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**TOPIC: AFRICAN COURT ON HUMAN  
AND PEOPLES RIGHTS: A LANDMARK  
ON SLIPPERY GROUNDS.**

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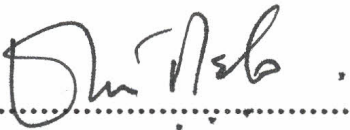
**DECLARATION**

**I Hon. Lady Justice Roselyn Naliaka Nambuye I do declare that this is my original work and has not been submitted and is not currently being submitted for a degree in any other institution.**

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**This dissertation is submitted for examination with my knowledge and approval as the University supervisor.**

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## **DEDICATION**

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## ABBREVIATIONS

ACHPR	-	African Charter on Human and Peoples Rights
ACHR	-	American Convention on Human Rights
ACHR	-	American Court of Human Rights
ACJ	-	Africa Court of Justice
AHSG	-	Assembly of Heads of State and Government
AU	-	African Union
ECHR	-	European Convention on Human Rights
ECHR	-	European Court of Human Rights
IACHR	-	Inter-American Commission on Human Rights
ICCPR	-	International Convention on Civil and Political Rights
ICESCR	-	International Convention on Economic Social and Cultural Rights
ICJ	-	International Court of Justice
NGO	-	Non-Governmental Organization
OAS	-	Organization of American States
OAU	-	Organization of African Unity
UDHR	-	Universal Declaration of Human Rights
UN	-	United Nations
UNGA	-	United Nations General Assembly



# INTRODUCTION

0.0

## 0.1 Statement Of The Problem

The Dissertation focuses on the African court on human and peoples rights here in after referred to as the “court” as an additional human rights redress institution for the African continent. The human rights court initially envisaged by the Lagos Conference in 1961 was a court that subjects of state parties could have recourse to, to vindicate their human rights violations. Twenty years later the African continent under the African Charter on Human and Peoples Rights (ACHPR) opted for the African commission on human and people’s rights, an institution admitted to be weak and in effective. The establishment of the African court on human and peoples rights is therefore to cure the ineffectiveness and in efficiency of the African commission. However a scrutiny of the current structural framework of the court reveals an institution that duplicates the weaknesses of the commission system and is therefore not going to be an effective tool for fighting impunity in the area of human rights on the continent. Some of the major flaws are firstly that it has been structured as a mere appendage of the commission. Secondly it has been robbed of its rightful status of being a human rights court as it has denied automatic accessibility to would be primary beneficiaries and users, and granted it to abstract entities. Thirdly the issue of complimentarity between it and the commission is vague and fourthly a guarantee for its independence and effective enforcement of its decisions is questionable.

## 0.2 Justification.

Since the established human and peoples rights court has failed to withstand the test of being a human rights court and an institution that strengthens the efficiency of the commission system and be an effective tool against impunity in the area of human rights on the continent, the only curative prescription for its structural ailment is a complete overhaul of its structural framework. This exercise calls for identification of these fundamental flaws in the structure, making suggestions of appropriate reforms as curative measures and then indicating the benefits or fruits to be gained from the suggested reforms.

## 0.3 Objective Of The Study

To strengthen the African human rights enforcement machinery by identifying the fundamental flaws in the court’s structural frame work that account for its weaknesses,

make suggestions for curative reforms and then highlight the benefits to be gained from the suggested reforms.

#### 0.4 THEORETICAL FRAMEWORK

The court system under study is meant to protect and enforce Human and Peoples Rights. Human rights can be defined as *“Those Fundamental Rights which empower human beings shape their lives with liberty, equality and respect for human dignity. It is the sum of civil, political, economic, social, cultural and collective rights laid down in International and Regional Human rights Instruments and in the constitutions of states. They form the only universally recognized value system under present international law comprising elements of liberalism, democracy, proper participation in government, social justice, the rule of law and good governance”*<sup>1</sup> These are internationally accepted principles of law governing the protection and enforcement of internationally guaranteed Rights of individuals against violations principally by states.<sup>2</sup> These comprise two branches, the normative system and the protective system.<sup>3</sup> The normative system is a set of International rules recognizing Human rights, providing for their scope and content and giving criteria for their permissible restriction and derogation in times of emergency. The International Protective System is a set of rules establishing legal mechanisms for the monitoring and the enforcement of state obligations.<sup>4</sup> Human rights law in general is embodied in legal rules that derive in part from declarations and Treaties.<sup>5</sup> Human rights Treaties (both general and specific in scope and both universal and regional in reach) establish international enforcement systems designed to ensure that state parties comply with their obligations.<sup>6</sup> These systems usually consist of a monitoring body or bodies composed of a given number of experts acting in their personal capacities.<sup>7</sup> The body is endowed with a range of functions including the power to receive and consider individual petitions.<sup>8</sup> Treaty based mechanism provide a protection system cemented on more binding instruments that recognize human rights and define them with greater precision.<sup>9</sup> Human rights bodies have been established at national level,<sup>10</sup> regional level,<sup>11</sup> and the global level.<sup>12</sup>

Under the African human rights arrangement the Normative System comprises the ACHPR and other International and Regional instruments dealing with Human rights that state parties are parties to, while the Protective System covers the Commission and the African Court on Human and Peoples Rights now the Human rights Division of the Integrated Court.

Before the Second World War human rights protection was largely domestic. The state played a dual role of being the main violator of Human rights and at the same time also being the principal protector.<sup>13</sup> The atrocities of the Second World War led to the creation of the United Nations, and its Human rights programme. The 1945 United Nations Charter itself proclaims in several clauses the need for the universal protection of human rights.<sup>14</sup>

Since the Second World War states have been laying down standards of human rights protection in Regional and International instruments. International instruments<sup>15</sup> fall under the UN Human rights Treaty system while Regional arrangements fall under each Regions Human rights Treaty system. There are now three main Regional groupings on human rights, that is in Africa the Americas and Europe. The Court System under study falls under the African Regional Human rights Regime and is the youngest of the three.

The court under study was initially envisaged by the Lagos Conference in 1961 as a court that subjects of state parties could have recourse to, to vindicate their human rights violations.<sup>16</sup> Instead of establishing a court in the first instance, the African Continent opted for the establishment of the African Commission on human and peoples rights an institution admitted to be weak and ineffective.<sup>17</sup> The establishment of the African court on human and peoples rights is therefore to cure the ineffectiveness and inefficiency of the African commission and be an effective tool against impunity in the area of human rights on the African continent. By taking this step the African leaders accepted that the human rights system needed more formality, more legalism, more force and more "teeth".<sup>18</sup> There are clear indications from the text of the protocol that the African court is intended to be a more structured and powerful legal body than the commission.<sup>19</sup>

On the face of the structure the court is indeed a land mark. The provisions on evidence, findings, judgments, notifications and executions are all more specific than those in the Charter and the full time president is an important step.<sup>20</sup> The protocol therefore provides an opportunity for the creation of an important force for human rights protection in Africa.<sup>21</sup> The court must not therefore be seen to be held hostage by the very confusions that it is supposed to address.<sup>22</sup>

In other words the structure should portray the court as an efficient and effective machinery for the protection and enforcement of human rights on the continent. An

effective human rights court should have certain salient features. Among others its structural frame work should be devoid of any fundamental flaws. Its structure has to portray it as a human rights court set up to protect human rights. Its structure should incorporate provisions for automatic accessibility to would be primary beneficiaries and users of the court that is, the individuals and NGOS. At no time should it be viewed as a court protecting state and state Agents rights.

Where the human rights control machinery comprises a two tier structure like the court under study, the court should not be viewed as a mere appendage of the commission system. Where the commission and the court complement each other as in the case under study the issue of complementarity between the two institutions should not be vague. The two should not appear to be rival institutions to each other and instead each should take note of the presence of the other and view themselves as interdependent institutions playing an important role in the promotion, protection and enforcement of human rights on the continent.

Effectiveness and efficiency also stems from a good human rights ideal in the normative structure that the court is called upon to interpret and enforce. A court structure cemented on a human rights system which requires member states to it to secure the enumerated human rights to their subjects yields better results than that cemented on a human rights ideal which requires member states to merely recognize those rights and undertake to adopt legislative or other measures to give effect to them.

Provisions in the recognition category allows state parties in this camp to move at their own pace to avail the rights stipulated to their subjects there by robbing the court of the necessary authority and power to compel state parties to the Charter to avail those rights to their subjects where none exists at the domestic level. Where as a human rights ideal in the normative structure which mandatorily requires the High Contracting Parties by use of the word "*shall secure*" to every one within their jurisdiction the rights and freedoms defined in the human rights Instrument gives the subjects and the court authority to compel state parties to avail those rights to their subjects. A human rights court is rendered meaningless or nugatory if it cannot avail rights guaranteed in the relevant instrument to the subjects of the High Contracting Parties.

Effectiveness of the court is also ensured where the normative structure makes provision for a safety valve which prevents member states from attacking the scope and

content of the rights and freedoms guaranteed. Such a provision enables the court to effectively ensure adherence to provisions of human rights in the instrument to the letter.

Existence of claw back clauses and lack of a derogation clause in the normative structure reduces the effectiveness of the court as it is subordinated to the domestic law. In such circumstances the court cannot effectively set universal standards for its members in the area of clawed back rights. Lack of a derogation clause robs the court of its right to effectively check on state parties excesses on human rights violations in cases of state of emergencies. In such circumstances the court cannot effectively declare an emergency in a particular state illegal or order a state party to lift the emergency because the prevailing circumstances do not warrant it or have changed for the better. In the European and Inter-American systems which contain derogation clauses, the court ensures that principles of International law and protection for non-derogable rights are upheld during emergencies.

An effective human rights court also needs to have at its disposal a political philosophy or ideal provided for in the continental political instrument which it can employ to whip up member states into compliance with its decisions. This is in addition to provision of adequate sanctions. The political philosophy or ideal should be one that requires as a must member states to adhere to the principles and objectives of human rights under the system or else they be axed. Failure to make such a provision creates an avenue for lip service adherence to human rights principles by member states and there is no way a human rights court can compel member states to adhere to those provisions as a must.

Provision of sanctions should not be framed in a discretionary manner. These should be framed in a mandatory manner in order to create a real fear of expulsion from the membership due to non compliance with the policies and principles of the union. Such a fear however remote is sufficient to enable the court whip up member states into compliance with the court decisions.

Provision of adequate manpower is another way of ensuring the effectiveness of the court. The court under study is coming in to improve on the weaknesses and ineffectiveness of the African Commission on human and people's rights. Article 31 of the ACHPR makes provision for 11 commissioners serving a vast continent with a bad record of human rights violations. This commission which has been operational from 1987 has been found to be weak and in effective. This is a pointer that the court which is coming in to cure that ailment must of necessity be adequately staffed. Article 11 (1) and

15 (4) of the protocol to the ACHPR on the establishment of an African Court on human and peoples rights made a provision for 11 judges working on a part time basis. The draft protocol on the integration of the African Court on human and people's rights and the court of Justice of the African Union vide its Articles 3, 5 and 8 makes provision for fifteen judges for the integrated court, at least seven of whom shall have competence in human and people's rights. The judges are to function on a part time basis save for the president. The vastness of the African Continent is still intact. The bad human rights violation record still stands. A bench of seven (7) part time judges cannot be expected to make an impact where 11 part time commissioners have failed. Apart time bench is likely to be plagued with the problem of divided loyalty and lack of concentration on the job a factor likely to hamper the effectiveness of the court in terms of work output notwithstanding the fact that the president works on a full time basis as he, the president can only deal with routine matters in the absence of a full bench. An adequately staffed full time bench accounts for efficient and effective protection of human rights on the continent. Authority for this is found in preamble one of protocol 11 to the ECHR which shows that reversal from the previous arrangement of having a part time bench to a full time bench equal to the number of the High Contracting Parties was due to an urgent need to restructure the control machinery established by the convention in order to maintain and improve the efficiency of its protection of human rights and freedoms. No doubt this accounts for the successes and effectiveness of the European human rights system.

Adequate funding is another factor contributing to the effectiveness of a court. A court without adequate facilities, without a sound financial back up to enable it finance its operations cannot function properly. Lack of adequate funding accounts for the ineffectiveness of the African Commission on human and peoples rights thus reducing it into a begger institution. The type of funding required is one which is independent and one which is not capable of being withheld by the political masters and used as a weapon with a view to disciplining the court or influencing its decisions. Such an arrangement calls for the establishment of an independent Judicial Fund for this purpose.

Political independence of both the bench and its registry is also of paramount importance and contributes a lot towards achieving efficiency and effectiveness of the court. One factor accounting for the commissions ineffectiveness was that it was highly politicized. This independence requires that the court be able to man and control its

registry without extraneous political direction or interference. This will also mean that the court should not be held responsible for reporting its activities or filing of reports to some self imposed political Agency.

As pointed out earlier the African Human rights arrangement is the youngest of the three, coming 3<sup>rd</sup> after the Inter-American and European Human rights arrangement. However, the three regional human rights regimes share some common characteristics. The criteria for eligibility, nomination and election of judges is the same. Tenure of office for European judges is full time while that of Africa and America is part time.<sup>23</sup>

On locus standi only the African and the Inter-American regimes have competence clauses. They also have a two tier system comprising the Inter-American Commission on human rights and the Inter-American court on human rights and the African Commission on human and peoples rights and the African court on human and peoples rights now a Judicial Division of the integrated Court. The European regime has one tier system comprising only the European court on human rights and all the parties enjoy unlimited accessibility to the European human rights court.<sup>24</sup>

The criteria for admissibility of cases before Court in all the three regimes is the same.<sup>25</sup>

As regards **Power Ratione Materiae - Jurisdiction**, the European and the Inter-American arrangement confine jurisdiction of the Court to matters arising from the conventions creating the Court and the Protocols thereto. The African regional arrangement has a wide jurisdiction which goes beyond the Charter and the protocol creating the Court to include other Human rights instruments ratified by the state parties.<sup>26</sup>

On publicity all the three systems, provide for **public hearings** but only the European and Inter-American regimes provide for publicity of court records and

judgements<sup>27</sup> All the three systems have jurisdiction to give **advisory opinions**. The European System confines the provision of opinion to the interpretation of the instrument creating the system on condition the request must not be on the content and scope of the rights provided. While the African System gives a wider jurisdiction covering other Human Rights instruments. The European System is also strict as it requires that the decision to ask for the opinion has to be passed by a majority vote of the Council of Ministers. The Inter-American system confines itself to Human rights instruments creating the system and compatibility with domestic laws.<sup>28</sup>

The African and the European Systems have **third party intervention provisions**. The Right granted under the African arrangement is pegged on an application by a party with an interest in the proceedings. The European court's discretion gives room for the Court to invite interested parties to join in the proceedings.<sup>29</sup>

In all the three systems **judgments** are by a majority of judges. Dissenting judgments are allowed. All the three systems do not provide for appeal. The African and Inter-American systems provide for request for interpretation of the judgment under certain conditions.

It is common to all the three systems that the **execution of judgments is voluntary**. The African and European Systems have monitoring bodies, namely the Executive Council for the African system and the Committee of Ministers for the European System.<sup>30</sup>

## 0.5 GENERAL HYPOTHESIS

- ◆ The court as currently structured is not going to cure the ineffectiveness of the commission system.
- ◆ The legal and institutional constraints we have identified in this study on the established Court contribute in creating an additional ineffective Human rights redress institution within the African Human rights Regime.
- ◆ Timely reform and restructuring of the entire Court's Structure as well as the commission's structure in areas of interaction with the court in the discharge of their functions is the only way forward for strengthening and creation of an effective Human rights court on the African continent.

## 0.6 RESEARCH METHODOLOGY

The study will be both descriptive and prescriptive. It will use both primary and secondary sources of material such as books, Articles, legal instruments, resolutions of the AU. The study will also make use of materials sourced from the Internet.



## **0.7.0 LITERATURE REVIEW**

### **0.7.1 A Critical Reflection Of The Proposed African Court On**

#### **Human And Peoples Rights**

The Author<sup>31</sup> of the Article has raised critical issues showing pitfalls in the African Human rights System as currently structured comprising the established Court and the Commission.

The Author is doubtful about the achievements that the Court as structured is likely to make in terms of improving upon the Commissions work. We share the same doubt hence the need to set out the legal and structural constraints that plague the Court structure as currently structured. We share the Author's sentiments that the Court can only seek to correct the short comings of the Commission System if it can be seen to be providing victims of Human rights violations with a really accessible forum in which to vindicate their basic Rights. We shall proceed to point out that this is a serious fundamental flaw as a human rights Court was created for victims of Human rights abuse and not abstract state parties incapable of suffering Human rights abuse. We shall proceed on the premise that the only way forward in restoring the accessibility of the Court to its intended beneficiaries is by amending Article 5 (3) and 34 (6) of the Protocol to scrape the competence clause.

The Author rightly points out that there is an unresolved ambiguity in the relationship between the Court and the Commission whose relationship is spelt out in general terms and built on hopes that on this account the two institutions will operate in harmony as far as possible. We believe a situation that allows competing organs to operate on the basis of good faith is likely to give rise to conflict of interest and parallel jurisdiction likely to generate into chaotic competition over the same subject matter. We shall therefore proceed on the premise that the relationship between the Court and the Commission has to be clearly spelt out in both the Charter for the Commission and the Protocol for the Court.

It is further observed that it is also not clear which cases will start before the Commission and which ones before the Court. We shall proceed to suggest that this can be resolved by clear provisions stating which organ is to act as a filter clinic for the other preferably the Commission to be the filter clinic for the Court. Though identifying that

the rules might not be the best way to resolve the ambiguity in the Protocol, no suggestion was made by the Author on how to resolve this matter. We shall approach the issue from the angle that there are clear provisions in Article 66 ACHPR on how such instruments can be altered and rules of procedure is not one of them.

### **0.7.2 The African Human Rights System; A Critical Evaluation**

The Author<sup>32</sup> of the Article observes that the mere addition of a Court, although a significant development is unlikely by itself to address sufficiently the normative and structural weaknesses that have plagued the African Human rights System since its inception. We share the same view that on the face of the Protocol a solution has been found for the ailment of the African Human rights System. But on closer analysis of the Protocols' provisions, those ills still persist and will continue to plague the Court System unless restructured. It is also rightly observed that the Court which is expected to strengthen the regional human rights system, it too as structured has its shortcomings. We share the same view that it is a shortcoming that all the judges except the president of the Court serve on a part time basis which part time basis undermines the integrity and independence of the Court. The Author of the Article has glorified the expansive jurisdiction of the African court without taking note of the serious jurisprudential conflict it is likely to generate at the international level as there are specific bodies and institutions mandated to interpret International Human rights instruments. On this account we shall proceed on the premise that the expanse jurisdiction should be trimmed along the lines of the European and the Inter-American Jurisdictions which confine themselves to the creating instruments, Protocols thereto and compatibility of the domestic legislation to the conventions. Conciliatory jurisdiction is lauded by the author *without noting that it is not properly vested. The Court is to exercise it in accordance* with the provisions of the Charter which provisions only refer to the Commission. The Protocol has not amended those provisions to refer to the Court as well. Advisory opinion jurisdiction is also lauded without taking note of its narrow application. We shall call for proper anchorage of conciliatory jurisdiction in the court and wider jurisdiction in the area of advisory opinions.

Accessibility to the Court is raised as a shortcoming by the author. We share the same sentiments that in as much as limitation on accessibility was meant to get states on board it is a terrible blow on the standing and reputation of the Court as it is the

individuals and the NGOs who are supposed to be the primary beneficiaries and users of the Court. The Court is not an institution for the protection of the rights of states or AU organs. It is a forum for protecting citizens against the state and other government agencies. The author further observes that this limitation will render the Court virtually meaningless unless it is interpreted broadly and liberally. Whereas we agree that the limitation will render the Court virtually meaningless we do not agree that interpretation whether broadly or liberally will cure the flaw. Restructuring is the answer.

On admissibility of cases the author suggests that the Court will transfer to the Commission cases that require amicable settlement not needing adversarial adjudication. This is not provided for in the Protocol. Though the Court's discretion in deciding what case to handle and what case not to handle has been lauded by the author as a tool against overloading, the author has failed to take note of the danger of the wide discretion being likely to be misused in the absence of clear provisions as to the type of cases that the Court can transfer to the Commission. The assertion that the Court will be left to handle only cases which have the potential to advance Human rights is the author's own opinion. We shall be proposing that there should be a clear provision as to what cases are to be transferred to the Commission and those that are to be handled by the Court.

The author lauds provisions on witnesses as going to shield witnesses from various pressures of intimidation and facilitate their ability to move freely and participate freely in the proceedings, but has failed to note that these are not properly anchored in the system as no unit has been set up to cater for them neither does it say which organ is to be responsible for the witnesses in the absence of a unit. We shall be calling for special units to cater for these services.

On findings and enforcement the author missed the flaw on failure to state how and against whom the execution is to be carried out. He also failed to note that the provision on extreme emergency is not accompanied by who should move the Court in such an emergency. The author failed to note the anomaly of allowing the proceedings to be held in public and then fail to publish the resultant judgement as a form of remedy. He treated lightly the issue of filing annual reports to the AHSR by the Court not realizing that this will amount to political interference in a judicial function. We shall be calling for clear provisions indicating against whom the orders for compensation and reparation are to be enforced, and who is to move the court for orders in cases of extreme

urgency and publication of the court records as well as lists of defaulting states as an enforcement remedy.

On compliance the author remarks that presumably the Assembly can take additional measures to force compliance such as passing resolutions urging states to respect the Court's judgments or alternatively the chairman to write to delinquent states to ask them to "*comply*" without realizing that the AHSG is required to operate within the instruments it has created itself for the establishment of the Court. Any inadequacies in this area have to be addressed through an amendment of the instruments concerned.

On institutional reforms we agree with the suggestion that the Charter should be amended to remove the protective functions from the African Commission and to vest them exclusively in the Court. We also support the removal of the claw back clauses in the Charter and introduction of a derogation clause as additional shields for the protection of human rights on the African continent.

### **0.7.3 The Future Relationship Between The African Court And The African Commission**

On the requirement of co-operation the learned commissioner<sup>33</sup> has humanized the two institutions and viewed them as such as parties who can sit down and negotiate their terms of co-operation. The two organs being creatures of legal instruments can only forge co-operation within the terms of the instruments creating them. We shall proceed on the premise that currently the terms of co-operation are ambiguous or non-existent and these need to be introduced and set out clearly through an amendment.

The learned commissioner rightly recognizes that there is some ambiguity as regards complementarity between the Commission and the Court. We agree. The issue is whether this ambiguity can be cured by rules of procedure. Complementarity is a creature of the Protocol which has been created in pursuance to Article 66 ACHPR. Interpretation of the Protocol should be done in such a way so as not to go against the spirit of the parent treaty. The spirit of the parent treaty is that its provisions and that of the Protocols made under it by extension requires that alterations to its provisions and that of its Protocols is by amendments or by agreements. Rules of procedure are not anticipated. The rules the learned commissioner has in mind are those stemming from the already agreed upon provisions in the Charter for the Commission and the Protocol for the Court. The spirit the rules are to reflect should be explicit in the provisions of the two instruments especially as regards substantive issues. Article 33 Protocol is no cure as

it gives the Court an open avenue to consult on each and every rule it makes as there is nothing to show that the consultation should be limited to matters falling under Article 6 and 8 Protocol although we agree that consultation should be confined to areas of interaction.

Concerning the issue of dual power of interpretation between the Court and the Commission, the learned commissioner is of the view that Article 4 of the Protocol to the ACHPR has resolved the issue. To him the issue is not one of avoiding duplication and contradiction between the two institutions but rather maximizing the use of all juridical resources available to the African Human rights System. To us the issue of dual power of interpretation between the Court and the Commission is not one of maximizing juridical resources but one of the possibility of there arising conflicting opinions over the same set of facts giving rise to a dilemma as to which institution's decision is to prevail. It matters not that the Court has power to make binding decisions and it can overrule the Commission. The exercise of this power of review can only arise if the Court has been moved by external forces by parties accessible to it. It cannot act on its own motion to defer the matter to itself and review the Commission's opinion. It is therefore necessary to consolidate the interpretative power in one institution preferably the Court, if not the provisions to stipulate that in the event of a conflict the Court's opinion to prevail. Since admittedly the court is the superior institution to the commission, it should have the power both to transfer cases from itself to the commission and to defer cases from the commission to itself.

## **0.8 CHAPTER BREAKDOWN**

**Introduction:** statement of the problem, justification, objective of the study, theoretical frame work, general hypothesis, research methodology, literature review, chapter break down.

**CHAPTER 1:** The African human rights regime

**CHAPTER 2:** The legal and institutional constraints on the established court on human and peoples rights.

**CHAPTER 3:** Towards an effective Human rights court. A case for reform.

**CHAPTER 4:** Conclusion: Suggested Fruits of reform.

## ENDNOTES TO INTRODUCTION

<sup>1</sup> Manfred Nowak. *The International Human rights Regime 2003*. Martinus Nijhoff Publishers. London/Boston pg 1

<sup>2</sup> Robert Wundeh Eno. *The jurisdiction of the African Court on Human and Peoples Rights*. "AHLJ volume 2.No 2 2002" PP 223 – 233. Pg 233

<sup>3</sup> Id

<sup>4</sup> Id

<sup>5</sup> Id

<sup>6</sup> Id Examples of General Treaties ; UDHR – Universal Declaration of human rights, specific Treaties - ICCPR - International Convention on Civil and Political rights, ICESCR – International Convention on Economic Social and Cultural rights, Regional – African Charter on human and peoples rights, Constitution – The current Kenyan Constitution.

<sup>7</sup> Id

<sup>8</sup> Op cit pg 224

<sup>9</sup> Id

<sup>10</sup> Id such as the South African Human rights Commission, The Commission on Human rights and administration of justice of Ghana, Uganda Human rights Commission, Kenya Human rights Commission.

<sup>11</sup> Id – Such as the African Commission on Human and Peoples rights, the African court on human and Peoples rights, the European court on Human rights, the Inter-American Court on Human rights, the Inter-American commission On Human rights.

<sup>12</sup> Id – Such as the UN Human rights Committee on the right of the child, committee against torture e.t.c

<sup>13</sup> Michelo Hansungule. 2000. "*Protection of Human rights under the Inter-American Systems. An outsiders Reflection*". Essays in Honour of Jacob. Th. Moller. Gud Mundur Alfredsson et al (eds). In International Human rights monitoring mechanisms pp 679 - 712. The Raoul Wallen Berg Institute Human rights Library Volume 7. Martinus Nijhoff Publishers. The Hague/Boston/London pg 682

<sup>14</sup> United Nations Charter signed on 26<sup>TH</sup> June 1945, in SanFrancisco at the conclusion of the United Nations conference on International organization, and came into force on 24<sup>th</sup> October 1945

(I) Preamble 2 of the Charter provides; Determined to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small(II) Article 1(3) provides -----, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.(III) Article 13(1) - -----, and assisting in the realization of human rights and fundamental freedoms for all without distinctions as to race, sex, language or religion.(IV) Article 55(C) -----, the United Nations shall promote universal respect for, and observance of human rights and fundamental human rights for all without distinction as to race sex, language or religion.

<sup>15</sup> N 13 Supra

<sup>16</sup> Dr Koffi Quashigah "African charter on Human and Peoples Rights. Towards are more effective reporting mechanism. Pg1 <http://www.chr.up.ac.za/centrepublishations/occ~paper> accessed on 25/05/2005

<sup>17</sup> N. Barney Pityana "The African court on Human and Peoples rights in municipal law" <http://www.unisa.ac.za/contents/about/principals/docsmunicipal-law.doc> accessed on 25/05/2005

<sup>18</sup> Julia Harrington.2002. *the African court on Human and Peoples Rights in Malcom D Evans et al (Eds)" The Afrcian charter on Human and Peoples Rights. The system in practice 1986 – 2006"* Cambridge University press page 334

<sup>19</sup> Id

<sup>20</sup> Id

<sup>21</sup> Id

<sup>22</sup> Id

<sup>23</sup>

### (I) African Court

Article. 1 through 12 of the Draft protocol on the Integration of the African Court on Human and Peoples Rights and the Court of Justice of the African Union provides that the Integrated Court consists of fifteen judges, nationals of state parties, at least seven of whom have competence in Human and Peoples Rights, Assembly is to ensure equal Gender representation, judges are expected to be impartial and independent, elected in an individual capacity, required to be persons of high moral character, to possess the necessary practical or academic qualifications required in his or her country for appointment to the highest judicial

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office, elected for a period of six years and may be re-elected, they elect their own president for a period of two years and he may be re-elected. President performs duties on a full time basis and resides at the Court, no judge participates in the decision of any case in which he or she has an interest or where he or she has previously taken part as an agent, the quorum of the Human rights Division is to be determined by the rules. Special Chambers can also be established by the rules of Court.

<http://www.issco.za/af/reg.org/unitytounion/pdfs/au/sirte/ju/05/pro.court.pdf> accessed on 5/10/05

### **European**

Article 19 through 26 of Protocol number 11 of the ECHR provides that; the number of judges is equivalent to the number of the high contracting parties, required to be of high moral character, possess qualifications required for appointment to high judicial office or be jury consultants of recognized competence, sit in their individual capacity, during tenure of office they are not to engage in any activity which is incompatible with their independence, impartiality or with demands of a full-time office, elected by the parliamentary Assembly from a list of three candidates submitted by each high contracting party elected for a period of six years and may be re-elected. Plenary Court elects one or two vice-presidents for a period of three years and they may be re-elected.

### **Inter-American**

Article 52 through 56 of the ACHR provides that; The Court consists of seven judges, nationals of the member states of the organization, elected in an individual capacity from among jurists of the highest moral authority and recognized competence in the field of Human rights, who possesses the qualifications required for the exercise of the highest judicial functions in conformity with the law of the state of which they are nationals or nominated, elected by secret ballot by the General Assembly of the organization, elected for a term of six years and may be re-elected only once, a judge reserves a right to hear a case to which his state is a party, the opposite state has liberty to appoint an ad hoc judge to sit on that case. An Ad hoc judge possesses the same qualifications; five judges shall constitute a quorum.

### <sup>24</sup> **Inter-American**

Article 61 (1) of the ACHR provides that; Only the state parties and the Commission shall have the right to submit a case to the Court.

Article 62 (1) of the ACHR provides that; A state party may upon depositing its instrument of ratification or adherence to this convention or at any subsequent time declare that it recognizes as binding ipso facto and not requiring special agreement the jurisdiction of the Court on all matters relating to the interpretation or application of this convention.

### **European**

Article 33 of Protocol no. 11 to the ECHR provides that; Any high contracting party may refer to the Court any alleged breach of the provisions of the convention and the protocols there to by another High contracting party.

Article 34 of the ECHR provides that the Court may receive applications from any person, non-governmental organization or group of individuals claiming to be victims of a violation by one of the High contracting parties of the rights set forth in the convention there to. The High contracting parties undertake not to hinder in any way the effective exercise of this right.

### **African**

Article 5 of the Protocol to the ACHPR on the establishment of an African Court on Human and Peoples Rights provides that the following are entitled to submit cases to the Court: The Commission, the state party which has lodged a complaint to the Commission, the state party against which the complaint has been lodged at the Commission, the state party whose citizen is a victim of Human rights violation, African Inter governmental organizations.

Article 5 (2) of the Protocol provides that a State party with an interest in a case may submit a request to the Court to be permitted to join.

Article 5 (3) of the Protocol provides that the Court may entitle relevant non- governmental organization (NGOs) with observer status before the Commission, and individuals to institute cases directly before it in accordance with Article 34 (6) of this protocol.

**Article 34 (6) of the Protocol provides that** at anytime of the ratification of this protocol or any time thereafter, the state shall make a declaration accepting the competence of the Court to receive cases under Articles 5 (3) of this protocol. The Court shall not receive any petitions under Article 5 (3) involving a state party which has not made such a declaration.

<sup>25</sup>



Article 35 of Protocol 11 to ECHR, Article 46 – 48 of the ACHR, Article 8 of the protocol to the ACHPR on the establishment of the African Court of Human and Peoples Rights adopts the provisions of Article 56 of the ACHPR. The requirements are that domestic remedies must have been exhausted, or that the same cannot be availed without undue delay, the petition, must be filed within six months from the date the party is notified of delivery of the judgement in the local remedy, it must not be similar to a matter already finalized or pending investigation in another international forum, it should not be based on information

from the mass media, it must not be anonymous, it must not be ill founded, disparaging to any state party or contrary to the principles of the convention, or be an abuse of the Right of petition.

#### **European**

<sup>26</sup> Article 32 of Protocol 11 to ECHR provides that; The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the convention and the protocols thereto which are referred to it as provided in Articles 33, 34 and 47. In the event of a dispute as to whether the Court has jurisdiction the Court shall decide.

#### **Inter- American**

(i)Article 62 (3) of the ACHR provides that; The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this convention that are submitted to it, provided that the state parties to the case recognize or have recognized such jurisdiction; whether by special declaration pursuant to the preceding paragraphs or by a special agreement.

#### **African**

(I)Article 3 of the Protocol to the ACHPR on the establishment of the Court provides that; The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation of the Charter, this protocol and any other relevant Human rights instruments ratified by the states.

2. In the event of a dispute as to whether the Court has Jurisdiction the Court shall decide

#### **African**

<sup>27</sup> Article 10 (1). of the Protocol to the ACHPR – provides; The Court shall conduct its proceedings in public. The Court may however, conduct proceedings in camera as may be provided for by the Rules of procedure.

#### **European**

(I)Article 40 (1) – of Protocol 11 of the ECHR provides that; Hearings shall be public unless the Court in exceptional circumstances decides otherwise.

2. Documents deposited with the Registrar shall be accessible to the public unless the president of the Court decides otherwise.

#### **Inter-American**

(I)David J. Harris and Stephen Livingstone 1998. The Inter-American System of Human rights Clarendon Press Oxford Appendix VI. Statute of the Court. Article 24 (1) provides that; The hearings shall be public unless the Court, in exceptional circumstances, decide otherwise.

1. The Court shall deliberate in private, its deliberations, shall remain secret unless the Court decides otherwise.

The decisions, judgements and opinions, of the Court shall be delivered in public session and the parties shall be given written notification thereof. In addition the decisions, judgements and opinions shall be publicized along with judges individual votes and opinions and with such other data or background information that the Court may deem appropriate.

#### **African**

<sup>28</sup> (i) Article 4 of the Protocol to the ACHPR provides that; . At the request of a member state of the AU, any of its organs, or any African organization recognized by the AU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant Human rights instruments, provided that the subject-matter of the opinion is not related to any matter being examined by the Commission. The Court shall give reasons for its advisory opinions provided that every judge shall be entitled to deliver a separate or dissenting decision.

#### **Inter-America**

(i)Article 64 of the ACHR provides that; The member states of the organization may consult the Court regarding the interpretation of this convention or of other Treaties concerning the protection of Human rights in the American States within their spheres of competence. The organs listed in chapter six of the Charter of the OAS as amended by the protocol of Buenos Aires, may in like manner consult the Court.

2. The Court at the request of a member state of the organization may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid International instruments.

### **European**

(iii) Article 47 – 49 of Protocol 11 of the ECHR provides that; Request for advisory opinions is by the Committee of Ministers only, must be on legal questions concerning the interpretation of the convention and the protocols thereto, such opinions are not to deal with any question relating to the content or scope of the Rights or Freedoms defined in Section I of the convention and the protocols thereto or with any other questions which the Court or the Council of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the convention, decisions of the Committee of Ministers to request an advisory opinion of the Court shall require a majority vote of the representatives entitled to sit on the Committee, the Court is to decide if the request for the opinion is within its competence, reasons are to be given for the advisory opinion and if it does not represent in whole or in part the unanimous opinion of the judges any judge shall be entitled to deliver a separate opinion, advisory opinion shall be communicated to the Committee of Ministers.

### **African**

<sup>29</sup> (i) Article 5 (2) of the Protocol to the ACHPR provides that; when a state party has an interest in a case, it may submit a request the Court to be permitted to join.

### **European**

(i) Article 36 of Protocol 11 of the ECHR – provides that; In all cases before a chamber or the Grand Chamber a High contracting party one of whose national is an applicant shall have the right to submit written comments and to take part in hearings.

1. The president of the Court may, in the interest of the proper administration of Justice invite any High contracting party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or to take part in hearings.

### **African**

<sup>30</sup> Article 29 – 31 of the Protocol to the ACHPR provides that Parties to the case shall be notified of the judgement to the Court and it shall be transmitted to the member states of the OAU and the Commission, the Council of Ministers shall also be notified of the judgement and shall monitor its execution on behalf of the Assembly, the state parties to the protocol undertake to comply with the judgement in any case to which they are parties within the time stipulated by the Court and to guarantee its execution, 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 a state has not complied with the Court's judgement.

### **European**

1. Article 44 – 46 of Protocol 11 of the ECHR Article 14 provides that; The judgement of the Grand Chamber shall be final.

2. The judgement of a chamber shall become final when the parties declare that it will not request that the case be referred to the Grand Chamber or three months after the date of the judgement, a reference to the Grand Chamber has not been requested or when the panel of the Grand Chamber rejects the request to refer under Article 43.

Article 45 1. The final judgement shall be published. Reasons shall be given for judgements as well as for decisions declaring applications admissible or inadmissible.

2. If a judgement does not represent in whole or in part, the unanimous opinion of judges, any judge shall be entitled to deliver a separate opinion.

Article 46: The High contracting parties undertake to abide by the final judgement of the Court in any case to which they are parties.

3. The final judgement of the Court shall be transmitted to the Committee of Ministers which shall supervise its execution.

### **Inter-American**

(iii) Article 66 – 70 of the ACHR.

Article 66 provides; Reasons are to be given for the judgement of the Court.

2. If the judgement does not represent in whole or in part the unanimous opinion of the judges any judge shall be entitled to have his dissenting or separate opinion attached to the judgement.

Article 67: The judgement of the Court shall be final and not subject to appeal. In case of disagreement the Court shall interpret it at the request of any of the parties, provided the request is made within ninety days from the date of notification of the judgement.

Article 68: The state parties to the Convention undertake to comply with the judgement of the Court in any case to which they are party.

2. That part of a judgement that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedures governing the execution of judgements against the state.

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Article 70: The parties to the case shall be notified of the judgement of the Court and it shall be transmitted to the state parties to the Convention.

<sup>31</sup> Andrea O'Shea . senior lecturer university of Durban. *AHRLJ 2000 pgs 285 - 298*

<sup>32</sup> Makau Mutua. Professor of law State University of New York at Buffalo Law School, Director Human rights Centre. Sunny Buffalo, Chair Kenya Human rights Commission. S.J.D (1987) Havard Law School. LLM 1985, Havard Law School. LLM 1984. University of Dar es Salaam .LLB 1983 .  
[http://hdr.undp.org/docs/publications/background\\_papers Mutua.pdf](http://hdr.undp.org/docs/publications/background_papers/Mutua.pdf) accessed 25/05/05.

<sup>33</sup> Ibrahim Ali Badawi Elsheikh. Member of the African Commission on Human and Peoples Rights. *AHRLJ Volume 2. No. 2 2002 pp 252 – 266.*

# CHAPTER ONE

## 1.0 THE AFRICAN HUMAN RIGHTS REGIME

### 1.1 Brief History

The first African regional political statement on Human rights is contained in the OAU Charter. In this document, Human rights were merely saluted in the preamble but no provision was made to cater for them in the objectives and principles of the OAU Charter<sup>1</sup>

In 1961 at the African Congress of Lagos Nigeria organized by the International Commission of Jurists (ICJ) the congress made the call for an African Convention on Human rights in what became known as the "Law of Lagos."<sup>2</sup> One of the recommendations of the Lagos Conference was that *"in order to give full effect to the Universal Declaration of Human rights of 1948, this conference invites African governments to study the possibility of adopting the African Convention of Human rights, in such a manner that the conclusions of this conference will be safeguarded by the creation of a Court of appropriate jurisdiction and that recourse there to be made available for all persons under the jurisdiction of the signatory states"*.<sup>3</sup> In 1967 the African Bar Association suggested the creation of an African Human rights Commission.<sup>4</sup> In 1968 Nigeria pressed for the establishment of Regional Commissions within the frame work of the United Nations.<sup>5</sup> In 1969 a United Nations seminar was organized at the instance of the United Nations Commission on Human rights held in Cairo. Its concern was to drum up support within the OAU for the creation of a regional Commission on Human rights.<sup>6</sup> In 1971 another UN seminar held at Addis Ababa discussed the establishment of an African Commission on Human rights and also an African Convention on Human rights. These calls were reactivated in another seminar held in Dar es Salaam in 1973.<sup>7</sup>

By 1979 the ground was prepared enough to result in the call by the Assembly of Heads of State and Government of the OAU to the General Secretary to organize as soon as possible in an African capital a meeting of highly qualified experts to prepare a preliminary draft of an African Charter of Human rights providing among other things for the establishment of bodies to promote and protect Human rights.<sup>8</sup> The decision to prepare a preliminary draft of the African Charter on Human and Peoples Rights was taken at the sixteenth Assembly of Heads of State and government of the OAU, held 17 -

20 July 1979 in Monrovia, Liberia.<sup>9</sup> Three meetings one held in Dakar in 1979 and two held in Banjul in 1980 and 1981 gave birth to a draft Charter.<sup>10</sup> The ACHPR was adopted unanimously by the Heads of States and Governments of OAU at their summit held in Nairobi in June 1981.<sup>11</sup>

The birth of the ACHPR was hailed as a historic achievement for Africa.<sup>12</sup> It is also a contribution to the fulfillment of an important goal of the United Nations System namely the establishment of effective Regional Mechanisms for the management of International obligations.<sup>13</sup> The Charter marked the continent's acceptance of responsibility and commitment to the promotion of and protection of Human rights.<sup>14</sup> The Charter came into effect on 21<sup>st</sup> October 1986 after a simple majority of OAU members had ratified it, five years after its adoption.<sup>15</sup> At the time of adoption the BANJUL Charter was the third regional human rights system in the world.<sup>16</sup> The Charter had a significant impact not only in Africa but also on the global effort at enhancing human rights protection.<sup>17</sup> It stressed the fact that African leaders had not only realised the occurrence of violations of human rights but also the need for the protection of fundamental rights through out the continent.<sup>18</sup> It was an African response to atrocities that had taken place on the continent and an attempt to salvage the image and stature of the continent.<sup>19</sup>

The Charter established the African Commission on human and Peoples rights as its control machinery. The Commission assumed office in 1987. It is still operational but it has attracted a lot of criticism in the discharge of its functions among them that its decisions lack enforceability,<sup>20</sup> the Commission's decisions are routinely ignored by states,<sup>21</sup> the Commission lacks authority to enforce its own decisions, it does not have the resources to undertake follow up and monitor compliance with its decisions.<sup>22</sup> The Assembly of Heads of State and Government to which the Commission's reports are submitted does not have any legislative frame work by which it can demand compliance.<sup>23</sup>

The foregoing criticisms of the Commission System necessitated the calling for the establishment of an African Court on Human and Peoples Rights. The appropriateness of the opportune time for the setting up of a Human rights Court was sounded by the then Secretary General of the OAU, Dr. Salim Ahmed Salim in his opening address of the 14<sup>th</sup> session of the African Commission in 1993. He said, "*Time*

has come to begin discussions for the establishment of an African Court on Human rights".<sup>24</sup> The process of drawing up the protocol was initiated at the Summit of Heads of State and Government of OAU at the 30<sup>th</sup> ordinary summit of the OAU in Tunis in June 1994.<sup>25</sup> A resolution adopted at this Assembly requested the Secretary General of the OAU to convene a meeting of Government experts to "*ponder*" in conjunction with the African Commission on Human and Peoples Rights to examine the ways of enhancing the efficiency of the Commission and to consider particularly the question of the establishment of the Court<sup>26</sup>.

A draft protocol prepared by the OAU Secretariat was submitted to a meeting of government experts in Cape Town South Africa. It was known as the "*Cape Town Draft*" because it was adopted in South Africa in September 1995. The second draft known as the "*Nouakchott draft*" was approved and adopted in Mauritania by the meeting of ministers of justice in 1997.<sup>27</sup> The final approved draft was adopted by the Heads of State and Government of the OAU in June 1998 in Ouagadougou, Burkina Faso. With a deposit of the 15<sup>th</sup> Instrument of ratification by the Union of Comoros on 26<sup>th</sup> December 2003, the requisite number of ratifications were received by the chairperson of the African Union (AU) Commission in Addis Ababa.<sup>28</sup> When the protocol establishing the African Court on Human and Peoples Rights came into force, the Court was viewed as a key organ of the African Union that will complement the protective mandate of the Commission.<sup>29</sup> It was regarded as great news for the fight against impunity on the African continent as it ushered in a new era in promotion and protection of Human rights in Africa.<sup>30</sup> It was also seen as an extremely positive step towards demonstrating African government's commitment to realize the spirit and letter of the ACHPR and ensure the protection of human rights in Africa and lastly, it was seen as an important step in building the African system for the protection of Human and Peoples Rights as it would be a means for combating impunity.<sup>31</sup>

The functions of the OAU have now been assumed by the AU. The AU constitutive Act has ushered in a new awakened continental spirit on the adherence, protection and enforcement of human rights. In its preambular 9 the AU is determined to promote and protect human and Peoples rights, consolidate democratic institutions and culture and to ensure good governance and the rule of law. In preambular 10 the AU is further determined to take all necessary measures to strengthen its institutions and

provide them with the necessary powers and resources to enable them discharge their respective mandates effectively.<sup>32</sup> In its objective (h) the AU undertakes to promote and protect Human and Peoples rights in accordance with the African Charter on Human and Peoples rights and other relevant human rights instruments. In its principle (m) the AU advocates respect for democratic principles, human rights, the rule of law and good governance.

In its articles 10 through 13 the AU makes provision for the executive council which is to monitor the implementation of policies formulated by the Assembly. The policies formulated by the Assembly fall under the powers and functions of the Assembly under article 9 of the AU Act one of which is to receive, consider and take decisions on reports and recommendations from other organs of the Union.<sup>33</sup> One of the policies of the Union is promotion, protection and adherence to human rights in accordance with the ACHPR.<sup>34</sup> Decisions of the Union include decisions of its major organs. The integrated Court is the judicial organ of the Union. Judgements or decisions of the Court qualify for monitoring and implementation through the executive council. The AU has also made provision for sanctions. Imposition of sanctions is provided for in article 23 of the Act. In the first instance sanctions are to be imposed on any member state that defaults in the payments of its contributions to the budgets of the Union. In the second instance they are imposed on any member state that fails to comply with the decisions and policies of the Union.<sup>35</sup> Article 23 (2) of the AU Act is what applies to the Court's decisions as it deals with the decisions and policies of the Union.

## **1.2.0 THE AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHTS (ACHPR)**

### **1.2.1 General Observations**

Preamble 10 of the ACHPR spells out the OAU's Human rights ideal which is that the state parties to the ACHPR are firmly convinced of their duty to promote and protect Human and Peoples Rights and Freedoms taking into account the importance traditionally attached to these Rights and Freedoms in Africa.

Article 1 of the Charter merely requires the member states of the OAU parties to the Charter to *recognize* the Rights, Duties and Freedoms enshrined in the Charter and undertake to adopt legislative or other measures to give effect to them.<sup>36</sup> The Charter goes further in article 62 to require the state parties to be submitting reports every two

years on the legislative or other measures taken with a view to giving effect to the Rights and Freedoms recognized and guaranteed by the present Charter.<sup>37</sup>

**The Charter contains claw back clauses.** The *claw back clauses* claw-back on the Right to life, Right to liberty, freedom of conscience, Right to receive information, Freedom of Assembly, Freedom of movement and the Right to freely participate in one's government.<sup>38</sup> The inclusion of claw back clauses erases the effectiveness of the Rights guaranteed in the Charter.

The Charter contains no specific provision entitling **a state to derogate from its obligations under the Charter.**<sup>39</sup> The usefulness of derogation clauses is that in the first instance during declared emergencies, they limit the circumstances in which a derogation may occur. In the second instance they define Rights from which no derogation is allowed and which ought to be respected even where derogation is permitted.<sup>40</sup> These clauses contain safeguards by providing for non-derogable rights even when circumstances permitting derogation exist. They provide some protection to the individual at periods of national or other emergency situation when his fundamental rights would be most at risk by limiting situations when these rights can be suspended.

The European and the Inter-American conventions contain derogation clauses which temporarily suspend the Rights guaranteed under the convention in certain circumstances.<sup>41</sup> Under the European System non-derogable Rights include the Rights to life, freedom from torture, freedom from ex post facto laws. The Inter -American System has a longer list comprising right to life, freedom from torture, freedom from slavery, freedom from ex post facto laws, freedom from imprisonment for failure to fulfill contractual obligations, Right to recognition as a person before the law, Right to a family, Right to name, Right to nationality and the Right to participate in government.<sup>42</sup>

### **1.3.0 RIGHTS PROVIDED FOR UNDER THE ACHPR.**

#### **1.3.1 Rights In Part 1 Of Achpr.**

Part 1 of the ACHPR deals with rights and duties. Chapter 1 of part 1 deals with Human and peoples Rights. It guarantees without restriction the traditional civil and political rights viz: the right to equality, justice before the law and personal dignity. Elements of justice before the law include the right to appeal to national organs, the right to defense and to be defended by counsel of the individual's choice, the right to be tried



within a reasonable time by an impartial Court or tribunal and the presumption of innocence. The right to life, to freedom of conscience, to freedom of association, Assembly and movement are subjected to limitations. They form what is popularly known as *claw back clauses*. They may be restricted or even derogated by law although there is no provision for derogation.<sup>43</sup>

### **1.3.2 The Second Series Of Rights In Part 1 Of Achpr.**

The second series of rights consist of the collective rights enumerated in Article No. 18 through to 26. The family is acknowledged as the natural unit and the basis of society. The rights of women and children are protected. The aged and the disabled have the right to special measures of protection in keeping with their physical or moral needs. The equality of all people in the enjoyment of the same respect and the same right is expressed with additional provision that nothing may justify the domination of one people by another. There is formulation of the right of all people to existence and their unquestionable inalienable right to self determination. It affirms that colonized people or oppressed peoples have the right to free themselves from the bonds of domination by resorting to any means recognized by the International community. The mass expulsion of aliens is prohibited. The Charter protects the right to property but it makes restriction in the interest of public need or in the general interest of the community in accordance with appropriate laws. But there is no mention of compensation whether to be prompt, adequate, appropriate or reasonable. It guarantees the right to work under equitable and satisfactory conditions and to receive equal pay for equal work. There is also provision for the right to economic and social development. The state parties to the Charter also have a right to freely dispose off their wealth and natural resources with a view to strengthening African Unity and solidarity.<sup>44</sup>

### **1.3.3 Rights In Chapter 11 Of Part 1.**

Chapter 11 of part 1 provides for duties in articles 27 through to 29. The duties relate to the family, the society and the state and include the duty to preserve harmonious development of the family including respect and maintenance of the family, the duty to serve the community and the nation, the duty to preserve African values, the duty to defend the security of the state and the duty to pay taxes.<sup>45</sup>

## **1.4.0 AFRICAN COMMISSION ON HUMAN AND PEOPLES RIGHTS**

### **1.4.1 Organization Of The Commission**

Part 11 of the ACPHR which provides for measures of safeguard makes provision for the Africa Commission on Human and Peoples Rights as an organ within the AU to promote Human and Peoples Rights and ensure their protection in Africa.<sup>46</sup>

The organization of the Commission is provided for in articles 31 through to 44. The Commission consists of eleven members chosen from amongst African personalities of the highest reputation, known for their high morality, impartiality and competence in matters of human and Peoples rights, particular consideration being given to persons having legal experience. They serve in their personal capacity. Election is by secret ballot by the Assembly of Heads of States and Government from a list of persons nominated by the state parties to the present Charter, nomination is limited to not more than two candidates. Nominees must be nationals of state parties to the Charter. Members of the Commission are elected for a six year period and are eligible for re-election. The Secretary General of the AU appoints the secretary to the Commission and provides staff and services necessary for the effective discharge of the duties of the Commission. The Commission elects its chairman and vice chairman for a two year period and are eligible for re-election. The Commission lays down its rules of procedure and seven members form a quorum. The chairman has a casting vote. The secretary general of the AU has a discretion to attend the meetings of the Commission with no right of participation in the proceedings or voting.

### **1.4.2 Mandate Of The Commission.**

The mandate of the Commission as set out in article 45 of the Charter is to promote human and peoples rights, collect documents, undertake studies on African problems in the field of human and peoples rights, organize seminars, symposium and conferences, disseminate information, encourage national local institutions concerned with human and peoples rights, should the case arise give views or make recommendations to governments to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples rights and fundamental freedoms upon which African governments may base their legislations, to cooperate with other African and International institutions concerned with the promotion and protection of human and peoples rights, to ensure the protection of human and peoples rights under

conditions laid down by the present Charter, interpret all the provisions of the present Charter at the request of a State Party, an institution of the AU, or an African Organization recognized by the AU, and perform any other task which may be entrusted to it by the Assembly of Heads of State.

#### **1.4.3 Procedure Of The Commission.**

This is provided for in articles 46 through 59. The Commission may resort to appropriate methods of investigations. It receives state communications. Consideration of the communication is subject to the conventional rule of exhaustion of local remedies if they exist unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged. There is power for amicable settlement of disputes. The Commission reports stating the facts and its findings are submitted to the AHSG together with its recommendations as it deems useful. The Commission also deliberates on other communications if they meet the admissibility criteria under article 56 of the Charter.

In cases where the communications relate to extreme urgency which reveal a series of serious or massive violations of human and peoples rights the Commission is to bring this to the attention of the AHSG which has a discretion to request the Commission to undertake an in depth study of these cases and make a factual report accompanied by its findings and recommendations. In any other instance of cases of serious or massive violation of human and peoples rights noticed by the Commission, the Commission brings these to the attention of the chairman of the AHSG who also has a discretion to request an in depth study. All measures taken within the provisions of the Charter remain confidential until such a time as the AHSG decides otherwise. Publications of the Commission's reports is also by consent of the AHSG.

#### **1.4.4 Applicable Principles.**

Applicable principles are provided for in article 60 through 61. In the discharge of its functions the Commission is enjoined to draw inspiration from International law on human and peoples rights particularly from the provisions of various African instruments on human and peoples rights, the Charter of the UN, other instruments adopted by the UN and by African countries in the field of human and peoples rights as well as from the provisions of various instruments adopted within the specialized Agencies of the UN.

of International law, all acts, decisions, regulations and directives of the organs of the Union, all matters specifically provided for in any other agreements that state parties may conclude among themselves or with the Union and which confer jurisdiction on the Court, the existence of any fact which if established would constitute a breach of an obligation owed to a state party or to the Union, the nature or extent of the reparation to be made for the breach of an obligation. The Assembly has power to confer jurisdiction over any other dispute besides the above.<sup>52</sup>

**The source** of law to be applied by the Court is the Act, International Treaties whether general or particular establishing rules expressly recognized by the contesting states, International custom as evidence of a general practice accepted as law, the general principles of law, recognized universally or by African States. Subject to Article 37 of the protocol judicial decisions and the writings of the most highly qualified publicists of various nations as well as the regulations, directives and the decisions of the Union as subsidiary means for the determination of the rules of law. The Court has power to decide a case *exaequo et bono* if the parties agree thereto.<sup>53</sup>

The Court has power to give **default judgements**. Decisions are by a majority vote with a casting vote to the presiding judge in the event of equal votes. Dissenting opinions may be attached. The judgment is binding on the parties in respect of that particular case. Decisions of the Court on the interpretation and application of the Act are binding on member states and organs of the Union. There is a right of intervention for states who have expressed interest in a matter they are not parties to. There is power to interpret the judgment upon request. Revision of the judgment is allowed only when it is based on discovery of a new fact of such nature as to be a decisive factor which fact was when the judgment was given unknown to the Court and also to the party claiming revision. Each party is to bear own costs unless the Court orders otherwise.<sup>54</sup>

The Court has jurisdiction to give **advisory opinions** on any legal question at the request of the Assembly, the parliament, the Executive Council, the Peace and Security Council, the ECOSOC, any of the financial Institutions, a Regional economic community or such other organs of the Union as may be authorised by the Assembly.<sup>55</sup>

The State parties are mandatorily required to **comply with the judgment** in any dispute to which they are parties within the time stipulated by the Court and shall guarantee its execution. In the event of non compliance the Court may upon application by the aggrieved party refer the matter to the Assembly which may decide upon measures

to be taken to give effect to the judgment. The Assembly may impose sanctions under article 23(2) of the Act. An annual report is to be submitted to the Assembly specifying cases in which state parties have not complied with the judgments.<sup>56</sup>

## **1.6.0 INTEGRATION OF THE AFRICAN COURT ON HUMAN AND PEOPLES RIGHTS AND THE AFRICA COURT OF JUSTICE**

### **1.6.1 Background To Integration**

The integration of the African Court on Human and Peoples rights and the Africa Court of Justice of the AU was through a decision of the Assembly of Heads of State and Government meeting in Addis Ababa Ethiopia between 6<sup>th</sup> and 8<sup>th</sup> July 2004 in its 3<sup>rd</sup> Ordinary Session.<sup>57</sup> After the resolution was passed the chairperson of the Commission was requested to work out modalities for implementing that decision. The above decision was followed by decision Ex.CI/162(VI) of the Executive Council at its sixth Ordinary Session held in Abujah – Nigeria from 24<sup>th</sup> to 28<sup>th</sup> January 2005 referring the recommendations of the Commission and the PRC on the integration of the Courts as well as the draft protocol for finalization and submission to the 7<sup>th</sup> ordinary session of the Executive Council in July 2005.<sup>58</sup>

While deliberating on the possible model of integration, the AU had two options to choose from for integration. One requiring the pooling of physical and financial resources which would have resulted in locating the two Courts in one building, sharing facilities such as libraries and information technology. This formula would have reduced costs without necessarily requiring the amendment of the protocols establishing the separate Courts.<sup>59</sup> The second option required the full fusion of the Institution and management of the two Courts leading to the creation of one Court with a pool of judges.<sup>60</sup> The AU opted to adopt the second option which necessitated the partial amendment of the protocols establishing the two Courts leading to the birth of the Draft protocol on integration. This fusion was intended to avoid splitting of resources both human and financial towards maintaining two Courts taking into consideration the fact that existing Institutions in Africa notably the African Commission face severe under Funding and understaffing problems which affects their effectiveness.<sup>61</sup> It would also avoid the proliferation of regional International Judicial Institutions dealing with human rights.<sup>62</sup>

Indeed at the time of merger, the African Continent was home to a number of International Judicial Institutions established under specific regional Treaties with

prescriptions dealing with human rights among others accompanied by a judicial Institution (a Court) to interpret the instrument as well as adjudicate over issues arising there under among them human rights issues. Examples of these are the East African Community Treaty.<sup>63</sup> One of the fundamental principles governing it is the recognition, promotion and protection of human and peoples rights in accordance with the provisions of the ACHPR.<sup>64</sup> The treaty establishes the East African Court of Justice.<sup>65</sup> The Assembly has power to confer upon the Court jurisdiction over human rights issues.<sup>66</sup>

The Eastern and Southern African Region falls under the common market for Eastern and Southern Africa (COMESA) Treaty.<sup>67</sup> One of its fundamental principles is recognition, promotion and protection of human and peoples rights in accordance with the provisions of the ACHPR.<sup>68</sup> The Treaty establishes a Court of justice as one of the organs of the common market<sup>69</sup> to ensure the adherence to law in the interpretation and application of the Treaty<sup>70</sup> and to have jurisdiction to adjudicate upon all matters which may be referred to it pursuant to this Treaty,<sup>71</sup> matters which would include issues of human rights as they are provided for in the fundamental principles of the Treaty. The Economic Community of West African States (ECOWAS) is another arrangement. One of its fundamental principles is recognition, promotion and protection of human and peoples rights in accordance with the ACHPR.<sup>72</sup> The Treaty also establishes a Court of justice whose mandate would be determined by a separate protocol to the Treaty which protocol we have no doubt would not ignore the fundamental principles of the parent Treaty among them those dealing with human rights. We therefore assume that the resultant Court would also have jurisdiction over human rights issues.<sup>73</sup>

The AU Constitutive Act is another arrangement<sup>74</sup> It establishes the Court of Justice as one of the organs of the Union.<sup>75</sup> The Court is to function in accordance with the provisions of the Act and the protocol.<sup>76</sup> Provisions of the AU Act include its objectives among them promotion and protection of human rights in accordance with the ACHPR and other relevant human rights instruments<sup>77</sup> and principles dealing with respect for democratic principles, human rights, the rule of law and good governance.<sup>78</sup>

To crown it all is the establishment of a specific African Court on human and peoples rights whose jurisdiction extends to all cases and disputes submitted to it concerning the interpretation and application of the Charter, the protocol and any other relevant human rights instrument ratified by the States concerned.<sup>79</sup> This expansive jurisdiction would enable this Court to assume jurisdiction over human rights issues under the EAC,

COMESA and ECOWAS Treaties whose provisions on human and people's rights are cemented on the ACHPR. This gives rise to a situation of overlapping mandates. This overlapping mandate gives rise to a serious risk of conflicting jurisprudence as the same rules of law might be given different interpretations in different cases by different tribunals.<sup>80</sup> The merger therefore offers an opportunity of developing a unified, integrated, cohesive and hopefully indigenous jurisprudence for Africa<sup>81</sup>, as adjudication of all human rights issues on the continent can now be brought under the umbrella of the integrated Court. The merger is also advantageous in that even if it were to be taken that prescriptions of human rights under the ECOWAS, COMESA and EAC Treaties are minor and those instruments do not qualify to be relevant human rights instruments under Article 3 ACHPR Protocol, the AU will not require a protocol to bring those prescriptions into the ambit of the jurisdiction of the merged Court. It will simply invoke article 19(2) of the protocol of the Court of justice of the AU and confer on the Court power to assume jurisdiction over human rights in these treaties as it has power to empower the Court to assume jurisdiction over any other dispute other than those referred to in that Article.<sup>82</sup> Once the integrated Court becomes seized of the matter it can then refer it to the specialized human rights division of the Court to adjudicate over it. By virtue of this same merger the decisions of the human rights division of the integrated Court are capable of being directly implemented by the AU Assembly which has power to receive, consider and take decision on reports and recommendations from other organs of the Union as well as monitor the implementation of policies and decisions of the Union as well as ensure compliance by all member states.<sup>83</sup> Decisions of the integrated Court qualify to be reports and recommendations from other organs of the Union. Policies of the Union which qualify for monitoring, implementation and ensuring compliance include promotion, protection and enforcement of human rights.

### **1.6.2 The Reasons For The Integration.**

The reasons put forward in the draft protocol for integration are four fold, namely:- commitment of the Union to the strengthening and enhancement of the protection of Human and peoples Rights in Africa, the enhancement of their capacity to attain the objectives of the two Courts of the Union as a whole, the need to rationalize the judicial structures of the Union and to make them more efficient and effective and to cater for the urgent need for the early operationalization of the Court of Justice and Human rights

of the African Union that is created by the integration of the African Court on Human and Peoples Rights and the Court of Justice of the African Union.<sup>84</sup>

Though the AU has put forward good reasons for integrating the two Courts, the integration has its own demerits. The demerits of the integration are that the operationalization of the human rights Court which has been awaited for, for the last 45 years has been put on hold shortly after the protocol to the ACHPR establishing it became effective. The fully fledged Court which was to be manned by 11 judges has been relegated to a mere human rights Division of the integrated Court to be manned by 7 jurists with expertise in human rights. The seven judges are expected to handle the same work load if not more that 11 Commissioners have been handling which Commission has been found to be ineffective and inefficient in the discharge of their duties in a continent which is vast and notorious for its bad human rights record. No criteria has been given for the choice of the number seven. The judges are too few hence the inability to form themselves into working committees or chambers to facilitate speedy disposal of work. This limitation of the number of judges at the Court's disposal if not addressed in time will make the Court's work not to have any serious impact on the protection and enforcement of human rights on the continent.

Another demerit on integration is that the protocol on the African Court on human and peoples rights is operational while that of the Court of Justice of the AU is yet to become operational. In addition the integration protocol will also need to be operationalized evidenced by the fact that there is no provision in the draft protocol on integration which stipulates that the human rights Division of the integrated Court can be operationalized ahead of the main integrated Court. Vide Article 13 of the draft protocol on integration, only states parties to the protocol on the human rights Court and the protocol of the Court of Justice can ratify it in accordance with their respective constitutional procedures. Other state parties which have not ratified either of the two protocols will only be allowed to ratify the protocol on integration on condition that it files a declaration to the effect that it also ratifies either of the two protocols or both. Vide Article 14 there of the protocol on integration shall enter into force 30 thirty days after the deposit of the instrument of ratification by 15 member states.<sup>85</sup> The scenario displayed by the contents of the provisions of Articles 13 and 14 defeat the 4<sup>th</sup> ideal of integration which promises or guarantees early operationalization of the human rights division of the integrated court.



The implication of this process is well captured in the sentiments expressed by the coalition for an effective African Court on human and peoples Rights. They said *“the process of negotiating, agreeing and ensuring ratification of such amending protocol will effectively post pone the establishment of the African Court on human and peoples Rights by a significant period. This cannot be in keeping with the will of those states that have ratified and ensured the entry into force of the African Court protocol. Moreover victims of human rights violation who would be entitled to access to the human rights Court for remedies under the protocol establishing the African Court on human and peoples rights, would be deprived of such remedies by the failure to establish the Court promptly”*.<sup>86</sup> Going by the experience on the ratification of the protocol on the human rights Court, it is likely to take another 5-6 years before the process of ratification of the three relevant protocols is complete. Human rights have therefore been sacrificed at the expense of rationalization of resources. The pace at which states are moving to put the human rights Court in force tends to show that Africa is either reluctant or hesitant in operationalizing the integrated Court.

### **1.6.3 The Salient Features Of The Integrated Court**

The Integrated Court is the Court of Justice and human rights of the African Union. It is to function in accordance with the provisions of the Protocol on the Court of human rights and the Protocol of the Court of Justice. The Integrated Court is the principal judicial organ of the Union. It is committed to the promotion of Justice and Protection of human and Peoples rights in Africa. The Court shall be constituted by a specialized human and peoples rights Judicial Division established under the protocol and any other judicial Division established by decision of the Assembly after obtaining the opinion of the Court or upon recommendation of the Court and which shall operate under provisions of the protocol<sup>87</sup>. The Court is to consist of fifteen judges who are nationals of state parties at least seven (7) of whom shall have competence on human and peoples rights. The Assembly is to ensure that there is equal gender representation.<sup>88</sup> The Court is to be composed of impartial and independent judges elected in an individual capacity from among jurists of high moral character,<sup>89</sup> who possess the necessary practical or academic qualification required in his or her country for appointment to the highest judicial offices, or is to be a jurist of recognized competence and experienced in the field of International law and or human and peoples rights. Each state party may nominate up

to two (2) of its nationals, as candidates, at least one (1) of whom shall be a woman.<sup>90</sup> The judges are to be elected for a period of six (6) years and may be re-elected only once. The Court is to elect its president and vice president for a period of two years and they may be re-elected only once. The president is to perform judicial functions on a full time basis and reside at the seat of the Court. The functions of the president and the vice-president are to be set out in the rules of procedure of the Court.<sup>91</sup> A judge ceases to hold office upon resignation, suspension or removal, in accordance with the provisions of the protocol.<sup>92</sup> Independence of the judges is ensured by the requirement that no judge may participate or hear a case in which he has an interest.<sup>93</sup> The full Court shall sit except where it is expressly provided otherwise in the protocol or by the rules of Court. The Court shall only examine cases before it if it has a quorum of at least seven judges. The quorum for a specialized Judicial Division is to be set out in the rules of Court. The Court may in accordance with the rules of Court establish special chambers.<sup>94</sup>

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# ENDNOTES TO CHAPTER ONE

<sup>1</sup>OAU Charter

Preamble 8 provides that; persuaded that the Charter of the United Nations and the universal declaration of human rights, to the principles of which we re-affirm our adherence, provide a sound foundation for peaceful and positive cooperation among states

Article 11 of the OAU Charter on purposes provided;

-To promote the unity and solidarity of the African state.

-To coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa.

-To defend their sovereignty, their territorial integrity and independence.

-To eradicate all forms of colonialism from Africa and

-To promote International cooperation, having due regard to the Charter of the United Nations and the Universal Declaration of Human rights.

OAU Article III on Principles provides;

-The sovereign equality of all member states

-Non-interference in the internal affairs of states.

-Respect for the sovereignty and territorial integrity of each state and for its inalienable right to independent existence.

-Peaceful settlement of disputes by negotiation, mediation, conciliation or arbitration.

-Unreserved condemnation in all its forms of political assassination as well as of subversive activities on the part of a neighbouring state or any other states.

-Absolute dedication to the total emancipation of the African territories which are still dependent.

-Affirmation of a policy of non-alignment with regard to all blocs.

<sup>2</sup> Dr. Koffi Quashigah. "African Charter on Human and Peoples Rights. Towards a more effective reporting mechanism." Pg 1

<http://www.chr.up.ac.za/centrepublishations/occ-paper> pg 1 accessed on 25/5/05

<sup>3</sup> Bahame Tom Nyanduga. Member of the African Commission on Human and Peoples Rights "Relationship between the African Commission on Human and Peoples Rights and the African Human rights Court". A paper presented at the Regional Conference on the establishment of an effective African Human rights Court 7 - 10 April 2004. Safari Park Hotel Nairobi Kenya (unreported).

<sup>4</sup> Encyclopaedia of Public International Law Volume 1. North Holland. Amsterdam/London/New York Tokyo pg 54

<sup>5</sup> Id

<sup>6</sup> Dr. Koffi Quashigah. "African Charter on Human and Peoples Rights. Towards a more effective reporting mechanism". Pg 2

<http://www.chr.up.ac.za/centrepublishations/occ-paper> pg 1 accessed on 25/5/05

<sup>7</sup> Id

<sup>8</sup> Id

<sup>9</sup> Ogendo H. W. O. O. 1993 "Human and Peoples Rights" what point is Africa trying to make? In Hyden and Nagan et al (Eds): *Human rights and governance in Africa* pg 74 - 86 University Press of Florida pg 75

<sup>10</sup> Encyclopaedia of public International law 1992. Volume 1. North Holland Amsterdam/London/New York/Tokyo pg 54

<sup>11</sup> Id

<sup>12</sup> Ogendo H. W. O. O. 1993 "Human and Peoples Rights what point is Africa trying to make?" In Hyden and Nagan et al (Eds): *Human rights and governance in Africa* pg 74 - 86 University Press of Florida pg. 75.

<sup>13</sup> Op cit pg 81

<sup>14</sup> Op cit pg 76

<sup>15</sup> Op cit pg 74

<sup>16</sup> Ahmed Nasir M. Abdullahi. Human rights protection in Africa. Toward effective mechanisms 1997. *East Africa journal of peace and human rights* vol. 3 no. 1 page 6

<sup>17</sup> Id

<sup>18</sup> Id

<sup>19</sup> Op cit page 8

<sup>20</sup> N. Barney Pityana. "The African Court on Human and Peoples Rights in Municipal Law".

<http://www.unisaac.za/contents/about/principles/docs/municipal-law.doc> accessed on 25/5/05

<sup>21</sup> Id

<sup>22</sup> Id

<sup>23</sup> Id

<sup>24</sup> Erika De Wet. 2001, "The protection mechanism under the African Charter and the protocol on the African Court of Human and Peoples Rights". In Gud Mundur A. et al (eds) pp 713 -729. *International Human rights monitoring mechanism Essays in Honour of Jacob Th. Moller*. The Raoul Wallen Berg Institute of Human rights Library Volume 7. Martinus Nijhoff Publishers. The Hague/Boston/London. Pg 717

<sup>25</sup> J. J. Gautler occasional paper. The African Court on Human and Peoples Rights Presentation analysis and commentary.

<http://www.Apt.ca> accessed on 25<sup>th</sup> May 2005

<sup>26</sup> Id Resolution NO AHG 230 (XXX) Sec. Doc. OAU/LEG/Exp/AFC/HPR September 1995

<sup>27</sup> Id

<sup>28</sup> Yeheneu Tsegaye. "The African Human rights Court. A savior of Human rights in Africa?" [http://www.Ethiopia first. com/news 2004/jan/Africa Human rights Court. Html](http://www.Ethiopiafirst.com/news/2004/jan/Africa%20Human%20rights%20Court.html) accessed on 25.5.

<sup>29</sup> Makau Mutua. The African human rights system. A critical evaluation.

<http://htr.undp.org/docs/publications/background-papers/mutua.pdf> accessed on 25/5/05

<sup>30</sup> N 28 Supra

<sup>31</sup> Association for the prevention of torture. Occasional paper. "The African Court on Human and peoples Rights. Presentational analysis and commentary. The protocol to the African Court on Human and peoples Rights". [http://: www.apt.ch](http://www.apt.ch) accessed on 25/5/05.

<sup>32</sup> AU constitutive Act

<http://www.au.2002.gov.za/docs/keyoau/auact.htm> accessed on 25.5.05

<sup>33</sup> Article 19 (b) of the AU Act provides; The functions of the Assembly shall be to receive consider and take decisions on reports and recommendations from the other organs of the Union.

<sup>34</sup> Preamble 9 of the AU constitutive Act provides; Determined to promote and protect human and peoples tights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law. Preamble 10 further determined to take all necessary measures to strengthen our common institutions and provide them with the necessary power and resources to enable them discharge their respective mandates effectively.

<sup>35</sup> Article 23 of the AU Act provides that; The Assembly shall determine the appropriate sanctions to be imposed on any member state that defaults in the remission of its contributions to the budget of the Union in the following manner: denial of the right to speak at meetings, to vote, to present candidates for any position or post within the Union or to benefit from any activity or commitments therefore.

(2) Further more any member state that fails to comply with the decisions of the polices of the Union may be subjected to other sanctions, such as the denial of transport and communication links with the other member state and other measures of political and economic nature to be determined by the Assembly.

<sup>36</sup> Article 1 of the ACHPR provides that; The member states of the organization of African Unity parties to the present Charter shall recognize the Rights, Duties and Freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.

<sup>37</sup> Article 62 of the ACHPR provides that; Each state party shall undertake to submit every two years, from the date the present Charter comes into force a report on the legislative or other measures taken with a view to giving effect to the Rights and Freedoms recognized and guaranteed by the present Charter.

<sup>38</sup> Articles 6, 8, through to 13 of the ACHPR provides that; No one may be deprived of his freedom except for reasons and conditions previously laid down by law.

-Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may subject to law and order, be submitted to measures restricting the exercise of these freedoms.

-Every individual shall have the Right to express and disseminate his opinion within the law.

-Every individual shall have the right to free association provided he abides by the law.

-Every individual shall have the Right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by the law in particular those enacted in the interest of national security, the safety, health, ethics and Rights and Freedoms of others.

-Every individual shall have the Right to Freedom of movement and residence within the borders of a state provided he abides by the law.

-Every individual shall have the Right to leave any country including his own and to return to his country. This right may only be subject to restriction provided for by law for the protection of national security, law and order public health or morality.

-Every citizen shall have the right to participate freely in the government of his country either directly or through freely chosen representatives in accordance with the provision of the law.

-Every individual shall have the right of access to public property and serve in strict equality of all persons before the law.

<sup>39</sup> Ahmed Nasir M. Abdullahi: 1997 "Human rights Protection in Africa: Towards effective mechanism". *East Africa Journal of Peace and Human rights* vol. 3, no 1 pg 9

<sup>40</sup> Id

#### **Inter-American**

<sup>41</sup> Article 27 of the ACHR provides that; In time of war, public danger or other emergency that threatens the independence or security of a state party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of times strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations, under International law and do not involve discrimination on the ground of race, colour, sex, language, religion or social origin.

-The foregoing provision does not authorize any suspension of right to juridical personality, right to life, right to humane treatment, freedom from slavery, freedom from ex post facto laws, freedom of conscience and religion, Right of the family, right to a name, right of the child, right to nationality, right to participate in government or of the judicial guarantees essential for the protection of such rights.

-Any state party availing itself of the right of suspension shall immediately inform the other state parties through the Secretary General of the organization of the American states of the provisions the application of which it has suspended, the reasons that gave rise to the suspension and the date set for the termination of such suspension.

#### **European**

(ii) Article 15 of the ECHR provides that Non-derogable rights are right to life save in execution of a sentence of a Court following his conviction of a crime for which this penalty is provided by law, torture or to inhuman or degrading treatment or punishment, slavery or servitude, no one to be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or International law at the time when it was committed. Nor should a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

<sup>42</sup> Article 15 (3) ECHR provides that; Any High Contracting party availing itself of this right of derogation shall keep the secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully exerted.

<sup>43</sup> Encyclopaedia of public International law 1992. Volume 1. North Holland Amsterdam/London/New York/Tokyo pg 54

<sup>44</sup> Op cit page 55

<sup>45</sup> Ogendo H. W. O. O. 1993 "Human and Peoples Rights what point is Africa trying to make?" In Hyden and Nagan et al (Eds): *Human rights and governance in Africa* pg 74 - 86 University Press of Florida pg 75

<sup>46</sup> Article 30 of the ACHPR provides that; An African Commission on human and peoples rights here in after called the Commission shall be established within the organization of African unity to promote human and Peoples rights and ensure their protection in Africa.

<sup>47</sup> Article 4 ,18 of the AU Act

<sup>48</sup> Article 2 of the Protocol to the AU Act provides that; The Court established by the Act shall function in accordance with the provision of the Act and this protocol. The Court shall be the principal judicial organ of the Union.

[http://www.African\\_Union.org/officialdocument/treaties/accessedon22.06/05](http://www.African_Union.org/officialdocument/treaties/accessedon22.06/05)

<sup>49</sup> Article 3 of the Protocol to the AU Act provides that; The Court shall consist of 11 judges who are nationals of state parties. The Assembly may when it deems it necessary review the number of judges. The judges shall be assisted by the necessary staff for the smooth functioning of the Court. No. (two) judges shall be nationals of the same state parties.

<sup>50</sup> Article 4 through to 15 of the Protocol to the AU Act

<sup>51</sup> Article 18 of the Protocol to the AU Act

- <sup>52</sup> Article 19 of the protocol to the AU Act
- <sup>53</sup> Article 20 of the Protocol to the AU Act
- <sup>54</sup> Article 32 through to 38, 40 through to 43 of the Protocol to the AU Act
- <sup>55</sup> Article 44 of the Protocol to the AU Act
- <sup>56</sup> Article 51 through to 53 of the Protocol to the AU Act
- <sup>57</sup> AU Dec.45 111 Decision by AU Assembly of heads of state and government in its third summit in Addis Ababa Ethiopia 6-8 July 2004.  
[http://www.Africa\\_uninon.org/Auaccessed29/9/05](http://www.Africa_uninon.org/Auaccessed29/9/05)
- <sup>58</sup> Draft protocol on the integration of the African Court of human and peoples rights and the Court of justice of the African Union.  
<http://www.iss.co.za/af/reg.org/unitytounial/pdfs/au/sirte/july05/prot.Court.pdfaccessedon29/9/05>
- <sup>59</sup> Kithure Kindiki – LL.B (MOI) LL.M.LL.D (Pretoria). Lecturer of International law, university of Nairobi, Kenya “The proposed integration of the African Court of justice and the African Court of Human and peoples rights: legal difficulties and merits” (unreported) pg 3.
- <sup>60</sup> Id
- <sup>61</sup> Op cit pg 6
- <sup>62</sup> Id
- <sup>63</sup> EAC Treaty [www.eac.int/treaty.htmaccessedon22.06.05](http://www.eac.int/treaty.htmaccessedon22.06.05)
- <sup>64</sup> Article 6(d) of the EAC Treaty
- <sup>65</sup> Article 23 of the E.A.C Treaty provides that; The Court shall be a judicial body which shall ensure the adherence to law in the interpretation and application of and compliance with this treaty.
- <sup>66</sup> Article 27(1) of the EAC Treaty provides that; The Court shall initially have jurisdiction over the interpretation and application of this treaty  
(2) The Court shall have such other original, appellate, human rights, and other jurisdiction as will be determined by the council at a suitable subsequent date. To this end the partner states shall conclude a protocol to operationalize the extended jurisdiction.
- <sup>67</sup> COMESA Treaty [www.comesa.int/www.iss.co.za.accessedon23.06.05](http://www.comesa.int/www.iss.co.za.accessedon23.06.05)
- <sup>68</sup> Article 6(e) of the COMESA Treaty
- <sup>69</sup> Article 7(c) of the COMESA Treaty
- <sup>70</sup> Article 19 of the COMESA Treaty
- <sup>71</sup> Article 33 of the COMESA Treaty
- <sup>72</sup> Article 4 (g) of the ECOWAS Treaty [www.iss.co.za/www.sec.ecowasint.acesseon22.06.05](http://www.iss.co.za/www.sec.ecowasint.acesseon22.06.05)
- <sup>73</sup> Article 15 (1) of the ECOWAS Treaty provides that; There is hereby established a Court of justice of the community  
(2) The status, composition, powers procedure and other issues concerning the Court of justice shall be set out in a protocol related there to.  
(3) The Court of justice shall carry out the functions assigned to it independently of the member state and the institutions of the community.  
(4) Judgements of the Court of justice shall be binding on the member state, the institutions of the community and individuals and corporate bodies.
- <sup>74</sup> AU Constitutive Act. <http://www.au.2002.gov.za/docs/keyoau/auact.htmaccessedon22.06.05>
- <sup>75</sup> Article 5 (d) of the AU Act
- <sup>76</sup> Protocol of the Court of justice of the African Union.  
[http://www.African\\_Union.org/officialdocument/treaties/accessedon22.06/05](http://www.African_Union.org/officialdocument/treaties/accessedon22.06/05)
- <sup>77</sup> Article 3 (h) of the AU Act
- <sup>78</sup> Article 4 (m) of the AU Act
- <sup>79</sup> Article 3 (1) of the Protocol to the ACHPR
- <sup>80</sup> Kithure Kindiki – LL.B (MOI) LL.M.LL.D (Pretoria). Lecturer of International law, university of Nairobi, Kenya “The proposed integration of the Africa Court of justice and the African Court of Human and peoples rights: legal difficulties and merits” (unreported) pg 7
- <sup>81</sup> Id
- <sup>82</sup> Article 19 (2) of the Protocol of the Court of justice of the African Union provides that; The Assembly may confer on the Court power to assume jurisdiction over any dispute other than those referred to in this article.
- <sup>83</sup> Article 9 (b), 9 (e) of the AU Act

<sup>84</sup> Draft protocol on the integration of the African Court of human and peoples rights and the Court of justice of the African Union.

<http://www.iss.co.za/af/reg.org/unitytounial/pdfs/au/sirte/july05/prot.Court.pdf> accessed on 29/9/05

<sup>85</sup> Article 13 of the Draft protocol on the integration of the African Court on Human and peoples rights and the Court of Justice of the African Union provides that; Subject to the provisions of paragraph 2 of this article this protocol shall be open for signature and ratification or accession by states parties to the protocol on the Human rights Court and the protocol of the Court of justice in accordance with the respective constitutional procedures. (2) A member state that has not ratified either the protocol on the Human rights Court or the protocol of the Court of justice may do so only provided that at the time of ratification or accession to this protocol, it makes a declaration in writing that its ratification or accession shall be taken to also amount to ratification of or accession to either of the protocols a for said as the case may be.

Article 14 (1) of the draft Protocol provides that; This Protocol shall provisionally enter into force thirty (30) days after being signed by at least (15) member states (2) it shall finally enter into force thirty (30) days after the deposit of the instrument of ratification by fifteen (15) members states.

<sup>86</sup> The coalition for an effective African Court on Human and peoples Rights. "Legal and institutional issues arising from the decision by the Assembly of Heads of state and government of the African Union to integrate the African Court on Human and peoples Rights and the Court of justice of the African Union"

<http://www.AfricanCourtcoalition.org> accessed 29/9/2005

<sup>87</sup> Article 2 of the draft Protocol on integration provides that;

1.The Court of Justice and Human rights of the African Union hereby established shall function in accordance with the provisions of the Protocol on the Court of Human rights and the Protocol of the Court of Justice.

2.The Court shall be the principle judicial organ of the Union and shall be committed to the promotion of justice and protection of Human and Peoples Rights in Africa.

3.The Court shall be constituted by a Specialized Human and Peoples Rights Judicial Division established under this Protocol and any other Judicial Division established by the decision of the Assembly after obtaining the opinion of the Court or upon recommendation of the Court and which shall operate under the provisions of this Protocol.

<sup>88</sup> Article 3 of the draft Protocol on integration provides that;

1.The Court shall consist of fifteen (15) judges who are nationals of state parties, at least seven (7) of whom shall have competence in Human and Peoples Rights.

2.On the composition of the Court, the Assembly shall ensure that there is equal gender representation.

3.Article 11 of the Protocol on the Human rights Court is deleted.

<sup>89</sup> Article 4 of the draft Protocol on integration provides that;

1.The Court shall be composed of impartial and independent judges elected in an individual capacity from among jurists of high moral character.

2.A judge of the Court shall possess the necessary practical, judicial or academic qualifications required in his or her country for appointment to the highest judicial offices, or shall be a jurist of recognized competence and experience in the field of International law and/or Human and Peoples Rights.

<sup>90</sup> Article 5 of the draft Protocol on integration provides that;

1. Each state party may nominate up to two (2) of its nationals as candidates possessing the required qualifications stipulated in this Protocol, at least one (1) of whom shall be a woman.

<sup>91</sup> Article 8 of the draft Protocol on integration provides that;

1.The Court shall elect its President and one Vice-President for a period of two (2) years. They must be re-elected only once.

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

3.The functions of the President and the Vice-President shall be set out in the Rules of Procedure of the Court.

<sup>92</sup> Article 9 of the draft Protocol on integration provides that;

1.A judge may resign his or her position in writing addressed to the President for transmission to the Chairperson of the Assembly. The resignation shall take effect thirty (30) days after notification to the Chairperson of the Assembly.

2.The President shall communicate in writing, the resignation or the recommendation for suspension or removal of a judge to the Chairperson of the Commission.

3.A recommendation of the Court to suspend a judge shall become final unless set aside by the Assembly and a recommendation to remove a judge shall take effect upon its endorsement by the Assembly.

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4. Article 19 of the Protocol on the Human rights Court is deleted and substituted with Article 11 of the Protocol of the Court of Justice as amended in paragraph 1 of this Article.

<sup>93</sup> Article 11 of the draft Protocol on integration provides that; No judge may participate in the decision of any case in which he or she has an interest or where he or she 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 Commission of inquiry, or in any other capacity. Any doubt on this point shall be settled by decision of the Court.

<sup>94</sup> Article 12 of the draft Protocol on integration provides that;

1. The full Court shall sit except where it is expressly provided otherwise in this Protocol or by the Rules of Court.

2. The Court shall only examine cases brought before it, if it has a quorum of at least seven (7) judges.

3. The quorum for a specialized judicial Division shall be set out in the Rules of Court.

4. The Court may, in accordance with the Rules of Court, establish Special Chambers.

5. Paragraph 3 of the Protocol of the Court of Justice shall become paragraph 5.



# CHAPTER TWO

## 2.0 THE LEGAL AND INSTITUTIONAL CONSTRAINTS ON THE AFRICAN COURT ON HUMAN AND PEOPLES RIGHTS NOW THE HUMAN RIGHTS DIVISION OF THE INTEGRATED COURT.

### 2.1 Complimentarity As A Constraint

The relationship between the African Commission on human and peoples rights and the Court is referred to as the need for the Court to enhance the efficiency of the African Commission and to complement and reinforce its functions especially its protective mandate.<sup>1</sup>

The provision on complimentarity is vague although the implication is that the Commission and the Court are intended to work together and share some powers.<sup>2</sup>

Areas of possible concurrence are that both institutions are autonomous, and are authorized to undertake contentious, advisory and friendly settlement functions over the same subject matter and many of the same parties. Further, the Commission can receive and act on Human rights situations across Africa. It can interpret the Charter and draw inspiration from the Human rights instruments independently of the Court, which Court can also do like wise, both institutions can entertain inter-party disputes alleging violations of the ACHPR, where individuals and NGOs file cases direct with the Court under Article 5 (3) of the Protocol the Court may decide admissibility or seek the opinion of the Commission which must respond as soon as possible, the Court may consider cases instituted before it or transfer them to the Commission though no criterion is provided as to the circumstances under which the Court may retain original jurisdiction or transfer the case to the Commission for settlement of disputes pending before them.<sup>3</sup>

Areas of possible conflict are that the Commission is not under any obligation to refer matters to the Court. It may or it may not refer its decisions to the Court to make consequential binding orders. Pursuant to Article 27 of the Protocol, where the Commission has conducted hearings and made a decision the Court may overturn that decision, the Court may subsequently give a different interpretation to a provision of the Charter that had previously been interpreted upon by the Commission and yet there is no provision as to whose decision is to prevail in the event of such conflict. The Court may want to start *denovo* a matter already conducted and concluded by the Commission either because the parties or the Court of its own motion so desires. The Commission is listed as

one of the persons entitled to submit cases before the Court but it is not clear as to whether it is to appear as an adversary or as an adviser.<sup>4</sup> A case has therefore been made out to show that indeed there is ambiguity as regards complementarity between the Commission and the Court which needs to be streamlined.

One possible model that this study can draw inspiration from in trying to resolve the complementarity problem between the two institutions is the Rome statute of the International Criminal Court. Preamble 10 and Article 1 of the Rome statute on the creation of the International Criminal Court provide that the ICC shall be complementary to National criminal jurisdictions.<sup>5</sup> The boundary of complementarity between the ICC and National criminal tribunals is clearly defined in article 17 of the said statute.<sup>6</sup> Similar provisions in the Protocol to the ACHPR would have assisted in defining clearly the points of interaction between the Commission and the Court and would assist in removing the ambiguity caused by the use of the word “*complementarity*” without defining the same.

## **2.2 Jurisdiction**

The jurisdiction of the Court extends to all cases and disputes submitted to it concerning the interpretation and application of the Charter, the Protocol and any other relevant Human rights instruments ratified by the states concerned. The Court is also called upon to apply the provisions of the Charter and any other relevant Human rights instruments ratified by the states concerned.<sup>7</sup> This provision tends to give an impression that this jurisdiction extends to all regional, sub-regional, bilateral, multilateral and International Treaties.<sup>8</sup> By virtue of this wide jurisdiction the Court is faced with two jurisdictional problems one on the home front and another one on the International front. On the home front the Courts jurisdiction under the Charter is shared with the Commission by virtue of the provisions of Article 45 (3) of the Charter,<sup>9</sup> but there is no provision to cater for a situation as to what is to happen if the African Commission and the Court were to give conflicting interpretations of the same Articles.

Article 3 of the Protocol should therefore have contained a provision to the effect that in the event of a conflict on the interpretative role between the Court and the Commission the Courts decision should prevail or alternatively it should have amended Article 45 (3) of the ACPHR divesting that jurisdiction from the Commission and then vesting it solely in the Court.

On the International front “*other relevant Human rights instruments ratified by state parties*” in Article 3 Protocol should be interpreted to include International instruments. The question that arises is whether the African Court is properly seized of the International mandate or whether the drafters of the Protocol framed the provision in a careless manner. The UN Charter is one of the International instruments making provision for Human rights. The power to interpret it is vested in the UN General Assembly.<sup>10</sup> Other International Human rights instruments are creations of the UN General Assembly resolutions. The UN has established the International Court of Justice as its principal judicial organ (ICJ).<sup>11</sup> The ICJ’s jurisdiction is set out in its statute. It comprises all cases which the parties refer to it and all matters specifically provided for in the United Nations Charter or in Treaties and Conventions in force.<sup>12</sup>

The foregoing being the position, it means that the proper place for interpreting the UN Charter is the UNGA, and the International Human rights instruments among them those making provision for Human rights like the UDHR, ICCPR and the ICESCR etc, is the ICJ. We have no doubt the European and the Inter-American systems had this in mind when they confined the interpretative role of their human rights Courts to the creating instruments and their Protocols.<sup>13</sup> Any purported attempt by the Court to assume that International jurisdiction in so far as the International human rights Conventions are concerned, it being a regional undertaking will be in direct violation of Art 103 of the UN Charter.<sup>14</sup>

### **2.3 Rendering Of Advisory Opinion**

Article 4 of the Protocol confers on the Court discretionary competence to give advisory opinions on any legal matter relating to the Charter or any other relevant Human rights instruments provided that the subject matter of the opinion is not related to a matter being examined by the Commission.<sup>15</sup> The request for opinion is limited to a member state of the AU, the AU, any of its organs or any other organization recognized by the AU.<sup>16</sup> A reading of Article 4 of the Protocol to the ACHPR shows that the power to render advisory opinions is purely discretionary. No guidelines are stated in the Protocol for determining either when to exercise or when to decline to exercise this jurisdiction. Provision for request of advisory opinion is an avenue for a sustained analysis of the meaning of the Charter, the Protocol and the compatibility of domestic legislation and regional initiatives within the Human rights norms, contained there in. In the Americas

advisory opinions issued by the Inter-American Court of Human rights have had significant consequences both in protecting Human rights in the Americas, and providing needed guidance to domestic Courts. They have also enabled some governments to introduce necessary reforms or to oppose legislation that would have breached the Convention without being compelled to do so by contentious decisions stigmatizing them as violators of Human rights.<sup>17</sup> The advisory opinions of the Court concerning the provisions of the ACHPR if well published would be useful to African states especially in relation to domestic legislation.<sup>18</sup>

The discretionary power in Article 4 makes the Court appear to be subordinate to the Commission. The Court which is to be manned by highly qualified jurists as per specification is the one which is competent to handle serious legal issues that may arise in the area of Human rights. If an aggrieved party has found it fit to seek an opinion from the Court when the matter is pending before the Commission it means that the matter is serious. It is therefore not proper for the drafters of the Protocol to slip in a provision which would allow the Court to decline jurisdiction solely on the ground that the matter is pending before the Commission. It is the Court which is supposed to play a leading role in the development of continental jurisprudence on Human rights. A proper procedure should have been that whenever an opinion is called for on a matter before the Commission then the proceedings before the Commission in that matter should stop until the opinion is given. Such a procedure would give the Court primacy over the Commission.

#### **2.4 Accessibility To The Court**

Under article 5 Protocol the Court has two types of access, to wit automatic and optional. Automatic or compulsory access is granted to the Commission, the state party which has lodged a complaint with the Africa Commission, the state party against whom a complaint has been lodged and the state party whose citizen is a victim of a Human rights violation. The first optional access is to a state party acting as a third party intervener if it considers that it has an interest in a case in which it was not initially involved which state party can apply to the Court to allow it to join the on going proceedings. The second optional accessibility is to individuals and NGOS under Article 5(3), as read with Article 34(6) of the Protocol to the ACHPR. Under this provision

NGOs and individuals cannot bring a suit against a state party unless at the time of ratification of the Protocol or there after the state party must have made a declaration accepting jurisdiction of the Court to hear such cases. The Court also has a discretion to grant or deny such access.<sup>19</sup>

The right of the third party intervention is very narrow as it is only, confined to a state party with an interest in the matter which state party has applied to be permitted to join the proceedings. The remedy is not automatic like under the European system where a state party whose National is an applicant has a right to submit written comments and participate in the proceedings. Under the European system, there is no requirement that an application has to be made first before one can be allowed to join proceedings. Too much discretion has been given to the Court under the African regional arrangement. The Court can refuse to grant the right to join without giving reasons. There is no provision empowering the president of the Court to invite any state party or any other person or NGOS to file written submissions to assist in the resolution of the case..<sup>20</sup> The Court's restriction on the third party intervention denies a chance to other key players in the Human rights protection mechanism to appear before the Court and champion the interests of the victims. Such key players are NGOS, individuals and groups of individuals. Individuals are the most likely victims of abuse of Human rights and not a state party. They are in a better position to put forward their grievances on their own or through some other medium and not through the state which may be the violator of those Rights.

Restrictions on accessibility to the Court by individuals and NGOS by Article 5(3) as read with Article 34(6) of the Protocol to the ACHPR is a fundamental flaw in the African Court system because it is the individuals and NGOs that have made the Commission functional and similarly it will be the individuals and the NGOs that will make the Court functional<sup>21</sup> . The Court is not an institution for the protection of the Rights of states or AU organs. A Human rights Court exists primarily for protecting citizens against the state and other government Agencies.<sup>22</sup> It is therefore the individuals and the NGOs who would be the primary beneficiaries and users of the African Court and not state parties because diplomatic and economic ties between member states usually discourages the initiation or institution of actions by one state against another.<sup>23</sup> This limitation pushes the individuals and NGOS to the in effective Commission. The

restriction in Article 5(3) of the Protocol to the ACHPR substantially limits the protection accorded to individuals and given that NGOs have submitted most of the communications to the Commission, can inhibit the ability of the Court to be effective.<sup>24</sup>

The need for the close relationship between the African Commission and the NGOs, and which should go for the Human rights Court now, was cultivated in a workshop on NGOs participation in the work of the African Commission held in Banjul the Gambia 5-7 October 1991.<sup>25</sup> In his opening address the then minister for justice of the Gambia stressed that *“eventually the success of the African Commission will be greatly facilitated by close collaboration between it and the NGOs. With their grass roots link NGOS cannot only bring the Commission to the ordinary African, but also serve as a very valuable source of information on Human rights practices in the struggle to check Human rights abuse”*. Those remarks also go for the Human rights Court. The importance of the role played by NGOs in the area of Human rights protection was also recognized and appreciated by the first OAU ministerial conference on Human rights meeting held from 12<sup>th</sup> to 16<sup>th</sup> April 1999 in Grand Bay Mauritius.<sup>26</sup> This conference recognized the contribution made by NGOs to the promotion and protection of Human rights in Africa.<sup>27</sup>

We do not expect state parties to ignore the principles of state sovereignty, state responsibility for the welfare of its own citizens, the policy of non- interference in another states affairs and then suddenly turn themselves into advocates to litigate on behalf of other states subjects on a count of violation of Human rights. Neither are state parties expected to rush to recognize the Courts competence to be used against them. This provision in effect pushes the bulk of the work load to the inefficient African Commission. It is our view that the existence of Article 5(3) as read with Article 34(6) of the Protocol of the ACHPR is a back door or under cover for the Protocols upholding of the doctrine of state sovereignty and policy of non-interference in other state affairs and Luke warm treatment of issues of Human rights, thus making the principles upon which the Court is cemented to be mere lip service.

Failure to accord them that right in the first instance in the Protocol is a serious fundamental flaw in the administration of Human rights justice on the continent. By insisting that at no circumstance will the Court accept the petitions from individuals and NGOs unless and until Article 34 (6) has been complied with, Article 5(3) has placed an

unnecessary road block in the path of the wheel of justice for the individuals for whom the institution was created. The Court, from the Protocols preamble principles was set up to enforce Human rights. There is therefore no justification for a procedure which was not introduced for the Commission to be introduced for an institution coming in to improve the efficiency of the Commission. Opening up the Court to individuals and NGOs would not flood the Court with cases as there is a safety valve in article 8 Protocol where the Court has power to hear a case or transfer it to the Commission.<sup>28</sup> A case has therefore been made out for the individuals and NGOs to have been given automatic access to the Court.

## **2.5 Admissibility Of Cases**

Article 6 of the Protocol to the ACHPR provides that the Court shall rule on the admissibility of cases taking into account the provision of article 56 of the African Charter.<sup>29</sup> The Court has discretion to request the opinion of the Commission when deciding admissibility under Article 5(3) of the Protocol to the ACHPR. The circumstances under which consultation is to be made are not clear. It is therefore necessary for the Protocol to lay down explicitly the circumstances under which consultations are to be made. As currently framed the article creates an avenue for the Court to decline jurisdiction and deny audience to individuals and NGOs who have gone through the Commission to reach the Court. To make the Court more effective, the power to transfer a case to the Commission should go hand in hand with a corresponding power to the Court to defer cases of serious nature from the Commission to itself. Such an arrangement would give the Court primacy over the Commission and flexibility in the discharge of its functions.

## **2.6 Consideration Of Cases**

Under the current arrangement, rules of procedure are the ones going to determine how the Court is going to consider cases taking into account the complementarity between the Court and the Commission.<sup>30</sup> When drawing up these rules the Court is required to consult the Commission.<sup>31</sup> Both the Commission and the Court are creatures of binding instruments. The Commission which operates under the ACHPR, has a defined mandate. The Court which is to operate under the Protocol has a defined

mandate. Under Article 66 of the ACHPR rules of procedure are not one of the means of amending the Charter.<sup>32</sup>

Under the Charter amendment is by way of Protocols or agreements by state parties to the AU. Article 8 of the Protocol to the ACHPR cannot therefore hold in so far as it purports to show that rules of procedure are going to determine issues of complementarity between it and the Commission. The state parties have to come up with another Protocol or agreement specifying how cases are going to be transferred and deferred between the Court and the Commission. An example of such an arrangement is found in the European system where there are clear provisions in the statute governing the transfer and deferral of cases between the committee, chamber, Grand chamber and the plenary Court.<sup>33</sup> The Inter-American system also has clear provisions in the statute governing the relationship of the Court and the Commission. It therefore follows that rules of procedure however created will not cure the default of failure to clearly state under article 8 the circumstances under which the Court and the Commission will consider cases.

## **2.7 Conciliatory Jurisdiction Or Amicable (Friendly) Settlement Of Disputes**

Article 9 of the Protocol to the ACHPR provides that the Court may try to reach an amicable settlement in a case pending before it in accordance with the provisions of the Charter. This procedure is therefore useful if properly anchored in the instrument. Under the ACHPR this power is vested in the Commission exercisable under article 48. Article 9 Protocol does not amend Article 48 of the Charter to make Article 48 of the Charter applicable to the Court.<sup>34</sup>

In the absence of a provision in the Protocol to the ACHPR to the effect that in so far as the Charter provision relating to amicable settlement by the Commission under the ACHPR also refers to amicable settlement of disputes by the Court, the power of amicable settlement of disputes is not properly vested in the Court.

## **2.8 Hearings And Representation**

**Hearings** are in public although the Court has discretion to hold them in camera as may be provided for in the rules.<sup>35</sup> the Protocol should have followed the Rome statute of the International criminal Court to specify circumstances under which the Court is to receive evidence in camera instead of leaving to the rules circumstances under which



hearings may be held in camera. Such a provision would prevent prolonged arguments between litigants in trying to argue out as to which situation warrants camera hearing and which one does not.

The Protocol also provides for **free legal representation** where the interest of justice so require.<sup>36</sup> While this is a remarkable achievement, one cannot fail to note that the Protocol does not specify who is supposed to provide such free legal aid. It is not enough to make a legal provision for a right or service without properly anchoring it in the system so that the facility can be enjoyed. Here in the circumstances under which free legal aid is to be given have not been indicated. Rules as we have said previously cannot be called in to make changes to the structure of the Court. Article 10 (2) of the Protocol to the ACHPR should have followed the foot steps of Article 67(d) of the Rome statute where it is expressly stipulated as to the circumstances under which free legal aid is to be granted.<sup>37</sup> It is therefore clear that under the provisions of the ICC it is the Court to provide the free legal aid.

In the absence of clear provisions as to who is to provide for free legal aid, the same is not properly anchored in the Court institution. Further no unit or Fund has been set up to cater for the same and so it is not available to the litigants. The structure has to be altered first to indicate who is to be responsible for free legal aid and then make rules to work out the modalities for their operation and or administration.

Article 10 (3) of the Protocol to the ACHPR provides that **any person, witness or representative of the parties** who appears before the Court shall enjoy protection and all facilities in accordance with International law necessary for the discharging of their functions.<sup>38</sup> There is no mention as to who is to be charged with that function. A proper way of addressing the issue should have been to set up **a victims and witnesses unit** within the Court registry a long the lines of that which was set up under article 43 (b)) of the Rome statute.<sup>39</sup> Victims of Human rights abuse are not any different from the victims of criminal offences subject of the Rome statute. They fall in the same category and they require the same protection. They require a unit similar to that set up under the ICC arrangement to arrange for protective measures, security arrangements, counselling and other appropriate assistance for witnesses and victims who appear before the Court. It would also cater for others who are at risk on account of testimony given by such witnesses. Further protection is also found in article 68 of the same Rome statute where

the Court is required to take appropriate measures to protect the safety, physical and psychological well being and dignity and privacy of the victims and witnesses. Such measures include proceedings in camera or to allow presentation of evidence by electronic or other special means.<sup>40</sup>

Protection of applicants, representatives and witnesses from harassment and threats by government is essential to the assurance of a fair trial. The efforts of the Human rights Court to adjudicate Human rights cases and to do justice to the parties particularly the aggrieved persons will be thwarted if the applicants or their representatives cannot approach the temple of justice without fear of reprisal.<sup>41</sup>

## **2.9 Evidence And Protection Of The Victims Views Before The Court**

In its proceedings the Court is enjoined to hear all submissions by all parties and if deemed necessary hold an enquiry. The states concerned are to assist by providing relevant facilities for the case. The Court has a discretion to receive written and oral evidence including expert testimony and shall make its decision on the basis of such evidence.<sup>42</sup> Article 26 of the Protocol to the ACHPR ignores the role of the victim. This is a fundamental flaw. Justice demands that the Court should know the views of the victim concerning issues being canvassed before it either directly or indirectly.<sup>43</sup> The Rome statute recognizes this principle and that is why it provides in article 68(3) to the effect that where the personal interests of the victims are affected the Court shall permit their views and concerns to be presented and considered by legal representatives where the Court considers appropriate.<sup>44</sup> Such a provision will be in line with the practice in the other two systems. Under article 22 of the rules of procedure of the Inter-American Court of human rights such an individual applicant or his representative can be authorized by the Court to take part in the discussion.<sup>45</sup>

Observations have also been made by the European Court of Human rights to the effect that the Court must bear in mind its duty to safeguard the interests of the individuals who may not be a party, to any Court proceedings and it is the interests of the proper administration of justice that the Court should have knowledge of and if need be, take into consideration the applicants point of view. It is necessary to make known the applicants views for purposes of throwing more light on the point in issue.<sup>46</sup>

The Protocol recognizes only two modes of presentation of evidence namely written and oral evidence including expert testimony.<sup>47</sup> Article 26(2) of the Protocol to the ACHPR left out very important modes of reception of evidence which are quicker and very effective namely audio visual tapes, video tapes, photographs of the scene and internet etc.

## **2.10 Terms Of Office Of Judges**

The Protocol provides that all judges with the exception of the president are to perform their functions on a part time basis.<sup>48</sup> The Commission system which has been found to be in effective also functions on a part time basis. Part time employment gives rise to divided loyalty. A continent with a bad Human rights record needs a full time bench in order to make an impact on its work. This is a fundamental flaw which cannot be cured by the provision that the president of the Court functions on a full time basis as the president's role in the absence of the full Court will probably be limited to routine matters of an administrative nature, correspondence and perhaps urgent applications if the rules allow. The fundamental flaw is not also cured by the provision that the Assembly may change this arrangement as it deems fit as this will call for a Protocol to be negotiated, debated and then ratified and only after the requisite number of states have ratified it, can the changes be effected, which is likely to take a long time. A bench of seven part time judges is modelled on the Inter-American system. The European system started off as a part time bench but changed to full time due to the urgent need to restructure the control machinery established by the Convention in order to maintain and improve the efficiency of its protection of Human rights and fundamental freedoms.<sup>49</sup> Having arrived at the conclusion that the existing Human rights protection Machinery is in effective the drafters of the Protocol should have come up with a structure depicting an effective Court structure. Such an effective structure would definitely be a full time Court staffed with a sufficient number of judges

The Protocol provides that independence of judges is ensured in accordance with International law.<sup>50</sup> Independence of the judges and the Court for that matter is one way of securing efficiency and effectiveness in the discharge of judicial functions. Enemy number one to judicial independence is political interference.<sup>51</sup> The independence of the judge is intended to give the Court the honour, prestige, integrity and unrestricted liberty

to do justice. It enables the judges to be bold in their pronouncements, to rise above popular clamor and the politics of the moment and to exercise freedom in thought and independence in action.<sup>52</sup> While the Protocol to the ACHPR may structurally protect the independence of the judge as individuals that is by salaries and removal provisions, their complete independence may be threatened by the judge's part time status.<sup>53</sup> Part time service of the judges under study undermines the integrity and independence of the Court as the judges are forced to hold other posts some of which might be politically controlled in order to earn extra salary. This is an avenue for political influence.

### **2.11 Registry Of The Court**

The Protocol makes provision for the Court to appoint its own registrar and staff of the registry from among nationals of member states of the AU according to the rules of procedure.<sup>54</sup> The independence of the Court should go hand in hand with the independence of the registry as well which must be insulated against external influence that might jeopardize its work. It must not only be dictated to but must resist dictation by the organs of the AU particularly the AU Secretariat. Leaving the administration of the Court as well as its independence solely to the rules is a serious flaw. A provision should have been added to stipulate that the registrar will be directly answerable to and solely be under the direction of the president of the Court.<sup>55</sup>

### **2.12 Findings Of Payments Of Compensation Or Reparation And Costs**

The Protocol provides for the remedies of payment of compensation or reparation and making provisional measures when necessary in cases of extreme urgency in order to avoid irreparable harm to persons.<sup>56</sup> The provision does not say against whom compensation and reparation is to be ordered or how the orders for the same are to be enforced. Neither does it say how the violation is to be remedied. Under the English system reparation is ordered to be payable only if the same is available within the internal law of the high contracting party.<sup>57</sup> Under the Inter-American system there is no restriction that in order to order reparation the internal law of the offending high contracting party must be allowing it. It provides that where the Court finds that compensation is to be ordered, it makes the said orders which are to be executed in

accordance with the law of the state party concerned governing the execution of judgements against the government.<sup>58</sup>

It is not enough for an instrument to make provision for a remedy which cannot be enjoyed by the intended recipient. The remedies provided for in Article 27(1) of the Protocol to the ACHPR are ideal for victims but the manner in which the Article is framed, is such that the said relief's cannot be accessed by the victims as the manner of execution and against whom the execution is to be made has not been indicated. In order to be effective Article 27(1) of the Protocol to the ACHPR should have specified that the compensation judgement and reparation order are enforceable against the violating state in accordance with the domestic law governing enforcement of judgements against the state. Further it should not have just stated that it will make orders to remedy the violation. It should have gone further and specified that where violation has been established, it shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated.

As for cases of extreme gravity and urgency, the Court is empowered to adopt such provisional measures as deems necessary to avoid irreparable harm to persons.<sup>59</sup> The provisional measures are not defined, neither does it say who is to move the Court for this relief. The relief of interim measures has its roots in domestic legal systems which provide for the possibility of interim measures to be ordered by the judge where it is considered that otherwise irreparable damage will be done or an irreversible situation created. The Court upon application can give a suspense order to the measures under attack on the introduction of the proceedings. The Court may also make an interim order or injunction that the status quo ante should be preserved. It is a form of emergency procedure by which the Court may request during the course of an application that a respondent government should refrain from carrying out particular steps or that it should take certain steps in order to protect the applicant. Interim orders serve to prevent a party to a dispute from prejudicing the final out come of the process by any arbitrary act before a judgement has been reached therefore rendering in effective any resulting judgement.

The guarantee of effective protection of Human rights implies the binding nature of interim measures. Any act which jeopardizes these measures will render ineffective any later judgement on the violation of the rights more importantly when dealing with the

government of states in which the rule of law has not yet taken strong root. Lives can be saved and acts of torture prevented through the judicious resort to protective measures.<sup>60</sup>

The relief of interim measures is a very important tool in the protection and enforcement of Human rights. Interim measures are therefore uncompromisable. The relief can also be invoked to make provisional measures for the protection of witnesses scheduled to testify before the Court when concern is expressed for their safety.<sup>61</sup>

Failure of the Protocol to specify who is to move the Court for issuance of interim measures in cases of violation of Human rights which is a protective measure is a serious fundamental flaw. We are alive to the provisions of Article 5 (1) of the Protocol to the ACHPR as regards parties who have automatic accessibility before the Court and who are likely candidates to move the Court for such a relief. The Commission is one of them. But given the open mandate it has under the Charter where by it has an alternative route of going to the AHSR instead of moving the Court, we feel that this is an unsafe route without the Protocol specifically saying that in such instance the Commission is to move the Court.

The other alternative is through state parties, but due to economic and diplomatic ties, state parties are most likely to be reluctant to be the first ones to sue their fellow state parties before the Human rights Court. Also a situation may arise where all possible candidates for moving the Court may fold their arms and debate as who should move the Court for issuance of the relief. In the circumstance it is important to specify who should move the Court for this relief.

Under the European system in any case of urgency the registrar with the authorization of the president of the chamber may without prejudice to the taking of any other procedural steps and by any available means inform the contracting party concerning the introduction of the application and summary of its objects.<sup>62</sup> Under the Inter-American system in cases not yet filed in Court, it is the Commission to move the Court.<sup>63</sup>

Article 27 of the Protocol to the ACHPR omits to make provision for costs where free legal aid has not been provided. This is also a fundamental flaw although it can be remedied through its provision in the rules. Under the Inter- American system the party requesting the production of evidence shall defray the costs thereof.<sup>64</sup> The English model is the best. Under it costs incurred by a European government cannot be claimed

back against the applicant. Where as costs resulting from the applicant, if they are successful can be claimed back from the government.<sup>65</sup> Article 27 of the Protocol to the ACHPR should, therefore, have contained a provision to the effect that the Court may also award costs.

### **2.13 Enforcement And Compliance With The Court's Decisions And Judgements**

Judgments are by a majority vote with allowance for a dissenting opinion. A perusal of Article 28 of the Protocol to the ACHPR shows that no provision has been made for a casting vote by the president, vice president or presiding judge in the event of a tie, a facility available to the chairman of the Commission and the President of the ACJ.<sup>66</sup> The Protocol establishes a number of finality provisions aimed at the speedy and efficient administration of justice. Judgements are to be delivered within 90 days of having completed its deliberations. Judgements are to be decided by a majority and are not subject to appeal. There is power of review of the decision in the light of new evidence under conditions to be set out in the rules of procedure. The principle of finality calls for a clear end of litigation and non-modification of judgements except for good causes and with clarification of the meaning or scope of the judgement rendered. Decisions on specific issues will provide a clear indication to other state parties as to whether their law and practice is in conformity with the ACHPR and other relevant Human rights instruments.<sup>67</sup> There is provision for review on account of discovery of new and important matter relevant to the case which were not within the knowledge of the applicant or the Court. But there is no time frame within which to move the Court for review, thus leaving room for review to be sought even at the point of execution. There is a discretionary right of interpretation of the judgement in circumstance not specified. The relief is therefore vague.<sup>68</sup>

The European system does not make provision for review but makes provision for reference from a lower chamber to the Grand chamber.<sup>69</sup> The Inter-American system does not provide for review. It provides for interpretation under specified circumstance namely in cases of disagreement as to the meaning and scope of the judgement.<sup>70</sup> The ACHR provides useful guidelines as to what aspect of the judgement parties can seek interpretation. It also specifies that it is the parties to move the Court for the interpretation. It also specifies the time frame within which to move the Court for

interpretation. By failing to specify who is to move the Court for interpretation and a time frame within which to move the Court for the relief creates room for busy bodies to move the African Court for the relief. It also creates room for mischief as it can be sought even at the time of execution.

The Protocol provides that state parties undertake to comply with the judgments in any case to which they are parties within the time stipulated by the Court and to guarantee its execution.<sup>71</sup> The executive council is mandated to monitor the execution of judgements of the Court on behalf of the AHSG of the union.

## **2.14 Publicity Of Judgments As An Enforcement Tool**

Publicity as a means of enforcement of Human rights was first employed by the Inter-American Commission on Human rights at its second session in 1961 when it released publicly the cable sent to the Cuban government for the consumption of the public generally. The cable had requested for a report from the government of Cuba on the means it was taking in respect of Human rights in the circumstance the country was going through.<sup>72</sup> The decision to publicise the cable sent to the Cuban government triggered the use of publicity as a way of trying to bring pressure to bear on those governments that did not comply with Human rights standards set out in the American declaration to comply with those standards. To this day publicity has remained one of the most important options at the discretion of the Commission to try and get recalcitrant states ashamed and hopefully comply.

The Protocol to the ACHPR only provides for notification and transmission of the judgement to the parties to the case, member states of the AU, the Commission and the council of ministers.<sup>73</sup> Notification and transmission does not amount to publication. It is contradictory for the Protocol to grant public hearings and delivery of the decision of the judgements in public and then fail to provide for its publication for public consumption. Both the European and the Inter-American systems provide for mandatory publication of judgements and other Court records.<sup>74</sup>

A perusal of the European and Inter-American provisions on publication shows that the main instrument makes provision for publication while the rules of procedure set out the finer details of what is to be published and what is not, to be published. Publication of Court records would go along way to assist other would be litigants and



even state parties not party to the proceedings access the generated jurisprudence and use the same to shape the course of their Human rights records. It follows that failure to provide for publication of judgements and Court records in the Protocol to the ACHPR is a serious omission, which need to be addressed.

On the European front compliance with European Court decisions have generally been good resulting in for example changes to legislation, reversal of case law and agreements to provide payments to the victims as required by the Court.<sup>75</sup> It is not unusual for states not directly involved in a case to seek to bring their law into conformity with the judgements of the Court although not legally bound by the judgement or decision of the Court. The secret in the success of the European system partly lies in publicity in addition to political will and common heritage of political traditions and ideals.

## **2.15 Political Will As An Enforcement Tool**

The African Court lacks a back up authoritative provision in the ACHPR which mandatorily requires state parties to *secure* to every one within their jurisdiction the rights and freedoms defined in the Charter. The ACHPR merely enjoins state parties to *recognize* Rights and duties.<sup>76</sup> There is no compelling theme in the article which makes it mandatory for the state parties to ensure that those Rights are availed to the citizens. This can be contrasted with Article 1 of the ECHR which mandatorily requires the high contracting parties to “*secure*” to everyone within their jurisdiction the Rights and Freedoms defined in section 1 of the Convention.<sup>77</sup> The use of the words “*shall secure*” makes it mandatory for the high contacting parties to ensure the provision of those Rights in their domestic legislation so that they are enjoyed by their citizens. Existence of such a provision in the Charter would make the enforcement of Article 62 of the Charter easier. Victims of violations under the European System can move to the Human rights Court and compel their state, to *secure* those rights to them at the domestic level, whereas the victims of violations under the ACHPR cannot take such an action against their states. Further we believe that existence of such a provision would not have resulted in Article 5 (1) of the Protocol to the ACHPR on accessibility being, drafted in the manner it was drafted. We have no doubt such a policy regards victims of Human rights abuse as primary users of the Court and they would have been accorded automatic access to the

Court. We are also of the view that the policies in article and 62 ACHPR account for the drafting of Article 5 (1), 5 (3) and 34 (6) of the Protocol to the ACHPR as the aim of these provisions is to protect state sovereignty at the expense of Human rights.

A Court whose decisions are backed up by a policy of *mandatory securing* of rights to subjects would command more respect and draw more support for its decisions than one backed up by a policy of *mere recognition*. In the first category states are obligated to ensure those rights reach the subjects while in the second category states move at their own pace when deciding when to avail those rights to their subjects. The attitude towards the provision of rights in the second category will persist even at the time of compliance with Court decisions despite the undertaking to comply with the judgements in any case to which they are parties.<sup>78</sup> What we are saying here is that although the African Human rights system seems to have put in place a mechanism to ensure compliance by state parties with its decisions, that mechanism is weak because it is not cemented on sound policy that would evoke voluntary outright compliance with the Court decisions. The policy currently in place gives the state parties to decide when to comply with such decisions as they please.

Further in the enforcement of Court decisions, a sound political principle by the controlling regional political body would be an added advantage. An example of this is Article 3 and 8 of the statute of the council of Europe.<sup>79</sup> These two provisions in the European system provide necessary force with which the enforcement Agency can employ to back up its enforcement of Court decisions. Article 30 of the Protocol to the ACHPR does not have such back up policy. The AU constitutive Act advocates respect for democratic principles, Human rights, rule of law and good governance,<sup>80</sup> but it has no provision to the effect that every member of the AU must accept those principles and ensure the enjoyment of Human rights to their subjects and any member who violates that principle must withdraw from the membership of the Union or be forced out of the Union.

Provision of sanctions against any member state that fails to comply with the decisions and policies of the Union is discretionary.<sup>81</sup> Such a provision is not one that can be said to be authoritative enough to whip up members into taking Human rights issues seriously and demand compliance in their enforcement at the domestic and regional level. A system of state parties undertaking to comply with the judgement to which they are parties and ensure its enforcement in the time stipulated is a system that requires a high

degree of political will and commitment to the cause of Human rights by governments as it is based on self criticism and good faith. The European system succeeds because when the reporting system uncovers some serious violations, the secretary general can bring such violations to the notice of the committee of ministers. Then the committee of ministers can proceed under Article 8 of the Statute of the Council of Europe which provides for expulsion from membership of the council of any member state which seriously violates the principles of the council of Europe. The ever existent, no matter how remote the possibility of expulsion from the council of Europe, provides some medium of compulsion within the European system.<sup>82</sup>

Drawing inspiration from the European system, we are of the opinion that if Article 23 (2) of the AU constitutive Act is strengthened and restructured to create a real fear of expulsion, we have no doubt that the fear of expulsion from the African Union, is perhaps one of the sanctions that could eventually compel African states to honour their obligations under the Charter and the Protocol. The executive council could also pass resolutions through the AU Assembly urging states to respect the Courts judgements. Addition of such a provision to Article 30 of the Protocol to the ACHPR would have been an added advantage as the AHSG would be duty bound to act whenever non compliance to the Courts judgement is brought to its attention.

## **2.16 Annual Report.**

The Protocol requires the Court to file an annual report to the AU Assembly listing states which have not complied with judgements.<sup>83</sup> This provision was copied from the Inter-American system where the ACHR requires the American Human rights Court to submit to each regular session of the General Assembly of the OAS, for the Assembly consideration a report on its work during the previous year specifying in particular the cases in which a state has not complied with its judgements and making any pertinent recommendation.<sup>84</sup> Article 31 of the Protocol to the ACHPR places the Court directly under the control and direction of the AU Assembly. Since we have argued that politicization is one of the contributing factors to the Commissions' weaknesses then it is better to depoliticize the Court. If the Court is expected to work independently then it should not expose itself to political pressure. Instead of following the Inter-American

model, the Protocol should have followed the European model where the inter action of the Court and the political arm of Human rights system is when its judgements are forwarded to the committee of ministers. This arrangement ensures that there is no political interference in the judicial function of the Court. Just like in the domestic set up where Courts do not file annual reports of their activities to the executive, the Human rights Court should follow the same trend and remain independent by not filing reports with the AHSG. The Courts interaction with the political organ should end with the forwarding of the judgements to the AU executive council for monitoring of their execution. If anything it should be the executive council to file annual reports and lists of the defaulting states with the AHSG and move the AHSG for resolutions requiring compliance. In the absence of such an arrangement the Courts independence will be called into question which fact is likely to reduce public confidence in the working of the Court.

## 2.17 Budget

The Protocol provides that expenses of the Court, emoluments and allowances for the judges and the budget of its registry shall be determined and borne by the OAU.<sup>85</sup> The AU has assumed the functions of the OAU. In its preamble 10 it states *that the AU is determined to take all necessary measures to strengthen its common institutions and provide them with the necessary power and resources to enable them discharge their respective mandates effectively.*<sup>86</sup> One of the common institutions of the AU is the Court. The Court will need both Human and material resources. The AU Act does not specify how it is going to fund its institutions. The draft Protocol on the integration does not mention Funding. Funding is required to set up the Court house, fund support staff, provide facilities like a library, housing for the president who is to reside at the seat of the Court and who since he is to work full time, requires full pay. The other judges will require their allowances and travel expenses. Without a sound base for Funding the Court will not function properly. The business of Human rights is too serious for the Court to be left to beg for Funding from foreign institutions as the Commission is presently doing.<sup>87</sup> Dependence on donor Funding is likely to lead the Court to face the same financial problems that have afflicted the Commission since its inception.<sup>88</sup> The Court must be sufficiently funded in order not only to discharge its basic functions but also to provide legal and financial aid to indigent litigants.<sup>89</sup> In the absence of a special Fund set up by

the AU for the operationalization of the Court, it stands to face the same financial problems facing the Commission. It is no wonder that as at now over two years have elapsed since the Protocol establishing it came into force in the year 2004 and yet no steps have been taken up by the AU to determine its seat, nominate and elect judges, set up its registry and staff in readiness for operationalizing it. The obvious reason for this stalemate is finance.

## ENDNOTES TO CHAPTER TWO

<sup>1</sup> preamble 7 of the ACHPR Protocol provides that; Firmly convinced that the attainment of the objectives of the African Charter on Human and peoples Rights requires the establishment of an African Court on Human and peoples rights to compliment and reinforce the functions of the African Commission on Human and peoples Rights

(ii) Rachel Murray. “A comparison between the African and European Court of Human rights” *AHRLJ volumes 2 No. 2 2002* (pp 195 – 222) Pg. 196.

<sup>2</sup> Article 2 of the Protocol to the ACHPR. The Court shall bearing in mind the provisions of the Protocol complement the protective mandate of the African Commission on Human and peoples Rights here in after referred to as “*the Commission*” conferred upon it by the African Charter on Human and peoples Rights here in after referred to as “the Charter

<sup>3</sup> Nzungurua J. Udombana. The African regional Human rights Court. Modelling its rules of procedure research partnership/ 2002. The Danish centre for Human rights. [http://www.Human Rights. dk/ upload/application/66197401/Udombana – African Human rights – Court pdf](http://www.HumanRights.dk/upload/application/66197401/Udombana-AfricanHumanrights-Court.pdf) pg. 96 accessed on 2.8.05

<sup>4</sup> Op cit pg. 98

<sup>5</sup> Preamble 10 of the Rome statute of the International criminal Court provides; Emphasizing that the International Criminal Court established under this statute should be complementary to National criminal jurisdictions.

Article 1 provides that; An International criminal Court (the Court) is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of International concern as referred to in this statute and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provision of this statute

[http://www.iccc – cpi – int/ library/ about / official journal/Rome statute 120704 – En pdf](http://www.iccc-cpi-int/library/about/officialjournal/Romestatute120704-En.pdf) accessed 22.5.05.

<sup>6</sup> Article 17 of the Rome statute provides; Issues of Admissibility

1. Having regard to paragraph 10 of the preamble and Article 1, the court shall determine that a case is in admissible where:

- a. The case is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution;
- b. The case has being investigated by a state which has jurisdiction over it sand the state has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or in ability of the state genuinely to prosecute;
- c. The person concerned has already been tried for conduct which is the subjected of the complaint, and a trial by the court is not permitted under Article 20, Paragraph 3;
- d. The case is not of sufficient gravity to justify further actions by the court.

2. In order to determine unwillingness in a particular case, the court shall consider, having a regard to the principles of due process recognized by the international law, whether one or more of the following exists, as applicable:

- a. The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the court referred to in Article 5;
- b. There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
- c. The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. in order to determine in ability in a particular case, the court shall consider whether, due to a total or substantial collapse or un availability of its national judicial system, the state is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings. .

<sup>7</sup> Article 3 (I) of the Protocol to the ACHPR provides that; The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter , this Protocol and any other relevant Human rights instruments ratified by the states concerned

(2) in the event of a dispute as to whether the Court has jurisdiction, the Court shall decide

(ii) Article 7 of the Protocol to the ACHPR provides that; The Court shall apply the provisions of the Charter and any other relevant Human rights instruments ratified by the states concerned.

<sup>8</sup> Robert Wundeh Eno. "The jurisdiction of the African Court on Human and Peoples Rights" *AHRLJ volume 2 No. 2 2002*. (pp 223-233) pg. 226

<sup>9</sup> Article. 45(3) of the ACHPR provides that; The function of the Commission shall be: interpret all the provisions of the present Charter at the request of a state party, an institution of the OAU or an African organization recognized by the OAU.

<sup>10</sup> Article-10 of the Charter of the United Nations provides that; The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and except as provided in Articles 12, may make recommendations to the members of the United Nations or to the security council or to both on any such questions or matter.

<sup>11</sup> Article 92 of the UN Charter provides that; The International Court of Justice shall be the principal Judicial organ of the United Nations. It shall function in accordance with the annexed statute, which is based upon the statute of the permanent Court of International justice and forms an integral part of the present Charter

<sup>12</sup> Article 36(1) of the ICJ Statute provides that; The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in Treaties and Conventions in force.

<sup>13</sup> Article 62(3) of the ACHR provides that; The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it.

(ii) Article 32 of Protocol 11 of the ECHR provides that; The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols there to which are referred to it as provided in Article 33, 34, and 47. (2) In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

<sup>14</sup> Article 103 of the UN Charter provides that; In the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other International agreement, their obligations under the present Charter shall prevail.

<sup>15</sup> (I) Robert wundeh. Eno. "The jurisdiction of the African Court on Human and Peoples Rights" *AHRLJ volume 2 . No.2 2002* (pp 223-233) pg. 231.

(ii) Article 4 of the Protocol to the ACHPR provides that; At the request of a member state of the OAU /AU, the OAU/AU any of its organs or any African organization recognized by the OAU/AU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant Human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission.

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

<sup>16</sup> Id

<sup>17</sup> Nzongurua Udombana. The African regional Human rights Court: modelling its rules of procedure. research partnership/2002. The Danish centre for Human rights pg. 128. <http://www.HumanRights.dk/upload/application/66197401/udombana – African Human rights Court. pdf>. accessed on 2/8/05

<sup>18</sup> Ibrahim Ali Badawi Elsheikh. "The future relationship between the African Court and the Africa Commission." *AHRLJ volume 2. No. 2 . 2002* (pp 252-260) pg. 252.

<sup>19</sup> Article. 5 (1) of the Protocol to the ACHPR provides that; Access to the Court. The following are entitled to submit cases to the Court. The Commission , the state party which has lodged a complaint to the Commission, the state party against which the complaint has been lodged at the Commission, the state party whose citizen is a victim of Human rights violation, African inter governmental organizations.

(2) When a state party has an interest in a case it may submit a request to the Court to be permitted to join.

(3) The Court may entitle relevant non-governmental organizations (NGOs) with observer status before the Commission and individuals to institute cases directly before it in accordance with article 34(6) of this Protocol.

(ii) Article 34(6) of the Protocol to the ACPHR provides that; At the time of the ratification of the Protocol or any time there after, the state shall make a declaration accepting the competence of the Court to receive cases under Article 5(3) of this Protocol. The Court shall not receive any petition under Article 5(3) involving a state party which has not made such a declaration.

<sup>20</sup> Article 36(2) of Protocol 11 of the ECHR provides that; The president of the Court may in the interests of the proper administration of justice invite any High contracting party which is not a party to the

proceedings or any person concerned who is not the applicant to submit written comments or take party in hearings.

<sup>21</sup> Erika de wet. 2001. "The protection mechanism under the African Charter and the Protocol on the African Court of Human and peoples Rights" in Gud Mundur A. etal (eds) (pp 713-729) *International Human Rights monitoring mechanism. Essays in honour of Jacob.Th. Moller*. The Raoul wallen berg institute

of Human rights library volume 7 Martinus Nijhoff publishers. The Hague/Boston/London pg. 720.

<sup>22</sup> Makau Mutua. The African Human rights system. A critical evaluation pg. 29

[http://hdr.undp.org/docs/publication/background\\_papers/Mutua](http://hdr.undp.org/docs/publication/background_papers/Mutua) – pdf accessed on 25/5/05

<sup>23</sup> Nsongurua J. Udombana. The African Regional Human rights Court: Modelling its rules of procedure. Research partnership/2002. The Danish centre for Human rights.<http://www>. Human rights.

dk/upload/application/66197401/Udombana - African Human rights – Court pdf. Pg. 76 accessed on 2.8.05.

<sup>24</sup> Dr. Rachel Murray 2000. *The African Commission on Human and peoples rights and International law*. Hart publishing oxford. Portland Oregon pg. 30.

<sup>25</sup> Conclusions and recommendation of a workshop on NGO participation in the work of the African Commission held in the Gambia 5-7 October 1991[http://www.chr.up.ac.za/hr\\_docs/African\\_docs/other/others.doc](http://www.chr.up.ac.za/hr_docs/African_docs/other/others.doc) accessed 25/5/05.

<sup>26</sup> CONF/HRA/DEC L (I) Grand Bay Mauritius declaration and plan of action. [www.Africa](http://www.Africa) review.org/docs/rights/Grand Bay. Accessed on 22.5.05

<sup>27</sup> Opcit preamble 13 pg. 3

<sup>28</sup> Robert Wundeh Eno. "The jurisdiction of the African Court on Human and peoples rights". *AHRLJ volume 2 no. 2. 2002* (pp 223 – 133) pg. 230.

<sup>29</sup> Article 6 of the Protocol to the ACHPR provides that; The Court when deciding on the admissibility of a case instituted under Article 5 (3) of this Protocol, may request the opinion of the Commission which shall give it as soon as possible.

2. The Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter. The Court may consider cases or transfer them to the Commission.

<sup>30</sup> Article 8 of the Protocol to the ACHPR provides that; The rules of procedure of the Court shall lay down the detailed conditions under which the Court shall consider cases brought before it bearing in mind the complemetarity between the Commission and the Court.

<sup>31</sup> Article 33 of the protocol to the ACHPR provides that; The Court shall draw up its rules and determine its own procedure. The Court shall consult the Commission as appropriate.

<sup>32</sup> Article 66 of the ACHPR provides that; Special Protocols or agreements may, if necessary supplement the provisions of the present Charter.

<sup>33</sup> Article 27-30 of Protocol 11 to the ECHR provides that; 27 (1) To consider cases brought before it, the Court shall sit in committees of three judges, in chambers of seven judges and in a Grand chamber of seventeen judges.

Article 28. Committee may consider admissibility.

Article 29. where the committee has not done so the chamber may do so.

Article 30. where a case raises a serious question affecting the interpretation of the Convention or the Protocols there to, or where the resolution of a question before the chamber might have a result in consistent with a judgement previously delivered by the Court the chamber may relinquish its jurisdiction in favour of the Grand chamber.

<sup>34</sup> Article 48 of the ACHPR provides that; If within three months from the date on which the original communication is received by the state to which it is addressed, the issues is not settled to the satisfaction of the two states involved through bilateral negotiations or by any other peaceful procedure either state shall have the right to submit the matter to the Commission through the chairman and shall notify the other state involved.

<sup>35</sup> Article 10(1) of the Protocol to the ACHPR provides; The Court shall conduct its proceedings in public. The Court may however conduct proceedings in camera as may be provided for in the rules of produce.

<sup>36</sup> Article 10(2) of the Protocol to the ACHPR provides that; Free legal representation may be provided where the interests of justice so require.

<sup>37</sup> Article 67(1) (d) of the Rome statute of the International criminal Court which provides for the rights of the accused provides; Subjects to Article 63, paragraph 2--- to be present at the trial, to conduct the defense in person or through legal assistance of the accused choosing, to be informed if the accused does not have legal assistance of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require and without payment if the accused lacks sufficient means to pay for it.



<sup>38</sup> Article 10(3) of the Protocol to the ACHPR provides that; Any person, witness or representative of the parties, who appears before the Court shall enjoy protection and all facilities in accordance with International law, necessary for the discharging of their functions, tasks and duties in relation to the Court.

<sup>39</sup> Article 43(6) of the Rome statute provides that; The registrar shall set up a victims and witnesses unit within the registry. The unit shall provide, in consultation with the office of the prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses. The unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence

<sup>40</sup> Article 68 (1) of the Rome statute provides that; The Court shall take appropriate measures to protect the safety, physical and psychological well being dignity and privacy of victims and witnesses. The Court shall have regard to age, gender, health, the nature of the crime.

Article 68(4) of the Rome statute provides that; The victims and witnesses unit may advise the prosecutor and the Court on appropriate protective measures, security arrangements, counseling and assistance.

<sup>41</sup> Nzongurua J. Udombana. The African regional Human rights Court: Modelling its rules of procedure.

Research Partnership/2002. The Danish centre for Human rights <http://www/Human Rights>.

dk/upload/application/66197401/udombana – African Human rights – Court. Pdf pg. 115.

Accessed on 2.8.05

<sup>42</sup> Article. 26 (1) of the Protocol to the ACHPR provides that; The Court shall 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.

Article 26(2) of the Protocol to the ACHPR provides that;The Court may receive written and oral evidence including expert testimony and shall make its decision on the basis of such evidence.

<sup>43</sup> Nzongurua J. Udombana. The African regional Human rights Court. Modelling its rules of procedure

Research Partnership/2002. The Danish centre for Human rights. <http://www.Human rights.dk/>

upload/application /66197401/Udombana – African Human rights – Court pdf pg. 114 accessed 2/8/05

<sup>44</sup> Article 68(3) of the Rome statute provides that; Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representative of the victims where the Court considers it appropriate in accordance with the rules of procedure and evidence.

<sup>45</sup> David J. Harris and Stephen Living Stone 1998. Clarendon press oxford. “*The Inter-American system of Human rights*”. Appendix VII rules of procedure of the Inter-American Court of Human rights pg. 545-561. Article 22 pg. 551 Representations of the Commission 22(2). If the original claimant or the representative of the victims or of their next of kin are among the persons selected by the delegates of the Commission to assist them, in accordance with the preceding paragraph that fact shall be brought to the attention of the Court which shall on the proposal of the Commission authorize their participation in the discussions.

<sup>46</sup> Nzongurua J. Udombana. The African regional Human rights Court. Modelling its rules of procedure

Research Partnership/2002. The Danish centre for Human rights. <http://www.Human rights.dk/>

upload/application /66197401/Udombana – African Human rights – Court pdf pg. 114 accessed 2/8/05

<sup>47</sup> Article. 26(2) of the Protocol to the ACHPR provides; The Court, may receive written and oral evidence including expert testimony and shall make its decision on the basis of such evidence.

<sup>48</sup> Article 15 (3) of the Protocol to the ACHPR provides; All judges except the president shall perform their functions on a part time basis. However the Assembly may change this arrangement as it deems fit.

<sup>49</sup> Preamble 1 of Protocol 11 to the ECHR provides; Considering the urgent need to restructure the control machinery established by the Convention in order to improve the efficiency of its protection of human rights and fundamental freedoms.

<sup>50</sup> Article 17 (1) of the Protocol to the ACHPR provides; The independence of the judge shall be fully ensured in accordance with International law.

<sup>51</sup> Nzongurua J. Udombana. The African regional Human rights Court: Modelling its rules of procedure

Research partnership/2002. The Danish centre for Human rights.<http://www.Human rights.dk/>

upload/application /66197401/Udombana – African Human rights – Court pdf pg. 144 accessed 2/8/05

<sup>52</sup> Id

<sup>53</sup> Id

<sup>54</sup> Article. 24(1) of the Protocol to the ACHPR provides that; The Court shall appoint its own registrar and other staff of the registry from among nationals of member states of the OAU according to the rules of procedure.

<sup>55</sup> Nzongurua J. Udombana. The African regional Human rights Court: Modelling its rules of procedure Research partnership/2002. The Danish centre for Human rights. [http://www.Humanrights.dk/upload/application/66197401/Udombana – African Human rights – Court pdf](http://www.Humanrights.dk/upload/application/66197401/Udombana-AfricanHumanrights-Court.pdf) pg. 145 accessed 2/8/05

<sup>56</sup> Article 27(1) of the Protocol to the ACHPR provides; If the Court finds that there has been a violation of Human and peoples rights it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.

<sup>57</sup> Article 41 of Protocol 11 to the ECHR provides that; If the Court finds that there has been a violation of the Convention or the Protocols there to if the internal law of the High contracting party concerned allows only partial reparation to be made the Court shall if necessary, afford just satisfaction to the injured party.

<sup>58</sup> Article 63(I) of the ACHR provides; If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule if appropriate that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

(ii) Article 68. (2) of the ACHR provides; That part of the judgement that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedures governing the execution of judgements against the state.

<sup>59</sup> Article 27(2) of the Protocol to the ACHPR provides that; In cases of extreme gravity and urgency and when necessary to a void irreparable harm to persons the Court shall adopt such provisional measures as it deems necessary

<sup>60</sup> Nzongurua J. Udombana. The African regional Human rights Court: Modelling its rules of procedure Research partnership/2002. The Danish centre for Human rights. [http://www.Humanrights.dk/upload/application/66197401/Udombana – African Human rights – Court pdf](http://www.Humanrights.dk/upload/application/66197401/Udombana-AfricanHumanrights-Court.pdf) pg. 85-86 accessed 2/8/05

<sup>61</sup> Id

<sup>62</sup> Nzongurua J. Udombana. The African regional Human rights Court: Modelling its rules of procedure Research partnership/2002. The Danish centre for Human rights. [http://www.Humanrights.dk/upload/application/66197401/Udombana – African Human rights – Court pdf](http://www.Humanrights.dk/upload/application/66197401/Udombana-AfricanHumanrights-Court.pdf) Pg. 85 accessed 2/8/05

<sup>63</sup> Article 63(2) of the ACHR provides; In cases of extreme gravity and urgency and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court it may act at the request of the Commission.

(ii) Article 19 ( c) of the Statute of the Inter-American Commission provides that; To request the Inter-American Court of Human rights to take such provisional measures as it considers appropriate in serious and urgent cases which have not yet been submitted to it for consideration whenever this becomes necessary to prevent irreparable injury to persons.

<sup>64</sup> Article 45 of the Rules of procedure of the Inter-American Court of Human rights provides that; The party requesting the production of evidence shall defray the cost there of.

<sup>65</sup> Rachel Murray. “A comparison between the African and European Court of Human rights” *AHRLJ volume 2, no 2 2002* (pp 195-222) pg. 214.

<sup>66</sup> Article 28 (1), (2) of the Protocol to the ACHPR provides that; The Court shall render its judgement within (90) days of having completed its deliberations. The judgement of the Court decided by majority shall be final and not subject to appeal.

(II) Article 34 (2) of the Protocol to the AU Act provides that; In the event of equality of votes the preceding judge shall have a casting vote.

(III) Rule 60 of the commission rules provides; each member of the commission shall have 1 vote. In the case of equal number of votes the chairman shall have a casting vote.

<sup>67</sup> Nzongurua J. Udombana. The African regional Human rights Court: Modelling its rules of procedure Research partnership/2002. The Danish centre for Human rights. [http://www.Humanrights.dk/upload/application/66197401/Udombana – African Human rights – Court pdf](http://www.Humanrights.dk/upload/application/66197401/Udombana-AfricanHumanrights-Court.pdf) Pg. 122 accessed 2/8/05.

<sup>68</sup> Article 28 (3), (4) of the Protocol to the ACHPR provides that; Without prejudice to sub-Article 2 above the Court may review its decision in the light of new evidence under conditions to be set out in the rules. The Court may interpret its own decisions.

<sup>69</sup> Article 44 of the Protocol 11 to ECHR provides that; The judgement of the Grand chamber shall be final. The judgement of the chamber shall become final when the parties declare that they will not request that the case be referred to the Grand chamber or three months after the date of the judgement, if reference of the case to the Grand chamber has not been requested or when the panel of the Grand chamber rejects the request to refer under Article 43.

<sup>70</sup> Article 67 of the ACHR provides that; The judgement of the Court shall be final and not subject to appeal. In case of disagreement as to the meaning or scope of the judgement the Court shall interpret it at the request of any of the parties provided the request is made within ninety days from the date of notification of the judgement.

<sup>71</sup> Article 30 of the Protocol to the ACHPR provides that; State parties to the present Protocol undertake to comply with the judgement in any case to which they are parties within the time stipulated by the Court and to guarantee its execution.

<sup>72</sup> Michelo Hansungule 2001. "The protection of Human rights under the Inter-American system. An outsiders view". In Gud mundur Alfredsson etal (eds) *International Human rights monitoring mechanisms. Essays in honour of Jacob. Th. moller.* (pp 670 – 705). The Raoul wallenberg institute of Human rights library volume 7. Martinus / Nijhoff publishers. The Hague Bostom /London Pg., 695

<sup>73</sup> Article 29(1) of the Protocol to the ACHPR provides that; The parties to the case shall be notified of the judgement of the Court and it shall be transmitted to the member states of the OAU and the Commission. Article 29(2) of the Protocol to the ACHPR provides that; The council of ministers shall also be notified of the judgement and shall monitor its execution on behalf of the Assembly.

#### **European**

<sup>74</sup> Article 40(2) of Protocol 11 to the ECHR provides that; Documents deposited with the registrar shall be accessible to the public unless the president of the Court decides otherwise.

(II) Article 44(3) of Protocol 11 to the ECHR provides that; The final judgement shall be published.

#### **Inter-American**

(ii) Article 24(3) of the Statute of the Inter-American Court of Human rights provides that; The decisions, judgements and opinions of the Court shall be delivered in public session, and the parties shall be given written notification there of. In addition the decisions, judgements and opinions shall be published, along with the judges individual votes and opinions and with such other data or back ground information that the Court may deem appropriate.

(iii) Article 30 of the Rules of procedure of the Court provides that; Publication of judgements and other decisions. The Court shall order publication of the judgements and other decisions of the Court, the former shall include only those explanations of votes, which fulfill the requirements set forth in Article 55(2) of these rules, documents from the dossier, except those considered irrelevant or unsuitable for publication records of the hearings and other documents that the Court considers suitable for publication. (2) The judgements shall be published in their original language (3) Documents relating to cases already adjudicated and deposited with the secretariat of the Court shall be made accessible to the public unless the Court decides otherwise.

<sup>75</sup> Rachel Murray: "A comparison between the African and European Court of Human rights." *AHRLJ volume 2, No.2 2002* (pp 195-222) pg 217.

<sup>76</sup> Article 1 of the ACHPR provides that; The member states of the OAU parties to the present Charter shall recognize the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.

<sup>77</sup> Article 1 of the ECHR provides that; The High contracting parties shall secure to everyone within their jurisdiction the Rights and Freedoms defined in section 1 of this Convention.

<sup>78</sup> Article 30 of the Protocol to the ACHPR provides that; The state parties to the present Protocol undertake to comply with the judgement in any case to which they are parties within the time stipulated by the Court and to guarantee its execution.

<sup>79</sup> Article 3 of the Statute of the council of Europe provides that; "Every member of the council of Europe must accept the principle of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realization of the aims of the council as specified in chapter 1."

Article 8 of the Statute of the council of Europe provides that; "Any member of the council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the committee of ministers to withdraw under Article. 7. If such a member does not comply with this

request, the committee may decide that it has ceased to be a member of the council as from such date as the committee may determine. <http://Convention.Coe.int/treaty/en/treaties/html/col.htm>. accessed 5/10/05

<sup>80</sup> Article 4(m) of the Au constitutive Act provides that; “Respect for democratic participles, Human rights, the rule of law and good governance”.

<sup>81</sup> Article. 23(2) of the AU constitute Act provides that; “Further more any member state that fails to comply with the decisions and policies of the union may be subjected to other sanctions. Such as the denial of transport and communication links with other member states and other measures of a political and economic nature to be determined by the Assembly.

<sup>82</sup> Dr. Koffi Quashigah. “African Charter on human and people’s rights. Towards a more effective reporting mechanism” Chapter 3 pg 13

[Http://www.chr.up.ac.za/centrepuplications/occ-paper](http://www.chr.up.ac.za/centrepuplications/occ-paper) accessed on 25/05/05

<sup>83</sup> Article 31 of the Protocol to the ACHPR provides that; The Court shall submit to each regular session of the Assembly a report of its work during the previsions year. The report shall specify in particular the cases in which a state has not complied with the Courts judgement.

<sup>84</sup> Article 65 of the ACHR provides that; To each regular session of the General Assembly of the organization of the American states, the Court shall submit for the Assembly’s consideration, a report on its work during the previous year. It shall specify in particular the cases in which a state has not complied with its judgement making any pertinent recommendations.

<sup>85</sup> Article 32 of the Protocol to the ACHPR provides that; 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 the criteria laid down by the OAU in consultation with the Court.

<sup>86</sup> Preamble 10 of the Au constitutive Act provides; “Further determined to take all necessary measures to strengthen our common institutions and to provide them with the necessary powers and resources to enable them discharge their respective mandates effectively.

<sup>87</sup> Nzongurua J. Udombana. The African regional Human rights Court: Modelling its rules of procedure Research partnership/2002. The Danish centre for Human rights. [http://www.Humanrights.dk/upload/application/66197401/Udombana – African Human rights – Court pdf](http://www.Humanrights.dk/upload/application/66197401/Udombana-AfricanHumanrights-Court.pdf) pg. 138. Accessed 2/8/05

<sup>88</sup> Dr. Rachel Murray 2000. *The African Commission on Human and peoples Rights and International law*. Hart publishing oxford Portland Oregon pg. 29.

<sup>89</sup> Nzongurua J. Udombana. The African regional Human rights Court: Modelling its rules of procedure Research partnership/2002. The Danish centre for Human rights. [http://www.Humanrights.dk/upload/application/66197401/Udombana – African Human rights – Court pdf](http://www.Humanrights.dk/upload/application/66197401/Udombana-AfricanHumanrights-Court.pdf) pg. 139. Accessed 2/8/05

# CHAPTER THREE

## 3.0 TOWARDS GREATER IMPROVEMENT ON THE EFFICACY OF THE ENFORCEMENT MACHINERY OF THE AFRICAN HUMAN RIGHTS REGIME: REFORMS ON THE COURT'S STRUCTURE AND THE COMMISSION'S STRUCTURE IN THE AREA OF THE COMMISSION'S INTERACTION WITH THE COURT'S FUNCTIONS.

### 3.1 General Observations

The reforms will centre on the Court. However, since the Commission has not been abolished by the establishment of the Court and it is still one of the Institutions engaged in the promotion, protection and enforcement of Human rights, the reforms cannot ignore it. The reforms on the Commission's structure will be limited to the areas in which it interacts with the Court's functions and which if not addressed are likely to render the existence of the Court meaningless. The reforms on the Court and the Commission's structures are important in that they aim at creating a meaningful future relationship between the Court and the Commission. The reforms should be seen as aiming at a common good for both the Commission and the Court aiming at creating close co-operation between the Court and the Commission as inter-dependent components and the key players of the African Human rights System operating within the AU. As currently structured the cooperation of both institutions can only be secured through good faith and mutual understanding of their personnel, a situation likely to lead to conflicts of interests and accusations of undermining of another's authority. This in turn can lead to creation of two parallel avenues for Human rights redress on the continent. Restructuring of the structures of the two institutions is therefore inevitable to enable the Commission structures take into account the presence of the Court.

### 3.2 Complementarity

The way forward on complementarity between the Commission and the Court is to invoke Articles 66 and 68 of the ACHPR to amend Article 2 of the Protocol to demarcate the boundaries of complementarity between the Court and the Commission aimed at stopping the Court from being a mere appendage of the Commission. Borrowing from Article 19 of the statute of the Inter-American Commission the provision should stipulate clearly that, the Commission is to serve as an organ of investigation thus playing a crucial

role as a filter mechanism as opposed to its current role of being a rival institution to the Court. The amendment would also empower the Court to request the Commission to carry out an enquiry under Article 26 Protocol instead of it the Court carrying out that function. The provision would also require that the role of the Commission before the Court is not that of a partisan but an advisor. The Commission is to gather all the relevant facts, provide an opinion on the matter and then place before the Court all the elements of the case relevant for the determination of the case by the Court. The Commission is to move the Court to take such provisional measures as it considers appropriate in serious and urgent cases under Article 27 (2) of the Protocol to the ACHPR to prevent irreparable injury to persons. Having ceded its interpretative role under Article 45(3) ACHPR, to the Court, a provision is to be made that the Commission to consult the Court on the interpretation of the ACHPR, the Protocol and any other regional and sub regional Human rights Treaties on the African continent.

### **3.3 Advisory Opinions**

Article 4(1) is to be amended by removing the discretion whereby an advisory opinion can be withheld solely on the ground that a matter is pending before the Commission. Instead it should be provided for that once an opinion is asked for from the Court in a matter whose proceedings are pending before the Commission, the proceedings before the Commission should await the furnishing of the opinion by the Court. The proviso which bars the Court from giving an opinion on a matter pending before the Commission should be removed.

This should be replaced by a new sub-paragraph 2, providing that *“in the event that an opinion is asked for in a matter pending before the Commission, the Commission proceedings shall stand stayed pending the provision of the opinion on the matter by the Court”*. The list of the parties eligible to seek legal opinions from the Court should be enlarged to include all those parties who are eligible to have accessibility to the Court.

### **3.4 Amicable Settlement Of Disputes**

Since the Court is to exercise this power in accordance with the ACHPR, Article 9 of the Protocol to the ACHPR should be amended to provide that *“where the word Commission appears in Article 52 of the Charter, it should be read as referring also to the Court”*. Further, a reading of *“Chairman”* of the Commission in Article 48 of the

Charter should be taken to also refer to the “*President*” of the Court under the Protocol. It should further be provided that where Article 48 refers to the “*Commission*” it should also be taken to refer to the “*Court*” as well.

### **3.5 Jurisdiction**

The jurisdiction of the Court should be confined to the Charter, the Protocol and other African regional and sub-regional Human rights instruments. This will go a long way to avoid the emergence of conflicting jurisprudence at the international level. This will also be in line with the European and the Inter-American Human rights regimes whose jurisdiction is confined to the Conventions creating the system and Protocols thereto as well as issues relating to compatibility of member states domestic law to the Convention’s provisions. Article 3 (1) to be amended to read that “*the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant African Regional Human rights instruments ratified by the State Parties concerned.*”

### **3.6 Accessibility To The Court**

Since individuals and NGOs are the primary beneficiaries and users of the Human rights Court, which Court is for the protection of Human rights and not state rights, it is therefore imperative that the list in Article 5 (1) of the Protocol to the ACHPR be amended to include individuals and NGOs. The competence clause under Article 34 (6) of the Protocol to the ACHPR should be scraped as it has no relevance in the system in view of the safety valve put in place to prevent the Court from being over whelmed by cases. Further, the discretion in Article 5(3) of the Protocol to the ACHPR on the type of NGOs to be accorded accessibility to the Court being limited to only those with observer status before the Commission should be removed so that all NGOs recognized in a particular State party should have audience before the Court like in the Inter-American system where all organizations recognized by OAS states have access to the Court.

The power of third party intervention under Article 5 (2) of the Protocol to the ACHPR should be widened so that the Court is given power to invite a State party or any other organization that appears to have an interest or one that may assist the Court reach a just conclusion on the matter to take part in the proceedings. It should not be limited to an application by a State party which has an interest. The class of applicants should be

enlarged to include individuals, NGOs, groups of individuals and State parties not party to the proceedings. The Court's discretion should be curtailed by making it mandatory that the Court is always to give reasons for granting or refusing a party to join the proceedings.

### **3.7 Admissibility And Consideration Of Cases**

Having recommended that the entire Article 5 (3) of the Protocol to the ACHPR be scrapped there will be no need for special consideration procedure for cases filed under Article 5 (3) of the Protocol to the ACHPR. All cases will require equal treatment. We are of the view that the mischief behind this provision was to prevent flooding of the Court by cases filed by individuals and NGOs after complying with Article 5 (3) of the Protocol to the ACHPR as read with Article 34 (6) of the Protocol. The Court should assign most of its admissibility issues to the Commission as this will reduce the workload of the Court. In this way the Commission will serve both as an organ of investigation and as a filter mechanism.

As for admissibility procedures under Article 56 (4) of the ACHPR which bars admissibility of cases based exclusively on news disseminated through the mass media, Article 56(4) of the Charter should be amended to make provision for an exception to information gathered through electronic media like video tapes and photographs. The requirement of exhaustion of local remedies should be applied only in instances where the Court is satisfied that the local remedy is available, sufficient and it is capable of redressing the complaint.

As for the transfer of cases to the Commission by the Court since no guide lines have been given as to the nature of cases that the Court can transfer, it should be stipulated in the provision that cases to be transferred to the Commission cover those that require: -

- (1) *Enquiry*
- (2) *Friendly or amicable settlement*
- (3) *Determination of admissibility*

In the premises, it follows that the first part of Article 6 (2) of the Protocol to the ACHPR which requires the Court to rule on admissibility of cases in accordance with Article 56 of the Charter will have to be deleted. What will be left is the second part of



Article 6 (2) of the Protocol to the ACHPR which provides that the *Court may consider cases or transfer them to the Commission*. This flexibility will enable the Court to reserve to itself only cases of a serious nature and leave the rest for the Commission. The power to transfer should go hand in hand with the power to defer cases from the Commission to the Court. So Article 6 (2) of the Protocol to the ACHPR should have a provision to the effect that *“the Court has power to transfer cases to the Commission and defer cases from the Commission to itself as the case may be”*.

We have argued herein that rules of procedure are not recognized under Articles 66 and 68 of the ACHPR as modes of making alteration to the ACHPR or its Protocols. It therefore follows that rules of procedure cannot be used to define the mode of consideration of cases between the Court and the Commission bearing in mind complementarity. The substantive provisions have to be set out in the Protocol leaving the finer details to the rules. Article 8 of the Protocol to the ACHPR should therefore be amended along the lines suggested above to make provision for clear provisions governing the transfer of cases from the Court to the Commission with a corresponding deferral power for the Court to defer cases from the Commission to it self.

### **3. 8 Free Legal Representation**

The ACHPR does not make provision for free legal aid. The other two systems have free legal aid properly anchored in the basic Human rights Conventions as a basic right. Article 6 (3) (a) of the ECHR provides for free legal aid as one of the minimum rights in criminal proceedings. It is provided if the subject has not sufficient means to pay for legal assistance. He is to be given it free when the interests of justice so require. Article 8 (2) of the ACHR provides for minimum guarantees in criminal proceedings one of which is the inalienable right to be assisted by counsel provided by the state. Provision should therefore be made either in Article 10 or 24 of the Protocol to the ACHPR for the creation of a legal aid Fund and Unit to cater for the provision of legal aid in order to make that provision have effect.

The Protocol does not make provision for personal representation and yet chances of such a situation arising are not remote. Article 10 (2) of the Protocol to the ACHPR should be amended to allow for personal representation as well. It should read that *“any person to a case shall be entitled to represent himself/herself or to be*

*represented by a legal representative of the party's choice". The provision on free legal aid should also be amended to specify that "free legal aid shall be provided by the free legal aid unit established by the Court and attached to its Registry".*

### **3.9 Witnesses**

A sub paragraph to be introduced for purposes of setting up a witnesses and victims unit to be attached to the Court's Registry. Setting up of a witnesses and victims unit within the Court Registry is the only sure way of guaranteeing protection and enjoyment of these facilities by any person, witness, representative of the parties who appear before the Court. This will avoid the current ambiguity and dilemma in Article 10 (3) of the Protocol to the ACHPR as to who is to provide those services.

### **3.10 Composition And Terms Of Office Of Judges**

Part of the secret of the success of the European Human rights System is that it has a large establishment of judges equivalent to the number of the high contracting parties, working on a full time basis. Article 11 of the Protocol to the ACHPR provided for eleven judges. The integration reduced the number to seven. We still maintain that the eleven were too few. Seven is worse. It is however noteworthy that although eleven were few the number was still large enough to enable the judges form themselves into committees and chambers. We do appreciate the financial constraints that led to the integration. However since the Court is expected to make an impact on the continent in the area of protection of Human rights, the continent has no alternative but to give its populace an effective and efficient institution. Having said in chapter 2 that a bench of seven judges working on a part time basis will not make an impact in the area of Human rights protection and enforcement on a vast continent with a bad record of Human rights abuse, the only way forward in trying to create a meaningful bench is either to increase the number to the number formally established of eleven or more or make them full time. Since tenure is to be changed to full-time Article 15 (2) of the Protocol to the ACHPR to be scrapped. Article 15 (4) of the Protocol to the ACHPR which is to become 15 (3) will read that *all judges inclusive of the president shall perform their functions on full-time basis.*

Guidelines on what amounts to incompatibility should be provided following the footsteps of the statute of the Inter-American Court of Human rights, which enumerates

what amounts to incompatibility. Article 18 of the Protocol to the ACHPR should be amended to stipulate that the position of a judge is incompatible with being:-

- ◆ A member or high ranking official of the executive branch of the government.
- ◆ An official of International organizations.
- ◆ Or any other position which prevents discharge of duties or affects independence or impartiality or the dignity and prestige of the office.

Sub paragraph 2 to be added to provide that in cases of doubt the Court shall decide.

Sub paragraph 3 to be added to provide that *incompatibility may lead only to dismissal of the judge and the imposition of applicable liabilities but shall not invalidate the acts and decisions in which the judge in question participated save that which directly affects the incompatibility issue.* Such clear provisions may act as a guide to state parties during nominations and elections and save the Court a lot of time in having to decide on the issue.

Article 19 of the Protocol to the ACHPR has been replaced by Article 9 of the Draft Protocol on integration which applies the provisions of Article 11 of the Protocol of the Court of Justice of AU to the Human rights Court. Vide these provisions cessation of office of a judge is through resignation or unanimous recommendation of the other judges that he or she no longer fulfills the requisite conditions to be a judge is final unless set aside by the Assembly. As framed Article 9 of the Draft Protocol on integration does not read in principles of natural justice. It would have been proper if it had read that *cessation of office of a judge is through death resignation or unanimous recommendation of the other judges upon due enquiry that he or she no longer fulfils the requisite conditions to be a judge.*

### **3.11 Registry Of The Court**

Independence of the Court's Registry is equally as important as the independence of the judges. This can be secured by putting in a provision to the effect that the Registrar and his entire staff shall be directly answerable to and solely be under the direction of the President of the Court. Sub paragraph 3 should therefore be added to read that *the Registrar of the court and his entire staff shall be directly answerable to and solely be under the direction of the president of the Court.*

### 3.12 Mode Of Production Of Evidence And Protection Of Victim Views Before The Court.

Mode of reception of evidence under Article 26 of the Protocol should take into account modern technological developments in this area of reception of evidence to incorporate other quicker modes of reception of evidence such as Internet, audio visual tapes, video tapes and photographs of the scene. In this regard sub – paragraph 3 to be added to provide that *the Court may also receive evidence through electronic devices such as the Audio visual tapes, video tapes, photographs of scenes of crime and internet e.t.c.* Article 26 (4) of the Protocol to the ACHPR to be added to provide that *the Court may also direct the Commission to hold an Enquiry.*

Protection of the victims views before the Court is not provided for and yet it is an important aspect of the mode of reception of evidence. Article 26 of the Protocol to the ACHPR should therefore be amended to make provision that *in consideration of the case the Court will also receive the views of the victim or their legal representatives.*

### 3.13 Findings

Article 27 (1) of the Protocol to the ACHPR to be amended to read that *where the Court makes findings that a violation of Human and peoples Rights has occurred it shall make appropriate orders to remedy the violation.* This should go further following the foot steps of Article 63 of the ACHR and add that *the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule if appropriate that the consequences of the measures or situation that constituted the breach of such rights or freedom be remedied.* As for payment of fair compensation and reparation, the provision should go further and adopt the provision of Article 68 (2) of the ACHR and provide that, *that part of the judgment that stipulates compensatory damages shall be executed in the country concerned in accordance with domestic procedures governing the execution of judgments against states.*

In deciding the way forward on interim measures in trying to decide as to who should move the Court for this relief we have to bear in mind that we have made recommendations in chapter 2 that for the Human rights protective mandate to be made meaningful, it should be divested from the mandate of the Commission and vested solely in the Court. The Provision of interim measures in cases of violations of Human rights is a

protective measure and that under the current Court structure individuals and NGOS have no automatic audience before the Court thus leaving possible candidates for those likely to move the Court for interim orders to the Commission, State parties and inter-governmental organizations. We have also observed that it is very unlikely that State parties will rush to file declarations declaring the Court's competence to receive petitions from individuals and NGOS with observer status before the Commission. We have also made observations that economic and diplomatic ties would prevent state parties from suing their fellow state parties.

The way forward is therefore to amend Article 27 (2) of the Protocol to the ACHPR and add a provision to the effect that *in cases of extreme gravity and urgency and when necessary to avoid irreparable harm to persons, the Commission, individuals, NGOS and inter governmental organizations or a State party may move the Court to adopt such provisional measures as it deems necessary*. We have included individuals and NGOS in the list of possible applicants because we have already made recommendations that automatic access to the Court be opened to individuals and NGOS because a Human rights Court is not for the protection of State Rights but individuals' Rights and that the ultimate users and beneficiaries of the Human rights Court are the individuals who should enjoy unfettered access to the Court.

### **3.14 Enforcement And Compliance With The Courts Judgments**

Article 28 (1) of the Protocol to the ACHPR should be amended to make provision for a casting vote in favour of the president, vice president or presiding judge, in the event of a tie. Further, Article 28 (3) of the Protocol to the ACHPR should be amended to provide that only parties to the case are the ones to move the Court for interpretation and review. Article 28 (4) of the Protocol to the ACHPR to be amended to provide that review is to be sought within 90 days from the date of notification of the judgment. The ACHPR Protocol should draw inspiration from the Inter-American Court procedure and the European Human rights Court and make provision for publication of Court documents. Article 30 of the rules of procedure of the Inter-American Court, authorizes the Court to order publication of the judgments and decisions of the Court, documents from the dossier except that which is found irrelevant, record of hearings and any other document the Court considers suitable for publication. Judgments are to be

published in the working language of the Court while the rest are to be published in their original languages; records of decided cases are to be made accessible to the public unless the Court decides otherwise.<sup>1</sup> On this account Article 28 (8) of the Protocol to the ACHPR should be added to the effect that *the judgements shall be published*.

Article 29 of the Protocol to the ACHPR should be amended so as to read “*publication*” of judgment instead of “*notification*” of judgment. It should be phrased along the lines of Article 24 (3) of the statute of the Inter-American Human rights Court to read “*the decisions, judgments and opinions of the Court shall be delivered in public session and the parties shall be given written notification there of. In addition the decisions, judgments and opinions shall be published along with the judges individual votes and opinion and with such other data or back ground information the Court may deem appropriate*”, sub paragraph 2 to read that “*copies of the judgment shall be transmitted to the parties to the case, state parties to the AU and the African Commission of Human and peoples rights, and the executive council of the AU. Sub paragraph 3 to provide that “copies of the judgments shall also be accessible to the members of the public at a fee to be determined by the registry. Sub paragraph 4 to provide that the executive council of ministers of the AU shall monitor the execution of the judgment. Article 29 of the Protocol to the ACHPR to be amended to read that in the event of non-compliance the executive council to seek resolutions from the AU Assembly for sanctions against defaulting States to ensure compliance.*

Article 30 of the Protocol to the ACHPR to contain sub paragraph 2 which is to provide that *in the event of non compliance with the judgment by any state party to the judgment the executive council shall publish the list of defaulting states and move the AU Assembly for resolutions requiring compliance within a stipulated period failing which provisions of Article 23 (2) AU Act on imposition of sanctions to apply.*

### **3.15 Annual Reports**

As argued in chapter two when discussing the Court’s annual report, like in the domestic setting independence of domestic Courts is ensured by them not submitting annual reports to the executive. Likewise independence of the Continental Human rights Court will be well secured if it is not required to file annual reports. In order to depoliticize the Court there should be no submission of annual reports to the AHSB.

Reports of defaulting states should be submitted by the Executive Council which monitors execution of the court's judgements. It is recommended that Article 31 of the Protocol to the ACHPR should be scrapped. Alternatively it should be amended to read *The executive council shall submit to each regular session or as the case may be, a list specifying the cases in which a state has not complied with the judgement.*

### **3.16 Funding/Budget**

In view of what we said in chapter 2 about the financial disabilities of the African Commission on Human and Peoples Rights, caused by the fact that it, the Commission has to compete for funding from the AU budget and which Funds are meager, a fact that has reduced the Commission into a beggar institution, the way forward on funding for the Court is for African States to be urged to be faithful in fulfilling their financial obligations to the African Union in order to enable the African Union Fund its institutions including the Court. The second alternative is for the AU to go a step further and amend Article 23 of the AU constitutive Act and add suspension from membership as one of the sanctions to be imposed against the defaulters on financial contributions. The third alternative is to follow recommendation 1.2 of the forum on participation of NGOS in the 36<sup>th</sup> ordinary session of the African Commission on Human and Peoples' Rights Dakar Senegal 20-22 May 2004 where the AU Assembly was urged to establish without delay a human rights Fund so as to ensure sustainable and adequate Funding to its Human rights institutions including the African Human rights Court.<sup>2</sup>

We suggest here in that the said Fund be set up under Article 19 of the AU Act as one of *the institutions of the AU*. Article 19 of the AU Act on financial institutions is to be amended to provide for *the establishment of a Judicial Fund to which the Courts expenses are to be charged*. This will go along way to secure the independence of the Court from political machinery and also save it from financial embarrassment of having to wait for the AU to collect contributions from the defaulting members before it can be operationalized. This would have completely depoliticized the institution. Article 32 of the Protocol to the ACHPR should therefore read that *"Expenses of the Court, emoluments and allowance for judges and the budget of its registry shall be met by the AU from funds disbursed from the AU Judicial fund established by the AU under Article 19 of the AU Act in consultation with the Court"*.

### **3.17 Rules Of Procedure**

The Courts consultation of the Commission in the formulation of the Court rules should be limited to the areas of complementarity under Article 2, 6, 8, 26 and 27 of the Protocol. The second portion of Article 33 of the Protocol to the ACHPR should read to the effect that *“the Court shall consult the Commission when formulating its rules as regards matters provided for under Articles 2, 6, 8, 26 and 27 of this Protocol.*

### **3.18 Role Of The Secretary General Of The Au**

This is provided for under Article 46 of the Charter which states that *“when the Commission resorts to any other method of investigation, it may seek direction from the Secretary General of the AU or any other person capable of directing it.”* Since the Commission enjoys unlimited accessibility to the Court it is only proper that it should turn to the Court for direction. Thus Article 46 of the Charter should be amended to read, *“the Commission may resort to any appropriate method of investigation. It may also seek or receive directions from the Court.*

### **3.19 Submissions Of The Final Reports To The Assembly Of Heads Of State And Government**

In order for this reporting procedure to be depoliticized and given a binding effect, the report should be filed with the president of the Court for further review, consultations and directions. Provision can be made to the effect that parties may be heard on the same before the Court if they so wish and there after the Court can make a binding decision on the matter. Allowing the Commission to adhere to its old procedure of filing reports with the AHSG for action will create two parallel execution processes. One where the AHSG has a wide discretion to execute or not to execute while the other one where the executive council is called upon to monitor and ensure compliance. Double standards are bound to create confusion and injustice to would be beneficiaries. Article 52 of the Charter should be amended to add sub paragraph 3 to the effect that *the procedure specified in Article 52 of the Charter as referring to the Commission refers to the Court.* Alternatively to provide that *the powers exercisable by the Commission under Article 52 of the Charter are to be exercisable by the Court.* The last sentence in Article



52 of the Charter to be amended to read that *the report is to be communicated to the Court.*

### **3.20 Reports Of The Commission's Activities**

Now that the Commission and the Court complement each other, it is only proper that its reports under Article 54 of the Charter be filed with the Court's president. Article 54 of the Charter to be amended to read *the Commission shall submit to the Court a report on its activities.* Rule 77 of the Commission's rules to be amended to read *the report shall be submitted to the Court and it shall be published as soon as it is ready.*

### **3.21 Cases Which Reveal The Existence Of A Series Of Serious Or Massive Violations Of Human Rights**

The activities in Article 58 of the Charter should be depoliticised by removing the requirement of having to seek authority from the AHSB or its chairman before proceeding to investigate. Article 58 (1) of the Charter to be amended to delete "*shall draw the attention of the Heads of States and government*" and substitute it with *shall make an application to the Court under Article 27 (2) of the Protocol to the ACHPR for orders of provisional measures to prevent irreparable injury to persons*". Article 58 (2) of the Charter to be amended to delete "*AHSB*" and substitute it with *the Court may then request for in depth study of these cases*". Article 58 (3) of the Charter to be amended to delete the chairman of the AHSB and substitute it with *the president or vice president of the Court.* The exercise of these powers by the Court will be in line with Article 26 (1) of the Protocol to the ACHPR where it has power to hold an enquiry. We have already said that the best organ to hold that enquiry is the Commission.

### **3.22 Publication Of The Commissions Reports**

These are considered to be confidential under Article 59 of the Charter. Their publication can only be done with the consent of the AHSB. This can be depoliticized by making the reports public as soon as they are ready.

Article 59 of the Charter to be amended by deleting all the three sub paragraphs and substituting them with a provision to the effect "*that all measures taken within the*

*provisions of the present charter by the Commission and the Court shall be published as soon as ready.”*

### **3.23 Commission's Hearings**

Communications are examined in private under rule 106 of the Commission rules. While other general matters are examined in public under rule 107 of the Commission rules. Now that the Court, which complements the Commission, conducts its proceedings in public, it is only proper that the two institutions do harmonize their procedures so that proceedings of both Institutions are conducted in public. Only in exceptional circumstances can they be held in camera i.e. instances where children are called as witnesses, cases of rape in genocide atrocities etc. Therefore the Commission's rules 106 and 107 should be amended to reflect the presence of the Court. The word *private* in rule 106 of the Commission's rules to be substituted with the word *public*.

### **3:24 The commission's mandate: promotional, interpretative and Protective**

Since the Commission does not have power to make binding decisions it is best suited to carry out **promotional duties**. The arrangement will also give the Commission an opportunity to engage more meaningfully in amicable settlement of complaints and screening of cases that may eventually get to the Court.<sup>3</sup> Article 30 of the Charter should be amended so that the last sentence reads that “*to promote Human and people's rights in Africa*” and also to delete the phrase “*ensure their protection*”.

Both the Commission and the Court have the power to **interpret** the ACHPR and other relevant Human rights instruments<sup>4</sup> but there is no provision as to which institution's decision is to prevail in the event of a conflict. We are of the view that the interpretative role should be vested solely in the Court. Such an arrangement will give the Commission an opportunity to seek opinions on the scope of some of the provisions of the African Charter with the view to enhancing its promotional mandate in general. This can also extend to issues such as the extend and the obligation of African states to ensure the enjoyment of human rights referred to in the Charter. The Commission will also have an opportunity to suspend consideration of a communication until it requests and receives

an advisory opinion on issues affecting the consideration of the case.<sup>5</sup> Such an opinion if well publicized would be useful to African states especially in relation to domestic legislation.<sup>6</sup> Article 45 (2) and 45 (3) of the Charter to be deleted since the protective and the interpretative mandates of the ACHPR is to be vested solely in the Court. Article 45 (4) of the Charter should be amended to read, “*Performing other tasks which may be entrusted to it by the Court.*”

The provision relating to the **protective function** of the Commission provides without elaborating that the Commission **shall ensure the protection of Human and peoples Rights in the Charter**. The protective mandate covers investigations of violation of Human rights, amicable settlement of disputes, receipt and processing of state communications and receipt, consideration and processing of individual complaints.<sup>7</sup> The power of investigation covers general investigation under Article 46 of the Charter and also investigations relating to special cases which reveal the existence of a series of serious or massive violations of Human and peoples Rights under Article 58 of the Charter. We are of the view that the investigative mandate in all circumstance be retained by the Commission not withstanding the power of enquiry of the Court under art 26 of the Protocol to the ACHPR. In cases of massive violations of Human rights the Commission is to be enabled to move to the site without first of all seeking authority from the AHSG or its chairman. Its findings instead of being filed with the AHSG, they should be filed in Court for purposes of facilitating issuance of interim relief or issuance of binding orders.

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## ENDNOTES TO CHAPTER THREE

<sup>1</sup> David J. Harris and Stephen Living Stone 1998. *The Inter-American system of Human rights*. Clarendon press oxford. Appendix VII. Rules of procedure of the Court pg. 545 – 561.

Article 30. Publication of Judgements and Other Decisions

1. The Court shall order the publication of:

a. The judgements and other decisions of the Court; the former shall include only those explanations of votes which fulfill the requirements set forth in Article 55(2) of these rules:

b. Documents from the dossier, except those considered irrelevant or unsuitable for publication;

c. The records of the hearings;

d. Any other documents that the Court considers suitable for publication.

2. The judgements shall be published in the working languages used in each case. All other documents shall be published in their original language.

3. Documents relating to cases already adjudicated, and deposited with the Secretariat of the Court shall be made accessible to the public, unless the Court decides otherwise.

<sup>2</sup> Resolution on the establishment of an independent and effective African Court on Human and Peoples' Rights by the forum on participation of NGOS

<http://www.fidh.org/ima/pdf/africanCourtHPR.pdf>. Accessed on 29/9/05

<sup>3</sup> Makau Mutua. The African Human rights system. A critical evaluation; Pg. 14

<http://hdr.undp.org/docs/publication/background-papers/Mutua-PDF> accessed on 25/5/05

(ii) Article 45(1) of the ACHPR

<sup>4</sup> Article 45 (3) 60,61 of the ACHPR

ii, Article 3, 4 (1) of the Protocol to the ACHPR

<sup>5</sup> Ibrahim Ali Badawl Elsheikh; "The future relationship between the African Court and the African Commission" *AHRLJ volume 2 no 2 2002* (pg. 252 – 260) \_ pg. 257

<sup>6</sup> Id

<sup>7</sup> Article 46 through 59 of the ACHPR.

# CHAPTER FOUR.

## CONCLUSION: FRUITS OF THE SUGGESTED REFORMS.

The aim of our study has been the restructuring of the African regional human rights regime enforcement machinery with a view to strengthening it. We have centered our study mainly on the Court's structure but touched partially on the Commission's structure in areas of interaction with the Court which areas we have also recommended for them to be reformed as the suggested reforms on the Court structure will be meaningless without corresponding reforms on the Commission's structure in these areas. We have proceeded on the premise that the Court envisaged at the pre formation stage more particularly at the Lagos conference way back in 1961 was a Court that people subjects of state parties could have recourse to. Upon its birth 43 years later in 2004 with the adoption of the Protocol to the ACHPR establishing it, it was expected to be a tool against impunity on the African continent in the area of human and peoples rights. It was also expected to place the issue of human rights more firmly on the continental agenda. Indeed on the face of the Court's structure as laid out in the Protocol establishing it, the Court is a land mark as it reveals peculiar features that may be absent in one or both of the other two senior systems, the European and the Inter-American. These include; the Protocol expressly excludes the participation of national judges in cases involving nationals from their country, the Protocol does not contemplate the appointment of ad hoc judges, the African Court has power to conduct enquires, the Court has enforcement and compliance mechanism , it makes provision for a full time president of the Court, both the Court and the Commission have power to settle disputes amicably, the Protocol provides for adequate gender representation and for the geographical distribution of judges, when Articles 3 and 7 are read together they show that jurisdiction of the African Court is wider than that of the European and the Inter-American systems, the African Court is vested with a broader jurisdiction than the other two human rights Court's in terms of who may submit requests for advisory opinions, the admissibility procedure under the Protocol is the same both for state communications and those of the other parties, the reliefs at the disposal of the African Court are broader than those offered by the other two regional Court's, the African Court is the only

regional human rights Court that has been called upon to exercise jurisdiction over a human rights instrument (ACHPR) with unique features and the only one that can be consulted in the event of preparation of its budgets.

Despite these peculiar features a critical scrutiny of the current structural framework of the Court reveals that the Court is standing on slippery ground. The slipperiness of the ground on which the Court is standing arises because of the presence of fundamental flaws in its structure and other additional constraints. These fundamental flaws include but are not limited to ambiguity of the principle of complementarity between the Court and the Commission, concurrent jurisdiction of the Court and the Commission over the interpretation of the ACHPR without stating whose opinion would prevail in the event of a conflict, denying automatic accessibility to would be beneficiaries and users of the Court namely the individuals and NGOS and granting it instead to abstract entities thereby turning the institution into a Court for the protection of state rights instead of protecting human rights, prescribing incomplete reliefs of payment of compensation and reparation without stating how these are to be executed and realized, lacking a sound financial base sufficient to guarantee its mystery, mastery, dignity, integrity and independence, although there is prescription for an enforcement machinery for the Court's judgements, it is not cemented on a sound principle of political policy which can be employed to whip up member countries into compliance with the Court's decisions, and lastly sanctions which can be employed to ensure compliance with the Court's decisions are too weak and discretionary. They are not laced with compulsory expulsion from the membership due to non-compliance with the principles and objectives of the AU.

The above described scenario has been further complicated by the lack of political will to operationalize the Court evidenced by the fact that although the idea of integration for purpose of rationalization of resources and to improve effectiveness was sound, its failure to provide for early operationalization of the human rights Division of the integrated Court is evidence of lack of political will on the part of the AU state parties to operationalize the Court institution.

Despite the gloomy picture painted by the presence of the fundamental flaws in the Court structure, there is a cure. The prescription for the cure is the suggested reforms

we have undertaken in this study. The reforms suggested here in will go along way in contributing to the creation of a meaningful future relationship between the Court and the Commission. They will contribute in laying a foundation stone for the common good of the two Institutions and create a frame work for closer cooperation between them as inter-dependent components and the key players for the African Regional Human Rights Regime operating within the AU. The restructured cooperation will no longer be secured on good faith and mutual understanding of personnel of the two Institutions but on sound provisions which will help to avoid creation of two parallel avenues for execution for human rights violations on the Continent. The two Institutions will now take note of the presence of the other.

The clear demarcation of the boundaries of complimentarity between the two institutions in revised Article 2 of the Protocol to the ACHPR will designate the Commission as an organ of investigation for the Court thus playing a crucial role as a filter mechanism for cases to be handled by the Court as opposed to it's current role of being a rival institution to the Court. The Court will be fully empowered to request the Commission to carry out an enquiry under revised Article 26 of the Protocol to the ACHPR. The role of the Commission before the Court will be transformed into one of an adviser as opposed to a partisan as it is required to gather all the relevant facts, provide an opinion on the matter and then place before the Court all the elements of the case relevant for the determination of the case. The suggested reforms have identified the Commission as the most ideal candidate for moving the Court under Article 27 (2) of the Protocol to the ACHPR for provisional measures to prevent irreparable injury to persons in cases of extreme urgency.

The divestation of the interpretative role from the Commission and vesting it solely in the Court will seal avenues for the emergence of conflicting jurisprudence over interpretation of regional human rights instruments in view of the fact that there is no provision showing which institutions' decision is to prevail in the event of a conflict.

By making provision that in the event of an opinion being asked for from the Court in a matter pending before the Commission, the proceedings before the Commission are to wait the Court's opinion, the Court will have been given primacy over the Commission and will no longer be viewed as a mere appendage of the Commission. This move is of paramount importance as it is the Court which is expected to make an impact on the current enforcement of human rights on the continent as it is

coming in to correct the in effectiveness of the Commission. The reforms are indented to create an opportunity for the Commission to make full use of the Court's opinion procedure for speedy disposal of cases before it thus providing needed guidance to domestic legislation. This is going to be a useful tool to the Commission considering that it, the Commission is mandated to provide guidance to African states on matters of domestic legislation.

Amendment of provisions on amicable settlement of disputes in Article 48 of the ACHPR and Article 9 of the Protocol to the ACHPR to read *president* of the Court alongside the *Chairman* of the Commission and the *Court* alongside the *Commission* will make the vesting of this jurisdiction in the Court properly anchored in the Charter as the Court is supposed to exercise the same in accordance with the Charter.

Confining the jurisdiction of the Court to the Charter, ACHPR, Protocol and other regional Human Rights instruments ratified by state parties will bring the Court procedures to be in line with the practice of the European and Inter-American Human Rights Court's, and go along way in avoiding the generation of confrontational jurisprudence at the International level. Further gain on this is that the suggested reform is not a bar to the Court's invocation of International Human Rights instruments and jurisprudence generated by other International bodies on the subject as the Court's power to do so under Article 60 and 61 of the Charter and Articles 3 and 7 of the Protocol to the ACHPR have not been interfered with.

Scraping of Article 5 (3) and 34 (6) of the of the Protocol to the ACHPR will turn the Court into the ideal Court envisaged by the 1961 Lagos conference as a Court that citizens of the State Parties could have recourse to. This will further restore the Court to its rightful status of being a human rights Court guaranteeing accessibility to would be primary beneficiaries and users of the Court namely the individuals and NGOS as opposed to granting accessibility to abstract parties as currently provided for.

Removal of the Court's wide discretion in Article 5 (2) of the Protocol to the ACHPR on third party intervention will widen the Court's exercise of this jurisdiction and make it more beneficial in that now reasons will have to be given for the Court's denial or granting of the right to intervene. Secondly the right of intervention will no longer be pegged on to a prior application being made. There will be a right to intervene



in favour of any party which appears to the Court to have useful information to enable the Court reach a just conclusion in the matter to file written submissions. This will create room for professionals to participate in the proceedings and offer their expertise and professional guidance to the Court.

Amendment on admissibility and consideration of cases procedures will ensure the primacy of the Court over the Commission. The new arrangement will create room for flexibility in the discharge of the Court's functions as the Court will have power to deal only with cases of a serious nature and also will have a right to defer serious cases from the Commission to itself. Guide lines have also been provided specifying circumstances in which the Court will consult the Commission on admissibility procedures.

Rejection of the rules of procedure as a means of dealing with ambiguities in the Protocol will restore the dignity, prestige and spirit of Article 66 of the Charter and make it clear that instruments once adopted have to be adhered to, to the letter. It will also show that amendments to the Court's structure through reforms we have suggested herein is the only cure for the fundamental flaws and ambiguities identified in the Court's structure which could not be cured through provision of rules.

Reforms on hearing and representation procedures will lead to the creation of a free legal aid, witnesses and victims unit making the availability of these services a reality as the services will now be properly anchored in the Court system. Proper administration will also be ensured as the ambiguity and dilemma in Article 10 (3) of the Protocol to the ACHPR as to who is to provide those services will have been cleared. Inclusion of provisions on consideration of the victim's views which had been omitted will bring the Court procedure on the subject at par with the practice in the other two systems, the European and the Inter-American.

Provision for reception of evidence through modern technological devices such as video tapes, internet, photographs etc. is bound to quicken Court proceedings and cut out costs on transportation of witnesses especially in instances where a large number of witnesses is involved.

Change of terms of service for Judges from part time to fulltime will have the potential of securing the efficiency and independence of the Court. This is modelled along the lines of the European Human Rights Court whose success secret lies partly in

the full time tenure of the office of the Judges. This will enable the Judges to be confident and bold in the pronouncements of their decisions thus making an impact on the enforcement of human rights on the continent.

Provisions on incompatibility guidelines will be beneficial in the process of nomination of Judges so that only those who qualify are nominated. This cuts down on repeat exercises arising from nomination of Judges holding positions incompatible with the office of a judge. It will also go along way to bar prolonged litigations as to what amounts to incompatibility and what does not.

Bringing the registrar of the Court directly under the president of the Court will ensure a proper chain of command, proper management, control and administration of the Court. It will also act as an insulation against external interference in the administration of justice.

Streamlining the reliefs in Article 27 of the Protocol to the ACHPR will make them more meaningful. Instead of stopping at the pronouncement that a violation has occurred the Court will have power to go ahead and make consequential orders in favour of the victim to the effect that the infringed right be restored and or ensured. Instead of making compensatory and reparatory orders which have no potential of being enforced, the Court will now have powers to order that such orders be enforced against the violating state in accordance with domestic law and practices or procedures governing the enforcement of judgments against governments. There will no longer be uncertainty as to which party is to move the Court for interim measures in cases of extreme gravity and urgency as the Commission has been identified as the most ideal party to move the Court for this relief as soon as the matter is brought to its attention.

On enforcement and compliance with the Court decisions, provision of a casting vote in favour of the president, Vice President or Presiding Judge in the event of equal votes will be a cure for a stale mate in decision making. It will also be in line with similar provisions in the ACJ structure as well as the Commission procedures. Confining the right to seek review to parties to the dispute will act as a shield against intrusions by busy bodies. Where as a requirement that review is to be sought within a specified period will be a shield against last minute mischief with a view to frustrating enforcement of judgments. Provision for publicity of Court records, judgments as well as a list of defaulting states as an enforcement tool will act as a deterrence to other states which

would be human rights violators. It will also assist other state parties to shape their national laws and conduct to be in line with human rights standards set by the Court's decisions. Scrapping of the requirement for the Court to file an annual report with the AHSG will depoliticize the Court and guarantee its independence from political interference.

Setting up of a judicial Fund to cushion the Court's operations will remove the stigma of a beggar institution from the Court and guarantee its dignity, mastery and majesty. It will be another sure way of ensuring efficiency and effectiveness of the Court as well as acting as an additional guarantee for the Institutions independence. It will also be in line with the AUs' determination to provide its common institutions with resources to enable them function effectively.

Entrenchment of a provision in the ACHPR that requires State Parties to *secure* enjoyment of rights enshrined therein to their citizens as opposed to the current one of mere *recognition* of those rights as well as provision of a principle in the AU Act which requires adherence to that principle by Union members with a threat of expulsion from the Union for non compliance with that principle accompanied by a mandatory sanction of expulsion for non-compliance with the principles of the AU will provide a strong base for the AUs ability to police and whip up members into compliance with the Court's decisions.

Turning to reforms on the Commissions' structure in the areas of interaction with the Court's process, provisions which require that the Commission turn to the Court for direction and enlightenment instead of the AU Secretary General, that final reports of the Commissions' activities as well as on communications be filed with the Court instead of the AHSG, and that it the Commission do move the Court in cases which reveal the existence of a series of serious or massive violations of human rights will be a great achievement in the strengthening of the human rights enforcement machinery. Firstly they will have depoliticized the Commissions process and therefore a victory over the Commissions ineffectiveness and inefficiency which has hitherto been attributed partly to allegations of the process being highly politicized. Secondly they will be in line with the complimentarity principle as they will have gone along way in harmonizing the functions of the two institutions with a view to creating closer cooperation between them. Thirdly they will be a cure to creation of double standards or parallel execution process

one ending up with non binding decisions being filed with the AHSG whereby the AHSG has a discretionary power to execute or not. While the other ending up with binding decisions with a defined enforcement procedure. Fourthly they will have done away with the confidentiality that had previously shrouded the Commissions execution process. Fifthly the Commission procedure will now benefit from the use of publicity as an enforcement tool. Sixthly the Commissions decisions will be enabled to shed off the non binding status and acquire a binding status through the Court process. Seventhly this will ensure equal treatment for all beneficiaries of the human rights enforcement process as all of them will now have their judgments enforced through the same process instead of only having those through the Court process being enforced leaving those through the previous Commission arrangement suffering the fate of not being enforced by the AHSG.

Redefining of the Commissions mandate will designate the Commission as the promotional and investigative arm of the enforcement machinery, a task best suited for it as it has no power to make binding decisions. It will also put to rest fears of generation of conflicting jurisprudence as a result of the exercise of the interpretative role by two rival institutions in view of lack of a provision under the current arrangement as to which institution's decision is to prevail in the event of a conflict.

The protective mandate which has hitherto been vaguely vested in the Commission will now be removed and vested in the right Institution, the Court, which Court has power to make binding decisions and employ a well defined execution procedure for their enforcement. Further, costs which had not been provided for in the current structure will now be awardable bringing the human rights court to be at par with the ACJ With which it is integrated, which ACJ has power to award costs conferred upon it by Article 43 of the Protocol to the AU Act.

The foregoing assessment of the suggested fruits of reform on the current Court structure as displayed in the Protocol to the Charter has shown that indeed the African Court on Human and Peoples rights though a land mark, is standing on slippery grounds as it has been cemented on a flawed structural frame work evidenced by the fact that it, the Court which had been created to cure the weaknesses and in effectiveness of the Commission has instead duplicated them. The suggested reforms will remove the slipperiness of the ground on which it stands and entrench it properly on firm ground. They should be able to give teeth to the Court and make it an effective tool in fighting

impunity in the area of human rights on the continent. They are also targeted at restoring the Court to its rightful status as a human rights Court.

# **ANNEXTURE 1.**

## **Constitutive Act of the African Union.**

We, Head of State and Government of the Member States of the Organization of African Unity (AOU):

1. The President of the People's Democratic Republic of Algeria
2. The President of the Republic of Angola
3. The President of the Republic Benin
4. The President of the Republic Botswana
5. The President of the Burkina Faso
6. The President of the Republic of Burundi
7. The President of the Republic of Cameroon
8. The President of the Republic of Cape Verde
9. The President of the Central African Republic
10. The President of the Republic of Chad
11. The President of the Islamic Federal Republic of the Comoros
12. The President of the Republic of the Congo
13. The President of the Republic of Cote d'Ivoire
14. The President of the Democratic Republic of Congo
15. The President of the Republic of Djibouti
16. The President of the Arab Republic of Egypt
17. The President of the State of Eritrea
18. The Prime Minister of the Federal Democratic Republic of Ethiopia
19. The President of the Republic of Equatorial Guinea
20. The President of the Gabonese Republic
21. The President of the Republic of The Gambia
22. The President of the Republic of Ghana
23. The President of the Republic of Guinea
24. The President of the Republic of Guinea Bissau
25. The President of the Republic of Kenya
26. The Prime Minister of Lesotho
27. The President of the Republic of Liberia
28. The Leader of the 1<sup>st</sup> of September Revolution of the Great Socialist People's Libyan Arab Jamahiriya
29. The President of the Republic of Madagascar
30. The President of the Republic of Malawi
31. The President of the Republic of Mali
32. The President of the Islamic Republic of Mauritania
33. The Prime Minister of the Republic of Mauritius
34. The President of the Republic of Mozambique
35. The President of the Republic of Namibia
36. The President of the Republic of Niger
37. The President of the Federal Republic of Nigeria
38. The President of the Republic of Rwanda
39. The President of the Sahrawi Arab Democratic Republic
40. The President of the Republic of Sao Tome and Principe
41. The President of the Republic of Senegal
42. The President of the Republic of Seychelles

43. The President of the Republic of Sierra Leone
44. The President of the Republic of Somalia
45. The President of the Republic of South Africa
46. The President of the Republic of Sudan
47. The King of Swaziland
48. The President of the United Republic of Tanzania
49. The President of the Togolese Republic
50. The President of the Republic of Tunisia
51. The President of the Republic of Uganda
52. The President of the Republic of Zambia
53. The President of the Republic of Zimbabwe.

INSPIRED by the noble ideals which guided the founding fathers of our Continental Organization and generations of Pan-Africanists in their determination to promote unity, solidarity, cohesion and cooperation among the peoples of Africa and African States;

CONSIDERING the principles and objectives stated in the Charter of the Organization of African Unity and the Treaty establishing the African Economic Community;

RECALLING the heroic struggles waged by our peoples and our countries for political independence, human dignity and economic emancipation;

CONSIDERING that since its inception, the Organization of African Unity has played a determining and invaluable role in the liberation of the continent, the affirmation of a common identity and the process of attainment of the unity of our Continent and has provided a unique framework for our collective action in Africa and in our relations with the rest of the world;

DETERMINED to take up the multifaceted challenges that confront our continent and peoples in the light of the social, economic and political changes taking place in the world;

CONVINCED of the need to accelerate the process of implementing the Treaty establishing the African Economic Community in order to promote the socio-economic development of Africa and to face more effectively the challenges posed by globalization;

GUIDED by our common vision of a united and strong Africa and by the need to build a partnership between governments and all segments of civil society, in particular women, youth and the private sector in order to strengthen solidarity and cohesion among our peoples;

CONSCIOUS of the fact that the scourge of conflicts in Africa constitutes a major impediment to the socio-economic development of the continent and of the need to promote peace, security and stability as a prerequisite for the implementation of our development and integration agenda;

DETERMINED to promote and protect human and peoples' rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law;

FURTHER DETERMINED to take all necessary measures to strengthen our common institutions and provide them with the necessary powers and resources to enable them discharge their respective mandates effectively;

RECALLING the Declaration which we adopted at the Fourth Extraordinary Session of our Assembly in Sirte, the Great Socialist People's Libyan Arab Jamahiriya, on 9.9.99, in which we decided to establish an African Union, in conformity with the ultimate objectives of the Charter of our Continental Organization and the Treaty establishing the African Economic Community;

HAVE AGREED AS FOLLOWS:

### **Article 1 Definitions**

In this Constitutive Act:

"Act" means the present Constitutive Act;

"AEC" means the African Economic Community;

"Charter" means the Charter of the OAU;

"Committee" means a Specialized Technical Committee of the Union;

"Council" means a Economic, Social and Cultural Council of the Union;

"Court" means the Court of Justice of the Union;

"Executive Council" means the Executive Council of Ministers of the Union;

"Member State" means the Pan-African Parliament of the Union;

"Union" means the African Union established by the present Constitutive Act.

### **Article 2 Establishment**

The African Union is hereby established in accordance with the provisions of this Act.

### **Article 3 Objectives**

The objectives of the Union shall be to:

- a. Achieve greater unity and solidarity between the African countries and the peoples in Africa;
- b. Defend the sovereignty, territorial integrity and independence of its Member States;
- c. Accelerate the political and socio-economic integration of the continent;
- d. Promote and defend African common positions on issues of interest to the continent and its peoples;



- e. Encourage international cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights;
- f. Promote peace, security, and stability on the continent;
- g. Promote democratic principles and institutions, popular participation and good governance;
- h. Promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments;
- i. Establish the necessary conditions which enable the continent to play its rightful role in the global economy and in international negotiations;
- j. Promote sustainable development at the economic, social and cultural levels as well as the integration of African economies;
- k. Promote cooperation in all fields of human activity to raise the living standards of African peoples;
- l. Coordinate and harmonize policies between existing and future Regional Economic Communities for the gradual attainment of the objectives of the Union;
- m. Advance the development of the continent by promoting research in all fields, in particular in science and technology;
- n. Work with relevant international partners in the eradication or preventable diseases and the promotion of good health on the continent.

**Article 4**  
**Principles**

The Union shall function in accordance with the following principles:

- a. Sovereign equality and interdependence among Member State of the Union;
- b. Respect of borders existing on achievement of independence;
- c. Participation of the African peoples in the activities of the Union;
- d. Establishment of a common defence policy for the African Continent;
- e. Peaceful resolution of conflicts among Member States of the Union through such appropriate means as may be decided upon by the Assembly;
- f. Prohibition of the use of force or threat to use force among Member States of the Union;
- g. Non-interference by any Member State in the internal affairs of another;
- h. The right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity;
- i. Peaceful co-existence of Member States and their right to live in peace and security;
- j. The right of Member States to request intervention from the Union in order to restore peace and security;
- k. Promotion of Self-reliance within the framework of the Union;
- l. Promotion of gender equality;
- m. Respect for democratic principles, human rights, the rule of law and good governance;
- n. Promotion of social justice to ensure balanced economic development;

- o. Respect for sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities;
- p. Condemnation and rejection of unconstitutional changes of governments.

**Article 5**  
**Organs of the Union**

1. The organs of the Union shall be:
  - a. The Assembly of the Union;
  - b. The Executive Council;
  - c. The Pan-African Parliament;
  - d. The Court of Justice;
  - e. The Commission;
  - f. The Permanent Representatives Committee;
  - g. The Specialized Technical Committees;
  - h. The Economic, Social and Cultural Council;
  - i. The Financial Institutions.
2. Other Organs that the Assembly may decide to establish.

**Article 6**  
**The Assembly**

1. The Assembly shall be composed of Heads of State and Government or their duly accredited representatives.
2. The Assembly shall be the supreme organ of the Union
3. the Assembly shall meet at least once a year in ordinary session. At the request of any Member State and on approval by a two-thirds majority of the Member States, the Assembly shall meet in extraordinary session.
4. The Office of the Chairman of the Assembly shall be held for a period of one year by a Head of State or Government elected after consultations among the Member States.

**Article 7**  
**Decisions of the Assembly**

1. The Assembly shall take its decisions by consensus or, failing which, by a two-thirds majority of the Member States of the Union. However, procedural matters, including the question of whether a matter is one of procedure or not, shall be decided by a simple majority.
2. Two-thirds of the total membership of the Union shall form a quorum at any meeting of the Assembly.

**Article 8**  
**Rules of Procedure of the Assembly.**

The Assembly shall adopt its own Rules of Procedure.

**Article 9**  
**Powers and Functions of the Assembly**

1. The functions of the Assembly shall be to:
  - a. Determine the common policies of the Union;
  - b. Receive, consider and take decisions on reports and recommendations from the other organs of the Union;
  - c. Consider requests for Membership of the Union;
  - d. Establish any organ of the Union;
  - e. Monitor the implementation of policies and decisions of the Union as well as ensure compliance by all Member States;
  - f. Adopt the budget of the Union;

- g. Give directives to the Executive Council on the management of conflicts, war and other emergency situations and the restoration of peace;
  - h. Appoint and terminate the appointment of the judges of the Court of Justice;
  - i. Appoint the Chairman of the Commission and his or her deputy or deputies and Commissioners of the Commission and determine their functions and terms of office.
3. The Assembly may delegate any of its powers and functions to any organ of the Union.

**Article 10**  
**The Executive Council**

1. The Executive Council shall be composed of the Ministers of Foreign Affairs or such other Ministers or Authorities as are designated by the Governments of Member States.
2. Council shall meet at least twice a year in ordinary session. It shall also meet in an extraordinary session at the request of any Member State and upon approval by two-thirds of all Member States.

**Article 11**  
**Decisions of the Executive Council**

1. The Executive Council shall take its decisions by consensus or, failing which, by a two-thirds majority of the Member States. However, procedural matters, including the question of whether a matter is one of procedure or not, shall be decided by a simple majority.
2. Two-thirds of the total membership of the Union shall form a quorum at any meeting of the Executive Council.

**Article 12**  
**Rules of Procedure of the Executive Council]**

The Executive Council shall adopt its own Rules of Procedure.

**Article 13**  
**Functions of the Executive Council**

1. The Executive Council shall co-ordinate and take decisions on policies in areas of Common interest to the Member States, including the following:
  - a. Foreign trade;
  - b. Energy, industry and mineral resources;
  - c. Food, agricultural and animal resources, livestock production and forestry;
  - d. Water resources and irrigation;
  - e. Environmental protection, humanitarian action and disaster response and relief;
  - f. Transport and communication;
  - g. Insurance;
  - h. Education, culture, health and human resources development;
  - i. Science and technology;
  - j. Nationality, residency and immigration matters;
  - k. Social security, including the formulation of mother and child care policies, as well as policies relating to the disabled and the handicapped;
  - l. Establishment of a system of African awards, medals and prizes.
2. The Executive Council shall be responsible to the Assembly. It shall consider issues referred to it and monitor the implementation of policies formulated by the Assembly.
3. The Executive Council may delegate any of its powers and functions mentioned in paragraph 1 of this Article to the Specialized Technical

Committees established under Article 14 of this Act.

#### **Article 14**

##### **The Specialized Technical Committees Establishment and Composition.**

1. There is hereby established the following Specialized Technical Committees, which shall be responsible to the Executive Council:
  - a. The Committee on Rural Economy and Agricultural Matters;
  - b. The Committee on Monetary and Financial Affairs
  - c. The Committee on Trade, Customs and Immigration Matters;
  - d. The Committee on Industry, Science and Technology, Energy, Natural Resources and Environment;
  - e. The Committee on Transport, Communications and Tourism;
  - f. The Committee on Health, Labour and Social Affairs; and
  - g. The Committee on Education, Culture and Human Resources.
2. The Assembly shall, whenever it deems appropriate, restructure the existing Committees or establish other Committees.
3. The Specialized Technical Committees shall be composed of Ministers or senior Officials responsible for sectors falling within their respective areas of competence.

#### **Article 15**

##### **Functions of the Specialized Technical Committees**

Each Committee shall within its field of competence;

- a. Prepare projects and programmes of the Union and submit in to the Executive Council;
- b. Ensure the supervision, follow-up and evaluation of the implementation of decisions taken by the organs of the Union;
- c. Ensure the coordination and harmonization of projects and programmes of the Union;
- d. Submit to the Executive Council either on its own initiative or at the request of the Executive Council, reports and recommendations on the implementation of provision of this Act; and
- e. Carry out any other functions assigned to it for the purpose of ensuring the implementation of the provisions of this Act.

#### **Article 16**

##### **Meetings**

1. Subject to any directives given by the Executive Council, each Committee shall meet as often as necessary and shall prepare its rules of procedure and submit them to the Executive Council for approval.

#### **Article 17**

##### **The Pan - African Parliament**

1. In order to ensure the full participation of African peoples in the development and economic integration of the continent, a Pan-African Parliament shall be established.
2. The composition, powers, functions and organization of the Pan-African Parliament shall be defined in a protocol relating thereto.

#### **Article 18**

##### **The Court of Justice**

1. A Court of Justice of the Union shall be established;
2. The statute, composition and functions of the Court of Justice shall be defined in a protocol relating thereto.

#### **Article 19**

### **The Financial Institutions**

The Union shall have the following financial institutions, whose rules and regulations shall be defined in protocols relating thereto:

- a. The African Central Bank;
- b. The African Monetary Fund;
- c. The African Investment Bank.

### **Article 20**

#### **The Commission**

1. There shall be established a Commission of the Union, which shall be the Secretariat of the Union.
2. The Commission shall be composed of the Chairman, his or her deputy or deputies and the Commissioners. They shall be assisted by the necessary staff for the smooth functioning of the Commission.
3. The structure, functions and regulations of the Commission shall be determined by the Assembly.

### **Article 21**

#### **The Permanent Representatives Committee**

1. There shall be established a Permanent Representatives Committee. It shall be composed of Permanent Representatives to the Union and other Plenipotentiaries of Member States.
2. The Permanent Representatives Committee shall be charged with the responsibility of preparing the work of the Executive Council and acting on the Executive Council's instructions. It may set up such sub-committees or working groups as it may deem necessary.

### **Article 22**

#### **The Economic, Social and Cultural Council**

1. The Economic, Social and Cultural Council shall be an advisory organ composed of different social and professional groups of the Member States of the Union.
2. The functions, powers, composition and organization of the Economic, Social and Cultural Council shall be determined by the Assembly.

### **Article 23**

#### **Imposition of Sanctions**

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

### **Article 24**

#### **The Headquarters of the Union**

1. The Headquarters of the Union shall be in Addis Ababa in the Federal Democratic Republic of Ethiopia.
2. There may be established such other offices of the Union as the Assembly may, on the recommendation of the Executive Council, determine.

**Article 25**  
**Working Languages**

The working languages of the Union and all its institutions shall be, if possible, African languages, Arabic, English, French and Portuguese.

**Article 26**  
**Interpretation**

The Court shall be seized with matters of interpretation arising from the application or implementation of this Act. Pending its establishment, such matters shall be submitted to the Assembly of the Union, which shall decide by a two-thirds majority.

**Article 27**  
**Signature, Ratification and Accession**

1. This Act shall be open to signature, ratification and accession by the Member States of the OAU in accordance with their respective constitutional procedures.
2. The instruments of ratification shall be deposited with the Secretary-General of the OAU.
3. Any Member State of the OAU acceding to this Act after its entry into force shall deposit the instrument of accession with the Chairman of the Commission.
4. promote sustainable development at the economic, social and cultural levels as

**Article 28**  
**Entry into Force**

This Act shall enter into force thirty (30) days after the deposit of the instruments of ratification by two-thirds of the Member of States of the OAU.

**Article 29**  
**Admission to Membership**

1. Any African State may, at any time after the entry into force of this Act, notify the Chairman of the Commission of its intention to accede to this Act and to be admitted as a member of the Union.
2. The Chairman of the Commission shall, upon receipt of such notification, transmit copies thereof to all Member States. Admission shall be decided by a simple majority of the Member States. The decision of each Member State shall be transmitted to the Chairman of the Commission who shall, upon receipt of the required number of votes, communicate the decision to the State concerned.

**Article 30**  
**Suspension**

Governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union.

**Article 31**  
**Cessation of Membership**

1. Any State which desires to renounce its membership shall forward a written notification to the Chairman of the Commission, who shall inform Member States thereof. At the end of one year from the date of such notification, if not withdrawn, the Act shall cease to apply with respect to the renouncing State, which shall thereby cease to belong to the Union.
2. During the period of one year referred to in paragraph 1 of this Article, any Member State wishing to withdraw from the Union shall comply with the provisions of this Act and shall be bound to discharge its obligations under this Act up to the date of its withdrawal.

**Article 32**  
**Amendment and Revision**

1. Any Member State may submit proposals for the amendment or revision of this Act.
2. Proposals for amendment or revision shall be submitted to the Chairman of the Commission who shall transmit same to Member States within thirty (30) days of receipt thereof.
3. The Assembly, upon the advice of the Executive Council, shall examine there proposals within a period of one year following notification of Member States, in accordance with the provisions of paragraph 2 of this Article.
4. Amendments or revisions shall be adopted by the Assembly by consensus or, failing which, by a two-thirds majority and submitted for ratification by all Member States in accordance with their respective constitutional procedures. They shall enter into force thirty (30) days after the deposit of the instruments of ratification with the Chairman of the Commission by a two-thirds majority of the Member States.

**Article 33**  
**Transitional Arrangements and Final Provisions**

1. This Act shall replace the Charter of the Organization of African Unity. However, the Charter shall remain operative for a transitional period of one year or such further period as may be determined by the Assembly, following the entry into force of the Act, for the purpose of enabling the OAU/AEC to undertake the necessary measures regarding the devolution of its assets and liabilities to the Union and all matters relating thereto.
2. The provision of this Act shall take precedence over and supersede any inconsistent or contrary provisions of the Treaty establishing the African Economic Community.
3. Upon the entry into force of this Act, all necessary measures shall be undertaken to implement its provisions and to ensure the establishment of the organs provided for under the Act in accordance with any directives or decisions which may be adopted in this regard by the Parties thereto within the transitional period stipulated above.
4. Pending the establishment of the Commission, the OAU General Secretariat shall be the interim Secretariat of the Union.
5. This Act, drawn up in four (4) original texts in the Arabic, English, French and Portuguese languages, all four (4) being equally authentic, shall be deposited with the Secretary-General of the OAU and, after its entry into force, with the Chairman of the Commission who shall transmit a certified true copy of the Act to the Government of each signatory State. The Secretary-General of the OAU and the Chairman of the Commission shall notify all signatory States of the dates of the deposit of the instruments of ratification or accession and shall upon entry into force of this Act register at the same with the Secretariat of the United Nations.

IN WITNESS WHEREOF, WE have adopted this Act.

**Done at Lome, Togo, this 11<sup>th</sup> day of July, 2000.**

Reference

African Union Summit, African Union Charter –

[http://www.au2002.gov.za/docs/key\\_oau/au\\_act.htm](http://www.au2002.gov.za/docs/key_oau/au_act.htm)

# ANNEXTURE 2

## African Charter On Human And Peoples Rights.

*Adopted by the Organization of African Unity at the 18<sup>th</sup> Conference of Heads of State and Government on 27 June 1981, Nairobi, Kenya*

*Entry into force: 21 October 1986.*

### Preamble.

The African States members of the Organization of African Unity, parties to the present Convention entitled "African Charter on Human and Peoples Rights".

**Recalling** Decision 115 (XVI) of the Assembly of Heads of State and Government at its Sixteenth Ordinary Session held in Monrovia, Liberia, from 17 to 20 July 1979 on the preparation of a "preliminary draft on an African Charter on Human and Peoples Rights providing *inter alia* the establishment of bodies to promote and protect human and peoples rights";

**Considering** the Charter of the Organization of African Unity, which stipulates that "freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples";

**Reaffirming** the pledge they solemnly made in article 2 of the said Charter to eradicate all forms of colonialism from Africa, to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples Africa and to promote international cooperation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights;

**Taking** into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples rights;

**Recognizing** on the one hand, that fundamental human rights stem from the attributes of human beings, which justifies their national and international protection and on the other hand that the reality and respect of peoples rights should necessary guarantee human rights.

**Considering** that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone;

**Convinced** that it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights:

Conscious of their duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neo-colonialism, apartheid, Zionism and to dismantle aggressive foreign military bases and all forms of discrimination, particularly those based on race, ethnic group, color, sex, language, religion or political opinions;

Reaffirming their adherence to the principles of human and peoples rights and freedoms contained in the declarations, conventions and other instruments adopted by the Organization of African unity, the Movement of Non-Aligned Countries and the United Nations;

Firmly convinced of their duty to promote and protect human and peoples rights and freedoms taking into account the importance traditionally attached to these rights and freedoms in Africa;

Have agreed as follows:



**PART 1**  
**RIGHTS AND DUTIES**  
**Chapter 1**  
**Human and People's Rights.**

**Article 1**

The member States of the Organization of African unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.

**Article 2**

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

**Article 3**

1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law.

**Article 4**

Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

**Article 5**

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degradation punishment and treatment shall be prohibited.

**Article 6**

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

**Article 7**

1. Every individual shall have the right to have his cause heard. This comprises:
  - a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, law, regulations and customs in force;
  - b) the right to be presumed innocent until proved guilty by competent court or tribunal;
  - c) the right to defence, including the right to be defended by counsel of his choice;
  - d) the right to be tried within a reasonable time by an impartial court or tribunal.
2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

**Article 8**

Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

**Article 9**

1. Every individual shall have the right to receive information
2. Every individual shall have the right to express and disseminate his opinions within the law.

**Article 10**

1. Every individual shall have the right to free association provided he abides by the law.
2. Subject to the obligation of solidarity provided for in article 29 no one may be compelled to join an association.

#### **Article 11**

Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.

#### **Article 12**

1. Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.
2. Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or mortality.
3. Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions.
4. A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.
5. The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.

#### **Article 13**

1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.
2. Every citizen shall have the right of equal access to the public service of his country.
3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

#### **Article 14**

The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

#### **Article 15**

Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.

#### **Article 16**

1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.
2. State parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

#### **Article 17**

1. Every individual shall have the right to education.
2. Every individual may freely take part in the cultural life of his community.
3. The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.

#### **Article 18**

1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.
2. The State shall have the duty to assist the family, which is the custodian of morals and traditional values recognized by the community.
3. The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the women and the child as stipulated in international declarations and conventions.
4. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.

#### **Article 19**

All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.

#### **Article 20**

1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.
3. All peoples shall have the right to the assistance of the States parties to the present Charter in the liberation struggles against foreign domination, be it political, economic or cultural.

#### **Article 21**

1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.
3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.
4. State parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources within a view to strengthening African Unity and solidarity.
5. State parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.

#### **Article 22**

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
2. State shall have the duty, individually or collectively, to ensure the exercise of the right to development.

#### **Article 23**

1. All peoples shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organization of African Unity shall govern relations between States.
2. For the purpose of strengthening peace, solidarity and friendly relations, State parties to the present Charter shall ensure that:
  - a) Any individual enjoying the right of asylum under article 12 of the present Charter shall not engage in subversive activities against his country of origin or any other State party to the present Charter;
  - b) Their territories shall not be used as bases for subversive or terrorist activities against the people of any State party to the present Charter.

#### **Article 24**

All people shall have the right to a general satisfactory environment favorable to their development.

#### **Article 25**

States parties to the present Charter shall have the duty to promote and ensure, through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.

### **Article 26**

States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

## **Chapter II Duties**

### **Article 27**

1. Every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community.
2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

### **Article 28**

Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.

### **Article 29**

The individual shall also have the duty:

1. To preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need;
2. To serve his national community by placing his physical and intellectual abilities at its service;
3. Not to compromise the security of the State whose national or resident he is;
4. To preserve and strengthen social and national solidarity, particularly when the latter is threatened;
5. To preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defence in accordance with the law;
6. To work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society;
7. To preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well-being of society;
8. To contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity.

## **PART II MEASURES OF SAFEGUARD**

### **Chapter 1**

## **Establishment and Organisation of the African Commission on Human and Peoples Rights.**

### **Article 30**

An African Commission on Human and Peoples Rights, hereinafter called "the Commission", shall be established within the Organization of African Unity to promote human and peoples rights and ensure their protection in Africa.

### **Article 31**

1. The Commission shall consist of eleven members chosen from amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples rights; particular consideration being given to persons having legal experience.

2. The members of the Commission shall serve in their personal capacity.

#### **Article 32**

The Commission shall not include more than one national of the same State.

#### **Article 33**

The members of the Commission shall be elected by secret ballot by the Assembly of Heads of State and Government, from a list of persons nominated by the State parties to the present Charter.

#### **Article 34**

Each State party to the present Charter may not nominate more than two candidates. The candidates must have the nationality of one of the States parties to the present Charter. When two candidates are nominated by a State, one of them may not be a national of that State.

#### **Article 35**

1. The Secretary General of the Organization of African Unity shall invite State parties to the present Charter at least four months before the elections to nominate candidates.
2. The Secretary General of the Organization of African Unity shall make an alphabetical list of the persons thus nominated and communicate it to the Heads of State and Government at least one month before the elections.

#### **Article 36**

The members of the Commission shall be elected for a six year period and shall be eligible for re-election. However, the term of office of four of the members elected at the first election shall terminate after two years and the term of office of the three others, at the end of four years.

#### **Article 37**

Immediately after the first election, the Chairman of the Assembly of the Heads of State and Government of the Organization of African Unity shall draw lots to decide the names of those members referred to in article 36.

#### **Article 38**

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

#### **Article 39**

1. In case of death or resignation of a member of the Commission, the Chairman of the Commission shall immediately inform the Secretary General of the Organization of African Unity, who shall declare the seat vacant from the date of death or from the date on which the resignation takes effect.
2. If, in the unanimous opinion of other members of the Commission, a member has stopped discharging his duties for any reason other than a temporary absence, the Chairman of the Commission shall inform the Secretary General of the Organization of African Unity, who shall then declare the seat vacant.
3. In each of the cases anticipated above, the Assembly of Heads of State and Government shall replace the member whose seat became vacant for the remaining period of his term unless the period is less than six months.

#### **Article 40**

Every member of the Commission shall be in office until the date his successor assumes office.

#### **Article 41**

The Secretary General of the Organization of African Unity shall appoint the Secretary of the Commission. He shall also provide the staff and services necessary for the effective discharge of the duties of the Commission. The Organization of African Unity shall bear the costs of the staff and services.

#### **Article 42**

1. The Commission shall elect its Chairman and Vice-Chairman for a two year period. They shall be eligible for re-election.
2. The Commission shall lay down its rules of procedure.
3. Seven members shall form a quorum.
4. In case of an equality of votes, the Chairman shall have a casting vote.
5. The Secretary General may attend the meetings of the Commission.

He shall neither participate in deliberations nor shall he be entitled to vote.  
The Chairman of the Commission may, however, invite him to speak.

**Article 43**

In discharging their duties, members of the Commission shall enjoy diplomatic privileges and immunities provided for in the General Convention on the Privileges and Immunities of the Organization of African Unity.

**Article 44**

Provision shall be made for the emoluments and allowances of the members of the Commission in the Regular Budget of the Organization of African Unity.

**Chapter II**  
**Mandate of the Commission.**

**Article 45**

The functions of the Commission shall be:-

1. To promote human and peoples rights and in particular:
  - a) to collect documents, undertake studies and researches on African problems in the field of human and peoples rights, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples rights, and should the case arise, give its views or make recommendations to Governments;
  - b) To formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples rights and fundamental freedoms upon which African Governments may base their legislations;
  - c) Co-operate with other African and International Institutions concerned with the promotion and protection of human and peoples rights.
2. Ensure the protection of human and peoples rights under conditions laid down by the present Charter.
3. Interpret all the provisions of the present Charter at the request of a State party, an Institution or the OAU or an African Organization recognized by the OAU.
4. perform any other tasks which may be entrusted to it by the Assembly of Head of State and Government.

**Chapter III**  
**Procedure of the Commission.**

**Article 46**

The Commission may resort to any appropriate method of investigation; it may hear from the Secretary General of the Organization of African Unity or any other person capable of enlightening it.

Communication from States

**Article 47**

If a State party to the present Charter has good reasons to believe that another State party to this Charter has violated the provisions of the Charter, it may draw, by written communication, the attention of that State to the matter. This communication shall also be addressed to the Secretary General of the OAU and to the Chairman of the Commission. Within three months of the receipt of the communication, the State to which the communication is addressed shall give the enquiring State written explanation or statement elucidating the matter. This should include as much as possible relevant information relating to the laws and rules of procedure applied and applicable, and the redress already given or course of action available.

#### **Article 48**

It within three months from the date on which the original communication is received by the State to which it is addressed, the issue is not settled to the satisfaction of the two States involved through bilateral negotiation or by any other peaceful procedure, either State shall have the right to submit the matter to the Commission through the Chairman and shall notify the other States involved.

#### **Article 49**

Notwithstanding the provisions of article 47, if a State party to the present Charter considers that another State party has violated the provisions of the Charter, it may refer the matter directly to the Commission by addressing a communication to the Chairman, to the Secretary General of the Organization of African Unity and the State concerned.

#### **Article 50**

The Commission can only deal with a matter submitted to it after making sure that all local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged.

#### **Article 51**

1. The Commission may ask the State concerned to provide it with all relevant information.
2. when the Commission is considering the matter, States concerned may be represented before it and submit written or oral representation.

#### **Article 52**

After having obtained from the States concerned and from other sources all the information it deems necessary and after having tried all appropriate means to reach an amicable solution based on the respect of human and peoples rights, the Commission shall prepare, with a reasonable period of time from the notification referred to in article 48, a report stating the facts and its findings. This report shall be sent to the States concerned and communicated to the Assembly of Heads of State and Government.

#### **Article 53**

While transmitting its report, the Commission may make to the Assembly of Heads of State and Government such recommendations as it deems useful.

#### **Article 54**

The Commission shall submit to each ordinary Session of the Assembly of Heads of State and Government a report on its activities.

### **OTHER COMMUNICATIONS**

#### **Article 55**

1. Before each Session, the Secretary of the Commission shall make a list of the communications other than those of States parties to the present Charter and transmit them to the members of the Commission, who shall indicate which communications should be considered by the Commission.
2. A communication shall be considered by the Commission if a simple majority of its members so decide.

#### **Article 56**

Communications relating to human and peoples rights referred to in article 55 received by the Commission, shall be considered if they:

1. indicate their authors even if the latter request anonymity,
2. are compatible with the Charter of the Organization of African Unity or with the present Charter,
3. are not written disparaging or insulting language directed against the State concerned and its Institutions or to the Organization of African Unity,
4. are not based exclusively on news disseminated through the mass media,
5. are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged,

6. are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter, and
7. Do not deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter.

#### **Article 57**

Prior to any substantive consideration, all communication shall be brought to the knowledge of the State concerned by the Chairman of the Commission.

#### **Article 58**

1. When it appears after deliberations of the Commission that one or more communications apparently relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples rights, the Commission shall draw the attention of the Assembly of Heads of State and Government to these special cases.
2. The Assembly of Heads of State and Government may then request the Commission to undertake an in-depth study of these cases and make a factual report, accompanied by its findings and recommendations.
3. a case of emergency duly noticed by the Commission shall be submitted by the latter to the Chairman of the Assembly of Heads of State and Government who may request an in-depth study.

#### **Article 59**

1. All measures taken within the provisions of the present Chapter shall remain confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide.
2. However, the report shall be published by the Chairman of the Commission upon the decision of the Assembly of Heads of State and Government.
3. the report on the activities of the Commission shall be published by its Chairman after it has been considered by the Assembly of Heads of State and Government.

### **CHAPTER IV APPLICABLE PRINCIPLES**

#### **Article 60**

The Commission shall draw inspiration from international law on human and peoples rights, particularly from the provisions of various African instruments on human and peoples rights, the Charter of the United Nations, other International Human Rights instruments adopted by the United Nations and by African countries in the field of human and peoples rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members.

#### **Article 61**

The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member States of the Organization of African Unity, African practices consistent with international norms on human and peoples rights, customs generally accepted as law, general principles of law recognized by African States as well as legal precedents and doctrines.

#### **Article 62**

Each State party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter.

#### **Article 63**

1. The present Charter shall be open to signature, ratification or adherence of the member States of the Organization of African Unity.
2. The instruments of ratification or adherence to the present Charter shall be deposited with the Secretary General of the Organization of African Unity.



3. The present Charter shall come into force three months after the reception by the Secretary General of the instruments of ratification or adherence of a simple majority of the member States of the Organization of African Unity.

**PART 111  
GENERAL PROVISIONS**

**Article 64**

1. After the coming into force of the present Charter, members of the Commission shall be elected in accordance with the relevant articles of the present Charter.
2. The Secretary General of the Organization of African Unity shall convene the first meeting of the Commission at the headquarters of the Organization within three months of the constitution of the Commission. Thereafter, the Commission shall be convened by its Chairman whenever necessary but at least once a year.
- 3.

**Article 65**

For each of the States that will ratify or adhere to the present Charter after its coming into force, the Charter shall take effect three months after the date of the deposit by the State of its instrument of ratification or adherence.

**Article 66**

Special protocols or agreements may, if necessary, supplement the provisions of the present Charter.

**Article 67**

The Secretary General of the Organization of African Unity shall inform member States of the Organization of the deposit of each instrument of ratification or adherence.

**Article 68**

The present Charter may be amended if a State party makes a written request to that effect to the Secretary General of the Organization of African Unity. The Assembly of Heads of State and Government may only consider the draft amendment after all the States parties have been duly informed of it and the Commission has given its opinion on it at the request of the sponsoring State. The amendment shall be approved by a simple majority of the State parties. It shall come into force for each State which has accepted it in accordance with its constitutional procedure three months after the Secretary General has received notice of the acceptance.

# ANNEXTURE 3

## **Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human Peoples Rights.**

*Adopted at the Conference of Heads of State and Government of the OAU, Ouagadougou, Burkina Faso, on June 9, 1998; OAU/LEG/EXP/AFCHPR/PRO(111)*

The Member States of the Organization of African Unity hereinafter referred to as the OAU, States Parties to the African Charter on Human and Peoples Rights:

**Considering** that the Charter of the Organization of African Unity recognizes that freedom, equality, justice, peace and dignity are essential objectives for the achievement of 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, freedoms and duties contained in the declarations, conventions and other instruments adopted by the Organisation of African Unity, and other international organizations;

**Recognizing** 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;

**Recognizing** further, the efforts of the African Commission on Human and Peoples Rights in the promotion and protection 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 and to consider in particular the establishment of an African Court on Human and Peoples Rights;

**Noting** the first and second Government Legal Experts' meetings held respectively in Cape Town, South Africa (September, 1995) and Nouakchott, Mauritania (April, 1997), and the third Government Legal Experts meeting held in Addis Ababa, Ethiopia (December, 1997, which was enlarged to include diplomats);

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

**HAVE AGREED AS FOLLOWS:**

### **Article 1: ESTABLISHMENT OF THE COURT**

There shall be established within the Organisation of African Unity an African Court on Human and Peoples Rights hereinafter referred to as "the Court", the organization, jurisdiction and functioning of which shall be governed by the present Protocol.

**Article 2: RELATIONSHP BETWEEN THE COURT AND THE COMMISSION**

The Court shall, bearing in mind the provisions of the Protocol, 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, herein referred to as "the Charter".

**Article 3: JURISDICTION**

1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.
2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

**Article 4: ADVISORY OPINIONS**

At the request of a Member of State of the OAU, the OAU, any of its organs, or any African organization recognized by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to any matter being examined by the Commission.

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

**Article 5: ACCESS TO 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 the complain has been lodged as the Commission
  - d) The State Party whose citizen is a victim of human rights violation;
  - e) African Intergovernmental Organisations.
2. When a State Party has an interest in a case, it may submit a request to the Court to be permitted to join.
3. The Court may entitle relevant Non-Governmental Organisations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with Article 34(6) of this Protocol.

**Article 6: ADMISSIBILITY OF CASES**

1. The Court, when deciding on the admissibility of a case instituted under Article 5(3) of this Protocol, may request the opinion of the Commission which shall give it as soon as possible.
2. The Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter.
3. The Court may consider cases or transfer them to the Commission.

**Article 7: SOURCES OF LAW**

The Court shall apply the provisions of the Charter and any other relevant human rights instruments ratified by the States concerned.

**Article 8: CONSIDERATIONS OF CASES**

The rules of Procedure of the Court shall lay down the detailed conditions under which the Court shall consider cases brought before it, bearing in mind the complementarity between the Commission and the Court.

**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.

**Article 10: HEARING AND REPRESENTATION**

1. The Court shall conduct its proceedings in public. The Court may, however, conduct proceedings in camera as may be provided for in the Rules of Procedure.
2. Any party to 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 requires.

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

**Article 11: COMPOSITION**

1. The Court shall consider of eleven judges, nationals of Member State of the OAU, elect in an individual capacity from among jurists of high moral character and of recognized 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.

**Article 12: NOMINATIONS**

1. State Parties to the Protocol may each propose up to three candidates, at least two of whom shall be nationals of that state.
2. Due considerations shall be given to adequate gender representation in the nomination process.

**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 Protocol present, within ninety (90) days of such a request its nominees for the office of judge 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 Member State of the OAU, at least thirty days prior to the next session of the Assembly of Heads of State and Government of the OAU hereinafter referred to as "the Assembly".

**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 13(2) of the present Protocol.
2. The Assembly 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. In the election of the judges, the Assembly shall ensure that there is adequate gender representation.

**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 remaining of the predecessor's term.
4. All judges except President shall perform their functions on a part-time basis. However, the Assembly may change this arrangement as it deems appropriate.

**Article 16: OATH OF OFFICE**

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

**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 a member of the 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.

**Article 18: INCOMPATIBILITY**

The position of judge of the Court is incompatible with any 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 Procedures of the Court.

**Article 19: CESSATION OF OFFICE**

1. A judge shall not be suspended or removed from the office unless, by the unanimous decision of the other judges 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 decision of the Court shall become final unless it is set aside by the Assembly at its next session.

**Article 20: VACANCIES**

1. In case of death or resignation of a judge of the Court, the President of the Court shall immediately inform the Secretary-General of the Organisation of African Unity, who shall declare the seat vacant from the date of death or from the date on which the resignation takes effect.
2. The Assembly shall replace the judge whose office become vacant unless the remaining period of the term is less than one hundred and eighty (180) days.
3. The same procedure and consideration as set out in Article 12, 13 and 14 shall be followed for the filling of vacancies.

**Article 21: 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 functions on a full-time basis and shall reside at the seat of the Court.
3. The functions of the President and the Vice-President shall be set out in the Rules of Procedure of the Court.

**Article 22: EXCLUSION**

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

**Article 23: QUORUM**

The Court shall examine cases brought before it, if it has a quorum of at least seven judges.

**Article 24: REGISTRY OF THE COURT**

1. The Court shall appoint its own Registrar and other staff of the registry from among nationals of Member States of the OAU 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.

**Article 25: SEAT OF THE COURT**

1. The Court shall have its seat at the place determined by the Assembly from among States parties to the Protocol. However, it may convene in the territory of any Member State of the OAU when the 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.

**Article 26: EVIDENCE**

1. The Court shall hear submissions by all parties and if deemed necessary, hold an enquiry. The State concerned shall assist by providing relevant facilities for the efficient handling of the case.
2. The Court may receive written and oral evidence including expert testimony and shall make its decision on the basis of such evidence.

**Article 27: FINDINGS**

1. If the Court finds that there has been a violation of human and peoples right, 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.

**Article 28: JUDGEMENT**

1. The Court shall render its judgement within ninety (90) days of having completed its deliberations.
2. The judgement of the Court decided by majority shall be final and not subject to appeal.
3. Without prejudice to sub-article 2 above, the Court may review its decision in the light of new evidence under conditions to be set out in the Rules of Procedure.
4. the Court may interpret its own decision
5. The judgement of the Court shall be read in open court, due notice having been given to the parties.
6. Reasons shall be given for the judgement of the Court.
7. If the judgement of the Court does not represent, in whole or in part, the unanimous decision of the judges, any judge shall be entitled to deliver a separate or dissenting opinion.

**Article 29: NOTIFICATION OF JUDGEMENT**

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

**Article 30: EXECUTION OF JUDGEMENT**

The State parties to the present Protocol undertake to comply with the judgement in any case to which they are parties within the time stipulated by the Court and to guarantee its execution.

**Article 31: 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 a State has not complied with the Court's judgement.

**Article 32: BUDGET**

Expenses of the Court, emoluments and allowances for the 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.

**Article 33: RULES OF PROCEDURE**

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

**Article 34: 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 thirty days after fifteen instruments of ratification or accession have been deposited.
4. For any State Party ratifying or acceding subsequently, the present Protocol shall come into force in respect of the State on the date of the deposit of its instrument of ratification or accession.
5. The Secretary-General of the OAU shall inform all Member States of the entry into force of the present Protocol.
6. At any time of ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5(3) of this Protocol. The Court shall not receive any petition under article 5(3) involving a State Party which has not made such a declaration.

7. Declarations made under sub-article (6) above shall be deposited with the Secretary-General, who shall transmit copies thereof to the State parties.

**Article 35: 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 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 thirty days after the Secretary-General of the OAU has received notice of the acceptance.

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# ANNEXTURE 4

## Decision on the Seats of the African Union

*Assembly of the African Union Third Ordinary Session 6 – 8 July, 2004: Addis Ababa, Ethiopia; Assembly/AU/Dec. 45 (III)*

1. TAKES NOTE of the proposal submitted by the Great Socialist Libyan Arab Jamahiriya;
2. DECIDES that the AU Commission is an integral part of the Headquarters of the Union as stipulated in Article 24 of the Constitutive Act;
3. DECIDES that the Organs of the Union should be located in different regions of Africa on the basis of the principle of geographical distribution;
4. FURTHER DECIDES that the African Court on Human and Peoples' Rights and the Court of Justice should be integrated into one Court;
5. REQUESTS the Chairperson to work out the modalities on implementing Paragraph 4 above and submit a report to our next Ordinary Session.

**<http://www.Africaunion.org/av>**



# ANNEXTURE 5

This is the html version of the file [http://www.iss.co.za/AF/RegOrg/unity to union/pdfs/au/sirtejul05/protcourts.pdf](http://www.iss.co.za/AF/RegOrg/unity%20union/pdfs/au/sirtejul05/protcourts.pdf).

**AFRICAN UNION**

**UNION AFRICAINE**

**UNIAO AFRICANA**

**Addis Ababa, ETHIOPIA**

**P.O. Box 3243 Telephone 517 700 Fax: 517844**

**EX.CL/195 (VII)**

**Annex 1**

**DRAFT PROTOCOL ON THE INTEGRATION OF THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS AND THE COURT OF JUSTICE OF THE AFRICAN UNION**

**EX.CL./195 (VII)**

**Annex 1**

**Page 1**

**DRAFT PROTOCOL ON THE INTEGRATION OF THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS AND THE COURT OF JUSTICE OF THE AFRICAN UNION**

The member States of the African Union, States Parties to the Protocol on the Establishment of the African Court on Human Peoples' Rights and the Protocol of the Court of Justice of the African Union:

**Considering** that the Constitutive Act established the Court of Justice of the African Union as the principal judicial organ of the Union;

**Noting** that the Protocol on the establishment of the African Court on Human and Peoples' Rights entered into force on 25 January 2004;

Recalling Decision Assembly of the Union meeting in Addis Ababa, Ethiopia from 6 to 8 July 2004 to integrate the African Court on Human and Peoples' Rights and the Court of Justice of the African Union into one Court, and requesting the Chairperson of the Commission to work out the modalities for implementing that decision;

**Recalling** Further Decision EX.CL/162 (VI) of the Executive Council at its Sixth Ordinary Session held in Abuja, Nigeria from 24 to 28 January 2005 referring the recommendations of the Commission and the PRC on the integration of the Courts, as well as the draft legal instrument prepared by the Commission, to a meeting of the PRC and Government Legal Experts for finalization and submission to the Seventh Ordinary Session of the Executive Council in July 2005, without prejudice to the Operationalisation of the African Court on Human and Peoples' Rights as far as possible.

**Reaffirming** the commitment of the Union to the strengthening and enhancement of the protection of human and peoples' rights in Africa;

**Recognizing** that the integration of the two courts will enhance their capacity to attain the objectives of the two courts and of the Union as a whole;

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**Page 2**

**Further** recognizing that the decision to integrate the two courts was based on the need to rationalize the judicial structures of the Union and to make them more efficient and effective; and

Firmly convinced of the urgent need for the early operationalisation of the court of justice and Human Rights of the African Court on Human and Peoples' rights and the court of justice of the African Union;

**HAVE AGREED AS FOLLOWS:**

**ARTICLE 1:**

**DEFINITIONS**

In this protocol, unless otherwise specifically stated:

'Assembly' means the Assembly of Heads of State and Government of the Union;

"Chamber" means a chamber of the court established in accordance with this Protocol and the rules of court;

"Chamber" means a Chamber of the court established in accordance with this protocol and Rules of court;

"Commission" means the commission of the Union;

"**Court**" means the court established in terms of article 2 of this protocol;

"Court of justice" means the court of justice of the African union;

"Division" means a Division of the Court established in accordance with this protocol and the Rules of Court;

"Human Rights Court" means the African Court on Human and peoples' Rights;

"President" means the person or persons elected as such in accordance with this protocol;

"Regions" means the geographical regions into which a decision of the assembly;

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**Annex I**

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"Rules of **Court**" means the rules made under Articles 33 and 58 respectively of the protocols on the Human Rights Court and the Court of Justice;

"Vice -President" means the person or persons elected as such in accordance with this protocol.

**ARTICLE 2:**

**ESTABLISHMENT OF THE COURT**

**1.**

Article 1 of the Protocol on the Human Rights Court and Article 2 paragraph (1) of the protocols of the Court of Justice are deleted and substituted with the following provision:

"The Court of Justice and Human Rights of the African Union hereby established shall function in accordance with the provisions of the Court of Justice."

**2.**

The **Court** shall be the principal judicial organ of the ion and shall be committed to the promotion of justice is amended to read as follows:

**3.**

Article 2 of the Protocol of the court of justice is amended by the insertion after paragraph 2 of the following provision:

**"3.**

The court shall be constituted by a specialized Human and peoples' Rights Judicial Division established under this Protocol and any other Judicial Division established by decision of the Assembly after obtaining the opinion of the Court or upon recommendation of the court and which shall operate under the provisions of this Protocol."

**ARTICLE 3:**

**COMPOSITION**

**1.**

Article 3 paragraph 1 of the Protocol of the Court of justice (Composition) is amended to read as follows:

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“ 1.

The court shall consist of fifteen (15) judges who are nationals of states Parties, at least seven (7) of whom shall have competence in human and peoples’ rights.”

2. Article 3 of the Protocol of the court, the assembly shall ensure that there is equal gender representation.”

3.

Article 11 of the Protocol on the Human Rights court is deleted.

**ARTICLE 4:**

**QUALIFICATIONS**

Article 4 of the Protocol of court of justice ( Qualifications) is deleted and substituted with the following provision:

“1

The court shall be composed of impartial and independent judges elected in an individual capacity from among jurists of high moral character.

“2

A judge of the Court shall possess the necessary practical, judicial or academic qualifications required in his or her country for appointment to the highest judicial offices, or shall be a jurist of recognized competence and experience in the field of international law and/ or human peoples’ rights.”

**ARTICLE 5:**

**SUBMISSION OF CANDIDATES**

Article 12 paragraphs 1 and 2 of the protocol on the Human Rights Court and article 5 paragraphs 2 and 3 of the protocol of court of justice are deleted and substituted with the following provision:

“Each state Party may nominate up to two (2) of its nationals as candidates possessing the required qualifications stipulated in this protocol, at least one (1) of whom shall be a woman.”

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**ARTICLE 6:**

**TERM OF OFFICE**

Paragraphs 1 and 2 of Article 15 of the Protocol on the Human Rights court are deleted and substituted with the following provision:

“1.

The Judges shall be elected for a period of six (6) years and may be re-elected only once. The term of five (5) judges elected at the first election shall expire at the of four (4) years and the other judges shall serve the full term.

2.

The Judges whose terms are to expire at the end of the initial period of four (4) years shall be chosen by lot to be drawn by the Chairperson of the Assembly after the first election has been completed.”

**ARTICLE 7**

**OATH OF OFFICE**

Article 16 of the Protocol on the Human Rights court is deleted and substituted with the following provision:

“1.

Before taking up his or her duties each Judge shall, in open court, take the following oath:

“I ....., do solemnly swear (or affirm or declare) that I shall faithfully exercise the duties of my office as Judge of the Court of justice and Human Rights of the

African Union impartially and conscientiously, without fear of favour, affection or ill-will and that I will preserve the secrecy of the deliberations of the Court.”

2.

The oath of office shall be administered by the Chairperson of the Assembly or his her duly authorized representative.”

#### **ARTICLE 8:**

##### **PRESIDENCY OF THE COURT**

Article 10 of the Protocol of the Court of Justice is deleted and substituted with the following provision:

“1.

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

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2.

The President shall perform judicial functions on a full- time basis and reside at the Court.”

#### **ARTICLE 9:**

##### **RESIGNATION, SUSPENSION AND REMOVAL FROM OFFICE**

1.

Article 11 of the protocol of the Court of Justice is amended to read as follows:

a) in paragraph 1:

“A judge may resign his or resign his or her position in writing addressed to the President for transmission to the Chairperson of the Assembly. The resignation shall take effect thirty (30) days after notification to the Chairperson of the Assembly.”

b)in paragraph 3:

“ The President shall communicate in writing, the resignation or the recommendation for suspension or removal of a judge to the Chairperson of the Assembly and the Chairperson of the Commission.”

c)in paragraph 4:

“ A recommendation of the Court to suspend a Judge shall become final unless set aside by the Assembly and a recommendation to remove a judge shall take effect upon its endorsement by the Assembly.”

2.

Article 19 of the protocol on the Human Rights **COURT** is deleted and substituted with Article 11 of the protocol of the **Court of Justice** as amended in paragraph 1 of this Article.

#### **ARTICLE 10: VACANCIES**

1.

Article 12 of the protocol of the court of justice is amended by the insertion after paragraph 2, with consequential re-numbering of the subsequent sub-paragraphs, of the following provision:

2.

The assembly shall replace the judge whose office became vacant unless the remaining period of the term is less than one hundred and eighty (180) days.”

3.

Article 20 of the Protocol on Human rights **Court** is deleted and replaced by Article 12 of the protocol of the **court** of Justice as amended above.

#### **ARTICLE 11: INDEPENDENCE**

1.

Article 13 paragraph 2 of the protocol of the court of justice is amended to read as follows:

“2. No judge may participate in the decision of any case in which he or she has an interest or where he or she 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 commission of inquiry, or in any other capacity.”

2. Article 17 paragraph 2 of Protocol on the human Rights Court is amended to read as follows:  
“2.

No judge may hear any case in which the same judge has an interest or where he or she 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.”

#### **ARTICLE 12:**

##### **QUORUM**

1.

Article 16 paragraph 1 of the protocol of the court of justice is “1.

The full court shall sit except where it is expressly provided otherwise in this Protocol or by Rules of Court.”

2.

Article 16 paragraph 2 of the protocol of the **court of Justice** is amended to read as follows:

“2.

The Court shall only examine cases brought before it, if it has a quorum of at least seven (7) judges.”

3.

Article 16 of the protocol of the **Court of Justice** is amended by the insertion, after paragraph 2 as amended in paragraph 2 of this article, with consequential re-numbering of the subsequent sub-paragraphs, of the following provision:

“3.

The quorum for a specialized judicial Division shall be set out in the rules **Court.**”

4.

Article 16 of the protocol of the court of Justice is amended by the insertion, after paragraph 3 and with consequential rein-numbering of the subsequent sub-paragraphs, of the following provision:

“4.

The Court may, in accordance with rules of Court, establish special chambers.”

5. Paragraph 3 of the protocol of the court of Justice shall become paragraph 5.

#### **ARTICLE 13: SIGNATURE AND RATIFICATION OR ACCESSION**

1.

Subject to the provisions of paragraph 2 of this article, this protocol shall be open for signature and ratification or accession by States Parties to the Protocol on the Human rights Court and the Protocol of the Court of Justice in accordance with their respective constitutional procedures.

2.

A member State that has not ratified either Protocol; on the human Rights Court or the protocol of the court of justice may do so only provided that, at the time of ratification of or accession to either of the protocol aforesaid, as the case may be.

3.

The instruments of ratification shall be deposited with the chairperson of the Commission.

4.

Any Member State acceding this protocol after entry into force shall be deposit the instrument of accession with the Chair person of the Commission.

1.

A state making a declaration under paragraph 4 of this artical shall deposit such declaration with the Chairperson of the Commission, who shall transmit copies thereof to the states Parties.

**ARTICLE 14: ENTRY INTO FORCE**

1.

This protocol shall provisionally enter into force thirty (30) days after being signed by a least fifteen (15) member states.

2.

It shall finally enter into force (30) days after the deposit of the instrument of ratification by fifteen (15) Member states.

**ARTICLE 15: SAVINGS**

In the event of any inconsistency between the provisions of this protocol and any provision of the protocol on human rights court or the Protocol of the Court of Justice, the provisions of this protocol shall, to the extent of the inconsistency, take precedence.

**ARTICLE 16:**

**REVIEW OF THE PROTOCOL**

The assembly may, at such intervals and in such manner as it may deem fit, provide for a review of the functioning of the court and for the elaboration of a single legal instrument relating thereto, provided that the review foresaid shall be carried out not more than six (6) years after the entry into force of this protocol.

# ANNEXTURE 6

## PROTOCOL OF THE COURT OF JUSTICE OF THE AFRICAN UNION

The Member States of the African Union:

**Considering** that the Constitutive Act established the Court of Justice of the African Union;  
**Firmly convinced** that the attainment of the objectives of the African Union requires the establishment of the Court of Justice of the African Union;

**HAVE AGREED AS FOLLOWS:**

### CHAPTER 1

#### Article 1 DEFINITIONS

In this protocol unless otherwise specifically stated:

- “**Act**” means the Constitutive Act of the Union;
- “**Assembly**” means the Assembly of Heads of State and Government of the Union;
- “**Commission**” means the Commission of the Union;
- “**Court**” means the Court of Justice of the Union;
- “**ECOSOCC**” means the Economic, Social and Cultural Council of the Union;
- “**Executive Council**” means the Executive Council of Ministers of the Union;
- “**Financial Institutions**” means the Financial Institutions established by the Constitutive Act;
- “**Judge**” means a judge of the Court;
- “**Member State**” means a Member State of the Union;
- “**Parliament**” means the Pan-African Parliament of the Union;
- “**Peace and Security Council**” means the Peace and Security Council of the Union;
- “**President**” means the President of the Court;
- “**Protocol**” means this Protocol defining the composition, powers and functions of the Court;
- “**Regions**” means the geographical regions into which the continent of Africa, at any time, is divided pursuant to a decision of the Assembly;
- “**Rules of Court**” means the Rules of Court under Article 58;
- “**Registrar**” means the Registrar of the Court;
- “**States Parties**” means the Member States that have ratified or acceded to this Protocol;
- “**Union**” means the African Union established by the Act;
- “**Vice President**” means the Vice President of the Court;

#### Article 2 ESTABLISHMENT OF THE COURT

1. The Court established by the Act shall function in accordance with the provisions of the Act and this Protocol.
2. The Court shall be the principal judicial organ of the Union.

#### Article 3 COMPOSITION

1. The Court shall consist of eleven (11) Judges who are nationals of States Parties.
2. The Assembly may, when it deems it necessary, review the number of Judges
3. The Judges shall be assisted by the necessary staff for the smooth functioning of the Court.
4. No two (2) Judges shall be nationals of the same State Party
5. In the Court as a whole, the representation of the principal legal traditions of African shall be assured.

6. Each region shall be represented by no less than two (2) Judges.

## **CHAPTER II**

### **Article 4**

#### **QUALIFICATION**

The Court shall be composed of impartial and independent Judges elected from among persons of high moral character, who possess the necessary qualifications required in their respective countries for appointment to the highest judicial offices, or are jurists of recognized competence in international law.

### **Article 5**

#### **SUBMISSION OF CANDIDATES**

1. Upon entry into force of this Protocol, the Chairperson of the Commission shall request each State Party to submit in writing within ninety (90) days of such a request, its nomination for the office of a Judge of the Court.
2. Each State Party may nomination only one (1) candidate having the qualifications prescribed in Article 4 of this Protocol.
3. Due consideration shall be given to adequate gender representation in the nomination process.

### **Article 6**

#### **LIST OF CANDIDATES**

The Chairperson of the Commission shall prepare a list of the candidates nominated, in alphabetical order and transmit it to the Member State at least thirty (30) days prior to the ordinary session of the Assembly at which the Judges are to be the elected.

### **Article 7**

#### **ELECTION OF JUDGES OF THE COURT**

1. The Assembly shall elect the Judges by secret ballot and by two-thirds majority of the Member States eligible to vote.
2. Where one or more candidates fail to obtain the two-thirds majority required for an election, the balloting shall continue until the required number of Judges has been elected. However, the next ballots shall be restricted to the candidates who obtain the greatest number of votes.
3. In the election of the Judges, the Assembly shall ensure that there is equal gender representation.

### **Article 8**

#### **TENURE OF OFFICE**

1. The Judges shall be elected for a period of six (6) years and may be re-elected only once. The term of five (5) Judges elected at the first election shall expire at the end of four (4) years and the other Judges shall serve the full term.
2. The Judges whose terms are to expire at the end of the initial period of four (4) years shall be chosen by lot to be drawn by the Chairperson of the Assembly immediately after the first election has been completed.
3. A Judge elected to replace another Judge whose term of office has not expired shall be from the same region and shall hold office for the remainder of the predecessor's term.

### **Article 9**

#### **OATH OF OFFICE**

1. Before taking up his or her duties each Judge shall in open court take the following oath:

"I ..... Do solemnly swear (or affirm or declare) that I shall faithfully exercise the duties of my office as Judge of the Court of Justice of the African Union impartially and conscientiously, without fear or favour, affecting or illwill and that I will preserve the secrecy of the deliberations of the Court".

2. The oath of office shall be administered by the Chairperson of the Assembly or his or her duly authorized representative.



Article 10

**PRESIDENCY OF THE COURT**

1. The Court shall elect its President and Vice-President for a period of three (3) years. The President and Vice-President may be re-elected once.
2. The President shall reside at the seat of the Court.
3. The modalities for elections of the President and the Vice-President and their functions shall be set out in the Rules of Court.

Article II

**RESIGNATION, SUSPENSION AND REMOVAL FROM OFFICE**

1. A Judge may resign his or her position in writing addressed to the President for transmission to the Chairperson of the Assembly.
2. A Judge shall not be suspended or removed from office save where, on the unanimous recommendation of the other Judges, he or she no longer fulfils the requisite conditions to be a judge.
3. The President shall communicate the recommendation for the suspension or removal of a judge to the Chairperson of the Assembly and the Chairperson of the Commission.
4. Such a recommendation of the Court shall become final upon its adoption by the Assembly.

Article 12

**VACANCIES**

1. A vacancy shall arise in the Court under the following circumstances:
  - (a) Death
  - (b) Resignation
  - (c) Removal from office.
2. In the case of death or resignation of a Judge, the President shall immediately inform the Chairperson of the Assembly in writing, who shall declare the seat vacant.
3. The same procedure and consideration for the election of a Judge shall also be followed in filling vacancies.

Article 13

**INDEPENDENCE**

1. The independence of the Judges shall be fully ensured in accordance with international law.
2. No Judge may participate in the decision of any case in which he or she 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 commission of inquiry, or in any other capacity.
3. Any doubt on this point shall be settled by decision of the Court.

Article 14

**PRIVILEGES AND IMMUNITIES**

1. The Judges shall enjoy, from the time of their election and throughout their term of office, the full privileges and immunities extended to diplomatic agents in accordance with international law.
2. The Judges shall be immune from legal proceedings for any act or omission committed in the discharge of their judicial functions.
3. The Judges shall continue, after they have ceased to hold office, to enjoy immunity in respect of acts performed by them when engaged in their official capacity.

Article 15

**INCOMPATIBILITY**

1. The position of a Judge shall be incompatible with any 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 Court.
2. Any doubt on this point shall be settled by the Court.

## Article 16

### **QUORUM**

1. The full Court shall sit except where it is expressly provided otherwise in this Protocol
2. except when sitting in Chamber, the Court shall only examine cases brought before it, if it has a quorum of at least seven (7) Judges;
3. The quorum for a Special Chamber shall be set out in the Rules of Court.

## Article 17

### **RENUMERATION OF JUDGES**

1. A Judge shall receive an annual allowance and, for each day on which he or she exercises his or her functions, a special allowance, provided that in any year the total sum payable to any Judge as special allowance shall not exceed the amount of the annual allowance.
2. The President shall receive an additional special annual allowance.
3. The Vice-President shall receive an additional special allowance for each day on which he or she acts as President.
4. The allowance shall be determined from time to time by the Assembly upon the recommendation of the Executive Council, taking into account the workload of the Court. They may not be decreased during the term of office.
5. Regulations adopted by the Assembly upon the recommendation of the Executive Council shall determine the conditions under which retirement pensions shall be given to the Judges and the terms and conditions under which their travel expenses shall be paid or refunded.
6. The allowance shall be free of all taxation.

## Article 18

### **ELIGIBILITY TO SUBMIT CASES**

1. The following are entitled to submit cases to the Court:
  - (a) States Parties to this Protocol.
  - (b) The Assembly, the Parliament and other organs of the Union authorized by the Assembly;
  - (c) The Commission or a member of staff of the Commission in a dispute between them within the limits and under the conditions laid down in the Staff Rules and Regulations of the Union;
  - (d) Third Parties under conditions to be determined by the Assembly and with the consent of the State Party concerned.
2. The conditions under which the Court shall be open to third parties shall, subject to the special provisions contained in treaties in force, be laid down by the Assembly, but in no case shall such conditions place the parties in a position of inequality before the Court.
3. The States which are not members of the Union shall not be allowed to submit cases to the Court. The Court shall have no jurisdiction to deal with a dispute involving a Member State that has not ratified this Protocol.

## Article 19

### **COMPETENCE/JURISDICTION**

1. The Court shall have jurisdiction over all disputes and applications referred to it in accordance with the Act and this Protocol which relate to:
  - (a) the interpretation and application of the Act;
  - (b) the interpretation, application or validity of Union treaties and all subsidiary legal instruments adopted within the framework of the Union;
  - (c) any question of international law;
  - (d) all acts, decisions, regulations and directives of the organs of the Union;

- (e) all matters specifically provided for in any other agreements that States Parties may conclude among themselves or with the Union and which confer jurisdiction on the Court;
  - (f) the existence of any fact which, if established, would constitute a breach of an obligation owed to a State Party or to the Union;
  - (g) the nature or extent of the reparation to be made for the breach of an obligation.
2. The Assembly may confer on the Court power to assume jurisdiction over any dispute other than those referred to in this Article.

## **CHAPTER 11**

### Article 20

#### **SOURCES OF LAW**

1. The Court, whose function is to decide in accordance with international law such disputes, as are submitted to it, shall have regard to:
  - (a) The Act;
  - (b) International treaties whether general or particular, establishing rules expressing recognized by the contesting states;
  - (c) International custom, as evidence of a general practice accepted as law;
  - (d) The general principles of law recognized universally or by African States;
  - (e) Subject to Article 37 of this Protocol, judicial decisions and the writings of the most highly qualified publicists of various nations as well as the regulations, directives and decisions of the Union as subsidiary means for the determination of the rules of law.
2. This provision shall not prejudice the power of the Court to decide a *case ex aequo et bono*, if the parties, agree thereto.

## **CHAPTER IV**

### Article 21

#### **SUBMISSION OF A DISPUTE**

1. Disputes shall be submitted to the Court by a written application to the Registrar. The subject of the dispute, the application law and basis of the jurisdiction shall be indicated.
2. The registrar shall forthwith give notice of the application to all concerned parties.
3. The Registrar shall also notify all Member States, the Chairperson of the Commission and any third parties entitled to appear before the Court.

### Article 22

#### **PROVISIONAL MEASURES**

1. The Court shall have the power, on its own motion or on application by the parties, to indicate, if it considers that circumstances so require any provisional measures which ought to be taken to preserve the respective rights of the parties.
2. Pending the final decision, notice of the provisional measures shall forthwith be given to the parties and to the Chairperson of the Commission.

### Article 23

#### **REPRESENTATION OF PARTIES**

1. The parties may be represented before the Court by agents.
2. An agent or party may have the assistance of counsel or advocate before the Court.
3. The organs of the Union, where relevant, shall be represented by the Chairperson of the Commission or his or her representative.

4. The agents, counsel and advocates of the parties before the Court shall enjoy the privileges and immunities necessary to the independent exercise of their duties.

Article 24

**PROCEDURE BEFORE THE COURT**

1. The procedure before the Court shall consist of two parts: written and oral.
2. The written procedure shall consist of the communications to the Court, the parties and the institutions of the Union whose decisions are in dispute, of applications, statements of the case, defences and observations and of replies if any, as well as all papers and documents in support, or of certified copies thereof.
3. The communications shall be made through the Registrar, in the order and time fixed by the Court either in the Rules or the case.
4. A certified copy of every document produced by one party shall be communicated to the other party.
5. The oral proceedings shall, if necessary, consist of hearing by the Court of witnesses, experts, agents, counsels and advocates.

Article 25

**SERVICE OF NOTICE**

1. For the service of all notices upon persons other than parties, agents, counsel and advocates, the Court shall apply direct to the government of the State upon whose territory the notice has to be served.
2. The same provision shall apply whenever steps are to be taken to procure evidence locally in the territory of the State concerned.

Article 26

**PUBLIC HEARING**

The hearing in Court shall be public, unless the Court, on its own motion or upon application by the parties, decides that the public not be admitted.

Article 27

**RECORD OF PROCEEDINGS**

1. A record of proceedings shall be made at each hearing and shall be signed by the presiding Judge and the Registrar of the session.
2. Such a record shall be kept by the Registrar and shall be the authentic record of the case.

Article 28

**REGULATION OF PROCEEDINGS**

1. The Court shall have the power to regulate its own proceedings. It shall have the power to make orders for the conduct of the case before it.
2. It shall decide the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking of evidence.

Article 29

**PRODUCTION OF DOCUMENTS**

The Court may, before the hearing begins, call upon the agents to produce any relevant document or to supply any relevant explanation. Formal note shall be taken of any refusal to produce documentations or supply an explanation requested by it.

Article 30

**ENQUIRIES**

The Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, and accepted by the parties to the dispute, with the task of carrying out an enquiry or giving an expert opinion.

Article 31

**REFUSAL OF EVIDENCE**

After the Court has received the proofs and evidence within the time specified for the purpose, it may, unless it decides that the interests of justice so require, refuse to accept any further oral or written evidence that any party may desire to present.

Article 32

**DEFAULT JUDGEMENTS**

1. Whenever one of the parties does not appear before the Court, or fails to defend the case against it, the other party may call upon the Court to give its Judgement.
2. The Court must before doing so, satisfy itself, not only that it has jurisdiction in accordance with Article 19, but also that the claim is well founded in fact and in law and that the other party had due notice.
3. An Objection by the party concerned may be lodged against the judgement within ninety (90) days of it being notified of the default judgement. The objection shall not have the effect of staying the enforcement of the judgement by default.

Article 33

**CONSIDERATION OF THE JUDGEMENT**

1. When, subject to the control of the Court, the agent, counsel and advocates have completed their submissions of the case, the President shall declare the hearing closed.
2. The Court shall adjourn to consider its judgement.
3. The deliberations of the Court shall take place in private and shall remain secret at all times.

Article 34

**MAJORITY NECESSARY FOR DECISION**

1. All questions shall be decided by a majority of the Judges present
2. In the event of equality of votes, the presiding Judge shall have a casting vote.

Article 35

**JUDGMENT**

1. The judgment shall state the reasons on which it is based.
2. The judgment shall state the names of Judges who have taken part in the decision.
3. The judgment shall be signed by all the Judges and certified by the President and the Registrar. It shall be read in open session, due notice having been given to the agents.
4. Subject to Article 32 and 41 of this Protocol, the judgment shall be final.

Article 36

**SEPARATION OR DESSENTING OPINION**

If the judgment 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.

Article 37

**BINDING FORCE OF JUDGMENTS**

The judgments of the Court shall be binding on the parties and in respect of that particular case.

Article 38

**DECISIONS ON INTERPRETATION AND APPLICATION OF THE ACT**

1. Decisions of the Court on the interpretation and application of the Act shall be binding on Member States and organs of the Union notwithstanding the provisions of Article 37 of this Protocol.
2. Whenever questions of interpretation of the Act arise in a case in which States other than those concerned have expressed an interest, the Registrar shall notify all such States and organs of the Union forthwith.
3. Every Member State and organ of the Union so notified has the right to intervene in the proceedings.
4. any decision taken in application of Articles 38 and 39 of this Protocol shall be by a qualified majority of at least two (2) votes and in the presence of at least nine (9) Judges.

Article 39

**INTERPRETATION OF OTHER TREATIES**

1. Whenever the question of interpretation of a treaty arises in a case in which States other than those concerned have expressed an interest, the Registrar shall notify all such States and organs of the union forthwith.
2. Every State Party and organ of the Union so notified has the right to intervene in the proceedings and the interpretation given by the judgment will be equally binding upon it.

Article 40

**INTERPRETATION OF A JUDGEMENT**

In the event of any dispute as to the meaning or scope of the judgement, the Court shall construe it upon the request of any of the parties.

Article 41

**REVISION**

1. An application for revision of a judgment may be made only when it is based upon discovery of a new fact of such nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, provided that such ignorance was not due to negligence.
2. The proceedings for revision shall be opened by a ruling of the Court expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision, and declaring the revision admissible on this ground.
3. The Court may require prior compliance with the terms of the judgement before it admits proceedings in revision.
4. The application for revision shall be made within six (6) months of the discovery of the new fact.
5. No application may be made after the lapse of ten (10) years from the date of the judgment.

Article 42

**INTERVENTION**

1. Any Member State that has an interest of a legal nature, which may be affected by the decision in the case, may submit a request to the Court to be permitted to intervene.
2. The Court shall decide upon the request.

Article 43

**COSTS**

Unless otherwise decided by the Court, each party shall bear its own costs.

Article 44

**ADVISORY OPINION**

1. The Court may give an advisory opinion on any legal question at the request of the Assembly, the Parliament, the Executive Council, the Peace and Security Council, the ECOSOCC, any of the Financial Institutions, a Regional Economic Community or such other organs of the Union as may be authorized by the Assembly.
2. A request for an advisory opinion under paragraph 1 of this Article shall be in writing and shall contain an exact statement of the question upon which the opinion is required and shall be accompanied by all relevant documents.

**CHAPTER V**

Article 45

**PROCEDURE FOR AMENDMENTS**

1. This Protocol may be amended if a State Party makes a written request to that effect to the Chairperson of the Assembly.
2. Proposals for amendment shall be submitted to the Chairperson of the Commission who shall transmit same to Member States within thirty (30) days of receipt thereof.

3. The Assembly may adopt by a simple majority, the draft amendment after the Court has given its opinion on the amendment.

Article 46

**POWER OF THE COURT TO PROPOSE AMENDMENTS**

The Court shall have the power to propose such amendments to this Protocol as it may deem necessary to the Assembly through written communication to the Chairperson of the Commission for consideration in conformity with Article 45 of this Protocol.

**CHAPTER VI**

Article 47

**SEAT AND SEAL OF THE COURT**

1. The seat of the Court shall be determined by the Assembly from among States Parties. However, the Court may sit in any other Member State if circumstances warrant and with the consent of the Member State concerned. The seat of the Court may be changed by the Assembly after due consultations with the Court.

**CHAPTER VII**

Article 48

**APPOINTMENT OF REGISTRAR**

1. The Court shall appoint the Registrar and Deputy Registrar (s) from amongst candidates proposed by the Judges of the Court, as it considers necessary, in accordance with the Rules of Court.
2. The Registrar and Deputy Registrar(s) shall be elected for a term of four (4) years. They may be re-appointed once. They shall reside at the seat of the Court.
3. The salary and conditions of service of the Registrar and Deputy Registrar(s) shall be determined by the Assembly upon recommendation of the Court through the Executive Council.

Article 49

**APPOINTMENT AND TERMS OF SERVICE OF OTHER STAFF**

1. The Court shall employ such staff as may be required to enable the Court to perform its functions and who shall hold office in the service of the Court.
2. The salary and other allowances of the other staff of the Court shall be determined by the Assembly upon the recommendation of the Court through the Executive Council.

Article 50

**OFFICIAL LANGUAGES OF THE COURT**

The official and working languages of the Court shall be those of the Union.

**CHAPTER VIII**

Article 51

**EXECUTION OF JUDGMENT**

The State Parties shall comply with the judgment in any dispute to which they are parties within the time stipulated by the Court and shall guarantee its execution.

Article 52

**NON – COMPLIANCE WITH JUDGMENT**

1. Where a party has failed to comply with a judgment, the Court may, upon application by either party, refer the matter to the Assembly, which may decide upon measures to be taken to give effect to the judgment.

2. The Assembly may impose sanctions under paragraph 2 of Article 23 of the Act.

Article 53

#### **REPORT TO THE ASSEMBLY**

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

### **CHAPTER IX**

Article 54

#### **BUDGET**

1. The Court shall elaborate its draft annual budget and shall submit it to the Assembly through the Executive Council.
2. The budget of the Court shall be borne by the Member States.

Article 55

#### **SUMMARY PROCEDURE**

With a view to the speedy dispatch of business, the Court shall form annually a chamber composed of five (5) Judges, which, at the request of the parties, may hear and determine cases by summary procedure in accordance with the Rules of Court. In addition, two (2) Judges shall be selected from among themselves for the purpose of replacing Judges who find it impossible to sit.

Article 56

#### **SPECIAL CHAMBERS**

The Court may from time to time form one or more chambers, composed of three (3) or more Judges as the Court may determine, for dealing with particular categories of cases.

Article 57

#### **JUDGMENT GIVEN BY A CHAMBER**

A judgment given by any of the chambers provided for in Articles 55 and 56 of this Protocol shall be considered as rendered by the Court.

### **CHAPTER X**

Article 58

#### **RULES OF COURT**

The Court shall frame rules for carrying out its functions and generally for giving effect to this Protocol. In particular, it shall lay down rules of procedure in conformity with this Protocol.

Article 59

#### **SIGNATURE, RATIFICATION AND ACCESSION**

1. This Protocol shall be open to signature, ratification and accession by Member States in accordance with their respective constitutional procedures.
2. The instruments of ratification shall be deposited with the Chairperson of the Commission.
3. Any Member State acceding to this Protocol after its entry into force shall deposit the instrument of accession with the Chairperson of the Commission.

Article 60

#### **ENTRY INTO FORCE**

This Protocol shall enter into force thirty (30) days after the deposit of the instruments of ratification by fifteen (15) Member States.

**Adopted by the 2<sup>nd</sup> Ordinary Session  
of the Assembly of the Union  
Maputo, 11 July 2003**



**PROTOCOL OF THE COURT OF JUSTICE OF THE AFRICAN UNION**

1. **People's Democratic Republic of Algeria**  
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2. **Republic of Angola**  
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3. **Republic of Benin**  
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4. **Republic of Botswana**  
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5. **Burkina Faso**  
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6. **Republic of Burundi**  
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7. **Republic of Cameroon**  
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8. **Republic of Cape Verde**  
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9. **Central African Republic**  
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10. **Republic of Chad**  
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11. **Union of the Comoros**  
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12. **Republic of the Congo**  
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13. **Republic of Cote d'Ivoire**  
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14. **Democratic Republic of Congo**  
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15. **Republic of Djibouti**  
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16. **Arab Republic of Egypt**  
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17. **State of Eritrea**  
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18. **Federal Democratic Republic of Ethiopia**  
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19. **Republic of Equatorial Guinea**  
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20. **Republic of Gabon**  
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21. **Republic of the Gambia**  
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22. **Republic of Ghana**  
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23. **Republic of Guinea**  
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24. **Republic of Guinea Bissau**  
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25. **Republic of Kenya**  
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26. **Kingdom of Lesotho**  
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27. **Republic of Liberia**  
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28. **Great Socialist People's Libyan Arab Jamahiriya**  
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29. **Republic of Madagascar**  
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30. **Republic of Malawi**  
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31. **Republic of Mali**  
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32. **Islamic Republic of Mauritania**  
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33. **Republic of Mauritius**  
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34. **Republic of Mozambique**  
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35. **Republic of Namibia**  
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36. **Republic of Niger**  
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37. **Federal Republic of Nigeria**  
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38. **Republic of Rwanda**  
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39. **Sahrawi Arab Democratic Republic**  
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40. **Republic of Sao Tome and Principe**  
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41. **Republic of Senegal**  
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42. **Republic of Seychelles**  
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43. **Republic of Sierra Leone**  
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44. **Republic of Somalia**  
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45. **Republic of South Africa**  
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46. **Republic of Sudan**  
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47. **Kingdom of Swaziland**  
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48. **United Republic of Tanzania**  
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49. **Republic of Togo**  
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50. **Republic of Tunisia**  
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51. **Republic of Uganda**  
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52. **Republic of Zambia**  
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53. **Republic of Zimbabwe**  
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