

report



minority
rights
group
international



African Court on Human and Peoples' Rights: Ten years on and still no justice

By George Mukundi Wachira





Masai women in Kenya demonstrating against the fact that their communal land is being sold to other tribes. Because of their semi-nomadic lifestyle and lack of political representation, their interests have been marginalized.

Sven Torfinn/Panos Pictures

Acknowledgements

Minority Rights Group International (MRG) gratefully acknowledges the support of DFID and Trocaire EARO (East African Regional Office), and the individuals who assisted with this publication, including the independent expert readers.

The partner organizations gratefully acknowledge the assistance of the many individuals involved in the preparation of this publication, in particular Paile Chabane, MRG's International Human Rights Officer – Africa. Edited by Preti Taneja. Copy editor: Sophie Richmond

ACDHRS

The Gambia-based African Centre for Democracy and Human Rights Studies (ACDHRS) is a regional, independent NGO, established in 1989, which aims to promote and protect human rights in Africa, by cooperating with, as well as supporting, facilitating and encouraging the work of partners, through the development, strengthening, effective use and implementation of international and regional standards and mechanisms. www.acdhhs.org

CEMIRIDE

The Centre for Minority Rights Development, CEMIRIDE, is an African NGO registered in Kenya working to secure the realization of minority and indigenous peoples' rights through capacity-building, public policy advocacy and strategic litigation, thereby ensuring inclusive societies and addressing identity-based conflicts. www.cemiride.info

The author

George Mukundi Wachira is a research fellow with the South African Institute for Advanced Constitutional Public Human Rights and International Law (SAIFAC). He is engaged in contemporary research on minority and indigenous peoples' land and resource rights in Africa. He is an advocate of the High Court of Kenya and has worked with a law firm in Kenya; the Constitution of Kenya Review Commission; United Nations High Commissioner for Refugees in Cairo, Egypt; and the African Commission on Human and Peoples' Rights in the Gambia.

Minority Rights Group International

Minority Rights Group International (MRG) is a non-governmental organization (NGO) working to secure the rights of ethnic, religious and linguistic minorities and indigenous peoples worldwide, and to promote cooperation and understanding between communities. Our activities are focused on international advocacy, training, publishing and outreach. We are guided by the needs expressed by our worldwide partner network of organizations, which represent minority and indigenous peoples.

MRG works with over 150 organizations in nearly 50 countries. Our governing Council, which meets twice a year, has members from 10 different countries. MRG has consultative status with the United Nations Economic and Social Council (ECOSOC), and observer status with the African Commission on Human and Peoples' Rights (ACHPR). MRG is registered as a charity and a company limited by guarantee under English law. Registered charity no. 282305, limited company no. 1544957.

© Minority Rights Group International 2008
All rights reserved

Material from this publication may be reproduced for teaching or for other non-commercial purposes. No part of it may be reproduced in any form for commercial purposes without the prior express permission of the copyright holders. For further information please contact MRG. A CIP catalogue record of this publication is available from the British Library. **ISBN 978-1-904584-78-0. Published** September 2008. **Typeset** Kavita Graphics. Printed in the UK on recycled paper. **African Court on Human and Peoples' Rights: Ten years on and still no justice** is published by MRG as a contribution to public understanding of the issue which forms its subject.

African Court on Human and Peoples' Rights: Ten years on and still no justice

By George Mukundi Wachira

Contents

Executive Summary	2
Timelines	3
Introduction	4
The political context for human rights in Africa	5
The Protocol to the African Charter on the Establishment of an African Court	13
The relationship between the African Commission and the African Court	15
Structure, mandate and composition of the African Court	17
Conclusion	25
Recommendations	26
Notes	28

Executive summary

In June 1998, at an Organization of African Unity's summit in Ouagadougou, Burkina Faso, African Heads of State signed the Protocol to establish the African Court on Human and Peoples' Rights. The breakthrough was the result of four solid years of hard work, intense negotiations and compromise to reach a common position. How disappointing for Africa's peoples then, that ten years after the Protocol's adoption, the Court has yet to hear a case.

There is no doubt about the scale of the needs. In the time that has elapsed, countless human rights violations have taken place on the African continent, with minorities and indigenous peoples particularly affected. As some of the poorest and most vulnerable communities on the continent, minority and indigenous people experience multiple human rights violations on a daily basis. Yet, due to their marginalized position, states are often indifferent to their plight. A strong legal mechanism is therefore essential if the rights of Africa's minorities and indigenous peoples are to be realised.

But it would be misleading to say that no progress has been made. Some important steps have been taken: judges have been appointed, rules of procedure have been elaborated, and the location for the Court – Arusha in Tanzania – has been established. But as this report outlines, there has been more work on logistics than on the real issues. The goal of a functioning, effective Court threatens to be derailed by bureaucracy.

One of the most important issues is the relationship between the African Commission and African Court. The African Commission on Human and Peoples' Rights is currently the main human rights monitoring body on the continent and, encouragingly, states have been increasing-

ly willing to engage with its work. However, the African Commission is a quasi-judicial body and the states' track record of enforcing its decisions has been poor.

The African Court is to complement the protective mandate of the African Commission by issuing binding decisions and ordering specific remedies. But, as this report shows, rivalry between the two institutions has hampered the establishment of a proper working relationship. It is vital that these differences are overcome – especially as, in the early years, most of the African Court's cases are likely to be referred to it by the African Commission.

With stronger political will from Africa's states, these obstacles could be overcome. But having voted to establish the African Court, states are wary about seeing it come to fruition. So far only two – Mali and Burkina Faso – have granted individuals and NGOs direct access to the Court. Furthermore, only 24 out of the possible 53 member states of the African Union are parties to the Protocol at present, and even these signatures have only been possible after serious lobbying from members of civil society.

Africa's civil society will continue to play a vital role in championing the African Court. But it is not their responsibility alone. States are obliged to live up to the promise that they made to their people a decade ago. As this report makes plain, it is in their interest to do so: an effective Court will help to anchor democracy on the continent, ultimately creating stronger and more prosperous nations.

The old legal adage is 'justice delayed is justice denied'. Ten years is long enough. The African Court on Human and Peoples' Rights must start its work.

Timelines

Significant events that have influenced the general human rights landscape in Africa

- **25 May 1963:** Adoption of the Organization of African Unity (OAU) Charter in Addis Ababa, Ethiopia.
- **10 September 1969:** Adoption of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, in Addis Ababa, Ethiopia.
- **Late 1960s and 1970s:** State of human rights on the African continent becomes deplorable, with numerous military coups, juntas and dictatorships, leading to concerted calls for the establishment of an institutional mechanism to promote and protect human and peoples' rights.
- **21 June 1981:** Adoption of the African Charter on Human and Peoples' Rights, in Nairobi, Kenya.
- **21 October 1986:** Entry into force of the African Charter on Human and Peoples' Rights (commemorated annually as Africa Human Rights Day).
- **2 November 1987:** Inauguration of the African Commission on Human and Peoples' Rights, in Addis Ababa, Ethiopia (today based in Banjul, The Gambia)
- **30 June 1989:** Lt Gen. Omar Hassan Ahmad al Bashir stages a military coup in Sudan. He and his Khartoum government are accused of overseeing crimes against humanity and severe violation of human rights especially in Southern Sudan and Darfur.
- **July 1990:** Adoption of the African Charter on the Rights and Welfare of the Child in Addis Ababa, Ethiopia.
- **May 1991:** Mohamed Siad Barre, who ruled Somalia from 1969 to 1991, is deposed and exiled. Somalia descends into

Significant steps towards the establishment of the African Court on Human and Peoples' Rights

- **January 1961:** The idea of an African Court is mooted at the meeting of African Jurists in Lagos, Nigeria – see the Law of Lagos, 7 January 1961.
- **September 1995:** Draft document on an African Human Rights Court is produced by a meeting of experts in Cape Town, South Africa.
- **April 1997:** Second meeting of government legal experts to discuss the draft Protocol to the African Charter is held in Nouakchott, Mauritania.
- **December 1997:** Third and final meeting of government legal experts to discuss the draft Protocol to the African Charter, bolstered by the presence of diplomats, is held in Addis Ababa, Ethiopia.
- **December 1997:** Draft Protocol is adopted by the conference of OAU Ministers of Justice/Attorneys General.
- **9 June 1998:** Adoption of the Protocol to the African Charter Establishing the African Court on Human and Peoples' Rights (Protocol to the African Charter), in Ouagadougou, Burkina Faso.
- **11 July 2003:** Adoption of the Protocol to the African Union Court of Justice, in Maputo, Mozambique.
- **25 January 2004:** Entry into force of the Protocol to the African Charter, establishing the African Court on Human and Peoples' Rights.
- **July 2004:** The African Union (AU) Assembly decides to merge the African Court on Human and Peoples' Rights with the African Court of Justice.

civil war and has not had an effective central government since.

- **6 April–mid July 1994:** The Rwanda genocide. According to the United Nations (UN) approximately 800,000–1 million Hutus were massacred.
- **27 April 1994:** The first multi-racial democratic elections in South Africa bring an end to apartheid. Nobel Laureate Nelson Mandela becomes President.
- **10 November 1995:** Execution of the Ogoni 9, including Ken Saro-Wiwa, writer, environmentalist and President of the Movement for the Survival of the Ogoni people of the Niger Delta in Nigeria (a minority and indigenous group). They are executed by the military dictatorship of General Sani Abacha, despite appeals by the African Commission on Human and Peoples' Rights not to do so pending a final determination of the case.
- **11 July 2000:** Adoption of the Constitutive Act of the African Union in Lome, Togo.
- **26 May 2001:** Entry into force of the Constitutive Act of the African Union.
- **February 2003–present:** Darfur conflict in Southern Sudan. According to the United Nations more than 200,000 people are estimated to have died and at least 2 million have been displaced from their homes.¹
- **11 July 2003:** Adoption of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa in Maputo, Mozambique.
- **31 December 2007:** Violence breaks out in Kenya over disputed presidential elections and degenerates into ethnic conflict. The violence claims the lives of over 1,500 people and displaces over 600,000 Kenyans.
- **13–14 January 2005:** A panel of legal experts meets in Addis Ababa, Ethiopia, to draft a Protocol on the Integration of the African Court on Human and Peoples' Rights and the Court of Justice of the AU.
- **January 2005:** The draft merger instrument is presented to the Executive Council of the AU at the summit in Abuja, Nigeria. The Executive Council decides that the operationalization of the African Court should continue without prejudice.
- **July 2005:** The Assembly of Heads of State and Government in Sirte, Libya, decides that the African Human Rights Court should be set up and the processes towards putting it into operation should begin.
- **21–25 November 2005:** A working group on the draft single legal instrument relating to the merger of the African Court on Human and Peoples' Rights and the Court of Justice of the AU meets to examine the draft document.
- **22 January 2006:** The first 11 judges of the African Court on Human and Peoples' Rights are elected by the AU Summit in Khartoum, Sudan.
- **2 June 2006:** The inaugural members (judges) of the African Court are sworn in in Banjul, The Gambia.
- **31 August 2007:** The Host Agreement to situate the Court in Arusha, Tanzania, is signed between the United Republic of Tanzania and the AU.
- **18 April 2008:** AU Ministers of Justice and Attorneys General resolve that non-governmental organizations (NGOs) and individuals only have direct access to the African Court if a state party makes an explicit declaration to that effect. They also agree that the composition of the court be increased from 11 to 16 members. Both of those resolutions are subsequently adopted by the AU Heads of States and Government in July 2008.
- **2 June 2008:** The terms of two judges of the African Court expire before any cases are considered.

Introduction

Yasir Sid Ahmed Hassan, outgoing Vice-Chair of the African Commission on Human and Peoples' Rights (African Commission), remarked during the African Commission's 42nd Ordinary Session in Congo Brazzaville, in November 2007 that 'the general human rights landscape on the African continent remains a cause for grave concern. From east to west, north to south, the African Commission on Human and Peoples' Rights continues to receive complaints on violations of all categories of human rights.'

The journey towards an effective human rights system in Africa has been long and arduous, and, while still far from being achieved, significant progress has been made. The current African Commission, the main human rights monitoring body on the continent at present – has established some important working practices and jurisprudence, but has been hampered by myriad constraints – among them, that its recommendations are not legally binding, that they have therefore not been implemented, the African Commission's lack of visibility on the continent to the wider public and its inadequate resources.

From the 1990s, champions of human rights and victims of human rights in Africa pushed for the establishment of a judicial institution that would be effective in protecting human and peoples' rights on the continent. Their efforts paid off when the Protocol to the African Charter Establishing an African Court on Human and Peoples' Rights (Protocol to the African Charter) was finally adopted in 1998. However, 10 years on since the adoption of the Protocol, the African Court has yet to consider any human rights cases, even though its judges were inaugurated in January 2006.

For minorities and indigenous peoples, the establishment of the African Court is of particular importance. This is because – as the African Commission has noted – 'protection and promotion of the human rights of the most marginalized and excluded groups on the continent is a major concern'.² Vulnerable and marginalized groups such as minority peoples in Africa have put a lot of hope in that institution to be an effective framework that will redress the human rights violations they face.

Hussein Barre of 'Truth be Told' Network, an organization that is assisting the Kenyan Somali community – a linguistic and religious minority community – in a case alleging massive human rights violations by the state during the infamous Wagalla Massacre of 1984³ is optimistic

that the African Court will be a forum of choice for many minority peoples.⁴ According to Barre:

*'given the complicity of the state in some of the massive human rights violations against minority peoples and the numerous hurdles of finding recourse at the domestic level due to political interference, minority peoples are likely to turn to the African Court on Human and Peoples' Rights to vindicate their rights.'*⁵

Ahola Ejembi of the Civil Liberties Organisation in Nigeria and member of the Akweyi people – who self-identify as a minority group in Nigeria – concurs and adds that:

*'due to political repression, exclusion and discrimination against minority peoples such as the Akweyi people of Nigeria, the domestic legal framework is often insensitive and out of touch to the claims and rights of our people. Our language, for example, is almost extinct. And it is therefore encouraging to know that when we fail to find recourse in our courts we can turn to the African Court on Human and Peoples' Rights, and importantly so since its decisions will be binding on our states.'*⁶

But as we shall see, despite high expectations, questions remain about the accessibility of the African Court to victims of human rights violations. Even when it is operational, will the African Court make a difference to the culture of impunity, and the often deplorable state of human rights on the continent?

This report briefly surveys the political context for human rights in Africa. It examines the transformation of the Organization of African Unity (OAU) into the African Union (AU), and the place and contribution of the regional human rights monitoring mechanism hitherto – the African Commission on Human and Peoples' Rights. The principal focus of the report is on the establishment of an African Court on Human and Peoples' Rights. The report examines the process of adopting the Protocol to the African Charter, its current status and provisions that are relevant to the protection of minorities and indigenous peoples in Africa. The structure and mandate of the African Court relative to the protection of minorities and indigenous peoples is also examined. Finally, the report makes some recommendations.

The political context for human rights in Africa

In order to appreciate the role of politics in the protection and promotion of human rights in Africa, it is useful to commence by briefly tracing the evolution of the first continental inter-governmental political organization, the OAU.⁷ That is necessary given the primary role played by that institution in shaping and influencing inter-state relations and in the adoption of instruments relevant to human rights on the continent.

The OAU was established at the height of the decolonization processes in Africa in 1963, in Addis Ababa, Ethiopia.⁸ Its primary focus was to unify the independent states and facilitate the end of colonialism on the continent.⁹ The issue of human rights was not deemed by the leaders at that time to be a matter of pressing concern.¹⁰ Indeed, soon after gaining their independence, most African states were mainly concerned with building the nation, often displaying a disregard for human rights standards.¹¹ The states were less inclined to advance the human rights causes of their neighbours even when there was need to – on the grounds that it would be tantamount to interfering with state sovereignty.¹²

The late 1960s to the early 1980s was a period when African states were still trying to grapple with consolidating their hold on power.¹³ Dictators and despots emerged through one-party rule and military coups. Some of the notorious regimes include those of Jean-Bedel Bokassa in Central Africa, Idi Amin in Uganda, Fernando Macias Nguema in the Republic of Equatorial Guinea, Mobutu Sese Seko of Zaire, Mengistu Haille Mariam of Ethiopia, Siad Barre of Somalia and Kamuzu Banda of Malawi.¹⁴

At the height of military and one-party rule, states of emergency abrogated human rights and illegally ousted the intervention of democratic institutions.¹⁵ Communities that were not represented adequately within the ruling political echelons of the country mainly due to their minority status became marginalized and excluded from skewed development projects and policies.¹⁶ Indeed, among the casualties of states' efforts to adopt programmes that were suited to enrich those in power were ethnic, linguistic and religious minorities.¹⁷ Minority and indigenous peoples were often left on the sidelines of the legal and policy frameworks of the state structures as a result of their inadequate representation at the decision-making levels.¹⁸ As a result, most of these groups remain among the poorest of the poor and lack access to state resources and institutions designed to protect their fundamental human rights.¹⁹

The OAU preferred to tackle disputes and problems on the continent through non-confrontational means such as mediation, arbitration, conciliation and use of the good offices of African leaders.²⁰ However, while these methods were used to deal with various issues bedevilling the continent, they were rarely employed to redress human rights violations.²¹ A major limitation of the amicable dispute resolution mechanism of the OAU was that it was 'reactive and remedial rather than proactive and preventive'.²² The measures were only employed on an ad hoc basis, normally after great damage such as 'loss of life and damage to property'.²³ In recognition of the limitation of its ad hoc measures to deal with problems on the continent, the OAU adopted a Mechanism for Conflict Prevention, Management and Resolution.²⁴

Amidst serious human rights abuses on the continent by states in the 1960s and 1970s, intense pressure and calls for the establishment of a regional human rights monitoring mechanism were mounted by civil society organizations and the United Nations.²⁵ These efforts culminated in the adoption by the OAU of the African Charter on Human and Peoples' Rights.²⁶ The OAU has since adopted a number of other treaties aimed at redressing the situation of human rights in Africa.²⁷ However, these treaties have remained largely paper aspirations against a backdrop of continuing human rights violations. There are myriad reasons for this, but Professor Adebayo Adedeji, a former UN Under-Secretary-General, who is currently leading the AU mediation efforts in Kenya, identifies inadequate political accountability in African states as one of the main causes for this.²⁸ In states where democratic institutions are weak, and where power is concentrated in the hands of the president, there is little to check politically instigated trials and detentions, assassinations, muzzling of the media and free press, and breach of social/economic rights.²⁹

The culture of impunity on the African continent is another cause of the poor state of the human rights record of most countries.³⁰ While some African leaders remain accused of committing serious human rights abuses in their countries, the law has often been applied selectively to leave an impression that those leaders are above the law.³¹ In Cameroon, for example, as recently as 2008, the Constitution was amended to allow President Paul Biya to contest elections as long as he so wishes.³² The Constitution of Cameroon additionally excludes him from being held accountable for any actions that he may have taken

while in office whenever he leaves office. Only recently has the power of the presidency begun to be challenged – partly by the spread of democracy on the continent and partly by developments in international criminal law. This has led to the indictment and trial of the former Liberian leader Charles Taylor by the Special Court for Sierra Leone, and, in July 2008, the prosecutor of the International Criminal Court at the Hague sought an arrest warrant for Sudanese President Omar El Bashir on the grounds of genocide, crimes against humanity and war crimes carried out during the conflict in Darfur.

The promise of the transformation of the OAU into the AU with regard to protection of human rights in Africa

In 2002, the OAU transformed into the AU, heralding new developments and initiatives, especially with regard to the protection of human rights on the continent.³³ The Constitutive Act of the AU expressly states that one of its main objectives is to promote and protect human and peoples' rights in accordance with the African Charter and other relevant human rights instruments.³⁴ In addition, the Constitutive Act obliges member states to promote gender equality and social justice, ensure balanced economic development, and to condemn and reject impunity and unconstitutional changes of government.³⁵ While maintaining the principle of non-interference in the internal affairs of member states, the Constitutive Act also makes provisions establishing, in essence, the principle of non-indifference to the internal affairs of member states. Thus, the Constitutive Act specifically provides for the right of the AU to intervene in a member state in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.³⁶ It also provides for the right of member states to request intervention from the AU in order to restore peace and security. Ultimately, the AU aims to promote and ensure peace, security and stability on the continent.³⁷

Within the AU framework, various institutions and organs have been established, most, if not all of which will be directly or indirectly responsible for human rights protection and promotion. These organs include: the Assembly of the Union (comprised of Heads of States and the Government of the AU); the Executive Council; the Pan-African Parliament; the Court of Justice; the African Commission; the Permanent Representative Committee; the Specialized Technical Committees; the Economic, Social and Cultural Council; and Financial Institutions.³⁸ The AU has also incorporated other programmes and ini-

tiatives, such as the African Peer Review Mechanism of the New Partnership for Africa's Development (NEPAD)³⁹ and the Conference on Security, Stability, Development and Cooperation in Africa (CSSDCA).

NEPAD is an ambitious economic programme aimed at increasing capital flow into African economies by increasing transparency, improving the democratic image of governments, and liberalizing trade. The African Peer Review Mechanism (APRM) under NEPAD is aimed at encouraging states to, among others, carry out self-assessment on their human rights, rule of law and democratic standards. The APRM process has been significant in its forthright approach of engaging states in self-assessment of their economic and human rights record – including their deficiencies. Reports of the APRM, which so far have covered Ghana, Kenya, Rwanda and South Africa, have made useful recommendations to the states concerned which, if implemented, would transform the human rights landscape on the continent. The CSSDCA is a unified strategy for development, linking the issues of security, stability, development and cooperation in a comprehensive and integrated fashion, recognizing that one flows into the other and that it is impossible to tackle any of these issues without concern for the others.

It is worth noting that the AU has increasingly employed some of its powers to intervene and protect people from human rights abuses, especially when they have occurred on a massive scale.⁴⁰ That is evident for example in Darfur, Somalia and Burundi, where the AU has sent peacekeeping forces – although admittedly with mixed results.⁴¹ In addition, the AU also sanctioned the use of force in October 2007, when AU troops mainly drawn from Tanzania helped the central government of Comoros to regain control of the semi-autonomous island of Anjouan.⁴² The AU is increasingly taking on the role of active mediation to stop human rights abuses and prevent countries slipping into civil crisis. This was evident in Kenya in early 2008, where the Chair of the AU, President John Kufuor of Ghana, intervened in the Kenya post-election crisis despite initial reluctance by the state itself. While not entirely successful, the diplomatic talks opened the gates for the mediation efforts led by former UN Secretary-General Kofi Annan. In July 2006, the AU was also instrumental in convincing Senegal's President Abdoulaye Wade to agree to begin the prosecution of former Chadian President Hissène Habré. Habré, exiled in Senegal, is accused of crimes against humanity, war crimes and torture committed during his 1982–90 rule of Chad.⁴³

The AU has also increasingly employed sanctions to punish a number of recalcitrant states, with some success. It has for instance placed travel and economic sanctions on several of its members, as well as barring some from actively participating in decision-making during its sum-

mits. Madagascar for instance was barred from the AU inauguration summit in 2002 because of doubts over the legitimacy of its president.⁴⁴ The AU also suspended Togo and urged its members to impose economic and travel sanctions on the Togolese government during an unconstitutional change of leadership in February 2005.⁴⁵ This AU intervention was successful: the Togolese government acquiesced and held elections in April 2005. Unfortunately, various observer groups deemed these elections to be neither free nor fair.

While the AU has had relative success by using its powers to impose sanctions on a number of countries, it has largely been reluctant to take such measures with regard to some states that are considered influential or that have 'powerful friends'.⁴⁶ It has instead resulted in mere condemnation, mediation and the despatch of peacekeeping forces. Among the countries that would undeniably invite AU sanctions are Sudan and Zimbabwe. While the AU was instrumental in preventing Sudan from assuming the chair of the AU in January 2007 when it was perceived to be its turn to do so – on the grounds that the country has failed to address massive human rights abuses in Darfur – it still refuses to impose sanctions.⁴⁷ Zimbabwe has failed to attract AU sanctions despite the blatant disregard for its peoples' human rights, largely because of unwavering support from South Africa, which is a major and influential political player in the sub-region and the continent.

The political shift towards an African human rights monitoring mechanism

The notion of establishing an African human rights monitoring mechanism is credited to the efforts of members of civil society and in particular the International Commission of Jurists (ICJ).⁴⁸ It was at a conference on the rule of law organized by the ICJ in Lagos, Nigeria, in January 1961, that 'the idea of an African Court on Human and Peoples' Rights was first mooted'.⁴⁹ The meeting was attended by jurists consisting of '194 judges, practising lawyers and teachers of law from 23 African nations as well as 9 countries of other continents'.⁵⁰ However, the idea of having a court remained just that – an idea. It was not included in the first regional human rights treaty of 1981 – the African Charter on Human and Peoples Rights.

Keba M'baye, who chaired the Committee of Experts that drafted the African Charter on Human and Peoples' Rights in the late 1970s, admits that the idea of an African human rights judicial institution had been conceived during the drafting of the Charter.⁵¹ He explains that the proposal for a judicial institution was rejected

during the drafting of the African Charter on the grounds that it was premature.⁵² It appears that the drafters of the Charter opted for a pragmatic alternative that would not antagonize the political leaders of the time. This was in the form of a quasi-judicial organ – the African Commission on Human and Peoples' Rights – which lacked real powers and was answerable to the OAU political organs.

According to Professor Frans Viljoen, the Director of the Centre for Human Rights, University of Pretoria, the decision by the African leaders of the time to establish only 'a quasi judicial organ was deliberate', in sync with the political atmosphere of the time.⁵³ African states were not amenable to being hauled before an 'adversarial and adjudicative judicial institution' to account for the human rights violations that were rife in almost every country.⁵⁴

Nsongurua Udombana, a human rights expert, traces the rationale for this to the argument that 'traditional African dispute settlement places a premium on the improvement of relations between the parties on the basis of equity, good conscience, and fair play rather than on strict legality'.⁵⁵ It is not surprising, therefore, that a quasi-judicial organ was settled on as a compromise.

However, the African Commission – with its attendant limitations – was seen as outdated by the early 1990s, when a wave of democratic change was sweeping across the continent. Multi-party politics was swiftly dismantling one-party rule in the majority of African states.⁵⁶ This came hot on the heels of the collapse of communism in the Eastern bloc in 1989, which had inspired one-party rule.⁵⁷ The desire for change was also influenced by internal and external pressure from donors and international actors. The World Bank and the International Monetary Fund (IMF), for example, preconditioned financial aid on reforms.

According to Charles Fombad, a Professor of Law at the University of Botswana: 'As democratization swept through the continent, it generated expectations of a new dawn and the end of an era of corrupt, authoritarian and incompetent dictatorships that had earned the continent notoriety for political instability, civil wars, famine, disease and similar ills'.⁵⁸ These developments brought about a 'change of heart'⁵⁹ at the continental level and it is therefore not surprising that establishment of the African Court on Human and Peoples' Rights began garnering support from states.

The campaign for an African Court on Human and Peoples' Rights received a political boost in 1993. The then Secretary-General to the Organization of African Unity (OAU), Salim Ahmed Salim, acquiesced 'that the time had come for an African Court on Human Rights'.⁶⁰ A year later, in 1994, the Assembly of Heads of States and Government of the OAU authorized its Secretary-General to consider the establishment of an African Court on Human and Peoples' Rights.⁶¹

Contribution of the African Commission to the protection and promotion of human rights on the continent

Before we consider the possibilities presented by the African Court on Human and Peoples' Rights, it is worthwhile considering the contribution made by the African Commission. This was inaugurated in 1987, six years after the adoption of the African Charter. At the time – the late 1980s to early 1990s – human rights standards on the continent were abhorrent. South Africa for example was reeling under apartheid. In Kenya, President Daniel Arap Moi unleashed a crackdown on political dissidents including the media. In Nigeria, terror reigned amidst coup attempts. Ethiopia was bombing civilians as its civil war intensified.⁶²

The African Commission's secretariat is based in Banjul, The Gambia. The Commission itself, made up of 11 members – African personalities with the 'highest reputation and integrity' – meets twice a year (15 days per session) in ordinary sessions⁶³ and can hold extra-ordinary sessions.⁶⁴

The mandate of the African Commission includes the promotion, protection and interpretation of the African Charter on Human and Peoples' Rights.⁶⁵ The promotional mandate of the African Commission entails, among others, human rights education, sensitization and raising awareness of the African Charter. This function is crucial because if people are not aware of their rights they cannot fully enjoy them, and certainly cannot ensure their respect and protection. The African Commission has carried out this mandate by conducting promotional missions, whereby Commissioners visit states to disseminate information about the African Charter and the African Commission. With regard to minorities and indigenous peoples, during promotional missions and study visits the African Commission has called upon state parties to the African Charter to institute effective measures to redress the continued subjugation and discrimination faced by indigenous peoples in Africa.⁶⁶

The African Commission has also employed other special mechanisms, such as Special Rapporteurs and Working Groups, to carry out its promotional mandate⁶⁷ and undertake specific activities on various thematic human rights issues of concern on the continent. Some of these mechanisms have raised the profile of the African Commission and made gains in its protection and promotion of human rights. Most notable is the Commission's Working Group of Experts on the Situation of Indigenous Peoples/Communities in Africa.⁶⁸ Naomi Kipuri, a mem-

ber of the Working Group of Experts, avers that through the expert mechanism, the African Commission was able to tackle this important human rights issue on the continent,⁶⁹ despite initial resistance by some members of the Commission and states generally.⁷⁰ For some African states, the question of the definition of who is indigenous in Africa seems to be one of the fundamental concerns.⁷¹ States have expressed concern that the lack of a definition would cause conflict and tension among various ethnic groups resident within their territories.⁷² They argue that a lack of defined parameters of the groups to whom the concept 'indigenous' applies is likely to cause problems of implementation, especially in light of the fact that they consider all Africans to be indigenous to the continent.⁷³ African states appear wary of the possibility that the recognition of a certain section of their population as indigenous would be tantamount to according those groups preferential treatment. They also fear that it would lead to secession of the recognized 'indigenous peoples' and destabilize regional peace.⁷⁴

The Working Group has tried to overcome these fears. One example of a successful contribution by the Working Group is the recent adoption of the first and only legal opinion by the African Commission on Human and Peoples' Rights.⁷⁵ Marianne Jensen, a member of the Working Group, is of the view that the legal opinion in support of the UN Declaration on the Rights of Indigenous Peoples may have been instrumental in the final adoption of the Declaration by African states.⁷⁶ Previously, African states had refused to support the Declaration, and were thus holding up the passing of an important tool for protecting the rights of indigenous peoples, which had taken over two decades of global negotiations to accomplish.⁷⁷ This delay was due to a number of concerns,⁷⁸ including:

- (a) the definition of indigenous peoples;
- (b) the issue of self-determination;
- (c) the issue of land ownership and the exploitation of resources;
- (d) the establishment of distinct political and economic institutions; and
- (e) the issue of national and territorial integrity.⁷⁹

The Advisory Opinion of the African Commission on Human and Peoples' Rights comprehensively responded to each of these concerns. The gist of the opinion was to demonstrate that the apprehension on the part of African states was unfounded. The opinion clarified that the standards and norms enumerated by the Declaration were indeed consistent with the African Charter on Human and Peoples' Rights.⁸⁰

Jensen says that: 'The opinion received overwhelming support from the Commission and member states.'

Robert Eno, a senior legal officer with the African Commission, equally holds the view that:

*'while there is no empirical evidence as to the influence the opinion had on African states in voting for the adoption of the UN Declaration on Indigenous Peoples, its considerable weight in their eventual decision to support the Declaration in New York cannot be discounted.'*⁸¹

It is instructive to note that while the African Commission has not yet formally endorsed the concept of minorities in Africa,⁸² it has undertaken a study on indigenous populations/communities in Africa.⁸³ In Africa most indigenous peoples fall within the ambit of ethnic and linguistic minority groups, and generally espouse similar claims. There are some differences in some of the rights some minority peoples may seek, however – especially related to language, citizenship and religion – hence the continued agitation by some minority groups for a distinct forum (separate from the Working Group of Experts on Indigenous Populations) to ventilate their issues before the African Commission.⁸⁴

The protective function of the African Commission includes consideration of complaints alleging human rights violations. These complaints (commonly referred to as communications) can be submitted by individuals, NGOs or state parties⁸⁵ to the African Charter alleging that a state party has violated specific rights as stipulated under the African Charter. This makes the African Commission one of the most flexible regional human rights instruments, entertaining complaints from anyone regarding violations of human rights by a state party to the Charter. In bringing forward a communication, the complainant need not be, or know, the victim but simply has to comply with the provisions under Article 56 of the African Charter.⁸⁶ That approach gives credence and generous access to the African Commission to anyone who has an interest in the protection of human rights in Africa, whether the person is a victim or not. The generous interpretation by the African Commission, allowing anyone seized of a human rights complaint to take it to the Commission, has enabled NGOs and activists to take up cases of human rights violations on the continent that would otherwise not have reached the Commission. Such an interpretation is crucial given the lack of capacity by most victims of human rights violations, especially minority peoples, to take cases to the African Commission, because of lack of resources, illiteracy and limited awareness, if any, of the mechanism.

However, it should be noted that the African Commission is considering requiring that persons who submit cases should have some form of formal instruction by the victim of the human rights violations.⁸⁷ That move is meant to

avoid scenarios where some of the litigants abandon cases as soon as the case's profile diminishes.⁸⁸ While examining these communications, the African Commission first seeks an amicable resolution of the matter, and should that fail, after consideration makes recommendations to the AU Assembly of Heads of State and Government.⁸⁹

In executing its protective mandate, the African Commission has progressively interpreted the African Charter. Despite a challenge by Nigeria to its capacity and mandate to consider cases and issue recommendations, the African Commission defended its actions and correctly ruled that it was within its legal powers.⁹⁰ The African Commission has entertained numerous cases alleging human rights violations, which can either be individual or group rights breaches. Some of the human rights cases that the African Commission has considered have sought to vindicate the rights of minority peoples.⁹¹ In a case that was submitted by one of the minority peoples of the Democratic Republic of Congo (then Zaire) – Katangese peoples – the African Commission, while not finding a violation of the right to self-determination, importantly endorsed the applicability of internal self-determination.⁹² According to the African Commission 'Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire'.⁹³

One of the most important jurisprudential contributions of the African Commission with regard to the protection of minority peoples' rights in Africa is its finding on the case involving the Ogoni peoples of Nigeria.⁹⁴ The case concerned the allegations of degradation of Ogoniland (in the Niger Delta of Nigeria) caused by Shell Corporation in collusion with the Nigerian government.⁹⁵ The African Commission found in favour of the Ogoni peoples and held that the government of Nigeria had violated various fundamental rights of the Ogoni peoples, including their socio-economic rights such as housing, food, health, as well as group rights such as environmental rights and rights over natural resources.⁹⁶

The African Commission has also reacted to allegations of serious human rights violations on the continent and has undertaken fact-finding missions to investigate allegations of massive human rights violations within member states.⁹⁷ At the end of each mission, reports are published with recommendations on how to improve the human rights situation in the country concerned.

The African Commission is also mandated to cooperate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.⁹⁸ To this end, cooperation has been sought with organizations such as the Inter-American Commission and Inter-American Court on Human Rights and other international and national human rights

NGOs. The African Commission has improved its working relations with NGOs,⁹⁹ national human rights institutions, and more high-ranking states delegates and other interested parties now participate in the sessions of the African Commission.¹⁰⁰ Marianne Jensen of the International Work Group for Indigenous Affairs (IWGIA) commends the African Commission's increasing willingness to cooperate with NGOs in its work.¹⁰¹ Through the work, technical support and resource assistance of civil society organizations such as IWGIA, the African Commission has established and been able to maintain the Working Group of Experts on Indigenous Populations/Communities in Africa.

The African Commission also grants observer status to NGOs that satisfy minimum criteria to enable them to participate actively during its ordinary sessions. Members of civil society contribute and propose means and strategies to resolve various issues of a human rights nature on the continent. Civil society organizations, through the NGO forum, prepare and submit draft resolutions on human rights issues for the African Commission's consideration and possible adoption. Some of these resolutions have condemned states' complicity in human rights violations, such as in Darfur, Nigeria and Rwanda. They have also included urging states to respect and protect human rights defenders, women, refugees and internally displaced persons, minorities and indigenous peoples. The NGO forum, since 2007, has urged the African Commission to deal with human rights issues faced by minority peoples.¹⁰² Individual NGOs have also made similar calls during the public session of the African Commission, reinforcing the need for additional attention to be paid to minorities.

In conformity with Article 62 of the African Charter, states are required to submit periodic reports to the African Commission for consideration. State reporting has provided a forum for state parties to account for the human rights situation and standards in their countries.¹⁰³ The state reporting exercise brings the African Commission as well as the state parties together to dialogue and find solutions to the problems of human rights in their respective countries. States in Africa are now taking seriously the work of the African Commission, as is evident in the increasingly high-ranking state officials who personally present, thoroughly engage, and respond to queries as well as points of clarifications during state reporting. The African Commission in turn presents the state with Concluding Observations comprised of recommendations and information on how the state can meet its obligations under the African Charter. Importantly for minorities and indigenous peoples in Africa, members of the African Commission are increasingly engaging state parties during state reporting on the measures they have adopted to recognize and protect the rights of indigenous

peoples, including affirmative action initiatives.¹⁰⁴ It is worthy of note that, while not mentioning minorities, the African Commission has urged states to respect their peoples' ethnic, linguistic and religious diversity as a means of preventing recurrent conflict in Africa.¹⁰⁵

Limitations of the African Commission on Human and Peoples' Rights

The African Commission's success in protecting human rights in Africa is severely limited by several factors. First is the issue of the Commission's independence. In the past the African Commission's membership comprised high-ranking government officials, including ambassadors, attorneys general and cabinet ministers. Such a composition raised questions, at least in the public perception, regarding the independence of the said officials in executing their functions, despite the fact that the African Charter provides that they are elected in their personal capacity. In an apparent response to criticism by some of the members of the African Commission, members of civil society and victims of human rights violations, the AU issued guidelines to state parties on nomination to the African Commission and the African Court on Human and Peoples' Rights.¹⁰⁶ The guidelines provide that: 'the candidates should not be a member of government, a minister or under-secretary of a state, a diplomatic representative, a director of a ministry or one of its subordinates, or a legal advisor to a foreign office'.¹⁰⁷ Elections of the current members of the African Commission on Human and Peoples' Rights 'reflect conformity by state parties to that guideline'.¹⁰⁸

Related to the question of independence is the issue of funding to the African Commission. Over the years the African Commission has decried the inadequacy of the resources that were made available by the AU for the execution of its expansive mandate.¹⁰⁹ Considering its vast mandate, the African Commission has depended on extra-budgetary funding from donors due to the insufficiency of the funds it receives from the AU. In turn, some states criticized the African Commission for being influenced in its agenda and activities by the vested interests of foreign NGOs.¹¹⁰ In 2008, the AU decided to increase the budgetary allocation to the African Commission on Human and Peoples Rights by over 400 per cent in order to ensure that the Commission ended its dependency on erratic donor funding.¹¹¹

One of the other persistent constraints on the work of the African Commission remains lack of awareness of its existence and mandate amongst African peoples. According to Evelyn Ankumah, the Executive Director of Africa

Legal Aid and a leading commentator on the African human rights system, the effectiveness of the Commission has been hampered by lack of publicity regarding its work.¹¹² The need to create awareness of the African Charter and the African Commission cannot be over-emphasized. Although in the recent past the Commission has significantly improved its public relations and engagement with the public, there is still a lot room for further advances.¹¹³ Members of the African Commission and the secretariat should be encouraged to publish and disseminate opinions and public information. The African Commission should also build partnerships with research institutions with printing and editing capacity in order to guarantee regular publication of its annual activity reports and other documents relevant for its promotional mandate.

One of the greatest constraints to the effectiveness of the African Commission's protective mandate is related to the lack of implementation and enforcement of its recommendations to state parties.¹¹⁴ Indeed, this is one of the greatest frustrations expressed by victims of human rights violations.¹¹⁵ Nigeria, for instance, even disputed the Commission's mandate to consider cases, let alone issue recommendations. In the case of *Civil Liberties Organisation v. Nigeria*,¹¹⁶ the military dictatorship of Sani Abacha suspended the application of the African Charter in Nigeria. The African Commission's finding that Nigeria had violated its human rights obligations brought protests from the state. The state argued that the African Commission lacked judicial capacity to make such recommendations.¹¹⁷ Although the Commission subsequently made it clear that it does have a mandate to consider cases and issue recommendations, these have largely gone ignored.¹¹⁸

Peter Kiplangat Cheruiyot, a programme officer with the Ogiek Welfare Development Program – Kenya, says that the problem of lack of enforcement of the recommendations of the African Commission is the result of the reluctance of members of minorities and indigenous communities to take cases to the institution.¹¹⁹ In his words:

*'Our people struggle to even take a single case to the Kenyan courts – the community has to sell the few possessions they have to gather enough money to institute proceedings in court – and have often lost. How can we possibly imagine taking a case to the African Commission on Human and Peoples' Rights all the way in The Gambia – and even if we win it has no meaning in Kenya because no one will ensure it is respected?'*¹²⁰

That is the dilemma that is faced by many other marginalized communities across the continent, as was

revealed by a group of minority peoples' representatives attending a seminar organized by Minority Rights Group International (MRG) and partners in Pretoria, South Africa, in March 2008.¹²¹

Related to the issue of enforcement of the African Commission's recommendations is the lack of a formal follow-up mechanism. When the Assembly of Heads of State and Government of the AU adopts the African Commission's activity reports, the Commission publishes the report but does not follow up to ensure that the recommendations contained therein are implemented. At present, the African Commission's follow-up is made through diplomatic *notes verbales*, during field missions and during its ordinary sessions when state delegates are present. In view of the results achieved, this approach has proved to be unsatisfactory. According to a former member of the African Commission, Professor Barney Pityana, it is imperative that the African Commission devise an effective mechanism to follow up on the implementation of its recommendations to state parties.¹²² Pityana is of the opinion that the African Commission should have a full-time chairperson who would then use her good offices to regularly engage states on the extent to which they have complied with recommendations of the African Commission, among others.¹²³ It is worth noting that the draft rules of procedure that are being considered by the African Commission envisages that the chair will be a full-time position.¹²⁴

Finally, cases before the African Commission often take years to be resolved. Numerous postponements of cases at the African Commission are the norm. That is mainly due to the short period of time Commissioners gather each year to consider cases, as well as its other activities. The Commission sits twice a year in its ordinary sessions (15 days per session). Consideration of cases is normally allotted to about two or three days each session.¹²⁵ According to legal officers interviewed during the African Commission's 42nd Ordinary Session in Congo Brazzaville: 'even the most hardworking body can hardly finalize the amount of cases that come before the Commission at each session'.¹²⁶

Judith Oder, a legal officer with INTERIGHTS, who litigates on strategic cases of human rights violations before the African Commission, decries the lack of timed and dated schedules for the hearing of cases at the African Commission.¹²⁷ According to Judith:

*'the lack of appropriate allocation of times and dates when cases will be heard by the Commission means that quite often, victims, potential witnesses and their counsels waste a lot of time and resources hanging around the venues of the Commission's session, unsure if their cases will be heard.'*¹²⁸

That has the effect of limiting the capacity of certain individuals and groups, especially the poor, to take cases to the African Commission.

However, beyond the constraint of time, state parties can also work to delay the finalization of cases at the African Commission. Frequent requests for adjournment of cases on the pretext that the state is not ready to proceed are notoriously common.¹²⁹ This is despite being served with the complainant's submissions on time and constant reminders from the Commission. The case brought by the Endorois (a minority community in Kenya) alleging violation of their land rights that is currently before the African Commission illustrates that reality. In that particular case lodged by the Centre for Minority Rights Development (CEMIRIDE) and co-counsel MRG on behalf of the Endorois Community,¹³⁰ the state initially refused to respond to the applicants and the African Commission's requests for a legal response. It

was only after the Commission had declared the case admissible in 2005 – more than two years after the case was lodged – that the state was jolted to respond. Today, five years since the case was first seized by the Commission, a decision is still awaited. That is despite the African Commission adopting interim measures during that period, appealing to Kenya to stop any activities on the Endorois disputed land that continued to breach their rights.

Will the African Court on Human and Peoples' Rights be any different from the African Commission on Human and Peoples' Rights? How soon can victims of human rights in Africa begin to take cases to that Court? In seeking to answer those two key queries, it is important to begin by tracing the evolution of this all-important institution in a bid to appreciate its scope, challenges and, importantly, its potential to protect human rights in Africa.

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

The first working draft of the Protocol to the African Charter was drafted by experts under the auspices of the ICJ.¹³¹ The working draft was subsequently submitted to the inaugural government experts' meeting on drafting the Protocol to the African Charter in Cape Town, South Africa in September 1995.¹³²

Cape Town was a politically significant choice for the inaugural Protocol drafting meeting. The chains of apartheid had just been cut loose. In 1994, the first multi-racial elections that brought Nobel Laureate Nelson Mandela to power had just been concluded. South Africa's Constitutional Court, that holds so much promise in terms of giving meaning to the fundamental rights of all, including minorities and indigenous peoples, had been inaugurated in 1995.

Members of civil society took an active role in the drafting of the eventual Protocol. The ICJ was pivotal in efforts to bring together judges, practising lawyers, activists and academics across the African continent to participate in deliberations on the African Court on Human and Peoples' Rights.¹³³ Some of the platforms were held alongside the ordinary sessions of the African Commission on Human and Peoples' Rights that have since become known as the NGO forum.

The Cape Town meeting approved the draft Protocol.¹³⁴ But it took a further two years to convene another meeting of experts in the Mauritanian capital, Nouakchott in April 1997. The most fundamental outcomes of the Nouakchott, meeting are five-fold. The resultant amended draft Protocol:

*'(1) introduced an amicable settlement into the Protocol for the first time; (2) increased the number of ratifications required to bring the Protocol into force from eleven to fifteen, (3) required the court to sit in one instead of two chambers, (4) authorized the Assembly of Heads of State and Government to intervene in the process of removing judges from the human rights court; and (5) effectively limited access to the Court to the Commission and state parties to the Protocol.'*¹³⁵

A cursory glance at some of these changes (which were essentially a reflection of the state suggestions) reveals the

member states' desire to have greater control and influence over the African Court on Human and Peoples' Rights. Some of these issues pose serious threats to the Court's effectiveness and possible commencement of its mandate.

The final text of the Protocol was adopted by the Assembly of Heads of State and Government of the OAU in Ouagadougou, Burkina Faso, in June 1998.¹³⁶ It took four solid years to arrive at a common position, a result of intense negotiations and compromise. While that is not unique to any treaty negotiation process, the stakes with the African Court on Human and Peoples' Rights were undoubtedly high. Although member states of the OAU had yielded and accepted that an African Court on Human and Peoples' Rights was a prerequisite to an effective human rights protection mechanism, they remained guarded.¹³⁷

Ibrahim Badawi El Sheikh, the then chair of the African Commission on Human and Peoples' Rights and expert at the drafting process, reports that the issue of access to the African Court ignited the most debate of all the issues discussed during the drafting process.¹³⁸ While states were willing to submit to a regional judicial institution on one hand they were equally determined to frustrate its functioning. As a result, NGOs and individuals are not granted direct access unless their states made declarations permitting them. Apart from Mali and Burkina Faso, no other country has granted direct access to these groups (for a full discussion, see p. 20).

The signature and ratification process

Only 24 out of the possible 53 member states of the AU were parties to the Protocol by the close of 2007.¹³⁹ Even the 24 ratifications have been garnered through serious lobbying by members of civil society through a Coalition for an Effective African Court.¹⁴⁰ According to Ibrahima Kane, a member of the Coalition: 'while it is difficult to empirically ascertain the amount of success the Coalition has had in securing state ratifications, it has undoubtedly managed to keep the issue afloat in public discourses'.¹⁴¹ Since adoption of the Protocol, the African Commission on Human and Peoples' Rights' bi-annual ordinary ses-

sions have also without fail impressed upon member states to ratify the Protocol.

Why are states reluctant to ratify the Protocol? A high-ranking government official whose state is yet to ratify the Protocol asked rhetorically: 'Why would we want to subject ourselves to additional embarrassment from a regional court? As it is we are still battling to fight negative information and numerous cases at the African Commission on Human and Peoples' Rights from NGOs.'¹⁴²

According to the state delegate, some states view the African Court on Human and Peoples' Rights as an additional burden, and if they can they would rather avoid being accountable to the institution. They have been uneasy at the increasing willingness of the African Commission to give NGOs with observer status greater access to its work. For example, since 2006, the African Commission posts submitted state reports on its website even before official consideration. In turn, individuals and NGOs have made use of these available reports to submit shadow reports and prepare in earnest to engage states during their presentation of the reports. While this is an innovative and welcome development on the part of the African Commission – which had hitherto retained great secrecy around its activities – it has not gone unchallenged by state parties. Some states have gone to great lengths to block the publication of the African Commission's annual state reports.¹⁴³

The current status of the African Court on Human and Peoples' Rights

The establishment and functioning of the African Court on Human and Peoples' Rights is expected once it finalizes its rules of procedure and the establishment of its secretariat in Arusha. The exact date is not known given that the African Court has spent more time dealing with logistics since the judges were appointed 2006 than dealing with the real issues. Indeed, according to the Vice-Chair of the African Commission on Human and Peoples' Rights Mme Angela Melo, instead of spending years talking about the rules of procedure and logistics of its establishment, the African Court should get down to business as soon as possible.¹⁴⁴ She advises that the African Court could borrow from the experience of the African Commission, whose review of its Rules of Procedure was in the hands of a smaller subcommittee of the African Commission that also incorporated some members of the civil society and has since completed its work within a year.¹⁴⁵ Professor Barney Pitso, a former member of the African Commission and now Vice-Chancellor of the University of South Africa, concurs:

*'It is difficult to comprehend why the African Court on Human and Peoples' Rights, two years since its judges were appointed, is still not operational. It is imperative that the African Court on Human and Peoples' Rights begins without further delay its core functions of adjudicating human rights cases on the continent rather than just meeting to talk about how to set up the Court, a function that should be left to bureaucrats.'*¹⁴⁶

A decision by the AU Assembly to merge the African Court on Human and Peoples' Rights and the African Court of Justice¹⁴⁷ is causing further delays in establishing the African Court on Human and Peoples' Rights. The decision to merge the two courts was, above all else, occasioned by resource constraint considerations.¹⁴⁸ A draft legal instrument will replace the initial Protocols establishing the two individual courts and establish an institution to be named the 'The African Court of Justice and Human Rights'.¹⁴⁹ The African Court of Justice and Human Rights will comprise a 'General Section' and a 'Human Rights Section'.¹⁵⁰ The merger legal instrument envisages that, upon adoption and entry into force, there will be a one-year transitional period, during which time the African Court on Human and Peoples' Rights – which is expected to be already operational – will transfer its prerogatives, assets, rights and obligations to the fused court.¹⁵¹

One of the most contentious issues relating to the fused court, is the right of individual and NGO access (for full discussion see p. 20). The draft merger instrument had originally dispensed with the requirement that states make a declaration in order to allow individuals and NGOs direct access to the African Court of Justice and Human Rights.¹⁵² However, at the meeting of Experts and Ministers of Justice/Attorneys General on Legal Matters of the AU, which took place in April 2008 in Addis Ababa, the Ministers of Justice have reinstated that requirement. This was subsequently endorsed by AU Heads of State summit at Sharm El Sheikh in Egypt in July 2008. The fused court will also increase its membership to 16 members from the current 11 of the African Court on Human and Peoples' Rights.¹⁵³

Some state officials have blamed the merger for the continued delay in ratifying the Protocol to the African Charter, alleging that:

*'We made a decision to merge the African Court on Human and Peoples' Rights and the African Court of Justice. In light of these circumstances we have been consulting and have decided to wait until the merger instrument is adopted so that we just sign one Protocol.'*¹⁵⁴

The relationship between the African Commission and the African Court

One of the most immediate difficulties is the relationship between the African Commission and the African Court. The African Court on Human and Peoples' Rights' mandate is to complement the protective mandate of the African Commission on Human and Peoples' Rights. The two institutions are therefore expected to deliberate and discuss how to harmonize their mandates in order to avoid possible conflicts and overlaps. However, to this day the two institutions have shied away from jointly discussing that complementarity. A member of the African Commission has stated that:

*'despite numerous attempts to get members of the African Court on Human and Peoples' Rights to share and deliberate their draft rules of procedure with the African Commission on Human and Peoples' Rights, such efforts have been thwarted in what we believe is a superiority complex on their part.'*¹⁵⁵

Although more recently the African Commission and the African Court have agreed to hold meetings to discuss common areas of interest, failure to forge a close working relationship could have serious consequences, particularly as it seems likely that the African Commission will end up 'feeding' cases to the African Court (see p. 20–1). Professor Barney Pityana says: 'In the event they fail to work together it is likely to seriously compromise the effectiveness of the Court in protecting the fundamental rights of African peoples.'¹⁵⁶

Overlaps of jurisdiction

Another major concern remains the possible overlaps and conflicts of jurisdiction between the African Court on Human and Peoples' Rights and the sub-regional courts of justice that have mushroomed in the recent past on the continent.¹⁵⁷ Some of these courts and tribunals include the Court of Justice of the Economic Community of West African States (ECOWAS);¹⁵⁸ the East African Court of Justice (EACJ);¹⁵⁹ and the Tribunal of the Southern African Development Community (SADC).¹⁶⁰

Research in 2007 by Jackline Nyaga, a lecturer at the University of Nairobi, reveals that there are possible jurisdictional overlaps and conflicts that demand urgent resolution to ensure that the courts do not duplicate efforts and are effective in protecting human rights on the continent.¹⁶¹

For example, some of these sub-regional courts, such as the three mentioned, are expressly or implicitly vested with jurisdiction to pronounce on human rights violations. The Protocol to the African Charter is silent on this possibility and it is left to the judges to determine how such overlaps will be resolved. There is a possibility that a matter may be brought before a sub-regional court and subsequently to the African Court on Human and Peoples' Rights. A question then arises as to whether the sub-regional courts can be regarded as an international tribunal, thereby precluding determination of the matters before them by the African Court on Human and Peoples' Rights. In the event they are considered in this way, matters before these courts would not be entertained by the African Court on the grounds that they have already been deliberated upon by another international tribunal.¹⁶² It is therefore imperative that these institutions share their rules of procedure in a bid to avoid possible loop-holes that could potentially hamper the effectiveness of the African Court on Human and Peoples' Rights.

Another potential difficulty is the interpretation of the African Charter by these sub-regional treaty-monitoring bodies.¹⁶³ That may entail the bodies applying directly the African Charter provisions in a dispute, or alternatively relying on the African Charter and the jurisprudence of the African Commission and the African Court on Human and Peoples' Rights as a source of law.¹⁶⁴ In either of the two options, the interpretation of the sub-regional treaty monitoring bodies may differ from that of the African Commission or that of the African Court on Human and Peoples' Rights. In view of the possibility of different outcomes depending on which forum a litigant decides to take a case to, there is need for proper coordination and harmony amongst the available platforms for vindicating fundamental human rights.

Inevitably, the proliferation of these bodies – partly a consequence of the failure to operationalize the African Court more speedily¹⁶⁵ – raises the possibility of 'forum shopping' in a bid to maximize on available choices of outcomes.¹⁶⁶ That is particularly so where the different platforms are likely to issue varied decisions on matters before them. It is therefore imperative that these institutions share information and cooperate on matters of common interest.¹⁶⁷ According to Chidi Odinkalu, a senior legal officer with the Open Society Justice Initiative and member of the Coalition for an Effective African Court, such cooperation will ensure that 'these institu-

tions are in a position to anticipate and respond to cases of unwarranted forum shopping. By sharing jurisprudence in completed cases, they will also be able to minimize the

opportunities for contradictory jurisprudence on the African Charter.¹⁶⁸

Structure, mandate and composition of the African Court on Human and Peoples' Rights

Competence of judges

The effectiveness of the African Court will be dependent on the independence and competence of the individuals who constitute its bench. The African Court is expected to be an impartial arbiter between individuals and states that violate their fundamental human rights. Under such circumstances, judges of the African Court must be individuals of impeccable ethical character, independence and competence – as laid down in the Protocol.

The 11 inaugural and current judges of the African Court on Human and Peoples' Rights were sworn in on 2 July 2006 by the AU Assembly in Banjul, The Gambia. Only the President of the African Court will serve on a full-time basis. The rest of the bench serves on a part-time basis. However, the Coalition for an Effective Human Rights Court has raised concerns about the competence of the judges and the procedure under which they were selected. It noted that the judges did not have demonstrable human rights experience.¹⁶⁹ It also criticized the nomination process of most member states as flawed – it had failed on account of not being open, transparent and inclusive of civil society.¹⁷⁰ According to Ahmed Motala:

*'of the 21 candidates nominated by 16 states only eight had any verifiable experience in human rights. States seem to have ignored the requirements of the Protocol that judges of the African Court on Human and Peoples' Rights have to be "jurists of high moral character and of recognized practical, judicial, or academic competence and experience in the field of human and peoples' rights".'*¹⁷¹

However, although human rights experience is an important credential for a member of a regional human rights court, lack of it is not entirely fatal with regard to their overall competence. A glance at their profiles suggests that they are all experienced lawyers and/or academics.¹⁷² They have served or qualify to be appointed as senior judges in their respective domestic courts and are well read in matters of the law.¹⁷³ However, given that the African Court on Human and Peoples' Rights is a specialized human rights court, it would be useful to train them on applicable international, regional and comparable human rights

law, including women's rights. Such training is of paramount importance for the judges' appreciation and comprehension of the application of human rights standards and norms.

Independence and impartiality

The Protocol includes some important guarantees to ensure that the judges' independence and impartiality are secured. The safeguards rely extensively on international law.¹⁷⁴

However, as earlier intimated, what appears on paper does not always translate into practice. The recent nomination process of judges to replace those whose terms had lapsed in July 2008 raises a suspicion of possible threats to the independence of the judges.

Although it is the prerogative of member states to nominate judges for election to the African Court on Human and Peoples' Rights, the decision by Uganda to replace George Kanyeihamba with Joseph Mulenga was fraught with controversy.¹⁷⁵ Uganda is reported to have blocked the nomination of Justice Kanyeihamba for fear that he would 'embarrass' the state at the African Court.¹⁷⁶ While there were no official reasons given by Uganda for not nominating Justice Kanyeihamba to serve a second term, members of the Coalition for an Effective African Court expressed concern that the actions of Uganda could spell disaster for the independence of judges of the African Court.

The nomination process in Uganda was shrouded in mystery and, contrary to the requirement of the *note verbale* by the AU Commission to member states on the nomination process,¹⁷⁷ members of civil society in Uganda were not consulted nor was the process transparent. If it is indeed true that his nomination was vetoed for fear that he would 'embarrass' Uganda, this sets a bad precedent at this early stage of the African Court's existence.

As the Ugandan nomination case has shown, there is need to revisit the issue of security of tenure of the judges. That could be, for instance, providing that judges serve a specific non-renewable term of about six years. Six years seems to be a reasonable period for the judges to have at least made some contribution to the jurisprudence of the African Court.

Gender equality

Another concern relating to the composition of the bench is the absence of gender equality. Nine out of the 11 judges are men, depicting a strong gender imbalance in the African Court's bench.¹⁷⁸ This is in stark contrast to the African Commission, which, in a welcome development, comprises at present, seven women out of a possible 11 Commissioners – and its chair is a woman. It is imperative that the appointment of judges of the African Court on Human and Peoples' Rights ensures gender equality. This is especially important given the potentially ground-breaking role the Court could play in establishing jurisprudence relating to women's rights on the continent (see see next section).

Christine Butegwa, a Communications Officer with the African Women's Development and Communication Network (FEMNET), is of the view that:

*'having more women and gender-sensitive men as judges in the African Court on Human and Peoples' Rights will contribute to the progressive interpretation of [the African Women's Protocol] and ensure the promotion of women's rights, peace and development. It is hoped that when the terms of office of male judges come to an end in June 2008 and June 2010, competent women judges will replace them.'*¹⁷⁹

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

The substantive jurisdiction of the African Court on Human and Peoples' Rights is both adjudicatory and advisory. That adjudicatory mandate 'extends to all cases and disputes submitted to the African Court on Human and Peoples' Rights concerning the interpretation and application of the Charter, the Protocol and other relevant human rights instruments ratified by the states concerned'.¹⁸⁰ The fact that other human rights treaties ratified by states concerned fall within the jurisdiction of the African Court presents various possible outcomes. Depending on how the African Court interprets that mandate, it is likely to give far wider notice to international legal resources, standards and norms than is currently the practice with the African Commission. In so doing the African Court will make use of alternative legal resources from other international and regional standard-setting mechanisms. Some of these might include the recently adopted UN Declaration on the Rights of Indigenous Peoples and the UN Declaration on the Rights of Minorities by state parties. Employing

such diverse legal tools has the potential to give a wider meaning to the fundamental human and peoples' rights than restricting its sources of law to the African Charter.

The African Court will therefore have a unique opportunity to interpret and determine violations of other important human rights treaties within the AU framework. These include the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and the Protocol to the African Charter on the Rights of Women in Africa. The interpretation of the latter will be particularly important for the development of women's rights on the continent.

The Protocol on the Rights of Women in Africa enshrines important provisions which eliminate all forms of discrimination against women in Africa. Importantly for minority and indigenous women, the Protocol guarantees their dignity,¹⁸¹ prohibits all forms of harmful practices,¹⁸² guarantees protection during armed conflicts¹⁸³ as well as access to justice and equal protection of the law,¹⁸⁴ and economic social and cultural rights.¹⁸⁵ Significantly, the Protocol expressly calls upon state parties to take special measures to 'ensure the protection of women from marginalized population groups'.¹⁸⁶ Such measures would inevitably include affirmative action measures to redress the precarious human rights situation of minority and indigenous women in Africa. These are some of the issues which, while generally affecting all women, are a particularly serious concern among minority and indigenous women.¹⁸⁷ Indeed, Christine Butegwa notes that 'test cases on women's rights could provide the African Court on Human and Peoples' Rights with early strategic opportunities to advance the African women's rights and set precedents for domestic courts'.¹⁸⁸

It is particularly important that the African Court takes on these cases because, up until now, the African Commission has not. According to the outgoing Special Rapporteur on the Rights of Women in Africa, Commissioner Angela Melo: 'so far there have been no cases alleging violation of women's rights that have been taken by women to the African Commission on Human and Peoples' Rights'.¹⁸⁹ Although there are multiple violations of women's rights on the continent, Commissioner Melo identifies that the hindrances: 'among others have been due to lack of awareness, poverty, societal patriarchal attitudes and even lack of legal capacity to take cases to not just the regional human rights mechanism but also the domestic courts'.¹⁹⁰ She proposes that the African Court should take a proactive stance when dealing with allegations of breaches of women's rights by facilitating women lodging and sustaining cases at the African Commission, for example through provision of legal aid, as stipulated by the Protocol to the African Charter.¹⁹¹

Equally, the African Court can hear cases that could be submitted by the Committee on the Rights and Welfare of the Child on violations of children rights as protected by the African Charter on the Rights and Welfare of the Child in Africa.¹⁹²

Such cases are likely to call upon the African Court to attach a legally binding force to the Committee on the Rights of the Child's recommendations or to hear them anew, thereby ensuring that the African Court's enforcement mechanism is activated.

While protecting all African children, the African Charter on the Rights and Welfare of the Child is particularly useful for minority and indigenous children because of its comprehensive provisions protecting these children against the double discrimination they face as children and as members of minorities. Some of these include, for example, an obligation on state parties to:

*'take appropriate measures with a view to achieving the full realization of the right to education and in particular ... take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community'*¹⁹³

The African Charter on the Rights and Welfare of the Child also provides important protection for minority and indigenous children by obliging state parties to 'take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child'.¹⁹⁴ While some of those harmful practices, such as early marriages and female genital mutilation, affect many children, they are of particularly serious concern among minority children.¹⁹⁵ It is therefore imperative that the Committee on the Rights and Welfare of the Child cooperates and collaborates with the African Court to protect indigenous and minority children from such practices.

The African Court might also extend its consideration of cases to other treaties that may not expressly appear to be human rights treaties. That is because some of the existing regional and sub-regional instruments, such as bilateral and multilateral economic treaties, may have a human rights trajectory. That is, notwithstanding the Protocol's qualification to only 'human rights treaties ratified'.¹⁹⁶ Some of these treaties could include the sub-regional economic treaties of the ECOWAS, the East African Community (EAC), the SADC, the Common Market for East and Southern Africa (COMESA) and

such others.¹⁹⁷ Others include treaties to protect biodiversity, natural resources, democracy, peace and security, all of which have an impact on the protection/abuse of human rights.

In terms of the Protocol to the African Charter, the African Court has the mandate to interpret and deliberate on other international human rights treaties¹⁹⁸ ratified by the states concerned beyond the continental scope, such as the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic Social and Cultural Rights (ICESCR) and the Convention on the Elimination of Discrimination Against Women (CEDAW). That provision is alive with possibilities and potential for the African Court to accord protection to victims of human rights violations on the continent in line with international standards, norms and developing jurisprudence.

In its advisory jurisdiction the 'Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission'.¹⁹⁹ Requests for advisory opinions can be made by 'a member state of the African Union, the AU, any of its organs, or any African organization recognized by the AU'.²⁰⁰ It is instructive to note that 'African organizations recognized by the African Union' have the capacity to request advisory opinions. Although the qualification 'African' has not been defined, it is envisaged that NGOs granted observer status with the African Commission on Human and Peoples' Rights and the ECOSOC will be able to make requests for advisory opinions. Although advisory opinions are not binding they have 'profound persuasive force and international repercussions'.²⁰¹ Advisory opinions will therefore play a critical role in the protection of human rights on the continent. That is particularly so in light of the fact that NGOs may not have direct access to the African Court to submit cases. Through advisory opinions NGOs will have an avenue to seek interpretation of the Charter and other instruments in a bid to protect fundamental human rights on the continent. Innocent Maja, the Executive Director of the CEMIRIDE, sees the advisory opinion possibility at the African Court as an excellent opportunity for minority and indigenous peoples to seek legal opinions from the African Court on issues of minority rights protection that could be useful for influencing legislation at the national level.²⁰²

Personal jurisdiction of the African Court on Human and Peoples' Rights – access to the court, lessons from other jurisdictions

The Protocol to the African Charter provides for both a compulsory and optional personal jurisdiction.²⁰³ The compulsory jurisdiction of the African Court entitles the following bodies to submit cases:

- The African Commission
- The state party which has lodged a complaint at the African Commission
- The state party against which the complaint has been lodged at the African Commission
- The state party whose citizen is a victim of a human rights violation
- African intergovernmental organizations.

Additionally, 'when a state party has an interest in a case it may submit a request to the Court to be permitted to join'.²⁰⁴

The African Court on Human and Peoples' Rights will exercise optional jurisdiction with regard to cases submitted by 'non-governmental organizations with observer status before the Commission and individuals'.²⁰⁵ In that regard, only those states that have allowed NGOs and individuals to institute cases against them will be able to do so. This presents a huge problem since only two states, Mali and Burkina-Faso, have made the declaration allowing individuals and NGOs such direct access to the African Court. Individuals and NGOs from the rest of the states that do not give such permission will rely on the African Commission to take cases to the African Court. This means that, apart from individuals from Mali and Burkina Faso, no one else from the rest of the African countries can take cases directly to the African Court on Human and Peoples' Rights.

Constraining direct access to the African Court will undoubtedly affect the number of cases it receives. Indeed, if the African Court does not receive cases from the African Commission as soon as it is ready, its effectiveness and legitimacy will be greatly compromised. In the likely possibility that states – as has been the experience of the African Commission – do not take cases to the African Court, the Court will mainly rely on cases referred by the African Commission. However, there is no guarantee that the African Commission will submit a significant number or, indeed, any cases to the African Court when it becomes functional. In the event that the

African Commission fails to submit cases to the African Court as soon as it is ready, the African Commission will deny victims of human rights violations an opportunity to seek justice before the African Court. It is therefore crucially important that safeguards are enacted to prevent that from happening.

The limitation will delay the full functioning and operationalization of the African Court. That is because, as noted with regard to the African Commission's experience, it is individuals and NGOs that have sustained the African Commission's cases mechanism, which is equally going to be the case with the African Court. Indeed, apart from one case involving the Democratic Republic of Congo against Uganda and Rwanda, there is no other case on record before the African Commission submitted by states. On the other hand there are in excess of 350 cases (355 cases by the 42nd Ordinary Session) that have been submitted by NGOs and individuals.²⁰⁶

Ibrahim Badawi El Sheikh, a former Chair of the African Commission on Human and Peoples' Rights, who was also one of the drafters of the Protocol to the African Charter, acknowledges that 'the question of allowing NGOs and individuals to submit cases to the African Court on Human and Peoples' Rights was one of the most complicated issues during the consideration of the Draft Protocol'.²⁰⁷ The restriction emerged after intense pressure from states such as Nigeria and Sudan, which were averse to a strong mechanism that could be utilized by individuals and NGOs to scrutinize their poor human rights records.²⁰⁸ It is instructive to note that the African Court will issue binding and authoritative decisions that will attract sanctions to recalcitrant states.

While the African Commission and the African Court are reviewing their rules of procedure, vital lessons could be drawn from the Inter-American human rights system. David Padilla, a former Assistant Executive Secretary to the Inter-American Commission on Human Rights, urges the African Commission to avoid the mistakes made by the Inter-American Commission.²⁰⁹ These include a failure to submit cases to the African Court in its early years – the early 1980s. It took six years from its establishment before the Inter-American Court of Human Rights received its first case, in 1986, from the Inter-American Human Rights Commission.²¹⁰ Since the amendment of the Inter-American Commission's Rules of Procedure in 2001, however, individuals and NGOs are allowed to be parties to cases.²¹¹ Previously, the Inter-American Human Rights Commission used to represent victims before the Inter-American Court on Human Rights and victims could not be heard or submit cases. Currently, individuals and NGOs act as legal advisors in the cases brought by the Inter-American Human Rights Commission before the Inter-American Court, which facilitates active partici-

pation in the litigation.²¹² By allowing victims of human rights violations and their counsels to actively participate in proceedings of the Inter-American Court as parties, the Inter-American Human Rights Commission has enhanced and improved its protection mechanism.²¹³ Indeed, that practice has significantly improved the accessibility of the Inter-American Court on Human Rights for individuals and NGOs, a system that could be borrowed by the African human rights system.

Similarly, before the European Human Rights Commission was abolished in 1998, only the Commission and a state party could submit cases to the European Court of Human Rights.²¹⁴ The reforms of 1998, aimed at restructuring the European human rights system to ensure efficiency and avoiding duplication of efforts, allowed individuals of all state parties to the European Convention on Human Rights direct access to the European Court of Human Rights.²¹⁵

What, then, needs to be done to allow individuals and NGOs in Africa to access the African Court on Human and Peoples' Rights in view of its Protocol constraints? If individuals and NGOs are to access the African Court through the African Commission, this will require an amendment to the African Commission's Rules of Procedure. Professor Frans Viljoen of the University of Pretoria foresees three probable scenarios for facilitating such access: 'firstly the African Commission on Human and Peoples' Rights could act as a mere conduit for individuals and NGOs cases to the African Court'.²¹⁶ The African Commission, upon receipt of complaints, would proceed to submit them to the African Court without substantive consideration. If such an approach is adopted the African Commission would submit as many cases as possible.

Second, the African Commission could also first assess if a matter is admissible and whether it raises pertinent issues that deserve the African Court's adjudication. That way the African Commission would be acting like a sieve and only submitting cases which it is convinced presents contentious issues. Professor Makau Mutua, the chair of a Kenyan NGO, the Kenya Human Rights Commission, and distinguished professor of human rights at Buffalo Law School in the USA, favours such an approach. He suggests that the African Court should be the regional forum that builds human rights jurisprudence of far-reaching continental interpretation and application.²¹⁷ Accordingly, the African Court should consider cases whose body of law would enhance African states' realization of human rights for their peoples.

In so doing the African Court would expend its efforts on complaints of human rights violations that have a regional impact, or whose determination would inform similar cases in Africa. It is instructive to note that the African Court is not obliged to consider all cases that are

submitted to it. The Protocol to the African Charter provides for transfer of cases to the African Commission from the African Court.²¹⁸ That means that the African Court can decide which cases to determine, and it is envisaged that the African Court would be informed by some of these jurisprudential considerations. The African Court's rules of procedure, currently being finalized, will hopefully address the criteria for those possibilities.

Third, the African Commission could submit cases where it has failed to reach an amicable settlement between the parties. Such an option is available before the Inter-American Commission on Human Rights when a settlement becomes elusive.²¹⁹

Additionally, in the event that the African Commission has issued a recommendation and the state has failed to implement it, the African Commission could submit it to the African Court for adoption, thereby attracting sanctions.

Procedure of the African Court on Human and Peoples' Rights: hearings, legal aid, investigations

In a welcome departure from the practice of the African Commission on Human and Peoples' Rights, the African Court's hearings shall be conducted in public unless otherwise stipulated in the Court's rules of procedure.²²⁰ The Protocol to the African Charter further provides that any party to a case shall be entitled to be represented by a legal representative of the party's choice. Free legal representation may be provided where the interests of justice so require.²²¹ That is a welcome development, since the lack of financial capacity of most indigenous peoples and minorities has often barred these groups from instituting cases before domestic, regional and international forums.²²² According to Dr Naomi Kipuri, a member of the indigenous Maasai community of Kenya, the possibility that the African Court will provide legal aid will overcome that barrier.²²³ However, in order to give effect to that provision, and to ensure that indigenous peoples and minorities access justice, sufficient financial resources must be put at the disposal of the African Court to facilitate legal aid. The African Court will rely on the AU, and possibly on external funding, to sustain its operations.

Although the Protocol to the African Charter does not provide time limits within which a matter must be disposed, it is instructive to note that it requires a judgment to be issued within 90 days of conclusion of deliberations.²²⁴ That may be construed to require of the African Court that it ensures a speedy dispensation of

cases. That will be a welcome departure from the African Commission, which has no stipulated time within which to issue a decision. The African Court also requires state parties to comply with its decisions within a given time frame.²²⁵ That signifies a clear departure from the practice of the African Commission, an arrangement that is expected to enhance the African human rights protection mechanism. Korir Singoei, the lead counsel in the CEMIRIDE case at the African Commission, is hopeful that the delays in finalizing cases that are presently the norm at the African Commission will, as a result, be a thing of the past with the coming of the African Court.²²⁶ It is hoped that once the African Court has set a date for a hearing, unless there are extremely compelling reasons to adjourn, matters will usually proceed. Victims of human rights violations will therefore have the opportunity to prepare and, where possible, attend the hearings with expert witnesses if appropriate.

‘The Court shall hear submissions by all parties and if deemed necessary, hold an enquiry.’²²⁷ This could mean that the African Court may institute its own investigation, either to ascertain the allegations or seek clarification. It has been argued that, by resorting to conducting investigations, in essence the African Court would be carrying out a similar mandate to that of the African Commission envisioned in Article 46 (the African Commission may resort to any appropriate method of investigation).²²⁸ Professor Frans Viljoen argues that such a role would best be carried out by the African Commission, and thus the two institutions would devise an efficient division of labour.²²⁹ That is because the African Commission has an express mandate to resort to any appropriate method of investigation,²³⁰ including the fact-finding investigations that so far have been conducted in Ethiopia, Nigeria and Zimbabwe. Given that both institutions may find it appropriate to hold an investigation to establish facts, it is imperative that such an enquiry serve both institutions. Such a division of labour would ensure that the two institutions do not duplicate efforts and that the African Court concentrates on the adjudication part of solving human rights disputes. ‘Such practical concerns will determine the viability of the coexistence of the Court and the Commission.’²³¹

The need for complementarity of the two institutions is further underscored by the fact that, on cases instituted by individuals and NGOs, the African Court may request the opinion of the African Commission before ruling on their admissibility.²³² The African Commission will therefore continue to play a pivotal role in the adjudication of cases before the African Court.

The African Court is also empowered to adopt provisional measures – interim rulings on urgent cases²³³ – a procedure developed by the African Commission under

its Rules of Procedure.²³⁴ To deal with urgent cases, the African Court has the power to make interim findings on matters of extreme gravity and urgency. Such decisions will be binding and not mere recommendations.²³⁵ States are therefore obliged to treat those findings with the same weight as final decisions.²³⁶ According to Yobo Rutin, the acting executive director of CEMIRIDE: ‘We are waiting in earnest for the African Court on Human and Peoples’ Rights to become operational due the fact that its decisions, including its interim measures, shall be binding and thus implemented.’²³⁷

Amicus curiae

Amicus curiae or ‘friend of the court’²³⁸ is a useful development before regional human rights monitoring bodies.²³⁹ The rationale for allowing *amicus curiae* briefs before the courts is to benefit from statements, evidence or legal reasoning that will enable a court to make a well-reasoned and just decision.²⁴⁰ The Inter-American Court on Human Rights has allowed *amicus* briefs under Rule 45(1) of its Rules of Procedure.

The African Court will also benefit from the unbiased expertise of *amicus* briefs to enrich its jurisprudence. The Protocol to the African Charter makes provision for *amicus curiae* briefs through Article 26, which allows written or oral evidence that can be adduced to include that of experts. Expert testimony, in this case, could include submissions by experts and individuals working with victims of human rights to assist the African Court arrive at informed and just decisions.

Amicus curiae briefs will be particularly important in cases before the African Court that involve vulnerable and marginalized groups, such as minorities and indigenous peoples. Given that minority peoples are often handicapped with regard to accessing and sourcing documentary proof to support allegations of human rights violations, experts working on the subject would significantly aid the African Court and victims to furnish documentary proof. The experts, including NGOs working in the area of promotion and protection of minority rights, would as a result assist the African Court to develop a rich jurisprudence through extensive and comparative research.

Decisions of the African Court on Human and Peoples’ Rights

The African Court on Human and Peoples’ Rights may try to reach an amicable settlement on a case pending before it in accordance with the provisions of the Charter.²⁴¹ Pursuant to Article 28 of the Protocol, the African Court shall render its judgment within 90 days of having completed its

deliberations. The judgment of the African Court is final and not subject to an appeal, although there is a possibility of review in the event of new evidence. All decisions shall be accompanied by reasons. The African Court may order appropriate remedies, including fair compensation and reparations.²⁴² There is also the possibility of a dissenting opinion under the Protocol, which is not envisaged under the African Commission practice so far.²⁴³

All parties to the case shall be notified of the judgment and it shall be transmitted to the member states of the AU and the AU Commission.²⁴⁴ The Executive Council shall also be notified and will be responsible for monitoring the execution of the judgment.

Remedies and enforcement

The African Court on Human and Peoples' Rights will issue binding decisions and order specific remedies.²⁴⁵ Where the African Court finds a 'violation of a human or peoples' rights it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparations'.²⁴⁶ At comparable regional human rights courts such as at the Inter-American Court on Human Rights, remedies have included ordering the 'state to amend or repeal law'.²⁴⁷ The Inter-American Convention on Human Rights goes further to ensure that decisions are implemented by providing that 'reparations ordered by the Inter-American Court on Human Rights can be enforced in national courts'.²⁴⁸ Were the African Court to emulate the Inter-American Court, victims of human rights in Africa would indeed find real protection of their fundamental human rights. Such an approach is adopted by one of the progressive sub-regional courts, the ECOWAS Court of Justice, whose judgments are enforceable at the highest domestic court.²⁴⁹

The European Court of Human Rights similarly orders remedies which recently have included punitive damages and non-monetary relief such as restitution.²⁵⁰ The European Court on Human Rights relies on the Committee of Ministers,²⁵¹ the equivalent of the AU Executive Council, to ensure compliance with judgments of the European Court of Human Rights. Article 8 of the Statute of the Council of Europe confers on the Committee of Ministers the power to sanction non-compliant member states. However, the Council of Europe has generally not employed sanctions against member states, instead preferring to engage them diplomatically with relative success.

In order for the African Court to be effective, it is hoped that African states will respect its decisions without waiting for the General Assembly of Heads of State and Government (General Assembly) to use its powers of adopting sanctions. Although the General Assembly has

powers to call upon states to respect decisions of the AU institutions, it is imperative that states themselves feel obliged to respect those decisions and take the relevant actions. Granted, in the absence of amicable implementation of the decision, it is expected that the AU will be proactive in enforcing the African Court's decisions by all necessary means. That could include imposition of sanctions as provided for in its Constitutive Act.²⁵² According to the Act:

'any member state that fails to comply with the decisions and policies of the Union may be subject to other sanctions such as the denial of transport and communications links with other member states, and other measures of a political and economic nature to be determined by the Assembly'.²⁵³

Indeed, well aware that states may fail to comply, with the decisions of the African Court, the Protocol to the African Charter provides that the AU Executive Council shall monitor the execution of the African Court's judgments on behalf of the General Assembly.²⁵⁴ The express provision for a monitoring agent is a welcome development. Decisions of the African Court, including cases in which recalcitrant states have failed to abide by the African Court's ruling, will be submitted to the General Assembly for action.²⁵⁵ Therefore, in line with the Constitutive Act of the AU, in the event state parties fail to adhere to decisions of the African Court, the AU Executive Council will recommend imposition of appropriate sanctions. According to Ibrahim Njobdi Amadou, director of LELEWAL – an NGO that deals with human rights issues of the Mbororo minority peoples of Cameroon:

'that the African Court on Human and Peoples' Rights decisions shall be binding and thus enforceable is very encouraging. That will ensure that minority peoples and other marginalized groups who previously did not have much hope in the regional human rights mechanism, such as women, shall seek the African Court on Human and Peoples' Rights' protection when they fail to find such protection by the national courts'.²⁵⁶

The role of NGOs and individuals (including victims and parties to the cases) in the execution of judgments of the African Court cannot be underestimated. Ben Kioko, legal counsel to the AU, says: 'The role of non-governmental organizations and individuals in monitoring and evaluating the execution of judgments is crucial, as has been the case with the democratization process on the continent in the last decade.'²⁵⁷ By actively lobbying and exerting pressure on the state, NGOs and individuals can influence a speedy implementation of the judgments.

Where that fails, they can draw the attention of the public through the media and other such platforms to ensure that the state honours its obligations. The naming and shaming strategy can similarly be employed against recalcitrant member states.

Undoubtedly, the legitimacy and credibility of the African Court on Human and Peoples' Rights will be measured by the extent to which its judgments are enforced domestically. According to Ben Kioko:

*'Non-implementation of the African Court on Human and Peoples' Rights decisions would render the institution a white elephant and contribute to an atmosphere of impunity, which would be most unfortunate when some progress seems to have been made in addressing impunity on the continent.'*²⁵⁸

Indeed, the African Court must guard its legitimacy with vigour by ensuring that its judgments make a difference to the people for whom it is meant to accord protection.

Ms Bintu Jalia Lukumu Abwooli, a member of the Ugandan Parliament and chair of the Parliamentary Committee on Equal Opportunities, advises members of

civil society to keep the African Court and recalcitrant states on their toes by exerting enough pressure to ensure that decisions of the African Court are implemented and enforced.²⁵⁹ According to the Ugandan MP:

*'globalization has opened many doors, including enhancing the capacity of vulnerable groups to employ modern technology such as emails, blogs and the mass media to raise awareness and draw the attention of the international community to human rights violations. In the same way, victims of human rights wrongs and members of civil society can blow the horn to ensure that governments respect the African Court's decisions.'*²⁶⁰

She adds:

*'It is not enough to only expect the African Court on Human and Peoples' Rights to follow up on the decisions it has made – which is expected of the institution – but with the combined efforts of the victims and a vibrant civil society, states are likely to respect the African Court on Human and Peoples' Rights rulings.'*²⁶¹

Conclusion

The African human rights system, as anchored by the African Charter on Human and Peoples' Rights, despite numerous challenges is full of promise with regard to the protection of human and peoples' rights on the continent. While it has been a long and onerous journey towards an effective protection and promotion mechanism – that is still a long way from being realized – the African Commission on Human and Peoples' Rights has undoubtedly laid the ground for greater advances. The adoption of the Protocol to the African Charter raised hopes among victims of human rights violations, including indigenous and minority peoples, that finally their human rights misery would be a thing of the past.

However, for the reasons elaborated in this report, there is still no certainty as to when the African Court will consider its first case. Part of the solution lies with the states themselves: ultimately, they have to show the political will to support the African Court. African states should therefore step up their ratification of the Protocol, as well as move to declare direct access to the Court for individuals and NGOs.

However, part of the solution lies in the hands of the African Court and African Commission, who must work swiftly to harmonize their rules of procedure. As these processes are delayed, individuals across the continent continue to suffer human rights violations and the situation is all the more precarious for indigenous and minority peoples, who are often additionally excluded in

fact and law from accessing domestic human rights protection mechanisms.

In addition, it is essential that African peoples, including minority and indigenous peoples, are aware of the African Court on Human and Peoples' Rights' potential and ability to redress human rights violations. According to Professor Barney Pitwana:

*'It is unfortunate that judges of the African Court on Human and Peoples' Rights and indeed the Court itself has not provided much information, if any, to the public it is expected serve on progress made, which is a cause for concern. It is essential that the African Court on Human and Peoples' Rights provides sufficient information on its progress if it hopes to receive requisite support and cases from individuals and the peoples it is created to protect.'*²⁶²

The enforcement and implementation of its decisions can also be influenced by the role played by victims of human rights violations to illuminate the African Court's decisions and the measures adopted by the state.

The ten years since the instrument establishing the African Court was adopted is a long time for the African Court not to have considered a single case. The African Court should ensure that the hopes and confidence of African peoples regarding the effectiveness of the institution to protect their fundamental rights are not a pipe dream.

Recommendations

To the AU

- Amend the instrument establishing the merged AU Court of Justice and Human Rights to allow NGOs and individuals to have direct access to the fused Court.
- Provide sufficient human and financial resources to the African Commission and the African Court to ensure they discharge their mandates efficiently and effectively.
- Guarantee judges of the African Court security of tenure through, for instance, providing for a non-renewable fixed term of six years.

To AU member states

- Make a declaration allowing individuals and NGOs to have direct access to the African Court.
- Provide for clear procedures for executing the African Court's judgments within their national frameworks.
- Give due regard to the issue of gender equality in the nomination and appointment of members of the African Court.
- Engage and consult members of civil society when nominating judges to the African Court to ensure transparency.

To the African Commission and the African Court on Human and Peoples' Rights

- Both institutions should confer and consult each other with a view to resolving the issue of complementarity and, importantly, the issue of individuals and NGOs having access to the African Court.
- Through their rules of procedure, both institutions should harmonize and structure a coherent framework of how NGOs and individuals can access the African Court through the African Commission.
- Exhibit and maintain independence from political interference from the AU or individual member states.
- Judges of the African Court should receive training on the application of international and regional human rights standards and norms, and in particular the standards and comparative jurisprudence on the rights of minorities and indigenous peoples.

- Utilize all available mechanisms to ensure that states and the AU Assembly take the African Court's decisions seriously. This will include regular briefings of the Executive Council of the AU on states that may fail to take heed of the African Court's decisions.
- Expressly and clearly propose specific ways in which recalcitrant states should be compelled to abide by the decisions of the African Court, including adoption of targeted sanctions.
- Maintain close cooperation with the responsible government departments for purposes of follow-up on the implementation of the African Court's decisions.
- Facilitate the provision of legal aid to individuals, especially minorities and indigenous peoples, who often lack the means to take cases to the Court.
- Maintain visibility and presence through dissemination of their work through modern technology such as user-friendly websites and list serves.
- Cultivate a good working relationship with the media, the public and members of civil society to enhance awareness of the two institutions, the process of taking cases and remedies available.

To minorities and members of civil society

- Take cases from marginalized groups such as indigenous and minority peoples to the African Court and support them through the process.
- Support and guard against any possible interference in the independence of the African Court.
- Intensify efforts to lobby more member states to make a declaration allowing individuals and NGOs to have direct access to the African Court.
- Assist the African Court in follow-up and monitor compliance of implementation of the decisions of the Court.
- Assist the African Court to harness expertise, skills and information to enhance the research capacity of the African Court and the African Commission.
- Continuously engage with the process of operationalizing and proper functioning of the African Court through research, lobbying and sensitizing governments and the public.

To donors and development agencies

- Establish a common pool of funds to finance the operations of the African Commission on Human and Peoples' Rights and the African Court.
- Fund sustainable internship programmes to the African Court and the African Commission.

To law schools and law societies/bar associations

- Train law students and lawyers on the African human rights system in a bid to ensure that more people are aware of and can utilize the regional human rights protection mechanisms to realize fundamental human rights at the continental level.

Notes

- 1 'Darfur death toll could be as high as 300,000: UN official', <http://www.cbc.ca/world/story/2008/04/22/darfur-un.html>, retrieved 10 August 2008.
- 2 See *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities*, submitted in accordance with the resolution on the Rights of Indigenous Populations/Communities in Africa, Adopted by the African Commission on Human and Peoples' Rights at its 28th Ordinary Session, ACHPR and IWGIA, 2005, p. 8.
- 3 The Wagalla massacre was a massacre of Somali Muslims by Kenyan security forces on 10 February 1984 in Wajir District, North Eastern Province, Kenya; see <http://www.kenyasomalis.org/Gsa-massacre.html>, retrieved 20 May 2008.
- 4 Authors' discussions with Hussein Barre during the 43rd Ordinary Session of the African Commission on Human and Peoples' Rights in Ezulwini, Kingdom of Swaziland, 6 May 2008.
- 5 *Ibid.*
- 6 Author's discussions with Ahola Ejembi during the 43rd Ordinary Session of the African Commission on Human and Peoples' Rights, Ezulwini, Kingdom of Swaziland, 6 May 2008.
- 7 See the Charter of the Organization of African Unity, adopted on 25 May 1963, 479 UNTS 39, 2 ILM 766 (1963).
- 8 *Ibid.*
- 9 *Ibid.*, Article 3; see also generally Naldi, G.J., *The Organization of African Unity*, 2nd edn, London, Mansell, 1999, pp. 2–18.
- 10 Naldi, G.J., 'Future trends in human rights in Africa', in R. Murray and M. Evans (eds), *The African Charter on Human and Peoples' Rights: The System in Practice 1986–2000*, Cambridge, Cambridge University Press, 2002, p. 2.
- 11 *Ibid.*, pp. 2–5; see also Ankumah, E., *The African Commission on Human and Peoples' Rights*, The Hague, Kluwer, 1996, pp. 4–8; Amate, C.O.C., *Inside the OAU: Pan-Africanism in Practice*, London, Macmillan, 1986, p. 472.
- 12 See generally Naldi, 'Future trends ...', *op. cit.*, p. 2.
- 13 Akinseye-George, Y., 'New trends in African human rights law: prospects of an African Court of Human Rights', 10 *University of Miami International and Comparative Law Review*, 2002, p. 160.
- 14 *Ibid.*
- 15 See Okoth Ogendo, H.W.O., 'The quest for constitutional government', in G. Hyden, D. Olowu and H.W.O. Okoth Ogendo, *African Perspectives on Governance*, Trenton, NJ, African World Press Inc., 2000, p. 42.
- 16 See *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities ...*, *op. cit.*, pp. 19–33.
- 17 See Hyden, G., 'The governance challenge in Africa', in Hyden *et al.*, *op. cit.*, p. 15.
- 18 See generally Kymlicka, W., 'Nation building and minority rights: comparing Africa and the West', in B. Berman, D. Eyoh and W. Kymlicka (eds), *Ethnicity and Democracy in Africa*, Oxford, James Currey, 2004, pp. 64–70; see also *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities ...*, *op. cit.*, pp. 14–59.
- 19 See 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*, 2003, p. 912.
- 20 See Maluwa, T., 'The peaceful settlement of disputes among African states, 1963–1983: some conceptual issues and practical trends', 38 *International Comparative Law Quarterly*, 1989, pp. 299–301.
- 21 See Naldi, 'Future trends ...', *op. cit.*, p. 4. Some of the problems the OAU dealt with by non-confrontational means include solving ethnic conflicts in the Great Lakes region of Central Africa; see Magnella, P.J., *Justice in Africa: Rwanda's Genocide, Its Courts and the UN Criminal Tribunal*, Aldershot, Ashgate, 2000, pp. 30–1 cited in Naldi, 'Future trends ...', *op. cit.*, note 19.
- 22 *Ibid.*, p. 4.
- 23 *Ibid.*
- 24 See Declaration of the Assembly of Heads of State and Government on the Establishment within the OAU of a Mechanism for Conflict Prevention, Management; see also Resolution AHG/3 December (XXIX) (the Cairo Declaration), RADIC 6, 1994, p. 158.
- 25 See Law of Lagos, 7 January 1961, para. 4, reprinted in 3 *Journal of International Commission of Jurists*, 1961, p. 9; see also the UN efforts, including hosting seminars to discuss the establishment of a mechanism for human rights protection in Africa, UN doc. ST/TAO/HR/25; GA Res. 32/127, UN GAOR, 32nd Sess., Supp. No. 45, at 149; UN doc. A/32/45, 1977; see UN doc. E/CN.4/966, 1968, paras 41–44; UN doc. ST/HR/SER.A/4, 1979.
- 26 African Charter on Human and Peoples' Rights, adopted 27 June 1981, Nairobi, Kenya, OAU doc. CAB/LEG/67/3 Rev. 5, entered into force 21 October 1986.
- 27 Naldi, 'Future trends ...', *op. cit.* Among the human rights instruments adopted by the OAU/AU to promote and protect specific human rights on the continent are: the Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 UNTS 45, entered into force 20 June 1974; 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 AU Assembly in Maputo, CAB/LEG/66.6, 11 July 2003, entered into force 25 November 2005; Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 9 June 1998, OAU doc. OAU/LEG/EXP/AFCHPR/PROT (III), entered into force 25 January 2005; African Charter on the Rights and Welfare of the Child, OAU doc. CAB/LEG/24/9/49, 1990, entered into force 29 November 1999.
- 28 See Hyden, 'The governance challenge in Africa', *op. cit.*, p. 20; see also generally the Audit of the African Union, <http://www.pambazuka.org/aumonitor/comments/962/>, retrieved 15 March 2008.
- 29 See Olowu, D., 'Bureaucracy and democratic reform', in G. Hyden *et al.*, *op. cit.*, pp. 153–74; see also Udombana, N.J., 'Toward the African Court on Human and Peoples' Rights: better late than never', 3 *Yale Human Rights and Development Law Journal*, 2000, p. 50.
- 30 African Commission on Human and Peoples' Rights, Resolution on Ending Impunity in Africa and on the Domestication and Implementation of the Rome Statute of the International Criminal Court, adopted during the African Commission 38th Ordinary Session, Banjul, The Gambia, 21 November–5 December 2005; see also Udombana, *op. cit.*, p. 50.
- 31 *Ibid.*

- 32 'Cameroon Assembly clears way for Biya third term', <http://www.alertnet.org/thenews/newsdesk/L10840480.htm>, retrieved 18 May 2008.
- 33 Mugwanya, G.W., *Human Rights in Africa: Enhancing Human Rights through the African Regional Human Rights System*, Ardsley, NY, Transitional Publishers, 2003, p. 3.
- 34 Constitutive Act of the African Union, adopted by the Assembly of Heads of State and Government of the Union, Lome, Togo, 11 July 2000, entered into force on 26 May 2001, Article 3.
- 35 *Ibid.*
- 36 *Ibid.*, Article 4(h).
- 37 See 'African Union: a new opportunity for the promotion and protection of human rights in Africa', Amnesty International Index IOR 63/0002/2002.
- 38 Constitutive Act of the African Union, *op. cit.*, Article 5.
- 39 The New Partnership for Africa's Development (NEPAD) is 'a pledge by African leaders based on a common vision and a firm and shared conviction, that they have a pressing duty to eradicate poverty and to place their countries, both individually and collectively, on a path of sustainable growth in the world economy and body politic' (NEPAD Declaration, adopted in Abuja, Nigeria, October 2001).
- 40 Constitutive Act of the African Union, *op. cit.*, Article 4(h).
- 41 See for example the official website of the UN-African Union Mission in Darfur, <http://unamid.unmissions.org/>, retrieved 18 March 2008.
- 42 See 'AU troops arrive in the Comoros', <http://news.bbc.co.uk/2/hi/africa/7289318.stm>, retrieved 15 May 2008.
- 43 See case against Hissène Habré, Human Rights Watch, <http://www.hrw.org/english/docs/2005/09/30/chad11786.htm>, retrieved 23 January 2008.
- 44 Cornwell, R., 'Madagascar: first test for the African Union', 12 *African Security Review*, 2003, p. 1.
- 45 See <http://www.un.org/av/radio.unandafrica.transcript36.htm>, retrieved 20 January 2008.
- 46 See 'What now from SADC?', http://www.pambazuka.org/aumonitor/comments/what_now_from_sadc/, retrieved 15 May 2008; see also 'South Africa and Darfur', http://www.pambazuka.org/aumonitor/comments/south_africa_and_darfur/, retrieved 15 May 2008; 'Pressure mounts on Zimbabwe at UN', <http://www.mg.co.za/article/2008-04-17-pressure-mounts-on-zimbabwe-at-un>, retrieved 15 May 2008; 'Test for the African Union', http://findarticles.com/p/articles/mi_m0XPQ/is_2002_July_15/ai_89070760, retrieved 15 May 2008.
- 47 See 'Sudan eats humble pie as Ghana takes the prize', http://www.pambazuka.org/aumonitor/comments/sudan_eats_humble_pie_as_ghana_takes_the_prize/, retrieved 15 May 2008; see also 'African snub to Sudan over Darfur', <http://news.bbc.co.uk/2/hi/africa/6310025.stm>, retrieved 15 May 2008.
- 48 Interview with Ibrahima Kane, senior lawyer, African Program, INTERIGHTS, during the 42nd Ordinary Session of the African Commission on Human and Peoples' Rights, Congo Brazzaville, 15 November 2007; see also Viljoen, F., 'A human rights court for Africa and Africans', 30(1) *Brooklyn Journal of International Law*, 2004, p. 8; Udombana, *op. cit.*, p. 79.
- 49 See 'About the African Court', Coalition for an African Court, http://www.africancourtcoalition.org/editorial.asp?page_id=16, retrieved 28 July 2008; see also International Commission of Jurists, *African Conference on the Rule of Law: A Report on the Proceedings of the Convention 11*, 1961, preamble, para. 4, http://www.chr.up.ac.za/hr_docs/african/docs/other/other22.doc, retrieved 15 March 2008.
- 50 *Ibid.*
- 51 See Viljoen, 'A human rights court for Africa and Africans', *op. cit.*, p. 4, citing Keba M'Baye, Introduction to M'Baye Proposal, Draft African Charter on Human and Peoples' Rights of 1979, OAU doc. CAB/LEG/67/1, para. 4.
- 52 *Ibid.*
- 53 *Ibid.*, p. 6; see also Udombana, *op. cit.*, p. 74.
- 54 *Ibid.*
- 55 *Ibid.*
- 56 These countries include: Angola, Benin, Burundi, Cameroon, Cape Verde, Central Africa Republic, Chad, Congo Brazzaville, Democratic Republic of Congo, Djibouti, Equatorial Guinea, Ethiopia, Gabon, Guinea Bissau, Ivory Coast, Kenya, Malawi, Mali, Mozambique, Niger, Rwanda, São Tomé and Príncipe, Seychelles, Sierra Leone, Somalia, Tanzania, Togo and Zambia; see http://en.wikipedia.org/wiki/Single-party_state, retrieved 26 December 2007.
- 57 See 'The story of Africa: independence', BBC World Service, <http://www.bbc.co.uk/worldservice/africa/features/story-oufafrica/14chapter11.shtml>, retrieved 26 December 2007.
- 58 See Fombad, C.M., 'Challenges to constitutionalism and constitutional rights in Africa and the enabling role of political parties: lessons and perspectives from Southern Africa', 55(1) *American Journal of Comparative Law*, 2007, p. 2.
- 59 States were initially opposed to the establishment of a continental judicial institution and the support for the court could therefore be termed as a 'change of heart'. See Keba M'Baye, *op. cit.*, para. 4, cited in Viljoen, *op. cit.*, p. 4.
- 60 *Ibid.*, p. 9, fn. 41.
- 61 See Resolution on the African Commission on Human and Peoples' Rights, AHG/Res. 230 (XXX), 13th Ordinary Session of the Assembly of Heads of State and Government of the Organization of African Unity, Tunis, Tunisia, 13-15 June 1994.
- 62 See country pages, <http://www.hrw.org/doc/t=africa>, retrieved 15 January 2007.
- 63 In accordance with Rule 1 of its Rules of Procedure, the African Commission has had 43 Ordinary Sessions since its establishment in 1987. The 43rd Ordinary Session was held in Ezwulwini, Kingdom of Swaziland, 7-22 May 2008.
- 64 See Rule 3 of the Rules of Procedure of the African Commission. Since its inception the African Commission has so far held four Extra-ordinary Sessions. The last Extra-ordinary Session was held in Banjul, The Gambia, 17-23 February 2008.
- 65 African Charter on Human and Peoples' Rights, Article 45.
- 66 See Country-specific Reports of the Working Group of Experts on Indigenous Populations/Communities in Africa, <http://www.iwgia.org/sw2186.asp>, retrieved 20 May 2008. These reports include those of Botswana, Burundi, Congo Brazzaville, Namibia and Niger.
- 67 Some of the Rapporteurs currently in existence are the Special Rapporteur on the Rights of Women in Africa; Special Rapporteur on Prisons and Conditions of Detention in Africa; Special Rapporteur on Human Rights Defenders in Africa; and Special Rapporteur on Refugees and Displaced Persons in Africa, Special Rapporteur on the Freedom of Expression in Africa. Working Groups include the Working Group on Economic, Social and Cultural rights in Africa; Working Group on Specific Issues Relevant to the Work of the African Commission; Working Group on the Death Penalty; Working Group on the Implementation of the Robben Island Guidelines; Working Group on the Situation of Indigenous Peoples/Communities in Africa.
- 68 See *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities*, *op. cit.*
- 69 Interview with Dr Naomi Kipuri during the 42nd Ordinary Session of the African Commission on Human and Peoples' Rights, Congo Brazzaville, 15 November 2007.
- 70 See Pityana, N.B., 'Introduction', in the *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities*, *op. cit.*, pp. 12-13.
- 71 See Africa Group, *Draft Aide Memoire*, UN Declaration on the Rights of Indigenous Peoples, 9 November 2006, para. 2.1.

- 72 *Ibid.*, para. 2.2; see also the Advisory Opinion of the African Commission on Human and Peoples' Rights on the UN Declaration on the Rights of Indigenous Peoples, Adopted by the African Commission on Human and Peoples' Rights, at its 41st Ordinary Session, Accra, Ghana, May 2007, para. 9, www.iwgia.org, retrieved 20 January 2007.
- 73 Advisory Opinion, *op. cit.*, paras 9 and 13.
- 74 Africa Group, *Draft Aide Memoire, op. cit.*, paras 3.0 and 5.0.
- 75 See Advisory Opinion of the African Commission, *op. cit.*
- 76 Interview with Marianne Jensen during the 42nd Ordinary Session of the African Commission on Human and Peoples' Rights, Congo Brazzaville, 16 November 2007.
- 77 See Resolution of Namibia on behalf of the Group of African States, UN GA, 61st Session, 3rd Comm., UN doc. A/C.3/61/L.57/Rev. 1, 2006; see also AU decision on the UN Declaration on the Rights of Indigenous Peoples, doc. Assembly/AU/Dec. 141 (VIII), 30 January 2007; Africa Group, *Draft Aide Memoire, op. cit.*
- 78 *Ibid.*; see also Advisory Opinion of the African Commission, *op. cit.*, para. 3.
- 79 *Ibid.*, para. 3.
- 80 *Ibid.*
- 81 Interview with Robert Eno during the 42nd Ordinary Session of the African Commission on Human and Peoples' Rights, Congo Brazzaville, 16 November 2007.
- 82 The Chair of the Working Group of Experts on Indigenous Populations/Communities in Africa indicated that the African Commission is presently not specifically dealing with the issue of minority rights but rather indigenous peoples' issues during the consideration of the State Report of the Republic of Tanzania, Ezulwini, Kingdom of Swaziland, 11 May 2008.
- 83 See *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, op. cit.*
- 84 See Draft Resolution on the Minority Peoples in Africa, recommended to the African Commission on Human and Peoples' Rights for adoption by the NGO Forum in Ezulwini, Kingdom of Swaziland, May 2008 (on file with the author).
- 85 The inter-state communications are envisaged under Articles 47–54 of the African Charter. However, apart from a communication brought by the Democratic Republic of Congo against Rwanda and Uganda, there has not been any other inter-state communication to date.
- 86 See Viljoen, F., 'Admissibility under the African Charter', in Murray and Evans, *The African Charter on Human and Peoples' Rights, op. cit.*, pp. 61–99 for a detailed discussion on admissibility under the African Charter. The African Charter Article 56 provides that: communications relating to human and peoples' rights referred to in Article 55 (relates to communications other than inter-state communications) received by the Commission shall be considered if they:
1. indicate their authors, even if the latter request anonymity;
 2. are compatible with the Charter of the OAU or with the present Charter;
 3. are not written in disparaging or insulting language directed against the state concerned and its institutions or to the OAU;
 4. are not based exclusively on news disseminated through the mass media;
 5. are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
 6. are submitted within a reasonable period from the time local remedies are exhausted or from the date the African Commission is seized of the matter; and
 7. do not deal with cases which have been settled by these states involved in accordance with the principles of the Charter of the UN, or the Charter of the OAU or the provisions of the present Charter.
- 87 Discussions by the author with Robert Eno, senior legal officer with the African Commission, 11 May 2008, during the 43rd Ordinary Session of the African Commission on Human and Peoples' Rights, Ezulwini, Kingdom of Swaziland.
- 88 *Ibid.*
- 89 In accordance with Article 59 of the African Charter, upon adoption by the Assembly the recommendations of the African Commission become the decisions of the Assembly; see generally Wachira, G.M. and Ayinla, A., 'Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: a possible remedy', 6(2) *African Human Rights Law Journal*, 2006, pp. 465–92.
- 90 See African Commission on Human and Peoples' Rights, Account of Internal Legislation and the Dispositions of the African Charter on Human and Peoples' Rights, doc. II/ES/ACHPR/4.
- 91 See, for instance, Communication 75/92, *Katangese Peoples Congress versus Zaire*, 8th Annual Activity Report in (2000) AHRLR 72 (ACHPR 1995), pp. 72–3 (Katangese case); Communication No. 155/96, *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights versus Nigeria*, decided at the 30th Ordinary Session, October 2001, 15th Annual Activity Report, in (2001) AHRLR 60 (ACHPR 2001), pp. 60–75 (SERAC case)
- 92 Communication 75/92, *Katangese Peoples Congress versus Zaire, op. cit.*, para. 4. According to the African Commission the people could exercise internal self-determination in any of the following ways: 'independence, self government, local government, federalism, confederalism, unitarism any other form of relations that accords with the wishes of the people'.
- 93 *Ibid.*, para. 6.
- 94 SERAC case, *op. cit.*
- 95 *Ibid.*
- 96 *Ibid.*, paras 70–1.
- 97 The African Commission has undertaken such fact-finding missions in Ethiopia, Nigeria and Zimbabwe. The report on Zimbabwe was published as part of the 17th Annual Activity Report of the African Commission; the reports on Ethiopia and Nigeria have never seen the light of day.
- 98 African Charter on Human and Peoples' Rights, Article 45(1)(c).
- 99 By the time of the 43rd Ordinary Session of the African Commission, Ezulwini, Kingdom of Swaziland, in May 2008, more than 300 NGOs had been granted observer status with the African Commission.
- 100 African Commission, Rules of Procedure, Rule 75 and 76.
- 101 Interview with Marianne Jensen during the 42nd Ordinary Session of the African Commission, in Congo Brazzaville, 16 November 2007.
- 102 See Draft Resolution on the Minority Peoples in Africa recommended to the African Commission on Human and Peoples' Rights for adoption by the NGO Forum, Ezulwini, Kingdom of Swaziland, May 2008 (on file with the author).
- 103 See generally Gaer, F.D., 'First fruits: reporting by states under the African Charter on Human and Peoples' Rights', 10 *Netherlands Human Rights Quarterly*, 1992, p. 29, for an evaluation of the initial state reporting under the African Charter; see also Evans, M., Ige, T. and Murray, R., 'The reporting mechanism of the African Charter on Human and Peoples' Rights', in Murray and Evans, *The African Charter on Human and Peoples' Rights, op. cit.*, pp. 36–60.
- 104 Some of these issues emerged during the consideration of the state reports of Sudan and Tanzania during the 43rd Ordinary Session, Ezulwini, Kingdom of Swaziland, 7–22 May 2008.
- 105 *Ibid.*
- 106 The Commission of the AU has developed criteria aimed at addressing the question of incompatibility, to ensure the independence of members of bodies nominated by member

states to its organs and institutions. In a circular to state parties dated 5 April 2005, the Commission of the AU noted that:

[a]s a guide for States Parties in interpreting the question of incompatibility or impartiality, the Advisory Committee of Jurists in the establishment of the Permanent Court of International Justice (now the ICJ) had pointed out that a member of government, a minister or under-secretary of state, a diplomatic representative, a director of a ministry, or one of his subordinates, or the legal adviser to the foreign office, though they would be eligible for appointment as arbitrators to the Permanent Court of Arbitration of 1899, are certainly not eligible for appointment as judges upon our court.

- 107 See Guidelines for Nomination and Election of Judges to the African Court on Human and Peoples' Rights, http://www.interrupt.org/doc/African%20Court%20Nomination%20Guidelines_doc, para 4, retrieved 14 March 2008.
- 108 See generally, Viljoen, F., 'Promising profiles: an interview with the four new members of the African Commission on Human and Peoples' Rights', 6 *African Human Rights Law Journal*, 2006, p. 237; see also Assembly/AU/Dec.84 (V) on the election of members of the African Commission in Sirte, Libya, 4–5 July 2005; on the election of judges of the African Court on Human and Peoples' rights see Assembly/AU/Dec.100 (VI), Khartoum, Sudan, 23–4 January 2006.
- 109 Interview with Commissioner Angela Melo during the 42nd Ordinary Session of the African Commission, Congo Brazzaville, 16 November 2007.
- 110 For instance the AU Assembly at its 6th Summit, Khartoum, Sudan, January 2006, decided:

'to adopt and authorize, in accordance with article 59 of the African Charter on Human and Peoples' Rights (the Charter), the publication of the 19th Activity Report of the African Commission on Human and Peoples' Rights (ACHPR) and its annexes, except for those containing the Resolutions on Eritrea, Ethiopia, the Sudan, Uganda and Zimbabwe. [It calls upon the] ACHPR to ensure that in future, it enlists the responses of all States parties to its Resolutions and Decisions before submitting them to the Executive Council and/or the Assembly for consideration; [and requests] States parties, within three (3) months of the notification by the ACHPR, to communicate their responses to Resolutions and Decisions to be submitted to the Executive Council and/or the Assembly...'

The countries concerned had voiced concern that the African Commission, in adopting these resolutions, was influenced by foreign NGOs. Sudan, for example, was very critical of the African Commission's adoption of a Report of its 3rd Extra-ordinary Session on the situation in Darfur, Pretoria, South Africa, 13–15 June 1994. The Extra-ordinary Session was funded by NGOs and Sudan argued that its resolutions were influenced by the donors.

- 111 See the speech by the Vice-Chairperson of the African Commission on Human and Peoples' Rights, Mrs Angela Melo, delivered at the opening ceremony of the 43rd Ordinary Session of the African Commission, Ezulwini, Kingdom of Swaziland, http://www.achpr.org/english/Speeches/43%20Session/Opening%20Speech%20_Final%20Rev__pd, retrieved 19 May 2008.
- 112 Ankumah, *op. cit.*, p. 38.
- 113 For instance, the website of the African Commission has recently been revamped and there are significant attempts to post items of interest to the public. Some of the current members of the African Commission, such as Commissioner Tom Nyanduga, have recently written a number of opinion papers and published in academic and policy journals. The

African Commission is also holding regular Ordinary Sessions outside Banjul, The Gambia. More states should be encouraged to invite the African Commission to host Ordinary Sessions and also accept requests for promotional missions.

- 114 See generally Wachira and Ayinla, *op. cit.*
- 115 *Ibid.*
- 116 See *Civil Liberties Organisation v. Nigeria* (2000) AHRLR 188 (ACHPR 1995) para. 20.
- 117 See African Commission on Human and Peoples' Rights, Account of Internal Legislation and the Dispositions of the African Charter on Human and Peoples' Rights, doc. II/ES/ACHPR/4.
- 118 See 'Non-compliance of state parties to adopted recommendations of the African Commission: a legal approach', 24th Ordinary Session, OAU DOC/OS/50b (XXIV), para. 2, 1998, reprinted in R. Murray and M. Evans (eds), *Documents of the African Commission on Human and Peoples' Rights*, Oxford, Hart Publishing, 2001, p. 355; see also generally Wachira and Ayinla, *op. cit.*
- 119 Discussions with Peter Kiplangat Cheruiyot during a Minority Rights Group International workshop on minority rights at the University of Pretoria, South Africa, 10–12 March 2008.
- 120 *Ibid.*
- 121 *Ibid.*
- 122 Interview with Professor Barney Pitso, former Chair of the African Commission and Vice-Chancellor and Principal of the University of South Africa, in Pretoria, South Africa, 27 February 2008.
- 123 *Ibid.*
- 124 Discussions with Ibrahim Kane, a member of the Working Group that was involved in drafting the Rules of Procedure of the African Commission on Human and Peoples' Rights during the 43rd Session of the African Commission, Ezulwini, Kingdom of Swaziland, 11 May 2008.
- 125 Interview with legal officers at the African Commission 42nd Ordinary Session, Congo Brazzaville, 17 November 2007.
- 126 *Ibid.*
- 127 Conversation with Judy Oder, at the INTERIGHTS offices, London, 10 December 2007.
- 128 *Ibid.*
- 129 Experience of the author whilst working with the African Commission from May 2004–May 2005, as well as interviews with legal officers of the African Commission during the 42nd Ordinary Session, Congo Brazzaville, 16 November 2007.
- 130 See Communication 276/2003, *CEMIRIDE (on behalf of the Endorois Community) versus Republic of Kenya*.
- 131 See draft prepared by the experts assembled by the OAU General Secretariat in collaboration with the African Commission on Human and Peoples' Rights and the International Commission of Jurists, 26–8 January 1994, Geneva, Switzerland, http://www.chr.up.ac.za/centre_publications/hrla/references/DOCUMENTS%20LEADING%20UP%20TO%20THE%20ESTABLISHMENT%20OF%20THE%20AFRICAN%20COURT%20p.170.doc, retrieved 5 December 2007.
- 132 Kioko, B., 'The African Union and the implementation of decisions of the African Court on Human and Peoples' Rights', *INTERIGHTS Bulletin*, vol. 15, no. 1, 2004, p. 7. See also Dieng, A., 'Introduction to the African Court on Human and Peoples' Rights', *INTERIGHTS Bulletin*, vol. 15, no. 1, 2004, p. 3. Adama Dieng, who is currently an Assistant Secretary-General of the UN and Registrar of the International Criminal Tribunal for Rwanda, was one of the experts representing the ICJ as its Secretary-General at the Cape Town meeting of experts.
- 133 See Viljoen, F., 'A human rights court for Africa and Africans', *op. cit.*, p. 20.
- 134 See Cape Town draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, as adopted by

- the First Government Legal Experts Meeting on the Establishment of an African Court on Human and Peoples' Rights, Cape Town, South Africa, 6–12 September 1995, OAU/LEG/EXP/AFCHPR (1), reproduced at 8(2) *African Journal of International & Comparative Law*, 1996, pp. 493–500.
- 135 See the Nouakchott draft Protocol to the Africa Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, as adopted by the Second Government Legal Experts Meeting on the Establishment of an African Court on Human and Peoples' Rights, Nouakchott, Mauritania, 11–14 April 1997, OAU/LEG/EXP/AFCHPR/RPT(2), reproduced in 9(2) *African Journal of International & Comparative Law*, 1997, pp. 432–9.
- 136 See Protocol to the African Charter Establishing an African Court on Human and Peoples' Rights adopted by the Assembly of Heads of State and Government of the OAU in Ougadougou, Burkina Faso, 9 June 1998, OAU/LEG/MIN/AFCHPR/PROT (111).
- 137 *Ibid.*, Articles 5(3) and 34(6); see also Nouakchott draft Protocol, *op. cit.*
- 138 See Badawi El Sheikh, I.A., 'Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights', 9(4) *African Journal of International & Comparative Law*, 1997, p. 947. Badawi was involved in the drafting processes of the Protocol as the then Chair of the African Commission.
- 139 See the African Union official website on documents, <http://www.africa-union.org/root/au/Documents/Treaties/List/Protocol%20on%20the%20African%20Court%20on%20Human%20and%20Peoples%20Rights.pdf>, retrieved 6 December 2007.
- 140 See the official website of the Coalition for an Effective African Court on Human and Peoples' Rights, <http://www.africancourtcoalition.org/>, retrieved 6 December 2007.
- 141 Interview with Ibrahim Kane during the seminar on the rights of ethnic, linguistic and religious minorities in Africa organized by MRG, 10–12 March 2008, Pretoria, South Africa.
- 142 Interview with government officials at the just concluded 42nd Ordinary Session of the African Commission on Human and Peoples' Rights, Congo Brazzaville, 13–17 November 2007. (The officials elected to remain anonymous.)
- 143 See for example the AU Assembly's decision to suspend the publication of the 17th Annual Activity Report of the African Commission, Assembly/AU/Dec.49(III); see also the decision by the AU Assembly to delete certain sections of the African Commission's 19th Annual Activity Report at the behest of some state parties, Assembly/AU/Dec 101 (IV), para. 1. See an analysis of the implication of these decisions in Wachira and Ayinla, *op. cit.*, p. 476.
- 144 Discussions with Commissioner Angela Melo during the seminar on the rights of ethnic, linguistic and religious minorities in Africa organized by MRG, 10–12 March 2008, Pretoria, South Africa.
- 145 *Ibid.*
- 146 Interview with Professor Barney Pitso, *op. cit.*
- 147 See AU Assembly's decisions on the merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union, Assembly/AU/Dec.45 (III) and Assembly/AU/Dec.83 (V) adopted respectively at its 3rd (Addis Ababa, Ethiopia, 6–8 July 2004) and 5th (Sirte, Libya, 4–5 July 2005), Ordinary Sessions.
- 148 See 'About the African Court', http://www.africancourtcoalition.org/editorial.asp?page_id=16, retrieved 19 May 2008.
- 149 Draft Protocol on the Statute of the African Court of Justice and Human Rights, EX CL/253 (IX), Annex II Rev. submitted to the 9th Ordinary Session Executive Council of the AU, Banjul, The Gambia, 25–9 June 2006 (on file with the author) Article 2.
- 150 *Ibid.*, Articles 5 and 16.
- 151 *Ibid.*, Article 7.
- 152 *Ibid.*, Articles 30 and 31. The current provisions of the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights restricts direct access of NGOs and individuals to the Court unless: 'at the time of the ratification of the Protocol or any time thereafter, the state shall make a declaration accepting the competence of the court to receive cases under article 5(3) of the Protocol'. See Article 34(6) of the Protocol to the African Charter. The issue is revisited in greater depth in the discussion of access to the African Court (pp. 20–1).
- 153 See 'Legal experts and Ministers of Justice meet on the merger of the courts', http://www.africancourtcoalition.org/editorial.asp?page_id=136, retrieved 19 May 2008.
- 154 Interview with a state delegate at the 42nd Ordinary Session of the African Commission in Congo Brazzaville, November 2007, who wishes to remain unnamed.
- 155 Interview with a member of the African Commission who requested anonymity with regard to those comments, which he indicated that, while true, are not official and could not be independently verified.
- 156 Interview with Professor Barney Pitso, *op. cit.*
- 157 See Wachira, G.M. (ed.), *Regional and Sub-regional Platforms for Vindicating Human Rights in Africa*, 6 *Judiciary Watch Report*, Nairobi, Kenyan Section of International Commission of Jurists, 2007.
- 158 The ECOWAS Court of Justice is established by sections 6 and 15 of the ECOWAS Treaty.
- 159 The EACJ is established under Article 9 of the East African Community Treaty.
- 160 The SADC Tribunal is established by Article 9 of the SADC Treaty.
- 161 Nyaga, J.M., 'Conflicts and overlaps of jurisdiction of various regional courts in Africa', in 7 *Judiciary Watch Report*, Nairobi, International Commission of Jurists (Kenya), 2007.
- 162 See Article 56(7) of the African Charter.
- 163 See Odinkalu, C.A., 'Complementarity, competition or contradiction: the relationship between the African Court on Human and Peoples' Rights and regional economic courts in East and Southern Africa', presentation to Conference of East and Southern African States on the Protocol Establishing the African Court on Human and Peoples' Rights, Gaborone, Botswana, 9–10 December 2003; http://www.africancourtcoalition.org/content_files/files/ChidionComplementarity.doc, retrieved 5 July 2008.
- 164 *Ibid.*, p. 10.
- 165 Nyaga, *op. cit.*
- 166 Odinkalu, *op. cit.*
- 167 *Ibid.*, p. 13.
- 168 *Ibid.*
- 169 Motala, A., 'Election of judges marks historic step in establishment of the African Coalition for an effective African Court', *Newsletter*, no. 5, p. 10, http://www.africancourtcoalition.org/content_files/files/ACCNewsletterEdition5.pdf, retrieved 7 December 2007.
- 170 *Ibid.*
- 171 *Ibid.*
- 172 See the African Judges at the official website of Coalition for an Effective African Court, http://www.africancourtcoalition.org/editorial.asp?page_id=62, retrieved 25 January 2007.
- 173 *Ibid.*
- 174 Protocol to the African Charter, Article 17.
- 175 Email correspondence with Sheila Nabachwa of the Ugandan Foundation for Human Rights Initiative (FHRI) and the East African representative of the Coalition for an Effective African Court on Human and Peoples' Rights, 5 June 2008; see also 'Uganda's government accused of blocking the re-election of judge to African Court', <http://www.voanews.com/english/Africa/2008-06-23-voa4.cfm>, retrieved 5 July 2008.
- 176 *Ibid.*

- 177 The *note verbale* inter alia provides that: the procedure for nomination of candidates, at the minimum, should be that for appointment to the highest judicial office in the state party; state parties should encourage the participation of civil society including judicial and other state bodies, bar associations, academic and human rights organizations and women's groups in the process of selection of nominees; a transparent and impartial national selection procedure should be employed in order to create public trust in the integrity of the nomination process
- 178 The inaugural judges of the African Court on Human and Peoples' Rights were: Sophia A.B Akuffo (Ghana), Hamdi Faraj Fanoush (Libya), Modibo Tounty Gundo (Mali), El Hadji Gisseh (Senegal), George Kanyeihamba (Uganda), Kellelo Justina Masafo Guni (Lesotho), Jean Mutsinzi (Rwanda), Bernard Makgabo Ngoepe (South Africa), Dr Gerald Niyungeko (Burundi), Dr Fatsah Ouguergouz (Algeria) and Jean Emila Sanda (Burkina Faso). Their profiles can be found at <http://www.africancourtcoalition.org/>, retrieved 7 December 2007; Justice Jean Emila Sanda and George Kanyeihamba's terms have since lapsed and have not been renewed. In their place Professor Githu Muigai (Kenya) and Joseph Mulenga (Uganda) were elected in July 2008.
- 179 Butegwa, C., 'Election of women judges to the African Human Rights Court', 4 *African Court Coalition Newsletter*, January–March 2006, p. 7.
- 180 Protocol to the African Charter, Article 3.
- 181 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Article 3.
- 182 *Ibid.*, Article 5
- 183 *Ibid.*, Article 11.
- 184 *Ibid.*, Article 8.
- 185 *Ibid.*, Articles 13–17.
- 186 *Ibid.*, Article 24.
- 187 See generally Banda, F. and Chinkin, C., *Gender, Minorities and Indigenous Peoples*, London, MRG, 2004.
- 188 Butegwa, *op. cit.*, p. 7.
- 189 Discussions with Commissioner Angela Melo during the seminar on the rights of ethnic, linguistic and religious minorities in Africa organized by MRG, 10–12 March 2008, Pretoria, South Africa.
- 190 *Ibid.*
- 191 See Article 10(2).
- 192 See Article 5(e) of the Protocol to the African Charter. The Committee on the Rights and Welfare of the Child fits within the definition of an African intergovernmental organization and as such can take cases to the African Court, as would the African Commission on Human and Peoples' Rights.
- 193 See African Charter on the Rights and Welfare of the Child, Article 11(3)e.
- 194 *Ibid.*, Article 21.
- 195 See 'Indigenous children face greater threats to survival', http://www.unicef.org/media/media_19429.html, retrieved 20 May 2008.
- 196 Protocol to the African Charter, Article 7.
- 197 See generally Wachira (ed.), *Regional and sub-regional platforms*, *op. cit.*
- 198 Protocol to the African Charter, Article 3.
- 199 *Ibid.*, Article 4(1).
- 200 *Ibid.*
- 201 See Viljoen, 'A human rights court for Africa and Africans', *op. cit.*, p. 52; Pasqualucci, J., 'Advisory practice of the Inter-American Court of Human Rights: contributing to the evolution of international human rights law', 38 *Stanford Journal of International Law*, 2002, pp. 241, 242.
- 202 Presentation by Innocent Maja on minority languages in Africa during a seminar organized by MRG and CEMIRIDE, Ezulwini, Kingdom of Swaziland, 6 May 2008.
- 203 Protocol to the African Charter, Article 5(3).
- 204 *Ibid.*, Article 5(2).
- 205 *Ibid.*, Article 5(3)
- 206 Interview with legal officers.
- 207 Badawi El Sheikh, *op. cit.*, note 24, p. 947.
- 208 See Report of the Second Government Legal Experts Meeting on the Establishment of an African Court on Human and Peoples' Rights, Nouakchott, Mauritania, 11–14 April 1997, OAU/LEG/EXP/AFCHPR/RPT (2), reproduced at 9(2) *African Journal of International & Comparative Law*, 1997, p. 427.
- 209 Padilla, D., 'An African human rights court: reflections from the perspective of the Inter-American system', 2(2) *African Human Rights Law Journal*, 2002, p. 191.
- 210 *Ibid.*
- 211 Article 61 of the American Convention on Human Rights; see Killander, M., 'The African regional human rights system and other regional systems', in F. Viljoen (ed.), *Judiciary Watch Report – The African Human Rights System: Towards the Coexistence of the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights*, Nairobi, Kenyan Section of the ICJ, p. 184. See also Padilla, *op. cit.*, p. 189.
- 212 See Padilla, *op. cit.*, p. 192.
- 213 *Ibid.*
- 214 European Convention on Human Rights, Article 44.
- 215 Killander, *op. cit.*, p. 184.
- 216 Viljoen, 'A human rights court for Africa and Africans', *op. cit.*, pp. 25–35.
- 217 Mutua, M., 'The African human rights court: a two-legged stool?', 21 *Human Rights Quarterly*, 2001, p. 362.
- 218 Protocol to the African Charter, Article 6(3).
- 219 Rules of Procedure of the Inter-American Commission, Article 44, provides that: 'when a state has not complied with the recommendations of the Commission, the Commission shall refer the case to the court, unless there is a reasoned decision by an absolute majority of the members of the Commission to the contrary'.
- 220 Protocol to the African Charter, Article 10.
- 221 *Ibid.*, Article 10(2).
- 222 Interview with Dr Naomi Kipuri in Congo Brazzaville.
- 223 Protocol to the African Charter, Article 10(2).
- 224 *Ibid.*, Article 28.
- 225 *Ibid.*, Article 30.
- 226 Discussion with Korir Singoei in Pretoria, during a seminar on indigenous peoples and minority rights in Africa, Pretoria, May 2007.
- 227 Protocol to the African Charter, Article 26
- 228 See Harrington, J., 'The African Court on Human and Peoples' Rights', in Murray and Evans, *The African Charter on Human and Peoples' Rights*, *op. cit.*, pp. 202, 324.
- 229 Viljoen, 'A human rights court for Africa', *op. cit.*, p. 32.
- 230 Protocol to the African Charter, Article 46.
- 231 *Ibid.*
- 232 *Ibid.*, Article 6.
- 233 *Ibid.*, Article 27(2).
- 234 Rule 111 of the African Commission's Rules of Procedure.
- 235 See Protocol to the African Charter, Article 30.
- 236 *Ibid.*, Article 27(2), see also Article 30.
- 237 Interview with Yobo Rutin during an MRG workshop on minority rights at the University of Pretoria, South Africa, 10–12 March 2008.
- 238 *Black's Law Dictionary* (6th edn), 1990, p. 82. According to *Black's Law Dictionary*, a person with a strong interest in or views on the subject matter of an action, but who is not a party to the action, may petition the court for permission to file a brief, ostensibly on behalf of a party but actually to suggest a rationale consistent with his own views.
- 239 See generally Mohamed, A.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', 43 *Journal of African Law*, 1999, p. 201.

- 240 See Viljoen, 'A human rights court for Africa', *op. cit.*, p. 51; see also Inter-American Court, Rules of Procedure, Article 45(1).
- 241 Protocol to the African Charter, Article 9.
- 242 *Ibid.*, Article 27.
- 243 *Ibid.*, Article 28.
- 244 *Ibid.*, Article 29. The AU Commission is the secretariat of the AU and is established through the Constitutive Act of the AU as adopted in July 2000 in Togo and entered into force on May 2001. See Article 5(1)e and Article 20 of the Constitutive Act.
- 245 Protocol to the African Charter, Articles 27(1) and 30.
- 246 *Ibid.*, Article 27(1).
- 247 See Killander, *op. cit.*, p. 186; see also American Convention on Human Rights, Article 63(1).
- 248 Killander, *op. cit.*, p. 186; American Convention on Human Rights, Article 68(2).
- 249 See Oziegbe, J., 'An overview of the ECOWAS Community Court of Justice: challenges and prospects', in Wachira (ed.), *Regional and sub-regional platforms*, *op. cit.*, p. 27.
- 250 See Shelton, D., *Remedies in International Human Rights Law*, Oxford, Oxford University Press, 2005, p. 282.
- 251 *Ibid.*, p. 384.
- 252 Constitutive Act of the African Union, *op. cit.*, Article 23.
- 253 Article 23 of the African Union's Constitutive Act:

'Imposition of Sanctions: 1. The Assembly shall determine the appropriate sanctions to be imposed on any Member State that defaults in the payment of its contributions to the budget of the Union in the following manner: denial of the right to speak at meetings, to vote, to present candidates for any position or post within the Union or to benefit from any activity or commitments therefrom. 2. Furthermore, any Member State that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly.

- 254 *Ibid.*, Article 29(2).
- 255 Protocol to the African Charter, Article 31.
- 256 Discussions with Ibrahim Njobdi Amadou during an MRG workshop on minority rights at the University of Pretoria, South Africa, 10–12 March 2008.
- 257 Kioko, *op. cit.*, p. 7.
- 258 *Ibid.*, p. 8.
- 259 Interview with Hon. Bintu Jalia Lukumu N. Abwooli during the seminar on the rights of ethnic, linguistic and religious minorities in Africa organized by MRG, 10–12 March 2008, Pretoria, South Africa.
- 260 *Ibid.*
- 261 *Ibid.*
- 262 Interview with Professor Barney Pityana, *op. cit.*

Getting involved

MRG relies on the generous support of institutions and individuals to further our work. All donations received contribute directly to our projects with minorities and indigenous peoples.

One valuable way to support us is to subscribe to our report series. Subscribers receive regular MRG reports and our annual review. We also have over 100 titles which can be purchased from our publications catalogue and website. In addition, MRG publications are available to minority and indigenous peoples' organizations through our library scheme.

MRG's unique publications provide well-researched, accurate and impartial information on minority and indigenous peoples' rights worldwide. We offer critical analysis and new perspectives on international issues. Our specialist training materials include essential guides for NGOs and others on international human rights instruments, and on accessing international bodies. Many MRG publications have been translated into several languages.

If you would like to know more about MRG, how to support us and how to work with us, please visit our website www.minorityrights.org, or contact our London office.

working to secure the rights of minorities and indigenous peoples

**minority
rights
group
international**

African Court on Human and Peoples' Rights: Ten years on and still no justice

It has been ten years since the African Heads of State signed the Protocol to establish the African Court of Human and Peoples' Rights at the Organization of African Unity summit in Burkina Faso in 1998. Yet the African Court has yet to hear a case.

There is great need for a functioning and effective human rights monitoring body, for all those living on the African continent, and especially for minorities and indigenous peoples, who are particularly affected by human rights violations both in major crises and on a daily basis – and who, because of their marginalization, are often ignored by governments.

This report looks at the context of human rights in Africa and describes what has been achieved in establishing the African Court. It also examines the difficulties that currently prevent the African Court and the African Commission on Human and Peoples' Rights working together in a complementary way and problems regarding the processes giving access to the Court.

The report gives an accessible, readable and up-to-the-minute account of the African Court on Human and Peoples' Rights which will be of value to all who are concerned with advancing and protecting human rights in Africa.