu/humanrts/africa/comcases/allcases.html>>.

African Union, "List of Countries which have signed, ratified/ acceded to the African Union Convention on Protocol to the African Charter on Human and Peoples' on the Establishment of the African Court of Human and Peoples' Rights" in <<http://www.africa-union.org/root/au/Documents/Treaties/List/Protocol%20on%20the%20African%20Court%20on%20Human%20and%20Peoples%20Rights.pdf>>

BBC News World Edition, "African Union to replace dictators' club" in <<http://news.bbc.co.uk/1/hi/world/africa/2115736.stm>>

Kieckbaev, Djalil I, "*Comparative Law: Method, Science or Educational Discipline?*" (2003) ECLJ. available at <<http://www.ejcl.org/73/art73-2.html>>

European Court of Human Rights data base at <http://www.echr.coe.int/echr>

Inter-American Court of Human Rights data base at http://www.corteidh.or.cr/index_ing.html

International Federation for Human Rights, "10 Keys to understand and use the African Court on Human and Peoples' Rights: A user's guide for victims of human rights violations in Africa and human rights defenders", <http://www.fidh.org/IMG/pdf/COUR_AF_ANGLcadre.pdf>

University of Minnesota Human Rights Library at <http://www1.umn.edu/humanrts/>

University of Pretoria, Centre for Human Rights, “African Human Rights System” in
<http://www.chr.up.ac.za/centre_publications/ahrs/court.html#for>

The United Nations Human Rights Treaties, “Status of Ratification: CCPR Optional Protocol” in
<http://www.bayefsky.com/.pdf/ccpr_opt_ratif_table.pdf>

CASE

Prosecutor v. Tadić, Appeal on Jurisdiction, No. IT-94-1-AR72 (2 Oct. 1995).

SPEECH

Annan, Kofi, “*Check Against Delivery, Embargo Against Delivery*”, The Secretary-General Address to the African Union Summit, Banjul, 1 July 2006.

