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The African Court on Human and Peoples' Rights: Safeguarding the Interests of African States

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Abstract

This article examines the extent to which the decision to establish the African Court on Human and Peoples' Rights was motivated by the desire of African states to safeguard their own interests at the expense of effectively protecting human rights in Africa. Using an examination of the drafting history of the Banjul Charter and the establishment of the African Commission as a background, this article explores the potential implications for the future of human rights protection on the continent as a result of the creation of the African Court on Human and Peoples' Rights and its proposed merger with the African Court of Justice.

INTRODUCTION

Over the course of two decades, considerable pressure was brought to bear upon African states by international NGOs and European states to mimic the European and Inter-American human rights systems through the adoption of a normative instrument providing for human rights protection. The promise was that in so doing, African states, for so long denigrated as primitive and barbaric and outside of the realm of civilization, would be granted admission to the ranks of the so-called civilized nations.[1] The yearning on the part of African nations to ''belong'' was hardly surprising and their willingness to accept what essentially amounted to Western-biased human rights norms, over which they had little influence in formulating, could also be anticipated.[2] What was perhaps surprising was the fact that the African nations appeared, on the

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1 Thus, a number of conferences and seminars were organized under the auspices of the International Commission of Jurists as well as the United Nations, at which the need for the creation of an African human rights mechanism was raised, the most important of which were: the African Conference on the Rule of Law (1961), UN Seminar on Human Rights in Developing Countries (1966), Dakar Conference (1967), UN Seminar on the Establishment of Regional Commissions on Human Rights with Special Reference to Africa (1969), Conference on African Legal Process and the Individual (1971), UN Seminar on the Study of New Ways and Means for Promoting Human Rights with Special Attention to the Problems and Needs in Africa (1973).

2 On the universalization of Eurocentric human rights norms and the subtext of human rights, see M Matua *Human Rights: A Political and Cultural Critique* (2002, University of Pennsylvania Press) at 10–38.

face of it, to be willing to renege on the principle of sovereignty and non-interference in domestic affairs, a principle they had guarded jealously since independence and which had always been seen as a major impediment to the creation of an African human rights mechanism.[3] However, as will be shown, whilst external pressure played a significant role in the decision to create the African Commission on Human and Peoples' Rights, the fact that the African Charter on Human and Peoples' Rights, which came into force in 1986, was framed in such a manner as to make few serious demands on African states to give up their precious sovereignty, was what ultimately led to its adoption.

Less than ten years after the Charter came into force, pressure was exerted upon African states to make provision for a human rights court. This resulted in the adoption in 1998 of the Protocol Establishing the African Court on Human and Peoples' Rights. Whilst a reasonably large body of literature now exists on the Court, there has been very little critical reflection as to why African states deemed it necessary to create such an institution and the implications this raises for the future functioning of the Court. This article seeks to examine, against the backdrop of the drafting of the African Charter and the establishment of the African Commission, the extent to which the decision to establish a human rights court, as well as the subsequent decision to merge this court with the African Court of Justice, was motivated by the desire of African states to protect human rights effectively and the degree to which other concerns, in particular the safeguarding of the interests of the state, may have played a role. In the final instance, an attempt will be made to explore the potential implications which the rationale behind the creation of the Court holds for the future of human rights protection on the continent.

AN AFRICAN COMMISSION OR AFRICAN COURT?

By 1979, the European and the Inter-American human rights systems both provided for the supervision of their respective constitutive documents through a commission as well as a court. Given the enthusiastic support of states parties, and in particular those of the European human rights system, for the creation of an African regional human rights mechanism, it would not have been surprising had there been a strong push for the creation of a commission as well as a court for Africa. However, this was not to be the case; in spite of the general desire on the part of these actors for an African system that closely resembled the European model, geo-political

3 See, in general, on the OAU, sovereignty and non-interference in domestic affairs, AB Akinyemi "The OAU and the concept of non-interference in the internal affairs of member states" (1972–1973) *British Yearbook of International Law* 393; O Okongwu "The OAU Charter and the principles of domestic jurisdiction in intra-African affairs" (1973) 13 *Indian Journal of International Law* 589; and UO Umozurike "The domestic jurisdiction clause in the OAU Charter" (1979) 78 *African Affairs* 197.

and other factors ordained that this was simply not possible, and rather than abandon their new civilizing project in Africa, they moved to throw their weight behind the creation of an African human rights commission.

In general, the debate as to whether or not provision should be made for a commission in conjunction with a court, or just a commission, was rather short lived. Other than mention of the creation of a court at a conference organized by the International Commission of Jurists in 1961, where it was proposed as the sole supervisory mechanism, the matter was not raised again.[4] The reasons for this are manifold and various explanations have been proffered as to why African states opted for supervision just by a commission rather than follow the lead provided by the European and Inter-American systems, particularly as it was clear that had they done so, they would have been able to ward off any arguments that the African system was inferior, lacking as it did judicial enforcement of human rights. The most widely held view in this regard, was that a commission with largely conciliatory functions was more in keeping with African mechanisms for dispute resolution than a court.[5] Closely related to this was the belief that by staking out a different path from that of the European and Inter-American systems, African states were asserting their African identity – their difference. However, closer scrutiny reveals another picture, one in which self-interest and preservation of the status quo played a predominant role in the decision to create a commission, rather than make provision for the dual supervisory mechanism that had been shown to be relatively effective elsewhere.

In a working paper presented to the OAU Committee of Experts in 1979, Kebya M'Baye (the then president of the International Commission of Jurists), drawing heavily on the International Covenant on Economic, Social and Cultural Rights and the American Convention on Human Rights, felt it significant enough to mention the omission of the provision of an African court from his draft, which was to serve as discussion document for the first version of the African Charter. He postulated that whilst a court was no doubt a good idea and an issue which could be introduced in the future by means of a protocol to the Charter, it was too premature to include it at that point.[6] The reasons why it was considered inopportune to do so were not expressed, yet it can be deduced that political exigencies, in particular an African preoccupation with sovereignty, not only suggested

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4 See above note 1.

5 See in this regard, G Naldi *The Organization of African Unity An Analysis of its Role* (2nd ed, 1999, Mansell) at 147 and G Naldi and K Magliveras "The proposed African Court of Human and Peoples' Rights: evaluation and comparison" (1996) 8 *African Journal of International and Comparative Law* 944. Also see E Bondzie-Simpson "A critique of the African Charter on Human and Peoples' Rights" (1988) 31 *Howard Law Journal* 643 at 650.

6 [Mbaye] Draft African Charter prepared for the Meeting of Experts in Dakar, Senegal, from 28 November to 8 December 1979, CAB/LEG/67/1, reprinted in C Heyns (ed) *Human Rights Law in Africa 1999* (2002, Kluwer Law International) at 65.

but demanded the exclusion of a court.[7] Thus, in keeping with the promise of article 2 of the OAU Charter to "defend sovereignty, territorial integrity and independence", the preliminary draft of the African Charter emphasized the "duty of solidarity and co-operation, on state sovereignty and the struggle against foreign domination".[8] This concern with sovereignty and non-interference in internal affairs was further highlighted in the Report of the Secretary-General on the African Charter, where it was noted that an amendment was necessary to article 45 of the Draft Charter, setting out the mandate of the Commission, in order to prevent too many reservations to the treaty, as it appeared from the text that the Commission had the power to interfere in the internal affairs of OAU member states.[9] The demands of politics were moreover perceptible in the rejection without substantial reason or discussion, as untimely, of a proposed amendment to the Draft Charter by Guinea in 1981 in an apparent attempt to hold South Africa accountable for its policies of racial discrimination by making provision for a tribunal to be created which would judge crimes against humanity and also protect human rights.[10] Nevertheless, in spite of these concerns, the overwhelming desire of newly independent African states to belong – their desire for acceptance by the international community and admittance to the ranks of the "civilized" – required that they bow to an international consensus on the general need for an African regional human rights mechanism.[11]

In the absence of external pressure or serious debate specifically in favour of the creation of a court that would pose a serious threat to the principle

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7 According to Keba M'Baye, the Charter constituted "what the African States were able to accept in 1981", as quoted in R Sock "The case for an African Court of Human and Peoples' Rights: from a concept to a draft protocol over 33 years" (March–April 1994) *African Topics* at 9.

8 See [Dakar Draft] African Charter on Human and Peoples' Rights CAB/LEG/67/3/Rev 1. Also see Report on the Draft African Charter presented by the secretary-general at the Thirty-seventh Ordinary Session of the OAU Council of Ministers, held in Nairobi, Kenya, 15–21 June 1981, CM/1149 (XXXVII).

9 See CM/Plen/Rapt Rpt (XXXVII) at para 205(b).

10 See Annex I CM/1149 (XXXVII) Rapporteur's Report CAB/LEG/67/Draft Rapt Rpt (II)Rev 4 at para 117. Also see K M'Baye *Les Droits de l'Homme en Afrique* (1992, Editions A Pedone, Paris) at 164. Also see F Ouguergouz *La Charte Africaine de Droit de l'Homme et des Peoples: Une Approche Juridique de Droits de l'homme Entre Tradition et Modernite* (1993, Presses Universitaires de France) at 72 at note 47.

11 The United Nations repeatedly emphasized the need to create human rights mechanisms in regions where they did not exist. See Resolution 7 (XXIV) of 1 March 1968, in which the Commission on Human Rights requested the secretary-general to arrange for regional seminars on the usefulness and advisability of the establishment of regional commissions on human rights. Also see A/10235 paras 173–76, in which European governments argued in favour of the desirability of the creation of regional mechanisms modelled on the European and Inter-American systems in those regions where they did not exist, and A/Res/32/127 of 16 December 1977, in which an appeal was made by the UN General Assembly to states in areas where regional arrangements in the field of human rights were non-existent, to consider concluding agreements with a view to establishing within their respective regions suitable regional machinery for the protection and promotion of human rights.

of non-interference which had been the bedrock of post-colonial African inter-state relations, and in order to make the proposal attractive to African leaders, the drafters of the Charter put forward a scheme of what amounted to be a weak supervisory mechanism, namely the African Commission. In order to counteract any qualms African governments might have had in relation to undue interference in domestic affairs, the drafters ensured that this Commission was to be made largely subservient to the primary political organ of the OAU, the Assembly of Heads of State and Government. This was to be accomplished through the confidentiality provisions of the Charter,[12] as well as the provisions relating to serious and massive violations.[13] In addition, a further attempt was also made to prevent unwarranted interference in domestic affairs through the inclusion of clawback clauses, permitting the restriction of the rights guaranteed, as

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12 See art 59, which provides that all measures taken by the Commission are to "remain confidential until the Assembly of Heads of State and Government shall otherwise decide". In practice, this means that any decisions, resolutions and reports adopted by the Commission cannot be made publicly available before the Assembly has approved them. The ability of the Assembly to prohibit the publication of potentially politically explosive documents hangs precariously over the Commission. This fact was made abundantly clear by its failure in July 2004 to approve the Commission's report on its visit to Zimbabwe undertaken in 2002, on the basis of objections raised by the Zimbabwean government (Decision on the 17th Annual Activity Report of the African Commission on Human and Peoples' Rights, Assembly/AU/Dec 49(III)); the subsequent failure to authorize publication of resolutions on Eritrea, Ethiopia, the Sudan, Uganda and Zimbabwe (Decision on the 19th Activity Report of the African Commission on Human and Peoples' Rights, Assembly/AU/Dec 101 (VI)); and most recently the decision by the Executive Council to prevent publication of a decision by the Commission on Zimbabwe (Decision on the 20th Activity Report of the African Commission on Human and Peoples' Rights, EX CL/Dec 310 (IX)). Also see C Odinkalu "The individual complaints procedures of the African Commission on Human and Peoples' Rights: a preliminary assessment" (1998) 8 *Transnational Law and Contemporary Problems* 359 at 368, in relation to a general discussion around the confidentiality provision.

13 In terms of art 58(1) of the African Charter, in the case of serious and massive violations, the Commission is merely required to draw them to attention of the Assembly of Heads of State and Government, leaving the latter with the decision as to whether or not to take action on such matters. Unsurprisingly, the Assembly has failed to take action in any of the cases referred to it by the Commission (see 47/90 *Lawyers Committee for Human Rights* v *Zaire*, 7th Annual Activity Report of the African Commission on Human and Peoples' Rights 1993–1994 Annex IX; 64/92 *Krischna Achutan (on behalf of Aleke Banda)* 68/92, *Amnesty International on behalf of Orton and Vera Chirwa* 78/92, *Amnesty International on behalf of Orton and Vera Chirwa* v *Malawi*, 7th Annual Activity Report of the African Commission on Human and Peoples' Rights 1993–1994 Annex IX; 25/89, 47/90, 56/91, 100/93 (joined) *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Temoins de Jehovah* v *Zaire*, 9th Annual Activity Report of the African Commission on Human and Peoples' Rights 1995–1996 Annex VIII.) On serious and/or massive violations in general, see R Murray "Serious or massive violations under the African Charter on Human and Peoples' Rights: a comparison with the Inter-American and European systems" (1999) 17 *Netherlands Quarterly of Human Rights* 109.

established by domestic law.[14] Therefore, by making provision for an African human rights commission, African states were able to establish a human rights system along lines similar to those in Europe and the Americas, but with limited encroachment on their internal affairs.

THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

The Commission began operating in 1987[15] with a broad mandate, including the promotion and protection of human rights, the interpretation of the Charter and any other task entrusted to it by the Assembly of Heads of State and Government.[16] In terms of its promotional mandate,[17] the Commission has the power to collect documents, undertake studies and research, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights and, should the case arise, give its views or make recommendations to governments.[18] It also has the power to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms and to co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.[19]

Its protectional mandate includes the examination of State Party Reports[20] and the consideration of communications alleging violations of human rights.[21] More specifically, the Charter provides for the receipt of communications from states as well as ''other communications''.

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14 It should be noted that the African Commission has interpreted the phrase ''by law'' to mean not domestic, but international law, thus in effect removing much of the criticism associated with these provisions (see 101/93 *Civil Liberties Organization in respect of the Nigerian Bar Association* v *Nigeria*, 8th Annual Activity Report of the African Commission 1998–1999 Annex V para 16; 102/93 *Constitutional Rights Project* v *Nigeria*, 12th Annual Activity Report of the African Commission 1998–1999 Annex V paras 57 and 58; 105/93, 128/94, 130/94 and 152/96 *Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda, Constitutional Rights Project* v *Nigeria*, 12th Annual Activity Report of the African Commission 1998–1999 Annex V para 66 and 212/98 *Amnesty International* v *Zambia*, 12th Annual Activity Report of the African Commission 1998–1999 Annex V para 50).

15 On 29 July 1987, the Assembly of Heads of State and Government elected the 11 commissioners.

16 See art 45 of the Charter.

17 On the promotional mandate of the Commission in general, see V Dankwa ''The promotional role of the African Commission on Human and Peoples' Rights'' in M Evans and R Murray (eds) *The African Charter on Human and Peoples' Rights: The System in Practice 1986–2000* (2002, Cambridge University Press) 335.

18 Art 45(1)(a).

19 Art 45(1)(b) and (c).

20 See art 62. Also see M Evans, T Ige and R Murray ''The reporting mechanism of the African Charter on Human and Peoples' Rights'' in M Evans and R Murray (eds) *The African Charter on Human and Peoples' Rights: The System in Practice 1986–2000* (2002, Cambridge University Press) 36.

21 See arts 47–59.

Initially, there was some debate as to whether or not ''other communications'' referred to communications from individuals and NGOs, or whether it referred to communications from an organ of the OAU or an African organization recognized by the OAU.[22] The secretary-general of the OAU at the time of the adoption of the Charter foresaw ''difficulty...[in] members of a governmental Commission agreeing easily on petitions from individuals''.[23] Some commentators went further in questioning the existence of the Commission's mandate to consider individual communications, other than those ''special cases'' which ''reveal the existence of a series of serious and massive violations of human and peoples' rights''.[24] The Commission's Rules of Procedure, adopted in February 1988, did nothing to clarify these ambiguities.[25] However, two months later at its Third Session, the Commission, in one of its most bold actions to date, made its position clear, by accepting communications from individuals.[26]

Notwithstanding the promise which the Charter and the early action of the Commission in accepting individual petitions in the absence of a mandate to this effect held out for human rights protection and for the development of a truly African conception of human rights and an African human rights jurisprudence, this potential remained largely unrealized. For example, even in instances where the Commission was called upon to deal with some of the more unique features of the Charter, such as the inclusion of economic and social rights, it failed to forge a truly African jurisprudence, relying heavily instead on the pronouncements of the Committee on Economic, Social and Cultural Rights.[27] Institutional weaknesses have also contributed to the failure of the Commission to make an impact in relation to the protection of human rights in Africa. The

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22 See UO Umozurike ''The African Charter on Human and Peoples' Rights'' (1983) 77 *American Journal of International Law* 902 at 908, R Gittleman ''The African Charter on Human and Peoples' Rights: a legal analysis'' (1982) 22 *Virginia Journal of International Law* 667 at 712, who were of the opinion that the Commission was entitled to receive communications from individuals and NGOs. On the other hand, see ENA Kotey ''The African Charter on Human and Peoples' Rights: an exposition, analysis and critique'' (1982–85) XVI *University of Ghana Law Journal* 130 at 147.

23 E Kodjo ''The African Charter on Human and Peoples' Rights'' (1990) 11 *Human Rights Law Journal* 280.

24 See W Benedek ''The African Charter on Human and Peoples' Rights: how to make it more effective'' (1993) 1 *Netherlands Quarterly of Human Rights* 25 at 31 and R Murray ''Decisions by the African Commission on individual communications under the African Charter on Human and Peoples' Rights'' (1997) 46 *International and Comparative Law Quarterly* 412 at 413.

25 The Commission revised its rules of procedure in 1995, see: <http://www.achpr.org/english/_info/rules_en.html>.

26 On individual communications in general, see Odinkalu ''The individual complaints procedures'', above at note 12 at 359–405.

27 See 155/96 *The Social and Economic Rights Action Center and the Center for Economic and Social Rights* v *Nigeria*, 15th Annual Activity Report of the African Commission on Human and Peoples' Rights 2001–2002 Annex V. For a general discussion and critique of this decision, see G Bekker ''Case Notes'' (2003) 47 *Journal of African Law* 126.

Commission's lack of funding,[28] the lack of independence of the commissioners,[29] the fact that much of the Commission's work has been shrouded in secrecy,[30] the Commission's inability to provide genuine redress to victims of human rights violations, and the lack of follow-up in relation to decisions of the Commission have all contributed to this state of affairs.[31] Barely five years after it had started operating, various commentators had already started to call into question the ability of the body to do anything meaningful about the human rights situation on the continent.[32] In particular, the lack of an effective remedy in relation to communications led one observer to suggest that: ''The only satisfactory solution seems to be an amendment of the text of the African Charter or the creation, by a special protocol, of another body, i.e. a Court''.[33] However, even prior to the Charter coming into force, the African system was criticized for not having

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28 The lack of funding by the OAU/AU has meant that the African Commission has had to seek funding from external donors in order to fulfil its mission. See *Evaluation: The African Commission on Human and Peoples' Rights* (December 1998, Danish Centre for Human Rights) at 53–54 for practical examples of numbers of staff funded by external sources for the period 1997–2000.

29 Over the years, large numbers of commissioners have had close links to their own governments including serving as ambassadors whilst simultaneously holding appointments in the Commission. The current president of the Commission, Salamata Sawadogo, is concurrently the Burkinabé ambassador to Senegal, and commissioner Mohamed Abdellahi Ould Babana is presently the Mauritanian ambassador in Addis Ababa. Other commissioners who have recently held government appointments whilst holding the post of commissioner include: Kamel Rezag-Bara, who held the post of Algerian ambassador to Libya, and the current vice-chair of the Commission, Yaser Sid Ahmad El-Hassan, who worked for the Ministry of Justice in Sudan.

30 This was particularly true for the early years of the Commission's operation when art 59 and the phrase ''all measures ... shall remain confidential until such time as the Assembly of Heads of State and Government shall decide otherwise'' were taken to mean not only the specific decisions taken against a particular state but, in essence, the whole communications process was to remain a secret. Thus, the details of the communications were ''contained in a confidential annex'' and the only information provided in regards to communications was in relation to the number of communications received and the number followed up upon (see paras 28 and 29 of the 6th Annual Activity Report of the African Commission on Human and Peoples' Rights). This situation was remedied in 1994 with the publication of the Commission's 7th Annual Activity Report, which provided specific information on the communications received by the Commission.

31 The Commission itself noted the seriousness of the matter stating that in the absence of a specific provision in the Charter compelling states to comply with the recommendations of the African Commission, ''the ... victims [of violations of the Charter] find themselves without any remedy'' (para 6 of Non-Compliance of State Parties to Adopted Recommendations of the African Commission: A Legal Approach, 24th Ordinary Session, Banjul, 22–31 October 1998 DOC/OS/50b (XXIV)).

32 See Benedek ''The African Charter on Human and Peoples' Rights'', above at note 24 at 25–40, and CE Welch ''The African Commission on Human and Peoples' Rights: a five-year report and assessment'' (1992) 14 *Human Rights Quarterly* 43.

33 See Benedek ''The African Charter on Human and Peoples' Rights'', above at note 24 at 32.

made provision for a court.[34] In this regard, the European and Inter-American systems were held out as being more advanced than the African system, which lacked a mechanism for judicial enforcement of rights.[35]

THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

The upsurge in interest on the part of external actors in the late 1980s and early 1990s for the creation of an African human rights court cannot solely be attributed, however, to the realization of the ineffectiveness of the African Commission as an organ to protect human rights on the continent. Rather, it has to be viewed against the setting of changing world affairs in which African states, having outlived their purpose as proxies during the Cold War era, came under fresh scrutiny, with the protection of human rights increasingly being mandated as a pre-condition for the granting of Western development aid.

Whilst calls for the reform of the African system through the creation of a court initially came primarily from external actors, it was not long before the refrain was also picked up by other actors on the African continent, in particular by NGOs and later even by the African Commission. Calls for the creation of an African court were made inter alia at the Commonwealth Judicial Colloquium on the Domestic Application of International Human Rights Norms held in Banjul in November 1990;[36] the African Bar Association's meeting in Abuja in March 1991;[37] the Kampala Forum in May 1991;[38] a seminar held by the African Commission and the Raoul Wallenberg Institute in Banjul in October 1992;[39] and at a symposium organized in Mombasa, Kenya, by World Organization against Torture and the Kenyan section of the International Commission of Jurists in

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34 See, eg, RM D'Sa "Human and peoples' rights: distinctive features of the African Charter (1985) 29 *Journal of African Law* 72 at 81 and Kotey "The African Charter", above at note 22 at 151–52.

35 See O Okere "The protection of human rights in Africa and the African Charter on Human and Peoples' Rights: a comparative analysis with the European and American systems" (1984) 6 *Human Rights Quarterly* 141 at 156, Kodjo "The African Charter", above at note 23 at 280, and W Benedek "Peoples' rights and individuals' duties as special features of the African Charter on Human and Peoples' Rights" in P Kunig, W Benedek and CR Malcolm *Regional Protection of Human Rights by International Law: The Emerging African System* (1985, Nomos Berlagsgesellschap, Baden-Baden) 59 at 62.

36 See "The Banjul Affirmation" in *Developing Human Rights Jurisprudence, Volume 4: Fourth Judicial Colloquium on the Domestic Application of International Human Rights Norms* (1992, Commonwealth Secretariat) at 276 at para 16. Also see "African judges adopt human rights principles" (1990) 5 *Interrights Bulletin* 39.

37 As referred to by P Amoah in "The African Charter on Human and Peoples' Rights – an effective weapon for human rights?" (1992) 4 *African Journal of International and Comparative Law* 226 at 238.

38 See: <http://www.au2002.gov.za/docs/key_oau/cssdca.htm>.

39 Para 7, Conclusions and Recommendations of the Seminar on the National Implementation of the African Charter on Human and Peoples' Rights in the Internal Legal Systems in Africa, 26–30 October 1992, SEM/002/01.

1993.[40] The topic of the creation of an African human rights court also repeatedly emerged in discussions at a series of seminars organized by the Fredrich-Naumann-Stiftung on regional systems for the protection of human rights.[41]

In January 1993, the International Commission of Jurists, in collaboration with the OAU General Secretariat and the African Commission, convened a high level brainstorming session in Dakar, Senegal, to discuss ways in which the African human rights system could be strengthened.[42] At this session, it was recommended that the time had come to turn the idea of the establishment of an African court into a reality.[43] Under the auspices of the International Commission of Jurists, Karl Vasak, a Czech jurist, in consultation with African commissioner, Alioune Blondin Beye, Justice Keba M'Baye of Senegal and Adama Dieng, the secretary-general of the International Commission of Jurists, prepared a Draft Protocol for the Court.[44]

Subsequent to the January 1993 meeting, a recommendation was made that serious consideration be given to the creation of an African human rights court at a workshop organized once again by the International Commission of Jurists, this time in collaboration with the African Commission on Human and Peoples' Rights and the African Centre for Democracy and Human Rights Studies, and held just prior to the Commission's 13th Ordinary Session from 29 March to 7 April 1993.[45] The conclusions and recommendations of this meeting were then presented to the Commission at its session – yet, it appears from records of that session that no formal discussion of the matter took place.[46] Nevertheless, the draft prepared by Karl Vasak was discussed at the following NGO workshop preceding the Commission's session in November 1993 in Addis Ababa. At this meeting it was decided that the ''Vasak'' Draft Protocol should be

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40 As referred to in NJ Udombana ''Toward the African Court on Human and Peoples' Rights: better late than never'' (2000) 3 *Yale Human Rights and Development Law Journal* 45 at 76.

41 See G Oestreich ''Conference Report'' in W Heinz (ed) *The System of Human Rights Protection in Africa and Europe: An Exchange of Experiences and Perspectives, Afro-European Conference* (26–31 March 1990, Strasbourg, Proceedings of the Conference) (1992, Friedrich-Naumann-Stiftung, Brussels) at 8, W Benedek ''Conference report'' in W Benedek and W Heinz (eds) *Regional Systems of Human Rights Protection in Africa, America and Europe, Third Afro-Americo-European Conference* (15–19th June 1992, Proceedings of the Conference) (1992, Friedrich-Naumann-Stiftung, Brussels) at 24.

42 See Rapport de Synthèse des Journées de Réflexion Portant sur la Commission Africaine des Droits de l'Homme et des Peuples, Organisées par la CIJ, ACHPR/MOC/XIII/013.

43 Id at para 5.

44 W Benedek ''14th session of the African Commission on Human and Peoples' Rights'' (1994) 12 *Netherlands Quarterly of Human Rights* 85 at 86.

45 ''Fourth workshop, 26–28 March 1993, Banjul, the Gambia'' in *The Participation of NGOs in the Work of the African Commission on Human and Peoples' Rights: A Compilation of Basic Documents* (1996, ICJ) 36 at para 20.

46 See Final Communiqué 13th Ordinary Session of the African Commission on Human and Peoples' Rights, 29 March – 7 April 1993, Banjul, the Gambia, at para 11.

redrafted by the International Commission of Jurists taking into account the comments by participants, and that once this had been done, the final product would then be presented, along with an explanatory note, to the heads of state of the OAU.[47] Pursuant to this decision, the International Commission of Jurists convened a group of African experts in Geneva on 26–28 January 1994 to rewrite the Protocol.[48] The draft eventually adopted (hereinafter referred to as the ICJ Draft), was heavily influenced by various international instruments, as is made clear in the introduction of the Explanatory Notes to the Draft Protocol, where it is stated that:

> "In drafting the document, inspiration was sought from existing regional documents which established the European and Inter-American courts, the Statute of the International Court of Justice, as well as the Report of the International Law Commission on the International Criminal Tribunal and other documents".[49]

Thus, in terms of the composition of the court, the terms of office of the judges, the provisions in relation to independence of the judiciary, who is entitled to bring petitions to the court, hearings, judgments, advisory opinions as well as issues related to the drafting of rules of procedure and ratification of the instrument, the ICJ Draft borrowed considerably from the two existing regional human rights instruments, stipulations of the Statute of the International Court of Justice as well as provisions of documents creating various international criminal tribunals. Nevertheless, the draft also purported to give "paramount consideration ... to the needs of the African continent".[50] Upon closer examination, however, it appears that primary importance was given not to the needs of the African continent and African peoples, but to African leaders and the entrenchment of the status quo. This is evidenced by the central role assigned to the ineffectual African Commission in proceedings before the Court[51] and is

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47 "Fifth workshop, 28–30 November 1993, Addis Ababa, Ethiopia" in *The Participation of NGOs in the Work of the African Commission on Human and Peoples' Rights: A Compilation of Basic Documents* (1996, ICJ) at para 4.

48 The group of experts was composed of: Dr Ben Salem (African Commission on Human and Peoples' Rights), Ahmed Motala (Lawyers for Human Rights), Raymond Sock (African Centre for Human Rights), Ben Kioko (OAU), Adama Dieng, Philip Amoah and Mona Rishmawi (all from the ICJ).

49 See Explanatory Notes to Draft Additional Protocol, Fifth ICJ Workshop on NGO Participation in the Work of the African Commission on Human and Peoples' Rights, 28–30 November 1993, Addis Ababa, Ethiopia. Also see B Kioko "The African Court on Human and Peoples' Rights" (July–September 1996) *African Legal Aid Quarterly* 25, where it is stated that "Legal instruments from other human rights systems were used as working documents".

50 See introduction of the Explanatory Notes to Draft Additional Protocol, above at note 49.

51 See art 2 of the ICJ Draft Protocol, which provides that the Court is to "supplement the protective mandate of the African Commission on Human and Peoples' Rights", as well as art 19(2), which provides that the Court may only consider a case after the Commission has dealt with the matter and made a determination and only after the

further reflected in the state-centric approach of the draft in relation to the dismissal of appointees to the court,[52] the appointment of national and ad hoc judges,[53] and the provisions in relation to locus standi, which provided for individual petition only on exceptional grounds.[54]

Later that same year, the OAU through its secretary-general, Salim Ahmed Salim, formally expressed a need for discussion around the issue of the creation of an African court for the first time at the African Commission's 14th Session.[55] The fact that the secretary-general had made these remarks can be seen as an indication of a growing feeling within the OAU that the African system was somehow lacking without a court. This belief in the inadequacy of the African system, fuelled largely by criticism of the existing mechanism by external actors, was further amplified by contemporaneous developments to replace the dual supervisory mechanism which had existed in Europe with a single court. In addition, the fact that the Inter-American Commission's work had largely been overshadowed by that of the Inter-American Court, and that the latter had, in many respects, become the dominant actor in human rights protection in the Americas, added to the sense of the inevitability with which Africans began to view the necessity of an African human rights court.

Despite this, the topic of the court was noticeably absent from the agenda of the NGO workshop held prior to the Commission's 15th Session, perhaps as it was felt that in the light of the of the OAU accepting the need for the creation of such an institution, it would be unnecessary to pursue the matter any further.[56] Nevertheless, the issue was itemized on the agenda of the Commission's Session at the suggestion of Commissioner Ibrahim Ali Badawi El-Sheikh, and although the matter was discussed in some degree of detail, there was very little critical examination as to whether or not a court was in fact an appropriate response to the perceived deficiencies of the

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contd
Commission has ''acknowledged the failure of efforts for a friendly settlement and within three months of a determination having been made by the Commission''.

52 See art 10(2) which potentially allows for the Assembly to overturn a decision by the Court to suspend or remove a judge from office.

53 See art 12.

54 See art 20, which provides for limited direct individual access to the Court on ''exceptional grounds''. In order to be granted such access, the principles as enunciated in art 56 of the Charter, which include the fact that communications are not to be framed in ''disparaging or insulting language directed against the State concerned and its institutions or to the Organisation of African Unity'', have to be complied with.

55 Held 1–10 December 1993. Para 9 of the Report on the Progress Made towards the Establishment of an African Court on Human and Peoples' Rights 12–16 April 1999, Grand Bay, Mauritius MIN/CONF/HRA/4(I).

56 See ''Sixth workshop, 15–17 April 1994, Banjul, the Gambia'' in *The Participation of NGOs in the Work of the African Commission on Human and Peoples' Rights: A Compilation of Basic Documents* (1996, ICJ) 43. The focus at this meeting was instead on arbitrary detentions, extra-judicial killings, human rights education, women's rights, the role of the media in the promotion and protection of human rights and art 58 of the African Charter.

Commission.[57] Instead, much of the discussion centred on the technical issue of the Commission's ability to initiate an amendment to the Charter. Overall, the general presumption which appeared to prevail was that a court was an essential prerequisite to ensure the protection of human rights on the continent. In this regard, a number of commissioners echoed the sentiment expressed by Commissioner Badawi when he stated that ''[W]e ... need a judicial arm, a judicial organ, to complement the African system for the protection of human rights, because I believe, that without such a judicial organ or arm, the legal protection ... would be missing''.[58]

Despite Badawi's unequivocal endorsement of the creation of a court, a certain degree of circumspection was nevertheless evident in some of his other remarks at this session. Thus, he cautioned against simply opting for a court ''...thinking that the African Court, will give us legal protection, because it is the case in the Inter-American system and the European system'', and implored for deep reflection to take place on the best means to provide for legal protection.[59] However, neither Commissioner Badawi nor any of the other commissioners engaged in such deep reflection and, after preliminary consideration of the issue of the Court, Commissioner Ndiaye was entrusted to prepare as a matter of formality a Draft Resolution on the issue to be presented at the 16th Session.[60] This lack of enthusiasm to engage in serious discussion and/or contemplation can perhaps be ascribed to the fact that it was felt that the creation of a court was inevitable and that all that remained was for the Commission to ensure that its role in a new dispensation would be safeguarded. More cynically perhaps, this rather jaded attitude can be seen as nothing more than a display of the general passivity characteristic of much of the Commission's work since its inception.

The idea of the creation of an African court, which would make fundamental inroads into the principle of sovereignty and non-interference, had at this point not received any official or formal support from African governments. However, this changed in June 1994, when the Assembly of Heads of State and Government of the OAU ''requested the Secretary-General of the OAU to convene a meeting of Government Experts to ponder in conjunction with the African Commission on Human and

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57 See The Future Relationship between the African Court and African Commission: Preliminary Remarks DOC/OS(XXXIII)/319. Also see Agenda of the 15th Ordinary Session in 7th Annual Activity Report of the African Commission on Human and Peoples' Rights 1993–1994, 30th Ordinary Session, 13–15 June 1994, Tunis, Tunisia.

58 For example, Commissioner Umozurike stated that ''there is absolutely no doubt that the African human rights system is incomplete without a court of human rights''. See unedited notes taken by Rachel Murray/Julia Harrington of the African Commission's 15th Session (on file with author).

59 Ibid.

60 See item 6 para 11.2 of the Report of the 15th Ordinary Session of the African Commission on Human and Peoples' Rights ACHPR/RPT/XVI. Also see para 26 of the Final Communique 15th Ordinary Session of the African Commission on Human and Peoples' Rights, 18–27 April 1994, Banjul, the Gambia.

Peoples' Rights over the means to enhance the efficiency of the Commission in considering particularly the establishment of an African Court on Human and Peoples' Rights''.[61] This move seems to have been prompted in large part by sustained pressure from external actors; however, the role of contemporaneous events in Rwanda in providing the final impetus for this decision should not be discarded, as African states wanted to be seen to be doing something tangible to address the genocide which had just taken place.

Four months after the OAU resolution calling for the establishment of an African Court, the matter was considered again at the 16th Session of the African Commission. At this meeting it was decided that a working group composed of commissioners Badawi, Nguema and Umozurike, was to conduct a study of the proposed Court in the light of the work and problems experienced by the Commission.[62] It was also decided that the findings of this group were then to be transmitted to the government experts.[63] However, nothing concrete appears to have come from this decision.

Pursuant to the earlier OAU resolution, a Government Experts Meeting was held in Cape Town on 6–12 September 1995,[64] at the conclusion of which a Draft Protocol to the African Charter was adopted (hereinafter referred to as the Cape Town Draft).[65] Prior to the Government Experts Meeting, NGOs in collaboration with the OAU secretary-general and the African Commission also met on 4–5 September 1995. At this meeting, the ICJ Draft was discussed and improved upon, the final product of which later served as the basis for discussions at the Government Experts Meeting, alongside the statutes of the European and Inter-American courts of human rights, the Statute of the International Court of Justice and the African Charter on Human and Peoples' Rights.[66] With the exception of a few grammatical and substantive changes as well as reordering of provisions, the Cape Town Draft looked much like its predecessor, the ICJ Draft which, as previously noted, largely mimicked the provisions of the European and

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61 AHG/Res 230 (XXX).

62 See para 41 of the Final Communique of the 16th Ordinary Session of the African Commission on Human and Peoples' Rights, 25 October–3 November 1994, Banjul, the Gambia.

63 Id at para 1. Also see item 5 para 8.6 of the Report of the 16th Ordinary Session of the African Commission on Human and Peoples' Rights, 25 October–3 November 1994, Banjul, the Gambia ACHPR/RPT/XVI.

64 See Government Legal Experts Meeting on the Question of the Establishment of an African Court on Human and Peoples' Rights, 6–12 September 1995, Cape Town, South Africa, OAU/LEG/EXP/AFCHPR/PRO(I)Rev1.

65 Cape Town Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights OAU/LEG/AFCHPR/PRO(I)Rev1. Also see OAU/LEG/EXP/AFCHPR(I)).

66 See para 15 of the Report of the Government Experts Meeting on the Establishment of an African Court of Human and Peoples' Rights OAU/LEG/EXP/AFC/HPR/RPT(I)Rev1. Also see B Kioko ''The process leading to the establishment of the African Court on Human and Peoples' Rights'', paper presented at The African Society of International and Comparative Law, Tenth Annual Conference, Addis Ababa, 3–5 August 1998, at 7.

American conventions, the Statute of the Inter-American Court as well as rules of procedure of the two courts.

As is the case with the earlier ICJ Draft, in an attempt to make the instrument more palatable to states, the exceptional nature of individual petitions was retained in the Cape Town Draft, though perhaps due to the influence of NGOs, softened by the non-mandatory consideration of the provisions of article 56 of the Charter in reaching a decision on admissibility.[67] Possibly also as a result of strong NGO involvement, the state-centric provision in relation to the role of the Assembly in overturning a decision by the Court to dismiss one of its ranks was notably absent in the Cape Town Draft.[68] Nevertheless, viewed as a whole, the instrument was still weighted more heavily in favour of the state than the victims of human rights abuses, particularly as the latter were unable to approach the Court directly, save in exceptional circumstances.

States were invited to make comments on the Report of the Government Experts Meeting as well as the Cape Town Draft.[69] Whilst making generally supportive comments in relation to the Court, the Mauritian authorities raised the concern that, in the absence of a stipulation limiting individual petitions to those by individuals/NGOs of states parties to the Protocol, the Court might be inundated by applications from international watchdogs, whilst the Burkinabé government focused on the fact that the exceptional jurisdiction clause in effect reduced the ''importance and effectiveness of the Commission''.[70] Closely related to the latter, the comments by the Lesotho government focused on concerns in relation to the Commission's ineffectiveness and the need to enhance the efficiency of the Commission before proceeding to create a court. Thus, it would appear that whereas states wanted to be seen in principle to support a human rights court, they feared that such a body would overtake the functions of the largely ineffectual Commission, and furthermore that if individuals were given

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67 See arts 5 and 6 of the Cape Town Draft. In relation to the latter provision, the Egyptian delegate raised a reservation, pointing out that the Commission should not be bypassed in favour of the Court and furthermore, that the granting of exceptional jurisdiction would ''risk opening a wider discussion on the interpretation of article 55 of the Charter'' (see para 23 of Report of the Government Experts Meeting, above at note 66).

68 Art 17 of the Cape Town Draft Protocol provides for the dismissal by unanimous decision of the other members of the Court and further provides that such a decision by the Court is final.

69 These comments were to be received on or before 1 March 1996. By the deadline, the Secretariat had not received any comments on the Draft. Mauritius was the first to do so on 8 March and was followed by Lesotho and Burkina Faso on 13 and 21 March, respectively. See paras 4–6 of the Report of the Secretary-General on the Measures Taken to Implement Resolution AHG/Res230 (XXX) on the Strengthening of the African Commission on Human and Peoples' Rights and the Establishment of an African Court of Human and Peoples' Rights, Council of Ministers 64th Ordinary Session, 1–5 July 1996, Yaounde, Cameroon, CM/1968 (LXIV). Also see id Annex III for an exposition of the comments submitted.

70 Ibid.

relatively unfettered access to such a court, it would pose a serious threat to the status quo.

Due to the fact that only three states had responded to the original request for comments, a reminder was sent out requesting once again that states submit comments on the Draft. In addition, states were also informed that the Report of the Government Experts Meeting, the Cape Town Draft and the comments by member states would all be presented for discussion to the 32nd Session of the Assembly of Heads of State and Government and the 64th Session of the Council of Ministers.[71] At the latter session, held in Yaounde, Cameroon, examination of the Draft Protocol was postponed to the following session and states were requested to submit comments and observations to the General Secretariat on the Draft by 10 November 1996.[72] Comments in addition to those by Mauritius, Lesotho and Burkina Faso were submitted before the deadline by Senegal, Tunisia, Sierra Leone, Benin, Côte d'Ivoire, Madagascar and Ethiopia.[73] Once again, a number of these comments displayed a preoccupation with the maintenance of the status quo and a reticence in relation to the effective protection of human rights. Thus, the Tunisians opined that the Protocol exhibited a *lacunae* in not providing for amicable settlement in relation to exceptional jurisdiction, highlighting the fact that the purpose of the Court, in echo of the Commission's view of its role, is ''not to deliver a judgement condemning a state'',[74] and further stressing the need to safeguard the interests of the state by requiring that a decision regarding the removal of judges should lie not with the Court, but with the Assembly of Heads of State. Sierra Leone, on the other hand, made a reservation to the exceptional jurisdiction provision to the same effect as that made by the Egyptian delegation when the Draft Protocol was discussed – that is, the Commission should not be by-passed in favour of the Court and that the granting of exceptional jurisdiction would open up discussion in relation to article 55 of the Charter.[75] The Côte d'Ivoirian comments similarly focused on the need to maintain a central role for the Commission, suggesting that the Commission be given the authority to decide on whether the Court ought to have jurisdiction in relation to a particular matter and that consultation with the Commission also take place in relation to a decision to admit individual petitions.[76] In similar vein, the Malagasy authorities' comments also focused on concerns in relation to the reduction in importance of the role of the Commission which, in their

71 Para 5 of the Report of the Secretary-General, above at note 69.

72 Paras 3 and 4 of CM/Res1674 (LXIV).

73 See Annex III, above at note 69.

74 See *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Temoins de Jehovah* v *Zaire*, above at note 13 at paras 39, 25/89, 47/90, 56/91, 100/93 (joined).

75 Annex III, above at note 69.

76 Ibid.

view, the granting of consultative powers and exceptional competence to the Court would entail.[77]

At the 65th Session, the OAU Council of Ministers did not refer the draft to the Assembly of Heads of State and Government as it would seem that it was felt that there had been insufficient input from member states. It was therefore decided that the Cape Town Draft would be circulated yet again for comments and observations and that these had to be submitted prior to 30 March 1997.[78] It was also determined that a Second Government Experts Meeting would be convened in order to finalize the draft, taking into account the comments and observations received by member states.[79] This Second Government Experts Meeting was held in Nouakchott, Mauritania, in April 1997,[80] prior to the 21st Session of the African Commission. At this meeting, attended by delegates of only 19 states, a Second Draft Protocol (hereinafter referred to as the Nouakchott Draft) was adopted by consensus.[81] This draft further strengthened the position of the state by, once again, allowing for the possibility of a decision of the Court regarding the dismissal of one of its members to be set aside by the Assembly.[82] Furthermore, the Nouakchott Draft provided not only for the exceptional nature of individual petitions, but additionally required that such petitions be limited to "urgent cases or serious, systematic or massive violations" and that states further make a declaration accepting the competence of the Court to receive such petitions.[83]

This Draft Protocol was then presented to the Council of Ministers at its 66th Session in Harare, Zimbabwe.[84] The Council of Ministers, however, failed once again to refer the document to the Assembly of Heads of State and Government, presumably as a result of the lack of participation on the part of member states in the process. Instead, they called for a Third Meeting of Government Experts to be held in Addis Ababa, which would be followed immediately thereafter by a Conference of Ministers of Justice/Attorney-Generals at the same venue, and requested that all member states submit comments and observations on or before 31 August 1997.[85] Furthermore, they requested all member states, especially those without

77 Ibid.

78 CM/326(LXV). Also see para 1 of Report of the Second Government Legal Experts Meeting on the Establishment of an African Court on Human and Peoples' Rights Meeting held 11–14 April 1997, Nouakchott, Mauritania, OAU/LEG/AFCHPR/RPT(2).

79 Id at para 2.

80 Ibid.

81 See 'Nouackchott' Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights Second Government Legal Experts Meeting on the Establishment of an African Court on Human and Peoples' Rights, 11–14 April 1997, Nouakchott, Mauritania, OAU/LEG/EXP/AFCHPR/PRO(2).

82 See art 19(2) of the 'Nouakchott' Draft Protocol, above at note 81.

83 See art 6.

84 Annex III Comments Received from the African Commission at the end of its 21st Ordinary Session (15–24 April 1997).

85 CM/Dec 348(LXVI).

representation in Addis Ababa, to ensure that they were duly represented at these meetings.[86] Subsequently, the deadline for submission of comments was extended to 30 September 1997.[87] Additional comments were received from Namibia, South Africa, Egypt, Senegal, Burkina Faso, Swaziland, the Gambia and Tanzania.[88] Both the comments by the governments of Egypt and Burkina Faso emphasized the necessity for African perspectives and needs to be taken into account in drafting the Protocol. However, with the exception perhaps of the remark by the Burkinabé government to the effect that NGOs be given direct access in the interests of the under-resourced and large number of illiterate persons on the continent, and the Namibian comments essentially to the same effect, none of the other comments can be said to have really taken the needs of the African populace into account.[89]

The Third Government Legal Experts Meeting (enlarged to include diplomats), at which minor changes were made to the Nouakchott Draft, was held in Addis Ababa from 8–11 December 1997. A final draft of the Protocol was unanimously adopted by this meeting.[90] The Protocol was finally approved at the 67th Session of the Council of Ministers in February 1998 in Addis Ababa.[91] It was then recommended by the Council of Ministers to the Heads of State and Government and placed before the OAU Assembly of Heads of State and Government Meeting in

86 Ibid.

87 See para 2 of the Introductory Note of the Comments and Observations Received from Member States on the Draft Protocol on the Establishment of an African Court on Human and Peoples' Rights Submitted to the Third Government Legal Experts Meeting (Enlarged to Include Diplomats) on the Establishment of an African Court on Human and Peoples' Rights, 8–11 December 1997, Addis Ababa, Ethiopia, OAU/LEG/EXP/AFCHPR/Comm(3).

88 Id at para 3.

89 The Gambian authorities, while not providing any reasoning for their opinion, also stated in relation to arts 5 and 6, that "Individuals and NGOs should be able to have direct access to the Court".

90 See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights OAU/LEG/EXP/AFCHPR/PROT(III)Rev1. One of the changes introduced to the text at this meeting was the removal of the requirement of the serious and massive nature of a violation in order for individual petitions to be invoked. The day after this meeting, a Conference of Ministers of Justice was held, at which only one change was made to the text, namely the addition of a second sentence to art 15(4) to the effect that the Assembly may change the part-time nature of appointments other than that of the president "as it deems appropriate" (see Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights OAU/LEG/MIN/AFCHPR/PROT(I)Rev2 and Report of the Secretary-General on the Conference of Ministers of Justice and Attorneys-General on the Draft Protocol on the Establishment of an African Court on Human and Peoples' Rights 67th Ordinary Session, 23–27 February 1998, Addis Ababa, Ethiopia, CM/2051 (LXVII) para 22).

91 Report of the Secretary-General on the Conference of Ministers of Justice and Attorneys-General on the Draft Protocol on the Establishment of an African Court on Human and Peoples' Rights, above at note 90.

Ouagadougou, Burkina Faso, from 8–10 June 1998, where it was formally adopted.[92]

This document did not substantially differ from the initial drafts of the Protocol. It contained all the standard provisions in relation to jurisdiction, access to the Court, the nomination and election process, terms of office, filling of vacancies, independence of the judiciary, and provisions relating to the rendering and execution of judgments as well as ratification. As such, the influence of the European and, in particular, the Inter-American models was strongly felt. The only differences contained in the Protocol related to the stated role of the Court vis-à-vis the Commission,[93] the prohibition of judges sitting in a case where they are a national of a state party to the case,[94] the requirement of gender and regional representivity,[95] and the broad jurisdiction of the Court *rationae materia*.[96] On the face of it, these provisions, in particular the latter, appear to be far-reaching and, viewed in isolation from the other provisions of the Protocol, appear to depart from the long held position of African states for a less than effective mechanism for the protection of human rights. However, seen within the broader context, it might be argued that even the ''radicial'' provision regarding jurisdiction strengthens rather than weakens the position of the state. This provision, by allowing for the possibility of complaints being brought not only on the basis of the African Charter, but on the basis of any other human rights instrument ratified by the state, may lead to diluted international standards and consequently a weakened form of human rights protection for Africa.

Recent developments in relation to the African Human Rights Court further underscore attempts on the part of African states to consolidate their position at the expense of victims of human rights violations. From the outset of the drafting of the Protocol Establishing the African Court on Human and Peoples' Rights there was some debate about the possibility of amalgamating the African Court of Justice and the African Human Rights Court into a single institution, but it was only in July 2004 that the Assembly of Heads of State made a final decision to integrate the two bodies.[97] The official explanation for such a merger was that it would be financially expedient to do so. However, what was not mentioned was that

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92 See paras 1 and 2 of the Explanatory Memorandum Regarding the Adoption of the Draft Protocol on the Establishment of an African Court on Human and Peoples' Rights, 68th Ordinary Session of the Council of Ministers, 5–11 May 1998, CM/2083 (LXVIII).

93 The relationship, unlike in the Inter-American or European system prior to the adoption of Protocol 11, is expressly stated as being one of ''complementarity'' (see art 2 of the Protocol).

94 See art 22 of the Protocol.

95 Arts 12(2) and 14(2) of the Protocol, respectively.

96 See art 7 of the Protocol. On the issue of the jurisdiction of the Court *ratione materiae*, see I Österdahl ''The jurisdiction *ratione materiae* of the African Court of Human and Peoples' Rights: a comparative critique'' (1998) 7 *Revue Africaine des Droits de l'Homme* 132.

97 See paras 4 and 5 of Assembly/AU/Dec 45(III).

this merger would ensure that the threat of a strong human rights court would be tempered by the election to such a court of judges without any particular expertise in the field of human rights, as the Draft Protocol on the Integration of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union makes provision for the establishment of a merged court consisting of 15 judges, at least seven of whom are to have competence in the area of human and peoples' rights and will form the core rather than the whole of a Specialized Human and Peoples' Rights Division, within a merged institution.[98]

After the matter of the merged court had been referred back and forth between the Permanent Representatives Council (PRC), Legal Experts and the Executive Council, a Meeting of Governmental Legal Experts was scheduled to be held in Algiers in order to consider a draft instrument prepared by the Algerian foreign minister and former president of the International Court of Justice, Dr Mohammed Bedjaoui. However, due to the fact that only 22 member states turned up for this meeting and that the necessary quorum was therefore lacking, a working group was constituted instead to consider the matter.[99] The Draft Protocol on the Statute of the African Court of Justice and Human Rights settled upon at this meeting introduced a number of fundamental changes to the Draft Protocol on the Integration of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union as well as changing the essence and substance of the Protocol Establishing the Human Rights Court, in particular making individual petitions automatic, rather than as previously provided for requiring a declaration accepting individual petitions.[100] A slightly modified version of this draft was tabled at the AU Summit in Khartoum in January 2006, but no decision was taken on it. Instead, states were requested to submit comments on the modified Khartoum draft to the AU Commission by 31 March 2006, which would then be submitted to a joint meeting of the PRC and Legal Experts for finalization.[101] This meeting, which took place in May 2006, in contrast to the earlier Algiers meeting which was attended by fewer than half of the member states of the AU, was attended by 45 member states. The dramatic increase in the number of states participating can perhaps be attributed to a fear that an instrument which did not go far enough in protecting the interests of the state might see the light. Although agreement was reached on some of the less

98 See art 4 of the Draft Protocol on Integration, and para 14 of the Report of a Brainstorming Session Involving a Group of Jurists and the Commission on the Integration of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union, EX CL/162(VI) Annex I and II.

99 This working group met on 21–24 November 2005 in Algiers (see Report of the Meeting of Government Legal Experts on the Merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union, EX.CL/211(VII)).

100 See art 32 of the Draft Protocol on the Statute of the African Court of Justice and Human Rights, UA/EXP/Fusion cours3(I).

101 See EX CL/Dec 237(VIII), Decision on the Merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union Doc EX CL/211(VIII).

controversial issues, no agreement could be found in relation to issues of jurisdiction, signature and ratification, and these matters were deferred for consideration to the AU Summit meeting in July 2006. At that meeting, the Executive Council took note of the recommendations of the PRC and Legal Experts Meeting, but failed to take any decision on the matter, deciding instead to postpone the matter yet again by referring the legal instruments to a meeting for ministers of justice and attorney-generals from member states for finalization and submission of a report to the next Ordinary Session of the Executive Council in January 2007.[102] By delaying any decision regarding the merger of the two institutions, African states have yet again ensured that the interests of the state trump. Meanwhile, the Human Rights Court, whose members have held three sessions to date, the most recent being in December 2006 in Arusha, are left in uncertainty as to the future of the institution.

CONCLUSION

Given the preoccupation of African states with the principle of sovereignty and non-interference, it is hardly surprising that when they did capitulate to external pressure in relation to the creation of an African human rights mechanism, they were more concerned with sovereignty and the maintenance of the status quo than with the protection of the individuals and groups within the state. This is evidenced by the manner in which the African Charter is framed, providing for a weak enforcement mechanism (the African Commission) that is lacking in funding and independence, largely subservient to the political machinery of the OAU/AU, and unable to provide meaningful redress to victims of human rights abuses.

A similar tale can be told in relation to the Protocol Establishing the African Court on Human and Peoples' Rights, which replicates a number of the problems which have beset the Commission, including subservience to the Assembly[103] and the lack of independence of judges.[104] It is also likely that the Court will suffer from the same funding issues that have dogged the Commission as scarce resources are stretched to the limit, with both the Commission and the Court competing for money. Whilst the Protocol does make provision for the ordering of remedies and the Court, at least on paper, has the ability to issue binding judgments, it is naïve to presume that states will comply with them.[105] However, of greatest concern is the fact that the Protocol effectively precludes those most likely to be affected

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102 Decision on the Draft Single Legal Instrument on the Merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union, EX CL/Dec 283 (IX).

103 This subservience manifests itself in the role assigned to the Assembly in the dismissal of members of the Court (see art 19(2) of the Protocol).

104 As is evidenced by the recent election to the bench of the legal advisor to the Burkinabé minister of justice.

105 See arts 27(1) and 30 of the Protocol.

by human rights abuses from accessing the Court as individuals are barred from bringing cases, unless a declaration accepting the right of individual petition has been made by the state concerned. Thus, it is unlikely that this newly-created body will fare any better than its predecessor in providing for the more effective protection of human rights and, in fact, given the constraints of who may petition the Court, it may do even worse, as the interests of the state are once again placed before those affected by human rights abuses on the continent.

Whilst some debate still continues as to the precise manner and form which a human rights court for Africa will take in terms of the possible merger of this institution with that of the Court of Justice, if anything is to be gleaned from the history of the drafting of the African Charter and the Protocol Establishing an African Court on Human and Peoples' Rights, it is that although African leaders are liable to make some concessions to outside demands, they will ultimately not do anything which will compromise their position of privilege and power.