Chapter 7 DISCUSSION OF DRAFT PROTOCOL

7.1 Introduction

The historical process, through which the draft Protocol establishing an African Court on Human and Peoples' Rights was adopted, has been discussed elsewhere.[1] The aim of this chapter is to analyse the proposed Protocol. The Protocol should be scrutinised critically to ensure that the proposed Court takes the form best suited to the realisation of human rights in Africa. The basis of discussion is the draft Protocol which was adopted at Cape Town in September 1995,[2] as subsequently amended at Nouakchott in April 1997.[3] The purpose of this analysis is twofold. As the proposed Protocol to the Charter is not yet finalised, further comments could probably still be considered before the final version is adopted. On the other hand, it is accepted that its basic form has already been moulded. How to maximise the Court's effectiveness and its putting into place is therefore the other aim of this analysis.

An initial question arises: At which level should this Protocol be discussed? Different levels of simplifying or explaining legal texts may and should be identified:[4]

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1 Chapter 6.1 above.

2 OAU/LEG/EXP/AFC/HPR/PRO (I) Rev I, reprinted in (1996) 8 *RADIC* 493.

3 OAU/LEG/EXP/AFC/HPR/PROT (2), adopted at the second government legal experts meeting, held from 11 to 14 April in Nouakchott, Mauritania.

4 During the drafting of the South African Constitution much emphasis has been placed on a "plain language" approach. To me, it was never clear at which level this "simplification" is directed. A comparison between the interim and final Constitutions reveals a deletion of words such as "shall", changing of passive voice constructions, shortening of sentences, division into sub-sections and listing of different aspects by item.

Footnotes continued on next page.

- *Explanation for lawyers*

The text may be explained for lawyers' consumption. This means that the text remains a document for lawyers. It is only made easier to access, understand and apply. The vocabulary remains locked in a technical register. But even in discussions aimed at lawyers overly formalistic and traditional legal language ("legalese") can and should still be avoided by applying the tenets of "plain English" (or "plain language").[5] In this chapter, the draft Protocol will first (and primarily) be discussed at this level. Some suggestions will illustrate how "plain language" tenets could be used to redraft the proposed provisions.

- *Simplification directed at the average informed adult*

To communicate with the average informed adult, one has to escape from the legal register to make room for the general, everyday vocabulary. Especially those "lay persons" in a position to create wider understanding or application of the law should be able to understand the relevant texts.[6] People like teachers, police officials, prison officials, para-legals, members of NGOs and community workers should all be in a position to understand and create wider understanding. In this chapter, the simplified version takes the form of a scheme that highlights the most important features of the Protocol, and its relationship to the African Charter.[7] It is presented in a colourful and user-friendly way. A schematic presentation has the added advantage of giving an overview at one glance. The reader is spared the trouble of struggling through the 34 articles of the Protocol and the 68 articles of the Charter to reconstruct meaning.

The final Constitution certainly is much more elegant and easier to read, but still by no means accessible to the average South African.

5 In these tenets, see eg the Law Reform Commission of Victoria (Australia) *Drafting Manual*, and a series of articles in *Michigan Bar Review*, see eg (1993) *Michigan Bar Review* 826 and 1198, and (1994) *Michigan Bar Review* 326.

6 As Gutto indicates, the use of "plain language" in law is ultimately aimed at making institutions "accessible" and more "participatory" ((1995) 11 *SAJHR* 311)).

7 I call it a scheme, but the term "algorithm" has also been used (see Mnqaba (1995)). The purpose of such an "algorithm" is to present rules in a visually more comprehensible and attractive format. It is done by breaking the rule up into questions, each with a "yes" or "no" answer. The user proceeds through the scheme by asking questions and ends up at the desired endpoint, which answers his or her legal problem.

- *Simplification directed at the relatively illiterate majority*

Using ordinary vocabulary, schemes or charts will still not reach the relatively illiterate majority. To really simplify a legal document, one needs to rethink concepts. Merely translating technical concepts into everyday language is insufficient.[8] In Africa, especially, the deficiencies in education

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[8] See eg the 1983 Constitution of Liberia, which was accompanied by a "simplified version" drafted by the Constitutional Advisory Assembly. This presents on illustration of how constitutional texts may be made accessible to "all" nationals. Two examples are cited:

Example 1

Article 1 from the Constitution:

STRUCTURE OF THE STATE

All power is inherent in the people. All free governments are instituted by their authority and for their benefit and they have the right to alter and reform the same when their safety and happiness so require. In order to ensure democratic government which responds to the wishes of the governed, the people shall have the right at such period, and in such manner as provided for under this Constitution to cause their public servants to leave office and to fill vacancies by regular elections and appointments.

Article 1 of the simplified text:

STRUCTURE OF THE STATE

(HOW OUR COUNTRY IS MADE)

The people have the power to make a government and they have the right to change it if the government is not good.

Example 2

Article 22 from the Constitution:

(a) Every person shall have the right to own property alone as well as in association with others; provided that only Liberian citizens shall have the right to own real property within the Republic.

(b) Private property rights, however, shall not extend to any mineral resources on or beneath any land or to any lands under the seas and waterways of the Republic. All mineral resources in and under the seas and other waterways shall belong to the Republic and be used by and for the entire Republic.

(c) Non-citizen missionary, educational and other benevolent institutions shall have the right to own property, as long as that property is used for the purposes for which acquired; property no longer so used shall escheat to the Republic.

(d) The Republic may, on the basis of reciprocity, convey to a foreign government property to be used perpetually for its diplomatic activities. This land shall not be transferred or otherwise conveyed to any other party or used for any other purpose, except upon the expressed permission of the Government of Liberia. All property so conveyed may escheat to the Republic in the event of a cessation of diplomatic relations.

Article 22 from the simplified text:

Footnotes continued on next page.

and information dissemination have been identified as paramount obstacles in communication. Any project aimed at making a legal instrument accessible to Africans has to attach considerable weight to this factor. Otherwise, "accessibility" and "promotion" not only remain ineffectual, but also become dishonest rhetoric. A few seminars or a few speeches broadcast on national television are bound to have minimal impact on the rural majority. Ultimately, in the African context, reinventing legal texts in local languages stands the best chance of conveying their content to the African masses. As this can hardly be attempted here,[9] an effort will be made to discuss the Protocol only at the first and second levels identified above.

7.2 Explanation for lawyers

The most recent draft Protocol, the one adopted by governmental experts in April 1997 at Nouakchott (the "Nouakchott Protocol"),[10] forms the basis of discussion. Reference will be made to the following previous drafts and *travaux préparatoires*:

- the proposal adopted at the 5th International Commission of Jurists Workshop on NGO Participation in the African Commission, held in Addis Ababa in November 1993 (the "Addis Ababa proposal");[11]

Every person in Liberia shall have the right to own property alone or together with other people, but only Liberian citizens can buy land and own deed. Properties like gold, diamond, iron ore, and so forth, under the ground belong to government. Church people and other foreigners whose purpose is not to make profit shall be allowed to buy lands. If they stop doing the thing for which they bought the land and begin to make profit, then the land will go back to the government. Government will give lands to Ambassadors from different countries and if they stop to work in Liberia, then the government will take back the land.

While this may be an admirable attempt at creating an understandable text, the end-product is a mixture of legal concepts (such as "deed" "citizens" and "properties").

9 Primarily due to the variety of languages spoken in Africa.

10 It is also referred to as "the Protocol", document OAU/LEG/AFC/HPR/PROT(2), adopted in Nouakchott on 14 April 1997.

11 International Commission of Jurists document Additional Protocol to the African Charter on Human and Peoples' Rights, Fifth International Commission of Jurists Workshop on NGO Participation in the African Commission on Human and Peoples' Rights, 28 - 30 November 1993, Addis Ababa, Ethiopia.

- "Explanatory Notes to Draft Additional Protocol",[12] drafted by a group of experts who met under International Commission of Jurists auspices in Geneva to finalise the Addis Ababa proposal.
- the version adopted by the first meeting of government legal experts at Cape Town in September 1995 (the "Cape Town Protocol");[13]
- the report adopted with the draft (Cape Town) Protocol,[14] which reflects the deliberations during the Cape Town meeting;
- comments by OAU member states in response to an invitation by the Secretary-General for commentary on the Cape Town Protocol, which are contained in the Report of the OAU Secretary-General, prepared for the 65th meeting of the Council of Ministers;[15]

The African Court on Human and Peoples' Rights, as proposed in the Nouakchott Protocol, is compared to other international courts. Courts that are included are, at the global level, the International Court of Justice (the "ICJ") and the International Tribunals established in respect of the ex-Yugoslavia and Rwanda. Courts referred to at the regional level are the European and Inter-American Courts of Human Rights and the European Court of Justice. At the sub-regional level, the various courts provided for in the treaties of African regional organisations are considered.[16]

7.2.1 Form of the Protocol

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12 Also an International Commission of Jurists document, marked "Fifth Workshop on NGO Participation in the African Commission on Human and Peoples' Rights", 28 - 30 November 1993, Addis Ababa, Ethiopia. This will be referred to as "Explanatory Notes". "Explanatory notes" were also made available to delegates at the Cape Town meeting. This largely resembles the previously drafted explanatory notes.

13 Document OAU/LEG/EXP/AFC/HPR/PRO (I) Rev I, adopted in Cape Town on 12 September 1995.

14 OAU document OAU/LEG/EXP/AFC/HPR/RPT (I) Rev I Report on Government Experts Meeting on the Establishment of an African Court on Human and Peoples' Rights 6 - 12 September 1995, Cape Town, South Africa.

15 See OAU document CM/1996 (LXV), Report of the Secretary-General on the Draft Protocol on the Establishment of an African Court on Human and Peoples' Rights, prepared for the 65th ordinary session of the OAU Council of Ministers (24 - 28 February 1997, Tripoli, Libya).

16 See eg the most detailed, the Protocol on the ECOWAS Community Court of Justice in (1991) 19 *Official Jnl of ECOWAS* 4.

The African Charter, adopted in 1981, does not provide for a judicial body, such as a court. In international law, generally, there is no obligation to submit inter-state disputes or disputes involving states and individuals or NGOs for judicial settlement by an international tribunal.[17] The decisions of an international court only bind a state that has given prior consent to accept the court's jurisdiction. Consent may be given in one of two ways: It may be given on an *ad hoc* basis, for the purpose of a particular dispute, or it may be of a more general nature, as provided for in a treaty before any concrete dispute arises. The states parties to the African Charter did not provide any such consent. The question therefore arises: If a Court on Human and Peoples' Rights is to be established, by what mechanism should this be set in place: by amendment to the Charter, or by an amending or optional Protocol to the Charter?

7.2.1.1 Amendment to the Charter?

The Court may be established by way of an amendment to the African Charter. The process of amendment is provided for in the Charter, and must proceed as follows:[18]

- Any state party may present a written request for an amendment to the OAU Secretary-General.
- All states parties are then informed of the proposal, and the state sponsoring the amendment gives an opportunity to the Commission to express its opinion.
- The Assembly of Heads of State and Government "may" then "consider" the draft amendment. A simple majority of the states parties is required to approve the amendment.

If a simple majority has approved amendment, it comes into force only for those states that have "accepted" the amendment. The commencement date is three months after the Secretary-General has received "notice of the acceptance". It is not clear whether a state's vote at the Assembly meeting to "approve" the amendment in itself constitutes "acceptance". A strict reading of the text

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17 Bilder in Henkin & Hargrove (eds) (1994) at 319.

18 Art 68 of the African Charter.

(that is, the deliberate terminological difference between "accept" and "approve") seems to suggest that the vote of approval merely opens up the process. States still have to file a "notice of acceptance" before they will be bound by the amendment. In this interpretation the process of amendment resembles that of agreeing to an optional protocol.

Another interpretation is also possible. Approval of the amendment may be interpreted by states as changing their obligations under the Charter, without them being required to file separate notices of acceptance. If the last interpretation is accepted, the simple majority required to secure approval may be too burdensome to create an African Human Rights Court in the foreseeable future. Uncertainty surrounding the precise process of amendment,[19] and the high threshold required to effect amendment that is likely to be accepted in the Protocol (a simple majority of OAU member states), are major obstacles on this possible route to establishing a court.

7.2.1.2 A Protocol: Amending or optional?

A distinction should be drawn between amending and optional protocols:

- An amending protocol introduces fundamental reform, and requires the consent of all the states parties to the original treaty in order for it to enter into force.[20] Protocol no 11 to the European Convention is an example of an amending protocol, which requires the consent of all states parties before it will enter into force.[21]

- All states parties to the original treaty need not accept an optional protocol. The original states will have to create it, and their support is necessary to open the process of optional ratification. But the Protocol may turn into force if a much smaller number of states have ratified it, as in the case of the Optional Protocols to the CCPR. An optional (or "additional") Protocol has been adopted to set up another Court in Africa. The ECOWAS Court of Justice was

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19 The African Charter has not been amended since its inception.

20 As is required in the case of Protocol no 11 to the European Convention. (See, about the nature of that Protocol, Council of Europe (1994b) at par 55.)

21 See ch 5.1.1 above.

established by way of a Protocol that was adopted by the Heads of State and Government of ECOWAS. At its adoption, the Protocol entered into force "provisionally", but it will only enter into force "definitively" after ratified by at least seven member states.[22]

The African Charter provides that special protocols or agreements may, if necessary, supplement the provisions of the Charter.[23] The Charter does not provide for any other requirements to be met, leaving it to the protocol or agreement to spell out particulars. This factor clearly makes it appropriate to refer to the Nouakchott Protocol as an "optional" (or even an "additional Protocol"), as it supplements the Charter. This seems to present the most promising route to secure the participation of a smaller number of states than 26 (a simple majority of OAU members), at least initially, to get the Court going.

But will an optional Protocol creating a court not be an "amending" protocol[24] as well? It is arguable that the Protocol does more than "supplement" the Charter. State parties to the African Charter have, at the time of ratification, not consented to the jurisdiction of a regional tribunal. Such a fundamental amendment cannot automatically bind states parties to the African Charter. In this argument, the Protocol should rather be termed an "amendment" or an "amending" Protocol and should be adopted in terms of article 68 of the Charter. An amendment or "amending Protocol" will require the consent of all states parties to the Charter to be bound by the jurisdiction of the Court. In my view, there is no reason why this route has to be followed, and a number of considerations weigh heavily against it. In the European system, it was imperative to adopt Protocol no 11 as an amending Protocol, as it would cause one institution (the European Commission) to be replaced by another (the Court). The changes brought about by the Protocol under discussion are less dramatic: An existing institution (the Commission) is retained, with its functions merely being supplemented (by the Court).

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22 Art 34 of the Protocol establishing the ECOWAS Community Court of Justice.

23 Art 66.

24 And therefore also an "amendment' in terms of art 68 of the Charter.

7.2.2 Preamble

Those member states of the OAU that agree to the Protocol, will do so with the following preambular declaration in mind:

Considering that the Charter of the Organisation of African Unity recognises that freedom, equality, justice, peace and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples,

Noting that the African Charter on Human and Peoples' Rights reaffirms adherence to the principles of Human and Peoples' Rights, freedom and duties contained in the declarations, conventions and other instruments adopted by the OAU, and other international organisations,

Recognising that the twofold objective of the African Charter on Human and Peoples' Rights is to ensure on the one hand promotion and on the other protection of human and peoples' rights, freedoms and duties,

Recognising further, the efforts of the African Commission on Human and Peoples' Rights in the protection and promotion of human and peoples' rights since its inception in 1987,

Recalling Resolution AHG/Res.230 (XXX) adopted by the Assembly of Heads of State and Government in June 1994 in Tunis, Tunisia, requesting the Secretary-General to convene a Government experts' meeting to ponder, in conjunction with the African Commission, over the means to enhance the efficiency of the African Commission in considering particularly the establishment of an African Court on Human and Peoples' Rights,

Firmly convinced that the attainment of the objectives of the African Charter of Human and Peoples' Rights requires the establishment of an African Court on Human Peoples' Rights to complement and reinforce the functions of the African Commission on Human and Peoples' Rights.

The Preamble provides the historical and political context in which the Protocol stands to be adopted. In the first paragraph, reference is made to the founding document of the OAU, its

Charter of 1963.[25] Being embedded in the OAU framework, the Protocol is not isolated from broader African concerns, such as efforts to enhance unity by the adoption of the Abuja Treaty establishing the African Economic Community. From the second paragraph, the close link between the African Charter, adopted in 1981, and this Protocol, is stressed. The link lies in the fact that the African Commission has proved to be insufficient to protect human and peoples' rights provided for in the Charter. An African Court on Human and Peoples' Rights is to supplement, not to substitute, the protection already undertaken by the Commission. The Commission retains its mandate. The Court's supplementary nature underscores the past and future contribution of the Commission.

Close reliance is placed on the authority of the Charter and of the Assembly as the source of the Protocol. The creation of a Court is presented as a continuation of trends, rather than a rupture with the past or a futuristic novelty. The authority of the Heads of State and Government is invoked by referring to their resolution which formally set the process of adoption into motion. In the last paragraph, the clearest indication is given of the drafters' passionate support for the establishment of the Court. Their "firm conviction" that a Court is "required", is based on the provisions of an existing instrument, the African Charter. A Court is to be established, not as a court for court's sake, or to threaten state sovereignty, but to realise the "attainment of the objectives of the African Charter".

The Protocol preamble differs from the Addis Ababa proposal in one small, but significant respect. The Cape Town draft incorporated and the Nouakchott draft retained the word "duties" in the third paragraph of the Preamble. This mirrors the inclusion of the concept both in the preamble to and in the substantive part of the African Charter. This could be read as an attempt, at the rhetorical level, to provide the Protocol with a clearer "African" foundation. At a conceptual level, it seeks to

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25 The first paragraph of this Preamble is identical to the second paragraph of the Preamble to the African Charter.

provide a notion familiar to African societies as a jurisprudential counter-balance to "rights and freedoms" included in the Charter.[26]

7.2.3 Article 1: Establishment of the Court

> *There shall be established an African Court on Human and Peoples' Rights "hereinafter referred to as the Court", the organisation, jurisdiction and functioning of which shall be governed by the present Protocol.*[27]

Aspects related to the proposed Court are regulated by the Protocol. Implicitly, this is a reminder that the African Charter does not provide for a court, and therefore this provision underlines the need for a separate Protocol. Article 1 has to be read with article 32, which empowers the Court to draw up its own Rules of procedure. The Protocol will, subsequently, be "extended" by these rules.

What's in a name? In the name of this "African Court on Human and Peoples' Rights", two elements are most striking:

- It is established as an explicitly continental ("African") Court, on the model of the two other regional human rights courts, the "European" and "Inter-American" Courts.
- Where the other two Courts are denoted Courts of "Human Rights", this one is a Court of "Human and Peoples' Rights". This recalls the substantive provisions contained in the African

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26 See Heyns (1996), who proposed that the "final" South African Constitution should make use of the "African" concept of "duties" to limit rights, rather than limitation mechanisms taken over from systems without roots in African soil.

27 Only the words "the Court" should have been placed in inverted commas. Redrafted according to plain language tenets, this article could read: "This Protocol establishes an African Court on Human Peoples' Rights and regulates its organisation, jurisdiction and functioning." The redrafted version discarded two formalistic and meaningless "shall"s, converted two passive voice constructions into the active voice, and reduced the number of words. A general definition article could be inserted at the end of the Protocol, which would clarify the shortened references. It would in my view also suffice to place ("the Court") after "Rights" in the version under discussion.

Charter, which set out the basis for the Court's jurisdiction. In other words, this feature also emphasises the "African" nature of the Court.

Note should be taken of the potential terminological snag created by the use of prepositions in the regional systems. The founding documents are the African Charter *on* Human and Peoples' Rights, the American Convention *on* Human Rights and the European Convention *on* Human Rights[28]. While the other two Courts are courts "*of* Human Rights", the African equivalent is a court "*on* Human and Peoples' Rights".[29] This preference is probably informed by the name of the existing supervisory body under the Charter, the African Commission *on* Human and Peoples' Rights.

7.2.4 Article 2: Relationship between the Court and the Commission

> *The Court shall complement the protective mandate of the African Commission on Human and Peoples' Rights "hereinafter referred to as the Commission", conferred upon it by the African Charter on Human and Peoples' Rights, "hereinafter referred to as the Charter".*[30]

Two objectives of the African Charter are identified in the Preamble to the Protocol: **promotion** and **protection** of rights, freedoms and duties. Since its inception, the Commission had been entrusted with both these functions. This article clearly states that the Court does not substitute, but rather supplements, complements and reinforces the work of the Commission. But the supplementary function extends only as far as the protective function is concerned. This means that promotion remains the exclusive domain of the Commission, while protection becomes the

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28 Officially known as the European Convention for the Protection of Human Rights and Freedoms, though. But see eg Harris *et al* (1995) *Law of the European Convention on Human Rights.*

29 This was not the case in the Cape Town draft, where "of" was used.

30 Again, the inelegancy of the inverted commas arises. The relevant phrase should rather have read "hereinafter referred to as 'the Commission'". Another attempt at redrafting: "The Court complements the protective mandate which the African Charter has conferred upon (granted ?) the Commission".

joint responsibility of the Commission and the Court. In fact, the general rule is that a communication will be entertained by both the Commission (first) and the Court (thereafter).

A rigid categorisation between promotion and protection does not reflect reality. The Court's judgments, especially advisory opinions, may have a great educational and promotional value. As for the primacy of the promotional function in the work of the African Commission: The European Commission, operating in a vastly different context, has no explicit mandate to promote human rights awareness. The Inter-American Commission has a mandate to "develop awareness of human rights among the peoples of America".[31] This region, which is in need of mass awareness raising, has also seen the development of a specific institute for the promotion of human rights.[32] A similar evolution in Africa would be advisable.

As far as the protective function is concerned, the focus of the Commission's work could also be affected. Its role should be to screen complaints to ensure that the Court is not overrun by complaints, and to collect data and information.[33] This will require an extension of the present fact-finding mandate of the Commission. It is submitted that the competence to undertake effective factual studies, to interview witnesses and to collect evidence is already provided for in the Charter.[34]

The two other regional systems each also has a two-tier system in place, in terms of which complaints are directed first to the Commission. Only after a filtering process may the Court's jurisdiction be invoked. In both the European and the American system the Commissions have been much more active than the Court.[35]

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31 Art 41(a) of the American Convention.

32 The Center for Justice and International Law (CEJIL).

33 This is in line with commissioner Amega's opinion that "the Commission serves as an organ of investigation" in terms of the Protocol ((1997) 7 *African HR Newsletter* at 2).

34 See the wide mandate in art 46 of the Charter: "The Commission may resort to any appropriate method of investigation...".

35 See ch 5.1 and 5.2 above.

7.2.5 Article 3: Jurisdiction

1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and the application of the Charter, this Protocol and any other applicable African Human Rights instrument.

2 In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by decision of the Court.

This article introduces the two different types of jurisdiction the Court may assume: **advisory** (mainly abstract "interpretation") and **contentious** (matters arising from the concrete "application" of the Charter). This jurisdiction is not restricted to the Charter and the Protocol, but extends to "any other applicable African Human Rights instrument". This reference is repeated in article 4(1), where this aspect is discussed.

The implication of this provision is that once a state has ratified the Protocol, it accepts, as a necessary consequence, the Court's compulsory jurisdiction relating to both individual and inter-state complaints. In terms of the Charter, both types of complaints are automatically possible once a state has ratified the Charter. In this sense, inroads into state sovereignty therefore follow immediately after ratification. The respective positions under the European and Inter-American systems differ. In terms of the European Convention, ratifying states automatically accept the Commission's jurisdiction in relation to inter-state complaints.[36] States may at any stage after ratification formally recognise the competence of the Commission to receive individual applications.[37] The position in the American Convention is the inverse: States become liable for scrutiny by the Commission on the basis of individual complaints automatically when they ratify the American Convention,[38] while the inter-state complaint procedure is optional.[39] States parties

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36 Art 24 of the European Convention.

37 Art 25 of the European Convention.

38 Art 44 of the American Convention.

39 Art 45(1) of the American Convention.

to both these regional Conventions must make express declarations that they accept the jurisdiction of the respective Courts.[40]

Under the Protocol, ratification entails accepting the jurisdiction of the Court in all instances. Tunisia presented a proposal at the Nouakchott meeting that the competence of the Court should be made subject to the requirement of a declaration from each state party accepting such competence.[41]

The jurisdiction of the Court extends to "cases ... submitted to it concerning the interpretation and application of the Charter ... and any other applicable African Human Rights instrument". Its advisory jurisdiction explicitly provides for opinions not only on the African Charter, but also on "other African human rights instruments".[42] A question that arises in this regard, is whether the Court's contentious jurisdiction also includes the provisions in "other African human rights instruments". In terms of this article, the Court has jurisdiction about the "application" of the Charter and "any other applicable African human rights instrument". Does this mean that the Court is endowed with contentious jurisdiction over disputes arising from the Convention on the Conservation of Nature and Natural Resources, for example, or any other regional human rights instruments?

Three arguments may be raised against such an interpretation.

- Article 3 states the general position on jurisdiction. Because the Court's advisory jurisdiction includes opinions on "other African human rights instruments", this aspect must be included in the general provision on jurisdiction. When the Protocol treats advisory jurisdiction, it repeats reference to these "other" instruments. Nowhere else is reference made to "other African human rights instruments" again. The implication is that the term is only included under the general provision for "jurisdiction" to provide for "advisory", and not contentious, jurisdiction.

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40 Art 46 of the European Convention and art 62 of the American Convention. Both provisions distinguish between conditional and unconditional acceptance of the Court's jurisdiction.

41 See OAU/LEG/EXP/AFCHPR/RPT(2) at par 19.

42 See art 4 of the Protocol, and the accompanying discussion.

- Human rights instruments in force in Africa, apart from the African Charter, do not provide for individual complaints mechanisms. It seems unreasonable to accept that the Protocol would have such a crucial amending effect on these instruments.

- If ratification of the Protocol entails the possibility of bringing individual complaints under all African human rights instruments, future ratifications of the existing human rights instruments will be inhibited, as will ratification of future African human rights instruments and of the Protocol itself.

Côte d'Ivoire objected to article 3(2) on the grounds that the Court will be a judge in its own cause by ruling on its own competence.[43] Instead, the government argued that the Commission should be given the competence to rule on a dispute. In his report on the state comments, the Secretary-General refuted this objection as follows: "The complementarity between the Commission and the Court and the need to ensure speedy and less costly settlement of cases would make such a proposal unwise, if not unworkable. Indeed, this would subject one of the bodies to the other, something the draft has tried to avoid."[44]

7.2.6 Article 4: Advisory opinions

1. At the request of a member State of the OAU, any of its organs, or any African organisation recognised by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or other applicable African human rights instruments.

2. The Court shall give reasons for its advisory opinions provided that every judge shall be entitled to deliver a separate or dissenting opinion.

7.2.6.1 Standing to request an opinion

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43 See OAU document CM/1996 (LXV) Annex III (h).

44 See OAU document CM/1996 (LXV) at 6.

The provision for standing to request an advisory opinion is very broad. There is, first of all, no requirement that a state must have ratified the Protocol - all member states of the OAU may make a request in terms of this article. Besides, not only member states, but also any OAU organ and "any African organisation recognised by the OAU" may approach the court for an advisory opinion. OAU organs include the Commission, the Secretary-General and the Council of Ministers. NGOs with observer status with the African Commission should all qualify as "recognised" organisations.[45] After the Commission's 15th session, there were 131 "organisations granted observer status" with the Commission.[46] At present the number has increased beyond 200.[47] Individuals may not approach the Court for advisory opinions.[48]

Experience under the Inter-American system has shown that requests for advisory opinions are more likely to come from the Commission than from individual states.[49] By requesting an opinion on an issue affecting states that had not accepted the jurisdiction of the Court, such states could be brought indirectly under the purview of the Court.[50] Although advisory opinions are not legally binding, they are legitimate and authoritative pronouncements of legal principle. Non-compliance

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45 It is suggested that the recognition of an NGO through the granting of observer status by the African Commission would mean that the NGO is an "organisation recognised by the OAU". The Commission is established by and functions as an institution under OAU auspices. As far as could be ascertained, no other procedure exists for the recognition of NGOs by the OAU.

46 See the Commission's Seventh Activity Report, OAU document AHG/198/ (XXX), listed at 36 to 61. However, a number of these organisations (such as Amnesty International, or International PEN, or even the International Commission of Jurists) are not in the narrow sense of the word "African" in nature. A broad interpretation should be followed to include all organisations which are actively involved in improving the plight of Africans. These organisations have in the past been active in bringing cases to the Commission.

47 See ch 3.3.1.10 above.

48 See also the competence of the ECOWAS Community Court of Justice, art 10 of the Protocol. Individuals do not have standing at all before that Court.

49 See Buergenthal & Shelton (1995) at 265: Of the first fourteen advisory opinions, five requests came from the Commission. At that stage 16 states have made declarations accepting the Court's jurisdiction. Of this 16, only five states approached the Court for advisory opinions: Costa Rica (four cases), Uruguay (three cases), and one each from Colombia and Peru. Argentina joined in one of the cases presented by Uruguay.

50 See ch 5.2 above.

does not constitute a breach of treaty obligations, but "the state is on notice that its conduct violates its treaty obligations".[51]

7.2.6.2 Subject matter of advisory opinions

Opinions may be sought not only on the interpretation of the Charter, but on matters relating to "other applicable African human rights instruments"[52] as well. Examples of instruments implied here are the African Convention on the Conservation of Nature and Natural Resources of 1968, the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969, the Convention on the Rights of the African Child of 1989 and the African Convention on the Ban on the Import of All Forms of Hazardous Waste into Africa and the Control of Transboundary Movements of Such Waste Generated in Africa (the "Bamako Convention", adopted in 1991).

Declarations with which a state expressed its agreement are also included. So, for example, will the Algiers Declaration on the Rights of Peoples be included in the Court's advisory jurisdiction.[53] The end result of the inclusion of "other African human rights instruments" would be that states would have to consider with more seriousness the consequences of signing or ratifying any regional instrument. If, for instance, a convention on the rights of African women is adopted, or the Charter is supplemented with an additional or optional protocol on women's rights,[54] states will have to bear in mind that the Court may give advisory opinions on that instrument.

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51 Buergenthal (1995) at 221.

52 The Cape Town draft did not include the word "applicable". The latter draft is to be preferred, as it uses the same terminology as art 3.

53 Contained in Shivji (1989) at 111 - 115, and discussed by him at eg 95 - 103. Other African human rights declarations are The Dar es Salaam Declaration on Academic Freedom and Social Responsibility of Academics (of 1990), the Khartoum Declaration on Africa's Refugee Crisis (of 1990), and the Kampala Declaration on Intellectual Freedom and Social Responsibility of 29 November 1990. For the texts of these declarations, see web site www.umn.edu/humanrts/africa/KAMDOK.htm.

54 See ch 3.8 above.

This also means that a judicial institution will in some cases substitute the function of a non-legal, conciliatiatory mechanism provided for under the original treaty. In terms of the African Convention on the Conservation of Nature and Natural Resources, disputes about the interpretation and application of the Convention "which cannot be settled by negotiation, shall at the request of any party be submitted to the Commission of Mediation, Conciliation and Arbitration"[55] of the OAU. An issue that immediately arises is whether the assumption of jurisdiction by the African Court on Human and Peoples' Rights would amount to an amendment of that treaty. Would states have to consent, or will this automatically became applicable even to states that have ratified the Convention before the new Court was instituted?

Article 4 restricts the human rights instruments on which advisory opinions may be rendered, to those of "African" origin and does not extend to international human rights instruments (such as the CCPR or CRC) which OAU member states have ratified. To enlarge the scope of the Court's jurisdiction to include all human rights instruments to which a state may be party, does not seem feasible. This would for example mean that the UN Human Rights Committee and the Court would have simultaneous jurisdiction in a matter arising from the CCPR.

The Addis Ababa proposal stipulated that the Court may provide a requesting state "with opinions regarding the compatibility of any of its domestic laws with the aforesaid treaties".[56] It is submitted that the omission of this provision does not exclude the Court from exercising this competence. It could have been inserted *ex abundanti cautela*, but the phrase "any legal matter", used in article 4(1), is sufficiently broad to include opinions on proposed or promulgated domestic legislation.

Article 64(1) of the American Convention extends the advisory jurisdiction of the Inter-American Court to treaties "concerning the protection of human rights in the American states". Specific provision is also made for states to request an opinion as to the compatibility of domestic laws with the American Convention or other international instruments. Peru brought a request for

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55 Art XVIII of the Convention.

56 See art 28(2) of the proposal. This is similar to art 64(2) of the American Convention. See eg the advisory opinion of the Court in *Proposed Amendments to the Naturalization Provision of the Political Constitution of Costa Rica*, I-A Court Series A 4, judgment of 19 January 1984.

clarification by the Court of the phrase "other treaties concerning the protection of human rights in the American states".[57] The Court concluded that its advisory jurisdiction could in general be exercised "with regard to any provision dealing with the protection of human rights set forth in any international treaty applicable in the American states".[58] This competence is independent of the nature of the treaty (bilateral or multilateral), whether human rights is the principal or merely an incidental purpose of the treaty, and whether the treaty is open to non-members of the inter-American system.[59] The Court may, however, decline to provide an advisory opinion in a particular case. Possible grounds for a refusal to give an advisory opinion on a matter would be when the issues raised "deal mainly with international obligations assumed by a non-American state or with the structure ... of international organs ... outside the inter-American system".[60]

One of the main objections against a wide interpretation of article 74 was that it would cause conflicting interpretations emanating from the Court and from other international treaty monitoring bodies, such as the Human Rights Committee. The Inter-American Court's response was as follows: In domestic courts and internationally there are instances of courts that are not hierarchically integrated. On the international plain, the ICJ has jurisdiction to give an advisory opinion on any legal question. That would include the American Convention. When conflicts occur, they would not be "particularly serious",[61] as advisory opinions lack the binding force of contentious judgments.

The advisory jurisdiction provided for in the Protocol is much more expansive than the narrowly circumscribed advisory jurisdiction provided for in the European system. In terms of Protocol no 2 to the European Convention, the European Court may at the request of the Committee of Ministers, give advisory opinions. These opinions may not deal with "any question relating to the content or scope of the rights or freedoms defined in section I"[62] of the European Convention. Nor may it

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57 *'Other Treaties' Subject to the Advisory Jurisdiction of the Court (Art 64 of the American Convention on Human Rights)* IACHR, OC-1/82 of 24 September 1982, Series A: Judgments and Opinions 1.

58 Series A: Judgments and Opinions 1 at par 52.

59 *Ibid.*

60 *Ibid.*

61 Series A: Judgments and Opinions 1 at par 51.

62 Art 1(1) of Protocol 2 to the European Convention.

relate to any other question that the Commission, Court or Committee of Ministers might have to consider "in consequence of any such proceedings".[63]

7.2.6.3 Other issues

A question that might arise is whether a domestic court may approach the African Court of its own accord. The "request of a member State" seems to refer to the state-as-government, rather than to component parts, such as individual judges. Another issue that might arise relates to the word "may". It implies that the Court cannot be compelled to entertain a request, but has a discretion to give an advisory opinion.

The Cape Town meeting of experts agreed that "the Court should not entertain requests for advisory opinion on questions which the African Commission was in the process of considering".[64] This flows from the complementary nature of the two bodies. The Commission may be "considering" a case not only as a communication, but may also be involved in the interpretation of the Charter "at the request of a State Party, an institution of the OAU or an organization recognised by the OAU".[65] This is an example of an aspect that should be stipulated in the Rules of procedure of the Court and of the Commission.

7.2.7 Article 5: Seizure of the Court

1. The following are entitled to submit cases to the Court:

a. The Commission.

b. The State Party which has lodged a complaint to the Commission.

c. The State Party against which a complaint has been lodged at the Commission.

2. When a State Party has a legal interest in a case, it may submit a request to the Court to be permitted to join.

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63 Art 1(2) of Protocol 2 to the European Convention.

64 See OAU/LEG/EXP/AFC/HPR/RPT/ (I) Rev 1 at par 17.

65 In terms of art 45(3) of the African Charter.

Articles 5 and 6 regulate the Court's personal jurisdiction, or competence *ratione personae*.

7.2.7.1 Individual complaints

As a general rule, individuals or NGOs do not have standing before the Court, as only the Commission or a state party may "seize" the Court. In other words, after an individual complaint had been directed to the Commission, the complainant loses control of the direction in which the matter progresses further. The complainant has no right to have the case submitted to the Court. However, the state against which the complaint was directed, is entitled to submit the case to the Court. So, too, is the Commission. If a state was found to be in violation of the Charter, and neither it nor the Commission refers the case to the Court, the individual is powerless to refer the case to the Court.

The European system also initially allowed only the Commission or a state party to bring a case before the Court.[66] The position in Europe has changed in late 1994, when Protocol no 9 to the European Convention entered into force. Article 5 of the Protocol amended article 48 of the Convention to include a new category of persons that may refer a case to the Court, namely "the person, non-governmental organization or group of individuals having lodged the complaint with the Commission". A screening mechanism was simultaneously introduced, effectively requiring members of this category to obtain "leave to appeal" to the Court. The Court will only consider a petition by an NGO or individual(s) if it succeeds at the first hurdle. This hurdle takes the form of a three-member, *ad hoc* panel of the Court. *Ex officio* represented on this panel will be the judge(s) of the state(s) involved. The criteria for successful clearance of this hurdle are the following:

- The case must raise a "serious question affecting the interpretation or application of the Convention".
- It must for some "other reason warrant consideration by the Court".

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66 Art 48 of the European Convention.

Only a unanimous finding by the panel on the basis of the above against hearing the case prevents the Court's consideration of the merit of the petition.[67]

In the Inter-American system individuals have standing only before the Commission. Thereafter, the Commission and states parties only have the right to refer a case for the Court's consideration.[68] This provision has been criticised,[69] as it presumes that the Commission will always represent the interests of the individual complainant. This is an incorrect assumption, because the Commission seeks diplomatic, rather than legal solutions, in controversial cases which "threaten to disrupt delicate relations within the inter-American system".[70] The individual is less likely to want to sacrifice judicial resolution for political compromise.

Although individuals may approach the Court under the circumstances set out in article 6, this represents the exception rather than the rule. It is submitted that the developments in the other two regional systems should be followed. The consensus-seeking approach of the Commission increases the possibility that individuals may become victims of political compromise and diplomatic trade-off.

7.2.7.2 Inter-state complaints

As far as state complaints are concerned, both the complaining state and the state complained against may submit the case to the Court. State parties retain the right to submit a request to the Court "to join" proceedings before the Court when they have "a legal interest in a case". The infrequency of such complaints in the European and the non-existence of any such cases under the African Commission and the Inter-American Courts has illustrated that a functional human rights system cannot depend on inter-state complaints.

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67 Art 5 of Protocol 9 to the European Convention, inserting article 48(2) into the Convention.

68 Art 61 of the American Convention.

69 At the Nouakchott meeting it was pointed out that "the statutes of the Inter-American Court on Human Rights were now being amended to allow individuals and NGOs to have access to the Court without hindrance" (OAU/LEG/EXP/AFCHPR/RPT(2) at par 20).

7.2.7.3 Referral by Commission

It is not made clear on which grounds the Commission should decide to refer a case to the Court. Presumably, if it has found no violation, the Commission will not refer the case. In all other cases, it seems advisable for the Commission to refer the case. Even if the Court's judgment would amount to a repetition of existing precedents, there should be a referral. If this is not done, a discrepancy will exist between cases in which the Commission had found violations, and cases in which the Court had given a final judgment. The reason for this discrepancy lies in the fact that the execution of Court judgments is explicitly monitored. The Council of Ministers is principally responsible for supervision, but the Assembly and the Court itself also play a role in ensuring compliance.

No such provision exists in the case of a finding by the Commission. The Commission's decision is merely included in its annual report to the Assembly, and remains confidential until then. This situation is caused by the weak implementation regime created by the African Charter in 1981. It will surely be untenable that some violations of the Charter (those found by the Court) will be supervised, while others (found by the Commission) will stand as mere recommendations in an annual report. Commissioner Amega envisages that matters referred to the Court are "somehow an appeal for the reversal of the decision or report" of the Commission.[71] In the light of the discussion above, this view should not be followed, as matters may also be referred to ensure effective realisation.

In this respect, one has to be mindful of an important difference between the African and European systems. In Europe, the Committee of Ministers at present still has a judicial function in cases not referred to the Court. In these cases, the Committee's decision becomes the final, binding decision. The European Commission thus has a function to determine which of the Court or the Committee of Ministers would be more suitable for a final decision. Some "political" matters could arguably be decided "best" by the Committee. By contrast, this will not be the case in the African system, where the Commission is unable to make final, binding decisions and the Council of Ministers has

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70 Vivanco (1994) at 86.

71 See (1997) 7 *African HR Newsletter* at 2.

no judicial role. No such role is envisaged in the Protocol for the Council of Ministers. It would therefore be appropriate for the African Commission to refer all cases of likely violations to the Court. It should be noted that the merger of the Commission and the Court under the European system in terms of Protocol no 11 will dispense with the role of the Committee of Ministers in respect of decisions by the Commission. Because all decisions will be taken by one institution, the role of the Committee in deciding matters not referred to the Court falls away.

7.2.8 Article 6: Other forms of submission of cases to the Court

1. The Court may entitle NGOs with observer status before the Commission, and individuals to institute directly before it, urgent cases or serious, systematic or massive violations of human rights.

2. As the Court decides on the admissibility of a case instituted under the first paragraph of this article, it requests the opinion of the Commission which must give it as soon as possible.

3. The Court rules on the admissibility of a case while taking account of the provisions stated in article 56 of the Charter.

4. The Court itself may consider the case or refer it to the Commission.

5. At any time after the ratification of this Protocol, the State must make a declaration accepting the competence of the Court to receive petitions under the first paragraph of this article. The Court shall not receive any petition involving a State Party which has not made such a declaration.

7.2.8.1 Direct access

In terms of the Cape Town Protocol, the Court could "on exceptional grounds, allow individuals, non-governmental organisations and groups of individuals to bring cases before the Court, without first proceeding under Article 55 of the Charter".[72] The latest draft refers to cases that may be "instituted directly before" the court. Whatever the formulation, this provision seems to be the

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72 Art 6 of the Cape Town Protocol.

product of compromise.[73] It goes further than the European and Inter-American systems, by allowing individuals (or groups of individuals) to seize the Court directly, without first approaching the Commission. In these cases, the Court will have original jurisdiction as an institution of first instance at the supra-national level.[74] However, this competence represents the exception, rather than the rule.

The grounds for direct access are two-fold:

- Firstly, the pressing nature ("urgency") of the events and possible redress will be relevant. This would mean that the Commission should be by-passed in order to save time in emergency situations. In this respect, this article has to be read with article 26(2), which provides for provisional measures. The Court may order such measures in cases of "extreme gravity and urgency", in order to "avoid irreparable harm". These should also be considerations of importance in a decision whether direct access to the Court should be allowed. Even if the Commission has the competence to recommend interim steps, a binding court order may be much more appropriate in the circumstances.

- The scale, extent and persistent nature of the violation(s) are also an important reason to approach the Court directly, as the Commission's procedure may take up valuable time. On the other hand, it should always be kept in mind that a judicial body may be inappropriate to redress massive-scale violations.[75]

In the Cape Town Protocol the meaning of the term "exceptional grounds" was left open deliberately. This means that direct access was not restricted to specified factors. Under those provisions, the Court could have provided for more detailed guidelines in its Rules of procedure,

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73 See the report on the Nouakchott meeting of legal experts: "Most delegations were of the view that the Court should be accessible to individuals and non-governmental organizations just like the Commission and the States Parties", but "some delegations", of which Nigeria and Sudan are identified by the name, favoured an optional clause (see OAU/LEG/EXP/AFCHPR/RPT(2) at paras 20 - 24; especially par 23 is not very clear, seemingly a product of incoherent translation).

74 The Explanatory Notes to the Draft Protocol, 28 - 30 November 1993, notes the following: "The working group felt strongly that it is definitely a step in the right direction" (at 6).

75 See argument in ch 8.1.3 above.

without setting unduly rigid or restrictive requirements. Still, the article dealt with "exceptional" jurisdiction. This has been emphasised in the Explanatory Notes, where it was "envisaged that the great majority of cases which will come before the Court will be referred to it by the Commission after it has first considered the complaint".[76]

Direct access may be warranted in other cases, such as the following:[77]

- Cases in which considerable delay had been caused at the domestic level, or even at the level of the Commission. In such cases the Court should be able to come to the rescue and finalise the matter speedily. The possibility is left open that a case may be submitted to the Commission, and that "exceptional grounds" are only raised thereafter, as the provision refers to "without first proceeding under article 55", and not "without first submitting a case in terms of article 55".

- If the nature of the case reveals that a binding court decision, rather than consensus seeking, is desirable, proceedings in front of the Commission may be superfluous. In other words, if it is already clear at the stage when the complaint is directed to the Court that friendly settlement is either unlikely or will be inappropriate, direct access should be granted.

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76 Explanatory notes to Draft Additional Protocol, 28 - 30 November 1993.

77 In this regard, the grounds on which Rule 17 of the Constitutional Court Rules allows direct access to the South African Constitutional Court are informative: It is allowed "in exceptional circumstances only, which will ordinarily exist only where the matter is of such urgency, or otherwise of such public importance, that the delay necessitated by the use of the ordinary procedure would prejudice the public interest or prejudice the ends of justice and good government". These grounds were successfully invoked in eg *Executive Council of the Western Cape Legislature v President of RSA* 1995 8 SACLR 70 (CC). In this case the Court accepted that local governmental elections in the whole of the province would be jeopardised if the issues involved were not resolved speedily. Direct access was also allowed in *S v Zuma* 1995 3 SACLR 1 (CC) and *S v Mbatha* 1995 10 SACLR 78 (CC) (legal certainty about the constitutionality in the Arms and Ammunition Act 75 of 1969 was considered to be of the utmost public importance). In *Zuma* (at par 11) Kentridge AJ stated that direct access should be allowed "in only the most exceptional cases, and it is certainly not intended to be used to legitimate an incompetent reference".

- Issues raised in the complaint which clearly involve a point of law that needs to be resolved by the Court's authoritative interpretation of the Charter, should also potentially be sufficient to constitute grounds to justify direct access.

7.2.8.2 Admissibility requirements

Even if direct access is allowed, the ordinary prerequisites for admissibility may not be discarded. The most important of these requirements is the exhaustion of local remedies. In terms of the Protocol these factors have to be "taken into account".[78] This allows for a departure from a rigid application of article 56, as there is no prescription that these conditions have to be met. The flexibility should allow for a generous interpretation.[79] It may also be noted that the corresponding provision in the Addis Ababa proposal was phrased differently. It required the Court to "apply the principles enunciated in Article 56 of the Charter".[80] The Cape Town and Nouakchott versions are less restrictive, as they do not require the "application" of the admissibility prerequisites, but merely that they must "be taken into account".

7.2.8.3 Optional declaration

The Cape Town Protocol made direct access to the Court (on "exceptional grounds") an automatic consequence of ratification, which would bind all states parties. It was often argued that the inclusion of this provision could deter ratification. The Egyptian representative at the Cape Town meeting of experts (Badawi, formerly a Chairman and member of the Commission) made a reservation in respect of article 6, as it was then formulated. He noted that the Court "should be rooted in an efficient Commission which therefore meant that the Commission should not be bypassed in favour of the Court".[81] His second ground of objecting was based on the risk of

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78 Art 6(3) of the Nouakchott Protocol.

79 See also Naldi and Magliveras (1996) 8 *RADIC* 944 at 953 - 954: "If the Court were prepared to approach this provision in a dynamic manner, bearing in mind the purpose of the exceptional jurisdiction, it could overlook technicalities or minor procedural irregularities for the sake of justice".

80 Art 20(2) of the Addis Ababa proposal.

81 OAU/LEG/EXP/AFC/HPR/RPT (I) Rev 1 at 5.

"opening discussion on the interpretation of Article 55 of the Charter, which, so far, had been interpreted by the Commission as allowing individual complaints and not just "situation" complaints.[82]

Of the nine states submitting comments on the draft Protocol to the Secretary-General, most showed reluctance to accept this provision. Burkina Faso[83] and Sierra Leone[84] endorsed the reservation made by the Egyptian delegates at Cape Town. Tunisia wanted a provision inserted that the Court "shall attempt to assist the parties in arriving at an amicable settlement".[85] Mauritius was the exception, as its views identified article 6 as one of the most welcome features of the Protocol.[86] Côte d'Ivoire had an objection of a different nature, suggesting that it would be advisable that the President of the Court decides whether "exceptional grounds" exist, but after consulting with the Commission. The reason for this proposal is that the proposed procedure would ensure that "the court will not have to indirectly rule twice on the same case".[87]

The Nouakchott Proposal took note of these concerns, and caused an **about-turn** from the Cape Town draft. Acceptance of the direct access procedure is now made optional. This resembles the optional individual complaints mechanism under the European Convention (and to an extent, under the first optional Protocol to the CCPR). In the case of the European Convention the optional mechanism was included as a compromise in the original convention. The Nouakchott proposal provides for an option within an optional protocol, which will be adopted to improve implementation under the African Charter. If this provision is accepted, it will undermine efforts to improve implementation, by providing states with an opportunity of adoption without empowering

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82 *Ibid.*

83 See CM/1996(LXV) Annex III (c).

84 See CM/1996 (LXV) Annex III (f).

85 See CM/1996 (LXV) Annex III (e).

86 See OAU CM/1996 (LXV) Annex III (a). Lesotho had "no objection to the contents of" the Protocol (at Annex III (b)).

87 CM/1996 (LXV) Annex III (g).

individuals against the state.[88] Article 6(5) creates the impression of an option, upon an option, upon an option...

If the approach of requiring an optional declaration is accepted, a possible alternative to granting individuals standing, is to ensure an explicit role to individuals and NGOs to be represented at hearings as *amici curiae*. This will ensure a role to non-state entities at the Court's hearings, but will not have the same deterring effect on potential ratifying states as the provision for direct access under exceptional circumstances.

7.2.8.4 The decision

A question that has not been answered by the provisions of article 6 is: Does the whole "Court" decide this matter, or may the President, a chamber, or a specific number of judges decide it? The discretion to decide whether a case may be allowed on this ground is that of the Court, as constituted. No provision is made for a "screening panel" to decide the matter. However, the Addis Ababa proposal included a provision along these lines. It provided that the matter "shall be submitted to a panel composed of three judges".[89] It also provided that the Court "may receive representations from the Commission for the purpose of such consideration".[90] In the absence of any such provisions in the Protocol, it must be assumed that the Court will entertain this issue at an ordinary hearing, composed of at least seven judges.[91] The possibility also exists that a chamber of five judges may consider such cases.[92] This matter should be addressed in the Rules of procedure. What is clear, is that the question has to be answered as a threshold question, by way of a preliminary hearing. This aspect also needs to be spelled out in the Rules of procedure.

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88 See also the appeal by NGOs for an amendment to this provision, so that the Court would not depend on the consent of states parties for its jurisdiction over urgent cases (see report of the NGO meeting before the 21st sitting of the Commission: (1997) 7 *African HR Newsletter* at 7).

89 Art 20(3) of the Addis Ababa proposal.

90 *Ibid.*

91 See art 20 of the Cape Town Protocol.

92 See art 20 below, and accompanying discussion in ch 7.2.22 below.

7.2.9 Article 7: Sources of law

The Court shall apply the provisions of the Charter and other human rights instruments.

The Cape Town draft read as follows: "In its deliberations, the Court shall be guided by the provisions of the Charter and the applicable principles stipulated in Articles 60 and 61 of the Charter".[93] The reference to the African Charter in both drafts is not strictly necessary. If nothing to this effect were included, the Charter would have applied as guideline in interpretation, anyway. One of the reasons for the inclusion of reference to articles 60 and 61 may have been to highlight the potential applicability of international human rights principles, cases and rules in the decisions of the Court. Articles 60 and 61 of the Charter opens the door for the Commission to "draw inspiration from international law on human and peoples' rights" and to "take into consideration ... general or special international conventions". This provision of the Protocol ensures that these competencies are not restricted to the Commission, but extend to the deliberations of the Court as well. Indeed, the wording used in the Cape Town Protocol ("be guided by") suggested stronger reliance on international sources than that used in the Charter ("draw inspiration" and "take into consideration").

The present formulation is very broad. What does "the application" of "other human rights instruments" by the Court entail? "Application" may refer to the Court's contentious jurisdiction.[94] If this were the case, the extension of this jurisdiction to all (and not only "applicable African") human rights instruments would be bewildering. A more plausible interpretation of this article is that it relates to both the advisory and contentious jurisdiction of the Court, setting out which "sources" they may refer to. In this view, "apply" means "use as sources that are to be given consideration".

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93 Art 7 of the Cape Town Protocol.

94 See art 3, where the distinction is drawn between "interpretation" and "application". In one interpretation, the first refers to the Court's advisory jurisdiction, and the second to its contentious jurisdiction.

7.2.10 Article 8: Conditions for considering communications

1. The Court shall not consider a matter before it originating under the provisions of Article 49 of the Charter until such time as the Commission has prepared a report in terms of Article 52 of the Charter.

2. The Court shall not consider a case originating under the provisions of Article 55 of the Charter until the Commission has considered the matter and prepared a report or taken a decision.

3. The Court may deal with the case only if the matter is brought before it, within three months of the decision of the Commission.

4. Having accepted a case as stipulated in the above provisions, the Court may decide to reject it if, after due consideration, the Court establishes the existence of one of the grounds of inadmissibility in Article 56 of the Charter.

7.2.10.1 Procedure before the Court

This article elaborates further on the co-existence of the Commission and the Court. The Commission retains its function of deciding on admissibility, of endeavouring to reach a friendly settlement, and of making a finding on the merits of the case. As a general rule, these various processes have to be finalised before a state party or the Commission may refer a matter for the Court's consideration. Once this stage has been reached, an individual (or group of individuals, or an NGO) has no competence to refer the case to the Court. From these provisions, it is clear that the Court has no inherent power to consider any matter. It merely reacts to applications brought before it.

The Court not only reconsiders the merits of the case, but also the Commission's finding on admissibility. Decisions on the merits are by majority vote. In terms of the Cape Town Protocol, findings on admissibility had to be taken by a two-thirds majority. It was changed in the

Nouakchott draft to the more appropriate requirement of a simple majority.[95] This will allow more applicants to pass the "first hurdle", as it will ensure that cases are not decided finally on technical or formalistic grounds. Another aspect should have been added: Findings on (in) admissibility must, like judgments on the merits, be given in open court, or at least with full statement of reasons on which the finding is based. The Protocol is not clear on what the possibilities of appeal or review against findings of inadmissibility are.[96]

In the case of an inter-state complaint, the Commission must always endeavour to reconcile the two states parties by means of an amicable settlement.[97] Only if this fails, should the Commission draw up a report, stating the facts and its findings. When submitting this report to the Assembly, the Commission may make "such recommendations as it deems useful".[98] This is obviously the "report" required by article 8(1) of this Protocol.

In the case of "ordinary" individual communications,[99] the Charter does not clearly provide for the Commission to take "decisions" or draft "reports". In practice, as allowed for in its Rules of procedure, the Commission holds hearings and makes findings on individual communications. These findings are couched as "decisions". Particulars of all these decisions (or "findings") are provided in the Commission's annual report to the Assembly. It must be assumed that the "annual report" to the Assembly, containing decisions on individual communications, is the "report" to which article 8(2) of this Protocol refers.

This still leaves the "special cases", provided for under article 58 of the African Charter. If a communication by one or communications by various individuals reveal "a series of serious or massive violations of human and peoples' rights", the Commission must draw the attention of the

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95 The Tunisian government also raised this issue in its comments to the Secretary-General before consideration of the Protocol by the OAU Council of Ministers (see CM/1996 (LXV) Annex III (e)).

96 This aspect should also be clarified in the Rules of procedure.

97 See art 52 of the Charter. In respect of individual communications this has not been spelt out in the Charter. This omission may be explained with reference to the fact that the procedure relating to individual petitions was left deliberately vague in the Charter.

98 Art 53 of the Charter.

99 In the sense of "not constituting a series of serious or massive violations of human and peoples' rights".

Assembly to this fact. The Assembly "may" then request the Commission to "undertake an in-depth study". The Commission then has to report on the facts found and must make recommendations to the Assembly. The "report" referred to in article 8(2) of this Protocol may also have this "report" in mind. If that were the case, the Court would have no jurisdiction to decide on massive and serious violations of Charter rights, until the following has happened:

- The Commission has drawn the attention of the Assembly to the occurrence of these violations.
- The Assembly has considered the information, and has decided to request the Commission to undertake fact-finding. The Assembly has a discretion in this regard, and may obviously also decide against such a step.
- The Commission has undertaken the requested study, and has drawn up a report.
- The Commission has submitted the report, with its recommendations, to the Assembly.
- Three months have expired after this report had been submitted to the Assembly.

Such an interpretation would ensure that a case would not be considered simultaneously by the Commission and the Court. But it will extensively delay a depoliticised and final judgment by the Court in cases of massive violations. This may reduce the potential role and impact of the Court. On the other hand, it may be argued that a judicial institution is not best placed to adjudicate on massive violations. The Commission may be better suited to handle such cases. Once more "individualised" cases crystallise, such cases may be brought to the Court for its determination.

7.2.10.2 Three-month time limit

The Protocol provides that the Court may only entertain a matter if it is brought before it "within three months of the decision of the Commission".[100] It may be argued that this provision is likely to prevent many cases from reaching the Court timeously. Communication channels in Africa are

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100 Art 8(3) of the Protocol.

often unreliable, making a quick response by a state party difficult. It seems inappropriate to import into Africa a deadline which in principle reflects the position in Europe.[101]

An important question is when the three-month period starts running. In terms of the Cape Town draft, the three month period started with "the submission of the report of the Commission to the Assembly of Heads of State and Government". The Cape Town meeting of experts adopted this requirement with the explicit understanding that the period was to run "from the date of the submission of the Commission's report to the Assembly".[102] The report of the Court is submitted only once a year, at the Assembly's annual summit, which usually takes place in June or July.[103] Read in this light, the requirement is not as burdensome as it may seem at first glance. If the Commission made its finding on the merits in, say, September, the parties will have almost a year plus three months to seize the Court. If the violation was found just before the annual Assembly session, the period may indeed be close to three months. The Commission makes its findings during its sessions, which at present take place in March/April and October/November annually. In practice, this will allow for a period of at least six months in which parties may decide to refer a matter to the Court.

The Nouakchott Protocol has reduced the time available to bring a case to the Court. The three-month time limit is restated, but it now starts running when the Commission takes a decision. One advantage of this requirement is that there will be a similar time limit in all cases. But the obvious disadvantage is that access to the Court will certainly be restricted. It limits the time available to the Commission to reconvene and to take decisions, it places undue pressure on states parties to decide on possible referrals, and it all but nullifies the potential pressure individual complainants could exert on the Commission to refer cases to the Court.

The argument here is not that there should be no deadline. There are good reasons why a matter may not be brought before the Court indefinitely. But the period must allow the Commission a

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101 See art 32(1) of the European Convention.

102 See OAU/LEG/EXP/AFC/HPR/RPT (I) Rev 1 at 4.

103 See art 28 of the Protocol.

reasonable opportunity to consider its options, to get a legal opinion, and instruct legal counsel, if required. Counsel may experience difficulties in obtaining the record or other information.

The requirement set out in the Nouakchott Protocol is inappropriate in an African setting. If the three-month rule were accepted, the period should at least only start running after submission of the Commission's report to the Assembly. It is suggested that a longer period or a more flexible criterion should be used. In this respect, the example of the African Charter may be instructive. In the Charter, the six-month requirement in respect of the exhaustion of local remedies became a "reasonable period".[104] The Commission has not experienced any problems in applying this open standard. Article 8(3) of the draft Protocol should be amended to incorporate a similar flexible standard. If this is not done, this provision may yet become the Achilles heel of the proposed African human rights system.

7.2.11 Article 9: Amicable settlement

The Court may try to reach an amicable settlement in a case pending before it in accordance with the provisions of the Charter.

Previous drafts did not endow the Court with a role of promoting amicable solutions between parties. In its comments on the Cape Town Protocol, directed to the OAU Secretary-General, Tunisia proposed the inclusion of a **conciliatory role** for the Court. The proposal refers to the example of the European Human Rights Commission.[105] It would have been more appropriate, as far as the Court is concerned, to have made reference to Protocol no 11 to the European Convention. Protocol no 11 creates a single institution to oversee implementation of the European Convention. In terms of that role, the Court retains its involvement in efforts to resolve disputes by

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104 Compare art 26 of the European Convention with art 56(6) of the African Charter. In the European system a case must be submitted to the Commission "within a period of six months" of the date a final decision has been taken by the local courts. In the African system the case has to be submitted "within a reasonable period from the time local remedies are exhausted".

105 See CM/1996 (LXV) Annex III (e) at 3.

amicable settlement.[106] Even so, that model would not be appropriate for the African Court on Human and Peoples' Rights. While the European Commission's settlement role will be lost with the "merging" of the Commission and the Court, the African Commission (and its role in amicable settlements) will be retained in terms of the Protocol. Criticism may justifiably be expressed that "this should not form part of the Court's function" and that "the Commission ... was already mandated to do so".[107]

Still, the role of the Court does not preclude the competence of the African Commission to pursue all attempts to reach an amicable settlement. This aspect is also emphasised in the Protocol establishing the ECOWAS Community Court of Justice.[108] It should therefore be welcomed that this aspect has been included in the Nouakchott Protocol.

7.2.12 Article 10: Hearings and presentations

1. The Court shall conduct its proceedings in public. The Court may, however, conduct proceedings in camera.

2. Any party to a case shall be entitled to be represented by a legal representative of the party's choice. Free legal representation may be provided where the interest of justice so require.

3. Any person, witness or representative of the parties, who appears before the Court, shall enjoy the immunities and privileges in accordance with international law, necessary for the discharging of their functions, tasks and duties in relation to the Court.

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106 See art 38 of the Convention, as it will be amended by Protocol no 11: "If the Court declares an application admissible, the Court must place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights."

107 See OAU/LEG/EXP/AFCHPR/RPT(2) at par 9.

108 See art 9(3) of the Protocol: "A Member State may, on behalf of its nationals, institute proceedings against another Member State or Institutions of the Community, relating to the interpretation and application of the provisions of the Treaty, after attempts to settle the dispute amicably have failed".

7.2.12.1 Locus standi *and participation by petitioner*

Proceedings before the Court are open to the public. An individual complainant would therefore be allowed to be present at the Court proceedings about his or her case. But is the role of the individual reduced to that of a passive spectator? Two instances have to be distinguished:

- As a general rule, the Commission refers cases and appears on the individual's behalf at Court proceedings. The individual complainant does not have *locus standi*, and must depend on the Commission to state and argue the case.[109] In theory, then, the individual has indirect access to the Court. But this should not exclude the complainant and his or her legal representatives altogether. The Rules of procedure of the Inter-American Court allow that "the delegates whom it designates" may represent the Commission.[110] These delegates may "have the assistance of any person of their choice".[111] The Commission invoked this provision when it chose legal representatives of the victims as its advisers in the Honduran "disappearance" cases.[112] The Rules of procedure of the African Court should allow a similar role to the petitioner and his or her lawyers.

- When the case is before the Court as court of first instance,[113] the role of the Commission is not clear. It would be possible that the individual and his or her legal representative play the role of the Commission. The case has not been before the Commission at all, and the Commission has no knowledge of the facts. The petitioner, and his legal advisers, on the contrary, have been involved in the case and are familiar with the facts and circumstances. Furthermore, no procedure is provided to refer the case back to the Commission, or to involve the Commission in the proceedings before the Court. The provision about legal representation only makes sense under these circumstances, where the individual has to appear before the

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109 The role of the Commission in the European system has been described in the following terms (Van Dijk & Van Hoof (1990) at 137): "The role of the Commission on the proceedings before the Court is best described as that of *amicus curiae*, an independent and impartial advisory organ with respect to the questions of fact and of law concerning a case before the Court".

110 Art 22 of the Rules of procedure of the Inter-American Court.

111 *Ibid.*

112 Cerna in Janis (ed) (1992) at 123.

113 By virtue of art 6 of the Nouakchott Protocol.

Court without the Commission playing any role. When a case has reached the Court by virtue of article 6, the individual and his or her legal representative have standing before the Court, and may participate in the proceedings. If this was not the case, the provision of legal representation in sub-article 2 would have no possible application.

In cases before the European Court, two measures had been devised to ensure continued participation by the individual complainant. The aim is to ensure fairness to both the state and the individual and to prevent alienating the public from the Court's process. The one measure was devised by the Commission, and catered for greater input by complainants in the preparation and presentation of the individual's case by the Commission. The Court, as a second measure, provided the individual with the opportunity to be represented by his or her own counsel at the Court's hearing.[114]

In both instances the petitioner should be allowed as active a role as possible in the proceedings. This is in keeping with the international tendency to attach more weight to the individual complainant in proceedings initiated by him or her.

7.2.12.2 Procedural rights

The procedural rights of those appearing in front of the Court are discussed under this heading. The provision of these aspects in the Protocol is limited. As a general rule, proceedings should be conducted in public. This provision differs from the right to a hearing granted under the Charter, where no provision is made for the right to a public trial. This is an instance of a potential substantive cross-fertilisation. The Court may order proceedings *in camera*.[115]

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114 See ch 5.1 above.

115 In terms of the Cape Town Protocol, the requirement was included that publicity may only be excluded if it was considered to be "in the interest of justice". As the Rules of the Court should in any event have clarified this open-ended concept, it can just as well be omitted from the Protocol.

The right to a legal practitioner of one's choice is also guaranteed. Under certain circumstances a legal representative will be appointed, presumably at the Court's expense. Again, the yardstick is the "interests of justice". This may be regarded as introducing too much uncertainty, as the open-endedness of the criterion may lead to varying possibilities. This could place a very heavy financial burden on the infrastructure. In the absence of any institutional support, the responsibility will fall to the NGOs to ensure that cases are brought and representatives are appointed. This provision extends the rights of an individual under the African Charter. Article 7(1)(c) of the Charter grants the "right to defence, including the right to be defended by counsel of his choice". No mention is made of the person who, due to poverty, cannot enforce this right. Article 10(2) of the Protocol must refer to the exceptional instances when an individual or group of individuals approach the Court. It would make little sense to apply this right only in the context of states and the Commission bringing cases before the Court. It will surely be very exceptional for a state to rely on the Court to provide support to obtain a lawyer.

In this respect, the role of NGOs should be highlighted. Local and international NGOs have been instrumental in assisting individuals to file communications with the African Commission. The provision in article 9(2) entails uncertainty, as no indication exists about the extent to which legal aid may be required. Rational economic actors may be poised against ratification in the light of this uncertainty. On the other hand, a wide discretion is allowed to the Court to grant legal representation, or to deny it.[116]

These provisions are in line with a greater awareness in recent years that procedural safeguards should be guaranteed in the proceedings of international human rights enforcement mechanisms. This movement can be illustrated by comparing the international criminal tribunals of Nuremberg and Yugoslavia/Rwanda with each other. The greater emphasis on due process rights lead to the inclusion of a right to appeal and much more elaborate Rules of procedure. In the European

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116 See the provision of art 10(2): Legal representation does not necessarily follow if the interests of justice so require, but "may" be granted under those circumstances, indicating a discretion to allow or disallow legal representation, even though its granting would be in the interests of justice.

system, for example, the Court made findings about "unreasonable delay" in the finalising of cases while the Court itself on average took longer than a year to finalise a case.[117]

7.2.13 Article 11: Composition

> *1. The Court shall consist of eleven judges, nationals of the Member States of the OAU, elected in an individual capacity from among jurists of high moral character and of recognised practical, judicial or academic competence and experience in the field of human and peoples' rights.*
>
> *2. No two judges shall be nationals of the same state.*

7.2.13.1 Eleven judges

The Court consists of eleven judges. This is less than the number of states required to ratify the Protocol before it enters into force. It is the same as the number of judges on the International Tribunal for Rwanda.[118] The American Convention required eleven ratifications before it (and, with it, the Court) could take effect, but the Court consists of only seven judges. The number of judges on the European Court is enormous in comparison, each member of the Council of Europe being represented.[119] The ECOWAS Community Court of Justice consists of seven members.[120] Eleven is more than the number of judges sitting on almost all the highest courts of individual African countries. In this respect, the Protocol resembles the composition of the South African Constitutional Court. During preceding deliberations, a Court of nine and fifteen judges[121] has also been considered. Having less than eleven judges, it was argued, would save costs. The Cape

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117 See ch 5.1.1.6 above.

118 See art 11 of the Statute of the International Court for Rwanda.

119 At the last count, it numbered 40 ((1997) 22 *Eur L Rev* 82 at 82 – 83).

120 See art 3(2) of the Protocol establishing the ECOWAS Community Court of Justice.

121 The ICJ is made up of fifteen judges - see art 3 of ICJ Statute.

Town meeting, taking into account that only the President would be full-time and that it may, in time, be necessary to constitute two chambers, agreed unanimously on the number of eleven.[122]

A strong argument against the European model is that it links judges closely to a specific country, and not to the membership as a whole. This has been illustrated in the American system. Like the Inter-American Court, the Inter-American Commission has seven members. In 1993 an attempt by Nicaragua to have the number increased to eleven was narrowly defeated. The argument forwarded by Nicaragua was that an increase in the number would lead to greater "representativity". As Vivanco pointed out, this was a disingenuous effort to enhance control by the OAS governments.[123] The members of the Commission do not represent states, but all the members of the OAS as a whole. Similarly, if the number of judges of the African Court on Human Rights approximate the number of member states of the OAU, the perception will be created that they "represent" their respective governments. This will obviously politicise the Court. The judges should be seen as independent experts who transcend their territorial origin. They are also not to be expected to favour their own governments in any way.

7.2.13.2 Nationals of OAU member states

The judges need not be members of states that ratified the Protocol. This could lead to a situation where the first fifteen ratifying states are "judged" by judges from states which are themselves not subject to the jurisdiction of the Court. A wealthy or otherwise powerful state may be able to use money diplomacy to gain influence over the affairs of other states through the Court. It is suggested that only states that have ratified the Protocol should be able to nominate and vote for judges.[124]

The elected judges need not be nationals from a state that has ratified the African Charter, either. This means that nationals from Eritrea and Ethiopia may be elected as judges. In the Inter-

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122 See OAU/LEG/EXP/AFC/HPR/RPT (I) Rev 1 (at par 18).

123 Vivanco (1994) at 79.

124 See discussion about art 13 in ch 7.2.15 below.

American system judges must be nationals of an OAS member state.[125] This enabled judge Buergenthal from the United States to be elected as both judge and President of the Inter-American Court. Under the European system, nationals from states that are not members of the Council of Europe, may be elected as judges.[126]

7.2.13.3 Qualifications

Similar to the American Convention, it is stressed that judges serve in their individual capacity. The qualifications required in the African Court are not as rigid as that in the Inter-American system. To qualify as judge in the American system, one has to "possess the qualifications required for the exercise of the highest judicial functions" in his or her own state.[127] Although the African judges must also be "jurists", no formal requirement is laid down. "Practical, judicial or academic competence and experience" in the field of human rights are the only prerequisites.[128] This leaves room for human rights activists, judges and academics to serve on the Court.[129]

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125 Art 53(2).

126 The judge elected in respect of Luxembourg, judge Macdonald, is a national of Canada.

127 See art 4(1) of the Statute of the Inter-American Court. A similar provision was included in the Addis Ababa proposal (art 3(1)). See also the Statute of the International Court for Rwanda, art 12, requiring judges to have qualifications for appointment to the highest judicial office in the country where they are from.

128 See Naldi and Magliveras (1996) 8 *RADIC* 944 at 956: "The drafters of the Protocol should be congratulated for not restricting the ambit of judges to specific jurists and for dropping the requirement in the European and American Conventions that candidates must possess the qualifications required for appointment to the highest judicial offices."

129 See Explanatory Notes to the draft Protocol: "... it was felt that there are many academics and others who have had vast experience in human rights and whose appointment to the Court will benefit it. Therefore jurisconsults were included" (at 1).

7.2.13.4 *Only one from a particular state*

There may not be more than one national of a particular State on the bench. This echoes article 4(2) of the Statute of the Inter-American Court.[130] The underlying aim is to ensure that as many countries as possible are represented on the Court, so as to avoid domination by one state or a group of states, or a perception to that effect. Making the Court more representative enhances perceptions of impartiality and credibility.

7.2.14 Article 12: Nominations

1. State Parties to the Charter may each propose up to three candidates, at least two of whom shall be nationals of that State.

2. Due consideration shall be given to adequate gender representation in the nomination process.

States parties to the African Charter are allowed to nominate jurists from other OAU member states. This practice should be encouraged, especially in the case of an independent and respected personality overlooked by his or her own state due to political considerations, such as a record of judicial activism.[131]

"Due consideration"[132] should be given to "adequate gender representation" during nominations. This is a directive not found in any of the other regional and international instruments.[133] No

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130 See also art 53(2) of the American Convention, art 3(1) of the Statute of the ICJ. By its very composition, the European system does not necessitate such a provision.

131 See eg the activism of Mwalusanya J in Tanzania, making it unlikely that he will be nominated by his own state (ch 3.4.4.3(v) above).

132 This is stronger than the wording of the Addis Ababa proposal, which read: "Consideration shall be given to adequate gender representation in the composition of the Court".

133 Of the two major regional courts and the ICJ, the European Court and the Inter-American Court each counted a single female judge by 1994. The European judge is Elisabeth Palm, elected in respect of Sweden, whose term expires in 2001 (see (1994) *YB of the European Convention on Human Rights*). Sonia

Footnotes continued on next page.

similar direction concerning the Commission is given in the Charter itself. The male dominance of the Commission has indeed been a source of criticism. The first female commissioner (commissioner Duarte-Martins, from Cape Verde) was only elected in 1993. In 1995 another woman, commissioner Ondziel-Gnelenga, was elected. The inclusion of the reference to "gender representation" must stand as a sign of the sustained pressure of NGOs to highlight the need to include women in the public sphere of decision-making. Neither of the other two regional Commissions or Courts had been immune from similar critical comment, and still have a male-dominated profile.[134] At the Cape Town discussions, the delegates from Benin and Tunisia were of the view that "whenever a State party nominates two candidates, each of the two genders" should be represented.[135] This formulation is supported.

7.2.15 Article 13: List of candidates

1. Upon entry into force of this Protocol, the Secretary-General of the OAU shall request each State Party to the Charter to present, within 90 days of such a request, its nominees for membership of the Court.

2. The Secretary-General of the OAU shall prepare a list in alphabetical order of the candidates nominated and transmit it to the Member States of the OAU at least thirty days prior to the next session of the Assembly of Heads of State and Government of the OAU ("Assembly").

Picado from Costa Rica was elected as judge on the Inter-American Court in 1988. She served as Vice-President from 1992 to 1995 (see Pasqualluci (1995) 17 *HRQ* 794). By 1996, Rosalyn Higgins had become the first woman to serve as a judge of the ICJ.

134 Three of the 31 commissioners on the European Commission (representing Estonia, Ireland and Norway) are female. Two of them serve as Presidents of the two Chambers (see (1997) 22 *EurLRev* 117).

135 See OAU/LEG/EXP/AFC/HPR/RPT (I) Rev 1 at par 19. See also observations by the Secretary-General in his report on comments by states on Draft Protocol (CM/1996 (LXV) at 7) about the Tunisian proposal made at Cape Town: "This well meaning idea was rejected, particularly by the women delegates. It was argued that a time may soon come when men would be the gender least represented and the gender requiring special attention in the OAU institutions".

A distinction is drawn between member states of the OAU and states parties to the African Charter. All OAU member states, represented in the Assembly, participate in the **election** of judges. Only those states that have ratified the African Charter may **nominate** candidates. However, candidates may be nationals of any OAU member state. By restricting the power to nominate to those states parties to the Charter, the influence of non-ratifying states is minimised. The near-universal ratification of the Charter has rendered the distinction between OAU members and states parties to the Charter of little importance.

States parties to the Charter have 90 days within which it must nominate suitable candidates. This period should be sufficient to enable states to consult with "relevant persons or bodies within their own countries and outside, regarding persons they should nominate".[136] NGOs, and civil society in general, should be alive to this time limit. Lobbying and pressure should be exerted in the process of governmental nomination. Judges sensitive to human rights will be elected only if national NGOs endeavour to ensure the nomination of human rights champions at the domestic level.

The election takes place at the "next session" of the Assembly. This could be interpreted to refer to "next ordinary session". If the requisite number of ratifications is reached just after one ordinary session, it may take almost a year before the election takes place. "Next session" may refer to any session, including an extraordinary session, which could be arranged for the election of judges in particular. It is a sufficiently weighty aspect to merit urgent and careful consideration. Against the option of organising a special "election" session, stands the financial implications of duplicating sessions of the Assembly.

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136 See International Commission of Jurists document Explanatory Notes to the Draft Protocol, 28 - 30 November 1993.

7.2.16 Article 14: Elections

1. The judges of the Court shall be elected by secret ballot by the Assembly from the list referred to in Article 12(2)[137] of the present Protocol.

2. States Parties shall ensure that in the Court as a whole there is representation of the main regions of Africa and of their principal legal traditions.

3. Due consideration shall be given to adequate gender representation during the election process.

4. The same procedure and considerations as set out in Articles 11, 12 and 13(1), (2) and (3)[138] shall be followed for the filling of vacancies.

The process of election is not regulated in detail. The article merely states that the judges will be elected in a secret ballot of members of the Assembly. The majority required to be elected is not specified.[139] Judges are elected by all OAU member states, and not only states parties to the Protocol. According to the "Explanatory Notes to Draft Protocol" the Working group and experts have considered whether the judges should not rather be chosen only by states that had ratified the Protocol. Two reasons are given why they opted for an election by the OAU Assembly. "It was felt that if all States are given the right to vote for candidates, it may encourage them to ratify the Protocol". Further, because the Court is an organ of the OAU, it "is accountable to the Assembly",[140] (and should therefore be elected by the Assembly).[141]

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137 This is a reference to the Cape Town Protocol. It should refer to art 13(2) of the "present Protocol".

138 Again, references incorrectly to the Cape Town Protocol. It should read "arts 12, 13 and 14(1), (2) and (3)".

139 All Assembly decisions are by two-thirds majority. This was also the provision in the Cape Town draft (art 13(1)).

140 See "Explanatory Notes on Draft Protocol", discussion of art 13.

141 The reference to "accountability" of judges is strange, as the ideal of the independence of courts is contradicted by the principle that they could be called to account to the other branches (legislative and executive) of government.

Another option is to keep the number of judges proportionate to the number of states that have ratified the Protocol, and to allow only those states that have ratified the Protocol to vote. This will provide a greater incentive to governments to ratify.

The freedom of choice granted to states parties is constrained by the following considerations:

- The main regions[142] of Africa should be represented in the final result.[143]
- The principal legal traditions should be represented.[144]

Representation of these elements is compulsory - "States parties shall ensure" that there "is" such representation. "Adequate gender representation", on the other hand, need not be "ensured", as only "due consideration" needs to be given thereto. Naldi and Magliveras find the directive to ensure geographical and legal representativity "surprising", as these considerations are not mentioned in the nomination phase.[145] If one considers that all states may nominate judges, it seems highly likely that a sufficient number of judges from the different regions and representing the major legal systems will be nominated. This factor renders compliance with these requirements at the nominations phase superfluous.

Another concern raised by Naldi and Magliveras is the threshold of a two-thirds majority.[146] This seems a more valid point to ponder. The inclusion of this provision in the Protocol may be motivated by the fact that unanimity should underlie decisions as far as possible, and that all OAU Assembly decisions require a similar majority.[147] But it could cause problems if the required majority is not reached. The Protocol does not cater for such an eventuality. Repeated sessions should be held to elect judges. On no account must this requirement be used to stall the putting in

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142 The ICJ Statute provides for the "main forms of civilization" to be represented (art 9 of ICJ Statute).

143 A tendency has developed to favour West Africa in the composition of the Commission. A repetition should be avoided. See Tables E and F in ch 3 above. The dominance of a regional faction or group of states necessarily taints the inclusivity and legitimacy of any institution with a claim to pan-African status.

144 See the discussion below. The report drafted after the Cape Town meeting refers to "African customary law, Islamic law, Common law and civil law": OAU/LEG/EXP/AFC/HPR/RPT (I) Rev 1 at par 19.

145 (1996) 8 *RADIC* 944 at 958.

146 Naldi and Magliveras (1996) 8 *RADIC* 944 at 957.

147 Art 10(2) of the OAU Charter.

place of the Court. Judges to the ICJ are elected by an absolute majority in both the General Assembly and the Security Council. The ICJ Statute also provides for a deadlock-breaking mechanism when the requirement of a double absolute majority cannot be reached.[148] In its comments about the Cape Town draft, the government of Madagascar proposed that a provision should be included to regulate the situation when the two-thirds majority is not reached. The Secretary-General agreed, and suggested that a new sentence be included which reflects the current practice with regard to election of members of the African Commission. The proposal, to be added after article 13(1), reads as follows: "If the first two ballots are inconclusive, the Assembly may decide to continue the voting process by simple majority".[149] This proposal is strongly supported.

The Nouakchott Protocol deleted the explicit two-thirds majority requirement. This was done after the OAU Legal Adviser had explained that the Rules of procedure of the Assembly stipulate that all decisions of that body are by a two-thirds majority.[150]

7.2.17 Article 15: Term of office

1. *The judges of the Court shall be elected for a period of six years and may be re-elected only once. The terms of four judges elected at the first election shall expire at the end of two years, and the terms of four more judges shall expire at the end of four years.*
2. *The judges whose terms are to expire at the end of the initial periods of two and four years shall be chosen by lot to be drawn by the Secretary-General of the OAU immediately after the first election has been completed.*
3. *A judge elected to replace a judge whose term of office has not expired shall hold office for the remainder of the predecessor's term.*
4. *All judges except the President shall perform their functions on a part-time basis.*

148 See arts 10, 11 and 12 of the ICJ Statute.

149 See CM/1996 (LXV) at 8.

150 See OAU/LEG/EXP/AFCHPR/RPT(2) at par 28.

The judges are elected for terms of six years.[151] They may be elected once again, making twelve years the longest period a judge may serve on the court.[152] This is similar to the position in the Inter-American system. The European system does not place any limitation on the number of years that a judge may serve.[153] An optimal alternative would be to lengthen the term of office, without providing for the possibility of re-election.[154]

Of the first eleven judges elected, only three will serve the full term of six years. The terms of four other judges expire after two years; that of the other four, after four years. This system of "leap-frogging" is also embodied in the Inter-American system. In the Americas, the term of three of the seven judges first elected expires at the end of three years.[155] A similar built-in mechanism to ensure continuity has been included in the African Charter. In almost all cases, initially, the person whose term expired, was re-elected. While this ensured continuity, it also meant a degree of stagnation.[156]

The Cape Town Protocol stipulated that a judge had to complete cases partly heard by him or her before his or her terms expires.[157] This has been omitted from the later proposal, and will probably be dealt with in the Rules of procedure. Saving costs seems to be the motivation behind allowing

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151 Judges of the ECOWAS Court are appointed for five years, once renewable (art 4(1) of the Protocol establishing the ECOWAS Community Court of Justice).

152 This is an advance on the Addis Ababa proposal, which provided for a once-renewable term of nine years, bringing the total number of years a judge could serve on the Court to eighteen. This is similar to the ICJ Statute (art 13): Judges are elected for 9 years, and may be re-elected. The Explanatory Notes to the Draft Protocol state that the period of nine years "is to ensure security of tenure" (at 3). Consideration should be given to include an age limit. This has been done in the Protocol establishing the ECOWAS Community Court of Justice, art 3(7): "A member of the Court shall not be eligible for re-appointment after the age of 65 years". That Protocol sets further age requirements - no person under 40 years or above 60 years of age is eligible for appointment.

153 See art 40(1) of the European Convention: Judges are elected for 9 years, and may be elected.

154 See Shelton (1996) 56 *ICJ Review* 23.

155 Art 54(1) of the American Convention.

156 See Table D in ch 3 above.

157 Art 14(4) of the Cape Town Protocol.

judges to continue hearing cases partly heard by them before their terms have expired.[158] The alternative would have been to start cases *de novo* if the term of any one of the presiding judges would expire. Following the route chosen, delegates in Cape Town remained conscious of the fact "this approach could result in having more than eleven judges at one time".[159]

7.2.18 Article 16: Oath of office

After their election, the judges of the Court shall make a solemn declaration to discharge their duties impartially and faithfully.

This provision was not included in the Cape Town Protocol. It is a mirror image of article 38 of the African Charter, which requires similar declarations after the election of members to the African Commission.

7.2.19 Article 17: Independence

1. *The independence of the judges shall be fully ensured in accordance with international law.*
2. *No judge may hear any case in which the same judge has previously taken part as agent, counsel or advocate for one of the parties or as a member of a national or international court or a commission of enquiry or in any other capacity. Any doubt on this point shall be settled by decision of the Court.*
3. *The judges of the Court shall enjoy, from the moment of their election and throughout their term of office, the immunities extended to diplomatic agents in accordance with international law.*
4. *At no time shall the judges of the Court be held liable for any decision or opinion issued in the exercise of their functions.*

158 OAU/LEG/EXP/AFC/HPR/PRT (I) Rev 1 at par 20. See similar provision in ICJ Statute, art 13(3).

159 OAU/LEG/EXP/AFC/HPR/RPT (I) Rev 1 at par 20.

The lack of independence of the African judiciary has been branded one of the main obstacles to the realisation of rights in Africa.[160] It has indeed been raised as a factor that can easily undermine the meaningful functioning of an African Court on Human Rights. Ensuring the independent functioning of the Court must therefore be an essential feature of the Protocol.

As far as domestic courts are concerned, article 26 of the African Charter places a duty on states parties to "guarantee the independence of the courts". The Protocol extends this principle to the African Court. The 1985 UN Basic Principles on the Independence of the Judiciary served as the most important pre-text for article 15.[161]

7.2.20 Article 18: Incompatibility

The position of judge of the Court is incompatible with any other activity that might interfere with the independence or impartiality of such a judge or the demands of the office, as determined in the Rules of procedure of the Court.

Similar provisions are found in the two other regional human rights Courts.[162] In the Statute of the Inter-American Court three categories of activities that would constitute incompatabily are listed. These are membership of the executive branch of government, being an official of an international organisation, and "any other" activity that might affect the independence or impartiality.[163] This provision has caused judge Sonia Picado to resign her position on the Court to become the Costa Rican ambassador to the United States.[164] In respect of judges of the ICJ, a much stricter standard

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160 See also the discussion of this aspect in ch 3.4.3 and ch 8.

161 See also art 17(2) of the ICJ Statute. See Shelton (1996) 56 *ICJ Review* 23, who discusses the principles of judicial independence in the context of international tribunals.

162 See eg art 40(7) of European Convention and art 71 of American Convention.

163 Art 18(1)(a) of the Statute of the Inter-American Court.

164 See Pasqualluci (1995) 17 *HRQ* 794.

applies. They are not allowed to exercise "any political or administrative function, or engage in any other occupation of a professional nature".[165]

The position of the African judges (except the President) will differ from that of the ICJ judges, as the African judges are not full-time appointments.[166] As far as the President is concerned, the "demands of the office" should disallow his or her taking other positions of employment. The Rules of procedure (or Statute of the Court) should spell this out.[167] It is suggested that a list similar to the one in the Statute of the Inter-American Court should spell out explicitly that certain professional activities are *per se* incompatible with the role of judge. Except for a vague reference to "impartiality", the African Charter does not set any requirement about "incompatibility".[168] This has led to the election to the African Commission of persons closely linked to governments, a state of affairs which should be prevented as far as possible when it comes to the new Court.[169]

7.2.21 Article 19: Cessation of office

1. A judge shall not be suspended or removed from office unless, by the unanimous decision of the other members of the Court, the judge concerned has been found to be no longer fulfilling the required conditions to be a judge of the Court.

2. Such a judgment of the Court shall become final unless it is set aside by the Assembly at its next session.

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165 This requirement is restated in the Protocol establishing the ECOWAS Community Court of Justice (art 4(11) of the Protocol). The appropriateness of such a requirement in the case of judges that are not full-time is open to serious questioning.

166 Art 16(1) of the ICJ Statute.

167 See also Shelton (1996) 56 *ICJ Review* 23, who identified norms for incompatibility of service as one aspect of judicial independence which needs to be strengtened.

168 See art 31(1) of the African Charter.

169 See eg the position of commissioner Ben Salem (Tunisian ambassador to Senegal), and further Table C above.

This provision does not regulate the detail of or the difference between the process of suspension and removal of judges.[170] Obviously, the difference between temporary and permanent removal is crucial. The grounds constituting each, will be set out in the Rules of procedure of the Court.

Naldi and Magliveras show that this provision differs from the position in the Inter-American Court. There, the OAS, and not the Court itself, determines judicial sanction. They conclude: "In this way, the important element of neutrality is maintained".[171] It is unclear if, in their opinion, "neutrality" is "maintained" in the Inter-American system or under the proposed Protocol. My opinion is that it is laudable that decisions about suspension and removal of judges have been removed from the political arena. This will go a long way to addressing one of the main concerns about the functioning of an African Court on Human Rights: its independence from political influence and persuasion. A decision about suspension or removal is best made by peers, and within a judicial setting. Not political pressure and short-term policy considerations, but a hearing, culminating in a "judgment", will be the basis of such a decision. In the event of serious reasons for removal or suspension, the Court is also better positioned to expedite the matter, and will not so easily become the victim of delays caused by extraneous factors.

Unfortunately, in terms of the Nouakchott Protocol the final decision about the dismissal of judges lies with the Assembly. It may set aside the Court's unanimous decision without providing reasons. At the Nouakchott meeting especially Nigeria and Tunisia held the firm view that "the Assembly which elected the judges should be involved in their removal".[172] This is similar to the Addis Ababa proposal, where the decision was also left to the Court, but a final veto was allowed

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170 The reason is probably because the two terms are used more or less synonymously, as there could be little reason only to temporarily "suspend" a judge who no longer fulfil the conditions to be a judge.

171 (1996) 8 *RADIC* 944 at 960.

172 See OAU/LEG/EXP/AFCHPR/RPT(2) at par 33. This was not a view uniformly held: "Some delegations ... strongly felt that the new formulation was unnecessary as the Court should be given the powers to suspend and remove any judge without any outside interference, in conformity with the provisions of most human rights instruments and the practice prevailing in Member States" (at par 34).

to the OAU Assembly.[173] No mention was made of this veto power in the Cape Town report or draft Protocol.[174]

Two other differences with the Addis Ababa proposal may also be noted. The one is that the Addis Ababa proposal sets out the grounds on which the relevant findings could be made. The grounds are "a criminal act, gross or repeated neglect or physical or mental incapacity".[175] Similar provisions should rather be included in the Rules of procedure. The second difference is that the Addis Ababa proposal provides for a judgment by two-thirds majority, while the Cape Town and Nouakchott drafts require judicial unanimity. Two-thirds of the Court is seven judges. The requirement that all judges (except the one being "judged") need to agree, is sound. This will ensure that a judge does not become victim to a pressure group within the Court, and be removed for a petty reason.

7.2.22 Article 20: Presidency of the Court

1. The Court shall elect its President and one Vice-President for a period of two years. They may be re-elected only once.

2. The President shall perform judicial function on a full-time basis and shall reside at the seat of the Court.

The President and Vice-President may be re-elected only once, for a total term of four years. No such prerequisite is included in the Statute of the Inter-American Court.[176] This is more limited

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173 "Such a judgment of the Court shall take effect immediately and will become final unless it is set aside by a two-thirds majority decision of the Assembly" (art 10 of the proposal).

174 Art 17(2) of the Cape Town Protocol reads as follows: "Such a judgment of the Court shall be final and take effect immediately".

175 See the Addis Ababa proposal art 10(1).

176 The Addis Ababa proposal followed this model, by only stipulating that the President and Vice-President "may be re-elected" (see art 11(1) of the proposal).

than the position pertaining under the ICJ Statute. It allows for the election of judges for three-year periods and indefinite re-election.[177]

Only the President is described as a full-time official of the Court. This implies that other judges are part-time, although the possiblity of them taking their seats on a full-time basis is not excluded. Working sessions are not mentioned in the Protocol.[178] In the Statute of the Inter-American Court regular and special sessions are foreseen.[179] It may later appear advisable that all judges should serve on a full-time basis. Even if the Court is not constantly in session, continued close proximity may be necessary to communicate effectively and work on judgments together. In the short term, however, other reasons dictate that only the President should take his or her seat on a permanent basis. For one, it will cut costs drastically, as only one residence will be needed and as the other judges would not be paid on a full-time basis.[180] Also, the majority of cases will first have to be processed by the Commission, and will take time to reach the Court. To establish eleven judges on a permanent basis immediately, would be premature.

The temporary or permanent nature of the positions of judges on the Inter-American Court was not fixed in the American Convention. The Court, addressing this issue in its draft Statute, opted for seven full-time judges.[181] This option was chosen to secure that the Court would not be regarded as an *ad hoc* court, lacking in prestige and legitimacy. The OAS Assembly found this unacceptable, ostensibly on the grounds "that a full-time court would be too expensive and was unjustified until

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177 Art 21(2) of the ICJ Statute.

178 Compare the "Explanatory Notes to Draft Protocol": "The working group had some discussion as to whether the position of President or Vice-Presidents should be full-time or part-time. It would be rather costly to have all three positions full-time. Furthermore, it may be difficult to have only one person to take a full-time position for three years". A full-time position, it was conceded, "will enhance the efficiency of the Court".

179 Art 22 of the Statute.

180 The question may certainly be posed whether the judges, some of whom will no doubt have been judges in their own countries, would then retain their positions. This factor has to be taken into account when the Rules of procedure stipulate which positions are incompatible with being a member of the Court.

181 See the discussion by Buergenthal (1981) 76 *AJIL* 231 - 235, on which the brief history that follows, is based.

the Court had a substantial case load".[182] A Court of part-time judges was established, leaving judges free to "practice law, to teach, and to engage in whatever occupations they may have in their native countries".[183] In terms of the Court's Rules of procedure, a Permanent Commission composed of the President, the Vice-President and another judge is constituted to serve as an "executive bureau". This model seemingly served as inspiration for the Addis Ababa proposal that two Vice-Presidents be elected, and that one of them, or the President, "shall perform judicial functions on a full-time basis and shall reside at the seat of the Court".[184]

In light of the fact that only the President is appointed on a full-time basis, it is a sound principle to rotate the Presidency after two, or, at least, four years.

The Rules of procedure should detail the division of work between the President, the Vice-President, and the other judges.

7.2.23 Article 21: Exclusion

If a judge is a national of any of the State parties to a case submitted to the Court, that judge shall not hear the case.

This is an instance in which the Nouakchott draft departs radically from the Cape Town draft. The previous provision made it possible for judges from one state to "retain the right to hear"[185] cases involving his or her state. It was entitled "Right to hear cases". Given that judges should be independent and not have an interest in any particular case, it follows that judges should not be disqualified from hearing cases emanating from the same country as the one of which they are nationals. This principle is accepted in all major international courts.[186] As a matter of fact, it

182 *Ibid.*

183 *Ibid.*

184 Art 11 of the proposal.

185 Art 19 of the Cape Town draft.

186 See art 43 of the European Convention, art 55(1) of the American Convention, arts 31(2) and 31(3) of the ICJ Statute, art 16(4) of the Statute of the European Court of Justice.

may be regarded as desirable that a judge from the state against which a complaint is directed be represented on the Court. The presence of such a judge will ensure that at least one member of the bench is completely familiar with the applicable legal system. In Africa, with its diversity of legal systems, this factor should be accorded even more importance than in other regions.

The position in the other two regional systems is as follows: In Europe, this factor is accommodated in the provision that the number of judges should be equal to the number of states parties. In practice, however, the European Court sits in chambers of nine judges.[187] The specific judges are chosen by lot, but the judge who is a national of a state party concerned takes his or her seat *ex officio*. If there is no such judge, the state party concerned must appoint an *ad hoc* judge for the purpose of that particular case. The position under the American Convention is different, as the Inter-American Court consists of only seven judges.[188] It is quite likely that a state (or states) party to a case would not be represented on the Court. In such an event, the state may appoint an *ad hoc* judge to serve on the Court for the duration of that case.[189]

It seems advisable that *ad hoc* judges should also be allowed to sit on the African Court. This will not only be in accordance with international tendencies, but will also enhance the effectiveness of the Court, will go a long way towards ensuring state co-operation and will serve the principle of representativity. It is regrettable that the recommendation contained in the Addis Ababa proposal has not been followed. It provided that if "among the judges called upon to hear a case none is a national of any of the States Parties to the case, each of the latter may appoint an *ad hoc* judge".[190] Similar considerations come into play as in the European system, where an *ad hoc* or national judge and a rapporteur-commissioner are appointed. The role of the national judge or commissioner is considered necessary "to guide the other members of the Court through the thicket

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187 Art 43 of the European Convention.

188 Art 52 of the American Convention.

189 See art 55(2) of the American Convention. There could be more than one ad hoc judge in a case: see art 55(3) of the American Convention.

190 Art 12(4) of the Addis Ababa proposal. See also art 12(3) of that proposal, which provides that if one of the judges is a national of a state party in the case, any other state party in the case may also appoint an *ad hoc* judge.

of national law and remedies and to field any question that arise concerning the domestic context of the dispute".[191]

The inclusion of a provision on *ad hoc* judges was extensively discussed in Cape Town.[192] One reason against such a provision is the financial implications: The presence of these judges, their *per diem* and allowances would have to be paid from the Court's budget.[193] The question may certainly be put whether the potentially restricted resources of the Court should be spent on securing the presence of *ad hoc* judges. On the other hand, the cost of these judges has to be weighed against the cost caused by their absence. These *ad hoc* judges bring specialist knowledge of the legal system concerned. Such expertise will have to be secured by other means if an *ad hoc* judge from the country concerned is not included on the bench. Allowing for *ad hoc* judges would enhance perceptions that the Court is an inclusive and participatory institution, and would counter arguments against the Court based on "state sovereignty".[194]

In its comments to the Secretary-General on the draft Protocol, Madagascar proposed a different possibility.[195] Its proposal allows for an *ad hoc* judge to be appointed in respect of a particular country, but only when a judge from any other state party involved in a dispute, already sits as a judge in that dispute. The Secretary-General was of the opinion that, if the consensus is for having *ad hoc* judges, the Madagascar proposal would be preferable. One should realise that the proposal allows a very limited role to *ad hoc* judges. Two possibilities for their participation is provided for:

- An *ad hoc* judge will be appointed in inter-state disputes, in which one state involved already has a judge on the bench.
- An *ad hoc* judge will also be appointed in the unlikely event of individual complaints being directed against more than one state, and one of these states is represented on the bench.

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191 Harris *et al* (1995) at 654. See, on *ad hoc* judges appointed to ICJ, art 31 Statute of ICJ.

192 It had been provided for in the Addis Ababa proposal, see art 12(3) and 12(4) thereof.

193 CM/1996 (LXV) at 8.

194 See, in this respect, also ch 8.1.1.

195 CM/1996 (LXV) Annex III(i) at 2.

The Nouakchott Protocol does not incorporate any of these aspects. It embodies a rigid rule that no judge may adjudicate a case which involves a state of which he or she is a national.

7.2.24 Article 22: Quorum

The Court will examine cases brought before it by at least seven judges.

In general a minimum of seven (of the eleven) judges (or two-thirds) must be present to hear and decide a case.[196] It implies that eleven judges usually hear a case, and that if not all eleven are available, at least seven must be present. All decisions of the Inter-American Court have to be adopted by the Plenary Court. The Court does not sit in panels of judges.[197]

The Cape Town Protocol left the door open that two different chambers, consisting of five judges each, may be established. The European experience, where the Court was overwhelmed by an increased case load partly informed this provision. This may be a future development, as no more than a trickle of cases should be expected initially. The possibility of chambers, also for summary proceedings, is provided for in the ICJ Statute.[198] A provision about such a possibility need not be included in the Protocol: The Rules of procedure of the Court will clarify how judges will be designated to take their seats on the bench of particular chambers.

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196 The quorum for the Inter-American Court is five of the seven judges (art 56 of the American Convention). In other words, 7 is the norm, but at least 5 judges must take their seats.

197 Art 59 of the American Convention.

198 A minimum of three judges may constitute a chamber: see art 26(1) of the ICJ Statute.

7.2.25 Article 23: Registry of the Court

> *1. The Court shall appoint its own Registrar and other staff of the registry according to the Rules of procedure.*
>
> *2. The office and residence of the Registrar shall be at the place where the Court has its seat.*

The Registrar will probably play an important role in the initial functioning of the Court. Many of the reasons for the problematic beginning of the Commission may be sought and have been identified at the secretarial level. The detailed functioning of the Registrar's office will be set out in the Rules of procedure. The selection of the registrar and his or her personnel is clearly of great importance. It is also important that the office be staffed with administrative and legally-skilled personnel. The two only senior Court officials who reside at the seat of the Court are the President and the Registrar. They will co-operate closely, and it is only sensible to accept that the President should have the determining say about whom to appoint. The Registrar must be a person of proven legal and administrative competence. The person appointed to the post must also have an excellent command of either English or French and a working knowledge of the other. It is of importance that the Registry is appointed by the Court, and not by the Secretary-General.[199]

A major constraint in this regard is of a financial nature. The budget of the Registry shall be "determined and borne by the OAU".[200]

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199 As is the case in the OAS, see Cerna in Janis (ed) (1992) at 119.

200 Art 29 of this Protocol, and accompanying discussion.

7.2.26 Article 24: Seat of the Court

1. The Court shall have its seat at the place determined by the Assembly. However, it may convene in the territory of any Member State of the OAU when a majority of the Court considers it desirable, and with the prior consent of the State concerned.

2. The seat of the Court may be changed by the Assembly after due consultation with the Court.

7.2.26.1 Location of seat

The location of the Court is left open for determination by the Assembly. This decision will probably only be taken when the requisite number of states have ratified the Protocol.[201] As part of its views on the Cape Town Protocol, Tunisia proposed to the Secretary-General that the seat of the Court should be "determined once and for all in the statutes".[202] The Secretary-General opposed the idea. Firstly, he pointed out that it would be contrary to the current practice of the OAU.[203] Secondly, he asked rhetorically: "Can the seat be determined before Member States willing to host the Court come forward with specific offers to enable the Assembly (to) determine which one is more attractive?"[204] Thirdly, it would lead to rigidity. To this one may add the possibility of the deterioration in the political situation in the host state. Any future change of the seat would then require the burdensome and time-consuming process of amendment to the Protocol.

Two models are suggested by the two other major human rights systems. One possibility is that the seat of the Commission and the Court may be the same, as in the European system.[205] The

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201 See the comments by the Secretary-General in his report on state views on the draft Protocol: "... it is envisaged that in conformity with the current OAU practice, the Secretariat would propose to the Asssembly a criteria on hosting the Court once the Protocol enters into force" (*sic*, see CM/1996 (LXV) at 8).

202 See CM/1996 (LXV) Annex III (e) at 5.

203 For his arguments, see CM/1996 (LXV) at 8.

204 *Ibid.*

205 All the Council of Europe institutions are located in Strasbourg, France. See also "Explanatory Notes to Draft Protocol", which states: "It may be most appropriate to have the seat of the Court at the same place

Footnotes continued on next page.

other is that the Commission and Court are situated in different states, as in the Inter-American system.[206] Another model is suggested in the African context - that the Court's seat is the same as that of the OAU headquarters in Addis Ababa, Ethiopia, although the Commission is in the Gambia.

The middle option is favoured here. This will mean that the continental human rights system will have three separate focal points - the seat of the political authority, that of the Commission, and that of the Court. One of the main arguments favouring this option is that the continent as a whole should be involved in the project to realise human rights in Africa. At the moment the centre of activity is in the north and west. Establishing the Court in sub-equatorial Africa will enhance continental representation and involvement. It will exercise a gravitational pull that spans the continent and will address concerns that the Commission had become dominated by West-African states.

The uniformity of location in Europe was influenced by the fact that all the institutions were created simultaneously. Where one institution (such as the Inter-American Commission) has already established itself, arguments could be entertained about the feasibility of locating the Court elsewhere. A similar debate is possible in Africa, as the Commission is now firmly established in Banjul, the Gambia.

Having the Commission and the Court in one country will enhance personal links and facilitate communication between the two institutions. This could reduce delays and will go a long way to circumventing the adverse effects of the three-month rule.[207] Scarce resources could be "pooled" for the use of both institutions, and will therefore be improved more easily. While these arguments may be convincing in the abstract, they become less convincing if applied to the concrete state of affairs. The present infrastructure available in the Gambia is not sufficient for both institutions.

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where the Commission has its seat. However, it was considered wise to leave that decision to the Assembly as there may be good reasons why the seat of the Court should be established elsewhere".

206 The Inter-American Commission's seat is Washington DC, in the United States, while the Court is located in San José, Costa Rica.

207 See the discussion of art 8(3) below.

The Gambian government has already been generous in its institutional support of the Commission and it is unlikely that a further burden will be borne with ease. Furthermore, one of the main considerations for the choice of Banjul as Commission seat has subsequently been eroded. The contention was (rightly, at that stage) that the Gambia was one of the few consistently stable democracies in Africa. The military coup d'état of 1994 has nullified the validity of this contention. Other problems, related to connections by air, infrastructure, power supply and available resources, have also arisen.

Based on these experiences, the following prerequisites for the seat of the Court may be listed:

- The seat should not be in Banjul.
- It should be in a state south of the equator.
- It should be located in a stable democracy.
- It should be situated in a state that has already ratified the Protocol or is likely to ratify in the near future.
- The country should have a sound economic base, which will enable it to render institutional support to the establishment of the Court. The most important is the provision of office and court buildings.[208]
- The seat should be in a location easily accessible by air and other routes.
- A well-functioning communication system should be in place.
- It should preferably be situated in a country where NGOs play an active role in society, and may interact with and give support to the activities of the Court.

Some countries that may be suggested are Botswana, Namibia, South Africa, Uganda and Zimbabwe. One factor favouring South Africa is the availability of and access to legal resources. Most major cities have libraries well-stocked with international human rights material. Cape Town

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208 Listed as a "criterion" by the Secretary-General in his report on state comments (CM/1996 (LXV) at 8).

deserves special mention as a possibility, as it has been the location of the meeting of experts drafting the initial proposed Protocol establishing the Court. The African Charter, one is reminded, is also known as the "Banjul" Charter, referring to the location of the initial drafting and the permanent seat of the Commission.

The third possibility, that the Court takes as its seat that of the OAU, must also be considered. Most of the arguments tilting the scale in favour of not establishing the Commission there, apply to the seat of the Court as well. These arguments relate mainly to the independence of the quasi-judicial and judicial bodies from political control.

7.2.26.2 Temporary changes

The seat may be temporarily changed to the territory of another OAS member state. This may be done when two requirements are met: A majority of the Court must deem it desirable, and the state has to consent to host the sitting.[209]

7.2.26.3 Permanent changes

The Protocol provides that the seat of the Court may be changed. Such a decision is made by the OAU Assembly (including states that have not ratified the Charter and the Protocol).

This contrasts with the Inter-American system, where the seat may be changed by a vote of parties to the American Convention, "in the OAS General Assembly".[210] In other words, the forum is the OAS Assembly, but only states parties vote. A two-thirds majority of the states parties to the Convention (not only those present) must favour such a change before the seat of the Inter-American Court can be changed.

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209 See art 3 of the Statute of the Inter-American Court for similar wording.

210 Art 3(2) of the Statute of the Inter-American Court.

This rigid "two-thirds" requirement is replaced in the Protocol with a more flexible approach: A change of seat may only be made "after due consultation with the Court". No doubt, the opinions of the members of the Court are of relevance. These views are not made conclusive. The judges need only be "consulted". A distinction may be drawn between "in consultation with" and "after consultation with".[211] The reference to "due consultation" may also be read as a mechanism through which the Court could initiate steps to have the seat changed.[212]

7.2.27 Article 25: Evidence

> *1. As far as possible, after due consideration, the Court will hear submissions by all parties and if deemed necessary, hold an enquiry. The States concerned shall assist by providing relevant facilities for the efficient handling of the case.*
> *2. The Court may receive written and oral evidence and other representations including expert testimony and it shall make a decision on the basis of such evidence and representations.*

Ordinarily, courts consider the facts and the law applicable in a particular matter. They first inquire about facts by receiving evidence. Evidence can include written statements, oral testimony and real evidence. Once the facts have been investigated, the Court considers the applicable law and its application to the facts. To assist the Court in making an informed decision, counsel submits argument on the legal position and the application of the law to the facts. In an appeal court the facts as found are usually used, and only submissions are entertained.

The role of the African Court has not been clarified. The Court has a discretion to hold an enquiry, to allow evidence, and to hear submissions. None of these possibilities are compulsory.

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211 On the distinction between the two terms, see eg the South African case *Colonial Secretary v Molteno School Board* 27 SC 96. "After consultation" implies that the decision-maker must inform other parties involved, but they need not agree with the decision-maker's decision. "In consultation with" requires a consensual agreement between the parties (see Basson & Viljoen (1988) at 57).

212 See Naldi and Magliveras (1996) 8 *RADIC* 944 at 960: The Court is entitled to propose another venue and the Assembly may agree to comply. The Assembly clearly retains a discretion.

7.2.27.1 Evidential matters

Different legal systems are represented in the African system. As far as the rules of evidence are concerned, definite differences exist between the common law and civil law approaches.

The Inter-American system is dominated by states with civil law backgrounds. The Court's approach may be characterised as "civil law", but is was first formulated in constitutional terms, rather than opting for any existing "domestic" system.[213] As in Africa, states with inquisitorial and accusatorial systems form part of the European human rights system. Potential conflict has largely been avoided by adopting a flexible approach to evidence.[214] At the level of the Commission, its functions of ascertaining the facts and of trying to solve matters amicably necessarily lend themselves to an inquisitorial approach.[215]

The Rules of the International Criminal Tribunal for the former Yugoslavia seem to favour a civil law approach to the admission of evidence. In general, the tribunal must apply rules of evidence which will best favour a fair determination of the matter before it "and may admit *any relevant evidence which it deems of probative value*".[216] The following rule has been adopted as far as the exclusion of evidence is concerned: "No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings".[217]

In the Tribunal's *Decision on the Defence Motion or Hearsay*[218] the defence argued that all hearsay evidence implicating the accused should as a general rule be excluded. The tribunal rejected this contention, holding that it must consider the relevance, the probative value and

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213 See eg art 34 of the Rules of procedure of the Inter-American Court.

214 See eg rule 26 of the Rules of Court of the European Court of Human Rights.

215 See art 28(1)(b) of the Convention.

216 Rule 89.

217 Rule 95 of the Rules of procedure and Evidence of the International Tribunal for Rwanda.

218 5 August 1996, *Tadio* case IT-94-I-T, see Tittemore (1996) 4 *Human Rights Brief* at 4.

reliability of evidence. Applied to the contested evidence, it meant that the tribunal would "hear both the circumstances under which the evidence arose as well as the content of the statement".

Whatever system the African Court follows, it should adopt a generous approach to questions of admissibility of evidence. In its first contentious case, the Inter-American Court was faced with questions about the admissibility of indirect evidence in the form of circumstantial evidence, *indicia* and presumptions.[219] The Court decided to allow all evidence that provides the Court with information about the relevant facts, without imposing strict and formal limitations.[220] The Court drew a distinction between the strict rules of evidence in a criminal trial, and those applicable in the consideration of a human rights violation: "The objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages resulting from the acts of the States responsible".[221]

7.2.27.2 Submissions

The Court has an option to allow submissions. This much is clear from the use of phrases such as "as far as possible" and "after due consultation". "Other representations" in article 23(2) should include *amicus curiae* briefs, in particular by NGOs with an interest in the matter, or any body that may enlighten the Court.

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219 See the *Velásquez Rodríguez* case, Series C 4, judgment of 29 July 1988.

220 At paras 140 - 146.

221 At par 134.

7.2.28 Article 26: Findings

1. If the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.

2. In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary.

7.2.28.1 Appropriate remedy

The Court has a wide discretion to make "appropriate orders" to "remedy the violation". No exhaustive list of possible remedies is provided. In the Cape Town Protocol, explicit reference was made to two general remedial possibilities.[222] The one was that the consequences of the violation be remedied. This could constitute an order of *restitutio in integrum*, a complete return or restoration of the position before the violation occurred. The other (not exclusive of the first) was payment of reparation or compensation to an injured party. This last possibility is restated in the Nouakchott Protocol. The Court should not hesitate to make use of this possibility. Especially in the African context, compensation is often the most appropriate remedy. It is appropriate if one considers adjudication in traditional African societies. The Report of the Uganda Constitutional Commission, for example, identified the failure of the post-colonial legal system to take into account Ugandan cultural norms, identified as directed at conciliation and harmony.[223] One of the main problems of this alien orientation has been the lack of compensation paid to victims in the criminal justice sphere. It has often been pointed out that dispute settlement in traditional Africa

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222 Art 24(2) of the Cape Town Protocol.

223 (1993) par 17.25 -17.26.

was aimed at restoring a societal imbalance.[224] Some form of compensation often contributed to this restoration. The provision in article 24(2) is a verbatim replica of the corresponding provision in the American Convention, showing that compensation as remedy is not peculiar to Africa.[225]

7.2.28.2 "Heads" of damages

Article 26(1) introduces the yardstick of "appropriate" remedial measures. This leads to the question of what may be included under the "heads" of damage: moral, actual or material damage?

The Inter-American Court has awarded actual, moral and material damages. These categories are illustrated well in the case of *Aloeboetoe v Suriname*.[226] In that case Surinamese soldiers abducted a group of men who were members of the Saramanca tribe. After having been ordered to dig their own graves, six of them were killed. The Court awarded moral damage to the successors (also the ascendant-parents) and material damages to victims' successor-wives and children. The Court's judgment represents a significant shift from its two previous judgments, in which it characterised the remedy as *restitutio in integrum*. The Court broadened the scope of damages to "remedy all the consequences of the violation that took place".[227] Restitution has made room for indemnification. One of these consequences was that payment was awarded for expenses to discover the whereabouts of victims' remains.

The Court went further, extending the ambit of "indemnification" clearly beyond monetary compensation. The state also has certain socio-economic responsibilities towards the heirs of the victims, the Court held. A public school had to be reopened for the Saramanca, and the state had to staff it with teaching and administrative staff to ensure its permanent functioning. In addition, the Court placed the state under an obligation to open a medical dispensary and to make it

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224 See also, in the South African context, the South African Law Commission's issue paper 7 on Restorative Justice. The Commission found South Africa not to be on par with the rest of the world as far as victim-compensation is concerned, and recommended a compensation scheme for victims of crime in South Africa.

225 See art. 63(1) of the American Convention: Only the phrase "is appropriate" was deleted in the Protocol.

226 Series C 15, judgment of 10 September 1993, see (1993) 14 *HRLJ* 413.

227 Par 47 of the judgment.

operational within the next year. The state must also use the means at its disposal to inform those affected about the fate of the victims and the location of their remains.
In their claim the applicants also requested measures of a more symbolical nature. This included requests that the President of Suriname make a public apology and that public facilities in the capital be named after the Salamanca. The Court did not make any order in this respect.

7.2.28.3 Quantum of damages

The quantum (amount) of compensation is not stipulated. The yardstick set in article 26(1) is that of "fair compensation".

In *Aloeboetoe v Suriname*[228] actual damages were assessed on the amount that the victims would have earned during their full working lives. The amount was calculated in the local currency and converted to US $ to circumvent the effect of spiralling inflation in Suriname. The money was placed in two trust funds, to be administered for the benefit of the adult and minor beneficiaries.

Moral damages in the *Velásquez Rodríguez* and *Godínez Cruz* cases was based on the account of a psychiatrist's expert testimony. In *Aloeboetoe*, on the other hand, no expert evidence was led. This may be explained by the fact that the (new) government admitted responsibility. The amount awarded is not motivated, but is presumably based on the on site investigation by a member of the Court's administrative staff. The payment took the form of lump sums paid to the beneficiaries.

7.2.28.4 Injured party

Any "injured party" is broadly recognised as a potential beneficiary.

The question in *Aloeboetoe* was whether the Salamanca tribe as such is an "injured party". Finding that the damage suffered by the tribe was too remote, the Court found that it did not

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228 (1993) 14 *HRLJ* 413.

qualify. The Court accepted that all persons belong to "intermediate communities". The state's duty to compensate does not extend to such communities. The Court added that in an exceptional case this could be granted if the community suffered direct damages. Criticism has been expressed against the tendency to regard all intermediate communities as identical. Certainly circumstances might arise where a specific community and its members are targeted for genocide. It may be argued that the reluctance to grant a claim collectively is the consequence of not enshrining a group concept in the Convention, and in the African context such group claims are much more likely to succeed.

7.2.28.5 Provisional measures

Before the Protocol aimed at establishing the Africa Court, American Convention was the only international human rights instrument that provides for judicially enforceable provisional measures.[229] Following the wording of Article 63(2) of the American Convention, article 26(2) of the Protocol enables the African Court to adopt legally binding provisional (or interim) measures. This shall however only be done if both the following two criteria are met:

- It must be a case of "extreme gravity and urgency".
- The measures must be necessary "to avoid irreparable damage to persons".

Under the American Convention, a distinction is drawn between matters under the Court's consideration and matters not yet submitted to the Court. The Commission does not have the competence to order interim measures. If a case is still being considered by the Commission, it must therefore refer the case to the Court for its determination on interim measures. A similar distinction is not drawn in the Protocol.[230] The reason may be that the Commission has the capacity

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229 But see also the Protocol establishing the ECOWAS Community Court of Justice, art 20: "The Court ... may order any provisional measures or issue any provisional instructions which it may consider necessary or desirable".

230 The Addis Ababa proposal added to a provision similar to art 24(3), the following: "With respect to a case not yet submitted to the Court, it may act at the request of the Commission".

to order interim relief.[231] In other words, if a case is still pending before the Commission and urgent relief is required, the Commission will issue recommendations. If the matter is being entertained by the Court, it may order interim relief. One major shortcoming of this procedure is the fact that the views issued by the Commission remain mere recommendations. If interim measures are contained in a judgment of the Court, they will have greater authority. If such an approach is adopted, the concurrent jurisdiction of the Commission may be retained. As soon as it becomes clear that a state is not abiding by the Commission's "views", the case should be referred to the Court for a final judgment.

Buergenthal argues that interim measures have a special importance in the inter-American system.[232] He provides the following motivation, which is equally applicable to Africa: "This is so because the system applies to a region where unlawful governmental action or inaction causing 'irreparable damage to persons' is not an uncommon occurrence".[233] The Inter-American Court has granted interim measures on numerous occasions.[234]

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231 The Commission may, in terms of its Rules of procedure, inform a country of its "views" concerning "the appropriateness of taking provisional measures to avoid irreparable prejudice being caused to the victim of the alleged violation" (Rule 111 of amended Rules).

232 In Bernardt (ed) (1994) 69.

233 *Ibid.*

234 See ch 5.2.5.7 above.

7.2.29 Article 27: Judgment

1. *The Court shall render its judgment within three months of having completed its deliberations.*
2. *The judgment of the Court taken by majority shall be final and not subject to appeal.*
3. *The judgment of the Court shall be read in open court, due notice having been given to the parties.*
4. *Reasons shall be given for the judgment of the Court.*
5. *If the judgment of the Court does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate or dissenting opinion.*

Judgment on the merits is by majority vote. This is preferable to a higher requirement, such as two-thirds approval. The experience in Europe illustrates that such a requirement may be too burdensome. This has been illustrated in the case of *Huber v Austria*[235], which was strongly criticised.[236] This situation was remedied by Protocol no 10 to the Convention, adopted on 30 March 1992, in terms of which the two-thirds majority required for a finding by the European Commission was reduced to a simple majority. This makes it more difficult for a small group of commissioners (or "states") to undermine finality in decision-making.

The Court's judgment is final, in the sense that it forms the apex of a judicial pyramid that starts with the lowest domestic courts in African countries. No further appeal is possible. This fact alone does not render the decision "binding", in that it is enforced. Only the execution or implementation of the judgment will ensure compliance. Experience in other regions has shown that states do not comply with a judgment of a supra-national court only by virtue of the fact that the Court has delivered a final judgment.

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235 European Court of Human Rights, Series A 188, judgment of 23 October 1990.

236 See Tomuschat (1992) 13 *HRLJ* 401 at 403.

Judges may deliver dissenting opinions. One of the criticisms of the Commission had been its emphasis of consensus, its lack of rational deliberation and the impossibility of dissent. Its Rules of procedure do not allow for dissenting opinions.

The Nouakchott proposal introduced the requirement in article 27(1): A time limit is set within which the Court must deliver its judgments. This is a salutary principle, but its formulation still leaves room for manoeuvre. The period of three months starts running when the Court has completed "its deliberations" and not after the parties have presented their cases. This leaves open the possibility of the "deliberations" only commencing at some later date, or of uncompleted deliberations being deferred *sine die*. Such an interpretation should be avoided. "Deliberations" are part of the proceedings and follows directly after the parties have presented their cases. Only in highly exceptional cases should the proceedings be postponed for later deliberation.

7.2.30 Article 28: Execution of judgment

The States Parties to the present Protocol undertake to comply with the judgment in any case to which they are parties and to guarantee its execution.

A similar provision is included in the American Convention.[237] That provision spells out that "compensatory damages" may be enforced in the state against which it was ordered, "in accordance with domestic procedure governing the execution of judgments against the state".[238]

The effcetive follow-up to decisions has troubled even the European system, which is otherwise held out as a model of effectiveness. The European Court may order a state to grant "just compensation", but is "debarred from enjoining it to amend its legislation" or to "make a deposit for the payment of the claimant's right to compensation".[239] The European Court thus does not pronounce itself on the question whether domestic law, as such, is in conflict with the Convention.

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237 Art 68(1) of the American Convention.

238 Art 68(2) of the American Convention.

239 See Tomuschat (1992) 13 *HRLJ* 401 at 404, and also *Idrocalce v Italy* (1992) 15 *HRLJ* 156.

Its duty is to find, in individual cases, whether a provision of the Convention had been violated.[240] However, the Committee of Ministers has included legislative reform in the exercise of its supervising function. Tomuschat gives examples of states that have taken quite some years to amend legislation, and of states that have complied instantly.[241] Another problematic aspect is that a political body such as the Committee of Ministers is not always in a position to evaluate whether legislative steps in fact amount to compliance with the Court's judgment.

As far as orders for compensation are concerned, the European Court orders a state to pay a specific amount in respect of costs, expenses or just satisfaction. In the 1990s it became clear that the Court could not take for granted that states were going to comply promptly with such orders. Consequently, it now orders that payment be made "within the next three months".[242] Even this has not prompted some states to comply with the Court's order.[243] The African Court on Human and Peoples' Rights should take these experiences into account.

7.2.31 Article 29: Notification of judgment

1. *The parties to the case shall be notified of the judgment of the Court and it shall be transmitted to the Member States of the OAU and the Commission.*
2. *The Council of Ministers shall also be notified of the judgment and shall monitor its execution on behalf of the Assembly.*

Although this article is headed "Notification", it deals with an important aspect of enforcement. The main political organ entrusted with monitoring compliance with court judgments is the Council of Ministers. The Council fulfils this function on behalf of the Assembly. The Court is not granted any powers to ensure compliance with its judgments.

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240 This approach is deduced from the wording of art 25 of the Convention.

241 (1992) 13 *HRLJ* 401 at 405 - 406.

242 See the first case in which such an order was made: *Moreira de Azevedo v Portugal,* Series A 208, judgment of 28 August 1991, at 34.

243 See Tomuschat (1992) 13 *HRLJ* 401 at 405.

To ensure transparency and accountability, the Protocol should add that the Court will release judgments to the public and the press immediately. Future access and reference will be improved if a yearbook of decisions is published annually. The publication should not be left to entrepreneurial individuals, but should be regulated as an integral function of the Court's registry.

The eventual "enforcement" of the Court's judgments is the responsibility of the OAU Assembly. But the Council of Ministers, rather than the Assembly, is given the task of "monitoring" state compliance. It is not clear what this entails. It may indeed be "keeping a mere record of judgments' implementation in the internal legal orders of recalcitrant states".[244] It could also take the form of placing the issue on the agenda of meetings of the Council of Ministers until the state complies. In the European system, the Council of Ministers has the power to censure any non-complying state.[245]

7.2.32 Article 30: Report

> *The Court shall submit to each regular session of the Assembly, a report on its work during the previous year. The report shall specify, in particular, the cases in which the State has not complied with the Court's judgment.*

Like the African Commission, the Court must submit yearly reports to the Assembly. All "measures taken" by the Commission remain confidential until the Assembly decide differently.[246] Being a judicial institution, the activities of the African Court on Human Rights are public knowledge. Access to information contained in judgments and other information is not restricted. In the case of the Court, the main aim of the annual report is to supplement the "enforcement" of judgments. However, it seems difficult for the Court to report about state-compliance, if the

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244 As Naldi and Magliveras suggest: (1996) 8 *RADIC* 944 at 963.

245 See Naldi and Magliveras (1996) 8 *RADIC* 944 at 965. They cite a recent case against Greece in which this step was taken.

246 See ch 3.1 above.

function of monitoring judgments is given to the Council of Ministers.[247] It would probably make more sense to empower the Council to report to the Assembly on non-compliance and on recommended action that the Assembly may take.[248] If the provision is retained in its present form, the Court should co-operate closely with the Council of Ministers, in order to keep itself informed about the implementation of judgments by states. The involvement of both institutions in overseeing implementation may enhance its effectiveness.

7.2.33 Article 31: Budget

Expenses of the Court, emoluments and allowances for judges and the budget of its registry, shall be determined and borne by the OAU, in accordance with criteria laid down by the OAU in consultation with the Court and bearing in mind the independence of the Court.

Budgetary constraints have greatly contributed to the inefficiency of the African Commission. Being dependent on the OAU, the Commission remained powerless. It is therefore unfortunate to note the drafting history of this article. Initially, in terms of the Addis Ababa proposal, the Court was entitled to "draw up its own budget" and submit it for the Assembly's approval.[249] The present version, adopted at Cape Town, has a different focus, stipulating that the OAU will "determine" the budget. The role of the Court is consultative: Criteria have to be drawn up by the OAU, "in consultation with the Court". The OAU also has to "bear in mind" the independence of the Court in deciding on criteria to fund the Court. These efforts to circumscribe the power of the OAU seem to be little guarantee against political manipulation of available finances.

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247 See also Naldi and Magliveras (1996) 8 *RADIC* 944 at 964. To them, it "is not immediately obvious why this obligation is imposed on the Court". They show that the provision is based on an equivalent in the American Convention. Where the Protocol provides for "monitoring" by the Council of Ministers, the American Convention is silent, leaving it to the Court to report to the Assembly (art 65). The Inter-American Court raised state non-compliance for the first time in its 1990 Annual Report (See Cerna in Janis (1992) at 121 - 122).

248 See art 65 of the American Convention, where similar powers are granted to the Court.

249 Art 14(1) of the proposal.

A question that regularly arises in this context is: Given the financial difficulties of the OAU, and given that the Court is an OAU institution, should "extra-budgetary resources" be mobilised? The Cape Town meeting addressed this issue and adopted the following principles:[250]

- The independence and integrity of the Court should be ensured.
- The OAU Secretary-General should do all that is necessary to ensure adequate funding for the Court, including mobilising extra budgetary resources.
- The criteria for determining the emoluments and allowances of the judges should be drawn up by the OAU taking into account the provisions of the relevant OAU Rules and Regulations in consultation with the Court.

7.2.34 Article 32: Rules of procedure

The Court shall draw up its Rules and determine its own procedures. The Court may consult the Commission as appropriate.

The Rules of procedure will further spell out the "organisation, jurisdiction and functioning" of the Court.[251] When the African Commission was established, it adopted Rules of procedure at its second session, on 13 February 1988. Amended Rules of procedure were adopted at its 19th session. It may also take some time for the Court to adopt its Rules of procedure. In the light of the complementary nature of the Commission's functions, it will in all likelihood have to amend its rules again, once the Court has finalised its functioning. The two sets of Rules of procedure should ensure the harmonious co-existence of the two institutions. In the light of the co-existence of the Court and Commission, and the Commission's experience in drafting Rules of procedure, the last sentence was added in Nouakchott.

Some of the issues that should be covered in the Rules of procedure are:

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250 See OAU/LEG/EXP/AFC/HPR/RPT (I) Rev 1 at par 24.

251 See art 1 of this Protocol.

- An indication should be given as to the award of costs. The ICJ Statute provides that parties bear their own costs, unless the Court provides otherwise.[252] It should be kept in mind that a threat of costs should not serve as a deterrent to potential complainants, or to the Commission.[253]

- The language policy of the Court should also be regulated. In the ICJ, two languages (English and French) are provided for, but the use of other languages may be authorised.[254]

- Provision should be made for the frequency and duration of the Court's sessions, especially when it does not have a heavy case load. It remains important for the judges to meet at least twice a year.[255] The door should be left open for more regular sessions, and especially for emergency sessions from time to time.

- Provision should be made for a Victims and Witnesses Unit. The protection and support of witnesses has been given priority in the International Tribunal for Rwanda.[256]

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252 Art 64 of the ICJ Statute.

253 Considerations applicable to a domestic setting, such as the South African Constitutional Court, may also be of relevance here. See the remarks by Ackermann J in *Ferreira v Levin NO* 1996 2 SA 621 (CC), at par 10: the possible "chilling effect" of an adverse cost order on individuals was marked a "very important policy issue which deserves anxious consideration". See also the remarks made by Mohamed DP (as he then was), in *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the School Education Bill, 1995 (Gauteng)* 1996 3 SA 165 (CC), at par 36: "A litigant seeking to test the constitutionality of a statute usually seeks to ventilate an important issue of constitutional principle. Such persons should not be discouraged from doing so be the risk of having to pay the costs of their adversaries, if the court takes a view which is different from the view taken by the petitioner".

254 Art 39 of the ICJ Statute.

255 As is the case in the Inter-American system - see arts 11 and 12 of the Rules of the Court. Anyone who has suffered from the confusion about dates and venues of forthcoming sessions of the African Commission would insist on the insertion of the following highlighted phrase: The Court shall meet twice yearly *on the dates decided by the Court at the immediately preceding session* (see art 11 of the Rules of the Inter-American Court).

256 See Rule 34 of the Rules of procedure and Evidence, UN Doc ITR/3/Rev 1 (1995), which entered into force on 29 June 1995. See also Rule 75: The Court may order appropriate measures for the privacy and protection of victims and witnesses. It may hold *in camera* proceedings to determine eg whether the

Footnotes continued on next page.

- Grounds which would lead to removal or suspension of judges, should be spelled out.
- It should be clarified how a decision on "exceptional grounds" is to be made. The procedure of this preliminary finding should be delineated.
- A division of functions between the President and Vice-President should be included.
- A rule should be included to ensure that the Commission and the Court do not entertain the same matter simultaneously.

7.2.35 Article 33: Ratification

1. This Protocol shall be open for signature and ratification or accession by any State Party to the Charter.

2. The instrument of ratification or accession to the present Protocol shall be deposited with the Secretary-General of the OAU.

3. The Protocol shall come into force one month after fifteen instruments of ratification or accession have been deposited.

4. For any State Party ratifying or adhering subsequently, the present Protocol shall come into force in respect of that State on the date of the deposit of its instrument of ratification or accession.

5. The Secretary-General shall inform all Member States of the OAU of the entry into force of the present Protocol.

The number of ratifications required is set at **fifteen**. In earlier deliberations, the number was set at nine[257] and eleven.[258] The increase in the required number of states may be a deliberate ploy to delay commencement of the Protocol, or it may be a product of greater optimism about the

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identity of witnesses should not be disclosed, or what measures (such as closed-circuit television) may be adopted to facilitate the testimony of vulnerable victims and witnesses.

257 See eg art 31(3) of the Addis Ababa proposal, and discussion in "Explanatory Notes on Draft Protocol".

258 Art 32(1) of the Cape Town Protocol.

readiness of states to ratify, occasioned by the democratisation of the 1990s. The likelihood of eleven states ratifying the Protocol within a relatively short time, is not too remote, but the likelihood of fifteen states doing the same is significantly smaller.

When expressing comments about the Cape Town draft Protocol, some states viewed the number required (eleven) as too low.[259] To Tunisia, it "would be difficult to comprehend the binding force of a document which is only ratified by eleven of the 54 Member States of the OAU. Comparison is drawn with the European Convention, which required two-thirds of the states to ratify before it entered into force".[260] The parallel is not convincing. The European Convention did not provide for compulsory acceptance of the jurisdiction of the European Court of Human Rights, but provided for optional acceptance. After eight states parties had accepted it, the first elections for judges were held.[261] At the Nouakchott meeting of legal experts Tunisian insistence on ratification by two-thirds of OAU member states was restated and further supported by Algeria.[262] Nigeria insisted on a simple majority, while Sudan suggested a one-third requirement as a compromise.[263] **All other delegations** (that is, 15 states) were of the opinion that eleven ratifications were adequate and expressed the view that "there was no need to require a higher figure".[264] Despite this clear majority, the principle of striving for consensus caused the meeting to agree on a figure of fifteen. Algeria, Nigeria and Tunisia nevertheless "recorded reservations on this point",[265] indicating that consensus was in fact not arrived at. The agreement arrived at illustrates the negative consequences of consensus seeking at this stage of elaboration. A standard has been eroded under the influence of a small minority of states that are in any event unlikely to ratify the Protocol within the forseeable future.

In the Inter-American system, states can also decide to accept the compulsory jurisdiction of the Court. The Court was constituted and judges were elected once the Convention entered into

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259 See CM/1996 (LXV) Annex III (e) at 5. See also the comments in ch 6.1.5.5 above.

260 See CM/1996 (LXV) Annex III (e) at 5.

261 In terms of art 56 of the European Convention.

262 See OAU/LEG/EXP/AFCHPR/RPT(2) at par 45.

263 *Ibid.*

264 OAU/LEG/EXP/AFCHPR/RPT(2) at par 46.

265 OAU/LEG/EXP/AFCHPR/RPT(2) at par 47.

force.[266] In other words, the Court could start functioning without a specific number of declarations accepting its jurisdiction being met. This is another instance in which Africa should follow closer in the footsteps of the Latin American system than the European. In Europe, states have generally given their support to developing an effective human rights mechanism. This has not been the case in either the Americas or Africa. In the light of these considerations, the number of eleven seems to have made good sense.

7.2.36 Article 34: Amendments

> *1. The present Protocol may be amended if a State Party to the Protocol makes a written request to that effect to the Secretary-General of the OAU. The Assembly may adopt, by simple majority, the draft amendment after all the States Parties to the present Protocol have been duly informed of it and the Court has given its opinion on the amendment.*
> *2. The Court shall also be entitled to propose such amendments to the present Protocol as it may deem necessary, through the Secretary-General of the OAU.*
> *3. The amendment shall come into force for each State Party which has accepted it one month after the Secretary-General of the OAU has received notice of the acceptance*

The procedure for amending the African Charter, set out above,[267] is mirrored in this proposed article. Four important differences may, however, be identified:

- The dichotomy of the Assembly "approving" and states "accepting" amendment to the Charter by way of notice, is replaced by a dichotomy between the Assembly "adopting" and states "accepting" amendments to the Protocol by way of notice. This, in my view, more clearly suggests that, in the case of the Protocol, the mere fact of adopting the amendments will not bind states.

- The Court, and not only states parties to the Protocol, may initiate amendments to the Protocol. The Commission is not endowed with the same competence in terms of the Charter.

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266 In terms of art 81 of the American Convention.

267 See discussion at ch 7.1.1 above.

- Amendments to the Charter come into force three months after receipt of the state's notice of acceptance. The period is reduced to one month in relation to the Protocol.

The requirement that the Assembly "may adopt" amendments by a simple majority is extremely problematic. Fifteen ratifications are required to allow the Protocol to enter into force. This is only about a quarter of the total membership of the OAU. Necessary reforms may be thwarted by the majority of member states that have not ratified the Protocol and may not have the intention to do so in the foreseeable future. Rather, the consent of **all states parties to the Protocol** should be sufficient to amend the provisions of the Protocol. Otherwise, even if almost half of the OAU members accept the Court's jurisdiction in future, the system is still held to ransom, because any reform will require the agreement of a simple majority of the OAU member states. The problem that may arise if this happened, is that the Protocol may be reformed to provide more effective realisation of rights. This would make further ratifications all the more difficult, driving a wedge between those states that have ratified the Protocol and those that have not ratified it. In other words, allowing parties to the Protocol to control its evolution may alienate non-parties and may make more ratifications unlikely.

7.3 *Simplification by schematising*

The following five tables set out important aspects of the proposed African Court on Human and Peoples' Rights:

TABLE L: SUPPLEMENTARY ROLE OF THE PROPOSED COURT

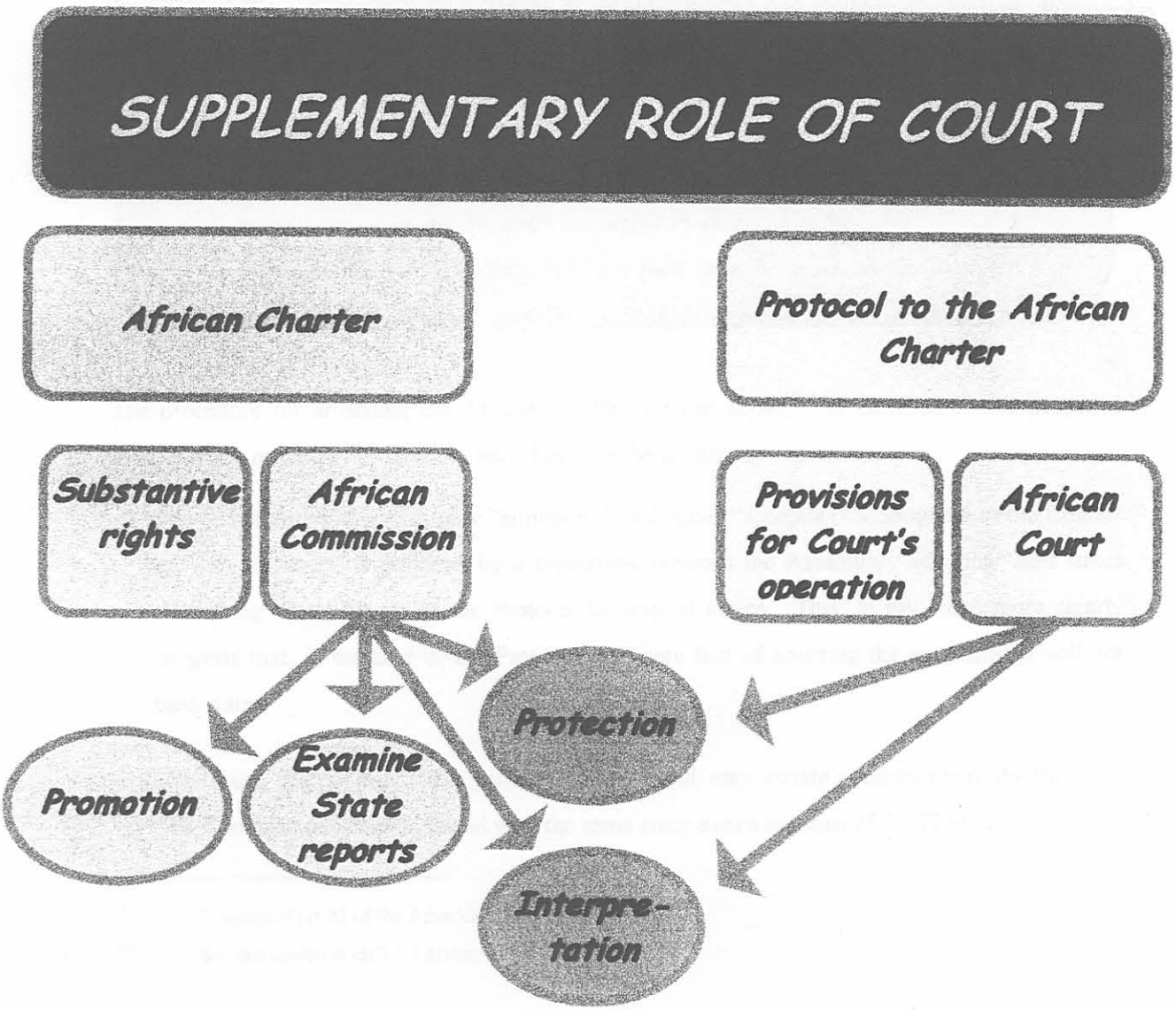

TABLE M: INDIVIDUAL COMPLAINTS DIRECTED TO THE COMMISSION AND PROPOSED COURT

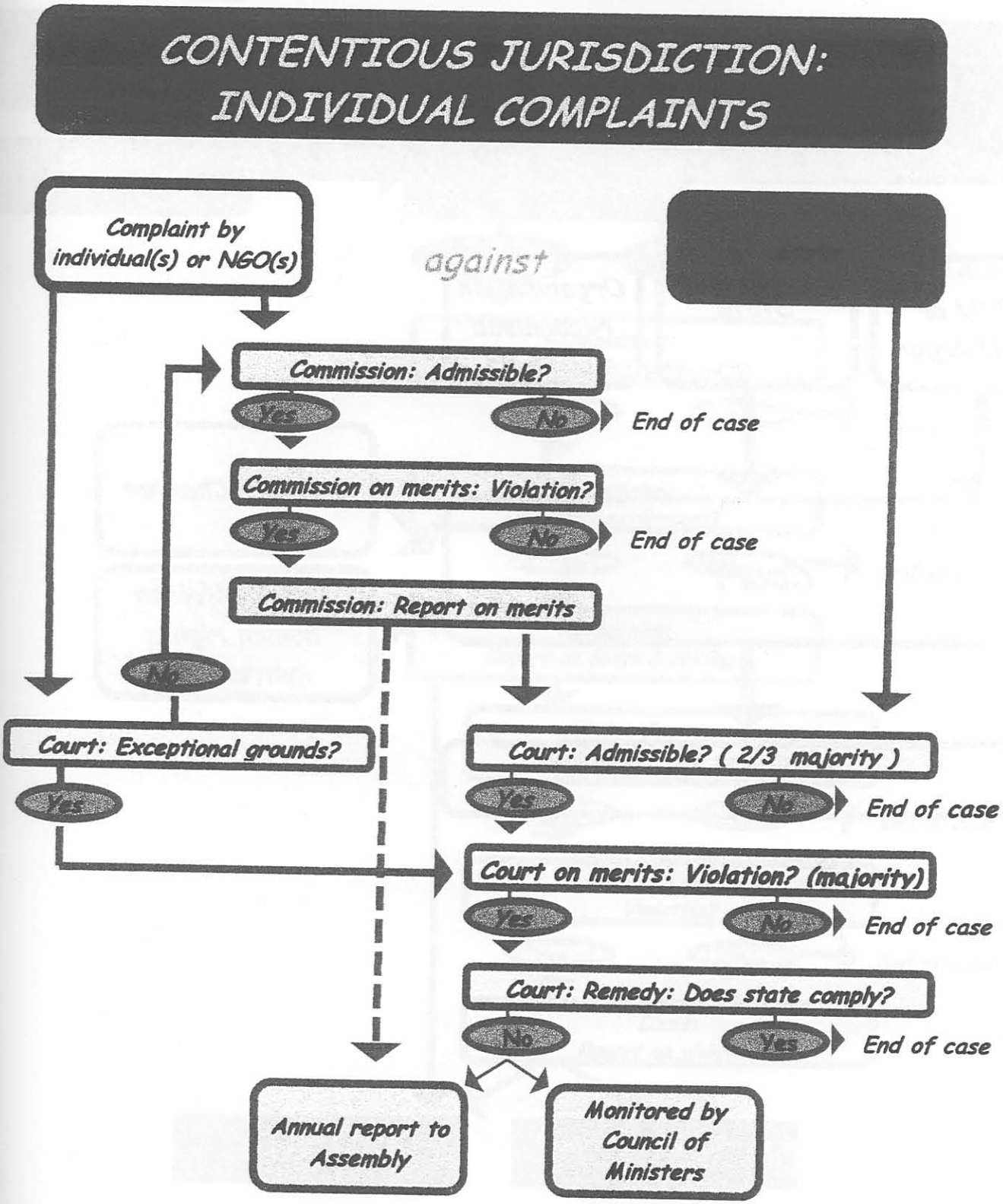

TABLE N: JURISDICTION OF THE PROPOSED COURT

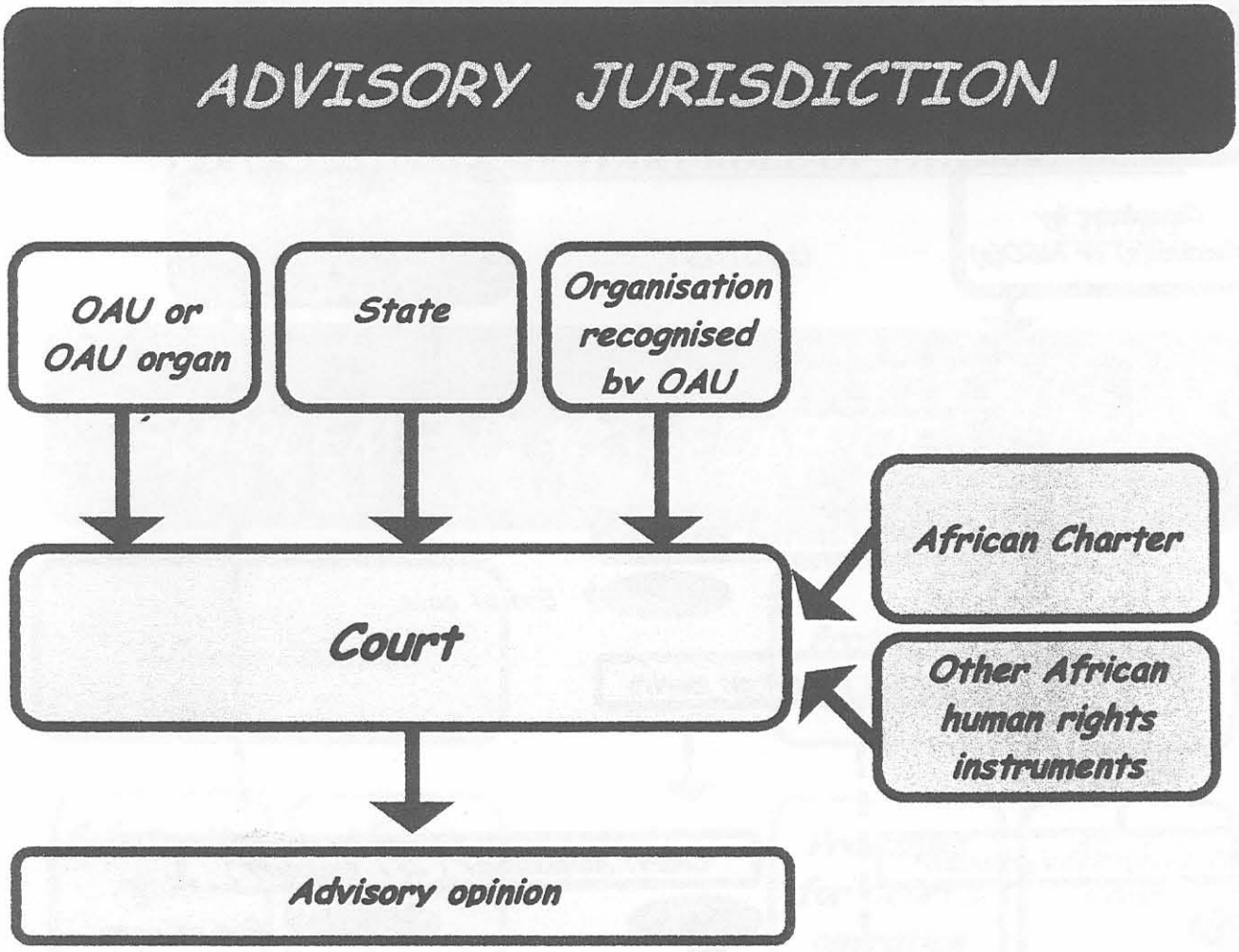

TABLE O: INTER-STATE COMPLAINTS SYSTEM UNDER THE PROPOSED COURT