

**THE AFRICAN REGIONAL HUMAN RIGHTS
SYSTEM AND OTHER REGIONAL SYSTEMS: A
COMPARATIVE ANALYSIS**

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CHAPTER 8

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Introduction

Human rights emerged as a subject of concern for the international community after the end of the Second World War. In May 1948, the American Declaration on the Rights and Duties of Man was adopted by the Ninth International Conference of American States and in December the same year the Universal Declaration on Human Rights was adopted by the UN General Assembly. In 1950 the European Convention on Human Rights was adopted by the Council of Europe. The Convention, which entered into force in 1953, established the European Commission of Human Rights and the European Court of Human Rights to monitor compliance with its provisions. In 1959 the Organization of American States (OAS) established the Inter-American Commission on Human Rights, which in 1965 was given the power to receive complaints from individuals of violations of the American Declaration. The American Convention on Human Rights was adopted in 1969 and entered into force in 1978. This Convention incorporated the Inter-American Commission and created an Inter-American Court of Human Rights.

The main institutional structure of these two regional human rights systems were thus already in place when the Organization of African Unity (OAU) Assembly of Heads of State and Government adopted the African Charter on Human and Peoples' Rights (African Charter) in 1981. The African Charter entered into force in 1986 and in accordance with its provisions the members of an African Commission on Human and Peoples' Rights (African Commission) were elected. In 1998 the OAU adopted a Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights (Protocol). This Protocol entered into force in January 2004 and the first judges were elected in January 2006.¹

¹ At the time of writing a draft protocol to merge the African Court on Human and Peoples' Rights and the African Court of Justice was discussed. In this article references to the African Court Protocol are to the 1998 Protocol.

This article examines the different legal frameworks and experiences of the European and Inter-American regional human rights systems. Particular focus is given to experiences of interest to the future work of the African Court.²

1 Monitoring

In 1998, the monitoring system under the European Convention was reformed. The European Commission of Human Rights was abolished and a new European Court of Human Rights with judges appointed on a full time basis was established. Today all members of the Council of Europe are state parties to the European Convention and individuals in these countries can petition the European Court of Human Rights directly concerning alleged violations of the Convention.³ A European Commissioner for Human Rights with a mandate to promote human rights was established by the Council of Europe in 1999.

The number of judges of the European Court of Human Rights is equal to the number of state parties to the Convention. Until it was dissolved in 1998, the European Commission of Human Rights also had a membership equal to the number of state parties. Though there is no provision that each state should have a national on the Court, in practice

² It should be noted that there are many other regional institutions dealing with human rights than are covered in this article. The transformation of the OAU into the African Union (AU) has been accompanied by institutional proliferation. In addition to the African Commission and Court and the African Committee on the Rights and Welfare of the Child, many of the AU organs have a human rights mandate. Human rights also play a role in African sub-regional organisations, perhaps most prominently in the Economic Community of West African States (ECOWAS). Similarly in Europe, the Council of Europe does not have a monopoly on human rights issues. The Organisation for Security and Co-Operation in Europe (OSCE) is very active in the human rights field. The European Union (EU) has adopted a Charter on Human Rights which incorporates all generations of rights. The EU currently has 25 member states and human rights requirements for joining the EU has led to many reforms in recently admitted and candidate countries.

³ Belarus is the only state in Europe that is not a member of the Council of Europe and a state party to the European Convention. This is because of the persisting dictatorship in the country accompanied by serious human rights violations.

this is the case even for the smallest member states, with one exception.⁴ The American Convention on Human Rights makes no provision on geographical distribution of Commissioners and Judges, who do not even need to be nationals of state parties to the American Convention. The African Court Protocol provides that the Judges of the Court shall represent 'the main regions of Africa and of their principal legal traditions',⁵ and while the Judges may be from AU states that have not ratified the Protocol, the nomination process makes this unlikely.⁶ There is no equivalent in the European or Inter-American system to the requirement for 'adequate gender representation' in article 12(2) of the Protocol on the African Court.⁷

To have the right people on the monitoring bodies is very important. Both the American and African Commissions and Courts are bodies with part time Commissioners and Judges meeting for a couple of weeks per year. This already limits the possible candidates since not everyone can take on this type of job. To ensure the best possible candidates it would be worth considering in future reforms of the African system that Judges and Commissioners should be elected by the Pan-African Parliament with input from civil society in the process. An example for such a reform could be the election of the Judges of the European Court who are elected by the Parliamentary Assembly of the Council of Europe.

Judges of the African Court are not allowed to sit on cases brought against their own countries.⁸ This has also been the practice of the African Commission. In contrast both the European Court and the Inter-American Court provide for judges from the complainant's home state to be on the bench.

⁴ There is no judge from Liechtenstein, but two from Switzerland.

⁵ Art 14(2) of the African Court Protocol.

⁶ As above, arts 11-14.

⁷ Of the 45 European Court judges only 12 are women. At the time of writing there was no woman on the seven-member Inter-American Commission and of the seven judges on the Inter-American Court only one is a woman. The African Commission compares favourably when it comes to gender representation. Five of the eleven members are women. In light of the pledges for gender parity of the AU it was a disappointment that of the eleven judges of the African Court elected in January 2006 only two were women.

⁸ Art 22 of the African Court Protocol.

For many years the African human rights supervisory system consisted only of the African Commission. The establishment of the African Committee on the Rights and Welfare of the Child, which held its first meeting in 2002,⁹ was the first specialised human rights monitoring body on the continent. Such specialised bodies exist also in the other regional systems. For example the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment establishes a Committee for Prevention of Torture. A Committee of Independent Experts monitors the implementation of the European Social Charter. The Inter-American Convention for the Elimination of All Forms of Discrimination against Persons with Disabilities (1999) establishes a Committee to supervise state compliance.

Neither the European Convention nor the American Convention provides for regular state reporting to monitor compliance.¹⁰ However, state reporting requirements exist under the European Social Charter and a number of Inter-American conventions.¹¹ Under the African Charter states are required to submit a report on implementation of the Charter every two years. This mechanism has not functioned very well. It has been suggested that the experiences under more successful reporting mechanism in the European Social Charter could provide some ideas for reform of the Charter mechanism.¹²

The Inter-American Commission and the African Commission have several similarities in their monitoring mechanisms. Both make use of

⁹ Lloyd, A 'The first meeting of the African Committee of Experts on the Rights and Welfare of the Child' (2002) 2 *African Human Rights Law Journal* 320.

¹⁰ Under the European Convention the Secretary-General of the Council of Europe can request reports, but such requests have been rare.

¹¹ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights; Inter-American Convention to Prevent and Punish Torture; Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women; Inter-American Democratic Charter; Inter-American Convention for the Elimination of All Forms of Discrimination against Persons with Disabilities.

¹² Quashigah, K 'The African Charter on Human and Peoples' Rights: Towards a more effective reporting mechanism' (2002) 2 *African Human Rights Law Journal* 261.

special rapporteurs¹³ and produce country reports based on on-site visits. The Inter-American Commission is mandated by the Convention to 'prepare such studies or reports as it considers advisable in the performance of its duties'.¹⁴ The Inter-American Commission has thus prepared a number of country reports, often based on on-site visits. It would be of interest for the African Commission to study the experience of the Inter-American Commission in this regard in particular in the light of its increased use of 'fact-finding' missions.

The confidentiality provisions in the African Charter are a matter of concern as the Commission has to get the approval of the AU Assembly to publish its reports. This is however not the full explanation of the lack of information available on the work of the Commission. The Inter-American Commission and Court and, in particular, the European Court has made much better use of the possibilities that information technology gives to spreading information about their work.

2 Complaints procedures

Prior to 1998, an individual alleging a violation of the European Convention could submit a complaint to the European Commission of Human Rights. This required that the state concerned had made a declaration allowing the Commission to consider the complaint. By the time the Commission was abolished all state parties had made such a declaration. Under the revised Convention individuals of all state parties now have direct access to the Court. The Court can consider alleged violations of the Convention and its Protocols.¹⁵

In 1965 the Inter-American Commission was given the power to consider individual complaints alleging violations of the American Declaration. With the entry into force of the American Convention in 1978 individuals

¹³ The Inter-American Commission has established three special rapporteurs, on migrant workers and their families, freedom of expression and rights of women.

¹⁴ Art 41(c) of the American Convention.

¹⁵ As of April 2006, 14 protocols to the Convention had been adopted. Some of these guarantee additional rights, while some deal with procedural reforms of the monitoring system.

of states that had ratified the Convention could submit complaints to the Commission alleging violations of the latter instrument, while the Commission would still consider petitions under the American Declarations from individuals in states that had not ratified the Convention. The Court can consider cases referred to it regarding alleged violations in states that have ratified the Convention, and that have made a declaration under article 62 of the Convention. The Inter-American Court delivered its first judgment in a contentious case in 1987. The reason for the lack of judgments by the Court in its early years was that no cases were referred to the Court by the Commission. The jurisdiction of the Commission and Court is not limited to violations of the Convention (and in the case of the Commission, the Declaration) but also include other conventions that give them explicit or implicit jurisdiction.¹⁶

Article 34 of the European Convention provides that a complaint shall be submitted by a person, NGO or group of individuals 'claiming to be a victim of a violation' by a state party. Under the American Convention it is not necessary for the individual against whom the alleged violation has been committed to submit the complaint. This can be done on his or her behalf by another person or organisation.¹⁷ The comment that this more liberal *locus standi* provision is important in the Americas 'where victims or their family members may be too intimidated or indigent to submit a petition'¹⁸ is equally valid for the African continent. Indeed, the African Commission has in its jurisprudence gone even further and allowed *actio popularis*.¹⁹

In both the European and Inter-American systems most petitions have been declared inadmissible. Possible explanations for this include that knowledge about the systems and what rights are protected is low. Many complainants do not seek legal advice.²⁰

¹⁶ Pasqualucci, J M *The practice and procedure of the Inter-American Court of Human Rights* (2003) 90.

¹⁷ Art 44 of the American Convention.

¹⁸ Pasqualucci (note 16 above) 6.

¹⁹ *Social and Economic Rights Action Centre (SEHRAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) para 49.

²⁰ Merrills, J G and Robertson, A H *Human rights in Europe – A study of the European Convention on Human Rights* (2001) 275.

The Inter-American Court can reverse the admissibility decisions of the Inter-American Commission.²¹ The same applied to the old European Court.²² The Protocol on the African Court also provides that the Court should take an independent decision on admissibility.²³ The possibility of reversing the admissibility by the Inter-American Court has been criticised by some observers, including a judge of the Court who held that this 'creates an imbalance between the parties, in favour of the respondent governments'.²⁴

The American Convention provides that the Inter-American Commission can request the Inter-American Court to adopt provisional measures in 'cases of extreme gravity and urgency'.²⁵ A similar provision does not exist in the European Convention, but the Rules of Procedure of the European Commission provided that the Commission could issue interim measures. Similarly the Rules of the European Court provides both for the issuing of interim measures and the fast-tracking of cases.²⁶

To decide cases the Inter-American Commission in general relies on the written information provided by the parties, though it may hold hearings, including the hearing of witnesses and on-site visits.²⁷ A hearing must be held if expressly required by one of the parties, but can also be held on the initiative of the Commission. Hearings before the Inter-American Commission are not public.²⁸ Oral hearings, which are public, are standard practice before the Inter-American Court.²⁹ The European Court may hold a hearing at the request of a party or on its own initiative.³⁰

²¹ Pasqualucci (note 16 above) 139.

²² Merrills & Robertson (note 20 above) 276

²³ Art 6(2) of the African Court Protocol.

²⁴ Pasqualucci (note 16 above) 140.

²⁵ American Convention art 63(2).

²⁶ Rules 39 and 41 of the Rules of Court.

²⁷ Pasqualucci (note 16 above) 141.

²⁸ As above 142-143.

²⁹ As above 194.

³⁰ Rule 54(3) of the Rules of Court.

All the regional human rights conventions provide that measures should be taken to try to obtain a friendly settlement between the parties. The Inter-American Commission has been relatively successful in obtaining friendly settlements. In 2005 it reached eight friendly settlements, while deciding six cases on the merits.³¹ The Inter-American Court does not play any role in trying to achieve a friendly settlement as opposed to the African system where it is foreseen that both the Commission and Court should pursue an amicable settlement.³² In the old European system the Commission was responsible for seeking a friendly settlement. This function that was transferred to the Registrar of the Court when the Commission was abolished.³³

3 Relationship between Commission and Court

With the reforms of the European human rights system in 1998, individuals in all state parties to the Convention (currently 45) were given access to the Court. Before the African Court such 'direct access' exists only if the state party to the Protocol has made a declaration under article 34(6) of the Protocol. For individuals of African states that have ratified the Protocol but not made such a declaration, the complaints procedure will be similar to the one in the Inter-American system and in the European system prior to the 1998 reforms.

Article 61 of the American Convention provides that only state parties and the Inter-American Commission can submit cases to the Inter-American Court and only against states that have recognised the competence of the Court to consider such cases.³⁴ The position of the individual is however not as difficult as a reading of this article would imply. Article 44 of the Rules of Procedure of the Inter-American Commission provides that when a state has not complied with the recommendations of the Commission, the Commission shall 'refer the

³¹ <<http://www.cidh.oas.org/casos/05.eng.htm>> (accessed 3 May 2006).

³² Padilla, D 'An African Human Rights Court: Reflections from the perspective of the Inter-American system' (2002) 2 *African Human Rights Law Journal* 189.

³³ Rule 62 of the Rules of Court.

³⁴ Art 62 of the American Convention.

case to the Court, unless there is a reasoned decision by an absolute majority of the members of the Commission to the contrary.' This 'automatic referral' that was introduced in 2001 has led to an increased number of judgments by the Court, which in April 2006 had delivered 140 judgments since its inception.³⁵

The role of the Inter-American Commission before the Inter-American Court was initially to represent the victims, but changes to the Rules of Procedure of the Court in 2001 now means that the victim has a more independent role as a party to the case.³⁶ Testimonial evidence from the Commission is admitted by the Court. At the request of the parties testimonies can be heard again by the Court.³⁷

The provision in the European Convention prior to the 1998 amendments was similar to the Inter-American Convention.³⁸ Only the European Commission of Human Rights or a state party could submit a case to the European Court of Human Rights.³⁹ The Rules of Procedure of the Commission provided that it should decide in plenary session whether a case should be referred to the Court or not.⁴⁰ The question of when the Commission should refer a case to the Court was not regulated in the Rules of Procedure of the Commission. Merrills and Robertson identify three criteria used by the Commission to decide whether to refer a case to the Court or not: whether the case raised new issues of interpretation of the Convention; whether the Commission was divided on whether a violation had taken place; and whether a case had 'important political implications'.⁴¹ Cases that were not submitted to the Court were sent to the Committee of Ministers which would determine whether a violation had taken place.

³⁵ <<http://www.corteidh.or.cr>> (accessed 3 May 2006).

³⁶ Art 2(23) of the Inter-American Court Rules of Procedure.

³⁷ Pasqualucci (note 16 above) p 199.

³⁸ Art 44.

³⁹ From 1994 individuals from states that had ratified a Protocol to the Convention could also refer cases to the Court, though a panel of three judges decided whether the case should be examined by the Court, while cases referred by the Commission or states were always considered by the Court.

⁴⁰ Rule 61(1) of the Rules of Procedure of the European Commission of Human Rights (as in force 28 June 1993).

⁴¹ Merrills and Robertson (note 20 above) 286.

4 Remedies and their enforcement

Article 63(1) of the American Convention provides as follows:

If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

The Inter-American Court has in many cases ordered the state to pursue investigations with the aim of identifying those responsible for a violation and to prosecute and punish them. The Court can also order the state to amend or repeal laws.⁴²

Article 41 of the European Convention reads as follows:

If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

The European Court has in many cases held that a declaratory judgment finding a violation constitutes just satisfaction and left it to the state to decide which measures should be implemented to comply with the judgment.⁴³ In recent years, the Court has started to give punitive damages and non-monetary relief, such as restitution, in some cases.⁴⁴

Though the African Court Protocol provides that its judgments are binding, there is no provision similar to the one in the American Convention that provides that reparations ordered by the Inter-American

⁴² Pasqualucci (note 16 above) 289.

⁴³ Shelton, *D Remedies in international human rights law* (2005) 281.

⁴⁴ As above 282.

Court can be enforced in national courts.⁴⁵ The role of the Committee of Ministers in ensuring the enforcement of judgments of the European Court⁴⁶ would be of interest to study in the light of the provision in the African Court Protocol providing that the AU Executive Council shall monitor the execution of the judgments of the Court.⁴⁷

5 Advisory opinions

The European Convention provides that the Committee of Ministers of the Council of Europe can request an advisory opinion from the Court on the interpretations of provisions of the Convention. In 2004 the Court declared the first request by the Committee of Ministers for an advisory opinion as falling outside the advisory competence of the Court.⁴⁸

More interesting from a comparative perspective is the advisory jurisdiction of the Inter-American Court.⁴⁹ Article 64 of the American Convention provides that

[t]he member states of the Organization may consult the Court regarding the interpretation of this Convention or other treaties concerning the protection of human rights in the American states. Within their spheres of competence [OAS organs] may in like manner consult the Court.

The Court delivered its first advisory opinion in 1982 and had by April 2006 adopted 18 advisory opinions.⁵⁰ In its first advisory opinion, the Court interpreted what is meant by 'other treaties' in article 64. The Court held that 'other treaties' include '[a]ny provision dealing with the protection

⁴⁵ American Convention art 68(2); Padilla (note 32 above) 193.

⁴⁶ Shelton (note 42 above) 384.

⁴⁷ Art 29(2).

⁴⁸ *Co-existence of the CIS Convention (applicable i.a. for Russia) and the ECHR*, 2 June 2004 (Grand Chamber).

⁴⁹ For a more detailed study of the advisory jurisdiction of the African court in light of the practice of the Inter-American Court see AP van der Mei 'The advisory jurisdiction of the African Court on Human and Peoples' Rights' (2005) 5 *African Human Rights Law Journal* 27.

⁵⁰ <<http://www.corteidh.or.cr>> (accessed 3 May 2006).

of human rights set forth in any international treaty applicable in the American States ... whether or not non-member states of the inter-American system are or have become parties thereto.⁵¹

This case is of particular interest for the African Human Rights Court in that the African Court Protocol in provide that the African Court has jurisdiction over the 'interpretation and application' of the African Charter or 'any other relevant human rights instruments'.⁵²

One limitation to the advisory jurisdiction of the Inter-American Court that has been noted is that it cannot on its own motion issue advisory opinions.⁵³ Though the African Court does not explicitly have such competency there is nothing preventing it from providing for such a possibility in its rules as the Court after the merger will be an AU organ and as such could request an advisory opinion from itself. Under article 3(2) of the African Court Protocol, it is up to the Court to decide whether it has jurisdiction. The Court could use its competence to issue advisory opinions on its own motion. This would be similar to the resolutions adopted by the African Commission and the general comments adopted by the UN human rights treaty bodies.

Conclusion

Today 800 million Europeans have direct access to the European Court of Human Rights. It has become a European Constitutional Court. With the expansion of state parties to the European Convention, the European Court has become a victim of its own success. The popularity of the Court has made it essential to increasingly look for new ways to improve the effectiveness of the system and in particular ensure speedy judgments in cases that raise important human rights issues.⁵⁴ The Inter-American

⁵¹ Advisory Opinion OC-1/82 of 24 September 1982, Series A No 1, para 52. See Van der Mei (note 32 above) 38.

⁵² Arts 3 and 4 of the African Court Protocol.

⁵³ Pasqualucci (note 16 above) 37.

⁵⁴ Lord Woolf *Review of the working methods of the European Court of Human Rights*, December 2005.

system has had a smaller case load and this system arguably displays more similarities with how the African system could come to develop than the European system. It is suggested that the African Commission should adopt a system for referral similar to the one that is the practice of the Inter-American Commission since the revision of its Rules of Procedure in 2001. Pasqualucci identifies the lack of universal applicability of the jurisdiction of the Court, necessity for domestic implementation of the Convention rights, the failure of OAS organs to exert political pressure, inadequate funding and quality control of judges as limitations for the effective functioning of the Inter-American human rights system.⁵⁵ These are issues that must be addressed also in Africa to ensure an effective protection of human rights.

One major problem experienced by the African Commission has been that states do not respond to allegations contained in communications. To ensure that states participate in the procedures before the Court will be one of its main challenges. Fear that states would not participate in the hearings before the Inter-American Court did not materialise. Indeed in some cases states have even accepted responsibility, leaving to the Court only to determine the remedies.⁵⁶ It is to be hoped that a similar practice will develop in Africa. As has often been pointed out, perhaps the most important factor affecting the success of the African Human Rights Court will be the effective functioning of the African Commission. Hopefully, it will not wait as long as its European and Inter-American counterparts to refer cases to the African Court.

⁵⁵ Pasqualucci (note 16 above) 340.

⁵⁶ As above 7-8.