

**African Human Rights Complaints Handling Mechanisms**  
**A Descriptive Analysis**

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## **List of definitions**

|                                   |  |
|-----------------------------------|--|
| AEC                               | African Economic Community   |
| African Court                     | African Court on Human and Peoples' Rights   |
| AMU                               | Arab Maghreb Union   |
| AU                                | African Union  |
| Bamako Workshop                   | Workshop on the ECOWAS Court's use for human right purposes, Bamako, Mali, 8-9 December 2006                                       |
| CEMAC                             | Economic and Monetary Community of Central Africa  |
| CEN-SAD                           | Community of Sahel-Saharan States  |
| CEPGL                             | Economic Community of the Great Lakes Countries  |
| Charter                           | African Charter on Human and Peoples' Rights   |
| Child Charter                     | African Charter on the Rights and Welfare of the Child   |
| Child Committee                   | African Committee of Experts on the Rights and Welfare of the Child  |
| COMESA                            | Common Market for Eastern and Southern Africa  |
| Commission                        | African Commission on Human and Peoples' Rights  |
| Communications Re-<br>form Report | Report on Suggested reforms of the Communications Procedure of the African Commission on Human and Peoples' Rights, November 2006  |
| Court Protocol                    | Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights |
| EAC                               | East African Community   |
| ECCAS                             | Economic Community of Central African States   |
| ECOWAS                            | Economic Community of West African States  |
| IGAD                              | Inter-Governmental Authority on Development  |
| IOC                               | Indian Ocean Commission  |
| MRU                               | Mano River Union   |
| OHADA                             | Organisation for the Harmonisation of Business Law in Africa   |
| OAU                               | Organisation of African Unity  |
| PAP Protocol                      | Protocol to the Treaty establishing the African Economic Community relating to the Pan-African Parliament                          |
| PSC Protocol                      | Protocol relating to the Establishment of the Peace and Security Council of the African Union                                      |
| REC                               | Regional Economic Community  |
| SACD                              | Southern African Development Community   |
| SACU                              | Southern African Customs Union   |
| UEAC                              | Economic Union of Central Africa (part of CEMAC)   |
| UEMOA                             | French acronym for West African Economic and Monetary Union  |
| UMAC                              | Monetary Union of Central Africa (part of CEMAC)   |
| Women Protocol                    | Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa                                      |

## **1. Background & Purpose**

The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (the Court Protocol), establishing the African Court on Human and Peoples' Rights (the African Court), was adopted on 9 June 1998 and entered into force on 25 January 2004. According to the Court Protocol, the African Court was established mainly to complement the protective mandate of the African Commission on Human and People's Rights (the Commission).

During its meeting in Addis Ababa 6-8 July 2004, the Assembly of Heads of State and Government of the African Union (the AU Assembly) decided to integrate the African Court and the – still to be established – African Court of Justice into a single court and, following the decisions at the Assembly of the AU in Banjul, The Gambia 1-2 July 2006, it was widely expected that a statute for this merged court, the African Court of Justice and Human Rights, would be approved during the course of 2007. Since then, not much has happened to reach agreement on the outstanding issues, and at the AU Assembly in Addis Ababa, 29-30 January 2007, the Assembly requested various AU organs to take the necessary steps to secure the swift operationalisation of the African Court.

The African Court will not be functioning in a vacuum. It is supposed to collaborate with the Commission. At this point, it does not seem clear exactly how this cooperation is to function, although some meetings have taken place with the participation of both judges and Commissioners.

Apart from the Commission and the African Court, AU has other mechanisms in place for the protection or promotion of human rights; such as the African Committee of Experts on the Rights and Welfare of the Child (the Child Committee), established according to the African Charter on the Rights and Welfare of the Child (the Child Charter). The Child Committee appears to be modelled on the committees established to monitor the implementation of the main United Nations human rights treaties, the so-called UN treaty bodies. Part of its mandate is to receive complaints from individuals. It has yet to make its first decision on a complaint. In addition, other AU organs and mechanisms, such as the AU Commission and the Pan-African Parliament, are supposed to take human rights into account in their work.

Outside the framework of AU, the African continent is home to a number of sub-regional economic communities (RECs). Some of these organisations have established courts with varying mandates and tasks. Only one of these courts, the court of the Economic Community of West African States (ECOWAS), has an explicit human rights mandate, but some of the other sub-regional courts could arguably have a certain human rights mandate as well.

The purpose of this report is to provide an overview of the various regional and sub-regional complaint handling mechanisms in Africa that deal or might deal with human rights issues. In general, the analysis of each mechanism includes information on purpose, organisation, jurisdiction, human rights mandate, procedure, enforceability, and cooperation. For the sake of completeness, all African RECs are included, but only limited information is provided with respect to RECs without a court that could arguably play a role with respect to human rights. The last organisation, Organisation for the Harmonisa-

tion of Business Law in Africa (OHADA), is not an REC, but since it has an active international court, it is nevertheless included.

As mentioned above, AU has established other organs and mechanisms than the African Court, the Commission and the Child Committee to further human rights on the African continent. Since such organs and mechanisms are not complaints handling mechanisms, they fall outside the scope of this report. For the sake of completeness, relatively brief sections on the main such organs and mechanisms are nevertheless included.

## **2. Main observations**

This report contains a description and analysis of the African human rights complaints mechanisms. On a regional level and under the umbrella of the African Union (AU), this includes the African Commission on Human and Peoples' Rights (the Commission), the African Court on Human and Peoples' Rights (the African Court), and the African Committee of Experts on the Rights and Welfare of the Child (the Child Committee).

In addition, the countries of Africa have established several sub-regional organisations, communities and similar entities, the so-called Regional Economic Communities (the RECs). The focus of the RECs tends to be economic, but several of them have courts attached and at least one of these courts has a clear mandate to deal with human rights complaints.

This section contains the main observations with respect to each of the regional and sub-regional bodies covered by the report.

### **Continental Human Rights Bodies**

#### **African Commission on Human and Peoples' Rights**

The African Commission on Human and Peoples' Rights (the Commission) is the treaty body established under the African Charter on Human and Peoples' Rights (the Charter). It consists of eleven Commissioners and has its own secretariat in Banjul.

In addition to the right and duty to interpret the Charter on request, the mandate of the Commission is to promote and protect human rights in Africa. This includes examining reports that each member state has an obligation to deliver every other year on the human rights situation on its territory. In addition, the Commission adopts resolutions and declarations and organises seminars, visits member states and takes other steps aimed at the promotion of human rights in Africa. Of principal interest to this report, the Commission receives and decides on complaints, called communications, both from member states and from individuals and NGOs. Only once has a communication been brought by a state, a communication brought by DR Congo with respect to the military operations of Burundi, Rwanda, and Uganda in DR Congo. Finally, the Special Rapporteurs of the Commission deal with specific allegations of human rights violations.



A general and overriding problem facing the Commission is a lack of funds and resources. Apart from the general impact on the Commission's work and that of its Secretariat, this also means that the Commissioners can only go on missions very rarely, if ever, and that the Commissioners, not least in their role as special rapporteurs, do not get the assistance from the Secretariat that is considered necessary. In addition to funds from AU, the Commission is supported by various donors, but this support is generally earmarked for special activities or subjects. For example, the Commission has not had sufficient funds to continue having a Special Rapporteur on extrajudicial killings.

The main observations with respect to the Commission's handling of communications are:

- Accessibility: From a legal point of view, the Commission is very accessible. Everybody can bring a communication; representation by legal counsel is not required; and an NGO may complain on behalf of itself or others. In recent years, the Commission has found approximately two thirds of the cases brought before it admissible. Yet accessibility is not helped by the Commission being placed in Banjul with its less than optimal lines of communication and difficult access from most African countries. It also limits the face-to-face access to the Commission that there is no fixed schedule for the sessions, meaning that a party wanting to present a case orally to the Commission cannot be certain when the case will be heard.
- Knowledge: Many people on the African continent are not aware of the existence of the Commission or that it may issue decisions and recommendations with respect to specific cases.
- Duration: Two to three years is the normal time span from a communication is brought until a decision has been made. This is due partly to the procedures of the Commission, partly to the lack of will and ability of many (state) parties to respect the time limits set by the Commission. In some cases, this has led to complainants losing interest or the communication losing its relevance. A study was made by the Commission in 2006 considering how to improve and shorten the procedure; the Commission was to continue its efforts to implement the proposals of this study.
- Quality: The decisions of the Commission are generally of a high standard and show a willingness to seek inspiration from broad range of African and non-African sources.
- Independence: According to the Charter, it is a condition for publication of decisions on communications that the AU Assembly has approved the publication. At its session in Khartoum, Sudan, 23-24 January 2006, the AU Assembly decided for the first time not to approve the publication of a decision on a communication (a communication concerning Zimbabwe). The formal reason for this decision was that the Commission, in the view of the AU Assembly, had not given the government of Zimbabwe sufficient opportunity to comment on the decision. Subsequently, the Commission has informed the AU Assembly that in its view, there is no duty to give governments more chances to comment as they have the opportunity to make their case as part of the proceedings. At this stage, the AU Assembly has not formally reconsidered its decision, but the subsequent practice indicates that the Commission continues to submit decisions to the AU Assembly without giving governments two months to provide comments as requested in the decision by the AU Assembly. The fact that the AU Assembly can suppress decisions by the Commission in any event weakens the independence of the Commission and, consequently, the AU Assembly should consider renouncing this right.

- Effect: An analysis shows that around one third of the decisions of the Commission have been fully or partially complied with by the member state in question. Even though this is a low fraction, it is sometimes sufficient for a victim that a respected body confirms that his or her rights have been violated. Furthermore, decisions of the Commission become part of African human rights law and can therefore be used for advocacy and as precedents all over Africa (and beyond), even if they are not adhered to. The Commission is considering establishing mechanisms to improve follow-up. With the operationalisation of the African Court, the Commission will be able to bring cases to the African Court to ensure adherence.
- Cooperation: The scope for the Commission's cooperation with the various African and global bodies involved in the protection of human rights is great. As admitted by the Commission in a brainstorming session in May 2006, the Commission has not established formal ties even with the AU organs and mechanisms involved in the protection and promotion of human rights. This is probably due to a lack of financial and human resources. If the Commission in particular and the African human rights system in general are to achieve their full potential, such cooperation is essential, not least between the Commission and the African Court. Support to establish such cooperation should, consequently, be given high priority by organisations wishing to support the African human rights system.

The Commission has appointed a number of special rapporteurs among the Commissioners. Currently there are special rapporteurs for women, human rights defenders, refugees and internally displaced persons, prisons and other places of detention, and freedom of expression. In addition to the tasks with respect to promotion of human rights, country visits, etc., the rapporteurs receive requests for assistance in varying degrees with respect to alleged human rights violations. The rapporteurs treat such requests in different manners. Some rapporteurs will typically just forward them to the Secretariat whereas others – after having sought to verify the contents – will contact the government of the relevant member state to instigate a dialogue and/or approach the press. Until now, however, the results of such efforts have been modest. The Commission is considering establishing more efficient and accessible methods for dealing with such messages; e.g. by setting up hotlines for some of the rapporteurs. In addition, it should consider establishing guidelines for the work of the rapporteurs to secure more uniform handling of requests for assistance. Some of the special rapporteurs have initiated collaboration with their United Nations counterparts; this would seem a good way of achieving greater impact for both the Commission and the United Nations rapporteurs.

#### African Court on Human and Peoples' Rights

In 1998, the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (the Court Protocol) was adopted. In 2004, the necessary number of countries had ratified it. In July 2005, the AU Assembly decided that the African Court should be merged with the African Court of Justice. The African Court of Justice is an organ to be established under the Constitutive Act on the AU for the purpose of – among other things – interpreting the Constitutive Act on the AU and other AU documents and adjudicating conflicts between AU member states. The efforts to realise this merger seem to have subsided for the time being, maybe in light of the difficulties on reaching agreement on certain key issues in a new protocol, and the African Court is busy becoming operational.

The first eleven judges of the African Court were appointed in January 2006, and the African Court is in the process of being established at its designated seat in Arusha, Tanzania.

The main observations with respect to the African Court's handling of cases are:

- Accessibility: The Court Protocol does not enable individuals and NGOs to access the African Court directly, unless the respondent state has made a specific declaration to this effect. Currently, only Burkina Faso and Mali have made such declarations. Consequently, for the time being accessibility is not one of the strong points of the African Court. In light of the almost non-existing will of African states to bring communications to the Commission, it must be assumed that the Commission will be the main channel of cases to the African Court. This necessitates a close cooperation between the African Court and the Commission.
- Knowledge: Since the African Court is still in the process of being established, it must be assumed that not many people on the African continent are aware of its existence. Given that most Africans and NGOs will not be able to bring cases directly to the African Court, this may not be an area of priority.
- Duration: The African Court has yet to receive its first case; it is therefore impossible to know how fast the African Court will be in handling cases. Not least given the fact that most cases will have been dealt with by the Commission before reaching the African Court, it is important for the African Court to find a way to keep the procedure time-efficient. This will depend on its rules of procedure, the resources available, the organisation of the work, and the willingness to uphold strict time limits, even in the face of foot-dragging respondent states. It will also depend on whether the African Court will be able and willing to base its decision-making on some of the work already done by the Commission in cases brought by the Commission.
- Quality: Prior to the election of the judges, questions were raised by NGOs as to the human rights knowledge of the very few candidates for the eleven positions. It is important to ensure that the personnel recruited to assist the judges have the necessary skills and that the judges themselves are provided with the relevant training. The judges have indicated a willingness to accept offers of training and study tours and should maybe consider preparing a needs analysis to ensure that assistance is based on the actual needs and wishes of the African Court (and not on the whims of donors).
- Independence: The Court Protocol contains various safeguards to ensure the independence of the individual judges. Furthermore, unlike the Commission, the African Court is responsible for recruiting its own staff.
- Effect: The African Court's decisions are binding and enforceable. Time will tell if the AU Assembly is willing to use its power, for example to instigate sanctions against member states who fail to comply with decisions.
- Cooperation: Since the main channel of cases to the African Court will in all likelihood be the Commission, at least for the time being, establishing efficient models for collaboration between these two bodies is essential if the establishment of the African Court is to have the intended effect. There have been some contacts and meetings between the judges and the Commissioners, yet, for instance, the Commission has not been much involved in the drafting of rules of procedure for the African Court, allegedly due to lack of resources,. It is important that the rules of procedure of the two organs are compatible. Much more and more formalised contact would

seem to be needed. It is also necessary to find a way to overcome the inconvenience of the Commission and the African Court being established at different ends of the African continent.

#### African Committee of Experts on the Rights and Welfare of the Child

The African Committee of Experts on the Rights and Welfare of the Child (the Child Committee) is the treaty body established under the African Charter on the Rights and Welfare of the Child (the Child Charter). It has eleven members, but as yet, no secretariat of its own.

In addition to the right and duty to interpret the Child Charter on request, the mandate of the Child Committee is to promote and protect the rights of the African child. This includes examining reports that each member state is obligated to deliver every third year on the child rights situation on its territory. Moreover, the Committee is mandated to receive and decide on communications, both from member states as well as from individuals and NGOs.

A general and overriding problem for the Child Committee is lack of funds and resources. As mentioned, the Child Committee does not have its own secretariat, but is dependent on the assistance of the AU Department of Social Affairs. In addition to funds from AU, the Child Committee is supported by some donors for specific purposes.

The main observations with respect to the Child Committee's handling of communications are:

- Accessibility: From a legal point of view, the Child Committee is very accessible. In practice, however, because of the lack of staff, etc., the accessibility is presumably quite limited. Everybody can bring a communication, representation by legal counsel is not required, and an NGO may complain on behalf of itself or others. The way the Child Committee's guidelines for communications are written, the Child Committee is even prepared to handle communications dealing with states that are not parties to the Child Charter. In addition, the guidelines set up a system where the decision on admissibility is in principle decided without input from the state party. Going this far carries the risk that the Child Committee will become considered more an activist than an objective and credible treaty body. For a body whose authority depends primarily on its credibility, such steps should be considered carefully. The Child Committee could consider seeking inspiration from the manner in which the Commission handles communications.
- Knowledge: Not many people are aware of the existence of the Child Committee. Even among people working with human rights in Africa, the Child Committee is considered to be of marginal importance.
- Duration: The Child Committee has not yet started to deal with communications. Given its lack of resources and staff of its own, it is a relevant fear that the handling of communications will be slow. When implementing its guidelines, the Child Committee should take steps to avoid this.
- Quality: As mentioned, the Child Committee has not started making decisions yet. Based on a review of its guidelines, which appear to be somewhat unclear and unstructured, it may be feared that the quality of decisions will be of a similar unsatisfactory standard. Again, this probably comes down to the Child Committee not having its own staff giving the work of the Child Committee priority.

- Independence: The Child Committee has been strict in assuring that members whose independence could be questioned have left the Committee. The way the Child Committee is organised does not match this positive attitude. Like the Commission, the Committee will need the approval of the AU Assembly before making any of its decisions public. Furthermore, without its own secretariat, the Child Committee relies on the assistance of the AU Department for Social Affairs. Consequently, it is difficult for the Child Committee to decide on its own priorities. Furthermore, it might be considered problematic with respect to independence and impartiality that the AU Department of Social Affairs is directly involved in the handling of communications. A solution should be found where the Child Committee is either serviced by its own secretariat or receives assistance from another independent body. Furthermore, as was mentioned above with respect to the Commission, the AU Assembly should consider renouncing its right to suppress the decisions of the Child Committee.
- Effect: Since the first decision of the Child Committee has yet to be made, it is impossible to know to what extent the decisions of the Child Committee will be implemented. It is positive that the Child Committee has decided to appoint a member as responsible for monitoring adherence, *viz.* the new guidelines on communications. The Child Committee is not explicitly mentioned as one of the bodies that can bring cases to the African Court, but it is possible to interpret the Court Protocol in such a manner that the African Court can accept cases from the Child Committee. It is essential for the Child Committee that they – like the Commission – can bring cases to the African Court.
- Cooperation: The Child Committee has indicated a serious interest in collaborating with the Commission. There is no doubt that the Committee could benefit very much from the experiences of the Commission. Ultimately, it is probably largely a question of resources, both at the Child Committee and at the Commission, whether such collaboration is developed. It could even be considered if the Commission's Secretariat could not – with additional resources – function as secretariat for the Child Committee as well.

#### Other Pan-African Bodies and Initiatives

Among the other AU bodies and initiatives that are supposedly active within human rights are:

- the Pan-African Parliament (PAP), an advisory organ of African parliamentarians,
- the Peace and Security Council (PSC), the standing organ of AU, among other things involved in peace keeping operations,
- the Economic, Social and Cultural Council (ECOSOCC), an advisory organ of representatives of African and African Diaspora civil society,
- the AU Commission, considered the engine of AU, with at least the Department for Political Affairs being involved in human rights,
- the New Partnership for Africa's Development (NEPAD), the development mechanism of AU with its African Peer Review Mechanism that also entails a review of human rights, and
- the Conference on Security, Stability, Development and Co-Operation in Africa (CSSDCA), in some ways the forerunner of NEPAD, later changed into Civil Society and Diaspora Directorate (CIDO), a framework for civil society and the African Diaspora.

## **Sub-continental bodies**

The African continent is home to several more or less well-functioning Regional Economic Communities (RECs). It is the idea that in the long term, some of the RECs shall be harmonised to enable them to be used as the building blocks for the African Economic Community (AEC), an integrated part of AU. Presently eight RECs are accredited to AU, but at some stage a consolidation is expected, as there is a major overlap with most countries being member of at least two RECs; no country should be member of more than one of the RECs that are to make up AEC. In addition, AU has divided Africa into five regions, and the final RECs should preferably correspond to these five regions. A complete overview of the membership of RECs can be found at the end of the chapter on RECs.

This report covers 14 RECs, some of which are currently not very active. In addition to the 14 RECs, a section has been included on the Organisation for the Harmonisation of Business Law in Africa (OHADA), a seemingly well functioning organisation of 16 primarily Western African states aimed at harmonising business law by making uniform acts, binding in all the member states.

Many of the RECs have more or less functional courts or tribunals, and some of these courts and tribunals might be able to handle (certain) violations of human rights. The only REC with a court explicitly mandated to handle cases of human rights violations in the member states is the Economic Community of West African States (ECOWAS), but some of the others REC courts could be argued to have implied human rights mandates. Even if the court of an REC is not mandated to handle cases on human rights in general, the treaties and other legal instruments of the some RECs contain provisions dealing with specific aspects of human rights, e.g. the rights of women, and such provisions will be subject to the jurisdiction of an REC court, even if human rights in general are not.

Even if some REC courts will be found to have the mandate to handle (some) human rights cases, they will still not be as equipped to do so as the bodies established by AU. The members of the Commission, the African Court and the Child Committee have presumably been chosen partly because of their knowledge of human rights, and the personnel, if any, of these bodies must likewise be expected to have knowledge of human rights matters. On the other hand, an REC court will have been established to solve problems with respect to that particular REC; since the protection and promotion of human rights is not the main purpose of any of the RECs, the judges of an REC court cannot be expected to have any knowledge of human rights, and the same goes for the staff. Consequently, if attempts to induce the REC courts to assert jurisdiction over human rights matters or the leaders of the RECs to broaden the scope of jurisdiction of the REC courts to include human rights matters shall truly advance the course of human rights in Africa, it is necessary that such attempts are followed by sufficient steps to prepare the judges and the staff of the REC courts to deal with human rights in a satisfactory manner. It would also improve the ability of the REC courts to make reasoned decisions if they had access to a Pan-African jurisprudence; the REC courts should, consequently, be encouraged to make all their decisions publicly available

In general, judgments by REC courts are final and binding. This would also be the case for judgments on human rights. Moreover, the fact that a judgment is made by a body in the vicinity might make a state more prone to actually adhere to the judgment than if the judgment is made by a body far away.

The moment the REC courts start to deal with issues of human rights, they will be in competition with the Commission, the African Court and the Child Committee. To the extent that one state is a member of more than one REC, there can also be competition between the courts of two such RECs. None of the REC courts covered by this report has provisions that take into account that such competition can occur. This is presumably due to the origin of the REC courts as organs meant to handle only the relevant REC law. In such cases, the jurisdiction is exclusive and no competition possible.

Even though finding a solution to the problem of jurisdictional competition is important for the theoretical legal mind and studies on this matter should be encouraged, only one REC court is currently dealing with human rights, making the potential for such competition limited. In addition, should the same matter for some reason be brought before both – at this time – the ECOWAS Court and the African Court, it must be assumed that the judges will be able to find a pragmatic solution. This could maybe even be a catalyst for some serious discussions on how the human rights jurisdiction of the REC courts and of the African Court might be harmonised.

The RECs covered by this report are the following:

#### Economic Community of West African States (ECOWAS)

The Economic Community of West African States (ECOWAS) is accredited to AU and more or less covers the Western Region of AU. It has fifteen members. ECOWAS has had a court since 1991. In 2005, a new protocol concerning the ECOWAS Court was adopted, giving the court the mandate to decide on alleged human rights violations by the member states. Individuals have access to the court in such matters. Several cases concerning alleged human rights violations are currently being handled by the ECOWAS Court, and such cases add up to more than 90 per cent of the new cases of the ECOWAS Court. This makes it acutely necessary for the ECOWAS Court and its partners to ensure the necessary knowledge of human rights law among its judges and staff.

As something unique, it is not a condition for bringing cases that domestic remedies have been exhausted. In that way, the ECOWAS Court is more accessible than the Commission, the African Court and the Child Committee. On the other hand, this could cause some problems *vis-à-vis* the national courts. Consequently, it would seem relevant to thoroughly analyse the consequences, advantages and disadvantages of the ECOWAS Court not demanding exhaustion of domestic remedies. The ECOWAS Court and especially its jurisdiction over human rights are not widely known and this hampers its actual reach. It is telling that most cases have concerned Nigeria where the ECOWAS Court is seated and therefore best known and most accessible. To bring the ECOWAS Court closer to the populations of the member states, the ECOWAS Court would like to carry out processes outside its permanent seat regularly, but lack of funds prevents it from doing so very often. This should be supported.

Recently, some changes to the ECOWAS Court have been decided. An appellate division will be set up, a judicial council is being established to secure the election of competent judges, and the administration of the ECOWAS Court is being reformed to free the judges' time to handle cases.

### West African Economic and Monetary Union (UEMOA)

In addition to ECOWAS, West Africa is home to the West African Economic and Monetary Union, better known under its French acronym, UEMOA. UEMOA has eight members and is not accredited to AU. In 2004, it was envisaged to merge some of the functions of UEMOA and ECOWAS, but this has been postponed indefinitely; there is some cooperation between the two RECs. UEMOA is responsible for maintaining the monetary union that enables the member states to use the West African CFA as a common currency. UEMOA has a functioning court that has made some decisions.

The UEMOA Treaty does not contain a Bill of Rights or similar instrument, but the UEMOA Treaty states that UEMOA respects the fundamental rights set out in the Charter. Arguably, this would enable persons to bring cases before the UEMOA Court alleging human rights violations by UEMOA, but it would not be possible to bring such cases against member states, both because the obligation to adhere to human rights does not cover the member states and because persons can only bring cases concerning UEMOA rules and decisions.

### Common Market for Eastern and Southern Africa (COMESA)

The Common Market for Eastern and Southern Africa (COMESA) covers nineteen countries in Eastern and Southern Africa (from Libya and Egypt in the North through a belt of countries to Malawi, Zambia and Angola in the South plus the island states Madagascar and Mauritius). COMESA is accredited to AU.

COMESA has a functioning court that has made some decisions. Under the COMESA Treaty, the member states have agreed to the principle of recognition, promotion and protection of human rights as set out in the Charter. It is not clear if and to what extent the COMESA Court will consider this to give it the mandate to handle cases concerning human rights violations by states. Furthermore, even though persons can bring cases before the COMESA Court once domestic remedies have been exhausted, the COMESA Treaty would appear to be drafted in such a way that persons cannot bring cases concerning mere actions (as opposed to acts and regulations) by member states.

### East African Community (EAC)

The East African Community (EAC) consists of Burundi, Kenya, Rwanda, Tanzania and Uganda and is accredited to AU.

EAC has a court that has so far publicised three decisions on the merits, and persons can bring cases before the EAC Court without any need to exhaust domestic remedies. By becoming party to the EAC Treaty, the member states have undertaken to abide by universally accepted human rights standards. The EAC Treaty further refers to the Charter. It is unclear if the EAC Court will consider this sufficient to enable it to handle cases brought by persons alleging violations by member states, especially in light of Art. 27 of the EAC Treaty that specifically mandates the EAC Council of Ministers to broaden the scope of the EAC Court to involve human rights; however, this has yet to be done. In one of the cases decided by the EAC Court so far, the EAC Court has acknowledged that when interpreting the specific provisions of the EAC Treaty, the principles set out in the general part of the EAC Treaty shall be taken into account. A draft protocol, broadening the mandate of the EAC Court to include human rights, etc., is currently being discussed by civil society.



#### Southern African Development Community (SADC)

The Southern African Development Community (SADC) has fourteen members and is accredited to AU. The SADC Court was ready to receive cases in April 2007 and it may receive cases from persons against member states, conditional upon exhaustion of domestic remedies.

The SADC Treaty states that the member states will adhere to human rights, and Art. 6 specifically prohibits discrimination based on gender, religion, race, etc. Individuals may bring cases before the court following exhaustion of domestic remedies. It is not clear if and to what extent the SADC Court will consider itself to be competent to make decisions on human rights matters, based on the general principle of adherence to human rights. The SADC Court should in any event be able to deal with cases of alleged violation of the prohibition against discrimination contained in Art. 6 of the SADC Treaty.

#### Economic and Monetary Community of Central Africa (CEMAC)

The Economic and Monetary Community of Central Africa (CEMAC) has six members and is not accredited to AU. CEMAC is responsible for maintaining the monetary union enabling the member states to use the Central African CFA as a common currency. The constituent documents of CEMAC contain no references to human rights. Consequently, there is nothing to indicate that the CEMAC Court will be competent to handle cases concerning human rights, even though individuals may bring cases against member states to the CEMAC Court. In 2003, there was talk of merging CEMAC and the Economic Community of Central African States (ECCAS).

#### Economic Community of Central African States ECCAS

The Economic Community of Central African States (ECCAS) has eleven members and is accredited to AU. The ECCAS Treaty contains no reference to human rights and the ECCAS Court, provided for in the ECCAS Treaty, has not been established. If the merger with CEMAC is realised, there will be no need to do so, since CEMAC already has a court.

#### The Arab Maghreb Union AMU

The Arab Maghreb Union (AMU) consists of Algeria, Libya, Mauritania, Morocco, and Tunisia and is accredited to AU. The AMU treaty does not contain any references to human rights. Furthermore, only the member states and the Council of Heads of State may bring cases to the AMU Court. No decisions of the AMU Court have been made public.

#### The Inter-Governmental Authority on Development (IGAD)

The Inter-Governmental Authority on Development (IGAD) covers Djibouti, Ethiopia, Kenya, Somalia, Sudan, and Uganda with Eritrea having suspended its membership in 2007. IGAD is accredited to AU. Under the IGAD Agreement, the members reaffirm their commitment to human rights in accordance with the Charter, but IGAD has no court or similar institution.

#### The Indian Ocean Commission (IOC)

The Indian Ocean Commission (IOC) consists of Comoros, Madagascar, Mauritius, Seychelles, and Réunion (France) and is not accredited to AU. IOC has no court or similar body and, apparently, no specific commitments to human rights.

#### Southern African Customs Union (SACU)

The Southern African Customs Union (SACU) consists of Botswana, Lesotho, Namibia, South Africa, and Swaziland and is not accredited to AU. The SACU Agreement does not contain any references to human rights and SACU does not have a permanent court.

#### Economic Community of the Great Lakes Countries (CEPGL)

The Economic Community of the Great Lakes Countries (CEPGL) consists of Burundi, DR Congo, and Rwanda and is not accredited to AU. The CEPGL Convention contains no references to human rights, and the envisaged commission to assure correct interpretation of the CEPGL Convention would only be mandated to solve conflicts between member states.

#### Community of Sahel-Saharan States (CEN-SAD)

The Community of Sahel-Saharan States (CEN-SAD) has 23 members, covering countries in both Northern and Western Africa. It is accredited to AU. It would appear to have neither a specific human rights interest nor a court.

#### The Mano River Union (MRU)

The Mano River Union (MRU) consists of Guinea, Liberia and Sierra Leone and is not accredited to AU. There is nothing to indicate that MRU has a specific human rights interest or a court.

#### Organisation for the Harmonisation of Business Law in Africa (OHADA)

The Organisation for the Harmonisation of Business Law in Africa (OHADA) is not an REC, but an organisation of 16 mainly French-speaking countries in Western Africa, meant to harmonise business law by adopting model laws that are directly binding in the member states. As such, it has no specific interest in human rights, but its acts might touch upon human rights issues. It has a court that has made more than 1,700 decisions. Among its unique features is a regional training centre that provides training to local judges and other law professionals, thereby increasing the knowledge of OHADA and its law.

### **3. Methodology**

This report has been made on the basis of participation in the 40<sup>th</sup> session of the African Commission on Human and Peoples' Rights in Banjul, November 2006; the participation in a workshop on the use of the ECOWAS court for human right purposes, organised by the West African Bar Association and the West African Human Rights Forum, in Bamako, Mali, 8-9 December 2006 (the Bamako Workshop); interviews with various experts and users of the African human rights system (as listed in the final section of the report); and the review of documents of AU and the covered RECs as well as material found on websites and in books and articles.

The section on the ECOWAS court has been based largely on a study made by Solomon T. Ebobrah, Lecturer, Faculty of Law, Niger Delta University, Nigeria and Doctoral Candidate, Faculty of Law, University of Pretoria, South Africa, as per agreement with Solomon T. Ebobrah.

The report has been researched and written by Ulrik Spliid, Senior Legal Advisor, Danish Institute for Human Rights. Unless otherwise indicated in the text, no information after 30 September 2007 has been included.

## **4. Description and Analysis**

### **Complaints mechanisms established by the African Union**

#### **The African Commission on Human and Peoples' Rights**

##### Introduction – the African Union (AU)

The African Union (AU) is the successor to the Organisation of African Unity (OAU), which was established in 1963 and ceased to exist on 10 July 2002 with the launch of AU at the 1<sup>st</sup> ordinary session of the AU Assembly in Durban 9-10 July 2002. On 7 July 2003, all 53 member states of the AU had ratified the Constitutive Act of the AU.<sup>1</sup> Apart from Morocco, the AU comprises all African states, including the African island states (Cape Verde, Comoros, Madagascar, Mauritius, São Tomé & Príncipe and the Seychelles) and the disputed Sahrawi Arab Democratic Republic.<sup>2</sup> Morocco is not member of AU because OAU and later AU recognised the Sahrawi Arab Democratic Republic as a full member.

The highest AU organ is the AU Assembly, consisting of the heads of state and government of the member states or their representatives, cf. Art. 6 of the Constitutive Act of the AU. According to Art. 6.3, the AU Assembly shall meet at least once a year in ordinary session. Since 2004, two ordinary sessions have taken place each year. The AU Assembly is the successor to the OAU Assembly. The AU Assembly makes decisions by consensus or, failing such consensus, by two-thirds majority, cf. Art. 7.1 of the Constitutive Act of the AU.

A meeting of the AU Assembly normally follows a meeting of the AU Executive Council, consisting of the ministers of foreign affairs of the member states or other ministers or authorities designated by the governments, cf. Art. 10.1 of the Constitutive Act of the AU. The AU Executive Council meets at least twice a year in ordinary session, cf. Art. 10.2; this is also the case in practice. The AU Executive Council is the successor to the OAU Council of Ministers. The AU Executive Council makes decision by consensus or, failing such consensus, by two-thirds majority, cf. Art. 11.1 of the Constitutive Act of the AU.

The Secretariat of AU is the AU Commission, cf. Art. 20.1 of the Constitutive Act of the AU. The AU Commission consists of ten Commissioners in total, including the chairperson and the deputy chairperson, cf. Art. 2(1) of the Statutes of the AU Commission, adopted by the AU Assembly at the 1<sup>st</sup> ordinary session 9-10 July 2002 in Durban. The AU Commission is the executive organ of AU and is based in the AU Headquarters in Addis Ababa. The first and current chairperson is Alpha Oumar Konaré, a

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<sup>1</sup> Adopted by the OAU Assembly at the 36<sup>th</sup> ordinary session 10-12 July 2000 in Lomé, Togo. The Protocol on Amendments to the Constitutive Act of the African Union was adopted by the AU Assembly at its 2<sup>nd</sup> ordinary session 10-12 July 2002, but has yet to be ratified by the necessary two-thirds majority of the member states, cf. its Art. 13. As of 10 August 2007 it had been ratified by 18 members out of 36 necessary.

<sup>2</sup> The Sahrawi Arab Democratic Republic claims sovereignty over mainly Moroccan-controlled Western Sahara, but does not in fact control this area that for many years was a Spanish colony. Morocco does not recognise the claim of the Sahrawi Arab Democratic Republic.

former president of Mali.<sup>3</sup> OAU did not have an organ like the AU Commission; its Secretariat was managed by a Secretary-General. For more information on the AU Commission *vis-à-vis* the human rights organs of AU, see below in the section on Other Pan-African Bodies and Initiatives.

#### Introduction – the African Commission on Human and Peoples’ Rights

The African Charter on Human and Peoples’ Rights (the Charter) was adopted on 27 June 1981<sup>4</sup> and came into force on 21 October 1986.<sup>5</sup> According to Art. 30, an African Commission on Human and Peoples’ Rights (the Commission) shall be established “*within the Organization of African Unity [now AU] to promote human and peoples’ rights and ensure their protection in Africa*”. This means that like the African Court, the Commission, in addition to its status as an independent treaty body, is in some way part of AU, even though it is not mentioned in Art. 5 of the Constitutive Act of the AU and it therefore is unclear if it can rightly be considered an “*organ*” of AU.

The first members of the Commission were elected at the 23<sup>rd</sup> ordinary session of the OAU Assembly 27-29 July 1987 in Addis Ababa, and the Commission was officially inaugurated on 2 November 1987 in Addis Ababa.

According to Art. 42.2 of the Charter, the Commission shall lay down its own rules of procedure. The present Rules of Procedure were adopted in Praia, Cape Verde, in October 1995. New rules of procedure are in the process of being drafted, necessitated by the establishment of the African Court and furthermore aiming at making the Commission more efficient.

#### Purpose and Function

The purpose and function of the Commission, as set out in Art. 45 of the Charter, may be divided into three parts: a promotion mandate, a protection mandate and an interpretation mandate.

With respect to the protection mandate, Art. 45.2 merely states that the Commission shall “*ensure the protection of human and peoples’ rights under conditions laid down by the present Charter*”. Among the steps taken by the Commission to protect human and peoples’ rights is the communications procedure, the procedure according to which the Commission deals with individual communications (complaints). This is the prime focus of the section on the Commission in this report. In addition, the Commission has developed a system of Special Measures, consisting of Special Rapporteurs and Working Groups. As part of these mechanisms, requests for assistance in specific cases are also received. This part of the Commission’s work will be dealt with in a particular sub-section of this section on the Commission.

With respect to promotion, the tasks specified in Art. 45.1 include (i) collecting documents, undertaking studies and research, organising seminars, etc., disseminating information, encouraging national

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<sup>3</sup> New Commissioners, including a new chairperson, should have been elected at the 9<sup>th</sup> ordinary session of the AU Assembly in July 2007, cf. a decision by the AU Executive Council at its 10<sup>th</sup> ordinary session 25-26 January 2007, but this was postponed and the election is now expected at the 10<sup>th</sup> ordinary session of the AU Assembly in early 2008. Allegedly, one obstacle was finding a successor to the popular Alpha Oumar Konaré, who is said not to be interested in one more term.

<sup>4</sup> The Charter was adopted by the 18<sup>th</sup> ordinary session of the OAU Assembly 24-27 June 1981 in Nairobi, Kenya.

<sup>5</sup> Three months after the ratification by a simple majority of OAU states, cf. Art. 63.3, and since then the African Human Rights Day.

and local human rights institutions, giving its views and recommendations to governments; (ii) laying down principles and rules relating to human and peoples' rights to be used by African governments when preparing legislation; and (iii) cooperating with other African and international institutions concerned with promoting and protecting human and peoples' rights.

With respect to interpretation, the Commission's mandate according to Art. 45.3 is to "*interpret all the provisions of the present Charter at the request of a state party, an institution of the Organization of African Unity [now AU] or an African organisation recognised by the Organization of African Unity [now AU]*". On no occasion has the Commission been formally asked to provide interpretations of the Charter in accordance with Art. 45.3.

Apart from the three mandates specified in Art. 45.1-3 of the Charter, the AU Assembly can entrust other tasks to the Commission, cf. Art. 45.4. So far, no tasks have been entrusted to the Commission with specific reference to Art. 45.4. At its 24<sup>th</sup> session 25-28 May 1998, the OAU Assembly adopted the recommendations of the Commission that formally entrusted the Commission with the task of examining the periodic reports that member states are obliged to deliver every two years according to Art. 62 of the Charter; this in effect amounted to entrusting a new task to the Commission.

### Organisation

At the time of its inauguration on 2 November 1987, the Commission did not have its own secretariat or its own premises, but was based at the Secretariat of OAU in Addis Ababa. On 12 June 1989, the new permanent Secretariat and headquarter of the Commission was inaugurated in Banjul, and this is where the Commission now maintains its Secretariat and headquarters. On 24 October 2001, the foundation stone for a dedicated headquarters building was laid in Banjul,<sup>6</sup> but to this day, the Secretariat of the Commission maintains its headquarters in temporary and rented premises.

According to Art. 31 of the Charter, the Commission shall consist of 11 members who shall serve in their personal capacity. The Commissioners shall be "*chosen amongst African personalities of the highest reputation, known for their morality, integrity, impartiality and competence in matters of human and peoples' rights; particular consideration being given to persons having legal experience*".

The Commission can have no more than one member from any given state, cf. Art. 32. In contrast to the Court Protocol, setting out in Art. 14 that Africa's sub-regions and principal legal traditions shall be represented in the African Court and that the African Court shall have adequate gender representation, and the protocol on the African Court of Justice,<sup>7</sup> setting out in Arts. 3 and 5 that the African Court of Justice shall have at least two members from each of the five African sub-regions, representation of the principal legal traditions of Africa and equal gender representation, neither the Charter nor the Rules of Procedure contains any provisions on the representation of the African sub-regions or principal legal traditions or on gender representation in the Commission.

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<sup>6</sup> Cf. the Commission's Resolution on the Construction of the Headquarters of the African Commission on Human and Peoples' Rights (ACHPR/Res.58(XXX)01).

<sup>7</sup> Protocol of the Court of Justice of the African Union, adopted by the AU Assembly at its 2<sup>nd</sup> ordinary session 10-12 July 2003 in Maputo, but not yet in force due to an insufficient number of ratifications (as of 12 June 2007, 13 ratifications out of 15 necessary).

With respect to gender equality, the Solemn Declaration on Gender Equality in Africa<sup>8</sup> states under item 5 that the Heads of State and Government agree to “*expand and promote the gender parity principle that we have adopted regarding the Commission of the African Union to all other organs of the African Union*”. The gender parity principle regarding the AU Commission is contained in Art. 6(3) of the Statutes of the AU Commission<sup>9</sup> and entails that at least half of the AU Commissioners shall be women. Moreover, the Kigali Declaration, adopted by the AU Ministerial Conference on Human Rights in Africa, 8 May 2003, Kigali, Rwanda, states in item 24 that “*The conference ... calls upon the AU Policy Organs to review the operation and composition of the African Commission on [Human and] Peoples’ Rights with a view to ... ensuring appropriate gender representativity*”.

Each state may nominate two candidates, cf. Art. 34 of the Charter. Since there are 53 members, 106 candidates could in principle be nominated, but considerably fewer candidates are generally nominated, limiting the competition. According to Art. 33, the Commissioners are elected by secret ballot by the AU Assembly. In practice, the Commissioners are elected by the AU Executive Council and the election result is then confirmed by the AU Assembly. The term is six years with the possibility of re-election, cf. Art. 36. Four, four and three Commissioners are elected every second year.

Apart from what is set out in Art. 31 of the Charter, there are no formal criteria for appointment to the Commission. In a Note Verbale to the ministers of foreign affairs of the member states on 29 March 2007<sup>10</sup> inviting them to submit candidates to the five seats on the Commission<sup>11</sup> up for election at the 11<sup>th</sup> ordinary session of the AU Executive Council 28-29 June 2007 in Accra, Ghana, the AU Commission elaborated on the criteria set out in Art. 31. In addition to requesting the member states to ask nominees to provide information on their judicial, practical, academic, activist, professional and other experience in the field of human and peoples’ rights (to include information on political and other associations relevant for eligibility and incompatibility), the AU Commission proposed that nominees be asked to submit statements indicating how they fulfil the criteria for eligibility contained in the Charter. The AU Commission then pointed to a statement by the Advisory Committee of Jurists made with respect to the establishment of the Permanent Court of International Justice (now the International Court of Justice). In the view of the AU Commission, this statement could be used as a guide when interpreting the question of incompatibility or impartiality. The statement said that “*(A) member of government, a Minister or Under Secretary of State, a diplomatic representative, a director of a ministry, or one of his subordinates, or the legal adviser to a foreign office ... are certainly not eligible for appointment as judges upon our Court*”.

The AU Commission further reminded the member states to ensure adequate gender representation in their nominations and “*to bear in mind the need to continue to enhance the independence and operational integrity of the Human Rights Commission in the spirit of the Grand Bay Declaration of 1999*”.

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<sup>8</sup> Adopted by the AU Assembly at its 3<sup>rd</sup> ordinary session 6-8 July 2004 in Addis Ababa.

<sup>9</sup> Adopted by the AU Assembly during its 1<sup>st</sup> ordinary session 9-10 July 2002 in Durban.

<sup>10</sup> This Note Verbale is roughly similar to the Notes Verbales requesting candidates for the 2005 election.

<sup>11</sup> The ordinary terms of four of the members (the chairperson, Ms Salamata Sawadogo (Burkina Faso), the vice-chairperson Mr. Yasin Sed Ahmed El Hassan (The Sudan), Ms. Angela Melo (Mozambique) and Mr. Mohamed Kamel Rezzag-Bara (Algeria)) would terminate and, in addition, Mr. Mohammed Abdellahi Ould Babana (Mauritania), had ceased to function as commissioner long before.

and the Kigali Declaration of 8 May 2003". The relevant provision of the Kigali declaration is item 24 mentioned above that also reiterates the need to strengthen the "independence and operational integrity" of the Commission.

In addition to trying to flesh out the relevant provisions of the Protocol, the AU Commission invited the states parties to consider "whether or not to apply the following additional factors submitted to the AU Commission by Civil Society Organisations": The procedure should be "at the minimum that for appointment to the highest judicial office in the State Party"; "participation of civil society, including Judicial and other State bodies, bar associations, academic and human rights organizations, and women's groups" should be encouraged; and "a transparent and impartial national selection procedure" should be employed.

As can be seen from the Note Verbale, it is the view of the AU Commission that the members of the Commission should live up to the same criteria that are ordinarily applied to members of international courts. Similar to the declarations mentioned (the Kigali Declaration and the Grand Bay Declaration), a Note Verbale from the AU Commission does not bind the member states. It could, however, be argued that the criteria pointed out by the AU Commission in any event follow from a correct interpretation of the reference to impartiality in the binding Art. 34 of the Charter. This would mean among other things that members of government, ministers and under-secretaries of state, diplomatic representatives, directors of ministries, legal advisers to foreign offices and persons with similar positions were barred from becoming Commissioners.

After the election at the 11<sup>th</sup> ordinary session of the AU Executive Council 28-29 June 2007, the Commission has members from Benin, Botswana, The Gambia, Mali, Mauritius, Mozambique, Nigeria, Rwanda, South Africa, Tanzania, and Zambia, seven of which, including the chairperson and the vice-chairperson, are women. This excludes both the Northern and the Central region of Africa in favour of the Southern, Western (both four Commissioners), and Eastern (three Commissioners) regions. This could undermine the credibility of the Commission when it comes to dealing with issues in countries in the Northern, Muslim part of Africa.<sup>12</sup>

The four Commissioners elected in 2005 all seemed to live up to the criterion of independence at the time of election; three being lawyers in private practice<sup>13</sup> and one being head of an independent commission.<sup>14</sup> Similarly, the five Commissioners that were elected in 2007 would also seem to live up to the criteria; three being lawyers in private practice,<sup>15</sup> one being a chief justice,<sup>16</sup> and one being the president of a national human rights institution.<sup>17</sup>

One of the Commissioners appointed in 2005, Mumba Malila of Zambia, was appointed Attorney General in his home country in November 2006. This has not led to his resignation as Commissioner. It

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<sup>12</sup> The former Commission had members from Sudan and Algeria (and, in principle, from Mauritania as well).

<sup>13</sup> Ms. Reine Alapini-Gansou (Benin), Mr. Musa Ngary Bitaye (The Gambia) and Mr. Mumba Malila (Zambia).

<sup>14</sup> Ms. Faith Pansy Tlakula (South Africa), Chief Electoral Officer of the South African Electoral Commission.

<sup>15</sup> Ms. Soyata Maiga (Mali), Ms. Catherine Dupe Atoki (Nigeria), and the re-elected Ms. Angela Melo (Mozambique).

<sup>16</sup> Mr. Yeung Sik Yuen (Mauritius).

<sup>17</sup> Ms. Zainabu Sylvie Kayitesi (Rwanda).



must in any event be obvious that according to the principles set out in the Note Verbale, Commissioner Malila would no longer be eligible.

Seven members of the Commission shall form a quorum, cf. Art. 42.3 of the Charter. In general, decisions can be made with a simple majority of votes. In case of equality of votes, the vote of the chairperson is decisive, cf. Art. 42.4.

The Commission elects its own chairperson and vice-chairperson among its members for a two-year period with the possibility of re-election, cf. Art. 42.1 of the Charter. The rules on the election and functions of the chairperson and the vice-chairperson are elaborated in rules 17-21 of the Rules of Procedure. The vice-chairperson takes over for the chairperson during the session should the chairperson be unable to attend, cf. rule 19(1); when doing so, the vice-chairperson has the same rights and duties as the chairperson.

Even though this term is used neither in the Charter nor in the Rules of Procedure, the chairperson and the vice-chairperson are generally referred to as the Bureau of the Commission. At the 42<sup>nd</sup> session, 14-28 November 2007, a new Bureau was elected, consisting of Sanji Monageng, Botswana, as chairperson and Angela Melo, Mozambique, as vice-chairperson.

Neither the Charter nor the Rules of Procedure contain extensive provisions on the specific role of the chairperson and the vice-chairperson of the Commission. In practice, the most important task would seem to be the chairing of meetings and sessions. According to the Charter's articles on communications, Arts. 47-59, the chairperson has certain specific tasks with respect to receiving communications, informing the states parties, etc. These tasks are in practice carried out by the Secretariat of the Commission.

The Commission is assisted by a Secretariat, lead by a Secretary appointed by the AU Commission, cf. Art. 41 of the Charter.<sup>18</sup> Furthermore, it is stated that the AU Commission shall "*provide the staff and services necessary for the effective discharge of the duties of the Commission*" and that the AU shall bear the costs of the staff and services.

For approximately 12 years, Germain Baricako was Secretary of the Commission; he stepped down in late 2005. A new Secretary, Dr. Mary Maboreke, assumed her duties on 30 July 2007. She comes from a position as head of the AU's Directorate of Women, Gender, and Development. In most of the interim period, one of the senior legal officers, Robert Eno, was Officer-in-Charge. According to the 21<sup>st</sup> activity report of the Commission, covering the period May-November 2006, the Secretariat should have a total staff of 35, including a deputy secretary/legal coordinator, 17 legal officers, a financial officer, a funds mobilisation officer, a documentation officer, a hotline manager and various support staff, "*to be able to work effectively*". According to the same activity report, the actual number of staff members is 17, including only 7 legal officers (only three of which are funded by the AU) but, for instance, no hotline manager and no documentation officer. This lack of staff is primarily due to insufficient resources.

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<sup>18</sup> This provision actually refers to the Secretary-General of OAU.

Already from the beginning, the Commission had insufficient funds. This has been stated regularly in the resolutions and decisions of the OAU Assembly and later the AU Assembly. In a resolution of the OAU Assembly from the 25<sup>th</sup> ordinary session in Addis Ababa, 24-26 July 1989, the OAU Assembly among other things “*requests the Secretary-General, in collaboration with the Advisory Committee on Administrative, Budgetary and Financial Matters to find, prior to the next financial year, appropriate solutions to the budgetary, financial and personnel problems raised by the African Commission on Human and Peoples’ Rights*”. Something similar has been reiterated at most of the following OAU and AU Assemblies up to at least the 7<sup>th</sup> ordinary session of the AU Heads of State and Government in Banjul 1-2 July 2006.<sup>19</sup>

The need for funds is also mentioned in the Grand Bay (Mauritius) Declaration and Plan of Action, adopted by the First OAU Ministerial Conference, 12-16 April 1999, Grand Bay, Mauritius<sup>20</sup> and in the Kigali Declaration.<sup>21</sup>

In its 20<sup>th</sup> activity report, covering the period January-June 2006, the Commission itself says, “*the work of the Secretariat of the African Commission continues to be severely compromised due to lack of funding. Even for its staffing requirements, the African Commission continues to depend more on extra-budgetary resources than on the AU for funding. Notwithstanding the extra-budgetary resources, the staffing situation still remains inadequate, given the increasing workload of the African Commission. There is an urgent need to recruit more staff of all categories to ensure the smooth running of the Commission.*” Something similar was repeated in the 21<sup>st</sup> activity report, covering the period May-November 2006.

According to the 21<sup>st</sup> activity report of the Commission, the assistance from various donors consists of the following (for the period May-November 2006): Funds from the Danish Institute for Human Rights to finance the post of Policy Phasing and Resource Mobilisation Officer and an expert and cooperation to develop next strategic plan; provision of three Canadian staff members from the Canadian Rights & Democracy;<sup>22</sup> and assistance from the Danish International Development Assistance (DANIDA) (through the International Working Group on Indigenous Affairs (IWGIA)<sup>23</sup>) and from the European Union (through the International Labour Organisation (ILO)) for the Working Group on Indigenous Populations/Communities.

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<sup>19</sup> See 28<sup>th</sup> ordinary session of the OAU Assembly in Dakar, 29 June-1 July 1992; 30<sup>th</sup> ordinary session in Tunis, Tunisia, 13-15 June 1994; 31<sup>st</sup> ordinary session in Addis Ababa 26-28 June 1995; 32<sup>nd</sup> ordinary session in Yaounde, Cameroon, 8-10 July 1996; 33<sup>rd</sup> ordinary session in Harare, Zimbabwe, 2-4 June 1997; 34<sup>th</sup> ordinary session in Ouagadougou, Burkina Faso, 8-10 June 1998; 35<sup>th</sup> ordinary session in Algiers, Algeria, 12-14 July 1999; 2<sup>nd</sup> ordinary session of the AU Assembly in Maputo 10-12 July 2003; 3<sup>rd</sup> ordinary session in Addis Ababa 6-8 July 2004; 6<sup>th</sup> ordinary session in Khartoum, Sudan, 23-24 January 2006; and 7<sup>th</sup> ordinary session in Banjul, 1-2 July 2006.

<sup>20</sup> Cf. item 23: “*There is also an urgent need to provide the Commission with adequate human, material and financial resources*”.

<sup>21</sup> Cf. item 23: “*The Conference ... calls upon the AU policy organs to provide the African Commission with suitable Headquarters, an appropriate structure and adequate human and financial resources for its proper functioning, including the establishment of a fund to be financed through voluntary contributions from member states, international and regional institutions*”.

<sup>22</sup> International Centre for Human Rights and Democratic Development is an independent organisation, established by the Canadian Parliament in 1988 to encourage and support human rights and democratic institutions and practices globally.

<sup>23</sup> IWGIA is an NGO registered in Denmark, working globally to defend and endorse the right of indigenous peoples.

At its 10<sup>th</sup> ordinary session 25-26 January 2007 in Addis Ababa, the AU Executive Council requested that the AU Commission, in collaboration with the Commission, propose a new structure for the Commission “*taking into consideration the broad mandate of the [Commission]*”. At the same time, the AU Executive Council authorised the Commission to, “*beginning the 2008 financial year, present and defend before the Permanent Representative Committee (PRC)*<sup>24</sup> *its annual budget independently from the budget of the Political Affairs Department*”. The fact that the Commission shall make its own budget from 2008 should improve its chances of increased funding from AU.

A proposal for a new structure for the Secretariat is contained in the 22<sup>nd</sup> activity report of the Commission, covering the period November 2006-May 2007. According to the proposal, the number of staff should be 36, comprising a Secretary, a deputy secretary, eight legal officers, two researchers, a public relations officer, an administrative officer, a finance officer, a resource mobilization officer, a projects, planning, monitoring and evaluation officer, two revisers/proof readers, three translators, one documentation officer, two bilingual secretaries, one computer technician/IT officer, one finance assistant, one documentation assistant, one clerk, two drivers, one receptionist, two cleaners, and two security guards. The total number according to the 22<sup>nd</sup> activity report is 16, less than half.

Talks with members and staff of the Commission and with representatives of organisations working with the Commission confirm that since its creation – in spite of the continued words of support from the African heads of state and ministers –the Commission has been lacking and still lacks the funds necessary to be able to function properly. Among the specific needs are staff to provide more assistance to (some of) the Special Rapporteurs, funding for missions (both for the Commissioners in their function as Commissioners and in their functions as Rapporteurs, heads of working groups, etc.), funding for promotional activities such as seminars and conferences and funding to be able to prolong the ordinary sessions and hold extraordinary sessions when necessary (only two ordinary sessions of two weeks per year is considered clearly inadequate). It is also considered problematic that a major part of the funding from external donors is earmarked, meaning that to some extent it becomes the donors and not the Commission that prioritises the work of the Commission.

In spite of the insufficient funds, the Commission has handled communications continuously since its establishment. In the periods covered by the 10<sup>th</sup> to the 22<sup>nd</sup> activity reports (October 1996-May 2007), the Commission reached decisions in 78 cases of which 54 were decisions on the merits and 24 were decisions declaring the cases inadmissible. A further nine cases were withdrawn, settled or postponed indefinitely prior to deciding on admissibility.<sup>25</sup>

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<sup>24</sup> The Permanent Representatives Committee is one of the organs of AU, cf. Art. 5 of the Constitutive Act of the AU. According to Art. 21, it is charged with preparing the work of the AU Executive Council and does other work under the instructions of the AU Executive Council. The Permanent Representatives Committee has special responsibilities for budgetary matters.

<sup>25</sup> For statistics, see below.

## Jurisdiction

As of 15 March 1999, the Charter had been ratified by all 53 member states of the African Union, meaning that all African countries apart from Morocco are covered by the Charter. Consequently, cases may be brought before the Commission against all African countries except Morocco.

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Women Protocol)<sup>26</sup> is an auxiliary document to the Charter, adopted with reference to Art. 66 of the Charter, which states that special protocols or agreements can be entered into to supplement the Charter. Consequently, the Commission is able to receive communications concerning alleged violations of the Women Protocol.

According to its Art. 27, the African Court shall interpret the Women Protocol, with the Commission having this task pending the establishment of the African Court, cf. Art. 32. Since the Commission can hardly make decisions on communications alleging violations of the Women Protocol without to some extent interpreting this protocol, Art. 27 could indicate that the Commission shall not have any competence with respect to the Women Protocol once the African Court is functioning. Also bearing in mind that the Commission's work with respect to communications is considered part of its protective mandate and not part of its promotional or its interpretative mandate, cf. Art. 45 of the Charter, the fact that the African Court has been granted the interpretative mandate with respect to the Women Protocol cannot mean that the Commission's protective mandate does not cover alleged violations of the Women Protocol.

As of 26 May 2007, the Women Protocol had been ratified by 21 countries, meaning that alleged violations perpetrated by these 21 countries<sup>27</sup> can be brought before the Commission.

The third main African human rights treaty is the African Charter on the Rights and Welfare of the Child (the Child Charter).<sup>28</sup> The Child Charter will be dealt with below since it has its own treaty body, the African Committee of Experts on the Rights and Welfare of the Child (the Child Committee). Part of the mandate of the Child Committee is to receive communications, cf. Art. 44 of the Child Charter. It could well be argued that the competence of the Child Committee is exclusive and that the Commission cannot deal with alleged violations of the Child Charter; this was also the view of some of the persons that were interviewed in connection with drafting this report during the 40<sup>th</sup> session of the Commission in November 2006. Others were of the opinion that given the Commission's general human rights mandate, it could also receive communications alleging violations of the Child Charter. The decision mentioned below on the OAU Refugee convention would seem to support this view.

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<sup>26</sup> The Women Protocol was adopted by the AU Assembly at the 2<sup>nd</sup> ordinary session 11-12 July 2003 in Maputo and entered into force on 25 November 2005, 30 days after ratification by 15 member states, cf. Art. 29.1.

<sup>27</sup> The countries are Benin, Burkina Faso, Cape Verde, Comoros, Djibouti, The Gambia, Libya, Lesotho, Malawi, Mali, Mauritania, Mozambique, Namibia, Nigeria, Rwanda, Senegal, Seychelles, South Africa, Tanzania, Togo, and Zambia.

<sup>28</sup> The Child Charter was adopted by the OAU Assembly during its 26<sup>th</sup> ordinary session 9-11 July 1990 in Addis Ababa and entered into force on 29 November 1999, 30 days after ratification by 15 member states, cf. Art. 47.3. As of 19 June 2007, the Child Charter had been ratified by 41 member states.

Other African conventions also touch upon human rights issues, e.g. the OAU Refugee Convention,<sup>29</sup> which in Art. 4 prohibits certain kinds of discrimination in the treatment of refugees. For the first time the Commission in a decision, contained in communication 249/2002, African Institute for Human Rights and Development (on behalf of Sierra Leonean Refugees in Guinea) against Guinea<sup>30</sup>, found not only that the Charter had been violated but also that another convention, in this case the OAU Refugee Convention, Art. 4, had been breached.

According to Arts. 60 and 61 of the Charter, the Commission shall draw inspiration from international law on human and peoples' rights, including both African and UN instruments, and shall take into consideration other international conventions expressly recognised by the member states as well as African practices consistent with international norms on human and peoples' rights, generally accepted customs, and legal precedents and doctrine.<sup>31</sup> This does not, however, mean that the Commission has been given the authority to adjudicate on other instruments than the Charter (and its various protocols), and the OAU Refugee Convention does not contain any provisions that would indicate that the Commission is competent to make decisions on alleged violations of this convention. Consequently, the Commission's decision in communication 249/2002 indicates that at least in cases where a provision of the Charter has been violated, the Commission will also be willing to adjudicate on alleged violations of other international – or at least African – instruments.

Among other conventions that could be relevant is the Cultural Charter for Africa,<sup>32</sup> which may be seen to underpin the rights to culture and education protected by Art. 17 of the Charter. The Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa<sup>33</sup> actually refers to the Charter in its preamble and could be seen as fleshing out obligations that to some extent would follow from Art. 24 (environment) and Art. 16 (health) of the Charter. The OAU Convention on the Prevention and Combating of Terrorism<sup>34</sup> contains a provision excluding acts for liberation and self-determination from the definition of terrorism (Art. 3); this could be said to supplement Art. 20 of the Charter. In addition, the OAU Convention

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<sup>29</sup> The Convention governing the Specific Aspects of Refugee Problems in Africa, adopted by the OAU Assembly during the 6<sup>th</sup> ordinary session 6-10 September 1969 in Addis Ababa and entering into force on 20 June 1974 upon ratification of one third of the member states of the OAU, cf. Art. 11. As of 26 May 2007, this Convention had been ratified by 45 member states.

<sup>30</sup> Printed in 20<sup>th</sup> activity report.

<sup>31</sup> An example of a communication where the Commission invoked a much different doctrine is communication 245/2002, Zimbabwe Human Rights NGO Forum ctr. Zimbabwe. In its decision, the Commission invoked its own jurisprudence, UN instruments, the American and European human rights conventions, the jurisprudence of the International Court of Justice, the Inter-American Court of Human Rights, the European Court of Human Rights, the International Criminal Tribunal for the former Yugoslavia and national courts, resolutions of the UN General Assembly, ECOSOC and the Human Rights Commission, national legislation and legal theory.

<sup>32</sup> Adopted by the OAU Assembly at its 13<sup>th</sup> ordinary session 2-6 July 1976 in Port Louis, Mauritius, and in force 19 September 1990 following the ratification by two thirds of the member states of OAU at the time, cf. Art. 34. As of 26 May 2007, the Cultural Charter has been ratified by 33 member states.

<sup>33</sup> Adopted 30 January 1991 in Bamako, Mali, by the Conference of Environmental Ministers and in force 22 April 1998, 90 days after the 10<sup>th</sup> ratification, cf. Art. 25.1. As of 12 June 2007, the Bamako Convention had been ratified by 23 member states.

<sup>34</sup> Adopted by the OAU Assembly at its 35<sup>th</sup> ordinary session 12-14 July 1999 in Algiers, Algeria, and in force 6 December 2002, 30 days after the 15<sup>th</sup> ratification, cf. Art. 20.1. As of 7 March 2007, the Terrorism Convention had been ratified by 37 member states.

for the Elimination of Mercenarism in Africa<sup>35</sup> might be relevant in certain cases concerning Art. 4 in the Charter, the right to life.

Finally, there are two new conventions, still awaiting the necessary number of ratifications, that contain provisions protecting human rights. One is the African Youth Charter, adopted by the AU Assembly at its 7<sup>th</sup> ordinary session 1-2 July 2006 in Banjul; this charter contains many of the classical human rights but is targeted particularly towards the African youth, defined as persons between 15 and 35 years of age.<sup>36</sup> The other is the African Charter on Democracy, Elections and Governance, adopted by the AU Assembly at its 8<sup>th</sup> ordinary session on 29-30 January 2007 in Addis Ababa.<sup>37</sup>

According to the Charter, there are two main categories of communications: Communications from member states (Arts. 47-54) and other communications (Arts. 55-59). A member state that wishes to bring a case before the Commission can use either the procedure set out in Arts. 47-48 or the procedure set out in Art. 49.

Under Art. 47, a member state that “*has good reasons to believe*” that another member state has violated the Charter may communicate this in writing to the “other” member state with a copy to the AU commission<sup>38</sup> and to the chairperson of the Commission. Rule 88 of the Rules of Procedure specifies that the communication shall contain “*a detailed and comprehensive statement on the actions denounced as well as the provisions of the Charter alleged to have been violated*”. Within three months the “other” member state shall provide a written explanation, containing relevant information on law and procedure and the redress given or course of action available. This is further elaborated on in rule 90 of the Rules of Procedure.

According to Art. 48, either state has the right to submit the matter to Commission if, within three months of the original communication being received by the “other” member state, the matter has not been settled to the satisfaction of both states; this shall be done via the chairperson of the Commission and the other state shall be notified. According to rule 91(2) of the Rules of Procedure, the issue shall also be referred to the Commission, should the “other” state fail to provide a reply within three months, as set out in Art. 47 of the Charter.

Instead of using the procedure set out in Arts. 47-48 of the Charter, a state can opt for the procedure set out in Art. 49. According to Art. 49, a state may refer a matter directly to the Commission if “*it considers that another State party has violated the provisions of the Charter*” by sending a written communication to the chairperson of the Commission with a copy to the AU Commission<sup>39</sup> and to the “other” state.

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<sup>35</sup> Adopted by the OAU Assembly at its 14<sup>th</sup> ordinary session 2-5 July 1977 in Libreville, Gabon, and in force 22 April 1985, 30 days after the 17<sup>th</sup> ratification, cf. Art. 13.2. As of 12 June 2007, the Mercenarism Convention had been ratified by 28 member states.

<sup>36</sup> As of 4 September 2007, the African Youth Charter had been ratified by two member states. According to its Art. 30.2, 15 ratifications are needed for it to enter into force.

<sup>37</sup> As of 2 August 2007, the Charter on Democracy, etc. had not been ratified by any member states. According to its Art. 48, 15 ratifications are needed for it to enter into force.

<sup>38</sup> The Charter refers to the Secretary-General of OAU.

<sup>39</sup> The Charter refers to the Secretary-General of OAU.

No matter which route is used, the Commission can only deal with a matter if all domestic remedies have been exhausted, “*unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged*”, cf. Art. 50 of the Charter.

The Rules of Procedure contain further provisions on Art. 47 negotiations in rules 88-92 and on cases brought before the Commission under either Art. 48 or Art. 49 in rules 93-101. Rules 93-101 do not make a clear distinction between cases brought under Art. 48 and cases brought under Art. 49. According to rule 93.2, both the Chairman of the Commission, the AU Commission<sup>40</sup> and the relevant state party shall be notified of any communication, whether it is submitted under Art. 48 or Art. 49. Such notification shall contain information on measures taken to resolve the question pursuant to Art. 47, measures taken to exhaust domestic remedies and any other procedures, if any, for the international investigation or settlement of the matter.

Thus far, only one case has been brought by a state against another state,<sup>41</sup> communication 227/99, DR Congo ctr. Burundi, Rwanda and Uganda, printed in the Commission’s 20<sup>th</sup> activity report. DR Congo brought this case by sending a communication to the Secretariat of the Commission with reference to Art. 49 of the Charter. Only upon a later request from the Commission did DR Congo notify the Secretary-General of the OAU (and the defendant states). This gave the Commission an opportunity to provide its interpretation of Arts. 47-48, since Uganda and Rwanda both argued that the case was inadmissible simply because DR Congo had failed to notify them and the Secretary-General of the OAU first. In its decision, the Commission stated that the procedure in Art. 47 is not mandatory and that there is no obligation under Art. 48 to inform the Secretary-General of the OAU. The Commission also stated that even where there is an obligation to notify the defendant states, the abstention from doing so does not in itself make the communication inadmissible since the Commission forwards a copy of the communication to the defendant states for comments in any event.<sup>42</sup>

The Commission reiterated the duty to exhaust domestic remedies, unless they would be unduly prolonged, cf. Art. 50, but since the case concerned alleged violations by the defendant states on the territory of DR Congo, the Commission did not find that any domestic remedies existed.<sup>43</sup> It is worth noticing that while both Uganda and Rwanda among its arguments of inadmissibility stated that the dispute in question was already pending before competent (non-legal) authorities of the OAU as well as other international bodies, the Commission did not explicitly respond to this allegation in its decision on admissibility. Consequently, it must be assumed that the Commission did not consider this material.

The duty to exhaust domestic remedies is also a fixture of the second category of communications, the “*other communications*”, cf. Art. 55 of the Charter. These are communications made by or on behalf of

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<sup>40</sup> Rule 93.2 refers to the Secretary-General of OAU.

<sup>41</sup> One other case, communication 157/96, Association Pour la Sauvegarde de la Paix au Burundi ctr. Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia, printed in the 17<sup>th</sup> activity report, was – as noted by the Commission – in practice brought on behalf of the military regime in Burundi and ought maybe to have been considered under Arts. 47-54 in the Charter as a state communication. It was, however, examined as an *other* communication, partly because the defendant states did not protest against this.

<sup>42</sup> See paragraphs 54-61 of the decision.

<sup>43</sup> See paragraphs 62-63.

individuals, groups of individuals or whole communities (often by national or – even more common – international NGOs). As mentioned above, so far only one communication has been made by a state, meaning that the rest of the communications has fallen within the category of “*other communications*”. The conditions for considering such communications are set out in Art. 56 of the Charter.

Firstly, the name of the author of the communication must be indicated (even if anonymity is requested<sup>44</sup>), cf. Art. 56.1. The name required is not the name of the person(s) whose rights have allegedly been violated, but of the persons submitting the complaint (which may be someone else).<sup>45</sup> According to the Commission’s Information Sheet no. 3 (on the communications procedure), the name of the representative must be indicated if the communication is submitted by an NGO.

Secondly, the communication shall be “*compatible with the Charter of the Organization of African Unity [now the Constitutive Act of the AU] or with the present Charter*”, cf. Art. 56.2. According to the aforementioned Information Sheet no. 3, this means that the communication shall invoke the provisions of the Charter alleged to have been violated or the relevant principles in the AU Charter (this must be a reference to the Constitutive Act of the AU as there is no AU Charter), and that the communication shall illustrate a *prima facie* violation of the Charter or some of the basic principles of the Constitutive Act of the AU.<sup>46</sup>

Thirdly, the communication may not be “*written in disparaging or insulting language directed against the state concerned and its institutions*” or the AU, cf. Art. 56.3. As stated in Information Sheet no. 3, “*Insulting language will render a communication inadmissible, irrespective of the seriousness of the complaint*”. At least one case, communication 65/92, Ligue Camerounaise des Droits de l’Homme ctr. Cameroon<sup>47</sup>, was declared inadmissible because of the wording, “*Paul Biya*<sup>48</sup> *must respond to crimes against humanity ... 30 years of the criminal neo-colonial regime incarnated by the duo Ahidjo*<sup>49</sup>/*Biya ... regime of torturers ... government barbarisms*”. This wording was considered insulting. On the other hand, the wording “*Far from guaranteeing the independence of the Court in relation to my trial, the Government of Ghana has shown an irrevocable determination to have me found guilty by hook or crook and incarcerated*” in communication 322/2006, Tsatsu Tsikata ctr. Ghana<sup>50</sup>, was not considered disparaging or insulting, but merely “*facts of allegations of Charter violations; and expressions of the complainant’s fear in this regard*”.

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<sup>44</sup> According to the Commission’s Information Sheet no. 3, there has only been one case where anonymity was requested.

<sup>45</sup> It is stated directly in the decision in communication 304/2005, FIDH, National Human Rights Organization (ONDH) and Rencontre Africaine pour la Defense des Droits de l’Homme (RADDHO) ctr. Senegal, printed in the 21<sup>st</sup> activity report, that “*the African Charter does not call for the identification of the victims of a Communication ... only the identification of the author or authors of the Communication is required*”.

<sup>46</sup> Information Sheet no. 3 mentions two cases that were declared inadmissible due to failure to prove a *prima facie* violation.

<sup>47</sup> Printed in the 10<sup>th</sup> activity report.

<sup>48</sup> Paul Biya has been President of Cameroon since November 1982 after seven years as Prime Minister.

<sup>49</sup> Ahmadou Ahidjo was President of Cameroon from independence in 1960 until his resignation in November 1982.

<sup>50</sup> Printed in the 21<sup>st</sup> activity report.



Fourthly, a communication must not be based exclusively on information from the mass media, cf. Art. 56.4. This was discussed in communication 147/95 and 149/96, Sir Dawda K. Jawara<sup>51</sup> ctr. The Gambia<sup>52</sup>, where the defendant state argued that the case was inadmissible, being based exclusively on news from the mass media. The Commission rejected this after emphasising the importance of the media in revealing human rights violations and stating that a communication does not become inadmissible because some aspects are based on news.<sup>53</sup> Since the claimant had provided some information that did not appear to come from the media, the communication could not be said to be based “*exclusively*” on information from the mass media.<sup>54</sup>

Fifthly, a communication must not be submitted prior to “*exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged*”, cf. Art. 56.5<sup>55</sup>. In the communication, the claimant should indicate the steps taken to fulfil this condition or, if this is not possible, indicate why this is the case.<sup>56</sup> According to the aforementioned communication 147/95 and 149/96, Sir Dawda K. Jawara ctr. The Gambia, a domestic remedy must be available, effective and sufficient if the complainant shall be obliged to pursue it. If a state alleges that local remedies have not been exhausted, “*it has the burden of showing that the remedies that have not been exhausted are available, effective and sufficient to cure the violation alleged*”, cf. communication 275/2003, Art. 19 ctr. Eritrea.<sup>57</sup>

A remedy is considered *available* if the complainant can “*pursue it without impediment*”.<sup>58</sup> According to communication 299/05, Anuak Justice Council ctr. Ethiopia,<sup>59</sup> “*The word “available” means “readily obtainable; accessible”; or “attainable, reachable; on call, on hand, ready, present; . . . convenient, at one’s service, at one’s command, at one’s disposal, at one’s beck and call.” In other words, remedies, the availability of which is not evident, cannot be invoked by the State to the detriment of the complainant*”. This would e.g. mean that a remedy is not *available* if the complainant has reason to

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<sup>51</sup> Sir Dawda K. Jawara was President in The Gambia from 1970 until the coup d’état in 1994 that brought the current President, Yahya Jammeh, to power. The case was brought on the basis of events in connection with this coup d’état.

<sup>52</sup> Printed in the 13<sup>th</sup> activity report.

<sup>53</sup> “*While it would be dangerous to rely exclusively on news disseminated from the mass media, it would be equally damaging if the Commission were to reject a communication because some aspects of it are based on news disseminated through the mass media ... There is no doubt that the media remains the most important, if not the only source of information. It is common knowledge that information on human rights violations is always obtained from the media ... The issue should not be whether the information was obtained from the media, but whether the information is correct. Did the complainant try to verify the truth about these allegations? Did he have the means or was it possible for him to do so, given the circumstances of his case?*” (quotes from paragraphs 24-26).

<sup>54</sup> The same reasoning may be found in communication 245/2002, Zimbabwe Human Rights NGO Forum ctr. Zimbabwe, printed in the 21<sup>st</sup> activity report.

<sup>55</sup> This condition can be found in the other regional human right complaints mechanisms, cf. Art. 35 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Art. 46 of the American Convention on Human Rights and is a general principle of international law.

<sup>56</sup> Cf. communication 299/05, Anuak Justice Council ctr. Ethiopia, printed in the 20<sup>th</sup> activity report: “*They must provide some prima facie evidence of an attempt to exhaust local remedies ... applicants are expected to indicate, for instance, the courts where they sought domestic remedies. Applicants must indicate that they have had recourse to all domestic remedies to no avail and must supply evidence to that effect. If they were unable to use such remedies, they must explain why. They could do so by submitting evidence derived from analogous situations or testifying to a state policy of denying such recourse*”.

<sup>57</sup> Printed in the 22<sup>nd</sup> activity report.

<sup>58</sup> Cf. communication 147/95 and 149/96, Sir Dawda K. Jawara ctr. The Gambia.

<sup>59</sup> Printed in the 20<sup>th</sup> activity report.

fear for his life or the like if he returns to his country to pursue the remedy.<sup>60</sup> The Commission's practice is, however, not entirely clear on this point since in communication 219/98, Legal Defence Centre ctr. The Gambia<sup>61</sup>, the communication was declared inadmissible despite the alleged victim having been deported, was not able to present himself in The Gambia, since "*the victim does not need to be physically in a country to avail himself of available domestic remedies, such could be done through his counsel*".

A remedy is considered *effective* if "*it offers a prospect of success*".<sup>62</sup> In the mentioned communication 147/95 and 149/96, Sir Dawda K. Jawara ctr. The Gambia, the Commission found that as jurisdiction of the national courts had been voided by decrees, there was no prospect of success.<sup>63</sup> A similar reasoning may be found in communication 245/2002, Zimbabwe Human Rights NGO Forum ctr. Zimbabwe<sup>64</sup>, where a "*Clemency Order... pardoning every person liable for any politically motivated crime*" denied the claimant the access to local remedies.

Lack of a legal aid scheme can also make a remedy ineffective: In communication 241/2001, Purohit and Moore ctr. The Gambia<sup>65</sup>, brought on behalf of patients at mental institutions in The Gambia, there had been no possibility to obtain legal aid to pursue the matter in the local courts. The Commission, while acknowledging that a literal interpretation of Art. 56 could lead to another result (since domestic remedies existed "*if you can afford it*"), concluded that in the absence of legal aid services, the remedies were not realistic for the complainants ("*this particular category of persons*") and therefore not effective; consequently, the case was admissible.<sup>66</sup> In communication 249/2002, African Institute for Human Rights and Development (on behalf of Sierra Leonean Refugees in Guinea) ctr. Guinea,<sup>67</sup> one of the reasons why the Commission found the domestic remedies not to be effective was that the Guinean courts would be "*severely overburdened if even a slight majority of victims chose to pursue legal redress in Guinea. Consequently, the requirement to exhaust domestic remedies is impractical*".<sup>68</sup>

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<sup>60</sup> As in communication 147/95 and 149/96, Sir Dawda K. Jawara ctr. The Gambia. In communication 232/99, John D. Ouko ctr. Kenya, printed in the 14<sup>th</sup> activity report, the complainant had been forced to flee and was recognised as a refugee; consequently, the domestic remedies were not available.

<sup>61</sup> Printed in the 13<sup>th</sup> activity report.

<sup>62</sup> Cf. communication 147/95 and 149/96, Sir Dawda K. Jawara ctr. The Gambia, printed in the 13<sup>th</sup> activity report.

<sup>63</sup> Something similar is found in a large number of cases against Nigeria, e.g. communication 102/93, Constitutional Rights Project and Civil Liberties Organisation ctr. Nigeria, and communication 105/93, 128/94, 130/94, 152/96 Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project ctr. Nigeria, printed in the 12<sup>th</sup> activity report, and in communication 251/2002, Lawyers for Human Rights ctr. Swaziland, printed in 18<sup>th</sup> activity report.

<sup>64</sup> Printed in the 21<sup>st</sup> activity report.

<sup>65</sup> Printed in the 16<sup>th</sup> activity report.

<sup>66</sup> In Communication 236/2000, Doebller ctr. Sudan, printed in the 16<sup>th</sup> activity report, the Commission also emphasised the lack of legal counsel, in this case due to Sudan not giving a visa to the chosen legal counsel.

<sup>67</sup> Printed in the 20<sup>th</sup> activity report.

<sup>68</sup> See also communication 299/05, Anuak Justice Council ctr. Ethiopia, printed in the 20<sup>th</sup> activity report, "*Thus, in cases of massive violations, the state will be presumed to have notice of the violations within its territory and the State is expected to act accordingly to deal with whatever human rights violations. The pervasiveness of these violations dispenses with the requirement of exhaustion of local remedies, especially where the state took no steps to prevent or stop them*".

A remedy is considered *sufficient* if “*it is capable of redressing the complaint*”.<sup>69</sup> Even though this is not specifically stated in the decision, communication 231/99, *Avocats sans Frontières ctr. Burundi*,<sup>70</sup> must be an example of a case where the remedy, the possibility to ask for pardon, would not be capable of redressing the complaint.<sup>71</sup> As stated in communication 299/05, *Anuak Justice Council ctr. Ethiopia*<sup>72</sup>, a remedy is insufficient if “*its pursuit depended on extrajudicial considerations, such as discretion or some extraordinary power vested in an executive state official*”. The Commission has also found that only remedies that are “*of a legal nature*” and “*not subordinate to the discretionary power of the public Authorities*” are relevant.<sup>73</sup>

With respect to the further proviso in Art. 56.3 that the local procedure not be “*unduly prolonged*”, the Information Sheet no. 3 refers to a case, communication 59/91, where appeal had been pending 12 years in a national court. This communication was considered admissible.<sup>74</sup>

As can be seen from the above, the Commission has taken a pragmatic and realistic view when it comes to admissibility. This does not mean that all cases are considered admissible. Of the 75 cases decided between October 1996 and November 2006, 23 were considered inadmissible. In communication 322/2006, *Tsatsu Tsikata ctr. Ghana*<sup>75</sup>, the communication was declared inadmissible because the case was still pending in Ghana. The decision in communication 299/05, *Anuak Justice Council ctr. Ethiopia*<sup>76</sup>, contains a lengthy description of the correct interpretation of the obligation to exhaust domestic remedies and says, “*It is not enough for the complainant to cast aspersion on the ability of the domestic remedies of the State due to isolated or past incidences... If a remedy has the slightest likelihood to be effective, the applicant must pursue it. Arguing that local remedies are not likely to be successful, without trying to avail oneself of them, will simply not sway this Commission.*” This communication was declared inadmissible. Communications have also been considered inadmissible simply because the complainants failed to provide any information on steps taken before the local courts.<sup>77</sup>

If a case has been considered inadmissible due to lack of exhaustion of domestic remedies, the complainant may submit the communication again once domestic remedies have been exhausted, cf. communication 198/97, *S.O.S. Esclaves ctr. Mauritania*.<sup>78</sup>

It is clear that the requirement to exhaust domestic remedies is by far the most important condition for admissibility set out in Art. 56. There are two more conditions in addition to the five conditions set out above. According to Art. 56.6, communications shall be submitted “*within a reasonable period from the time local remedies are exhausted*”.<sup>79</sup> In communication 322/2006, *Tsatsu Tsikata ctr. Ghana*<sup>80</sup>, the

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<sup>69</sup> Cf. communication 147/95 and 149/96, *Sir Dawda K. Jawara ctr. The Gambia*.

<sup>70</sup> Printed in the 14<sup>th</sup> activity report.

<sup>71</sup> “*With regard to the plea for pardon, it is not a judicial remedy but serves to affect the execution of a sentence.*”

<sup>72</sup> Printed in the 20<sup>th</sup> activity report.

<sup>73</sup> See communication 253/2002, *Antoine Bissangou ctr. Republic of Congo*, printed in the 21<sup>st</sup> activity report.

<sup>74</sup> Another relevant case is communication 199/97, *Odjouriby Cossi Paul ctr. Benin*, printed in the 17<sup>th</sup> activity report

<sup>75</sup> Printed in the 21<sup>st</sup> activity report.

<sup>76</sup> Printed in the 20<sup>th</sup> activity report.

<sup>77</sup> See e.g. communication 221/98, *Alfred B. Cudjoe ctr. Ghana*, printed in the 12<sup>th</sup> activity report.

<sup>78</sup> Printed in the 12<sup>th</sup> annual activity report.

<sup>79</sup> The sentence goes on to say “*or from the date the Commission is seized of the matter*”, but since seizure of a matter does not take place until the time that the communication has been received by the Commission, this part of the condition does

Commission stated, “*this is quite related to the principle of the exhaustion of local remedies in accordance with article 56(5). This means that the Commission estimates the timeliness of a Communication from the date that the last available local remedy is exhausted by the Complainant. In the case of unavailability or prolongation of local remedies, it will be from the date of the Complainant’s notice thereof.*” In practice, the question of the timeliness of communications has not been a major issue.

The last and seventh condition is that a communication may not “*deal with cases which have been settled by the states involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organisation of African Unity [now the Constitutive Act of the AU] or the provisions of the present Charter*”, cf. Art. 56.7. In Information Sheet no. 3, it is stated that a communication cannot be “*one that has already been, or is being settled through another international body, like the UN Human Rights Committee, or even some organ of the AU*”. Like the condition in Art. 56.6 that communications be submitted within a reasonable time, the question of competing jurisdiction has not been a major issue. Even though the provision refers to cases having “*been settled*”, it will presumably be interpreted as comprising also cases that have simply been brought before the new African Court, the Child Committee, the UN Human Rights Committee or any of the other UN treaty bodies even if the case is still pending before such an organ; even though it could be argued that bringing a case before one of these organs (apart from the African Court which is capable of giving a final and binding ruling) will not necessarily lead to the case being settled.

As will be discussed in detail below, at least one sub-regional court, the Community Court of the Economic Community of West African States (ECOWAS), has jurisdiction to adjudicate on human rights violations by states. It is not clear from the wording of Art. 56.7 whether the fact that a case is pending or has already been decided by such a sub-regional court will prevent the Commission from dealing with such case. The wording of Information Sheet no. 3 seems to indicate that this would indeed be the case. It could well be argued that to the extent the procedure of the relevant sub-regional court lives up to reasonable standards (as reflected in the Charter and the relevant body of international human rights law) and the human rights issue has been taken into account and tried by the sub-regional court, there is no need for the Commission to look into such a case again and it should, consequently, be possible for the Commission to refuse to take on such a case, based on Art. 56.7.

According to Art. 58 of the Charter on communications from other than member states, the Commission shall initially look into whether one or more communications “*reveal the existence of a series of serious or massive violations of human and peoples’ rights*”. If this is the case, the Commission shall inform the AU Assembly, which can then request the Commission “*to undertake an in-depth study of these cases and make a factual report, accompanied by its findings and recommendations*”. In practice, however, “*the practice of the Commission has been to consider every communication even if it refers to only a single violation of the Charter. The rationale behind this practice is that a single violation still violates the dignity of the victim and is an affront to international human rights norms*”, cf. the Commission’s Information Sheet no. 2 (Guidelines to the Submission of Communications). A review of the cases decided by the Commission shows that many cases concerning a single alleged violation

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not seem to have any practical effect. Tellingly, there is no reference to this condition in the Commission’s Information Sheet no. 3.

<sup>80</sup> Printed in the 21<sup>st</sup> activity report.

have been considered,<sup>81</sup> and in no cases has the Commission awaited a request from the AU (or OAU) Assembly to deal with a case.

### Human Rights Mandate

As stated above, the Commission was established specifically to deal with human rights, cf. Art. 45 of the Charter. Consequently, the Commission's overall mandate to handle human rights cases is not in doubt. As indicated above, it is not certain to what extent the Commission can take on cases dealing with violations of human and peoples' rights that are not protected by the Charter, but by other African legal instruments.

According to Arts. 47 and 49 of the Charter, states can bring cases before the Commission based on alleged violations of the Charter.<sup>82</sup> As stated above, it must be considered certain that at least cases based on alleged violations of the Women Protocol can be brought, as this protocol is auxiliary to the Charter and does not have its own treaty body. It is more doubtful if communications based on alleged violations of the Child Charter can be brought since the Child Charter is independent and has its own body, the Child Committee. As mentioned, the Commission's decision in communication 249/2002, African Institute for Human Rights and Development (on behalf of Sierra Leonean Refugees in Guinea) against Guinea,<sup>83</sup> shows that under some circumstances the Commission will also be ready to make a decision on the violation of provisions in other international instrument, in this case the OAU Refugee Convention. This case contained violations of both the Charter and the OAU Refugee Convention. It remains to be seen if the Commission will be willing to take on cases that do not also concern an alleged violation of the Charter (or the Women Protocol).

Unlike Arts. 47 and 49, Art. 55 of the Charter (on "*other communications*") does not contain any reference to violations of the Charter. It must, however, be assumed that it was not intended to make the scope for *other* communications wider than the scope for *state* communications and, consequently, what is indicated above on communication under Arts. 47 and 49 must also apply to communications under Art. 55. It should, however, be noted that among the conditions for admission is that a communication is "*compatible with the Charter of the Organisation of African Unity [now probably the Constitutive Act of the AU] or with the present Charter*", cf. Art. 56.2. In the Information Sheet no. 3, this has been interpreted as the necessity for a communication to "*illustrate a prima facie violation of the Banjul Charter or some of the basic principles of the AU Charter, such as "freedom, equality, justice and dignity"*". This could be seen as an indication that the Commission will be willing to look at human rights violations more broadly, even if no specific violation of the Charter (or any other relevant instrument) has taken place. Most likely, such an interpretation would be erroneous.

As mentioned above, in the period between October 1996 and May 2007, the Commission has decided 78 cases. In this period, a further eight cases were settled or withdrawn and one case was postponed indefinitely before decisions on admissibility were made. All communications handled by the Commis-

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<sup>81</sup> See e.g. communication 197/97, Bah Ould Rabah ctr. Mauritania that deals with one violation of Art. 14 (the right to property) and communication 199/97, Odjouoriby Cossi Paul ctr. Benin, both printed in the 17<sup>th</sup> activity report that deals with one violation of Art. 7.1.d (the right to be tried within a reasonable time by an impartial court).

<sup>82</sup> Art. 47: "*If a state party...has good reason to believe that another state party...has violated the provisions of the Charter*". Art. 49: "*If a state party... considers that a state party has violated the provisions of the Charter*".

<sup>83</sup> Printed in the 20<sup>th</sup> activity report.

sion concern human rights. The outcome of the communications reported in the 12<sup>th</sup> to 22<sup>nd</sup> activity report can be summarised as follows:<sup>84</sup>

Communications with decision on admissibility:

| Activity Report                    | Period                | Inadmis.  | Admis.    | Violation | Settled | No viol. | Total     |
|------------------------------------|-----------------------|-----------|-----------|-----------|---------|----------|-----------|
| 10 <sup>th</sup>                   | 1996-7                | 2         | 6         | 4         | 2       | -        | 8         |
| 11 <sup>th</sup>                   | 1997-8                | 1         | 3         | 1         | -       | 2        | 4         |
| 12 <sup>th</sup>                   | 1998- 9               | 2         | 4         | 4         | -       | -        | 6         |
| 13 <sup>th</sup>                   | 1999-2000             | 4         | 12        | 11        | 1       | -        | 16        |
| 14 <sup>th</sup>                   | 2000-1                | -         | 9         | 9         | -       | -        | 9         |
| 15 <sup>th</sup>                   | 2001-2                | 2         | 1         | 1         | -       | -        | 3         |
| 16 <sup>th</sup>                   | 2002-3                | 3         | 4         | 4         | -       | -        | 7         |
| 17 <sup>th</sup>                   | 2003-4                | 3         | 6         | 4         | -       | 2        | 9         |
| 18 <sup>th</sup> , 1 <sup>st</sup> | 2004, 2 <sup>nd</sup> | 2         | 3         | 2         | -       | 1        | 5         |
| 18 <sup>th</sup> , 2 <sup>nd</sup> | 2005, 1 <sup>st</sup> | 2         | 1         | 1         | -       | -        | 3         |
| 19 <sup>th</sup>                   | 2005, 2 <sup>nd</sup> | -         | -         | -         | -       | -        | -         |
| 20 <sup>th</sup>                   | 2006, 1 <sup>st</sup> | 1         | 2         | 2         | -       | -        | 3         |
| 21 <sup>st</sup>                   | 2006, 2 <sup>nd</sup> | 2         | 2         | 2         | -       | -        | 4         |
| 22 <sup>nd</sup>                   | 2007, 1 <sup>st</sup> | -         | 1         | 1         | -       | -        | 1         |
|                                    |                       | <b>24</b> | <b>54</b> | 46        | 3       | 5        | <b>78</b> |

Communications with no decision on admissibility:

| Activity Report                    | Period                | Postponed | Settled | Withdrawn |
|------------------------------------|-----------------------|-----------|---------|-----------|
| 10 <sup>th</sup>                   | 1996-7                |           |         |           |
| 11 <sup>th</sup>                   | 1997-8                |           |         |           |
| 12 <sup>th</sup>                   | 1998- 9               |           |         |           |
| 13 <sup>th</sup>                   | 1999-2000             |           |         |           |
| 14 <sup>th</sup>                   | 2000-1                |           |         |           |
| 15 <sup>th</sup>                   | 2001-2                |           |         | 1         |
| 16 <sup>th</sup>                   | 2002-3                | 1         |         | 2         |
| 17 <sup>th</sup>                   | 2003-4                |           |         | 1         |
| 18 <sup>th</sup> , 1 <sup>st</sup> | 2004, 2 <sup>nd</sup> |           |         |           |
| 18 <sup>th</sup> , 2 <sup>nd</sup> | 2005, 1 <sup>st</sup> |           |         | 2         |
| 19 <sup>th</sup>                   | 2005, 2 <sup>nd</sup> |           |         |           |
| 20 <sup>th</sup>                   | 2006, 1 <sup>st</sup> |           | 1       | 1         |
| 21 <sup>st</sup>                   | 2006, 2 <sup>nd</sup> |           |         |           |
| 22 <sup>nd</sup>                   | 2007, 1 <sup>st</sup> |           |         |           |
|                                    |                       | 1         | 1       | 7         |

<sup>84</sup> Based on a review of the relevant activity reports.

## Procedure

As mentioned above, cases brought before the Commission can be divided between communications brought by states (Arts. 47-54 of the Charter) and communications brought by non-state actors (ordinary citizens, NGOs, etc.), the so-called *other* communications (Arts. 55-59). As mentioned above, only one case has so far been processed as a *state* communication and, apart from some formal differences in the manner in which the case is brought, the single *state* communication and the *other* communications have been processed in the same manner.

All communications have to be sent in writing to the Commission via its Secretariat. The Secretariat works in French and English<sup>85</sup>. According to rule 34 of its Rules of Procedure, the working languages are those of AU, meaning that Arabic and Portuguese are working languages of the Commission, which again means that communications may also be submitted in either of these languages.<sup>86</sup> With respect to *state* communications, the complaining state can either use the Arts. 47-48 procedure or the Art. 49 procedure. The Arts. 47-48 procedure is aimed at finding a settlement, which entails that a letter is sent from the complaining state to the defendant state, setting out the alleged violation. This letter shall be sent in copy to the AU Commission and to the Commission. The defendant state then has three months to reply. If no solution is found within three months, both parties may bring the matter before the Commission and shall notify the other state, cf. Art. 48. A state can also bring the case directly to the Commission simply by sending a communication to the Commission with a copy to the AU Commission and the defendant state, cf. Art. 49. As can be seen from the Commission's decision in the one *state* communication<sup>87</sup> so far, described in detail above, the Commission has taken a pragmatic view as to the adherence to the formalities prescribed in Arts. 47-49.<sup>88</sup>

*Other* communications shall simply be sent in writing to the Commission via its Secretariat. There is no special format to be used, but the communication shall contain the information necessary to show that the conditions in Art. 56 (see above) are met. This entails that a communication shall contain a full description of the alleged violation, indicating the date, time and place of occurrence. It shall also identify the state concerned, which has to be a party to the Charter (or, if some other instrument, e.g. the Women Protocol, is alleged to have been violated, a party to that instrument). If it is not possible for the complainant to point to the exact provision that has allegedly been violated, the complainant shall at least indicate the principles that have been infringed. The communication shall also include the name of the author(s) (with indication if anonymity is requested). If possible, the communication shall contain the names of any authorities familiar with the facts of the case. It is indicated in the Commission's Information Sheet no. 2 and set out in rule 104 of the Rules of Procedure that if some of the requirements are not met, the complainant will be notified by the Secretariat and given the opportunity to provide further information before the matter is presented to the Commissioners.<sup>89</sup>

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<sup>85</sup> According to information from the Secretariat of the Commission.

<sup>86</sup> During a conversation at the 40<sup>th</sup> session in November 2006, it was indicated by a member of the staff of the secretariat that should a communication be delivered in any other (African) language, the Secretariat would probably try to have it translated.

<sup>87</sup> Communication 227/99, DR Congo ctr. Burundi, Rwanda and Uganda, printed in the 20<sup>th</sup> activity report.

<sup>88</sup> In spite of rule 97 of the Rules of Procedure, stating that communications shall be considered only when the procedure in Art. 47 and the time limit in Art. 48 have been exhausted. Rule 97 is part of Section 11 of Chapter XVI that deals with communications transmitted according to either Art. 48 or Art. 49.

<sup>89</sup> See further Information Sheet no. 2 and 3.

If the victim's life, personal integrity or health is in imminent danger, this may be indicated in the communication with a request for provisional measures in accordance with Rule 111 of the Commission's Rules of Procedure (see further below).

During its 40<sup>th</sup> session in Banjul in November 2006, a report<sup>90</sup> suggesting reforms of the communications procedure (the Communications Reform Report) was presented to and taken note of by the Commission. This report contains proposals for a form to be used for *other* communications and another to be used for *state* communications. It must be assumed that such forms will be adopted within the near future, making it easier for complainants to provide the correct information and for the Commission and its Secretariat to process communications. The Communications Reform Report also proposes to introduce on-line submission of complaints.

When the Secretariat has received a communication, it registers it and then acknowledges receipt in writing. A summary is made of the communication and this summary is sent to the Commissioners as the basis for the Commission's decision on *seizure* of the communication, cf. Art. 55.<sup>91</sup> A simple majority is sufficient to decide on seizure. According to Information Sheet no. 2, the Commissioners are requested to give their written response concerning the matter of seizure; the communication can be considered seized once seven<sup>92</sup> Commissioners have responded; alternatively, the decision on seizure must be made at the next session. According to information provided by the author of the Communications Reform Report, the matter of seizure is always decided at a session.

There are no guidelines on the criteria for seizing a communication and, in practice, communications are always seized.<sup>93</sup> The Communications Reform Report proposes that the decision on seizure be taken by the Commissioners by a "write-in" vote (as already described in Information Sheet no. 2), thereby hopefully shortening the procedure with approximately six months compared to today where decision on seizure has to await a session.

Once a communication has been received, one legal officer from the Secretariat and one Commissioner will be assigned to deal with the communication. The legal officer will be chosen based on language skills and on knowledge of the specific field that is the subject of the communication. A legal officer from the defendant country or from a country in conflict with the defendant country will not be chosen. The same criteria are used when choosing the Commissioner to be in charge (the *rapporteur*). The legal

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<sup>90</sup> The report is called *Suggested reforms of the Communications Procedure of the African Commission on Human and Peoples' Rights by the Communications Reforms Expert (Abiola Ayinla) under the 'Expertise Program' – A joint initiative of the Danish Institute for Human Rights, Copenhagen, Denmark & the Centre for Human Rights, Pretoria, Republic of South Africa, November 2006.*

<sup>91</sup> Arts. 47-54 on *state* communications contain no similar provision requiring seizure, but it appears from the decision in communication 227/99, DR Congo ctr. Burundi, Rwanda and Uganda, printed in the 20<sup>th</sup> activity report, the only *state* communication so far, that in this case as well, the Commission took a formal decision on the seizure of the communication at a session.

<sup>92</sup> The number stated in Information Sheet no. 3 is seven which is equal to the number that constitutes a quorum, cf. rule 43 of the Commission's Rules of Procedure. It must be assumed that at least six of the seven replies must be in favour, since there would otherwise be a risk that the majority supporting seizure could turn into a minority.

<sup>93</sup> Only two cases, communications 57/91, Tanko Bariga ctr. Nigeria, and 106/93, Amuh Joseph Vitine ctr. Cameroon, were not seized, cf. the Communications Reform Report, p. 23.



officer will be responsible for drafting the various letters and decisions in cooperation with the *rappor-  
teur*.<sup>94</sup>

Following seizure, the defendant state is informed of the communication and both parties are requested to provide their comments on the matter of admissibility within three months so that the matter of admissibility can be considered at the coming session. It is the practice of the Commission to send the parties several reminders before progressing to make a decision. This means that much more than six months may pass between decision on seizure and decision on admissibility. For obvious reasons, the states are mostly late in responding.<sup>95</sup> The decision of admissibility is normally based on the parties' written statements; in some cases, though, the parties have provided oral submissions on admissibility.

A decision on admissibility is made during an ordinary session at a closed meeting of the Commission after which time the parties are informed. The general quorum is seven Commissioners, cf. rule 43 of the Rules of Procedure, and decisions can be made by simple majority, cf. rule 62 of the Rules of Procedure. If the communication is declared inadmissible, the matter is over.<sup>96</sup> If the communication is considered admissible, the parties are invited to provide their comments on the merits, in principle before three months, but also with respect to the merits, the Commission will send several reminders, etc.<sup>97</sup>

Once a case is ready to be decided on the merits, the parties will be informed and invited to present their case at the session when the communication is expected to be discussed and decided by the Commissioners. It is possible to present witnesses at such a hearing and to be represented by lawyers or other representatives. The Commission will only indicate the session, not the exact time of the hearing. Since communications are decided in closed sessions, they will be heard at the last half of an ordinary

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<sup>94</sup> This information was provided by members of the staff of the Secretariat in conversation during the 40<sup>th</sup> session in November 2006.

<sup>95</sup> As an example, see communication 249/2002, African Institute for Human Rights and Development (on behalf of Sierra Leonean refugees in Guinea) ctr. Republic of Guinea, printed in the 20<sup>th</sup> activity report: On 17 April 2002, the communication was delivered; in May 2002 it was seized and the parties informed; in June 2002, the complainant delivered a statement on admissibility that was sent to the defendant state in August 2002. By letters of November 2002, January 2003 and March 2003, the defendant state was asked to respond. At the session in May 2003, the communication was declared admissible without the defendant state having provided any feedback; in June 2003 the parties were asked to submit their comments on the merits within three months, and the complainant did so in August 2003. The complainant's comments on the merits were forwarded to the defendant state in September 2003 and again by DHL in October 2003, since the defendant state claimed not to have received it the first time. During the session in November 2003, the parties made oral submissions on admissibility; the complainant's submissions on the merits were translated into French and sent to the defendant state in December 2003. In April 2004, the defendant state delivered its comments on the merits; at the session in May 2004 the Commission heard oral submissions from the complainant and witnesses; and at the session in November-December 2004 the decision on the merits was delivered.

<sup>96</sup> Even though the complainant can in principle try to submit the communication again once the conditions have been fulfilled as explicitly stated in communication 198/97, S.O.S. Esclaves ctr. Mauritania, printed in the 12<sup>th</sup> activity report. This case was declared inadmissible due to lack of exhaustion of domestic remedies.

<sup>97</sup> According to Information Sheet no. 3, the Commission can also provide its *Good Offices* to assist in finding a settlement, should the parties so desire. None of the cases reported in 10<sup>th</sup> to 22<sup>nd</sup> activity report was settled through the *Good Offices* of the Commission.

session.<sup>98</sup> In addition, there is no certainty that a case will be heard at the indicated session, meaning that the parties risk showing up without being allowed to present their case. There is no duty to present a case orally as the Commission is capable of deciding cases based on written material. Prior to the closed meeting where the final decision is to be made on a communication, the legal officer and the *rapporteur* might have prepared a draft decision.<sup>99</sup>

There is no obligation to be represented by a lawyer or another representative before the Commission, but as set out in the Commissions Information Sheet no. 2 “*it is always useful to seek the help of a lawyer*”. The Commission does not offer any kind of legal assistance. Certain NGOs, such as the Institute for Human Rights and Development in Africa (IHRDA), have programmes to assist in advocacy before the Commission.<sup>100</sup>

The parties are expected to procure and present the necessary documentation and evidence,<sup>101</sup> but the Commission (via its Secretariat) can also take steps to secure supplementary information itself in accordance with Art. 46 of the Charter, giving the Commission the right to “*resort to any appropriate method of investigation*”.<sup>102</sup> Apart from doing this via the authorities of the relevant state, the Secretariat may also contact disinterested national NGOs for information.<sup>103</sup>

Sometimes the defendant state refrains from taking any part in the process. In such cases, the Commission will make its decision based solely on the information provided by the complainant.<sup>104</sup> Unlike what is the case in some national legal systems, the Commission is under no obligation to accept information and allegations that are uncontested, but can and will make its own evaluation of the material presented. Furthermore, as the Commission emphasised in communication 227/99, DR Congo ctr. Burundi, Rwanda and Uganda,<sup>105</sup> the fact that a member state, in this case Burundi, does not make any written or oral submissions, does not absolve said state from the decision reached by the Commission.

As mentioned above, seven Commissioners are necessary to constitute a quorum, cf. rule 43 of the Rules of Procedure, and a simple majority can make a decision on a communication, cf. rule 62 of the

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<sup>98</sup> At an ordinary session, the first week is normally taken up by public sessions, e.g. the examination of states, and the second week is used for private deliberations.

<sup>99</sup> See Information Sheet no. 3. This paragraph is also based on information provided orally during conversations with complainants and representatives of complainants during the 40<sup>th</sup> ordinary session in November 2006.

<sup>100</sup> Cf. the website of IHRDA, [www.africaninstitute.org](http://www.africaninstitute.org), according to which one of IHRDA’s programmes is a programme for legal advocacy before the Commission.

<sup>101</sup> Cf. Information Sheet no. 3.

<sup>102</sup> As an example, see communication 219/98, Legal Defence Centre ctr. The Gambia, printed in the 13<sup>th</sup> activity report. In this case, the Commissioners requested the secretariat to investigate if the alleged victims could have resorted to local remedies. The secretariat took various steps to provide information, but it is not clear from the communication to what extent usable information was actually provided.

<sup>103</sup> This information was provided during conversations with members of the staff of the Secretariat during the 40<sup>th</sup> session in November 2006.

<sup>104</sup> See e.g. communication 155/96, The Social and Economical Rights Action Center and the Center for Economic and Social Rights ctr. Nigeria, printed in the 15<sup>th</sup> activity report, where the Commission states in paragraph 49 that “*the Commission is compelled to proceed with the examination of the matter on the basis of the uncontested allegations of the complainants, which are consequently accepted by the Commission*”.

<sup>105</sup> Printed in the 20<sup>th</sup> activity report.

Rules of Procedure. It is possible to dissent even though this is very seldom done.<sup>106</sup> The decision with respect to a communication is called a *recommendation*. A recommendation will normally contain the Commission's view as to whether or not a violation has taken place (with an indication of the relevant articles of the Charter) and a recommendation of the actions that the defendant state should take if a violation has taken place; e.g. to "*harmonize its legislation with that of the African Charter*" and to "*pay compensation for the loss suffered by the complainant*".<sup>107</sup> Originally, the Commission would simply state if a violation had occurred, but at least since the 1996, the Commission has in most cases given some recommendations on actions to be taken by the defendant state if violations have been found.<sup>108</sup>

Once a communication has been finally decided and the decision drafted in its final form, the process used to be that the decision was sent to the parties for information. Yet starting in June-July 2004 and culminating in July 2006, following the change in practice of the AU Executive Council and the AU Assembly in the application of Art. 59 of the Charter, see below, the Commission felt a need to ensure that its decisions with respect to communications were not made public before being approved by the AU Assembly. Prior to that, it did not matter much since the Commission could feel sure that the activity reports containing the decisions would be adopted and approved for publication as presented to the AU Assembly.

Initially, the issue of confidentiality prior to adoption was solved by the Secretariat sending its decision to the parties with a note to the effect that the decision should be kept confidential until approved by the AU Assembly. After an incident where a decision was made public by a party without awaiting the AU Assembly's approval, the procedure will probably henceforth be that until approved by the AU Assembly, the parties will be informed only that a decision has been made, but not of the contents of such a decision.<sup>109</sup> The decision will then be communicated upon the approval by the AU Assembly.

When informed during conversations at the 40<sup>th</sup> session in November 2006 about the intention to keep decisions secret pending AU Assembly approval, also *vis-à-vis* the parties, most NGO-representatives were sceptical towards such a procedure on the grounds that it would delay the process and was an indication of lack of independence of the Commission *vis-à-vis* the AU Assembly. However, one NGO-representative indicated that it was only natural that the Commission would take note of the current understanding of Art. 59 and that the delay would be negligible since there is normally an AU Assembly to approve the activity report of the Commission just a few months after each session of the Com-

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<sup>106</sup> The sole example in the communications printed in activity reports 10-22 is communication 197/97, Bah Ould Rabah ctr. Mauritania, printed in the 17<sup>th</sup> activity report. In this case, Commissioner Yasir Sid Ahmad El Hassan (Sudan) dissented from the Commission's decision to find a violation of Art. 14 of the Charter.

<sup>107</sup> From communication 253/2002, Antoine Bissangou ctr. Republic of Congo, printed in the 21<sup>st</sup> activity report.

<sup>108</sup> See e.g. communication 102/93, Constitutional Rights Project and Civil Liberties Organisation ctr. Nigeria, printed in the 12<sup>th</sup> activity report, where the Commission requested "*the government of Nigeria to release all those who were detained for protesting against the annulment of the elections; and to preserve the traditional functions of the court by not curtailing their jurisdiction*". As an example of a case where the Commission has limited itself to stating that a violation has taken place can be mentioned communication 137/94, 139/94, 154/96 and 161/97 International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation ctr. Nigeria, printed in the 12<sup>th</sup> activity report.

<sup>109</sup> This information was provided during a conversation with the officer-in-charge of the Secretariat during the 40<sup>th</sup> session in November 2006.

mission. A commissioner confirmed the view that this new requirement would not prolong the process much.

Apart from being submitted to the parties, the decision in a communication is included in the relevant activity report of the Commission, transmitted to the AU Assembly, cf. Art. 59 of the Charter, that says, “*all measures taken within the provisions of the present Charter shall remain confidential until such time as the Assembly ... shall otherwise decide. However, the report shall be published by the Chairman of the Commission upon the decision of the Assembly ... The report on the activities of the Commission shall be published by its Chairman after it has been considered by the Assembly ...*”. Art. 59 should be read in conjunction with Art. 54, saying, “*The Commission shall submit to each ordinary Session of the Assembly ... a report of its activities*”. At the 2<sup>nd</sup> ordinary session of the AU Assembly in Maputo, Mozambique, 10-12 July 2003, the AU Assembly mandated the AU Executive Council to consider the activity reports of the Commission and to submit a report to the AU Assembly based on these considerations. Consequently, it is now the AU Executive Council (and not the AU Assembly) that considers the activity reports of the Commission.

As mentioned above, until the 3<sup>rd</sup> ordinary session of the AU Assembly 6-8 July 2004,<sup>110</sup> the practice of the AU Assembly was to approve the activity reports of the Commission without much discussion.<sup>111</sup> The reports include the resolutions of the Commission and the decisions with respect to communications. It also offers an overview of the information provided at the relevant sessions. On the agenda for the 5<sup>th</sup> ordinary session of the AU Executive Council and the 3<sup>rd</sup> ordinary session of the AU Assembly in June-July 2004 in Addis Ababa was the adoption of the 17<sup>th</sup> activity report of the Commission. This activity report contained the report of the fact-finding mission carried out by the Commission to Zimbabwe 24-28 June 2002. This led to discussion at the AU Executive Council where the Zimbabwean government raised the objection that it had not been given the opportunity to comment on the report.<sup>112</sup> This led the AU Assembly to suspend publication of the 17<sup>th</sup> activity report (at the recommendation of the AU Executive Council), pending possible observations from the state concerned (Zimbabwe). This decision would not seem to have any direct impact on decisions/recommendations with respect to communications. Once the government of Zimbabwe had provided observations with regard to the report of the fact-finding mission, the 17<sup>th</sup> activity report, including the findings and recommendations of the Commission based on the fact-finding mission and the comments by the Zimbabwean Government, was adopted during the 4<sup>th</sup> ordinary AU Assembly in Abuja in 30-31 January 2005.

When the AU Executive Council at its 8<sup>th</sup> ordinary session in Khartoum 16-21 January 2006 was considering the 19<sup>th</sup> activity report of the Commission, the AU Executive Council decided to recommend to the AU Assembly (i) to adopt and authorise the publication of the 19<sup>th</sup> activity report of the Commission (with annexes), apart from the resolutions on Eritrea, Ethiopia, Sudan, Uganda and Zimbabwe; (ii)

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<sup>110</sup> And the preceding 5<sup>th</sup> ordinary session of the AU Executive Council.

<sup>111</sup> See for instance the 2<sup>nd</sup> ordinary session of the AU Assembly in Maputo 10-12 July 2003, where the AU Assembly without much ado adopted the 16<sup>th</sup> activity report and commended the Commission for its excellent work.

<sup>112</sup> As stated in Frans Viljoen's article, Recent developments in the African regional human rights system, African Human Rights Law Journal, vol. 4, no. 2, 2004, pp. 344-347, the usual practice of the Commission is to solicit comments from states in such cases; apparently the Commission had contacted the Zimbabwean Department of Justice for comments, but the Zimbabwean Department of Foreign Affairs had not been informed.

to request the concerned member states to make their views on said resolutions known to the Commission within three months and to request the Commission to submit a report thereon to next ordinary session of the Executive Council; and (iii) to call upon the Commission to enlist the response of the relevant states parties to all resolutions and decisions before submitting such resolutions and decisions to the AU Executive Council and/or the AU Assembly. In its decision at its 6<sup>th</sup> ordinary session 23-24 January 2006, the AU Assembly followed the recommendation of the Executive Council and further decided to request member states to submit responses to resolutions and decisions within three months of having been notified by the Commission. As can be seen, this decision specifically refers to decisions, which would seem to include decisions with respect to communications.

At its 9<sup>th</sup> ordinary session 25-29 June 2006 in Banjul, the AU Executive Council adopted and authorised publication of the 20<sup>th</sup> activity report, apart from the decision in communication 245/2002, Zimbabwe Human Rights NGO Forum ctr. Zimbabwe. With respect to this decision, Zimbabwe was requested to communicate its comments to the Commission within two months and, based thereon, the Commission should present a report at the next session.<sup>113</sup>

As a general point, the AU Executive Council invited “*member states to communicate within two (2) months following the reception of ACHPR [Commission] notification, their observations on the decisions that ACHPR [the Commission] is to submit to the Executive Council and /or the Assembly*”. In order to do so, the Commission would have to inform the defendant state on decisions prior to presenting these to the AU Executive Council and would then have to wait two months before presenting the decisions to the AU Executive Council. It must be assumed that this new procedure would lead to delays compared to the procedure hitherto used where a decision was included in the activity report presented to the AU Executive Council immediately after it had been made.

It would seem that this new procedure has not been implemented: The 21<sup>st</sup> activity report, covering the period May-November 2006 and presented to the AU Executive Council in January 2007, contains three decisions on communications made at the 40<sup>th</sup> session in November 2006 of which one was a decision on the merits, finding a violations by Congo-Brazzaville; it is not possible that this decision has been submitted to Congo-Brazzaville and that Congo-Brazzaville has then been given two months to comment prior to the presentation to the AU Executive Council. Similarly, the 22<sup>nd</sup> activity report, covering the period November 2006-May 2007, contained a decision on a communication made during the 41<sup>st</sup> session in May 2007 where Eritrea was found to have violated a number of provisions of the Charter. This activity report, including the annex with the decision, was recommended for adoption by the AU Executive Council at its 11<sup>th</sup> ordinary session 28-29 June 2007; again, it is not possible that Eritrea could have been given two months to comment on this decision prior to the meeting of the AU Executive Council.

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<sup>113</sup> The decision with respect to this communication was then removed from the 20<sup>th</sup> activity report and instead published as part of the 21<sup>st</sup> activity report (together with the comments of the Zimbabwean government). The 21<sup>st</sup> activity report was recommended for adoption and authorisation for publication by the AU Executive Council at its 10<sup>th</sup> ordinary session 25-26 January 2007.

### Remedies and Enforceability

The Charter does not authorise the Commission to make legally binding decisions. Rather, with respect to communications from states, the Commission shall, according to Arts. 52 and 53, make a report containing facts, findings and, if it finds it useful, recommendations to the AU Assembly of Heads of State and Government. Rule 101 of the Rules of Procedure specifies that the report shall “*concern the decisions and conclusions that the Commission will reach*”.

As mentioned above, the only complaint brought by a state was communication 227/99, brought by the DR Congo against Burundi, Rwanda and Uganda in March 1999. The Commission made a decision on the merits during its 33<sup>rd</sup> ordinary session 15-29 May 2003 in Niamey, Niger. The report on the matter, containing a description of the facts, the complaint, the procedure and the law (both with respect to admissibility and the merits) and the findings and recommendations of the Commission, in total 16 pages, is part of the 20<sup>th</sup> activity report, covering the period January-June 2006.<sup>114</sup> In the conclusion, the Commission finds that Burundi, Rwanda and Uganda have violated 13 articles of the Charter; it urges Burundi, Rwanda and Uganda to abide by their obligations under the Charter and other international law instruments, takes note of certain positive developments, and recommends the payment by Burundi, Rwanda and Uganda of compensation. As mentioned above, the 20<sup>th</sup> activity report was presented to the AU Executive Council during its 9<sup>th</sup> ordinary session on 25-29 June 2006 in Banjul, which adopted it and authorised its publication.<sup>115</sup>

As can be seen, it would appear that when it comes to communications by states, the Commission generally follows the procedure set out in the Charter and its Rules of Procedure.

With respect to *other* communications, i.e. the communications from other than member states, the Commission shall, cf. Art. 58 of the Charter, draw the attention of the AU Assembly to “*special cases*” that reveal the “*existence of a series of serious or massive violations of human and peoples’ rights*”, and the AU Assembly can then “*request the Commission to undertake an in-depth study of these cases and make a factual report, accompanied by its findings and recommendations*”. Similarly, according to rule 120 of the Rules of Procedure, the Commission shall prepare observations on admissible cases and communicate these to the AU Assembly and the relevant state party; the AU Assembly can then request an in-depth study and a factual report accompanied by findings and recommendations.

A review of the cases decided by the Commission shows that the two-pronged procedure described in the Charter and the Rules of Procedure – where the Commission first provides its observations to the AU Assembly which can then request a factual report with findings and recommendations – is not the procedure actually being followed. Rather, as described above, the Commission makes its decision on the admissibility and, if relevant, the merits and then prepares a report, generally containing a description of the facts, the complaint, the procedure and the law (both with respect to admissibility and, if relevant, the merits) and the findings and recommendations of the Commission. This report is then included in an activity report of the Commission and submitted to the AU Executive council. As can be seen, this is akin to the procedure followed for *state* communications.

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<sup>114</sup> It is not clear why the report on this communication was not made part of an earlier activity report.

<sup>115</sup> As mentioned above, without inclusion of the decision on a communication concerning Zimbabwe.

The question is then what happens once a decision in a communication has been made by the Commission, presented to the AU Executive Council and the AU Assembly as part of an activity report, and this activity report has been adopted. According to the Commission's Information Sheet no. 3, page 10, the "*mandate of the Commission is quasi-judicial and, as such, its final recommendations are not in themselves legally binding on the States concerned. These recommendations are included in the Commission's Annual Activity Reports which are submitted to the AU Assembly ... in conformity with article 54 of the Charter. If they are adopted, they become binding on the State Parties and are published*".

It does not follow explicitly from the Charter that upon adoption by the AU Assembly, the recommendations of the Commission become binding. From the relevant articles of the Charter, it follows that the original purpose of the Commission's consideration of communications was to provide the AU Assembly with information and recommendations, cf. Arts. 52, 53, and 58.<sup>116</sup> There would not be much purpose in making recommendations to the AU Assembly unless it was presumed that the AU Assembly could act on such recommendations. According to Art. 6.2 of the Constitutive Act of the AU, the AU Assembly is the "*supreme organ of the Union*". According to Art. 9.1, one of the functions of the AU Assembly is to make "*receive, consider and take decisions on reports and recommendations from the other organs of the Union*". It may delegate any of its powers and functions to any organ of AU, cf. Art. 9.2; this would include delegation to the AU Executive Council. Consequently, the AU Assembly (or the AU Executive Council per delegation) is mandated to make decisions of the reports and recommendations of the Commission.

It is not stated directly in the Constitutive Act of the AU that decisions by the AU Assembly are binding for the member states. The fact that the AU Assembly is the supreme organ of AU would plausibly entail that decisions by the AU Assembly are binding for the other AU organs (to the extent that said decision does not encroach on some inherent or treaty-given freedom of said organ), but would not necessarily entail that the decisions are also binding on member states. According to Art. 23.2, "*any member state that fails to comply with the decisions and policies of the Union may be subjected to other sanctions ... to be determined by the Assembly*". Decisions by the supreme organ, the AU Assembly, must be considered "*decisions ... of the Union*". Since sanctions can apparently be levied on member states failing to comply with such decisions, it must be assumed that such decisions are binding since it does not make sense to sanction member states for failing to live up to non-binding decisions.

Hereafter the question remains whether the adoption by the AU Assembly (or the AU Executive Council per delegation) entails an endorsement of the decisions by the Commission on individual communications in such a way that they become binding as decisions by the AU Assembly itself. This would appear to be the meaning of the above quote from the Commission's Information Sheet no. 3. In reality, this point is moot since the AU Assembly has never taken any steps to force any member state to adhere to a decision by the Commission with respect to a communication and since a body does not exist

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<sup>116</sup> According to Arts. 52-53, dealing with state communications, the Commission shall "*prepare ... a report to the States concerned and communicated to the Assembly ...*", cf. Art. 52, and the Commission may make "*to the Assembly ... such recommendations as it deems useful*", cf. Art. 53. Similarly, with respect to *other* communications, the Commission shall "*make a factual report, accompanied by its findings and recommendations*", cf. Art. 58.

that can make binding decisions on this question. This question would seem to hinge more on an interpretation of the Constitutive Act of the AU than on an interpretation of the Charter, meaning that it would presumably fall under the yet to be established African Court of Justice.<sup>117</sup>

Assuming that it did make a practical difference whether the decisions by the Commission become binding upon adoption of its activity reports by the AU Assembly, it could well be argued that the statement to this effect in the Commission's Information Sheet no. 3 is incorrect. When adopting an activity report, it would not seem that the AU Assembly (or the AU Executive Council) makes any specific assessment of each point of law contained in the activity report, but rather that it approves that this has been the work carried out by the Commission in the relevant period; that the correct procedures *vis-à-vis* the member states have been followed; and that the activity report may be made public.

The fact that in recent years the AU Assembly has examined the contents of the activity reports closer and actually excluded certain parts of the activity reports from publication can probably not be used as an argument that the AU Assembly has then explicitly approved the remainder of the activity reports. This might be the case if the AU Assembly had done so based on the contents of the excluded parts, but this has not been the case; the exclusions have allegedly been based on procedural grounds, namely the alleged lack of giving the states in question a chance to react and comment. Also, if the adoption of an activity report entails the specific adoption of every decision and recommendation contained in said activity report, what would be the consequence of an activity report containing both a decision with recommendations by the Commission and the repudiation by the relevant state of such a decision and recommendations (as is the case in the 21<sup>st</sup> activity report with respect to the above-mentioned communication 245/2002, Zimbabwe Human Rights NGO Forum *ctr.* Zimbabwe)?

Consequently, in spite of the statement in the Commission's Information Sheet no. 3, it must probably be accepted that the decisions and recommendations by the Commission are and remain non-binding.

In spite of the Commission's decisions not being legally binding, the Commission could still have a follow-up mechanism, primarily aimed at keeping up the pressure on member states to comply with decisions. Currently, the Commission does not have any follow-up mechanism. In connection with the treatment of state reports and on missions to member states, the Commission has on occasion raised questions with respect to implementation.<sup>118</sup>

The Communications Reform Report, taken note of by the Commission at a private meeting during the 40<sup>th</sup> session in November 2006 in Banjul, contains a proposal for a follow-up mechanism.<sup>119</sup> This mechanism would entail the creation of a follow-up database, containing information on the status of compliance with past recommendations, as well as the appointment of a follow-up rapporteur. In order to give the rapporteur the necessary tools, all decisions should contain a recommendation for the defendant state to revert to the Commission within 90 days on the measures taken to implement the decision of the Commission. If no information was received (following reminders), the follow-up rapporteur

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<sup>117</sup> According to Art. 19.1, the African Court of Justice has jurisdiction over the interpretation and application of the Constitutive Act of the AU.

<sup>118</sup> Cf. p. 39 of the Communications Reform Report.

<sup>119</sup> Cf. pp. 37-48.



could take various steps; such as trying to organise meetings with the state in question; invite a representative to take part in discussions of this matter with the Commission; conduct follow up missions; seek information from other sources, take up the matter in connection with the examination of state reports, etc. Similar steps could be taken if the information received did not indicate satisfactory adherence by the state party. At the end of the process, a final follow-up report would be included in the activity report of the Commission.

It must be assumed that such a mechanism would improve the level of adherence by states. It would also require additional resources, both financial and human, at the Secretariat of the Commission. An analysis made in connection with the Communications Reform Report<sup>120</sup> shows a compliance level of approximately 34 per cent.

With the establishment of the African Court, the Commission will be able to refer cases of non-compliance to the AHPR, cf. Art. 5.1 of the Court Protocol. To do so, the Commission will in any event need to establish a mechanism to obtain information on implementation or lack of implementation. According to the Communications Reform Report,<sup>121</sup> it is proposed in the Commission's new draft rules of procedure that if a member state has not complied with a recommendation within 120 days, the case shall be referred to the African Court.

With respect to provisional measures, that is measures taken before a final decision has been made, the Charter does not specifically mandate the Commission to take interim measures, even though Art. 58.3 states, "*a case of emergency duly noticed by the Commission shall be submitted by the latter to the Chairman of the Assembly ... who may request an in-depth study*". According to rule 111 of the Rules of Procedure, the Commission may, prior to making its final decision, "*inform the State party concerned of its views on the appropriateness of taking provisional measures to avoid irreparable damage being caused to the victim of the alleged violation*". It may also "*indicate to the parties any interim measure, the adoption of which seems desirable in the interest of the parties or the proper conduct of the proceedings before it*". It is further specified that the chairperson of the Commission in consultation with other members may take such action between sessions and that, if provisional measures are taken, the state party shall be informed that this does not prejudice the final decision.

As can be seen from rule 111 of the Rules of Procedure, the purpose of a provisional measure can be not only to avoid irreparable damage to the victim, but also in a wider sense to do something "*desirable*" in the interest of the parties or for the proper conduct of the proceedings. It must be assumed that the core area for provisional measures will be situations where a measure is necessary to avoid irreparable damage.

The wording of rule 111 of the Rules of Procedure does not indicate that such measures are binding. Unless some support can be found in the (binding) Charter, this would also be problematic, as the Rules of Procedure cannot in themselves create obligations binding on the member states.

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<sup>120</sup> Cf. pp. 39-40.

<sup>121</sup> Cf. p. 51.

The Commission's own practice with respect to the binding effect of provisional measures does not seem consistent. In the Commission's decision in communications 137/94, 139/94, 154/96 and 161/97, International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation ctr. Nigeria,<sup>122</sup> the Commission held that it was a violation of Art. 1<sup>123</sup> of the Charter that Nigeria had executed Ken Saro-Wiwa Jr. and his co-defendants despite an appeal not to do so under rule 111 of the Rules of Procedure. The reasoning is not very clear, but it seems to be that rule 111 is meant to assist the member states in implementing their obligations under the Charter and that execution in face of a stay requested with reference to this rule defeats its purpose. To have carried out the executions in spite of pleas from the Commission not to do so "*is a blot on the legal system of Nigeria ... That is a violation of the Charter is an understatement*". It is further stated that "*a state not wishing to abide by the African Charter might have refrained from ratification. Once legally bound, however, a state must abide by the law in the same way an individual must*".<sup>124</sup>

In the more recent communication 240/2001, Interights et al. (on behalf of Mariette Sonjaleen Bosch) ctr. Botswana, the Commission had also made a request to stay the execution of the alleged victim. Nevertheless, Botswana went ahead with the execution and, in light of this, the complainant argued that it was a violation of Art. 1 of the Charter that Ms. Bosch had been executed without regard to the request to stay the execution.<sup>125</sup> In its decision, the Commission, without any reference to rule 111, said, "*Article 1 obliges States Parties to observe the rights in the African Charter and to 'adopt legislative or other measures to give effect to them.'* The only instance that a State Party can be said to have violated Article 1 is where the State does not enact the necessary legislative enactment" and did not find a violation of Art. 1 of the Charter. It should be noted that unlike in communications 137/94, 139/94, 154/96 and 161/97, the Commission did not find any violations of the Charter in communication 240/2001. This might have influenced the outcome.

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<sup>122</sup> Printed in the 12<sup>th</sup> activity report.

<sup>123</sup> Art. 1 says that "*the member states ... shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative and other measures to give effect to them*".

<sup>124</sup> The complete reasoning is as follows:

*"Nigeria has been a State Party to the African Charter for over a decade, and is thus bound by Article 1 of the African Charter.*

*The Commission assists States parties to implement their obligations under the Charter. Rule 111 of the Commission's Rules of Procedure (revised) aims at preventing irreparable damage being caused to a complainant before the Commission. Execution in the face of the invocation of Rule 111 defeats the purpose of this important rule. The Commission had hoped that the Government of Nigeria would respond positively to its request for a stay of execution pending the former's determination of the communication before it.*

*This is a blot on the legal system of Nigeria which will not be easy to erase. To have carried out the execution in the face of pleas to the contrary by the Commission and world opinion is something which we pray will never happen again. That it is a violation of the Charter is an understatement.*

*The Nigerian Government itself recognises that human rights are no longer solely a matter of domestic concern. The African Charter was drafted and acceded to voluntarily by African States wishing to ensure the respect of human rights on this continent. Once ratified, States Parties to the Charter are legally bound to its provisions. A state not wishing to abide by the African Charter might have refrained from ratification. Once legally bound, however, a state must abide by the law in the same way an individual must."*

<sup>125</sup> Botswana claimed never to have received the request.

### Special Mechanisms

As mentioned above, the Commission has developed a system of Working Groups and Special Rapporteurs. This is not stated in the Charter, but according to rule 28 of the 1995 Rules of Procedure, the Commission may establish working groups and committees composed of its members if “*deemed necessary for the exercise of its functions*”. Based on this, the Commission has established Working Groups on (i) Specific Issues related to the work of the African Commission; (ii) Indigenous Populations/Communities in Africa; (iii) Economic, Social and Cultural Rights in Africa; (iv) the Robben Island Guidelines; and (v) Death Penalty in Africa; and appointed Special Rapporteurs on (i) Prisons and Conditions of Detention in Africa; (ii) Rights of Women in Africa; (iii) Freedom of Expression in Africa; (iv) Human Rights Defenders in Africa; (v) Refugees, Asylum Seekers, Migrants and Internally Displaced Persons in Africa; and (vi) Summary, Arbitrary and Extra-Judicial Executions in Africa.<sup>126</sup>

From the specific mandates it is clear that at least some of the Special Rapporteurs can look into the specific and individual cases, thereby in effect making the Special Rapporteurs complaint handling mechanisms, albeit informal ones.

An example is the mandate of the Special Rapporteur on Prisons and Conditions of Detention in Africa, adopted at the 21<sup>st</sup> session of the Commission 15-24 April 1997 in Nouakchott, Mauritania. The mandate empowers the Special Rapporteur to “*examine the situation of persons deprived of their liberty within the territories of States Parties to the African Charter*”. As part of this mandate, the Special Rapporteur may “*at the request of the Commission, make recommendations to it as regards communications filed by individuals who have been deprived of their liberty, their families, representatives, by NGOs or other concerned persons or institutions*” and “*propose appropriate urgent action*”. It is further stated that the Special Rapporteur shall “*receive information from individuals who have been deprived of their liberty, their families or representatives, from governmental or non-governmental organisations and individuals*”.

During an interview on 23 November 2006, the current Special Rapporteur, Commissioner Mumba Malila, informed that he regularly receives letters from detainees and their family, alleging mistreatment. If an allegation seems credible and the matter demands urgent attention, he can either send an urgent appeal to the relevant government or undertake a mission. At the time of the interview, he had neither written letters to governments nor, due to lack of funding, undertaken missions.<sup>127</sup> In principle, he should have a dedicated legal officer to assist him in his work as Special Rapporteur, but there have not been sufficient resources for this. At the time of the interview, he would simply forward letters received to the Secretariat. He further mentioned a proposal for a hotline for prisoners and places of detention to enable calls and emails to be received around the clock. Between the 39<sup>th</sup> session in May 2006 and the 40<sup>th</sup> session in November 2006, the Secretariat presented representatives of the French Foreign Affairs, the Association for the Prevention of Torture (APT), and Penal Reform International (PRI) with proposals for funding of this proposal.<sup>128</sup>

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<sup>126</sup> This position has been vacant since 2001. A review of the mandate was on the agenda for the private part of the 41<sup>st</sup> session of the Commission in May 2007.

<sup>127</sup> Mumba Malila became Special Rapporteur on Prisons in December 2005.

<sup>128</sup> Cf. the report by the Special Rapporteur on inter-session activities at the 40<sup>th</sup> session as contained in the 21<sup>st</sup> activity report.

The mandate of the Special Rapporteur on Freedom of Expression in Africa, adopted at the 36<sup>th</sup> session of the Commission in Dakar, Senegal, 23 November-7 December 2004, empowers the Rapporteur to “undertake investigative missions to Member States where reports of massive violations of the right to freedom of expression are made and make appropriate recommendations to the African Commission” and “make public interventions where violations of the right to freedom of expression have been brought to his/her attention ... in the form of issuing public statements, press releases, urgent appeals”.

During an interview on 18 November 2006, Commissioner Faith Pansy Tlakula, the Special Rapporteur on Freedom of Expression since December 2005, informed that, like the Special Rapporteur on Prison, she receives many requests for interventions in specific cases. She may make appeals to governments, but she has no power to force the governments to take any steps to rectify a situation. In general, she will only go into a case either if there seems to be widespread abuse or it involves a life-threatening situation, e.g. if a journalist has received (credible) death threats. To safeguard her credibility, she will only raise substantiated issues. This necessitates her checking information in advance. In most cases, she merely forwards letters to the Secretariat. She mentioned a case in The Gambia concerning three imprisoned journalists. In this case, she had sent letters to the Government in July and October 2006. At the time of the interview, she had not received any response from the Gambian government, but two of the journalists had been released. She is willing to use the media to put pressure on governments. Faith Pansy Tlakula would like to establish a more efficient system for this kind of communications and planned to set up a special website with a complaints form, guidelines and an email address. Eventually she would like a hotline. Lack of assistance from the Secretariat, due to a dearth of resources, made it difficult to achieve these goals.

The mandate of the Special Rapporteur on Human Rights Defenders, adopted at the 35<sup>th</sup> session on 21 May-4 June 2004 in Banjul, empowers the Special Rapporteur to “seek, receive, examine and to act upon information on the situation of human rights defenders in Africa” and to “cooperate and engage in dialogue with Member States, National Human Rights Institutions, relevant intergovernmental bodies, international and regional mechanisms of protection of human rights defenders, human rights defenders and other stake holders”. This is less clear than the mandates of the Special Rapporteurs for Prisons and Freedom of Expression with respect to requests from individuals, but this has not prevented Commissioner Reine Alapini-Gansou, Special Rapporteur for Human Rights Defenders since December 2005, from intervening in a number of individual cases. She receives many requests to intervene in specific cases concerning human rights defenders. When she receives such requests, she will look into the matter and, if deemed relevant, she will write to the relevant governments.<sup>129</sup> In the report on her inter-session activities, delivered at the 40<sup>th</sup> session in November 2006,<sup>130</sup> she mentions eight cases where she contacted governments concerning individual cases; and the report delivered at the 41<sup>st</sup> session in May 2007<sup>131</sup> mentions nine cases where she sent letters to governments; and three cases where she issued press releases. The report delivered at the 41<sup>st</sup> session further mentions two cases of governments responding.

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<sup>129</sup> Information provided during an interview with Reine Alapini-Gansou on 19 November 2006.

<sup>130</sup> To be found in the 21<sup>st</sup> activity report.

<sup>131</sup> To be found in the 22<sup>nd</sup> activity report.

The mandate of the Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally Displaced Persons in Africa, adopted at the 36<sup>th</sup> session on 23 November-7 December 2004 in Dakar, empowers the Special Rapporteur to “*seek, receive, examine and act upon information on the situation of refugees, asylum seekers and internally displaced persons in Africa*”, “*undertake studies, research and other related activities to examine appropriate ways to enhance the protection of refugees, asylum seekers and internally displaced persons in Africa*” and “*cooperate and engage in dialogue with Member States, National Human Rights Institutions, relevant intergovernmental and non-governmental bodies, international and regional mechanisms involved in the promotion and protection of the rights of refugees, asylum seekers and internally displaced persons*”.

During an interview on 23 November 2006, Commissioner Bahama Tom Nyanduga, Special Rapporteur on Refugees, etc. since December 2004, informed that during this period he had received three to four individual letters requesting his intervention. The best thing would be to undertake investigative missions in such cases, but there are normally no funds for this. In one case, he had written to Egypt about an eviction of refugees. He received a response with an explanation, but this had not improved the situation of the refugees in question. His report on inter-session activities at the 41<sup>st</sup> session in May 2007<sup>132</sup> further mentions a letter written by him to the Kenyan government about the closure of the border towards Somalia.

The mandate of the Special Rapporteur on Women does not seem to lend itself so easily to interventions of this nature and there is no mention of activities of this kind in the reports on inter-session activities, presented at the 39<sup>th</sup>, 40<sup>th</sup> and 41<sup>st</sup> sessions. On the other hand, the mandate for the Special Rapporteur on Extra-Judicial, Summary or Arbitrary Executions would seem to invite requests for assistance of this nature,<sup>133</sup> but there has not been a Special Rapporteur on this subject since 2001.

With respect to the Working Groups, the mandate of the Working Group on the Indigenous Populations/Communities in Africa, as adopted during the 34<sup>th</sup> session 6-20 November 2003, among other things empowers the Working Group to “*gather, request, receive and exchange information and communications from all relevant sources, including Governments, indigenous populations and their communities and organisations, on violations of their human rights and fundamental freedoms; Undertake country visits to study the human rights situation of indigenous populations/communities; [and] Formulate recommendations and proposals on appropriate measures and activities to prevent and remedy violations of the human rights and fundamental freedoms of indigenous populations/communities*”. This would enable the working group to take action upon receiving letters and similar communications about violations. The mandates of the other Working Groups do not indicate that the intervention in individual cases was envisaged.

As can be seen, most of the Special Rapporteurs do look into individual requests for assistance and are willing to raise such issues *vis-à-vis* the relevant governments. The main strength of the Special Rap-

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<sup>132</sup> To be found in the 22<sup>nd</sup> activity report.

<sup>133</sup> According to the mandate, the Special Rapporteur shall, among other things, keep a register on victims, follow up on enquiries leading to discovering the identity of perpetrators, and intervene with member states for the trial and punishment of perpetrators.

porteurs (as opposed to the Commission's communications procedure proper and other mechanisms) is that the Special Rapporteurs can act quickly. The main weaknesses are that the Special Rapporteurs cannot make decisions as such, and that they have no power to force anybody to do anything.<sup>134</sup> Furthermore, the Special Rapporteurs are not able to work as effectively and efficiently as they would like due to lack of resources. Two of the Special Rapporteurs, the Special Rapporteur on Freedom of Expression in Africa and the Special Rapporteur on Prisons and Conditions of Detention in Africa, are envisaging the creation of specific hotlines to streamline the process by which they can deal with individual communications.

### Cooperation

The African Court was established to "*complement the protective mandate of the ... Commission*", cf. Art. 2 of the Courts Protocol, and the Commission is one of the bodies with a specific right to submit cases to the African Court, cf. Art. 5.1. Moreover, when deciding on admissibility, the African Court may request the opinion of the Commission and it may even transfer cases to the Commission, cf. Art. 6. Finally, according to Art. 33, the Court shall "*consult the Commission as appropriate*" when drawing up its rules of procedure. As can be seen, a close relationship between the Commission and the African Court is envisaged. This matter is further examined in the section on the African Court below.

There have been contacts between the Commission and the African Court. The then chairperson of the Commission took part in the first session of the Court 10-14 July 2006,<sup>135</sup> and during an interview at the 40<sup>th</sup> session in November 2006, she expressed her expectations for a good relationship between the Commission and the Court.<sup>136</sup> In addition, discussions on the relationship between the Commission and the African Court were on the agenda for the private parts of both the 40<sup>th</sup> and the 41<sup>st</sup> sessions of the Commission (in November 2006 and May 2007). Some sources have indicated fears that the new rules of procedure of the African Court and the new rules of procedure of the Commission will not be coordinated (due to lack of resources to have joint meetings, etc.), which could make the cooperation on cases less effective and efficient.

Similar to the coordination between the UN treaty bodies, it would be natural for the Commission and the African Committee of Experts on the Rights and Welfare of the Child (the Child Committee) to collaborate and share experiences. According to item 63 of the report of the brainstorming meeting on the Commission 9-10 May 2006 in Banjul, organised by the AU Commission,<sup>137</sup> "*there are no formal relationships with the PAP,<sup>138</sup> the ECOSOCC,<sup>139</sup> the PSC,<sup>140</sup> the African Court on Human and Peoples' Rights, the African Committee on the Rights and Welfare of the Child, the NEPAD,<sup>141</sup> the*

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<sup>134</sup> Which in practice it not unlike the Commission when it comes to communications – even though this will change with the ability to transmit cases to the African Court.

<sup>135</sup> Cf. the 21<sup>st</sup> activity report.

<sup>136</sup> During other conversations at the 40<sup>th</sup> session of the Commission in November 2006, some of the representatives of NGOs gave information to the effect that the first contacts between the Commissioner and the new judges of the African Court had not been positive, but that this could be because they had been too early and that the judges needed to get more settled before such contacts could be beneficial.

<sup>137</sup> The report is part of the 20<sup>th</sup> activity report of the Commission.

<sup>138</sup> The Pan-African Parliament.

<sup>139</sup> The Economic, Social and Cultural Council of the AU.

<sup>140</sup> The Peace and Security Council of the AU.

<sup>141</sup> New Partnership for Africa's Development.

CSSDCA/CIDO,<sup>142</sup> *the Division on Refugees, IDPs and Humanitarian Affairs, as well as other relevant regional organisations*". This does not mean that there are no contacts between the Commission and the Child Committee. From the establishment of the Child Committee, members of the Child Committee have taken part in sessions of the Commission and had meetings with Commissioners.<sup>143</sup> Given the limited resources in the AU system, it could even be considered if it might not be more cost-effective to let the Commission's Secretariat service the Child Committee as well.<sup>144</sup>

With respect to the other organs of the AU, no formal relationship as yet exists with the Pan-African Parliament, even though one of the areas where the Pan-African Parliament may make recommendations and take other steps is human rights. There have been some limited contacts. With respect to the Peace and Security Council, this organ is supposed to "*seek close co-operation with the African Commission ... in all matters relevant to its objectives and mandate. The Commission ... shall bring to the attention of the Peace and Security Council any information relevant to the objectives and mandate of the Peace and Security Council*", cf. Art. 19 of the Protocol relating to the Establishment of the Peace and Security Council of the African Union. At this time, there does not seem to be much contact. The same is the case with respect to NEPAD and CSSDCA/CIDO.<sup>145</sup>

The Commission has to work together with the AU Commission since the AU Commission is supposed to supply the human, financial and other resources to enable the functioning of the Commission. In addition, the AU Commission, being the engine of AU, is involved in promoting human rights, doing policy work, etc. This means that collaboration could be possible in many areas. The main areas for such collaboration would not concern communications.

As described in detail above, the Commission also has to interact with the AU Executive Council and the AU Assembly with respect to communications.

The Commission has links to UN, not least the Office of the High Commissioner for Human Rights. As can be seen from the report of the 40<sup>th</sup> session,<sup>146</sup> several of the Commissioners are invited to take part in meetings organised by the UN. In addition, there is an interest, both from the Commission and the UN, in closer contact between UN Special Rapporteurs and the Special Rapporteurs of the Commission, e.g. in the form of joint missions and statements.

The Commission has a system of accreditation where Non-Governmental Organisations, National Human Rights Institutions and others can be granted observer status *vis-à-vis* the Commission and a large number of such observers have been accredited.

As mentioned above, the Commission is dependent on receiving assistance from partners. According to the 22<sup>nd</sup> activity report, the present partners are the Canadian Rights & Democracy, the Danish International Development Assistance (DANIDA; through International Working Group on Indigenous Af-

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<sup>142</sup> The Conference on Security, Stability, Development and Cooperation in Africa/African Citizens Directorate CIDO.

<sup>143</sup> See further the section on the Child Committee below.

<sup>144</sup> This was mentioned as an idea at the meeting with representatives of the Institute for Human Rights and Development in Africa, 22 November 2006.

<sup>145</sup> See further below under the section on Other Pan-African Bodies and Initiatives.

<sup>146</sup> Printed in the 21<sup>st</sup> activity report.

fairs (IWGIA)), the Senegal-based Open Society Initiative for West Africa (OSIWA),<sup>147</sup> the Republic of South Africa, and the Danish Institute for Human Rights.

## **The African Court on Human and Peoples' Rights**

### Introduction

At the 34<sup>th</sup> ordinary session of the OAU Assembly, held 8-10 June 1998 in Ouagadougou, Burkina Faso, the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (the Court Protocol) was adopted and signed by 30 member states. The Court Protocol came into force 25 January 2004, 30 days after being ratified or acceded to by 15 member states, cf. Art. 34.3. As of 26 May 2007, 23 countries<sup>148</sup> had ratified the Court Protocol. As mentioned above, the Charter itself has been ratified by all 53 member states.

The African Court on Human and Peoples' Rights (the African Court) is not listed among the organs of AU in Art. 5 of the Constitutive Act of the AU, but it appears from Art. 1 of the Protocol that the African Court “*shall be established within the Organization of African Unity*”, now AU. As is the case for the Commission, it must therefore be considered unclear to what extent the African Court is an “*organ*” of AU.

### Purpose and Function

According to the preamble of the Court Protocol, the African Court is meant to “*complement and reinforce the functions of the African Commission on Human and Peoples' Rights*” so that the “*objectives of the African Charter on Human and Peoples' Rights*” can be achieved.

The African Court is to decide on matters concerning the “*interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned*”, cf. Art. 3.1 of the Court Protocol. The African Court can also provide advisory opinions on legal matters relating to the Charter and other relevant human rights instruments, cf. Art. 4.1. One such “*other relevant human rights instrument*” is the Women Protocol. According to Art. 27 of the Women Protocol, the African Court “*shall be seized with matters of interpretation arising from the application or implementation*” of the Women Protocol.

Another relevant human rights instrument is the Child Charter. Neither the Child Charter nor its treaty body, the Child Committee, is specifically mentioned in the Court Protocol. As described further below, it must nevertheless be one of the functions of the African Court to adjudicate on the Child Charter as well as on other African human rights instruments.

Whereas it can well be argued that the Commission cannot go beyond the Charter (see above), since Arts. 47 and 49 specifically refer to violations of the Charter, the point of departure for the African

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<sup>147</sup> Open Society Initiative for West Africa (OSIWA) is one of 32 foundations founded and supported by George Soros and meant to promote among other things rule of law, democracy, etc. OSIWA has its headquarters in Dakar.

<sup>148</sup> Algeria, Burkina Faso, Burundi, Côte d'Ivoire, Comoros, Gabon, Gambia, Ghana, Kenya, Libya, Lesotho, Mali, Mozambique, Mauritania, Mauritius, Niger, Nigeria, Rwanda, South Africa, Senegal, Tanzania, Togo, and Uganda.



Court must be that it can interpret, apply and provide advisory opinions on all human rights instruments applicable to the specific situation, cf. Art. 3.1 of the Court Protocol. This would include not only the specific African human rights instruments listed above, but also global human rights instruments, such as the various UN human right conventions and other (African) conventions dealing with human rights matters, see for instance the conventions listed above with respect to the Commission.

### Organisation

During the 3<sup>rd</sup> ordinary session of the AU Assembly in Addis Ababa 6-8 July 2004 it was decided to merge the African Court with the African Court of Justice, a regional court listed as one of the AU organs in Art. 5.1 of the Constitutive Act of the AU. This was reiterated at the 5<sup>th</sup> ordinary session of the AU Assembly in Sirte, Libya, 4-5 July 2005 where it was decided that pending this merger, the seat of the merged court and the African Court should be in the Eastern region of Africa and that all steps should be taken to make the African Court functional without awaiting the merger

According to Art. 18 of the Constitutive Act of the AU, the statute, composition and functions of the African Court of Justice shall be set out in a separate protocol. This protocol was adopted on 11 July 2003 in Maputo, but has still not entered into force since only 13 of the necessary 15 member states had ratified it as of 12 June 2007.

The proposed merger seems to have been put on hold, as examined further below in the sub-section on Cooperation.

According to Art. 11.1 of the Court Protocol, the African Court shall consist of eleven judges, to be “*nationals of member states of the OAU [the AU], elected in an individual capacity from among jurists of high moral character and of recognised practical, judicial or academic competence and experience in the field of human and peoples’ rights*”. The judges shall be from eleven different member states, cf. Art. 11.2.

Further criteria are set out in the Court Protocol: According to Art. 14.2, the main regions of Africa and their principal legal traditions shall be represented in the African Court. Adequate gender representation shall be assured, cf. Art. 14.3. According to Art. 18, “*the position of a judge of the Court is incompatible with any activity that might interfere with the independence or impartiality of such judge or the demands of office, to be determined in the Rules of Procedure of the Court*”.

In its Note Verbale of 5 April 2004, informing the member states of the AU of the forthcoming election of judges to the African Court (expected to take place during the AU summit in July 2004) and of the possibility to make nominations, the AU Commission elaborated on these criteria. With respect to representation of the main African regions, the AU Commission proposed the use, if possible, of the “*AU geographical representation formula*” which would mean that three judges should be from West Africa and two judges from Central, East, South and North Africa, respectively. To ensure adequate gender representation and representation of the principal legal traditions, the AU Commission requested countries nominating judges to nominate at least one woman and to give preference to candidates with experience in more than one of the principal legal traditions of Africa, being civil law, common law, Islamic law and custom, and African customary law.

With respect to Art. 18 of the Court Protocol, the AU Commission requested the member states to ask nominees to provide information on their judicial, practical, academic, activist, professional and other experience in the field of human and peoples' rights; such information to include information on political and other associations relevant for eligibility and incompatibility. The AU Commission further proposed that nominees be asked to submit statements indicating how they fulfil the criteria for eligibility contained in the Court Protocol. The AU Commission then pointed to the statement by the Advisory Committee of Jurists made with respect to the establishment of the Permanent Court of International Justice, also quoted in the Note Verbale concerning the election to the Commission;<sup>149</sup> saying basically that a member of government or equivalent, a diplomat, a high-ranking official in a ministry and the legal adviser to a foreign office are not eligible.

Finally, the AU Commission referred to the additional factors, proposed by civil society, also mentioned in the Note Verbale on the nomination of candidates for the Commission.

In its resolution no. 76(XXXVII)05 on the Establishment of an effective African Court on Human and Peoples' Rights, dated 11 May 2005, the Commission expressed its support for the criteria and requirements set out in the Note Verbale.

In the end, the election of judges did not take place during the 3<sup>rd</sup> ordinary session of the AU Assembly in Addis Ababa, 6-8 July 2004. Instead, as mentioned above, the AU Assembly decided to merge the African Court with the African Court of Justice and all decisions necessary to make the African Court operational were postponed. During the 6<sup>th</sup> ordinary session of the AU Executive Council in Abuja six months later, 24-28 January 2005, it was decided that steps to make the African Court operational could continue; this was confirmed during the 5<sup>th</sup> ordinary session of the AU Assembly in Sirte, 4-5 July 2005, where it was decided that the election of judges (and other steps necessary to make the African Court operational) should be carried out without awaiting the merger. Consequently, the election of judges took place during the 6<sup>th</sup> ordinary session of the AU Assembly in Khartoum, 23-24 January 2006.

According to Art. 12.1 of the Court Protocol, each member state may propose up to three candidates, two of which shall be nationals of the proposing state. It follows from Art. 12.2 that in the nomination process, the states shall give due consideration to adequate gender representation. Given the number of member states at the time of election, 66 candidates could have been proposed. Only 21 candidates were in fact proposed; five of them were women, and allegedly less than seven had human rights experience.<sup>150</sup> Some NGOs have indicated that more should be done to encourage the eligible states to put forward candidates, as more competition would improve the quality of the judges.

During its 6<sup>th</sup> ordinary session 23-24 January 2006 in Khartoum, the AU Assembly appointed the eleven first judges, following the election conducted by the AU Executive Council. Ordinarily, judges are elected for six years with one possibility of re-election, cf. Art. 15.1 of the Court Protocol; and yet, conceivably to assure continuation, at the first election three of the judges are elected for six years, four

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<sup>149</sup> See above.

<sup>150</sup> Cf. press release by Coalition for an Effective African Court on Human and Peoples' Rights, January 2006, [www.africancourtcoalition.org/content\\_files/files/PressRelease1.4.3.3.pdf](http://www.africancourtcoalition.org/content_files/files/PressRelease1.4.3.3.pdf).

for four years and four for two years. The judges appointed are from Algeria, Burkina Faso, Burundi, Ghana, Lesotho, Libya, Mali, Rwanda, Senegal, South Africa, and Uganda. Of the eleven judges, only two are women.

The President and the Vice-President are elected by and among the judges, both for a period of two years with one possibility of re-election, cf. Art. 21.1 of the Court Protocol. During its second meeting, 18-21 September 2006 in Addis Ababa, the judges elected Gerard Niyungeko, Burundi, as the first President, and Modibo Tounty Guindo, Mali, as the first Vice-President.<sup>151</sup> According to Art. 21.2, the President shall perform his functions full-time and shall reside at the seat of the African Court. The other judges function part-time, but this may be changed by decision of the AU Assembly, cf. Art. 15.4. The functions of the bureau of the African Court (the President and the Vice-President) shall be specified in the Rules of Procedure, cf. Art. 21.3.

Certain provisions have been included in the Court Protocol to secure the independence of the judges. According to Art. 17.1, the “*independence of the judges shall be fully ensured in accordance with international law*”. The judges shall enjoy the same immunities as diplomats from their election and until they resign, cf. Art. 17.3, and cannot be held liable for any decision or opinion issued as part of their function as judges, cf. Art. 17.4. Furthermore, a judge can only be removed or suspended by the unanimous decision of the other judges, such decision only becoming final if the AU Assembly does not reverse it at its following session, cf. Art. 19.

Until the appointment of a Registrar, the deputy legal counsel of the AU acts as Registrar for the African Court. Pending the preparation of the premises of the African Court, the African Court has been managed from Addis Ababa.

It has been decided that the African Court shall have its seat in Arusha, Tanzania, and the long-term plan is for the African Court to take over the premises that are currently being used by the International Criminal Tribunal for Rwanda that is expected to finalise its work by the end of 2008. Until then, the African Court will have its offices in the building of the Arusha International Conference Centre,<sup>152</sup> which is in the process of being prepared for the African Court.<sup>153</sup> After some delay, the host agreement between AU and Tanzania concerning the African Court was signed on 31 August 2007.<sup>154</sup>

According to Art. 24 of the Court Protocol, the African Court shall appoint its own Registrar<sup>155</sup> and other staff. This is in contrast to the Commission whose Secretary is appointed and whose staff is provided by the AU Commission, cf. Art. 41 of the Charter. Presumably, this is meant to give the African Court a greater degree of independence.

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<sup>151</sup> Cf. AU Press Release no. 48/2006.

<sup>152</sup> Cf. article from People’s Daily Online, 21 March 2007, [english.people.com.cn/200703/21/eng20070321\\_359486.html](http://english.people.com.cn/200703/21/eng20070321_359486.html).

<sup>153</sup> According to the website of the Coalition for an Effective African Court on Human and Peoples’ Rights, [http://www.africancourtcoalition.org/editorial.asp?page\\_id=120](http://www.africancourtcoalition.org/editorial.asp?page_id=120), 14. September 2007, the judges will be able to observe the progress at their session in Arusha 17-28 September 2007.

<sup>154</sup> Cf. the website of the Coalition for an Effective African Court on Human and Peoples’ Rights.

<sup>155</sup> The Registrar is the highest officer of the African Court.

Among other items on the agenda for the 3<sup>rd</sup> session of the African Court, 11-20 December 2006 in Addis Ababa, were the discussion and adoption of draft rules of procedure for the African Court, recruitment of Registrar and staff, consideration and adoption of a plan of action, and preparation of the 2007 budget for the court. According to the Vice-President of the African Court,<sup>156</sup> a draft organogram for the Secretariat and draft job descriptions for the staff were circulated prior to the session and it was the intention to commence recruitment shortly after the approval of the job descriptions. A total staff of about 40 (excluding the judges) was envisaged.

The African Court is not yet handling cases, but the Vice-President expected that the African Court would start to function during the first quarter of 2007.

Apparently, things did not go as smoothly as expected, but at its 11<sup>th</sup> ordinary session 25-29 June 2007, the AU Executive Council authorised the African Court to put in place a structure with a staff of 46 (excluding the judges), divided between an Office of the President, an Office of the Registrar, a Registrar, Legal Matters, Linguistic Matters, Information, Communication and Technology, Protocol Services, Library and Documentation - Archives, Indexing and Distribution, Finance and Accounting, Human Resource Management, Typing and Reproduction, and General Assistance, and to start recruiting, taking into account the AU recruitment factors, such as quota, gender and geographic representation.

The 6<sup>th</sup> session of the African Court took place 17-28 September 2007 in Arusha. Among the items on the agenda were the seat of the Court; the issue of recruitment of the Registrar and other staff; creation of a website; robes and symbols; and the financial situation. The President has been installed in Arusha with some staff, but not yet a Registrar.

According to Art. 32 of the Court Protocol, the expenses of the African Court shall be determined and defrayed by the AU<sup>157</sup> “*in accordance with criteria laid down by the OAU [AU] in consultation with the Court*”. It is expected that the African Court will also be able to attract some donor funding and it has, in fact, entered into an agreement with the German development agency, GTZ, on 15 November 2006.

### Jurisdiction

As mentioned above, as of 26 May 2007, the Court Protocol had been ratified by 23 member states of AU. That means that, provided the other conditions are met, cases against these countries can be brought before the African Court and these countries can themselves bring cases.

According to Art. 5.1 of the Court Protocol, cases can be submitted to the African Court by (a) the Commission; (b) a state which has “*lodged a complaint*” to the Commission (what is meant is plausibly a state that has lodged a communication to the Commission according to Arts. 48 or 49 of the Charter); (c) a state against which a complaint has been lodged before the Commission (a state that is the subject of a communication brought by virtue of either Art. 48 or 49 (inter-state communications) or Art. 55-59 (other communications)); (d) a state whose citizen is a victim of a human rights violation;

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<sup>156</sup> Information given during an interview 7 December 2006.

<sup>157</sup> The text refers to the OAU.

and (e) African intergovernmental organisations. States may also make a declaration giving non-state actors the right to bring cases to the African Court, cf. Arts. 5.3 and 34.6, see further below.

With respect to the right of the Commission to bring cases, the Court Protocol does not contain any provisions on which cases the Commission may bring before the African Court. In an earlier draft, it was stated that the African Court could not consider a matter before it had been the subject of a report by the Commission. It would seem most natural for the Commission to bring a case that it had already decided and where the relevant state had failed to implement the decision of the Commission.<sup>158</sup> As the Court Protocol is drafted, however, there is no reason why the Commission cannot bring a case to the African Court before having made its report. If, for instance, the Commission finds it likely that the state will not comply with an eventual decision, e.g. because the state party has refused to participate in the procedure before the Commission,<sup>159</sup> the Commission could decide to bring the case to the African Court to obtain a binding decision as soon as possible. Another reason could be that the Commission finds binding provisional measures to be necessary; the Court Protocol, unlike the Charter, gives a mandate for the adoption of binding provisional measures, cf. Art. 27.2 of the Court Protocol.

With respect to the right of states involved in cases pending before the Commission, either as complainants or respondents, it must likewise be assumed that as soon as a communication has been received by the Commission, a state (respondent as well as complainant) must be entitled to bring the case before the African Court. As can be seen from Art. 5.1 (d), a state can also choose to bypass the Commission entirely if it is of the opinion that one of its citizens has been a victim of a human rights violation. In light of the practice before the Commission where only one case has been brought by a state,<sup>160</sup> it must be expected that very few cases will be brought by states alleging that other states have violated relevant human rights norms. Whether states would be interested in bringing cases where the Commission has found them guilty of violations before the African Court (in order to be cleared) remains to be seen.

The last compulsory route of jurisdiction is the right of “*African Intergovernmental Organisations*” to bring cases before the African Court. “*African Intergovernmental Organisations*” must include the AU and the various sub-regional organisations, such as the regional economic communities, the so-called RECs (ECOWAS, SADC, EAC, etc.). With respect to AU, this organisation has various bodies. It is not clear which of these will be able to bring cases before the African Court. The Assembly is the supreme organ of the AU, cf. Art. 6.2 of the AU Constitutive Act, and the Assembly at least must be able to bring a human rights case against a member state before the African Court. Presumably, the AU Commission would be responsible for handling the case on behalf of the Assembly. It is more doubtful if the AU Commission by itself could decide to bring a case before the African Court since this organ acts under the supervision of the AU Assembly. The same is the case for the AU Executive Council and the AU Permanent Representatives Committee.

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<sup>158</sup> This is also what is envisaged by the draft rules of procedure, quoted in the Commission’s Communications Reform Report.

<sup>159</sup> Like it was the case with respect to Nigeria communication 155/96, The Social and Economical Rights Action Center and the Center for Economic and Social Rights ctr. Nigeria, printed in the 15<sup>th</sup> activity report of the Commission.

<sup>160</sup> Communication 227/99, DR Congo ctr. Burundi, Rwanda and Uganda, printed in the Commission’s 20<sup>th</sup> activity report.

With regard to the Pan-African Parliament, this organ has for the time being “*advisory and consultative powers only*”, cf. Art. 11 of the PAP Protocol.<sup>161</sup> It is stated in Art. 3.2 that one of the objectives of the Pan-African Parliament shall be to “*promote the principles of human rights and democracy in Africa*” and it follows from Art. 11.9 that the Pan-African Parliament may “*perform such other functions as it deems appropriate to achieve the objectives set out in article 3*”. It could be argued that if the Pan-African Parliament deems it appropriate to bring a case before the African Court to promote human right, it can do so based on Art. 11.9, cf. Art. 3.2, of the PAP Protocol. In any event, the Pan-African Parliament is not subordinate to the AU Assembly.

The Peace and Security Council of the African Union was created by the PSC Protocol.<sup>162</sup> The Peace and Security Council is a “*standing decision-making body for the prevention, management and resolution of conflicts*”. Among the objectives of the Peace and Security Council is to “*protect human rights and fundamental freedoms*”, cf. Art. 3 (f) of the PSC Protocol, and it shall be guided by, among other things, the principles enshrined in the Universal Declaration of Human Rights; in particular by “*respect for the rule of law, fundamental human rights and freedoms, the sanctity of human life and international humanitarian law*”, cf. Art. 4. Among the powers of the Peace and Security Council is to “*anticipate and prevent disputes and conflicts, as well as policies that may lead to genocide and crimes against humanity*”, cf. Art. 7.1. It could be argued that if the Peace and Security Council decides that bringing a case before the African Court will help to prevent disputes, conflicts, or policies that may lead to genocide or crimes against humanity, then the Peace and Security Council will have the mandate to do so. Like the Pan-African Parliament, the Peace and Security Council is not subordinate to the AU Assembly.

The Economic, Social and Cultural Council is one of the organs of the African Union, cf. Art. 5 of the Constitutive Act of the AU. It is “*an advisory organ composed of different social and professional groups of the member states of the Union*”, cf. Art. 22 of the Constitutive Act of the AU. Among its objectives, cf. Art. 2 of its statutes, is to promote and defend a culture of human rights. Bringing cases before the African Court is a way to defend a culture of human rights. However, given the purely advisory role of the Economic, Social and Cultural Council and the fact that, unlike the Pan-African Parliament and the Peace and Security Council, it has not been established by an independent and ratified international instrument, but by simple decision of the AU Assembly, it will presumably not be able to bring cases to the African Court.

Of more practical interest than whether the Pan-African Parliament or the Peace and Security Council can bring cases before the African Court is whether the Child Committee can bring cases. As will be further described below, the Child Committee is responsible for protection and promotion with respect to the Child Charter and can, in a fashion very similar to the Commission, receive communications. It would seem logical if the Child Committee, like the Commission, could bring cases before the African Court; such a right for the Child Committee is apparently included in the present draft protocol for the merger of the African Court and the African Court of Justice.

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<sup>161</sup> Protocol to the Treaty establishing the African Economic Community relating to the Pan-African Parliament, adopted 2 March 2001 in Sirte, Libya, and entered into force 14 December 2003.

<sup>162</sup> Protocol relating to the Establishment of the Peace and Security Council of the African Union, adopted 10 July 2002 in Durban, and entered into force 26 December 2003.

Only if the Child Committee can be considered an African intergovernmental organisation will it be able to bring cases before the African Court, for the time being at least. Seen isolated, it is not obvious that a committee of independent experts falls under the definition “*African Intergovernmental Organisations*”. On the other hand, the Child Committee has been established under the auspices of the AU and pursuant to an international (intergovernmental) charter, and the members of the Child Committee are elected by the AU Assembly. More importantly, it would seem illogical if the African Court should not have the same function *vis-à-vis* the Child Committee with respect to the Child Charter as it has *vis-à-vis* the Commission with respect to the Charter. Consequently, it must be assumed (and hoped for) that the African Court will interpret “*African Intergovernmental Organisation*” in Art. 5(f) of the Court Protocol as including the Child Committee.

When considering whether the various organs of AU can be considered “*African Intergovernmental Organisations*”, such as the Child Committee, the Pan-African Parliament and the Peace and Security Council, the argument could be made that since Art. 4.2 on advisory opinions specifically gives organs of AU a right to request advisory opinions, the drafters of the Court Protocol would have mentioned organs of AU specifically in Art. 5 as well, had they desired to give such organs the right to bring cases under Art. 5.

According to Art. 5.2, a state with an interest in a pending case may request the African Court to be admitted to join. At this stage, it is not possible to say what kind of interest a state will need to show to be allowed to join. Furthermore, based on the fact that only once has a state decided to bring a case before the Commission, it must be assumed that the right to join will be used very sparingly.

According to Art. 5.3, the African 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*”. Art. 34.6 says, “*the state shall make a declaration accepting the competence of the Court to receive petitions 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*”. Consequently, unless a state has made this special declaration, there is no direct access to the African Court for individuals and NGOs. Currently, only two states, Mali and Burkina Faso, have made such declarations.<sup>163</sup> The Protocol contains no requirement that the individual or the NGO instituting the case have a personal interest in the case (unless this, with respect to NGOs, can be read into the word “*relevant*”, see further below). Consequently, it would appear to be possible for one individual to institute a case concerning the violation of the rights of someone completely unrelated.

The wording of Art. 5.3 could give the impression that even if a state has made a declaration under Art. 34.6, the African Court still needs to decide if it will “*entitle*” NGOs and individuals to institute cases directly before it. Assuming that all other conditions for admissibility, etc. are fulfilled, including such conditions as have been stipulated by the African Court with reference to Art. 8 of the Court Protocol, it must be expected that if there is the necessary declaration, the African Court will accept cases

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<sup>163</sup> Cf. Mosope Fagbongbe: Operationalizing the African Court of Human and Peoples’ Rights, 18 May 2007, <http://www.thecourt.ca/2007/05/18/operationalizing-the-african-court-of-human-and-peoples%E2%80%99-rights/>.

brought by individuals and NGOs without reading any special discretion into the wording of Art. 5.3.<sup>164</sup>

The Protocol does not specifically mention national human rights institutions (NHRIs). Consequently, NHRIs are only able to bring cases before the African Court if these NHRIs are considered to fall under the definition of “*relevant non-governmental organisations*” in Art. 5.3 of the Court Protocol and if they have observer status before the Commission. The Commission distinguishes between NGOs which can get observer status in accordance with the criteria set out in the Commission’s resolution on granting observer status to NGO’s, adopted at the Commission’s 25<sup>th</sup> Ordinary Session, in Bujumbura, Burundi, 26 April-5 May 1999 on the one hand, and national human rights institutions (NHRIs) which can be granted affiliate status in accordance with the criteria set out in the Commission’s resolution on granting observer status to NHRIs in Africa, adopted at the Commission’s 24<sup>th</sup> Ordinary Session, in Banjul, 22-31 October 1998 on the other. When comparing the two resolutions, it would appear at first glance that it is more difficult for an NGO to be granted observer status than for an NHRI, and that NHRIs have a slightly better standing *vis-à-vis* the Commission than do NGOs.<sup>165</sup>

Since Art. 5.3 of the Court Protocol does not mention NHRIs but only NGOs, and since NHRIs, both in general and *vis-à-vis* the Commission, are not considered to be NGO’s, the point of departure must be that NHRIs affiliated with the Commission under the 1998 resolution adopted in Bujumbura are not covered by Art. 5.3. It could, however, be argued that since the Commission gives NHRIs rights on par with or even exceeding those of NGOs, the Court should do likewise.

Another question is whether the African Court will find that any organisation given observer status as an NGO by the Commission will also be an NGO for the purpose of Art. 5.3 of the Court Protocol. Some organisations that have been granted observer status as NGOs by the Commission would normally not be considered NGOs. The Commonwealth Secretariat, for instance, was granted observer status as an NGO in 1990, but is the Secretariat of an intergovernmental organisation (the Commonwealth). Since Art. 5.3 refers to “*non-governmental organisations (NGOs) with observer status before the Commission*” and not simply organisations granted observer status with the Commission, it must be assumed that the Court has discretion to make its own assessment as to whether an entity is an NGO or not. It should also be noted that Art. 5.3 refers to “*relevant*” NGOs. It is unclear what is meant by “*relevant*”; e.g. if this means that the NGO bringing the case must have some relevant interest in the case.<sup>166</sup>

With respect to the subject of the African Court’s jurisdiction, it follows from Art. 3.1 of the Court Protocol that the jurisdiction of the African Court “*shall extend to all cases and disputes submitted to it*

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<sup>164</sup> This interpretation is supported by Fatsah Ouguergouz in *The Establishment of an African Court of Human and Peoples’ Rights*, African Yearbook of International Law, vol. 11, 2003 (copyright 2005), pp. 79-141, especially p. 114.

<sup>165</sup> The UN also distinguishes between NGOs and NHRIs. The direct basis for the involvement of NGOs, Art. 71 of the UN Charter, is not considered to apply to NHRIs as well, and NHRIs consequently have a less strong legal basis for taking part in the work of UN.

<sup>166</sup> Similarly, 10 Keys to understand the and use the African Court on Human and Peoples’ Rights, FIDH, November 2004, p. 44; and Anne Pieter van der Mei in *The New African Court on Human and Peoples’ Rights: Towards an Effective Human Rights Protection Mechanism for Africa?*, Leiden Journal of International Law, 18 (2005) pp. 113-129, especially p. 121.



*concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the states concerned*". Consequently, the African Court has the jurisdiction to hear not only cases that relate to the Charter and the Court Protocol, but also to other human rights instruments, both African and global. Apart from the Charter and the Court Protocol, the relevant African instruments would be the Women Protocol, the Child Charter and maybe others, see above with respect to the Commission. Art. 7 with the heading "Sources of Law" closely mirrors Art. 3.1, stating that the African Court shall "*apply the provisions of the Charter and any other relevant human rights instruments ratified by the states concerned*". In case of a dispute concerning the African Court's jurisdiction, it is for the African Court to decide, cf. Art. 3.2.

There are two conditions. The first is that the human rights instrument must be "*relevant*". Conceivably, this is only supposed to mean that the human rights instrument must have a bearing on the case being brought. The other is that the human rights instrument must have been ratified by the state concerned. This must mean not only that the instrument must have been ratified, but also that it must have come into effect.<sup>167</sup> Based on the normal principle of reciprocity in cases brought by a state against another state (as mandated by Art. 5.1 (b) or (d) of the Court Protocol), it is not sufficient that the state that has allegedly violated some relevant human rights instrument is a party to this instrument; the state bringing the case must also be a party to the instrument. If, on the other hand, a case is brought by the Commission, an African intergovernmental organisation, an NGO or an individual (Art. 5.1 (a) or (e) or Art. 5(3)), it must be irrelevant if the alleged victim or the individual bringing the case is a citizen of a country having ratified the relevant treaty or if the NGO is based in such a country. With respect to cases brought by a state against which a complaint has been lodged before the Commission, cf. Art. 5.1 (c), if the complainant is also a state, both of these states must be parties to the relevant human rights instruments.

Whereas the Charter sets out specific conditions for admitting cases to the Commission, the Court Protocol does not contain anything similar with respect to the admissibility of cases to the African Court. According to Art. 6.1, the African Court may request the opinion of the Commission when deciding on the admissibility of cases brought by virtue of Art. 5.3, that is by individuals or NGOs. As the article is phrased, it must be facultative for the African Court if it wishes the input of the Commission. According to Art. 6.2, the Court shall take the provisions of Art. 56 of the Charter into account when ruling on admissibility of cases. One of the demands of Art. 56 is the exhaustion of domestic remedies. For more information about the content of Art. 56, reference is made to the section above on the Commission. Since Art. 56 of the Charter deals with the admissibility of "*other communications*", i.e. communications from other than states parties, it must be assumed that at least with respect to cases brought by states parties, the Court has no obligation to take the provisions of Art. 56 into consideration. Similarly, it would make little sense to subject cases brought by the Commission to the admissibility conditions set out in Art. 56 of the Charter. Most likely, the African Court will also refrain from applying this provision with respect to cases brought by African intergovernmental organisations.

According to Art. 6.3, the African Court "*may consider cases or transfer them to the Commission*". Since the heading of Art. 6 is "*Admissibility of Cases*" and since the remainder of Art. 6 deals exclu-

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<sup>167</sup> Normally, international instruments do not come into force until a certain minimum number of states have ratified them. In addition, under certain instruments a state is not bound until a specified time period has lapsed following ratification.

sively with admissibility, one interpretation would be that this provision only deals with admissibility, meaning that the African Court can choose to transfer decision-making on admissibility to the Commission. Art. 6.3 could, however, also be understood as giving the African Court the mandate to transfer a case in its totality, i.e. including decision on the merits, to the Commission; not least because the provision refers to the transfer of cases as such, not to the transfer of a specific issue of the case.<sup>168</sup> If this interpretation turns out to be the correct one, it must be assumed that such transfer will be out of the question for cases brought by the Commission (unless, perhaps, if the case is brought by the Commission prior to the Commission having made its final decision).

When considering the issue of the jurisdiction of the African Court (Art. 3 of the Court Protocol), access to the court (Art. 5) and admissibility (Art. 6), it should be taken into account that according to Art. 8, 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*”. According to Art. 33, the African Court shall adopt its own rules of procedure, to the extent appropriate after consultation with the Commission. Consequently, the African Court has an opportunity to clarify the various uncertainties due to the wording and brevity of Arts. 3, 5 and 6 and to stipulate further conditions. The African Court might, for instance, decide to make some conditions for admissibility of cases brought by states that might mirror Art. 50 of the Charter, also demanding exhaustion of local remedies for states wanting to bring complaints to the Commission.

The Protocol is silent on the languages of the African Court and this will probably be dealt with in the Rules of Procedure. It must be assumed that the African Court will adopt the working languages of AU as its official languages; meaning, if possible, African languages, Arabic, English, French, and Portuguese, cf. Art. 25 of the Constitutive Act of the AU. The African Court will probably limit its actual working languages to something less, for example English and French, as is the case for the Commission. It will presumably be possible to make complaints and address the African Court in any of its official languages, even though it will most likely ensure a speedier process to use one of the working languages.

The African Court has a specific mandate to provide advisory opinions “*on any legal matter relating to the Charter or any other relevant human rights instrument*”, cf. Art. 4.1 of the Court Protocol. A request for such an opinion may be made by a member state of the AU (even if such a member state has not ratified the Court Protocol), AU, any of its organs, and “*any African organisation recognized by the OAU [AU]*”. It is unclear what exactly is meant by “*any African organisation recognized by the OAU [AU]*”. A restrictive interpretation would imply that this definition only covers African intergovernmental organisations and only such that are explicitly recognised by AU. Some but not all of the RECs have been explicitly recognised by AU; by applying this interpretation, only the explicitly recognised RECs would have the right to request advisory opinions. A more liberal interpretation would also include intergovernmental African organisations that have *de facto* been recognised by AU, e.g. by AU

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<sup>168</sup> This is the view of Anne Pieter van der Mei in *The New African Court on Human and Peoples’ Rights*, pp. 122-123, who also refers to the principle of complementarity between the Commission and the Court. Presumably, the more mundane cases would be referred to the Commission. This would be at odds with the view that once all African states have made declarations under Art. 34.6 of the Court Protocol or individuals have in some other way been given the right to bring cases to the African Court, the Commission shall focus on its promotional mandate.

cooperating with such organisations. Finally, the definition could be interpreted as covering NGOs as well, based on the argument that if the intention had been to limit the right to intergovernmental organisations, the wording of Art. 5.1 (d) (“*African Intergovernmental Organizations*”) would have been used. This is something that the Court might specify in its Rules of Procedure.

It follows from Art. 4.1 of the Court Protocol that it is a further condition for providing an advisory opinion that “*the subject matter of the opinion is not related to a matter being examined by the Commission*”. The use of the word “*examined*” could imply that the limitation of the African Court’s mandate only refers to subject matters being examined by the Commission as part of its communications procedure. A more practical approach would be to interpret the limitation as also covering matters where the Commission has been asked to provide an interpretation of a provision of the Charter under Art. 45.3. of the Charter. This would avoid redundancy and the risk of contradicting views. In addition, even though this is not explicated in the Court Protocol, it must be assumed that the African Court will decline to provide an advisory opinion if it touches on a legal matter that is the subject of a case pending before the African Court (in order to avoid prejudging said case). According to Art. 4.1, the African Court “*may*” provide an opinion and is consequently under no obligation to provide opinions under Art. 4.1. It will therefore be entitled to decline requests for opinions based on the above views.

#### Human Rights Mandate

The African Court undoubtedly has a human rights mandate, covering the rights protected by all human rights instruments ratified by a state that is a party to the Court Protocol, cf. Art. 3.1 of the Court Protocol. As stated in Art. 7, the sources of law to be used by the African Court are the same as the sources of law specified in Art. 3.1.

The Protocol contains no specific limitation with respect to the type of human rights cases that may be adjudicated by the African Court, provided that the cases concern the application or interpretation of the Charter, the Court Protocol or any other human rights instrument ratified by the relevant states parties. Until more countries have made the optional declaration under Art. 34.6, it must be assumed that most of the cases before the African Court will come from the Commission, given that the African states have been extremely reluctant to bring cases to the Commission and that there is no reason to believe that the desire to bring cases to the African Court will be greater.

According to information given by its Vice-President 7 December 2006, the African Court should be able to start receiving cases sometime at the end of the first quarter of 2007. This was apparently too optimistic; since then the President of the African Court has expressed that the African Court will hopefully be able to take cases sometime after July 2007.<sup>169</sup>

#### Procedure

The Court Protocol contains some provisions on the handling of cases before the African Court. Further specifications are expected to be contained in the African Court’s Rules of Procedure.

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<sup>169</sup> Cf. article from Bua News 25 April 2007, African Human Rights Court To Operate After July, [www.africancourtcoalition.org/editorial.asp?page\\_id=70](http://www.africancourtcoalition.org/editorial.asp?page_id=70).

The Court Protocol does not indicate how a case is to be brought before the African Court. It must be assumed that a case must be started by the complainant delivering some sort of written complaint to the African Court; containing information on the parties; the alleged victims and perpetrators; the human rights issue to be decided by the African Court (if possible with a reference to the relevant human rights provisions) and the claim; the facts of the case; the fulfilment of the conditions for submitting a case; a list of the evidence to be supplied (both documents and witnesses); and various practical details such as address, email address, etc. Photocopies of any documents to be relied upon as evidence should be enclosed. If the case is being brought by the Commission (which, as stated above, will probably be the norm for the time being), it must be assumed that the Commission shall provide a copy of its report and decisions in the matter; said report and decisions will normally contain some of the information that should otherwise be stated in the written complaint.

According to Art. 27.2, the African Court can adopt provisional measures “*in cases of extreme gravity and urgency*”. Consequently, if a claimant wishes for the African Court to adopt such measures, this should be indicated and highlighted in the complaint and the relevant arguments should be stated.

Probably the state allegedly responsible for a violation will then be invited to reply to the initial complaint. In the reply, the state should state its claim (e.g. that the case is not admissible, that no violation took place, etc.) as well as its comments to the issues raised and the facts stated in the complaint and the arguments supporting its claim. The state should also provide a list of evidence to be supplied (with relevant photocopies enclosed) and the relevant practical details. It must be assumed that the African Court in its Rules of Procedure or in guidelines will to some extent specify the format and the contents of the initial complaint and the reply.

If the Commission brings a case, the Commission will be a party to the case. It does not appear from the Court Protocol if the alleged victim will also be given this status and thereby the opportunity to make his or her own submissions to the African Court.<sup>170</sup> Unless the alleged victims have some right to make their views heard by the African Court, either by being given status of parties or by the Rules of Procedure providing the alleged victims with some specific rights, the alleged victims will only be able to play a role in the proceedings to the extent that the Commission allows this. Having the Commission in reality representing alleged victims without the victims being directly represented at the African Court presents certain difficulties since the Commission, in light of its status as an independent and impartial organ, cf. Art. 31 of the Charter, probably has to maintain some degree of impartiality and objectivity, even in its role as a party to a case before the African Court. Among other things, this means that the Commission in its submissions presumably cannot go further than its own decision, meaning again that the arguments that the Commission did not find viable will not be presented to the African Court.

With respect to the preparation of a case, it must be assumed that the parties each will be allowed to present at least two written statements, allowing them to answer to each other’s allegations. It is not clear if the African Court will request specific statements on the question of admissibility. To the extent

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<sup>170</sup> In FIDH’s publication *10 Keys to understand the and use the African Court on Human and Peoples’ Rights*, FIDH, November 2004, p. 70, it is stated that in cases brought by the Commission, “*it is unlikely that the victim or their representatives would have the status of “party” before the Court, conforming to the rights guaranteed in a direct petition*”.

that the respondent state contests admissibility, it must be assumed that the African Court will make a ruling on this issue before finalising the written part of the procedure concerning the merits of the case. At the Commission, admissibility is usually contested. This might not become the case for the African Court, at least not for cases being brought by the Commission since the Commission in such cases will already have considered the question of admissibility and it is difficult to imagine the African Court setting further conditions for admissibility.

As mentioned above, the African Court may request the input of the Commission when it comes to admissibility, cf. Art. 6.1 of the Court Protocol. Depending on the interpretation of Art. 6.3, the African Court might even be able to refer the entire matter of admissibility to the Commission.

If the African Court (or, if relevant, the Commission) finds the case to be admissible, the written part of the procedure can continue. According to Art. 26.2, the African Court “*may receive written and oral evidence including expert testimony and shall make its decision on the basis of such evidence*”. Even though this is not stated directly, it must be assumed that it is from the parties (and the parties only) that the African Court “*may receive written and oral evidence*”. This would indicate that the African Court uses an adversarial procedure where the parties are responsible for presenting the case to the judges without the judges taking steps to investigate the facts of the case (see below, however, on the possibility for the African Court to hold an enquiry). It is preferable if all non-oral evidence is presented as part of the exchange of submissions and the African Court might even set out some limitations as to how late in the proceedings new evidence can be submitted, e.g. in the Rules of Procedure.

According to Art. 26.1, the African Court shall “*hear submissions by all parties and if deemed necessary, hold an enquiry*”. It is not clear when such an enquiry shall take place, but it would probably be most relevant when the African Court has had a chance to consider if the material presented by the parties is sufficient or not. There seems to be no reason why such an enquiry could not take the form of a visit to the place where the alleged violation took place; especially as it follows from Art. 26.1 that the states concerned shall “*assist by providing relevant facilities for the efficient handling of the case*” and as the African Court may “*convene in the territory of any member state*”, cf. Art. 25.2.

The Protocol does not set out the procedure to be followed during the oral hearing of the case – or whether it is indeed always necessary to conduct an oral hearing instead of simply deciding the case based on the written submissions of the parties. It must be assumed that if there is an oral hearing, the parties will be able to present their views, respond to the views of the other party, and examine and cross-examine witnesses and parties.

According to Art. 10.1, the main rule is that the proceedings of the African Court are conducted in public with the possibility to conduct proceedings behind closed doors as per the Rules of Procedure. It is also possible for the African Court to conduct hearings in any member state of the AU, e.g. in the state where the alleged violations took place, provided that the state in question consents, cf. Art. 25.1. The use of this possibility would not only make it easier for the parties and the possible witnesses to take part in the proceedings, but also be a way to make the African Court more known outside its seat.

According to Art. 10.2 of the Court Protocol, “*any party to a case shall be entitled to be represented by a legal representative of the party’s choice*”. Consequently, a party may choose either to represent

him- or herself or to appoint a legal representative. The words “*legal representative*” would indicate that there are no specific limitations as to whom a party can appoint as representative, be it an NGO, a lawyer, or someone else. The French version, however, uses the phrase “*conseil juridique*” which would normally refer to a lawyer (a legal counsel). In its practice, the Commission does not limit who can represent parties; it must be assumed that the African Court will choose the same route, given the likelihood that at least some parties will lack the financial resources to retain the services of a legal practitioner. The second part of Art. 10.2 provides that “*free legal representation may be provided where the interests of justice so require*”. This indicates an intention to set up a system of free legal aid, but the wording of the provision neither stipulates an obligation to set up such a system nor a right for parties to obtain free legal aid under certain circumstances.

It follows from Art. 10.3 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*”. It is not clear exactly what kind of protection and facilities persons appearing before the African Court can expect. Hopefully, the African Court will provide some specifications in its Rules of Procedure. It would at least be necessary to ensure that such persons can obtain a visa to the state where the African Court holds its hearing in the relevant case and that they have some degree of protection and immunity while being there. The African Court cannot itself provide these things; but it is hopefully part of the host agreement that was entered into with the host country, Tanzania, on 30 August 2007.

According to Art. 9 of the Court Protocol, the African Court may try to “*reach an amicable settlement in a case pending before it in accordance with the provisions of the Charter*”. Since there is no rule to the contrary in the Court Protocol, the African Court may take steps to help find an amicable settlement at any given time during the process. Presumably, the phrase “*in accordance with the provisions of the Charter*” would mean that the African Court should only assist in reaching amicable settlements that respect the human and peoples’ rights guaranteed by the Charter; this would have been clearer if this provision of the Court Protocol had been modelled on rule 98 in the Rules of Procedure for the Commission, which states that settlements reached with the help of the Commission shall be “*based on the respect for human rights and fundamental liberties, as recognised by the Charter*”. Furthermore, since the African Court can deal with violations of any human rights instrument that is binding on the states parties in question, the reference to the Charter seems insufficient; if a case brought before the African Court deals with an alleged violation of e.g. the Child Charter, any settlement reached with the assistance of the African Court should respect the rights protected by the Child Charter, not simply the rights set out in the Charter. Should the parties instead choose to settle without the assistance of the African Court, and the complainant then requests to withdraw the case, the African Court might refuse to accept the withdrawal, but in an adversarial process (like the process before the Court) it is very difficult to continue a case if the complainant is no longer interested in pursuing it.

As mentioned above, it is not clear what the status of the actual victims of the alleged human rights violations will be in a case brought by the Commission. This issue is also important with respect to settlements. If the actual victims do not have status as parties, there is no reason why a case could not be settled without the approval of the victims. The whole issue of the rights of the actual victims in the process before the court is an issue that will need to be looked into by the judges of the African Court.

The Protocol is silent on the status of a settlement entered into with the assistance of the African Court. Since judgments of the African Court are legally binding, it would be preferable if settlements were given the same status as judgments. One way to achieve this would be for the African Court to make a judgment confirming the settlement.

A judge shall recuse him- or herself from a case where the country in which he or she is a citizen is a party, cf. Art. 22 of the Court Protocol. Art. 22 does not cover the situation where the victim of an alleged violation and a judge is from the same state, but that state is not party to the case. Unless this question is dealt with by the Rules of Procedure, the issue must be decided based on generally applicable standards concerning the impartiality of judges. In addition, it is stated in Art. 17.2 that a judge cannot hear a case if he or she has been involved in this case, e.g. as counsel for one of the parties or as member of a court or commission having dealt with the case.

According to Art. 23 of the Court Protocol, the African Court is quorate if at least seven judges are present.

### Remedies and Enforceability

After finishing its deliberations in a case, the judges of the African Court have 90 days to render their judgment, cf. Art. 28.1 of the Court Protocol.<sup>171</sup> A simple majority of judges is sufficient to reach a decision, cf. Art. 28.1, and it is possible to dissent, cf. Art. 28.7. The judgments of the court are final and not subject to appeal, cf. Art. 28.2; it is possible for the African Court to review a decision in the light of new evidence, cf. Art. 28.3; and the African Court can also be asked to interpret its own decisions, cf. Art. 28.4. With respect to the African Court's review of decisions, the conditions for doing so shall be set out in the Rules of Procedure. Reasons for the judgments shall be provided, cf. Art. 28.6.

In addition to being read in open court, cf. Art. 28.5, the judgments shall be transmitted both to the parties and to all member states of the AU, the Commission and the AU Executive Council,<sup>172</sup> cf. Art. 29.

In its judgments, the African Court is not limited to merely finding that a violation has taken place; it shall also “*make appropriate orders to remedy the violation, including the payment of fair compensation or reparation*”, cf. Art. 27.1 of the Court Protocol. Apart from awarding (financial) compensation or reparation, this provision must give the African Court the power to demand certain actions; e.g. the release of detainees unlawfully held or the repeal or change of a provision of national law that is contrary to the relevant human rights instrument. The Court is expected to specify a time limit for adherence to a judgement, cf. Art. 30.

According to Art. 30, the “*states parties to the present Protocol undertake to comply with the judgment in any case in which they are parties within the time stipulated by the Court and to guarantee its execution*”. As can be seen by this article, the judgments of the African Court are binding on the states and executable. The Protocol does not, however, contain any provisions requiring for example that the states shall ensure that their national courts will execute the judgments of the African Court or in any other way ensure the practicalities of the execution of its judgments.

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<sup>171</sup> It is not clear what happens if the African Court fails to live up to this deadline.

<sup>172</sup> The text refers to the OAU Council of Ministers.

The AU Executive Council “*shall monitor [the judgment’s] execution on behalf of the Assembly*”, cf. Art. 29.2. Moreover, in its report to the regular session of the AU Assembly, the African Court “*shall specify, in particular, the cases in which a state has not complied with the Court’s judgment*”. Both the AU Executive Council and the AU Assembly consists of representatives of all AU member states, irrespective of whether such states have ratified the Court Protocol or not, and states that have not ratified the Court Protocol will therefore be as much involved in securing the implementation of judgments as states that have ratified the protocol.

It is not stated in the Court Protocol what steps can be taken to force a state to implement a decision. According to Art. 23.2 of the Constitutive Act of the AU, “*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*”. Since the African Court is – to some extent – an organ of the AU, mandated to make binding decisions, it must be assumed that the AU Assembly will have the right to subject a state that does not comply with a judgment of the African Court to sanctions. Whether or not the AU Assembly will be willing to do so is a different question.

As mentioned above, the African Court also has the mandate to adopt provisional measures “*in cases of extreme gravity and urgency*”, cf. Art. 27.2. An example of such a measure could be to request a state not to carry out an execution if a case is pending about possible human rights violations in connection with a death sentence.<sup>173</sup> Since the African Court is a true court with the ability to make binding judgments, it must also be assumed that provisional measures adopted under Art. 27.2 are binding on the states. Art. 30, containing the states’ undertaking to comply with the decisions of the African Court, only refers to the judgments of the African Court. Consequently, it could be argued that decisions on provisional measures are not binding as such. In any event, such decisions would still be decisions by an AU body mandated to make binding decisions, and, consequently, provided the political will was there, the AU Assembly could impose sanctions for non-adherence.

### Cooperation

As mentioned above, the AU Assembly during its 3<sup>rd</sup> ordinary session in Addis Ababa, 6-8 July 2004, decided to merge the African Court with the African Court of Justice, a regional court listed as one of the AU organs in Art. 5.1 of the Constitutive Act of the AU, but still not in function. This was reiterated at the 5<sup>th</sup> ordinary session of the AU Assembly of Heads of State and Government in Sirte, 4-5 July 2005. At this session, it was decided that the seat of the merged court should be in the Eastern region of Africa. The AU Assembly also decided that a draft protocol for the establishment should be prepared for consideration at the next ordinary session of the AU Executive Council and Assembly and accepted the offer by Mohamed Bedjaoui, the former President of the International Court of Justice and the then Algerian Foreign Minister, to prepare a draft.

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<sup>173</sup> Such measures have been adopted by the Commission several times, albeit with mixed success, see e.g. communication 137/94, 139/94, 154/96 and 161/97, International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation ctr. Nigeria, printed in the 12<sup>th</sup> activity report of the Commission.



During the 6<sup>th</sup> ordinary session of the AU Executive Council 16-21 January 2006 in Khartoum, it was decided to request the member states' comments no later than 31 March 2006 in order for the Permanent Representatives' Committee and the legal experts of the member states to finalise the draft at a joint meeting in time for the draft protocol to be submitted at the sessions of the AU Executive Council and Assembly in the summer of 2006.

The meeting of the Permanent Representatives' Committee and the legal experts took place 14-19 May 2006 and the recommendations were presented to the AU Executive Council during its 7<sup>th</sup> session 25-29 June 2006 in Banjul. It was not possible for the states to reach an agreement and, as recommended by the AU Executive Council, the AU Assembly decided that a meeting of the African ministers of justice should be held to solve the outstanding issues and make recommendations to the AU Executive Council in January 2007. The outstanding issues were:

- Should the representation of men and women on the merged court be “*equal*”, as set out in Art. 7.3 of the protocol for the African Court of Justice, or merely “*adequate*”, as set out in Art. 14.3 of the Court Protocol?
- Should the representation of judges from the five African sub-regions be equal (at least two from each sub-region), as set out in Art. 3.6 of the protocol for the African Court of Justice, or is it sufficient that each of the sub-regions are merely represented, as set out in Art. 14.2 of the Court Protocol?
- Should the mandate of the merged court be almost unlimited, as implied by Art. 19 of the Protocol for the African Court of Justice?
- Should NGOs, NHRIs and individuals have direct access to the merged court,<sup>174</sup> or should access be limited as is the case under the Court Protocol?<sup>175</sup>
- Should the states be allowed to make reservations when ratifying the new protocol,<sup>176</sup> or should the practice hitherto followed with respect to African human rights instruments be adhered to, meaning that reservations cannot be made?<sup>177</sup>
- Would states have to ratify the new protocol even if they had already ratified either the Court Protocol or the Protocol for the African Court of Justice, or could the protocol for the merged court become binding upon signature for states having ratified either Protocol?<sup>178</sup>

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<sup>174</sup> This was proposed by Mohamed Bedjaoui.

<sup>175</sup> Allegedly, Zimbabwe, Tunisia and Egypt were against giving direct access, with Zimbabwe being the most vehement opponent. On the other hand, South Africa, Senegal, Ghana, and Burkina Faso were allegedly not prepared to accept a protocol that did not contain provisions for direct access.

<sup>176</sup> This is the normal rule of international treaty law, as set out in the Vienna Treaty Law Convention, Arts. 19-23.

<sup>177</sup> If reservations can be made, the states sceptical towards the idea of direct access for individuals and NGOs will be able to make reservations to the relevant clauses of the protocol. Allegedly, the only state with a strong view about the right to make reservations was Zimbabwe, which currently has around 15 cases pending before the Commission. In the proposal by Mohamed Bedjaoui, reservations could not be made.

<sup>178</sup> Being a new international instrument, the normal rule under international law would be that specific ratification of the protocol be necessary. Certain states indicated that under their national law, it would in any event be necessary with a new ratification, no matter what was stated in the protocol.

For some reason the meeting of the ministers of justice did not take place in 2006, and the issue of the merger of the two courts is not reflected in any of the decisions of the AU Assembly or the AU Executive Council at the ordinary sessions in January 2007 in Addis Ababa or in June-July 2007 in Accra. It is not known when the AU member states will take up this matter again. In addition, once the AU member states have managed to adopt a protocol for the merged court, the protocol will still need to be ratified by the minimum number of states before it comes into force. Consequently, the African Court will in all likelihood function several years before the merger is a reality.<sup>179</sup>

The African Court has been established to complement the protection mandate of the Commission, cf. the last section of the preamble and Art. 2 of the Court Protocol, according to which the African Court shall “*complement the protective mandate of the [Commission]*”. Some specific instances where cooperation or interaction is envisaged are set out in the Court Protocol.

The Commission is among the bodies that may bring cases to the African Court, cf. Art. 5.1 (a). This can only function effectively and efficiently if the Commission and Court agree on the process for the handling of such cases.

As stated above, the African Court may request the opinion of the Commission with respect to admissibility of cases brought by NGOs or individuals, cf. Art. 6.1 of the Court Protocol. The African Court may even transfer cases to the Commission, cf. Art. 6.3; as also stated above, it is unclear if a case in its totality or only the issue of admissibility may be transferred. This also necessitates cooperation and agreement.

According to Art. 33, the African Court shall “*consult the Commission as appropriate*” when drawing up its Rules of Procedures.

Both the African Court and the Commission have a protective mandate, and this “*complementarity*” shall be considered when the African Court lays down its detailed conditions to consider cases, cf. Art. 8 of the Court Protocol. It is not clear what is meant by this. It could for instance be that such conditions shall be set out in manner that does not in practice eliminate the protective mandate of the Commission. Naturally, as long as cases can be brought directly to the African Court against only two out of 53 member states, the Commission will continue to have a pivotal role to play in the protection of human and peoples’ rights in Africa, irrespective of the conditions set by the African Court. Based on various conversations, it would appear that within the African human rights community, opinions tend to differ as to whether in the long run the Commission should maintain its protection mandate or – once individuals and NGOs in general are able to bring cases directly before the African Court – should focus exclusively on promotion and standard setting.

An overlap also exists with respect to advisory opinions: According to Art. 45.3 of the Charter, one of the functions of the Commission is to interpret the provisions of the Charter at the request of a state party, an institution of the AU, or an African organisation recognised by the AU. According to Art. 4.1

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<sup>179</sup> The information on the merger between the African Court and the African Court of Justice is partly from the participation in a meeting of the Coalition for an Effective African Court on Human and Peoples’ Rights 17 November 2006 in Banjul.

of the Court Protocol, the African Court may provide advisory opinions on legal matters relating to the Charter and any other human rights instrument. As can be seen, the mandate of the African Court is broader than the mandate of the Commission, since the Commission can only interpret the Charter, not other human rights instruments. In addition, all member states of the AU may request opinions from the African Court, whereas only states having ratified the Charter may request interpretations from the Commission. In practice, this makes no difference as all AU member states have ratified the Charter. Since the Court Protocol does not contain any provisions to eliminate the Commission's mandate to provide interpretations of the Charter, both the Commission and the African Court must plausibly have such mandate. To put this in perspective, it should be noted that the Commission has yet to receive its first request for an interpretation according to Art. 45.3.

With respect to the Women Protocol, the right to interpret this protocol lies with the African Court, cf. Art. 27 of the Women Protocol. Until the establishment of the African Court, the Commission shall fulfil this role, cf. Art. 32.

The AU Assembly and the AU Executive Council have reiterated the need for the African Court and the Commission to cooperate; for instance at the 9<sup>th</sup> ordinary session of the AU Executive Council 25-29 June 2006 in Banjul, where the Executive Council *“requests the [Commission] to establish close collaboration ties with the African Court of Human and Peoples' Rights”*; and at the 6<sup>th</sup> ordinary session of the AU Assembly 23-24 January 2006 in Khartoum where the Assembly *“requests the [Commission] to take part in the process of operationalization of the African Court on Human and Peoples' Rights”*.

The African Court and the Commission have already held some meetings, but apparently without reaching specific results. In conversation, both Commissioners and judges are of the opinion that it is important with good relations between the African Court and the Commission and that good relations will be achieved, even though there are some fears concerning the logistic difficulties of having the seats of the African Court and the Commission being on opposite sides of the African continent. The view was also offered that the reason why the first meeting had not yielded many results most likely was that the African Court had not at the time of the meeting had the opportunity to find its own way; only when this had happened would it make sense for the Commission and the African Court to take more specific steps to initiate closer collaboration.

In many ways, the function of the Commission with respect to the Charter is similar to the function of the Child Committee with respect to the Child Charter. Consequently, similar possibilities for cooperation exist between the Child Committee and the African Court and between the Commission and the African Court. To the extent that individuals and NGOs have access to bring cases directly before the African Court, cases concerning alleged violations of the Child Charter may be brought before either the African Court or the Child Committee, cf. Art. 44.1 of the Child Charter. In addition, even though the Child Committee is not mentioned specifically in Art. 5 of the Court Protocol, it must be assumed that the African Court will accept that the Child Committee can bring cases before the African Court. Furthermore, both the African Court and the Child Committee have the mandate to give advisory opinions on the Child Charter, cf. Art. 4.1 of the Court Protocol and Art. 42.d of the Child Charter.

The question as to whether the Pan-African Parliament and the Peace and Security Council can bring cases before the African Court is discussed above.

As will be mentioned below, presently just one of the Regional Economic Communities (RECs) has a court with an explicit human rights mandate.<sup>180</sup> It is likely that more will follow. In addition, some of the courts of other RECs arguably already have a mandate to deal with (some) human rights cases. In this respect, it is relevant to consider what – if any – is the relation between the African Court and the various regional courts. Of obvious relevance is the question of whether the African Court should take a case even if an REC court has already decided it or if it is pending before an REC court; there is nothing in the Court Protocol preventing the African Court from taking such a case.

In the long term it could be considered whether or not the African Court should formally be considered an appeal instance for the REC Courts with respect to human rights and/or whether a system should be established according to which the REC Courts could refer questions of interpretation of the Charter, the Women Protocol, and other human rights instruments to the African Court. According to the Treaty Establishing the African Economic Community (the AEC),<sup>181</sup> the RECs are seen as the main building blocks of the AEC, which is integrated in AU. A protocol exists, setting out the relationship between AEC and the RECs. It is the long-term intention to integrate the RECs into AEC, for which reason the RECs are supposed to be harmonised. Consequently, it would seem logical if some relationship could also be established between the African Court and the REC courts.

As mentioned above, the African Court is funded by AU. The funding from the AU will presumably not be adequate for the African Court to function sufficiently well. On 15 November 2006, the African Court entered into an agreement with the German development agency GTZ. Furthermore, according to the activity report for the African Court for 2006, the Konrad Adenauer Foundation and the Danish Institute for Human Rights have offered support with respect to organising study trips and providing training for the judges and staff, and the African Court has “*agreed in principle to these spontaneous offers for cooperation*”.

The African Court has attracted the interest of civil society. The umbrella organisation Coalition for an Effective African Court on Human and Peoples’ Rights, consisting of approximately 350 members, many of whom are NGOs or NHRIs, has been trying to influence AU, the relevant member states and the judges with respect to the election of judges, the protocol for the merger of the African Court and African Court of Justice, the rules of procedure, etc. According to this organisation, it enjoys a very good relationship with the President and Vice-President of the African Court.<sup>182</sup> Other NGOs are also interested in the African Court, including FIDH (International Federation for Human Rights), which in 2004 published 10 Keys to Understand and Use the African Court on Human and Peoples’ Rights, a user’s guide, and African Legal Aid (AFLA), who co-sponsored a Pan-African Conference 1-2 December 2006 in Accra, Ghana, with the purpose of introducing the judges of the AHPR court to civil

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<sup>180</sup> The ECOWAS Community Court.

<sup>181</sup> This AEC Treaty was adopted by the OAU Assembly at its 27<sup>th</sup> ordinary session 3-5 June 1991 in Abuja, Nigeria and entered into force 12 May 1994.

<sup>182</sup> Information provided during meetings 17 and 21 November 2006.

society. Presumably, most organisations with an interest in human rights continentally in Africa will have some interest in the African Court.

## **The African Committee of Experts on the Rights and Welfare of the Child**

### Introduction

The African Charter on the Rights and Welfare of the Child (the Child Charter) was adopted by the OAU Assembly on 11 July 1990 in Addis Ababa, entering into force on 29 November 1999, 30 days after ratification by 15 member states of OAU; cf. its Art. 47.3. As of 19 June 2007, it had been ratified by 41 member states.<sup>183</sup> According to Art. 32 of the Child Charter, an “*African Committee of Experts on the Rights and Welfare of the Child ... shall be established within the Organization of African Unity [now AU] to promote and protect the rights and welfare of the child*”. This means that even though the African Committee of Experts on the Rights and Welfare of the Child (the Child Committee) is not mentioned as one of the organs of AU in the Constitutive Act of AU, it must still to some extent be considered an “*organ*” of AU, cf. the similar discussions with respect to Commission and the African Court above.

The Child Committee was established by the OAU Assembly at its 37<sup>th</sup> ordinary session 9-11 July 2001 in Lusaka, Zambia.<sup>184</sup>

According to Art. 38.1 of the Child Charter, the Child Committee shall lay down its own rules of procedure. The present rules were adopted at its 2<sup>nd</sup> ordinary session 17-21 February 2003 in Nairobi, Kenya.

### Purpose and Function

As stated in Art. 32 of the Child Charter, the Child Committee is established to “*promote and protect the rights and welfare of the child*”. More specifically, its mandate is set out in Art. 42, an Article that has obviously been modelled on Art. 45 of the Charter. Consequently, the mandate of the Child Committee can be divided into three parts: a protection part, a promotion part, and an interpretation part.

With respect to the protection mandate, Art. 42.b of the Child Charter states that the Child Committee shall “*monitor the implementation and ensure protection of the rights enshrined in this Charter*”. The reference to implementation is new in comparison with Art. 45.2 of the Charter. Among the elements of the protective mandate of the Child Committee is the communications procedure; specifically mandated by Art. 44 and the primary focus of this section.

With respect to promotion, the tasks specified in Art. 42.a of the Child Charter are roughly similar to the tasks specified with respect to the Commission in Art. 45.1 of the Charter, that is (i) collecting information, commissioning assessments on African problems concerning child rights, organising meet-

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<sup>183</sup> The 12 states that have yet to ratify the Child Charter are Central African Republic, Djibouti, DR Congo, Guinea-Bissau, Liberia, Sahrawi Arab Democratic Republic, Somalia, São Tomé & Príncipe, Sudan, Swaziland, Tunisia, and Zambia.

<sup>184</sup> Cf. the report of the Child Committee to the AU Executive Council to its 27<sup>th</sup> ordinary session 28 June – 2 July 2005 in Tripoli, Libya.

ings, encouraging national and local institutions, and giving its view and recommendations to governments; (ii) laying down principles and rules on children's rights and welfare; and (iii) cooperating with other African, international and regional institutions concerned with promoting and protecting children's rights and welfare.

With respect to interpretation, the Child Committee's mandate according to Art. 42.c again is roughly similar to the mandate of the Commission under the Charter, i.e. to "*interpret the provisions of the present Charter at the request of a state party, an institution of the Organization of African Unity [now AU] or any other person or institution recognised by the Organization of African Unity [now AU]*".

Apart from the three mandates specified in Art. 42, the AU Assembly, the AU Commission,<sup>185</sup> any other organ of AU as well as the United Nations can entrust tasks to the Commission, cf. Art. 42.d. This is broader than the similar provision in Art. 45.4 of the Charter that only enables the AU Assembly to entrust additional tasks to the Commission. As far as can be seen, no tasks have been entrusted to the Committee under Art. 42.d.

According to Art. 43, the member states shall submit a regular report on measures to implement the Child Charter to the Child Committee; the first time within two years of acceding to the Child Charter and then every three years. The report of the 8<sup>th</sup> session of the Child Committee, 27 November-2 December 2006, mentions four reports, received from Egypt, Mauritius, Nigeria, and Rwanda, respectively.

### Organisation

According to Art. 33 of the Child Charter, the Child Committee shall consist of eleven members who shall serve in their personal capacity. The members shall be "*of high moral standing, integrity, impartiality and competence in matters of the rights and welfare of the child*". The Committee can have no more than one member from any given state.

Neither the Child Charter nor the Rules of Procedure contains any provisions on the representation of the African sub-regions or principal legal traditions or on gender representation.

With respect to gender equality, a note should be made of item 5 of the Solemn Declaration on Gender Equality in Africa<sup>186</sup> that calls upon all organs of the African Union to live up to the gender parity principle of the AU Commission, contained in Art. 6.3 of the Statutes of the AU Commission<sup>187</sup> and entailing that at least half of the AU Commissioners shall be women.

Each member state may nominate two candidates, only one of which may be from the nominating state, cf. Art. 35 of the Child Charter. According to Art. 34, the members are elected by secret ballot by the AU Assembly. In practice, the members are elected by the AU Executive Council and the election re-

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<sup>185</sup> The Child Charter refers to the "*Secretary-General of the OAU*".

<sup>186</sup> Adopted by the AU Assembly at its 3<sup>rd</sup> ordinary session 6-8 July 2004 in Addis Ababa.

<sup>187</sup> Adopted by the AU Assembly during its 1<sup>st</sup> ordinary session, 9-10 July 2002.

sult is then confirmed by official appointment by the AU Assembly.<sup>188</sup> The term is five years without the possibility of re-election, cf. Art. 37.

Apart from what is set out in the Child Charter, rule 11.2 of the Rules of Procedure states that “*The position of a member of the Committee is incompatible with any activity that might interfere with the independence or impartiality of such a member or the demands of the office such as working in any intergovernmental organisation, UN Agencies, or a Cabinet Minister or Deputy Minister, member of parliament, Ambassador, or any other politically binding function*”. This can be seen as derived from Art. 33’s demand for impartiality. The Committee has taken this seriously since the beginning; at the 2<sup>nd</sup> Session 17-21 February 2003, information was given that due to their new posts<sup>189</sup>, three members had resigned with reference to Art. 33 and rule 11.2.<sup>190</sup> In such cases, the member state that nominated the resigning member shall appoint a replacement for the remainder of the term, subject to the approval of the AU Assembly, cf. Art. 39 of the Child Charter. The Committee also has strict rules about absence, setting out in rule 14 that in case of absence from two consecutive sessions, the Committee position can be declared vacant.<sup>191</sup>

The Child Charter does not contain any provisions on the sessions of the Child Committee, but detailed provisions are contained in the Rules of Procedure. The Child Committee shall hold two ordinary sessions annually and may convene extraordinary sessions, cf. rules 2-3. Unless otherwise decided, the sessions shall be held at the AU headquarters, cf. rule 4.

Seven members of the Committee shall form a quorum, cf. Art. 38.3 of the Child Charter. In case of equality of votes, the vote of the chairperson is decisive, cf. Art. 38.4.

According to Art. 38.2, the Committee elects its own officers (a chairperson, three vice-chairpersons, a rapporteur and a deputy rapporteur, cf. rule 16 of the Rules of Procedure) among its members for a two-year period with the possibility of re-election, cf. rule 17.

The Child Charter does not contain any provisions on the specific roles of the officers of the Child Committee, apart from giving the chairperson a decisive vote. Such provisions are contained in the Rules of Procedure. According to the Rules of Procedure, the chairperson has specified tasks in connection with the convening of each session, cf. rules 2-5; the preparation of the agenda, cf. rule 6; the absence of members, cf. rule 14; and the correction of meeting records, cf. rule 35. The chairperson is also responsible for supervising the work of the Secretariat, cf. rule 23, and for holding press conferences after each session, cf. rule 32. During the sessions, the chairperson chairs the meetings and has broad powers to direct the proceedings, cf. rules 39-42. When acting as chairperson, a vice-chairperson assumes the powers and duties of the chairperson, cf. rule 20.

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<sup>188</sup> Cf. for example the AU Assembly’s decision on appointment of six new members at the 5<sup>th</sup> session 4-5 July 2005 in Sirte, Libya. Of interest with respect to gender parity is that at this election, five out of six elected were women.

<sup>189</sup> One had been appointed minister, another had joined UNICEF, and the third had joined the UN Tribunal for Rwanda.

<sup>190</sup> Cf. Amanda Lloyd: Report on the second ordinary session of the African Committee of Experts on the Rights and Welfare of the Child, *African Human Rights Law Journal*, (2003), pp. 329-346.

<sup>191</sup> In other cases where a member ceases to function, the other members can with unanimous approval remove such a member.

According to Art. 40 of the Child Charter, the AU Commission<sup>192</sup> shall appoint a Secretary for the Child Committee. Rule 22 of the Rules of Procedure expands this provision, specifying that the AU Commission shall provide a Secretariat with “*necessary staff and facilities for the effective performance of its functions as assigned to it under the Children’s Charter*”. The Secretary shall, under the general supervision of the chairperson, be responsible for the Secretariat and “*assist the Committee and its members*”, “*serve as an intermediary for all communications*”, and be “*custodian of the archives of the Committee*”, cf. rule 23.

During its entire existence, it has been a priority for the Committee to get a Permanent Secretary. At the 2<sup>nd</sup> session of the Child Committee 17-21 February 2003, “*establish[ment of] an effective secretariat for the Committee to ease communication and co-ordination of activities*” was among the priorities identified for 2003-4.<sup>193</sup> At the 8<sup>th</sup> meeting of the Child Committee 27 November-2 December 2006 it remained a concern of the Committee that a Secretary had still not been secured and that this was having a negative impact on the work. The representative of the AU Commission explained that no suitable candidate had applied and the position was being re-advertised. When examining the report of the 8<sup>th</sup> and 9<sup>th</sup> session of the Child Committee at the 11<sup>th</sup> session of the AU Executive Council 28-29 June 2007 in Accra, the AU Executive Council requested the AU Commission to “*urgently operationalise the Secretariat of the Committee to enable it function more effectively*”.

The Child Committee has had an acting secretary on loan from the AU Department for Social Affairs,<sup>194</sup> which, in effect, is also the home of the Child Committee. In addition, it relies on the advice of the legal officers of the AU Department for Social Affairs.<sup>195</sup> Apart from the constraints of not having a dedicated staff of its own, it could be argued that the closeness to the AU Department for Social Affairs encroaches on the independence and impartiality of the Child Committee, both with respect to the assessment of state reports and the treatment of communications. It has also been questioned whether the lawyers of the AU Department for Social Affairs have the necessary knowledge of international human rights, and whether it would not be better for the Child Committee to receive such assistance from the AU Department for Political Affairs who, in addition, has a stronger position within AU.<sup>196</sup>

Under rule 26 of the Rules of Procedure, AU shall provide the budget of the Child Committee; in addition, the Committee may accept donations. In addition to being marred by the lack of a Secretariat, the Child Committee has been complaining about insufficient resources. At the 3<sup>rd</sup> session 10-14 November 2003 in Addis Ababa, several members mentioned the difficulties of living up to the mandate without more resources. At that point, the Committee did not yet have its own budget.<sup>197</sup> As with the Commission, the lack of resources seems to have been a permanent fixture of the Child Committee; and

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<sup>192</sup> The Child Charter refers to the “*Secretary-General of the Organization of African Unity*”.

<sup>193</sup> Cf. Amanda Lloyd’s report on the 2<sup>nd</sup> session.

<sup>194</sup> Cf. the Report of the 8<sup>th</sup> meeting of the Child Committee, 27 November – 1 December 2006, sections 20, 49-50 and 66-68.

<sup>195</sup> Cf. information provided during meeting 22 November 2006 with representatives of the Institute for Human Rights and Development in Africa in Banjul.

<sup>196</sup> This point was raised during the meeting 22 November 2006 with representatives of the Institute for Human Rights and Development in Africa.

<sup>197</sup> Cf. Amanda Lloyd: The Third Ordinary Session of the African Committee of Experts on the Rights and Welfare of the Child, *African Human Rights Law Journal*, (2004), pp. 139-158.



during the 8<sup>th</sup> session 27 November-1 December 2006, a core group of three Committee members was appointed to follow up on resource mobilisation.

The Child Committee has managed to attract outside support. Save the Children, Sweden, has been supporting the work of the Committee since its establishment.<sup>198</sup> During the 2<sup>nd</sup> session 17-21 February 2003, UNICEF pledged support and ICRC<sup>199</sup> expressed willingness to cooperate with the Committee. UNICEF has been supporting a policy officer and provided funds for the activities of the Committee.<sup>200</sup> The Child Committee has also been receiving some support from the Institute for Human Rights and Development in Africa,<sup>201</sup> an NGO based in Banjul, and from the African Network for the Prevention and Protection against Child Abuse and Neglect (ANPPCAN),<sup>202</sup> an NGO based in Nairobi.

### Jurisdiction

As mentioned above, the Child Charter had been ratified by 41 member states as of 19 June 2007; meaning that these 41 states are covered by the Child Charter and by the jurisdiction of the Child Committee. However, according to the website of the Child Rights Information Network (CRIN), Egypt has made a reservation with respect to Art. 44, meaning that Egypt will not consider itself subject to the Child Committee's mandate with respect to communications.<sup>203</sup>

According to the Child Charter, the Child Committee may “*receive Communications from any person, group or non-governmental organisation recognised by the Organization of African Unity [now AU], by a member state, or the United Nations relating to any matter covered by this Charter*”, cf. Art. 44.1. Furthermore, it is stated in Art. 44.2 that a communication shall “*contain the name and address of the author and shall be treated as confidential*”. According to rule 74 of the Rules of Procedure, “*the Committee shall develop guidelines relating to the admissibility and consideration of communications pursuant to the provisions of Article 44 of the Children's Charter*”.

Draft Guidelines for Considering Communications were prepared prior to the 8<sup>th</sup> session of the Child Committee 27 November-2 December 2006 and were discussed and adopted during that session. The draft, as amended, was then forwarded to the AU Legal Counsel's office for improvements with respect to language and terminology.<sup>204</sup> The full name of the Guidelines for Considering Communications is Guidelines for the Consideration of Communications Provided for in Article 44 of the African Charter on the Rights and Welfare of the Child.

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<sup>198</sup> Cf. the report of the 8<sup>th</sup> meeting, section 16.

<sup>199</sup> The International Committee of the Red Cross.

<sup>200</sup> Cf. the report of the 8<sup>th</sup> meeting, sections 42 and 49.

<sup>201</sup> Cf. the report of the 8<sup>th</sup> meeting, section 17.

<sup>202</sup> As per information given during the meeting with representatives of the Institute for Human Rights and Development in Africa 22 November 2006.

<sup>203</sup> [www.crin.org/RM/acrwc.asp](http://www.crin.org/RM/acrwc.asp). Information on reservations is not available on the website of AU and it has, consequently, not been possible to verify this information on Egypt or on reservations made by other member states, if any. According to information provided at a meeting of the Coalition for an Effective African Court on Human and Peoples' Rights 17 November 2007, it has not been the practice to accept reservations to African human rights instruments, see the section on the African Court, above.

<sup>204</sup> Cf. the report of the 8<sup>th</sup> meeting, sections 22-23 and 69.

According to Chapter 2, Art. 1.I.1 of the Guidelines, communications may be presented “*by individuals, including the victimized child and/or his parents or legal representatives, witnesses, a group of individuals or non-governmental organizations recognized by the African Union, by a Member State or by any other institution of the United Nations system*”. The words “*recognized by the African Union*” must be assumed only to apply to NGOs.

With respect to NGOs recognised by AU, a document called Criteria for Granting Observer Status and for a System of Accreditation within the AU was adopted by the AU Executive Council at its 7<sup>th</sup> session in Sirte, 1-2 July 2005 and endorsed by the AU Assembly at its 5<sup>th</sup> session 4-5 July 2005. According to this document, the AU Executive Council may grant African and African Diaspora NGOs observer status and the Chairperson of the AU Commission may accredit non-African NGOs and states. NGOs granted observer status or accredited under this mechanism must be considered “*recognized*” as set out in Art. 44.1 of the Child Charter and Art. 1.I.1 of Chapter 2 of the Guidelines. None of the reports of the sessions of the AU Executive Councils following the adoption of the system of accreditation refers to NGOs being granted observer status. This could indicate that no African NGOs have been granted such status. As the list of participants at the sessions of the AU Assembly and AU Executive Summit in July 2006 contains a number of African and international NGOs, it may be assumed that the organisations present were to some extent “*recognized*” and would therefore be able to bring communications to the Child Committee.

The Commission has its own system of accreditation and granting observer status. It is not clear if an organisation accredited by the Commission will be considered “*recognized*” for the purposes of bringing communications to the Child Committee, but given the broad access to bring cases under Art. 1.I.1 of Chapter 2 of the Guidelines it must be assumed that the Child Committee will also apply a liberal interpretation in this respect.

Moreover, at the 8<sup>th</sup> session of the Child Committee 27 November-2 December 2006, the Child Committee adopted its own guidelines for granting observer status.<sup>205</sup> It must be considered certain that the Child Committee will accept communications from NGOs granted observer status by the Child Committee itself.

The author of a communication must either be the alleged victim or be acting on behalf of the victim, cf. Art. 1.I.2 of Chapter 2 of the Guidelines. If the author can prove to be acting in the supreme interest of the child victim, the victim’s agreement is not necessary, cf. Art. 1.I.3 of Chapter 2 of the Guidelines.

According to Art. 1.II.1 of Chapter 2 of the Guidelines, communications may not be anonymous, shall be in writing and shall concern a state that is a signatory to the Child Charter. It would have been more logical to refer to states having ratified or acceded to the Child Charter than to states having signed it

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<sup>205</sup> According to the report of the 8<sup>th</sup> meeting, inspiration had been drawn from both the AU criteria for granting observer status and the Commission’s guidelines on observer status.

since only states that have ratified or acceded to the Child Charter are bound by its provisions.<sup>206</sup> However, according to Art. 1.II.2 of Chapter 2 of the Guidelines, the Committee will admit a communication “*from a State non-signatory to the Charter in the overall best interest of the child. In so doing the Committee shall collaborate with other related Agencies implementing Conventions and Charters to which the non-signatory country is State Party*”. The use of “*non-signatory*” and “*State Party*” as opposites in Art. 1.II.2 could also indicate that what is meant by “*signatory*” in Art. 1.II.1 of Chapter 2 of the Guidelines is actually whether a state is a party to the Child Charter, not whether it has signed it.

With respect to Art. 1.II.2 of Chapter 2, the wording “*from a State non-signatory*” is somewhat ambiguous. The obvious linguistic understanding of this phrase would be that the *author* of the communication may be a “*State non-signatory*”. In the context, the meaning is presumably that the Child Committee in certain cases is prepared to consider communications, the subject of which is an alleged violation by a state that is not a party to the Child Charter; “*from a State non-signatory*” referring to the *geographic* provenance of a communication. To counter the obvious objection that the Child Committee has no mandate and jurisdiction to do so, the Child Committee pledges to collaborate with agencies having such a mandate.

The six conditions for admitting a communication are set out in Art. 1.III of Chapter 2 of the Guidelines and are roughly similar in substance to Art. 56.7 (2-7) of the Charter with respect to the Commission, even though the wording and the order differ somewhat. Consequently, (a) the communication must be “*compatible with the provisions of the Constitutive Act of the African Union or with the [Child] Charter*”; (b) the communication must not be “*exclusively based on information circulated by the media*”; (c) the issue of the communication must not have been “*considered according to another investigation, procedure or international regulation*”; (d) domestic remedies must have been exhausted; (e) the communication must be presented within a reasonable period after exhaustion of local remedies; and (f) the wording of the communication must “*not be offensive*”. This means that the Child Committee will be able to seek inspiration in the practice of the Commission in its decisions on admissibility.

The formulation of the provision on local remedies is as follows: “*The author has exhausted all the available appeal channels at the national level or when the author of the Communication is not satisfied with the solution provided*”. It is not clear what is meant by the second half of this provision.

The wording on compatibility with the Child Charter or the provisions of the Constitutive Act of the AU must derive from Art. 44.1 of the Child Charter, stating that a communication must “*relat[e] to any matter covered by this Charter*”. Based on this wording, it could well be argued that the Child Committee has no jurisdiction to admit communications that are only compatible with the Constitutive Act of the AU, not with the Child Charter.

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<sup>206</sup> It is also possible for a state to be a party to a convention without having signed it. The list of states parties to the Child Charter on the website of AU contains several states, e.g. Angola and Burundi, who have acceded to the Child Charter and therefore are bound by its provisions without having signed it.

### Human Rights Mandate

The Child Charter was established specifically to deal with the rights enshrined in the Child Charter, cf. Art. 32 and 42. Such rights are in general rights that would be considered human rights. Consequently, there is no doubt that the Child Committee has a human rights mandate, albeit limited to the human rights protected by the Child Charter.

The Child Charter defines a child as a human being below the age of 18, cf. art 2, and contains a broad range of provisions meant to safeguard the interests of every child in the member states. This ranges from a prohibition of discrimination, Art. 3; over civil and political rights, such as the right to life, Art. 5; the right to name and nationality, Art. 6; freedom of expression, association, thought, conscience and religion, Arts. 7-9; the right to privacy, Art. 10; freedom from abuse and torture, Art. 16; economic, social and cultural rights, such as the right to education, Art. 11; the right to leisure, recreation and culture, Art. 12; and the right to health, Art. 14. The Child Charter also contains provisions on disabled children, Art. 13; child labour, Art. 15; juvenile justice, Art. 17; family protection, Art. 18; parental care, protection and responsibilities and separation from parents, Arts. 19-20 and 25; harmful practices, Art. 21; armed conflict, Art. 22; refugee children, Art. 23; adoption, Art. 24, apartheid and discrimination, Art. 26; sexual exploitation, Art. 27; drug abuse, Art. 28; trafficking, Art. 29; children of imprisoned mothers, Art. 30; and the responsibilities of the child, Art. 31.

According to Art. 46 of the Child Charter, the Child Committee shall “*draw inspiration from international law on human rights, particularly from the provision of the African Charter ..., the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, the International Convention on the Rights of the Child, and other instruments adopted by the United Nations and by African Countries in the field of human rights, and from African values and traditions*”. When deciding if a matter falls within the ambit of the Child Charter (and when making decisions on alleged violations), the Committee shall interpret the Child Charter in the light of said instruments and principles.

The direct rights holder with respect to certain rights of the Child Charter is not a child but someone else. According to Art. 18.2, the member states shall ensure the equality of rights and responsibilities of spouses with regard to children, and according to Art. 30, special consideration shall be given to expectant mothers and the mothers of small children convicted of crimes. Even though Art. 32 states that the Child Committee is established to “*promote and protect the rights and welfare of the child*”, it must be assumed that breaches of such rights can also be brought before the Child Committee. This is based on Art. 42 that mandates of the Child Committee to protect “*the rights enshrined in this Charter*” and Art. 44 that refers to “*any matter covered by this Charter*”. This has not been taken into account when drafting the Guidelines, which seem to assume that the alleged victim will always be a child, cf. Arts. 1.I.1 and 1.I.3 of Chapter 2 , which refer to “*the victimized child*”.

The Guidelines contain no information on the language of communications. According to rule 28 of the Rules of Procedure, the official languages of the Child Committee are those of AU, meaning “*if possible, African languages, Arabic, English, French and Portuguese*”, cf. Art. 25 of the Constitutive Act of AU; and the working languages are English and French. It must be assumed that communications can be brought in any of the official languages. Rule 30 states that “*Any person addressing the Committee in a language other than one of the working languages shall provide and bear the expenses of interpre-*

*tation into one of the working languages*". Presumably, this will also apply to communications under Art. 44 of the Child Charter.

According to the report of its 6<sup>th</sup> session in Addis Ababa 13-17 June 2005, the Child Committee had received a communication and was unsure as to what to do with it because guidelines had yet to be drafted and adopted. Since it was agreed that this was a legal question, the Office of the Legal Counsel of the AU Commission would advise on whether the Committee was mandated to deal with it; if this was the case, it would be discussed informally at the next session. Moreover, receipt of the communication would be acknowledged. The report of the 8<sup>th</sup> session, 27 November-2 December 2006, does not contain references to any communications. It must therefore be assumed that the Child Committee has yet to decide on its first communication.

### Procedure

According to Art. 1 of Chapter 1 of the Guidelines on Communications, "*any correspondence or any complaint from a State, individual or NGO denouncing acts that are prejudicial to a right or rights of the child shall be considered as communication*". This is a very broad definition and will make it all the more important for the Committee to establish a sound procedure for deciding on admissibility.

The first step when receiving a communication is to decide on admissibility. The Child Committee may set up working groups of three members to decide on admissibility, possibly before sessions, cf. Art. 2.II.1 of Chapter 2 of the Guidelines. When a decision has been reached, information about the decision shall be given to the author, cf. Art. 2.II.2 of Chapter 2, who may request reconsideration based on additional documents or facts, cf. Art. 2.II.3. Decisions on admissibility shall be made by simple majority of the members present, cf. Art. 1.I.4 of Chapter 2.

If the communication is considered admissible, the respondent state will be informed in confidentiality, presented with the decision on admissibility and all other relevant documents, and asked to "*present an explanation in a written statement containing his observation*" within three months, cf. Art. 2.II.4-5 of Chapter 2 of the Guidelines.<sup>207</sup> Consequently, the decision on admissibility is made based on the information from the author of the communication only. To decide this issue without hearing both parties is not in accordance with normal standards for fair procedures and contrary to the procedure of the Commission. Probably to make up for this, Art. 2.2 of Chapter 3 enables the Child Committee, "*after considering the validity of a Communication*", to "*reconsider a decision according to which a Communication is admissible in light of the explanations or decisions presented by the State Party*". Before doing so, the author of the Communication shall be allowed to comment on the material from the respondent state. It is unclear if the phrase "*after considering the validity*" means that the reconsideration of the question of admissibility shall not take place until the Child Committee has made its decision on the merits. This would be very impractical, and the Child Committee will probably institute a procedure where the question of admissibility can be reopened upon receipt of the first submission by the respondent state.

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<sup>207</sup> According to the website of the Child Rights Information Network, [www.crin.org/RM/acrwc.asp](http://www.crin.org/RM/acrwc.asp), the time given to the state to respond is six months.

If the respondent state does not respond within the term set, i.e. three months according to Art. 2.II.4 of Chapter 2 of the Guidelines, the Child Committee may proceed directly to decide on the communication, cf. Art. 2.III.4 of Chapter 2. The Guidelines do not spell out what happens should the state provide a response. It must be assumed that, in conformity with normal standards of fair procedure, the author will be given the chance to comment on such a response and that the state will be given the opportunity to comment once more before the Child Committee proceeds to deciding on the merits.

The Committee may request additional information from the author of the communication and from the state and may request the presence of representatives of the parties to provide further information and clarification, cf. Arts. 2.V.1 and 3 of Chapter 2 and Art. 2.3 of Chapter 3 of the Guidelines. The Committee may also “*send one of its members to conduct on the spot investigations*”, cf. Art. 2.V.4. According to Art. 45.1 of the Child Charter, the Child Committee may “*resort to any appropriate method of investigating any matter falling within the ambit of the present Charter*”. There is no reason why this should not apply to the Child Committee’s procedure with respect to communications.

It is unclear what is meant by Art. 2.V.2, stating that “*Within the period fixed by the Committee, the State party concerned shall present to the Committee, explanations by way of written statements indicating, if need be, the measures that it has been able to take in conformity with the Committee’s directives. If necessary, the Committee may indicate the information requested from the State party concerned.*” Since it refers to directives of the Child Committee, it could refer either to measures taken to implement requests for provisional measures, see below, or measures taken to implement the final decision on a communication. As the provision is placed between provisions that would seem to deal with the process whereby the Child Committee gathers information to be able to make a decision, it probably deals mainly with the information that the respondent state is to give as part of this process.

Communications shall be treated in confidence, cf. Art. 44.2 of the Child Charter. Consequently, according to Art. 1.1 of Chapter 3 of the Guidelines, the Child Committee will consider communications in closed meetings and, according to Art. 1.2, the Child Committee and its members shall make no public statements on communications.

According to Art. 3 of Chapter 3 of the Guidelines, the Child Committee shall take measures to ensure the “*effective and meaningful participation*” of the child concerned by a communication, according to the principle that “*when the child is capable of expressing his opinions, he should be heard by a Committee member*”. It is not stated how such participation shall take place.

According to Art. 2.II.6 of Chapter 2, the Child Committee “*shall decide by simple majority of members*”. Since Art. 1.I.4 of Chapter 2 deals specifically with decisions on admissibility, Art. 2.II.6 presumably deals with all other decisions with respect to communications.

A member of the Child Committee shall recuse him- or herself from consideration of communications if the state having nominated him or her is a party to the case, or if the member has a personal interest in the case or has already been involved in the matter, cf. Art. 2.VI of Chapter 2 of the Guidelines.

The Guidelines do not contain any information as to the contents of the decisions of the Child Committee with respect to communications. It must be assumed that a decision will at least contain the Child

Committee's view as to whether a violation has taken place or not (with an indication of the relevant Article(s) of the Child Charter). It will probably also contain recommendations for the actions necessary to rectify the situation in cases where a violation has taken place, since there is little sense in appointing a committee member to monitor decisions if decisions do not contain recommendations, cf. Art. 4 of Chapter 3 of the Guidelines.

It must be assumed that since the Child Committee does not have its own designated secretariat, it will be assisted by the staff of the AU Commission when preparing communications. As mentioned above, this may be criticised based on the Child Committee's general principle of independence and impartiality, cf. Art. 33, and the specific provision on confidentiality in Art. 44.2.

According to Art. 4.4 of Chapter 3 of the Guidelines, the decisions of the Committee shall be submitted to the AU Assembly and shall be published after consideration by the AU Assembly and the states concerned.<sup>208</sup> The decisions on communications will presumably be contained in the report that the Child Committee is to submit to the AU Assembly every two years, cf. Art. 45.2 of the Child Charter. According to rule 63 of its Rules of Procedure, the Child Committee will present a report to the AU Assembly every year. The practice is that such reports are submitted to the AU Executive Council, not the AU Assembly, every year.<sup>209</sup> Art. 4.4 of Chapter 3 of the Guidelines further provides that the states concerned shall ensure their dissemination in their countries, in conformity with Art. 45.4 of the Child Charter. Art. 45.4 obliges the member states to make the reports of the Child Committee "*widely available to the public in their own countries*".

Art. 4.3 of Chapter 3 of the Guidelines states, "*The Committee Chairperson shall inform the Chairperson of the African Union Commission*". It is not clear what is to be the subject of such information. Nor is it clear from the Guidelines if the Child Committee will inform the author of a communication on its decision immediately after the decision has been made, or if it will await the consideration by the AU Assembly.<sup>210</sup>

### Remedies and Enforceability

Similar to what is the case for the Commission, the Child Charter does not give the Child Committee the authority to make legally binding decisions. Apart from submitting the decisions to the AU Assembly, the Guidelines do not spell out what is to be done with the decisions made. According to Art. 4.1-2 of Chapter 3 of the Guidelines, the Child Committee shall designate a member to be "*responsible for monitoring its decisions*" and this member shall regularly report to the Committee. Presumably, the job of this member is to monitor whether the member states implement the decisions made. To be able to do so, the Child Committee will need to put in place a system to obtain such information.

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<sup>208</sup> At the current time, the reports are not available on the website of the Child Committee [www.african-union.org/child/home.htm](http://www.african-union.org/child/home.htm).

<sup>209</sup> In the last three years, reports have been tabled by the AU Executive Council at the 7<sup>th</sup> session 1-2 July 2005 in Sirte; at the 9<sup>th</sup> session 27-28 June 2006 in Banjul; and at the 11<sup>th</sup> session 28-29 June 2007 in Accra.

<sup>210</sup> See the similar discussion above with respect to the Commission.

As to whether the decisions of the Child Committee become binding upon adoption of its reports by the AU Assembly, please see the discussion about this subject in the section on the Commission. Most likely, this is not the case.

Assuming that the Child Committee will have direct access to the African Court, the Child Committee will be able to refer cases where the states have not implemented its decisions to the African Court. A discussion about the possibility of the Child Committee to access the African Court is contained in the section on the African Court. Referral to the African Court is not mentioned in the Guidelines.

According to Art. 2.IV of Chapter 2 of the Guidelines, the Child Committee, when deciding to consider a communication, “*may forward to the State party concerned, a request to take provisional measures that the Committee shall consider necessary in order to prevent any other harm to the child or children who would be victims of violations*”. In the provision on provisional measures in rule 111 of the Rules of Procedure of the Commission, the criterion is to avoid “*irreparable damage*”; this has, for instance, been used to request countries not to carry out executions, pending the final decision of the Commission. The criteria in the Guidelines, the prevention of any other harm, would seem to be broader. The practice of the Child Committee will reveal if it will go beyond the standard of irreparable damage. As the practice of the Commission shows, there is in any event no certainty that member states will follow a request for provisional measures.<sup>211</sup> The African Court is directly mandated in the Court Protocol to make provisional measures, cf. Art. 27.2, which means that such measures are in all likelihood binding.

### Cooperation

As stated above, the Child Committee does not have its own secretariat, but is assisted by the AU Commission’s Department of Social Affairs. This necessitates a close collaboration between the Child Committee and this Department. It should be considered if this collaboration is too close in light of the charter-based independence and impartiality of the Child Committee, cf. Art. 33 of the Child Charter.<sup>212</sup>

With respect to the Commission, it would appear obvious that collaboration is both natural and beneficial. Not least the Child Committee could learn from the experiences of the Commission with respect to state reporting, communications, etc. The Commission and the Child Committee may be compared to the UN treaty bodies.<sup>213</sup> The UN treaty bodies have formalised cooperation to share experiences, streamline working methods, etc. According to item 63 of the report of the brainstorming meeting on the Commission 9-10 May 2006 in Banjul, organised by the AU Commission,<sup>214</sup> “*there are no formal*

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<sup>211</sup> See e.g. communication 137/94, 139/94, 154/96 and 161/97, International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation ctr. Nigeria, printed in the 12<sup>th</sup> activity report of the Commission.

<sup>212</sup> This view was raised during a meeting with representatives of the Institute for Human Rights and Development in Africa, 22 November 2006.

<sup>213</sup> The Commission with its broad focus most closely resembles a combination of the UN Human Right Committee, the treaty body established according to the International Covenant on Civil and Political Rights, and the UN Committee on Economic, Social and Cultural Rights, the treaty body established by ECOSOC Resolution 1985/17 to monitor implementation of the International Covenant on Economic, Social and Cultural Rights. The Child Committee mirrors the Committee on the Rights of the Child, the treaty body established according to the Convention on the Rights of the Child.

<sup>214</sup> The report is part of the 20<sup>th</sup> activity report of the Commission.



*relationships with ... the African Committee on the Rights and Welfare of the Child*". This does not mean that there are no contacts between the Commission and the Child Committee. Already from the establishment of the Child Committee it wished to establish links with the Commission; and members of the Child Committee have taken part in sessions of the Commission and had meetings with Commissioners.<sup>215</sup> Given the limited resources in the AU system, it might even be considered if it could not be more cost-effective to let the Commission's Secretariat service the Child Committee as well.<sup>216</sup>

Even though this is not specifically stated in the Court Protocol, it must be hoped for that the Child Committee will be able to bring cases to the African Court, based on the general right for "*African Intergovernmental Organisations*" to do so, cf. Art. 5.1 (e) of the Court Protocol.<sup>217</sup> This issue is discussed in more detail in the section on the African Court.

It has been on the Child Committee's agenda from the beginning to establish relations with the UN Committee on the Rights of the Child, including to exchange information on state reporting.<sup>218</sup> As part of such a relationship, members of the Child Committee have taken part in sessions of the UN Committee on the Rights of the Child.<sup>219</sup>

As mentioned above, the Child Committee has received various assistance from Save the Children (Sweden), UNICEF, ICRC, the Institute for Human Rights and Development in Africa,<sup>220</sup> and the African Network for the Prevention and Protection against Child Abuse and Neglect (ANPPCAN).<sup>221</sup>

### Miscellaneous

Among participants at the 40<sup>th</sup> session of the Commission in November 2006, the impression, communicated during various talks, seemed to be that the Child Committee is not a very strong body. It was considered almost invisible, mainly due to its lack of resources and the fact that it does not have its own secretariat. Some gave the impression that it was largely irrelevant and that it would be better to focus on the Commission, which could probably also look at the rights of children and could arguably make decisions on alleged violations of the Child Charter.<sup>222</sup> The fact that the drafters of the Court Protocol

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<sup>215</sup> Cf. Amanda Lloyd's reports on the 2<sup>nd</sup> session, 17-21 February 2003, and the 3<sup>rd</sup> session, 10-14 November 2004. At the 6<sup>th</sup> session, 13-17 June 2005, it was mentioned that members of the Child Committee should visit the Commission to "*learn from their experience*".

<sup>216</sup> This was mentioned as an idea at the meeting with representatives of the Institute for Human Rights and Development in Africa 22 November 2006.

<sup>217</sup> This was the view of the representatives of the Institute for Human Rights and Development in Africa.

<sup>218</sup> It was one of the priorities for 2003-2004, cf. Amanda Lloyd's report on the 2<sup>nd</sup> session 17-21 February 2003, and was reiterated at the 3<sup>rd</sup> session 10-13 November 2004, cf. Amanda Lloyd's report on the 3<sup>rd</sup> session.

<sup>219</sup> Cf. the report of the 6<sup>th</sup> session of the Child Committee, 13-17 June 2005.

<sup>220</sup> Cf. the Report of the 8<sup>th</sup> meeting, section 17.

<sup>221</sup> As per information given during the meeting with representatives of the Institute for Human Rights and Development in Africa 22 November 2006.

<sup>222</sup> In the article *The merits and demerits of the African Charter on the Rights and Welfare of the Child*, printed in the *International Journal of Children's Rights* 10, 2002, pp. 157-177, Danwood Mzikenge Chirwa questions the wisdom of having a separate body to deal with children's rights, given the lack of funds and the similarities between the Commission and the Child Committee.

seem to have forgotten the Child Committee<sup>223</sup> would seem to emphasise the marginal position of the Child Committee.

Reading the (available) reports of the meetings of the Child Committee, it would appear that the members of the Committee are working seriously to make a difference, albeit with hardly any resources and limited assistance. Time will tell if the Child Committee will manage to obtain a more prominent position once it starts receiving and treating communications and its country reporting procedure is properly implemented.

## **Other Pan-African Bodies and Initiatives**

### Introduction

The purpose of this section is to provide an overview of Pan-African bodies and initiatives that are not complaints mechanisms, but are required or expected to work together with one or all of the three African Union complaints mechanisms presented above.

### Pan-African Parliament (PAP)

The Pan-African Parliament is one of the organs of the African Union, cf. Art. 5 of the Constitutive Act of the AU. The purpose of the Pan-African Parliament is to “*ensure the full participation of African Peoples in the development and economic integration of the continent*”, cf. Art. 17.1 of the Constitutive Act of the AU. It was established by the Protocol on the Pan-African Parliament, the PAP Protocol.<sup>224</sup>

According to Art. 3 of the PAP Protocol, one of the objectives of the Pan-African Parliament is to “*promote the principles of human rights and democracy in Africa*”. In the long term, the Pan-African Parliament shall be given legislative powers, but initially it is only an advisory and consultative body, cf. Art. 11. In this capacity, it may “*examine, discuss or express an opinion on any matter, either on its own initiative or at the request of the Assembly or other policy organs and make any recommendations it may deem fit relating to, inter alia, matters pertaining to respect of human rights, the consolidation of democratic institutions and the culture of democracy, as well as the promotion of good governance and the rule of law*”.

The Pan-African Parliament consists of five members from each member state that are to be elected by the national parliaments from among their members and are to reflect the diverse opinions of the respective parliaments, cf. Arts. 4 and 5 of the PAP Protocol. This makes the total number of Parliamentarians 265. It has its seat in Midrand, South Africa.<sup>225</sup>

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<sup>223</sup> As mentioned above, unlike the Commission, the Child Committee has not specifically been granted the right to bring cases to the African Court.

<sup>224</sup> The correct name is Protocol to the Treaty establishing the African Economic Community Relating to the Pan-African Parliament (since the establishment of a Pan-African Parliament was already envisaged in the Treaty establishing the African Economic Community); adopted at the 27<sup>th</sup> ordinary session of the OAU Assembly 3-5 June 1991 in Abuja and entered into force 12 May 1994. The PAP Protocol was adopted 2 March 2001 in Sirte and entered into force 14 December 2003.

<sup>225</sup> Cf. [www.pan-africanparliament.org](http://www.pan-africanparliament.org).

Since the Pan-African Parliament is meant to “*promote the principles of human rights*”, cf. Art. 3 of the PAP Protocol, it is one of the institutions that the Commission is supposed to co-operate with, cf. Art. 45.1 (c) of the Charter. The Pan-African Parliament can also request the Commission to interpret a provision of the Charter, cf. Art. 45.3 of the Charter. The Commission and the Pan-African Parliament seem to be in the early stages of establishing a working relationship, cf. the reference in the 20<sup>th</sup> activity report of the Commission to a meeting held in January 2006 between the Chairperson of the Commission, Salamata Sawadogo, and the Chairperson of the Pan-African Parliament, Gertrude Mongela, on how to foster a fruitful relationship. Also according to this activity report, the Special Rapporteur on Women, Commissioner Angela Melo, wrote to Gertrude Mongela in December 2005 to propose cooperation with respect to the domestication of the Protocol on the Rights of Women. Representatives of the Pan-African Parliament participated in the two-day brainstorming session on the Commission, organised by the AU Commission 9-10 May 2006 in Banjul. According to item 63 of the report of this meeting<sup>226</sup> “*there are no formal relationships with the PAP [Pan-African Parliament] ... as well as other relevant regional organisations*”. One of the recommendations was for the Commission to initiate consultations with the Pan-African Parliament, the Peace and Security Council and the Economic, Social and Cultural Council to establish ways to formalise their relationship and develop common programmes, e.g. by the Commission and these organs inviting each other to attend sessions.

It would seem clear that in some areas the tools available to the two institutions are similar: It has long been accepted that the Commission may engage in fact-finding missions, such as the mission undertaken to Zimbabwe in 2002; and during its meeting in May 2007, the Pan-African Parliament decided to send its own fact-finding mission to Zimbabwe to investigate allegations of the abuse of human rights.<sup>227</sup>

The Pan-African Parliament will be able to request advisory opinions from the African Court, cf. Art. 4.1 of the Court Protocol, and will arguably be able to submit cases to the African Court, cf. Art. 5.1 (e) that enables “*African Intergovernmental Organisations*” to submit cases.<sup>228</sup>

With respect to the Child Committee, Arts. 42.a (iii) and 42.c of the Child Charter contain provisions similar to Arts. 45.1 (c) and 45.3 of the Charter, meaning that the Child Committee and the Pan-African Parliament may cooperate, and that the Pan-African Parliament may request the Child Committee to interpret provisions of the Child Charter.

#### AU Peace and Security Council (PSC)

The Peace and Security Council was established pursuant to the Protocol establishing the Peace and Security Council, the PSC Protocol.<sup>229</sup> According to Art. 2 of the PSC Protocol, it is established by the AU Assembly pursuant to Art. 5.2 of the Constitutive Act of the AU, meaning that the Peace and Secu-

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<sup>226</sup> The report is part of the 20<sup>th</sup> activity report of the Commission.

<sup>227</sup> Among much opposition from Zimbabwe to the fact-finding mission, the Pan-African Parliament has decided to postpone further consideration on this matter to its next session in November 2007, cf. [jurist.law.pitt.edu/paperchase/2007/05/pan-african-parliament-delays-zimbabwe.php](http://jurist.law.pitt.edu/paperchase/2007/05/pan-african-parliament-delays-zimbabwe.php).

<sup>228</sup> This issue is discussed further in the section on the African Court.

<sup>229</sup> The full name is Protocol relating to the Establishment of the Peace and Security Council of the African Union. It was adopted by the AU Assembly at its 1<sup>st</sup> ordinary session 9-10 July 2002 in Durban and entered into force 26 December 2003. As of 26 May 2007, the PSC Protocol had been ratified by 42 member states.

ity Council is an organ of the African Union. The Peace and Security Council is to be the “*standing decision-making organ for the prevention, management and resolution of conflicts*”, cf. Art. 2 of the PSC Protocol.

One of the objectives of the Peace and Security Council is to “*promote and encourage democratic practices, good governance and the rule of law, protect human rights and fundamental freedoms, respect for the sanctity of human life and international humanitarian law, as part of efforts for preventing conflicts*”, cf. Art. 3 (f) of the PSC Protocol. Furthermore, according to Art. 4 (c) of the PSC Protocol, one of the guiding principles is “*respect for the rule of law, fundamental human rights and freedoms, the sanctity of human life and international humanitarian law*”.

According to Art. 6 of the PSC Protocol, the Peace and Security Council shall act within peace and security promotion, peacemaking, peace support interventions, peace building and post-conflict reconstruction, and humanitarian action and disaster management. Its broad powers are described in Art. 7. It shall, among other things, be responsible for peacekeeping and similar missions,<sup>230</sup> make recommendations for interventions under Art. 4(h) of the Constitutive Act of the AU,<sup>231</sup> institute sanctions when an unconstitutional change of government takes place, etc. According to Art. 7 (m), it shall “*follow-up, within the framework of its conflict prevention responsibilities, the progress towards the promotion of democratic practices, good governance, the rule of law, protection of human rights and fundamental freedoms, respect for the sanctity of human life and international humanitarian law by Member States*”.

The Peace and Security Council consists of 15 member states, cf. Art. 5 of the PSC Protocol, and one of the criteria for election is that the member state shows “*respect for constitutional governance, in accordance with the Lomé Declaration,*<sup>232</sup> *as well as the rule of law and human rights*”, cf. Art. 5.2 (g). The current member states are Algeria, Angola, Botswana, Burkina Faso, Cameroon, Congo-Brazzaville, Egypt, Ethiopia, Gabon, Ghana, Malawi, Nigeria, Rwanda, Senegal, and Uganda. The Peace and Security Council meets at least twice a month and is based at the headquarters of AU in Addis Ababa, cf. Art. 8 of the PSC Protocol.

According to Art. 19 of the PSC Protocol, the “*Peace and Security Council shall seek close cooperation with the African Commission on Human and Peoples’ Rights in all matters relevant to its objectives and mandate. The Commission on Human and Peoples’ Rights shall bring to the attention of the Peace and Security Council any information relevant to the objectives and mandate of the Peace and Security Council.*” At the brainstorming meeting on the Commission 9-10 May 2006, one recommen-

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<sup>230</sup> As an example of an intervention can be mentioned the authorisation of a 462 person large deployment of military and police personnel to Comoros as the African Union Mission for Support to the Elections in the Comoros (AMISEC) at its 47<sup>th</sup> meeting on 21 March 2006.

<sup>231</sup> Art. 4 (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*”.

<sup>232</sup> Lomé Declaration of July 2000 on the framework for an OAU response to unconstitutional changes of government, adopted by the AU Assembly during its 36<sup>th</sup> ordinary session 10-12 July 2000 in Lomé, Togo, which among other things sets out the principles for applying sanctions in case of unconstitutional change of government, defined in the Declaration. The principles set out in the Lomé Declaration are further developed in Chapter 8 of the African Charter on Democracy, Elections and Governance, adopted 30 January 2007 and, as of 2 August 2007, still not ratified by any member state.

dition was that the Commission “*should explore the possibility of the Peace and Security Council of the AU (PSC) to enforce the decisions of the ACHPR within the framework of Article 19 of the PSC Protocol*”.<sup>233</sup> Another recommendation was for the Commission to initiate consultations with, among others, the Peace and Security Council establish ways to formalise their relationship and develop common programmes. At that meeting, it was also acknowledged that at the time, no formal relationship existed between the Peace and Security Council and the Commission. Apart from this, the 19<sup>th</sup> to 22<sup>nd</sup> activity reports, covering the period July 2005 – May 2007, do not contain any references to cooperation between the Commission and the Peace and Security Council.

Like the Pan-African Parliament, the Peace and Security Council may request that the Commission interpret a provision of the Charter, cf. Art. 45.3 of the Charter, and is among the institutions with which the Commission is supposed to co-operate, cf. Art. 45.1 (c) of the Charter.

The Peace and Security Council would also be able to request advisory opinions from the African Court, cf. Art. 4.1 of the Court Protocol, and would arguably be able to submit cases to the African Court, cf. Art. 5.1 (e), enabling “*African Intergovernmental Organisations*” to submit cases.<sup>234</sup>

With respect to the Child Committee, Arts. 42.a (iii) and 42.c of the Child Charter contain provisions similar to Arts. 45.1 (c) and 45.3 of the Charter, meaning that the Child Committee and the Peace and Security Council may cooperate and that the Peace and Security Council may request the Child Committee to interpret provisions of the Child Charter. Such cooperation seems less likely than cooperation between the Peace and Security Council and the Commission and the African Court, respectively, but might, for instance, be relevant with respect to the prohibition on child soldiers in Art. 22 of the Child Charter.

#### Economic, Social and Cultural Council (ECOSOCC)

The Economic, Social and Cultural Council (ECOSOCC) is one of the organs of the African Union, cf. Art. 5 of the Constitutive Act of the AU. It is “*an advisory organ composed of different social and professional groups of the member states of the Union*”, cf. Art. 22 of the Constitutive act of the AU. The Statutes of the Economic, Social and Cultural Council of the African Union, the ECOSOCC Statutes, were adopted by the AU Assembly at its 3<sup>rd</sup> ordinary session 6-8 July 2004 in Addis Ababa.

The objectives, as set out in Art. 2 of the ECOSOCC Statutes, are to promote dialogue between all segments of the African people; forge strong partnerships between governments and civil society; promote participation of civil society in AU policies and programmes; support policies and programmes promoting peace, security, stability, development, and integration in Africa; “*promote and defend a culture of good governance, democratic principles and institutions, popular participation, human rights and freedoms as well as social justice*”; promote gender equality; and promote and strengthen African civil society.

Among its functions “*as an advisory organ*”, ECOSOCC shall “*contribute to the promotion of human rights, the rule of law, good governance, democratic principles, gender equality and child rights*”, cf.

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<sup>233</sup> Cf. the report of this meeting, as contained in the 20<sup>th</sup> activity report of the Commission.

<sup>234</sup> This issue is discussed further in the section on the African Court.

Art. 7 of the ECOSOCC Statutes. It may also give advice, undertake studies, and submit recommendations, etc.

ECOSOCC shall be composed of different social and professional groups, representing, among others, women, children, the elderly, the disabled, professional groups, NGOs, communities, and cultural organisations, including groups from the African Diaspora, cf. Art. 3 of the ECOSOCC Statutes.

ECOSOCC shall consist of 150 CSOs (Civil Society Organisations), cf. Art. 4 of the ECOSOCC Statutes, to be elected following consultations in all member states. The highest organ is the General Assembly, consisting of the 150 CSOs. The General Assembly will meet every other year, cf. Art. 9.3. The General Assembly elects a bureau, cf. Art. 9.4, and a standing committee to coordinate the work of ECOSOCC, cf. Art. 10. Furthermore, “*to formulate opinions and provide inputs into the policies and programmes of the African Union*”, ten Sectoral Cluster Committees shall be established, one of them being for political affairs and covering “*Human Rights; Rule of Law; Democratic and Constitutional Rule; Good Governance; Power Sharing; Electoral Institutions; Humanitarian Affairs and assistance, etc.*”.

Since ECOSOCC is to “*contribute to the promotion of human rights*”, cf. Art. 7 of the ECOSOCC Statutes, it is one of the institutions that the Commission is supposed to co-operate with, cf. Art. 45.1 (c) of the Charter. ECOSOCC can also request the Commission to interpret a provision of the Charter, cf. Art. 45.3 of the Charter.

Representatives of ECOSOCC participated in the two-day brainstorming session on the Commission, organised by the AU Commission 9-10 May 2006 in Banjul. According to item 63 of the report of this meeting,<sup>235</sup> “*there are no formal relationships with the ECOSOCC, ... as well as other relevant regional organisations*”. One of the recommendations was for the Commission to initiate consultations with, among others, ECOSOCC to establish ways to formalise their relationship and develop common programmes. At this stage, there does not seem to be any formal cooperation and the report from the brainstorming session is the only place in the 19<sup>th</sup> to 22<sup>nd</sup> activity report of the Commission where ECOSOCC is mentioned.

ECOSOCC may request advisory opinions from the African Court, cf. Art. 4.1 of the Court Protocol.

With respect to the Child Committee, Arts. 42.a (iii) and 42.c of the Child Charter contain provisions similar to Arts. 45.1 (c) and 45.3 of the Charter, meaning that the Child Committee and ECOSOCC may cooperate, and that ECOSOCC may request the Child Committee to interpret provisions of the Child Charter.

#### The African Union Commission

The AU Commission is one of the organs of the AU, cf. Art. 5 of the Constitutive Act of AU. The AU Commission is the Secretariat of AU and as such the executive and administrative arm of AU. According to its Strategic Plan 2004-2007,<sup>236</sup> it sees itself as the engine of AU.

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<sup>235</sup> The report is part of the 20<sup>th</sup> activity report of the Commission.

<sup>236</sup> Cf. [www.africa-union.org/AU%20summit%202004/volume%202%20final%20-%20English%20-%20June%202004.pdf](http://www.africa-union.org/AU%20summit%202004/volume%202%20final%20-%20English%20-%20June%202004.pdf).

The AU Commission consists of a chairperson, one or more deputies and the Commissioners, assisted by the necessary staff, cf. Art. 20 of the Constitutive Act of the AU. Currently, the AU Commission consists of ten Commissioners, including the chairperson and the deputy. The AU Commission is based at the AU headquarters in Addis Ababa.

The AU Commission has some specific tasks with respect to the Commission, the African Court and the Child Committee. The AU Commission<sup>237</sup> appoints the Secretary and provides the staff and services necessary for the Commission, cf. Art. 41 of the Charter, and appoints the Secretary of the Child Committee, cf. Art. 40 of the Child Charter. In contrast, the African Court appoints its own Registrar and staff, cf. Art. 24 of the Court Protocol, but in the start-up phase of the African Court, the AU Commission has assisted the African Court. The AU Commission handles all formalities with respect to ratification and amendment of the African Charter, the Court Protocol, the Child Charter, the Women Protocol and other African human rights instruments.<sup>238</sup> The AU Commission also has the right, as described above with respect to the Pan-African Parliament, etc., to request advisory opinions from the Commission, the African Court and the Child Committee.

According to its Strategic Plan 2004-2007, the AU Commission's Action Area 2 is Good Governance, Peace and Human Security. Strategy 1 under this Action Area includes standard setting and promoting a political culture based on, among other things, human rights. As part of this strategy, the AU Commission will, *inter alia*, assist in building the capacity of member states to realise human and peoples' rights, promote respect for women's rights, and create an African democracy and human rights observatory. The work with respect to human rights is mainly concentrated in the Department of Political Affairs. Other relevant departments are the Department for Social Affairs, assisting the Child Committee, among other tasks, and the Directorate of Women, Gender, and Development.

Consequently, there is much scope for collaboration between the AU Commission and the Commission, the African Court and the Child Committee, respectively. Such collaboration is also necessary due to the close ties between the Commission and these three bodies and because of the AU Commission's role as engine for the whole of AU.

#### New Partnership for Africa's Development (NEPAD)

The New Partnership for Africa's Development (NEPAD) describes itself as a "*vision and strategic framework for Africa's renewal*" on its website.<sup>239</sup> The NEPAD Framework was adopted at the 37<sup>th</sup> OAU Summit in Lusaka, Zambia, 9-11 July 2001.<sup>240</sup> It may be considered the development agenda for AU.

According to the conclusion of the NEPAD Framework Document, October 2001, the objective of NEPAD is "*to consolidate democracy and sound economic management*", cf. par. 202. The NEPAD

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<sup>237</sup> At the time of adoption of the Charter, the Secretary-General of OAU.

<sup>238</sup> Cf. Arts. 64, 67 and 68 of the Charter, Arts. 34-35 of the Court Protocol, Arts. 47-48 of the Child Charter, and Arts. 28-30 of the Women Protocol.

<sup>239</sup> [www.nepad.org](http://www.nepad.org).

<sup>240</sup> Declaration on the New Common Initiative (MAP and OMEGA).

Framework Document contains several references to human rights. According to par. 49, African leaders will, among other things, take joint responsibility for “*promoting and protecting democracy and human rights in their respective countries and regions by developing clear standards of accountability, transparency and participatory governance at the national and sub-national levels*”. According to par. 71, African leaders have learned from experience that, among other things, human rights are conditions for sustainable development and are pledging to work to promote human rights.

The NEPAD Framework Document sets out a number of initiatives, including the Democracy and Political Governance Initiative. As part of this initiative, “*Africa undertakes to respect the global standards for democracy, the core components of which include political pluralism, allowing for the existence of several political parties and workers’ unions, and fair, open and democratic elections periodically organised to enable people to choose their leaders freely*”, cf. par. 79. The purpose of the initiative is to “*contribute to strengthening the political and administrative framework of participating countries, in line with the principles of democracy, transparency, integrity, respect for human rights and promotion of the rule of law*”, cf. par. 80. To achieve this, the participating countries will undertake commitments to meet basic standards within governance and democratic behaviour and to support and build the relevant institutions. At the same time, mechanisms will be put in place to monitor progress made by the states to honour such commitments.

A main component of NEPAD is the African Peer Review Mechanism (APRM). Member states of AU can voluntarily subject themselves to review. The purpose of the review is to ensure that the policies and practices of the member state being reviewed conform to the agreed values within democracy and political governance, economic governance, corporate governance, and socio-economic development. Within the thematic area of democracy and political governance are nine key objectives, no. 3 being “*promotion and protection of economic, social, cultural, civil and political rights as enshrined in all African and international human rights instruments*”. Nos. 7-8 specifically mention the rights of women, children and other vulnerable groups, including displaced persons and refugees; and no. 2 mentions, among other things, democracy, the rule of law, and a Bill of Rights.<sup>241</sup>

So far, 25 countries have acceded to the APRM.<sup>242</sup> Overall, the process starts with the country being reviewed receiving a questionnaire; secondly, a country review visit takes place; thirdly, the country report is drafted; fourthly, the country report is submitted to the APR Forum of Heads of State and Government of participating states for consideration and formulation of necessary actions; and, fifthly, six months after consideration at the APR Forum, the country report is tabled in key regional and sub-regional structures, such as the Commission, the Pan-African Parliament and the Peace and Security Council.<sup>243</sup> Ghana, Kenya and Rwanda have been reviewed, and Algeria, Nigeria and South Africa are in the process of being reviewed.<sup>244</sup>

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<sup>241</sup> See the website of the APRM of NEPAD, [www.nepad.org/aprm/](http://www.nepad.org/aprm/).

<sup>242</sup> Algeria, Angola, Benin, Burkina Faso, Cameroon, Congo-Brazzaville, Egypt, Ethiopia, Gabon, Ghana, Kenya, Lesotho, Malawi, Mali, Mauritius, Mozambique, Nigeria, Rwanda, Senegal, Sierra Leone, South Africa, Sudan, Tanzania, Uganda, and Zambia.

<sup>243</sup> Cf. [www.nepad.org/aprm/](http://www.nepad.org/aprm/).

<sup>244</sup> Cf. article in This Day, 30 January 2007, [www.roppa.info/IMG/html/200701310070.html](http://www.roppa.info/IMG/html/200701310070.html).



Both the NEPAD Secretariat and the APRM Secretariat are based in Midrand, South Africa. According to various decisions by the AU Summit, the NEPAD structures are to be integrated into the AU structures and processes.<sup>245</sup>

Since human rights are included in the prerequisites for development in the NEPAD Framework Document and are among the matters to be investigated as part of the APRM, it would be logical if some cooperation existed between the Commission and the NEPAD and APRM structures. According to the report of the 9-10 May 2006 brainstorming session on the Commission, see above, there is no formal relationship between the NEPAD and APRM structures and the Commission. Apart from the mentioned brainstorming session, the only place, where NEPAD and APRM are mentioned in the 19<sup>th</sup> to 22<sup>nd</sup> activity report of the Commission is in the 22<sup>nd</sup> report, stating that Commissioner Kamel Rezag Bara participated in the opening ceremony of the Conference of Heads of State on the implementation of NEPAD 21 March 2007.

No information has been found indicating any formal relationship between the NEPAD and APRM structures and the African Court and the Child Committee, respectively.

#### The Conference on Security, Stability, Development and Cooperation in Africa (CSSDCA)

The Conference on Security, Stability, Development and Cooperation in Africa (CSSDCA) stems from a series of meetings, etc. in the 1980s, organised by the African Leadership Forum (ALF), established and, at the time, led by Olusegun Obasanjo, at that time former and future president of Nigeria. It was inspired by the Conference on (later Organisation for) Security and Cooperation in Europe (CSCE/OSCE). These meetings culminated in the Kampala Forum 19-22 May 1991, a meeting of more than 500 participants, including a number of former and current heads of state. The Kampala Forum adopted the Kampala Document, which recommended the OAU Assembly to launch CSSDCA according to the principles contained in the Kampala Document.<sup>246</sup>

According to the Kampala Document, a new order must be established where the countries live up to certain binding principles within four *calabashes*: security, stability, development, and cooperation. Within the security calabash, it was acknowledged that security of a nation encompasses the security of the individual to live in peace and enjoying all fundamental human rights. Under the stability calabash, one of the principles to be adhered to by all member states was respect for human rights. Among the proposals to further this principle was an annual assessment by the Commission of the human rights record of each member state. The Commission should in general provide input to the monitoring with respect to the stability calabash.

Even though the Kampala Document was presented for adoption at various OAU Summits,<sup>247</sup> it was never adopted. At the extraordinary OAU Summit 8-9 September 1999 in Sirte, Libya, it was agreed to

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<sup>245</sup> Cf. Decision on the implementation of the New Partnership for Africa's Development (NEPAD), 4<sup>th</sup> ordinary session of the AU Assembly 6-8 July 2004, Addis Ababa.

<sup>246</sup> Cf. the website of the Africa Leadership Forum, [www.africaleadership.org](http://www.africaleadership.org).

<sup>247</sup> Cf. Journal of African Law 48, 2 (2004), Institutions with Responsibility for Human Rights Protection under the African Union, by Amanda Lloyd and Rachel Murray, p. 168.

convene an African Ministerial Conference on Security, Stability, Development and Cooperation.<sup>248</sup> Such a ministerial meeting took place 8-9 May 2000 in Abuja, Nigeria. Based on this, the OAU Summit at its 36<sup>th</sup> session 10-12 July 2000 in Lomé adopted the CSSDCA Solemn Declaration. This Declaration reiterates many of the principles of the Kampala Document, including that “*Democracy, good governance, respect for human and peoples’ rights and the rule of law are prerequisites for the security, stability and development of the Continent*”. With respect to security, it was specifically stated that security includes “*the right of peoples to live in peace with access to the basic necessities of life, while fully enjoying the rights enshrined in the African Charter on Human and Peoples Rights*” and that a “*sacred responsibility of all African states*” was to ensure security “*within the basic framework of the African Charter on Human and Peoples’ Rights and other relevant international instruments*”. With respect to stability, it was stated that stability requires all states to be guided by “*strict adherence to the rule of law, good governance, peoples participation in public affairs, respect for human rights and fundamental freedoms, the establishment of political organizations devoid of sectarian, religious, ethnic, regional and racial extremism*”.

The Solemn Declaration contained various steps with respect to implementation; such as the incorporation of CSSDCA principles in national institutions responsible for monitoring implementation; the setting up of a special coordinating unit within the OAU Secretariat; and continued discussions on the implementation of the various calabashes of the CSSDCA process.

The 38<sup>th</sup> (and last) OAU Summit 8 July 2002 in Durban approved a draft Memorandum of Understanding on Security, Stability, Development, Cooperation, and requested the member states to take the steps required to implement this Memorandum of Understanding. The draft Memorandum of Understanding reiterated some of the principles of the Kampala Document and the CSSDCA Solemn Declaration with respect to human rights. It further contained undertakings to observe, protect and promote human rights in accordance with the Charter.

The Memorandum of Understanding contained 45 specific and time-bound Key Performance Indicators to be used to measure the compliance of member states. Nos. 14-23 dealt with governance and democracy (such as having independent judiciaries and national electoral commissions), and nos. 24-28 dealt with human rights (such as the ratification and implementation of the Child Charter and the submission of annual reports to the Commission on the human rights situation in every member state).

Finally, the Draft Memorandum of Understanding contained very elaborate monitoring mechanisms according to which national mechanisms for monitoring should work with the CSSDCA Unit that would elaborate comprehensive work programmes and time schedules for such monitoring. In the report by the Secretary General of the OAU, presented at the OAU Assembly session, he said that the Memorandum of Understanding offered the AU “*a comprehensive peer review process that is premised on the combination of a bottoms-up and top-down approach*”.

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<sup>248</sup> As part of the so-called Sirte Declaration, where it was also decided in principle to establish an African Union, cf. 62.210.150.98/Portal/oau-oua/eng\_syrt.htm.

As can be seen, the idea of a peer review, looking at both rights and development, can be found in both NEPAD and CSSDCA and, as stated at the website of the South African Department of Foreign Affairs, “*there are particular areas of overlap and possible duplication that need to be addressed*”.<sup>249</sup>

Maybe due to the overlap between NEPAD and CSSDCA when it comes to the interplay between rights, development and security and the peer review mechanism, CSSDCA has been gradually changed into something different, namely a framework for civil society and the African Diaspora, CIDO (Civil Society and Diaspora Directorate).<sup>250</sup> This directorate, now the African Citizens Directorate CIDO, has been established as part of the Bureau of the Chairperson of the AU Commission.<sup>251</sup> The review mechanism and the monitors seem to have been put aside.

It is unclear what cooperation, if any, will be established between on the one hand what is now CIDO and on the other hand the Commission, the African Court and the Child Committee, respectively. According to the report of the 9-10 May 2006 brainstorming session on the Commission, see above, there is no formal relationship between CSSDCA/CIDO and the Commission.

## Sub-Regional Organisations

### Economic Community of West African States (ECOWAS)

#### Introduction

The Economic Community of West African States (ECOWAS<sup>252</sup>) was founded on 28 May 1975 with the signing of the Treaty of Lagos (the 1975 ECOWAS Treaty). Currently, ECOWAS has 15 member states.<sup>253</sup> Some of its members are also members of other Regional Economic Communities (RECs) such as the West African Economic and Monetary Union (UEMOA) and the Community of Sahel-Saharan States (CEN-SAD).<sup>254</sup> At its inception, ECOWAS was aimed at collective self-sufficiency through the advancement of economic integration in West Africa that should ultimately lead to a large trading block and a single monetary union. ECOWAS is one of the RECs that are to be the building blocks of the African Economic Community (AEC) and is among the eight RECs accredited to the AU.<sup>255</sup>

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<sup>249</sup> Cf. [www.dfa.gov.za/foreign/Multilateral/africa/cssdca.htm](http://www.dfa.gov.za/foreign/Multilateral/africa/cssdca.htm).

<sup>250</sup> Cf. the overview of the activities of the CSSDCA given by the AU Commission in January 2005, [www.africa-union.org/ECOSOC/CSSDA%202005.pdf](http://www.africa-union.org/ECOSOC/CSSDA%202005.pdf).

<sup>251</sup> Cf. the opening address to the 3<sup>rd</sup> African Union – Civil Society Forum 20-21 June 2006 in Banjul, delivered by Dr. Jinmi Adisa, Head of the African Citizens Directorate CIDO, [www.africa-union.org/root/AU/Conferences/Past/2006/July/summit/doc/CSO/OPENING%20ADDRESS%20AT%20THE%203RD%20AU-CSO%20FORUM%20BY%20DR.%20ADISA.doc](http://www.africa-union.org/root/AU/Conferences/Past/2006/July/summit/doc/CSO/OPENING%20ADDRESS%20AT%20THE%203RD%20AU-CSO%20FORUM%20BY%20DR.%20ADISA.doc).

<sup>252</sup> The French acronym is CEDEAO (Communauté économique des États de l'Afrique de l'Ouest) and it is under this name that ECOWAS is known in the Francophone West African countries.

<sup>253</sup> Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo. Mauritania was originally a member, but withdrew in 1999.

<sup>254</sup> For a complete overview of membership of the sub-regional organisations covered by this report, see the penultimate section.

<sup>255</sup> The Treaty establishing the African Economic Community was adopted by the OAU Assembly at its 27<sup>th</sup> session 3-5 June 1991 in Abuja and entered into force 12 May 1994. As of 26 May 2007, it has been ratified by 48 of the 53 member

To achieve its goals, several protocols and supplementary protocols were subsequently made and annexed to the 1975 ECOWAS Treaty.<sup>256</sup> From a human rights perspective, the most important of these protocols were those relating to non-aggression, free movement of persons, and mutual assistance on defence, and they provided the closest link ECOWAS had to human rights at the time.

Recognising the need to “*adjust to the dramatic changes that were taking place in West Africa, the African Continent and in other parts of the world since the Treaty was adopted in May 1975*”,<sup>257</sup> a Committee of Eminent Persons was established in 1990 to review the 1975 ECOWAS Treaty,<sup>258</sup> The outcome of the Committee’s work was a draft treaty which significantly amended the original 1975 Treaty and which paid special attention to human rights in the West African sub-region. On 24 July 1993, the states parties to the 1975 ECOWAS Treaty adopted the 1993 revised Treaty of ECOWAS (the 1993 ECOWAS Treaty). Under the 1993 ECOWAS Treaty, the institutions of ECOWAS are the Authority of Heads of State and Government (the ECOWAS Authority), the Council of Ministers, the Community Parliament, the Economic and Social Council, the Community Court of Justice (the ECOWAS Court), the Executive Secretariat, the Fund for Co-operation, Compensation and Development, the Specialised Technical Commissions, and any other institutions that may be established by the ECOWAS Authority.<sup>259</sup> As of January 2007, the Executive Secretariat has been transformed into a nine-member ECOWAS Commission with a President, a Vice-President and seven Commissioners.<sup>260</sup>

According to Art. 3 of the 1993 ECOWAS Treaty, the aims of ECOWAS are “*to promote co-operation and integration, leading to the establishment of an economic union in West Africa in order to raise the living standards of its peoples and to maintain and enhance economic stability, foster relations among member states and contribute to the progress and development of the African Continent*”.

In pursuit of these objectives, the member states affirmed and declared adherence to certain fundamental principles, including “*recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights*”<sup>261</sup> and the “*promotion and consolidation of a democratic system of governance in each member State as envisaged by the Declaration of Political Principles adopted in Abuja on 6 July 1991*”.<sup>262</sup> Together with relevant protocols and supplementary protocols, the 1993 ECOWAS Treaty forms the legal basis of the ECOWAS human rights complaints mechanism.

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states of the AU. The long-term aim is to create an economic community covering all of Africa. The way to achieve this, as set out in Art. 6 of this treaty, goes via strengthening and harmonising the RECs. Africa has a large number of RECs and many countries belong to more than one. At its 26<sup>th</sup> ordinary session 23 February-1 March 1976, the OAU Council of Ministers decided that there shall be five regions in Africa: Northern, Western, Central, Eastern & Southern; ECOWAS roughly corresponds to the Western Region.

<sup>256</sup> More than 30 protocols and supplementary protocols have been made. A compendium of these protocols is available at the ECOWAS Secretariat in Abuja, Nigeria.

<sup>257</sup> Chapter I of the final report of the Committee of Eminent Persons.

<sup>258</sup> Cf. Authority Decision A/DEC.10/5/90 of 30 May 1990.

<sup>259</sup> Art. 6 of the 1993 ECOWAS Treaty.

<sup>260</sup> See the ECOWAS Newsletter, issue 1 of October 2006. As can be seen, this is somewhat similar to the organisation of AU Commission, described above.

<sup>261</sup> Art. 4(g) of the 1993 ECOWAS Treaty.

<sup>262</sup> Art. 4(j) of the 1993 ECOWAS Treaty.

The 1975 ECOWAS Treaty made provisions for the establishment of a “*Tribunal of the Community*”, cf. Art. 4 (e). Based on this Article and Art. 11 of the 1975 ECOWAS Treaty, the ECOWAS Court was established in 1991 through a protocol (the 1991 ECOWAS Court Protocol).<sup>263</sup> The establishment of the ECOWAS Court was confirmed in Art. 15 of the 1993 ECOWAS Treaty, which also confirmed the ECOWAS Court as one of the institutions of ECOWAS, cf. Art. 6. Following the work of the Committee of Eminent Persons set by ECOWAS to review the 1975 ECOWAS Treaty<sup>264</sup> and the effect of the ECOWAS Court’s judgment in the case of *Afolabi Olajide vs. Federal Republic of Nigeria*,<sup>265</sup> a supplementary protocol amending the 1991 ECOWAS Court Protocol was adopted in 2005 (the 2005 ECOWAS Court Protocol).<sup>266</sup> A combined reading of Art. 4(g) of the 1993 ECOWAS Treaty, the 1991 ECOWAS Court Protocol and the 2005 ECOWAS Court Protocol provides the legal basis for the human rights complaints mechanism of the ECOWAS Court.

### Purpose and Function

The ECOWAS Court is “*to ensure the observance of law and justice in the interpretation and application of the Treaty and the Protocols and Conventions of ECOWAS*” and to settle “*such disputes as may be referred to it in accordance with the provisions of ... the Treaty*”.<sup>267</sup> According to Art. 9 of the 1991 ECOWAS Court Protocol,<sup>268</sup> the ECOWAS Court has jurisdiction on the interpretation and application of the ECOWAS treaties, protocols, conventions and other legal instruments and may further adjudicate on the failure of member states to honour their obligations under the ECOWAS treaties, protocols, conventions and other legal instruments. In addition, the ECOWAS Court has jurisdiction to determine cases of human rights violations that occur in member states.<sup>269</sup>

Overall, the purpose and function of the ECOWAS Court with respect to human rights may be said to be (i) to ensure justice (and by extension respect for rights) in the interpretation and application of the ECOWAS treaties and all other instruments of ECOWAS; (ii) to adjudicate in situations where it is alleged that member states have failed to honour their (human rights) obligations as contained in the ECOWAS treaty, protocols, conventions, and other instruments; and (iii) to determine cases of human rights violations that occur in member states with a view to making binding and enforceable judgments.<sup>270</sup>

### Organisation

Art. 26.1 of the 1991 ECOWAS Court Protocol empowers the ECOWAS Authority to determine the seat of the ECOWAS Court; it is currently located in Abuja, Nigeria. According to Art. 26.2, the ECOWAS Court may hold sittings in any other member state when required by facts and circum-

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<sup>263</sup> Protocol A/P/1/7/91 of 6 July 1991 on the Community Court of Justice. The ECOWAS Court takes the place of the originally proposed Tribunal of the Community.

<sup>264</sup> As mentioned above, this culminated in the revised 1993 ECOWAS Treaty.

<sup>265</sup> 2004/ECW/CCJ/04 (Judgment delivered in April 2004).

<sup>266</sup> Supplementary Protocol A/SP.1/01/05 of 2005.

<sup>267</sup> Cf. the 3<sup>rd</sup> paragraph of 1991 ECOWAS Court Protocol (the preamble).

<sup>268</sup> As amended by Art. 3 of the 2005 ECOWAS Court Protocol.

<sup>269</sup> Cf. the Art. 9.4 as amended by the 2005 ECOWAS Court Protocol.

<sup>270</sup> According to Art. 19.2 of the 1991 ECOWAS Court Protocol, the decisions of the ECOWAS Court are “*final and immediately enforceable*” by the Court. The ECOWAS Court may also order provisional measures, cf. Art. 20.

stances. Sitting outside of Abuja is expensive, which limits the use of this option even though it is considered one of the best ways to make the ECOWAS Court known.<sup>271</sup> In December 2006, the Court sat in Bamako, Mali. The official languages of the ECOWAS Court are English, French and Portuguese.<sup>272</sup>

The ECOWAS Court is composed of seven independent members who sit as full time judges. The judges are selected and appointed by the ECOWAS Authority from among nationals of the member states<sup>273</sup> and must be persons of high moral character between the ages of 40 and 60 and either possess sufficient qualifications to be appointed to the highest judicial offices in their respective states or be competent and recognised international lawyers.<sup>274</sup> Member states are required to nominate not more than two persons for appointment.<sup>275</sup> The President of the ECOWAS Commission prepares a list of the persons nominated; from this list, the ECOWAS Council of Ministers prepares a shortlist of fourteen candidates; and from this shortlist, the ECOWAS Authority selects the judges.<sup>276</sup>

The judges are appointed for terms of five years,<sup>277</sup> renewable once, and elect their own President and Vice-President, cf. Art. 4 of the 1991 ECOWAS Court Protocol. As part of the various reforms of the ECOWAS institutions approved in 2006 by the ECOWAS Authority, a single four-year term for the judges is fixed “*so as to be in harmony with the tenures of the statutory appointees of the other institutions*”.<sup>278</sup> The President and Vice-President are appointed for terms of three years.<sup>279</sup> The President (and in his/her absence, the Vice-President) is responsible for administration of the ECOWAS Court and presides at sittings and deliberations.<sup>280</sup> A Court Registry made up of a Chief Registrar and Registrars assists the President and judges in their functions.<sup>281</sup> The provisions of the current Rules of Procedure<sup>282</sup> and the prevailing practice puts the pressure of administration and management of the Registry on the President of the ECOWAS Court, as the Chief Registrar is required to take instructions from the President on most major issues.<sup>283</sup>

The 1991 ECOWAS Court Protocol was adopted by the member states on 6 July 1991. On 30 January 2001, the first judges were appointed. Art. 9 of the 1991 ECOWAS Court Protocol allowed only member states and the ECOWAS Authority to bring cases to the ECOWAS Court. This is probably the rea-

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<sup>271</sup> This was the consensus at the Bamako Workshop (the workshop on the ECOWAS Court’s use for human right purposes in Bamako, Mali, 8-9 December 2006).

<sup>272</sup> Cf. Art. 31 as amended by the 2005 ECOWAS Court Protocol.

<sup>273</sup> Cf. Art. 3.1 of the 1991 ECOWAS Court Protocol.

<sup>274</sup> Cf. Arts. 3.1 and 3.7 of the 1991 ECOWAS Court Protocol.

<sup>275</sup> Cf. Art. 3.4 of the 1991 ECOWAS Court Protocol.

<sup>276</sup> Cf. Arts. 3.4-3.5 of the 1991 ECOWAS Court Protocol and Art. 6 of the Rules of Procedure of the Court.

<sup>277</sup> Four members of the first bench of the ECOWAS Court were appointed for only three years, cf. Art. 4.1 of the 1991 ECOWAS Court Protocol.

<sup>278</sup> See the ECOWAS Newsletter, issue 1 of October 2006.

<sup>279</sup> Cf. Art. 3.2 of the 1991 ECOWAS Court Protocol.

<sup>280</sup> Cf. Arts. 7 and 8 of the Rules of Procedure. As part of the reforms approved in 2006, the administration of the ECOWAS Court will be reviewed and altered to allow the judges to concentrate on their judicial functions.

<sup>281</sup> Art. 29 of the 1991 ECOWAS Court Protocol empowers the ECOWAS Court to set out the duties of the Registry in the Rules of Procedure. Accordingly, Chapter III of the Rules of Procedure deals with the Registry.

<sup>282</sup> According to Art. 32 of the 1991 ECOWAS Court Protocol, the ECOWAS Court establishes its own rules of procedure, subject to the approval of the ECOWAS Council of Ministers. The current Rules of Procedure were adopted in June 2002 and approved by the ECOWAS Council of Ministers on 28 August 2002.

<sup>283</sup> Cf. e.g. Arts. 7 and 14 of the Rules of Procedure of the ECOWAS Court.

son why the Court remained idle until 2003. In late 2003, the important case of Afolabi Olajide vs. Federal Republic of Nigeria (the Afolabi Case) came before the Court.<sup>284</sup> In its judgment, the ECOWAS Court<sup>285</sup> held that “*the first paragraph of article 9(3) of the Protocol is to be applied as meaning that this Court is competent to hear disputes instituted by a member state on behalf of its nationals against another member state or Institution of the Community and not otherwise, as in this case*” and, consequently, dismissed the case.<sup>286</sup>

In the aftermath of the Afolabi case, the 1991 ECOWAS Court Protocol was amended, among other things to allow non-state actors to bring cases.<sup>287</sup> In addition, the 2005 ECOWAS Court Protocol expanded the jurisdiction of the ECOWAS Court to include the competence to determine human rights violations that occur in member states,<sup>288</sup> meaning that the ECOWAS Court may adjudicate on any matter involving an allegation of human rights violation in an ECOWAS member state. As of June 2006, the ECOWAS Court had concluded about eleven cases, but none was connected with its human rights jurisdiction. Although available records at the ECOWAS Court’s Registry indicate that over twenty cases have been filed since then (with a few touching on human rights), no cases involving human rights had been concluded at the time study visits to the ECOWAS Court took place,<sup>289</sup> and no decisions have been made public since then. The President of the ECOWAS Court, Justice Aminatta Malle-Fanogo, in a speech in September 2007 in connection with the commencement of the new legal year, stated that human rights will constitute the principal issue of the ECOWAS Court, as more than 90 per cent of the applications lodged at the ECOWAS Court of Justice deals with human rights violation.<sup>290</sup> Consequently, it must be assumed that the first decisions will be forthcoming.

According to Art. 30 of the 1991 ECOWAS Court Protocol, all its operational expenses are charged to the budget of the Executive Secretariat (now the ECOWAS Commission). The funds provided by the ECOWAS Commission are considered insufficient.<sup>291</sup> For all practical purposes, the proceedings of the ECOWAS Court are free of charge.<sup>292</sup>

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<sup>284</sup> 2004/ECW/CCJ/04 (Judgment delivered in April 2004). In this case, Mr. Afolabi, a Nigerian businessman, alleged a breach of his right to freedom of movement under the revised ECOWAS Treaty, the Protocol on the free movement of persons and goods, and Art. 12 of the African Charter on Human and Human Rights. The reaction of the Defendant State (Nigeria) was a preliminary objection challenging the right of the Applicant to bring the case before the Court. The Defendant relied on Art. 9.3 of the 1991 Protocol to contend that individuals lacked direct access to the Court.

<sup>285</sup> The ECOWAS Court was presided over by the then President of the Court, Justice Hansine Naphawaniyo Donli.

<sup>286</sup> Cf. paragraph 61 of the judgment.

<sup>287</sup> Cf. Arts. 9 and 10 as amended/inserted by the 2005 ECOWAS Court Protocol.

<sup>288</sup> Cf. Art. 9.4 as amended by the 2005 ECOWAS Court Protocol.

<sup>289</sup> Visits to the ECOWAS Court’s Registry in Abuja 9-12 January and 23 January 2007 indicated that within the last months of 2006, several new cases with human rights issues had been filed. However, a telephone interview with the Chief Registrar of the ECOWAS Court 10 January 2007 suggested that none of these cases had been concluded and the prevailing practice prevents officials from releasing information on cases pending before the Court. This does not prevent interested persons from attending sessions of the Court, as Art. 14.3 of the 1991 ECOWAS Court Protocol requires the Court’s sittings to be in public.

<sup>290</sup> Cf. article in The News 18 September 2007.

<sup>291</sup> This appeared to be the consensus at the Bamako Workshop.

<sup>292</sup> According to information from the ECOWAS Court, it used to charge certain nominal fees. After a review concluding that there was no mandate to charge such fees, this practice was discontinued in early 2007.

## Jurisdiction

The 15 member states of ECOWAS have all signed both the 1991 ECOWAS Court Protocol and the 2005 ECOWAS Court Protocol. It follows from Art. 11 of the 2005 ECOWAS Court Protocol that it shall “*enter into force provisionally upon signature by the Heads of State and Government*”.<sup>293</sup> Accordingly, the 2005 ECOWAS Court Protocol, and with it the human rights complaints mechanism of the ECOWAS Court, is applicable in the territories of all the member states of the ECOWAS.

According to Art. 10 of the 1991 ECOWAS Court Protocol, inserted by the 2005 ECOWAS Court Protocol, access to the ECOWAS Court is, depending on the facts, open to member states, the President of the ECOWAS Commission, the ECOWAS Council of Ministers, individuals, corporate bodies and staff of any Community institution. Neither of the two ECOWAS Court Protocols specifically mentions the competence of NGOs to bring cases before the ECOWAS Court.

While it could be argued that the term “*corporate bodies*” as used in Art. 10(c) is wide enough to accommodate actions by NGOs, Art. 10(c) only covers “*proceedings for the determination for an act or inaction of a Community official which violates the rights of the individual or corporate bodies*”. This would indicate that a *corporate body* (whether this includes NGOs or not) may only instigate a case based on an alleged violation of this body’s rights, not based on the alleged violations of the rights of others, and only based on a violation by the action or inaction of an ECOWAS official.

Art. 10(d) concerning violations of human rights, as inserted by the 2005 ECOWAS Court Protocol, only mentions “*individuals on application for relief for violation of their human rights*”; not corporate bodies, NGOs or similar entities. Consequently, it could be argued that with respect to alleged human rights violations by member states, only the individuals who are allegedly the victims may bring such matters before the ECOWAS Court. The experience from the Commission is that practically all cases are brought by NGOs; presumably due to the economic realities of Africa and the lack of knowledge making it impossible for most prospective litigants to pursue international legal action on their own. As the 2005 ECOWAS Court Protocol is drafted, it is only the ECOWAS Court that can decide if NGOs may bring cases under Art. 10(d).<sup>294</sup> The somewhat different question as to whether an NGO may act as representative (“*agent*”) of a party according to Art. 12 in the 1991 ECOWAS Court Protocol is discussed below.

Neither the 1991 nor the 2005 ECOWAS Protocol contains a list of who may be defendant in a case before the ECOWAS Court, but from Art. 9 and 10 it may be inferred that member states, ECOWAS and its institutions, and ECOWAS officials can be defendants before the ECOWAS Court.<sup>295</sup>

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<sup>293</sup> Upon ratification by nine member states, the 2005 ECOWAS Court Protocol shall enter into force definitively, cf. Art. 11.2. Despite efforts to get access to this information, including several visits to the offices of the ECOWAS Commission, it has not been able to get information on the status of ratification.

<sup>294</sup> The ECOWAS Court has not yet had the opportunity to make a decision on this point. During an interview Mr C.A. Odinkalu of the Open Society Initiative for West Africa indicated that that organisation would soon file a human rights action on behalf of some ECOWAS citizens against Côte d’Ivoire. If this comes to pass, it will create the opportunity to test the position of the Court on this matter.

<sup>295</sup> Cf. Arts. 9 and 10 as amended/inserted by the 2005 ECOWAS Court Protocol.



Under both the 1991 and the 2005 ECOWAS Court Protocols, the ECOWAS Court is empowered to adjudicate on disputes relating to the interpretation and application of the ECOWAS treaties, protocols and conventions and all other legal instruments of the Community.<sup>296</sup> The amended Art. 9 goes on to give the ECOWAS Court jurisdiction on (i) matters relating to the legality of regulations, directives, decisions and other subsidiary legal instruments of ECOWAS;<sup>297</sup> (ii) the failure of member states to honour ECOWAS obligations contained in the ECOWAS treaties, protocols, conventions and other legal instruments;<sup>298</sup> and (iii) cases of allegations of human rights violations that occur in member states.<sup>299</sup>

Unlike the practice in most human rights complaints mechanisms, the conditions for bringing cases to the ECOWAS Court based on an alleged human rights violation in a member state are very limited. Art. 10(d), as inserted by the 2005 ECOWAS Protocol, sets out only two conditions for individuals wanting to access the ECOWAS Court on application for relief for human rights violations; namely that (i) the application should “*not be anonymous*”; and that (ii) the application should “*not be made whilst the same matter is pending before another International Court for adjudication*”.

The condition of non-anonymity does not give rise to any particular difficulties. The second condition, on the other hand, is open to interpretation. Is it only if a matter is pending before an international body able to make a binding decision<sup>300</sup> that the ECOWAS Court is precluded from admitting a case concerning this matter? Or will the ECOWAS Court also dismiss matters that are pending before bodies or mechanisms that can only assist in finding an amicable solution or make non-binding recommendations?<sup>301</sup> The wording of Art. 10(d) seems to indicate that only actual judicial bodies count. This is, in any event, subject to the interpretation by the ECOWAS Court.

It is common that international courts and bodies demand the exhaustion of domestic remedies before admitting a case.<sup>302</sup> In Art. 39 of ECOWAS Protocol A/SP1/12/01 on Democracy and Good Governance (the ECOWAS Democracy and Good Governance Protocol),<sup>303</sup> it was proposed that the 1991 ECOWAS Court Protocol “*shall be reviewed so as to give the Court the power to hear ... cases relating to violations of human rights, after all attempts to resolve the matter at the national level have failed*”. The final version of the 2005 ECOWAS Court Protocol does not, however, contain any requirement for the exhaustion of domestic remedies before seizing the ECOWAS Court.

The ECOWAS Court case of Jerry Ugbokwe vs. the Federal Republic of Nigeria<sup>304</sup> would seem to confirm the view that there is no requirement to exhaust domestic remedies. In some cases, this will make

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<sup>296</sup> Cf. Art. 9 of the 1991 ECOWAS Court Protocol and Art. 9.1 as amended by the 2005 ECOWAS Court Protocol.

<sup>297</sup> Cf. Art. 9.1(c) as amended by the 2005 ECOWAS Court Protocol.

<sup>298</sup> Cf. Art. 9.1(d) as amended by the 2005 ECOWAS Court Protocol.

<sup>299</sup> Cf. Art. 9.4 as amended by the 2005 ECOWAS Court Protocol. Other areas of competence of the ECOWAS Court include actions against ECOWAS, ECOWAS institutions and officials of ECOWAS and its institutions.

<sup>300</sup> Such as the African Court.

<sup>301</sup> Such as the Commission and various UN bodies.

<sup>302</sup> On the African continent, this is the case e.g. for the African Court, the Commission, and the Child Committee. It is also the case for various UN bodies and within the European and American human rights complaints systems.

<sup>303</sup> Adopted 21 December 2001 and supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security.

<sup>304</sup> Case no. ECW/CCJ/APP/02/05.

the human rights complaints mechanism before the ECOWAS Court attractive above other human rights complaints mechanisms; however, considering the fact that the ECOWAS Court is a supranational court, this position also seems to hold the potential for disruptive conflicts with the legal systems of member states.<sup>305</sup> Yet as it currently stands, if an application is not anonymous and the matter is not pending before any other international court, it is admissible before the ECOWAS Court.

The decision in the case of Jerry Ugbokwe vs. the Federal Republic of Nigeria has been read by some to imply that the ECOWAS Court is wary of assuming the role of an appeal court *vis-à-vis* the national courts. This could mean that it might actually be an advantage for persons wishing to bring a case before the ECOWAS Court not to take the case to the national courts beforehand.

Under Art. 76 of the 1993 ECOWAS Treaty, “*any dispute regarding the interpretation or the application of the provisions of this Treaty shall be amicably settled through direct agreement ... Failing this, either party ... may refer the matter to the Court*”. It could be argued that this also applies to individuals wishing to bring a case before the ECOWAS Court, but the duty in this case will in any event be very limited; maybe just to inform the state in advance of bringing the case.<sup>306</sup>

#### Human Rights Mandate

As already stated, ECOWAS evolved as an intergovernmental economic body; thus its human rights focus could be considered largely incidental. Similarly, the ECOWAS Court was conceived as a Community tribunal for the resolution of conflicts that were not resolved by amicable settlement by the member states of the Community. The 1975 ECOWAS Treaty and other documents from the commencement of ECOWAS do not refer to human rights to be applied by the ECOWAS Court. This changed, however, beginning with the Declaration of Political Principles by the ECOWAS Authority in June 1991 and culminating in the 1993 ECOWAS Treaty that introduced human rights into the ECOWAS system and could be argued to provide a human rights mandate for the ECOWAS Court.<sup>307</sup>

In Art. 4(g) of the 1993 ECOWAS Treaty, the ECOWAS member states affirmed their adherence to the “*recognition, promotion and protection of human rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights*”. This treaty also contains certain specific rights, which are enforceable by the ECOWAS Court.<sup>308</sup> In addition to the Declaration of Political Principles and Art. 4(g) of the 1993 ECOWAS Treaty, other legal instruments and documents of ECOWAS either refer to or proclaim adherence to major international human rights instruments, binding member states to respect for such instruments. The preamble to the ECOWAS Democracy and Good Governance Protocol refers to various international instruments, including the Universal Declaration of Human Rights and the Charter; while in Art. 1(h), the ECOWAS member states undertake to guarantee the rights set out in “*the African Charter on Human and Peoples’ Rights and other international instruments*”. The ECOWAS Democracy and Good Governance Protocol also contains other specific guarantees of human

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<sup>305</sup> Interviews conducted, among other things in connection with the Bamako Workshop, indicate that lawyers familiar with the system recognise the danger, but also appreciate the benefits for complainants as compared to other existing human rights complaints mechanisms.

<sup>306</sup> This was the view expressed by Franca Ofor, research assistant of the ECOWAS Court, during the Bamako Workshop.

<sup>307</sup> In the preamble of the 1993 ECOWAS Treaty and in Art. 4-6 of the Declaration of political principles, the member states of ECOWAS committed themselves to respect for human rights.

<sup>308</sup> Cf. e.g. Art. 66 of the 1993 ECOWAS Treaty.

rights and imposes human rights obligations on ECOWAS member states in these regards. Apart from the 1993 ECOWAS Treaty, various protocols and conventions and other instruments with binding force, there are non-binding instruments such as declarations and plans of action in which member states of ECOWAS declare to be prepared to adhere to various human rights standards. All this taken together provides the normative framework for the realisation of human rights in the ECOWAS system.

Probably in recognition of the substantial human rights obligations imposed cumulatively by the various ECOWAS documents, and in appreciation of the link between respect for human rights and regional security, the 2005 ECOWAS Court Protocol gives a clear and specific human rights mandate to the ECOWAS Court. Hence, under Arts. 9.4 and 10(c)-(d), inserted by Arts. 3 and 4 of the 2005 ECOWAS Court Protocol, the ECOWAS Court has a specific mandate, both with respect to complaints by individuals of violations of human rights that occur in member states and with respect to acts and inactions of ECOWAS institutions and officials that violate the rights of individuals and corporate bodies. Furthermore, the competence of ECOWAS Court to adjudicate on matters involving the failure of member states to honour their obligations under the ECOWAS Treaty, protocols, conventions and other instruments may be argued to translate into an implied human rights mandate, as the failure of member states to fulfil the human rights obligations contained in those instruments can be argued to ignite the ECOWAS Court's jurisdiction.

As mentioned above, the 1993 ECOWAS Treaty refers to the Charter and Art. 9.4, and 10(d) of the ECOWAS Court Protocol, inserted by Art. 4 of the 2005 ECOWAS Court Protocol, refers to human rights without any qualification. Accordingly, all cases of violations of the human rights contained in the Charter may be brought before the ECOWAS Court. Similarly, violations of other human rights, such as press freedom, the right of free movement, the right of political participation, women's rights, freedom from discrimination and all other rights specifically set out in any of the Community's instruments can be the basis of an action before ECOWAS Court.

It must also be assumed that at least human rights contained in instruments that have been ratified by all member states of the ECOWAS may be adjudicated by the ECOWAS Court. It remains to be seen from the practice of the ECOWAS Court if the Court will also be prepared to make decisions on alleged violations of a human right that is contained in an instrument that binds the violating member state, even if this human right is neither contained or referred to in an ECOWAS document nor generally accepted by the ECOWAS member states.

It should be noted that in addition to applying the ECOWAS treaties and other legal instruments, Art. 19 of the 1991 ECOWAS Court Protocol enjoins the ECOWAS Court to apply (where necessary) the "*body of laws as contained in article 38 of the Statutes of the International Court of Justice*". This Art. 38 refers to "*(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted law; (c) the general principles of law recognized by civilized nations; (d) ... judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law*".

As stated earlier, there is currently no concluded case where the ECOWAS Court has exercised either its specific or implied human rights mandate. Until this is the case, it is not possible to know exactly how the ECOWAS Court will administer its human rights mandate.

### Procedure

According to Art. 11 of the 1991 ECOWAS Court Protocol, a case may be brought by an application addressed to the Registry of the ECOWAS Court. The application shall set out the name of the parties, the subject matter of the dispute, and a summary of the arguments of the plaintiff. The usual order of the application is: the name of the parties; the legal basis of the application; name and address of the plaintiff; the designation of the defendant; the subject matter of the application; a statement of the facts; a summary of the plaintiff's plea; the form of order sought by the plaintiff; a statement of the nature of evidence; and the addresses for service.<sup>309</sup>

The application has to be signed by the plaintiff or by his/her agent or lawyer. The signed application (along with any annexes) is lodged at the Registry together with five copies for the court and a copy each for every party to the proceedings.<sup>310</sup> The application must contain an address for service within the area where the Court sits; instead or in addition, the applicant may elect to receive service by fax or other technical means of communication (email will presumably be acceptable). Non-compliance with the formal provisions contained in the Rules of Procedure may lead to a decision of inadmissibility, unless the defects are remedied within a period of no more than 30 days.

Upon receipt of the application, the Chief Registrar is required to serve notice of the application and of all documents relating to the subject on the defendant.<sup>311</sup> A Judge-Rapporteur is appointed by the President to be in charge of the preparation of the case.

Within one month of receiving service of the application, the defendant is expected to forward the grounds for defence. The defence should include the name and address of the defendant, the arguments of fact and law that the defendant is relying on, the form of order sought by the defendant, and the nature of the defendant's evidence.<sup>312</sup>

Within one month of receipt of the defence, the plaintiff (applicant) may file a reply to the defence. The defendant may then file a rejoinder within one month of receipt of the reply.<sup>313</sup> While the reply and the rejoinder may contain new evidence (if this delay is explained), no new plea may be introduced unless it is based on matters of law or fact unearthed during the proceedings.<sup>314</sup>

After the exchange of the relevant documents, the President of the Court may set a date for the Judge-Rapporteur to make a preliminary report on the given case. The report may contain recommendations as to whether a preparatory inquiry or any other preparatory step is required.<sup>315</sup> Possible preparatory

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<sup>309</sup> Cf. Art. 33 of the Rules of Procedure.

<sup>310</sup> Cf. Art. 32 of the Rules of Procedure.

<sup>311</sup> Cf. Art. 11.2 of the 1991 ECOWAS Court Protocol.

<sup>312</sup> Cf. Art. 35 of the Rules of Procedure.

<sup>313</sup> Cf. Art. 36 of the Rules of Procedure.

<sup>314</sup> Cf. Art. 37 of the Rules of Procedure.

<sup>315</sup> Cf. Art. 39 of the Rules of Procedure.

inquiries and measures may include the personal appearance of parties, a request for further information or production of a document, oral testimony, commissioning of an expert report, and the inspection of the place or thing in question.<sup>316</sup> The Judge-Rapporteur conducts this part of the proceedings with the necessary participation of the ECOWAS Court and the parties.

Both in the preparatory inquiry and during the oral proceedings, the ECOWAS Court may on its own or upon the application of any party order the attendance of witnesses or that an expert's report be obtained. The Court may set a date for the oral procedure after the preparatory inquiry is concluded, or it may order that the parties lodge written observations and proceed to the oral procedure after the period fixed for the lodging of the written observations.<sup>317</sup> After the preparatory phase, the matter goes to the oral procedure where the President of the Court presides.<sup>318</sup> It follows from Art. 14.2 of the 1991 ECOWAS Court Protocol that the President has to preside over every trial of the ECOWAS Court. Even though it is set out in Art. 4.8 that the President shall be replaced by the Vice-President or another judge if he/she cannot participate in the proceedings of a given case, it is allegedly the view of the current President of the ECOWAS Court that Art. 14.2 overrides this possibility of replacement, meaning that the President in person is necessary to provide quorum.<sup>319</sup> It has been argued that this is impractical as (i) it makes it impossible for the ECOWAS to proceed with cases should the President be indisposed; and (ii) it prevents the ECOWAS Court from setting up different chambers, should the need arise.<sup>320</sup>

The parties to any case before the ECOWAS Court are required to be represented by an agent, advisor or lawyer, and the President is authorised to put questions to the agents, advisors or lawyers during the proceedings.<sup>321</sup> There are no rules as to who may function as an “agent” or “advisor” of a party, meaning that qualified lawyers do not have a monopoly in this respect. Moreover, according to Franca Ofor, research assistant at the ECOWAS Court, an NGO may represent a party.<sup>322</sup> If this is indeed the case, this substantially lessens the impact of Art. 10(d), as inserted by the 2005 ECOWAS Court Protocol, specifying that “individuals” and not e.g. NGOs may bring cases before the ECOWAS Court on the basis of human rights violations in member states.

Lawyers who are admitted to appear at the courts in one of the member states of ECOWAS may appear before the ECOWAS Court, cf. Art. 12 of the 1991 ECOWAS Court Protocol, provided such a lawyer lives up to certain formal rules set out in Art. 28 of the Rules of Procedure. Since the establishment in 2006 of the ECOWAS Community Court Justice Litigation and Awareness Program,<sup>323</sup> it has been possible to get assistance to cover out of pocket expenses (but not legal fees) for legal counsel for hu-

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<sup>316</sup> Cf. Art. 41 of the Rules of Procedure.

<sup>317</sup> Cf. Art. 50 of the Rules of Procedure.

<sup>318</sup> Cf. Art. 53 of the Rules of Procedure.

<sup>319</sup> See The Law, practice and procedure of the Community Court of Justice, a paper presented by the President of the ECOWAS Court at the Bamako Workshop.

<sup>320</sup> This seemed to be the general view at the Bamako Workshop.

<sup>321</sup> Cf. Art. 12 of the 1991 ECOWAS Court Protocol and Arts. 54- 55 of the Rules of Procedure.

<sup>322</sup> Information provided orally during the Bamako Workshop.

<sup>323</sup> Funded by the Open Society Initiative for West Africa.

man rights cases before the ECOWAS Court. This fund is administered by the West African Human Rights Forum and the West Africa Bar Association.<sup>324</sup>

In exceptional cases, the President of the ECOWAS Court may (on the application of either party) order expedited procedure. Expedited procedure allows for derogation from the provisions of the Rules of Procedure. An application for expedited action has to be made in a separate document at the filing of the original documents.<sup>325</sup> The Rules of Procedure also make provisions for preliminary objections or other preliminary pleas. An application in this regard is made by a separate document without touching on the substance of the case.<sup>326</sup> The ECOWAS Court has discretion to make a decision after hearing the parties orally on the preliminary application or to reserve its decision until the final judgment. Where the application touches on the ECOWAS Court's jurisdiction, and the ECOWAS Court finds that it lacks jurisdiction in a given case, or where a case is manifestly inadmissible, the Court is required to so decide in a reasoned order after hearing the parties.<sup>327</sup>

According to Art. 21 of the 1991 ECOWAS Court Protocol and Art. 89 of the Rules of Procedure, interested parties may intervene in a matter pending before the ECOWAS Court.<sup>328</sup> Such intervention is made practically possible by the obligation for the Registry to give notice of the proceedings in the Official Journal of the Community, such notice to contain not only the name of the parties but also the subject matter and a summary of the pleas and of the main supporting arguments.<sup>329</sup>

Art. 14 of the 1991 ECOWAS Court Protocol requires that unless an application to the contrary is made by either party or this is for other reasons decided by the ECOWAS Court, sittings of the Court are conducted in public.

In the event that the defendant, even though the application by the plaintiff has been duly served, fails to lodge a defence, Art. 90 of the Rules of Procedure allows the applicant to apply for a default judgment to be ordered against the defaulting party and sets out the procedures to be followed. The application for a default judgment must be served on the defendant, and the ECOWAS Court has to consider, among other things, if the case of the plaintiff seems well-founded.

Overall, the procedure of the ECOWAS Court compares more to the procedure of national courts than to the procedure of e.g. UN treaty bodies and other supranational human rights supervisory bodies.

### Remedies and Enforceability

Decisions of the ECOWAS Court are final and binding, cf. Art. 19.2 of the 1991 ECOWAS Court Protocol,<sup>330</sup> subject to the provisions of review contained in Art. 25 and further specified in Arts. 92-94 of the Rules of Procedure. Under these provisions, a party can request review within three months of having become aware of some decisive fact that was neither known to the ECOWAS Court nor to the party

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<sup>324</sup> Information provided orally during the Bamako Workshop.

<sup>325</sup> Cf. Art. 59 of the Rules of Procedure.

<sup>326</sup> Cf. Art. 87 of the Rules of Procedure.

<sup>327</sup> Cf. Art. 88 of the Rules of Procedure.

<sup>328</sup> Cf. e.g. the intervention in the Jerry Ugokwe vs. Nigeria case.

<sup>329</sup> Cf. Art. 13.6 of the Rules of Procedure.

<sup>330</sup> Cf. also Art. 62 of the Rules of Procedure.

claiming revision at the time of the original decision;<sup>331</sup> there is an absolute cut-off date five years after the original decision. When receiving a request for revision, the ECOWAS Court decides on admissibility prior to moving on to the substantial matter of the case. The ECOWAS Court can demand that the original decision is adhered to as a condition for opening the revision proceedings. As mentioned below, steps are also being taken to introduce a possibility to appeal.

The nature of judgments that the ECOWAS Court is empowered to give is not specified in any of its instruments. It follows from the provisions relating to enforcement that the Court can make orders with financial implications on nationals of member states and on member states.<sup>332</sup>

According to Art. 20 of the 1991 ECOWAS Court Protocol, the ECOWAS Court may order any provisional measures or issue any provisional instructions that it considers necessary in any case pending before it. By extension, the ECOWAS Court can also make any order it deems necessary in a final judgment.

Closely connected to Art. 20 is the provision that obliges member states and institutions of ECOWAS to “*refrain from any action likely to aggravate or militate against*” the settlement of any dispute pending before the ECOWAS Court, cf. Art. 22.2 of the 1991 ECOWAS Court Protocol. This can be interpreted as a compulsory stay on all activities in order to maintain a status quo pending the determination of a dispute. Art. 22.2 was used as the basis of the ECOWAS Court’s decision to order interim measures in *Ugokwe ctr. Nigeria* in 2005, in this case ordering the National Assembly not to swear in a member of the Assembly.<sup>333</sup>

Art. 19.2 of the 1991 ECOWAS Court Protocol makes the decisions of the ECOWAS Court immediately binding, and Art. 22.3 requires both member states and institutions of ECOWAS to take all measures necessary to ensure execution of the Court’s decisions. Art. 24, as inserted by the 2005 ECOWAS Court Protocol, requires that execution of a judgment of the ECOWAS Court be in the form of a Writ of Execution which the Chief Registrar is required to submit to the relevant member state. The member state in question is then required to execute the judgment according to the civil procedure of its national courts. Art. 24.4 further obliges member states to determine the competent national authority to execute the ECOWAS Court’s judgment and to notify the Court of said authority.<sup>334</sup> Only the ECOWAS Court may suspend the execution of its own decisions.<sup>335</sup>

The matter of enforcement in the member states was discussed at great length during the ECOWAS workshop in Mali 8-9 December 2006. The general impression seemed to be that in most of the ECOWAS member states, decisions of the ECOWAS Court would only be enforceable if the necessary national rules to this effect were implemented by the national parliaments, and that in most countries such rules had not been adopted. It should be noted that according to Art. 77.1 of the 1993 ECOWAS Treaty, the ECOWAS Authority may impose sanctions against states that do not fulfil their obligations

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<sup>331</sup> If the lack of knowledge is due to negligence, revision is not possible.

<sup>332</sup> Cf. Art. 24 as inserted by the 2005 ECOWAS Court Protocol.

<sup>333</sup> See BNW News & Archives, news.biafranigeriaworld.com, 3 June 2005.

<sup>334</sup> In Nigeria, the authority is the Supreme Court.

<sup>335</sup> Cf. Art. 24(5) as inserted by the 2005 ECOWAS Court Protocol.

towards ECOWAS; at least in theory, sanctions could be imposed on a state that fails to live up to the obligations contained in the ECOWAS Court Protocols, including failure to adhere to a decision of the ECOWAS Court.

### Cooperation

The legal framework of the ECOWAS Court is silent on the question of cooperation. Art. 10(f), as inserted by the 2005 ECOWAS Court Protocol, allows some form of relationship with national courts in the sense that it allows national courts to refer questions on the interpretation or application of the ECOWAS Treaty and other legal instruments to the ECOWAS Court, whenever such questions arise in cases before the national courts.

Since the legal instruments of ECOWAS make frequent references to or invoke obligations based on the Charter, and in view of the fact that the Charter allows the Commission to engage with other mechanisms, there is a clear possibility for interaction. Currently, there is no evidence of any on-going, formalised cooperation between the ECOWAS Court and any other human rights complaints mechanism, although the ECOWAS Court is reported to have been represented at the inauguration of the African Court and some discussions aimed at cooperation have reportedly commenced.<sup>336</sup>

In view of the treaty-based move towards an African Economic Community as part of the AU framework, based on the regional economic communities of which ECOWAS is one, it also cannot be ruled out that one day there will be a system in place where decisions of the ECOWAS Court can be appealed to the relevant AU court, be it the African Court for human rights matters or the – still inoperational – African Court of Justice for other matters.<sup>337</sup>

In any event, there is an overlap of jurisdiction between the Commission and the African Court on the one hand and the ECOWAS Court on the other. There are certain advantages for individuals in using the ECOWAS Court as compared to both the Commission and the African Court. Unlike decisions of the Commission, decisions of the ECOWAS Court are legally binding and enforceable. With respect to the African Court, legal and physical persons do not have direct access, unless the relevant state has made the necessary declaration.<sup>338</sup> Furthermore, there is no obligation to exhaust domestic remedies before taking a case to the ECOWAS Court. As stated above, the ECOWAS Court should not take on a case that has been or is in the process of being decided by the APCR Court,<sup>339</sup> but it is unclear what will be the view with respect to the Commission, whose decisions are not binding.

While there is ample room for civil society, donor nations and organisations to interact and cooperate with the ECOWAS Commission, no evidence has been found of any formal collaboration agreement

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<sup>336</sup> The staff at the ECOWAS Court's Registry was not very certain about this. In addition, one of the members of the Commission and the rapporteur for human rights defenders, Reine Alapini-Gansou, has repeatedly expressed a wish to visit the ECOWAS Court, presumably to consider some form of cooperation.

<sup>337</sup> As stated above in the section on the African Court, it has in principle been decided by the AU Assembly to merge these two courts.

<sup>338</sup> Cf. Art. 34.6 of the Court Protocol.

<sup>339</sup> Cf. Art. 10(d), as inserted by the 2005 ECOWAS Protocol.



between the ECOWAS Court and civil society, donor nations and organisations. That does not mean that the ECOWAS Court is not trying to obtain assistance from donors, etc.<sup>340</sup>

Civil society organisations have also taken other initiatives with respect to the ECOWAS Court. In 2006, a three-year programme was set up by Open Society Initiative for West Africa. The elements of this programme is to (i) publish all human rights related ECOWAS documents, including decisions of the ECOWAS court; (ii) hold training sessions for lawyers on the law and procedures of the ECOWAS Court;<sup>341</sup> (iii) hold awareness sessions for non-governmental organisations and national human rights institutes on the working of the ECOWAS Court; (iv) hold sessions for superior court judges of the member states on the law and procedure of the ECOWAS Court to ensure sufficient knowledge for the proper interaction between the national courts and the ECOWAS Court; (v) set up the ECOWAS Community Court Justice Litigation and Awareness Fund to support both litigation of human rights cases at the ECOWAS Court and awareness initiatives; and (vi) publish annual reports on the state of human rights in each of the states of West Africa. This programme will be carried out in partnership with various organisations, e.g. the West Africa Bar Association and the West African Human Rights Forum.<sup>342</sup>

Another possible donor, mentioned at the Bamako Workshop, is the Ford Foundation,<sup>343</sup> which has a regional office in Lagos, Nigeria.

#### Miscellaneous

Recently, the ECOWAS Authority approved some reforms of various ECOWAS institutions. The establishment of an appellate division of the ECOWAS Court has been approved. It has also been decided to establish a Community Judicial Council to ensure that competent judges are selected to the ECOWAS Court. Finally, it has been decided to reform the administration of the ECOWAS Court to free the judges to focus on their judicial functions.<sup>344</sup> These reforms are still being carried out, and it remains to be seen how they will affect the functioning of the Court.<sup>345</sup>

Several difficulties for the optimal functioning and impact of the ECOWAS Court as a human rights complaints mechanism were discussed at the Bamako Workshop. One main problem was the lack of awareness, among both judges, lawyers, persons of authority and members of the general population, with respect to the existence, mandate and procedure of the ECOWAS Court. Several of the steps envisaged as part of the above-mentioned support programme aim at increasing awareness, but there was consensus that this was not sufficient. An important step to increase knowledge would be to hold more sessions outside of the headquarter of the Court (Abuja in Nigeria), but this is expensive and the budget

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<sup>340</sup> At the Bamako Workshop, Franca Ofor mentioned that the ECOWAS Court was trying to get Open Society Initiative for West Africa (OSIWA) to provide assistance, e.g. to establish a proper library both for the judges, the court staff and visiting lawyers.

<sup>341</sup> One of these training sessions was the Bamako Workshop.

<sup>342</sup> This information was provided orally at the Bamako Workshop.

<sup>343</sup> The Ford Foundation is a grant-making organisation, set up in 1936 and headquartered in New York, USA. It has 12 regional offices all over the world.

<sup>344</sup> See generally the October 2006 edition of the ECOWAS Newsletter.

<sup>345</sup> Three staff of the ECOWAS Court's Registry that were interviewed were not aware of any reforms approved by the ECOWAS Authority with respect to the ECOWAS Court.

of the ECOWAS Court for 2007 contains funding for only two sessions outside Abuja, a number that was considered insufficient. Proposals, e.g. to use the radio to spread awareness, were mentioned. It could also be relevant to somehow use NGOs and paralegals.

Another problem was the lack of actual knowledge among law practitioners (primarily lawyers and judges), officials and parliamentarians about ECOWAS law and procedure. The law faculties could do more to include ECOWAS community law in the curriculum, and the national bar associations and the courts could include this subject in the training of lawyers and judges. It was important not to exclude the traditional arbiters of justice.

The actual running of the ECOWAS Court could also be improved. Franca Ofor<sup>346</sup> mentioned the lack of resources, e.g. to make translations which sometimes led to otherwise unnecessary adjournments;<sup>347</sup> to set up a proper library; to provide human rights training for the judges and the relevant staff,<sup>348</sup> etc.; and the need to critically review the texts of the ECOWAS Court to make sure that they were practical.<sup>349</sup> The use of IT could also make the ECOWAS Court more accessible; e.g. if witnesses, parties and representatives could be present by video link instead of having to physically go to Abuja. A positive step to free the judges from time-consuming administrative work was the decision by the ECOWAS Council to appoint a director for administration and funds.

The participants at the Bamako Workshop were also very concerned about the question of implementation of decisions in the member states. This has been discussed above.

It is a problem that the ECOWAS Court is to some extent perceived as a mainly Nigerian institution.<sup>350</sup> This is not only due to the fact that the court is based in Nigeria, but also because most of the cases so far have involved Nigeria. It must be assumed that holding sessions in different West African states will assist in giving the ECOWAS Court a more West African (as opposed to Nigerian) profile.

## **West African Economic and Monetary Union (UEMOA)**

### Introduction

The West African Economic and Monetary Union, better known under its French acronym UEMOA,<sup>351</sup> was established with the signing of the UEMOA Treaty 10 January 1994 in Dakar, Senegal, to supplement the West African Monetary Union or UMOA.<sup>352</sup> A revised UEMOA Treaty was entered into on 29 January 2003 and it is this revised treaty that will be referred to in the following. The current mem-

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<sup>346</sup> The single representative of the ECOWAS Court at the Bamako Workshop.

<sup>347</sup> Documents need to be available in French, English and Portuguese; especially Portuguese is a problem as the ECOWAS Court does not have a Portuguese translator.

<sup>348</sup> Since the ECOWAS Court is not primarily a human rights court, no specific steps were taken at the time of appointment of the current judges to assure some human rights knowledge.

<sup>349</sup> A case in point is the apparent need for the President to take part in all oral hearings.

<sup>350</sup> According to the website of African International Courts and Tribunals, [www.aict-ctia.org](http://www.aict-ctia.org).

<sup>351</sup> Union Economique et Monétaire Ouest Africaine.

<sup>352</sup> Union Monétaire Ouest Africaine was established 12 May 1962 and got a new treaty 14 November 1973, which is still valid. It can trace its history back to the creation of the West African Central Bank in 1959 (BCEAO) and beyond.

ber states are Benin, Burkina Faso, Côte d'Ivoire, Guinea Bissau, Mali, Niger, Senegal, and Togo. All the member states are members of ECOWAS and CEN-SAD as well.

UEMOA is not accredited to AU. The West African REC accredited to AU is ECOWAS.<sup>353</sup> In 2004, it was envisaged to merge some of the functions of UEMOA and ECOWAS, but this has been postponed indefinitely.<sup>354</sup> UEMOA and ECOWAS cooperate in certain areas.

Apart from maintaining the monetary union,<sup>355</sup> the objectives of UEMOA are to create a common market with free movement of goods, services, capital and persons; increase competitiveness; coordinate economic policy; coordinate policies and take common steps within human resources, land settlement, transport and telecommunication, environment, agriculture, energy, industry and mines, cf. Art. 4 of the UEMOA Treaty.

According to Art. 3 of the UEMOA Treaty, UEMOA respects the fundamental rights set out in the Universal Declaration of Human Rights and the Charter (but, unlike for example COMESA, it is UEMOA as such, not the member states, that states to respect such fundamental rights).

The organs of the UEMOA are the Court of Justice, the Audit Court, the Conference of Heads of State and Government, the Council of Ministers, the Commission, and the Parliament, cf. Art. 16 of the UEMOA Treaty. UEMOA also has a central bank (BCEAO) as part of the monetary union.

Further provisions on the two courts can be found in the Additional Protocol no. 1; this protocol (the UEMOA Court Protocol) is an integral part of the UEMOA Treaty and consequently came into force with the UEMOA Treaty without the need for designated ratification. The UEMOA Court Protocol was slightly amended when Guinea Bissau joined UEMOA in 1997, and references to the UEMOA Court Protocol will be to this protocol as amended. In addition, the UEMOA Court of Justice has a statute, the UEMOA Court Statute,<sup>356</sup> and rules of procedure, the UEMOA Court Rules.<sup>357</sup>

### Purpose and Function

According to Art. 1 of the UEMOA Court Protocol, the UEMOA Court of Justice shall assure the rule of law in the interpretation and application of the UEMOA Treaty.

### Organisation

The UEMOA Court of Justice consists of judges elected for six years, cf. Art. 2 of the UEMOA Court Protocol. The judges shall be persons that will ensure independence and legal competence. The number

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<sup>353</sup> Cf. CAMEI/Consol.Report/(I), consolidated report of the First Conference of African Ministers of Economic Cooperation, 27-28 March 2006.

<sup>354</sup> Cf. [www.aict-ctia.org/courts\\_subreg/waemu/waemu\\_home.html](http://www.aict-ctia.org/courts_subreg/waemu/waemu_home.html).

<sup>355</sup> The member states all use the Franc CFA (Franc des Colonies Françaises d'Afrique), the common name used for two different currencies, the Franc CFA used in the UEMOA countries with code XAF and the Franc CFA used in CEMAC countries (Francophone Central Africa) with code XOF. Even though these currencies have the same name and value and are both pegged to the Euro, based on an agreement with France, they have not been freely interchangeable since 1993. Information from [fr.wikipedia.org/wiki/Franc\\_CFA](http://fr.wikipedia.org/wiki/Franc_CFA).

<sup>356</sup> Acte additional no. 10/96 portant status de la Cour de Justice.

<sup>357</sup> Règlement no. 1/96/CM portant Règlement des procédures de la Cour de Justice de l'UEMOA.

of judges is not specified, so as to enable enlargements maintaining the ratio of one judge per member state when and if additional countries join UEMOA. Currently, there are eight judges, corresponding to the number of member states. The judges decide among themselves who shall function as general advocate,<sup>358</sup> cf. Art. 2 of the UEMOA Court Protocol and Art. 7 of the UEMOA Court Statute.

The seat of the UEMOA Court of Justice is in Ouagadougou, cf. Art. 16 of the 1996 UEMOA Court Rules, but it may exercise its functions over all of the territory of UEMOA.

A judge may not carry out any other function that may compromise his or her independence or impartiality, cf. Art. 2 of the UEMOA Court Rules.

In the period 1996-2001, the UEMOA Court gave three advisory opinions and made decisions in six cases, all brought by persons against the UEMOA Commission.<sup>359</sup>

According to Art. 47 of the UEMOA Treaty, the budget for UEMOA includes defraying the costs of the UEMOA Court.

### Jurisdiction

An overview of the various tasks of the UEMOA Court is contained in Art. 27 of the UEMOA Court Statute. According to this provision, it decides on (i) alleged violations by member states of their obligations under the UEMOA Treaty<sup>360</sup>; (ii) annulment of rules, directives and decisions by UEMOA organs;<sup>361</sup> (iii) claims for damages against UEMOA;<sup>362</sup> (iv) conflicts between member states;<sup>363</sup> (v) conflicts between UEMOA and its staff;<sup>364</sup> and (vi) prejudicial references from national courts.<sup>365</sup> Furthermore, the UEMOA Court may, at the request of the UEMOA Commission, comment on drafts; and, at the request of the UEMOA Commission, the UEMOA Council of Ministers, the UEMOA Heads of State and Government or member states, give advice on the compatibility of an international agreement in existence or under negotiation *vis-à-vis* the UEMOA Treaty and on any difficulty with respect to the use or interpretation of the UEMOA Treaty.

Cases concerning alleged violations by member states may be brought by the UEMOA Commission and by member states, cf. Art. 15.1 of the UEMOA Court Rules. Cases concerning the alleged non-legality of UEMOA rules, directives and decisions may be brought by the UEMOA Council of Ministers, the UEMOA Commission, member states, and physical and legal persons, cf. Art. 15.2 of the UEMOA Court Rules. According to Art. 15.3 of the UEMOA Court Rules, the UEMOA Court of Justice may review decisions on sanctions against businesses breaching competition rules and, even though this is not clearly stated, it must be assumed that such businesses can bring cases of this nature

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<sup>358</sup> The office of general advocate is also a feature of the European Court of Justice without, however, the general advocate being one of the judges.

<sup>359</sup> Cf. the website [droit.francophonie.org](http://droit.francophonie.org).

<sup>360</sup> Cf. the UEMOA Court Protocol, Art. 5.

<sup>361</sup> Cf. the UEMOA Court Protocol, Art. 8.

<sup>362</sup> Cf. the UEMOA Court Protocol, Art. 15.

<sup>363</sup> Cf. the UEMOA Court Protocol, Art. 17.

<sup>364</sup> Cf. the UEMOA Court Protocol, Art. 16.

<sup>365</sup> Cf. the UEMOA Court Protocol, Art. 12.

before the UEMOA Court of Justice. As mentioned above, cases may be brought by the personnel of UEMOA and by persons claiming compensation from the UEMOA, cf. Arts. 15.4 and 15.5 of the UEMOA Court Rules.

With respect to prejudicial matters (matters of UEMOA law), the national appeal courts are obliged and the lower courts are allowed to bring such matters before the UEMOA Court of Justice, cf. Art. 15.6 of the UEMOA Court Rules. As mentioned above, both the UEMOA Commission, the UEMOA Council of Ministers, the UEMOA Heads of State and Government, and member states may request advice from the UEMOA Court of Justice, cf. Art. 15.7 of the UEMOA Court Rules. Finally, based on a specific agreement, the UEMOA Court of Justice may decide on conflicts between member states on the interpretation or application of the UEMOA Treaty, cf. Art. 15.8 of the UEMOA Court Rules.

### Human Rights Mandate

As mentioned above, the jurisdiction of the UEMOA Court of Justice only covers matters concerning what could be referred to as *UEMOA law*, meaning the interpretation and application of the UEMOA Treaty and the various UEMOA instruments.

The UEMOA Treaty does contain a reference to the Universal Declaration of Human Rights and the Charter in Art. 3, stating that UEMOA will respect the rights contained in these documents. It also contains some provisions that could be seen to contain human rights elements, such as the right (in principle) to free movement of persons and the right not to be discriminated against due to nationality contained in Art. 91. This means that if decisions, rules or directives of UEMOA violate provisions of said human rights instruments or provisions directly contained in the UEMOA Treaty, member states and physical and legal persons may in principle bring such matters before the UEMOA Court of Justice, cf. above.

There is no possibility for individuals to bring cases on human rights violations by member states before the UEMOA Court of Justice, both because the UEMOA Treaty does not oblige member states to adhere to human rights, cf. Art. 3, and because individuals can only bring cases concerning rules, directives and decisions made by UEMOA organs, not concerning acts of member states.<sup>366</sup>

### Procedure

Based on a reading of the UEMOA Court Statute, the procedure of the UEMOA Court would appear to follow normal standards. The parties are to produce written statements and have right of reply. This is followed by an oral hearing (which may include witnesses, cf. Art. 34 of the UEMOA Court Statute), after which time the general advocate presents his conclusions, cf. Art. 38 of the UEMOA Court Statute. Following this, the UEMOA Court makes its decision.

According to Art. 28 of the UEMOA Court Statute, the working language is French.

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<sup>366</sup> Since all the member states of UEMOA are members of ECOWAS as well, such cases can be brought before the ECOWAS Court, as described in the section on the ECOWAS Court.

Parties other than UEMOA organs and member states (who may be represented by an agent or a lawyer admitted to the bar in a member state) are obliged to be represented by a lawyer admitted in a member state, cf. Art. 29 of the UEMOA Court Statute.

The general rule is that proceedings of the UEMOA Court take place in public, cf. Art. 36 of the UEMOA Court Statute. Judgments are delivered in public, cf. Art. 42 of the UEMOA Court Statute.

Claimants other than UEMOA organs and member states have to pay a deposit at the time the case is brought, cf. Art. 31 of the UEMOA Court Statute. In general, however, the UEMOA Court of Justice does not demand payment for treating cases, cf. Art. 63 of the UEMOA Court Rules.

Ordinarily, the losing party has to pay the costs of the other party, cf. Art. 60 of the UEMOA Court Rules.

According to Art. 65 of the UEMOA Court Rules, the UEMOA Court of Justice may provide judicial assistance to indigent parties.

#### Remedies and Enforceability

No information about the enforceability of the decisions of the UEMOA Court is contained in the UEMOA Court Rules and the UEMOA Court Statute. With respect to UEMOA Court Protocol, the version available on the website of UEMOA<sup>367</sup> misses a number of the articles, and the articles that are available contains no relevant provisions. It has not been possible to obtain a complete version.

The UEMOA Court of Justice is entitled to make interim measures, cf. Art. 72-76 of the UEMOA Court Rules.

#### Cooperation

As mentioned above, UEMOA cooperates with ECOWAS within certain areas,<sup>368</sup> but no information has been found indicating that such cooperation includes the UEMOA Court. No other relevant information has been found.

## **Common Market for Eastern and Southern Africa (COMESA)**

### Introduction

COMESA, the Common Market for Eastern and Southern Africa, was formed in December 1994 by the COMESA Treaty, adopted by 23 countries to replace the former Preferential Trade Area (PTA) from 1981. Currently, COMESA has 19 member states,<sup>369</sup> covering very diverse states from Libya and Egypt in the North through a belt of countries down to Malawi, Zambia and Swaziland and the island

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<sup>367</sup> [www.uemoa.int](http://www.uemoa.int).

<sup>368</sup> As mentioned, there has even been talk of a merger.

<sup>369</sup> The present members of COMESA are Burundi, Comoros, DR Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.

states of Madagascar, Mauritius, Comoros and Seychelles. Several of the member states are members of other RECs, such as EAC, SADC, IGAD, CEN-SAD, etc.<sup>370</sup>

COMESA is one of the RECs that are to be the building blocks of AEC, and it has been accredited as such to the AU.<sup>371</sup>

As the name indicates, COMESA is a common market and, consequently, the predominant focus is on cooperation with respect to economy, trade, etc. In line with this, the aims and objectives as set out in Art. 3 the COMESA Treaty mainly deal with economic matters, but also refer to the “*promotion of peace, security and stability among the Member States*”, albeit to “*enhance economic development in the region*”. Among the main principles, set out in Art. 6, that the member states “*agree to adhere to*”, are “*recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights*”.

According to Art. 7(1), one of the organs of COMESA is the Court of Justice (the COMESA Court). More elaborate provisions on the COMESA Court are set out in Chapter 5, Arts. 19-44, of the COMESA Treaty. The COMESA Court was modelled on the European Court of Justice.<sup>372</sup>

#### Purpose and Function

According to Art. 7 of the COMESA Treaty, the COMESA Court “*shall ensure the adherence to law in the interpretation and application of this Treaty*”.

#### Organisation

Originally, the COMESA Court was placed with the COMESA Secretariat in Lusaka, Zambia, but in 2003, it was decided that it should move to Khartoum. This move was commenced on January 23, 2006 when the COMESA Court took possession of its new permanent seat, but, apparently, had difficulty being fully effectuated with some staff staying in Lusaka;<sup>373</sup> according to a source from July 2006, the move raised doubt as to the continued existence of the COMESA Court.<sup>374</sup> However, according to the Communiqué of the 11<sup>th</sup> COMESA Summit, 15-16 November 2006 in Djibouti, the participants expressed their appreciation that the restructured COMESA Court had commenced hearing cases.

In June 2005, the COMESA Court was expanded to contain both a Court of First Instance (with seven judges) and an Appellate Division (with five judges). Judges for both instances have been elected.<sup>375</sup>

According to Art. 22 of the COMESA Treaty, it is up to the COMESA Authority (the heads of state or government) to remove judges from office. This raises questions as to the judges’ independence.

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<sup>370</sup> For a complete overview, see the penultimate section of this report.

<sup>371</sup> COMESA would roughly correspond to the *Eastern Region*, cf. the 1976 OAU decision CM/Res.464 (XXVI).

<sup>372</sup> Cf. [www.aict-ctia.org](http://www.aict-ctia.org) and LawDevelopment, vol.3, No. 3, July 2006, [www.thecommonwealth.org/shared\\_asp\\_files/uploadedfiles/DC68F8A8-93FD-4117-A2E7-DA37CFB3A943\\_LAWDJuly2006.pdf](http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/DC68F8A8-93FD-4117-A2E7-DA37CFB3A943_LAWDJuly2006.pdf).

<sup>373</sup> Cf. [www.aict-ctia.org/courts\\_subreg/comesa/comesa\\_home.html](http://www.aict-ctia.org/courts_subreg/comesa/comesa_home.html).

<sup>374</sup> According to LawDevelopment, vol.3, No. 3, July 2006, the Court’s non-Muslim staff members were having difficulty adjusting to Sudan’s Sharia law and there were major problems of funding and lack of infrastructure, [www.thecommonwealth.org/shared\\_asp\\_files/uploadedfiles/DC68F8A8-93FD-4117-A2E7-DA37CFB3A943\\_LAWDJuly2006.pdf](http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/DC68F8A8-93FD-4117-A2E7-DA37CFB3A943_LAWDJuly2006.pdf).

<sup>375</sup> Cf. [www.aict-ctia.org/courts\\_subreg/comesa/comesa\\_home.html](http://www.aict-ctia.org/courts_subreg/comesa/comesa_home.html).

The website of the COMESA Court<sup>376</sup> lists seven cases where the COMESA Court has made decisions. It would appear that all the decisions on the website deal with procedural matters; including decisions taking note of settlements, decisions on stay of action, and dismissals for lack of exhaustion of local remedies.

According to Art. 42 of the COMESA Treaty, the COMESA Court is to be financed by the member states, using the same formula as the one for providing funds to the COMESA Secretariat. The budget is to be prepared by the COMESA Court itself and be approved by the COMESA Council.

### Jurisdiction

According to Art. 23 of the COMESA Treaty, the COMESA Court has the jurisdiction “*to adjudicate on all matters which may be referred to it pursuant to this Treaty*”. The specific jurisdiction is set out in Arts. 24-27. These Articles enable (i) member states to bring cases against the COMESA Council of Ministers based on the breach of obligations under or provisions of the COMESA Treaty or on acts, regulations, directives, or decisions being “*ultra vires or unlawful or an infringement of the provision of the Treaty or any rule of law relating to its application or amounts to a misuse or abuse of power*”;<sup>377</sup> (ii) member states as well as the COMESA Secretary General, based on a decision of the COMESA Council of Ministers, to bring cases against member states concerning the breach of obligations under or provisions of the COMESA Treaty;<sup>378</sup> and (iii) legal and natural persons to bring cases concerning the legality of acts, regulations, directives, or decisions of the COMESA Council of Ministers or of member states on the grounds of such acts, regulations, directives, or decisions being “*unlawful or an infringement of the provision of the treaty*”.<sup>379</sup> With respect to cases brought by legal and natural persons against member states, it is a condition that local remedies have been exhausted, cf. Art. 26.

In addition, the COMESA Court has jurisdiction over disputes between COMESA and its employees and over claims against COMESA by third parties, cf. Art. 27. Under certain circumstances, the COMESA Court may have jurisdiction based on agreement by the parties, cf. Art. 28 of the COMESA Treaty. Moreover, under Art. 30, a court in a member state is obliged to ask for a preliminary judgment on questions of COMESA law if a ruling on this matter is necessary to settle the case pending before the national court. Finally, the COMESA Court may provide advisory opinions at the request of the COMESA Authority and Council of Ministers and a member state, cf. Art. 32 of the COMESA Treaty.

Even though it could appear that simple “*unlawfulness*” of an act, directive, decision or regulation is sufficient for a natural or legal person to bring a case against a member state or the COMESA itself (since the reference to the COMESA Treaty from a normal linguistic understanding of the provision only refers to “*infringements*”), cf. Art. 26, it must be assumed that the unlawfulness has to follow from the COMESA Treaty. None of the seven cases being brought before the COMESA Court so far<sup>380</sup>

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<sup>376</sup> Cf. [www.comesa.int/institutions/court\\_of\\_justice/precedents/Judgements/view](http://www.comesa.int/institutions/court_of_justice/precedents/Judgements/view).

<sup>377</sup> Cf. Art. 24.

<sup>378</sup> Cf. Arts. 24-25.

<sup>379</sup> Cf. Art. 26.

<sup>380</sup> According to the website of the COMESA Court, [http://www.comesa.int/institutions/court\\_of\\_justice/](http://www.comesa.int/institutions/court_of_justice/).



provides an answer to this question.<sup>381</sup> One case, Coastal Aquaculture vs. Kenya, might have provided such an answer. In this case, Coastal Aquaculture appeared to demand damages for losses in connection with an investment, among other things due to Kenya's alleged corrupt practices. The information about this lawsuit does not indicate that there was any specific "COMESA-angle",<sup>382</sup> so this might have been an attempt to broaden the use of the COMESA Court by basing suits on breaches of the general principles set out in Art. 6 of the COMESA Treaty, e.g. the duty to adhere to the rule of law. Eventually, however, this case was dismissed due to lack of exhaustion of local remedies.

The wording of Art. 26 would further seem to imply that simple actions or omissions by member states cannot be brought before the COMESA Court by natural or legal persons, even if such actions or omissions are allegedly unlawful under the COMESA Treaty. The wording only refers to "*determination ... [of] the legality of any act, regulation, decision or regulation*" which would seem to rule out mere actions.

As mentioned above, it is a condition for natural and legal persons wanting to bring cases before the COMESA Court against member states that domestic remedies have been exhausted, cf. Art. 26. The case brought before the COMESA Court mentioned above was dismissed exactly for lack of adherence to this condition.

It is not a condition that a case has neither been decided nor is in the process of being decided by another international mechanism. Apparently it was not assumed that such a case could ever occur, given that the main scope of the COMESA Court is to interpret the COMESA Treaty. See about this issue below under Miscellaneous.

### Human Rights Mandate

As mentioned above, with respect to cases against member states, the COMESA Court is only authorised to deal with cases alleging unlawfulness or infringement under the COMESA Treaty, cf. Art. 26. The COMESA Treaty does not contain a "*Bill of Rights*" or similar provision. It does contain some fundamental principles that the member states have agreed to adhere to, one being the "*recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples rights*", cf. Art. 6 (e). Other principles are the "*recognition and observance of the rule of law*" and the "*promotion and sustenance of a democratic system of governance in each Member State*", cf. Art. 6 (g) and (h).

In addition, the COMESA Treaty contains some material provisions that are or could become relevant with respect to human rights. In Chapter 22, Art. 143 about Social and Cultural Affairs, it is stated that the member states shall promote cooperation with respect to, among other things, "*employment and working conditions*", "*labour laws*", the "*provision of facilities for the disabled*", and the "*right of*

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<sup>381</sup> Of these cases, two were settled; one, a case between Eritrea and Ethiopia, have been stayed based on a request by both parties (this case could have been interesting since Eritrea claimed that no breach of the COMESA Treaty was involved); one was brought by an employee against a COMESA organ under the provision giving the COMESA Court specific jurisdiction over such cases; and one was brought by an individual claiming damages for defamation by COMESA. It has not been possible to ascertain the exact theme of the latter case.

<sup>382</sup> Cf. article from Financial Times, 1 August 2001, as found on [http://www.jubileeresearch.org/jmi/jmi-corruption/company\\_Kenyan\\_government\\_court.htm](http://www.jubileeresearch.org/jmi/jmi-corruption/company_Kenyan_government_court.htm).

*association and collective bargaining*”; it is further stated that the COMESA Council shall adopt a social charter. Such a social charter does not seem to have been adopted yet, but it could well contain certain human rights.

Chapter 24, Arts. 154-145 deal with women in development and business. These articles give the member states certain specific obligations, among other things to “*through appropriate legislative and other measures ... (b) eliminate regulations and customs that are discriminatory against women and specifically regulations and customs which prevent women from owning land and other assets*” and “*(c) promote effective education awareness programmes aimed at changing negative attitudes towards women*”.

Chapter 28, Art. 164, on free movement of persons, labour and services, contains provisions according to which the member states agree to take the necessary measures to progressively reach free movement of persons, etc. and to conclude a protocol on the free movement of persons, labour, services, rights of establishment, and rights of residence. According to the 2006 Annual Report of COMESA, this protocol was adopted in 2001, but at the end of 2006 it had only been signed by four countries. Pending the implementation of this protocol, the Protocol on the Gradual Relaxation and Eventual Elimination of Visa Requirements within the PTA remains in force.

As set out in Art. 26 of the COMESA treaty, natural and legal persons may bring cases against member states based on alleged violations of the COMESA Treaty by national acts, regulations, directives or decisions. It must be assumed that national acts, regulations, directives or decisions that are allegedly contrary to any of the provisions of the COMESA Treaty, including the provision protecting women’s right not to be discriminated against, can be brought before the COMESA Court. The same must be the case with respect to alleged violations of the protocol on the free movement of persons, labour, services, rights of establishment and rights of residence and of the COMESA social charter, once in force (even though Art. 26 specifically refers to the “*provisions of this Treaty*”).

It remains to be seen whether the references to the Charter and to the rule of law and democratic governance in Art. 6 are sufficient to enable natural and legal persons to bring cases alleging breach of said principles (in fact alleged breach of the Charter) by member states before the COMESA Court, or if such references will be found to be mere expressions of principles that are not intended to be legally binding or justiciable.<sup>383</sup> It could also be argued that since all states inevitably commit breaches against human rights, a “reasonable” number of breaches would not mean that a country had breached the “*principle*” of recognition of human rights, cf. Art. 6 of the COMESA Treaty; on the other hand, massive human rights violations committed with the full knowledge of the rulers of a country would conceivably be a breach of such principle.

In any event, it should be kept in mind that mere actions by member states are arguably not part of the jurisdiction of the COMESA Court as Art. 26 only refers to “*act, decision, directive or regulation*”.

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<sup>383</sup> In his presentation at the Conference of East and Southern African States on the Protocol Establishing the African Court on Human and Peoples’ Rights, Gaborone, Botswana, 9-10 December 2003, Chidi A. Odinkalu, a Nigerian human rights lawyer and currently the senior legal officer for Africa Open Society Justice Initiative, presented the view that treaty provisions as the ones in the COMESA Treaty do give the relevant court the mandate to adjudicate on human rights matters.

This would mean that whereas an act (a law) by a member state containing provisions contrary to the Charter could arguable be brought before the COMESA Court, mere actions breaching the Charter (such as state-sponsored torture, infringements of the right to free speech, etc.) could not be brought before the COMESA Court.

The COMESA Treaty does not contain any specification of the sources of law that may be used by the COMESA Court. Consequently, it is up to the COMESA Court to decide on the extent to which it will take sources of law outside the COMESA Treaty into consideration; e.g. when deciding on the correct understanding on the provision on women in the COMESA Treaty. There is no requirement that the COMESA judges have any knowledge of human rights law.<sup>384</sup> This is unsurprising as the main area of the COMESA Treaty and, consequently, of the COMESA Court is not human rights, but it does make the likelihood that the COMESA judges will notice human rights issues smaller than would otherwise have been the case.

As yet, these issues have not been decided by the COMESA Court. It has, however, touched upon certain matters of human rights in its jurisprudence, e.g. the right to access to justice and legal remedies, the right to administrative justice, and the right to property.<sup>385</sup>

#### Procedure

Based on a reading of the 2003 Rules of the COMESA Court,<sup>386</sup> the procedure of the COMESA Court would appear to follow ordinary standards. The parties are to produce written statements to the Court and have right of reply. This is followed by an oral hearing after which time the Court will make its ruling.

According to Art. 43 of the COMESA Treaty, the official languages of the COMESA Court are English, French and Portuguese. According to Art. 33, a party appearing before the Court must be represented by counsel; in rule 25 of the 2003 Rules, it is further specified that such counsel must be a lawyer entitled to practice in a member state. In general, judgments shall be delivered in public sessions, cf. Art. 31; since it is stated in the 2003 Rules that certain things, such as the judges' deliberations, take place in closed session,<sup>387</sup> it must be assumed that other proceedings are done in public session.

With regard to evidence, this may be provided by the presentation of documents, statements in court by parties and witnesses, expert reports and inspections, and the COMESA Court may itself take steps to obtain the necessary information.<sup>388</sup>

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<sup>384</sup> According to Art. 20 of the COMESA Treaty, the judges of the Court shall be persons of "*impartiality and independence who fulfil the conditions required for the holding of high judicial office in their respective countries of domicile or who are jurists of recognised competence*".

<sup>385</sup> Cf. speech by Lord Justice Kalaile, "Building Effective Strategies: The Role of Regional and Sub-Regional Organizations in strengthening judicial systems", delivered at the conference African Dialogue II, 24-26 May 2002.

<sup>386</sup> Based on the decision to establish an appellate division, the 2003 Rules will have to be amended.

<sup>387</sup> Cf. rule 19 of the 2003 Rules.

<sup>388</sup> Cf. rule 39 of the 2003 Rules.

As a main rule, proceedings before the COMESA Court are free.<sup>389</sup> Between the parties, the party losing the case shall pay the costs of the winning party as per decision by the COMESA Court. The COMESA Court can also decide to split the costs as it sees fit, based on the results on the merits.<sup>390</sup>

#### Remedies and Enforceability

The judgments of the COMESA Court are binding upon the COMESA Council and the member states, and the COMESA Court may impose sanctions to force compliance, cf. Art. 24 of the COMESA Treaty.

The COMESA Court may award pecuniary damages. Such awards are enforceable in member states according to their normal rules on enforceability of judgments, cf. Art. 40 of the COMESA Treaty.

The COMESA Court is entitled to make binding interim decisions, cf. Art. 35 of the COMESA Treaty. According to Art. 34, once a case has been brought before the Court, the member states shall refrain from actions that will aggravate the dispute or be detrimental to its resolution. In one case, this was used as sufficient authority for the COMESA Court to order the stay of execution of a decision by the appeal court of a member state.<sup>391</sup>

#### Cooperation

No information has been found concerning the extent to which the COMESA Court cooperates with other mechanisms, civil society or others. With respect to donors, USAID provided assistance to facilitate the completion of the new organisational structure, necessitated by the decision in 2004 to divide the COMESA Court into a first instance tribunal and an appellate division.<sup>392</sup>

As mentioned above, COMESA is one of the RECs that are accredited to AU as one of the building blocks of AEC. In this respect, there is collaboration between COMESA and other RECs, notably the East African Community (EAC) and the South African Development Community (SADC), among other things to harmonise programmes and solve any contradictions due to overlapping membership, which is fairly common.<sup>393</sup> At this stage, there is no information that any such cooperation involves the COMESA Court.

#### Miscellaneous

As mentioned above, some countries that are member of COMESA are also members of other RECs. Overlapping membership could lead to more than one court considering itself competent to deal with the same case; which could, in principle, lead to conflicting results. If and when the courts of the RECs deal exclusively with interpretation of the treaties and other instruments of their “own” REC, such conflict cannot appear, but to the extent that the courts of RECs (start to) consider themselves able to adjudicate on matters pertaining e.g. to the Charter (for instance because of a reference to the Charter as

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<sup>389</sup> Cf. rule 65 of the 2003 Rules.

<sup>390</sup> Cf. rule 62 of the 2003 Rules.

<sup>391</sup> Cf. Standard Chartered Financial Services, A.D. Gregory and C.A. Cahill vs. Court of Appeal for the Republic of Kenya.

<sup>392</sup> Cf. COMESA Annual Report 2004, p. 39.

<sup>393</sup> Cf. COMESA Annual Report 2006, p. 59.

contained in the COMESA Treaty), there is a risk of conflicting jurisdiction and jurisprudence, both among the courts of the RECs and between REC courts and the Commission and the African Court..

## **East African Community (EAC)**

### Introduction

The East African Community (EAC) came into being with the entry into force of the EAC Treaty on 7 July 2000. The member states at that time were Kenya, Tanzania and Uganda, countries with a history of cooperation going back to 1917 and a first East African Community in the years 1967-1977. As of 1 July 2007, Burundi and Rwanda are also members of EAC.<sup>394</sup>

Like COMESA, EAC is an REC, accredited as such to the AU. It does not, however, correspond directly to one of the five AU regions.<sup>395</sup> Apart from Tanzania, all the members of EAC are also members of COMESA. Some of the members are also members of other RECs.<sup>396</sup>

According to Art. 5.2 of the EAC Treaty, the member states shall establish first a customs union, then a common market followed by a monetary union, and, ultimately, a political federation. The objectives of EAC are “*widening and deepening cooperation among the Partner States in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs*”, cf. Art. 5.1. As can be seen, the scope of cooperation is very broad.

Since the Summit of Heads of State 27-29 August 2004 in Nairobi, it has been considered to use a so-called “*fast track mechanism*” to reach the ultimate goal of a political federation

Among the fundamental principles, set out in Art. 6, that shall “*govern the achievement of the objectives of the Community by the Partner States*” are “*good governance, including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights*”. Moreover, the member states “*undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights*”, cf. art 7.2.

One of the organs of EAC is the East African Court of Justice (the EAC Court), cf. Art. 9.1. Among the other organs of EAC are a Summit, consisting of the heads of state or government, a Council, containing the relevant ministers, and a Legislative Assembly. More elaborate provisions on the EAC Court may be found in Chapter 8, Art. 23-47, of the EAC Treaty. These provisions seem to be modelled on the provisions on the COMESA Court in the COMESA Treaty with certain provisions having identical wording.

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<sup>394</sup> Cf. Communiqué of extraordinary summit, 20 August 2007, in Arusha.

<sup>395</sup> Cf. CAMEI/Consol.Report/(I), consolidated report of the First Conference of African Ministers of Economic Cooperation, 27-28 March 2006.

<sup>396</sup> For a complete overview, see the penultimate section of this report.

### Purpose and Function

According to Art. 23 of the EAC Treaty, the EAC Court “*shall ensure the adherence to law in the interpretation and application of and compliance with this Treaty*”.

### Organisation

The first six judges of the EAC Court were sworn in on 30 November 2001. Their temporary seat is in Arusha at the Secretariat of the EAC. The judges are only in session when the need arises.<sup>397</sup> The number of judges has since been increased to ten with the inclusion of Burundi and Rwanda as members of EAC.<sup>398</sup> By decisions of November and December 2006, the EAC Summit decided to split the EAC Court into a Court of First Instance and an Appellate Division and at the Summit in June 2007 it was decided that for the time being, one of the judges from each member state should become a judge of the Appellate Division, making the number of judges of each division five. According to Art. 140.4 of the EAC Treaty, the judges serve on an ad-hoc basis until otherwise decided by the EAC Council.

An important difference as compared to the COMESA Treaty is that whereas it is the COMESA Authority that single-handedly decides on the removal of judges, thus encroaching on the independence of the COMESA judges, the similar organ of EAC, the EAC Summit, may only make such decisions based on the recommendation by an ad hoc independent tribunal of “*three eminent judges from within the Commonwealth of Nations*”, appointed by the EAC Summit, cf. Art. 26 of the EAC Treaty.

The changes made in the EAC Treaty, both in order to accommodate the increase of member states from three to five and to establish an appellate division, have not been available. It follows, however, from the Communiqué of the Summit in November 2006 that the Court of First Instance shall have the jurisdiction originally set out for the one-instance EAC Court in Art. 23 of the EAC Treaty. Consequently, it can be assumed that the main provisions (such as jurisdiction, conditions to bring cases, etc.) will not be changed, apart from the fact that it will be possible to appeal within the framework of the EAC Court.

The EAC Court received its first case in December 2005.<sup>399</sup> This case was decided in October 2006. The website of the EAC Court mentions three more cases, two of which have been decided on the merits.

The EAC Court is financed via the normal budget of the EAC. Out of the total EAC budget for the financial year 2006-7 of USD 20,609,962, proposed by the EAC Council to the EAC Legislative Assembly, USD 724,576 was proposed allocated to the EAC Court.<sup>400</sup>

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<sup>397</sup> Cf. the website of the EAC Court, [www.eac.int/court.htm](http://www.eac.int/court.htm).

<sup>398</sup> Cf. the Communiqué of the EAC Summit in June 2007.

<sup>399</sup> Cf. [www.aict-ctia.org/courts\\_subreg/eac/eac\\_home.html](http://www.aict-ctia.org/courts_subreg/eac/eac_home.html).

<sup>400</sup> Cf. the budget speech of the Chairman of the Council of Ministers to the EAC Legislative Assembly delivered 25 May 2006, [www.eac.int/EAC\\_budget\\_speech\\_may\\_06.pdf](http://www.eac.int/EAC_budget_speech_may_06.pdf).

## Jurisdiction

The EAC Court shall “initially have jurisdiction over the interpretation and application of this Treaty”, cf. Art. 27.1 of the EAC Treaty. According to Art. 27.2, the EAC Court shall “have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date”, and a protocol shall be concluded by the member states to “operationalise the extended jurisdiction”. Since human rights is specifically mentioned among the areas that can be brought under the jurisdiction of the EAC Court at a later stage, this would indicate that the EAC Court cannot deal with such matters at the present time; see more about this below under Human Rights Mandate.

The specific jurisdiction is set out in Arts. 28-32 of the EAC Treaty. Art. 28 enables member states to bring cases against member states and EAC organs and institutions based on the breach of obligations under or provisions of the EAC Treaty. Art. 29 enables the EAC Secretary-General, based on a decision of the EAC Council, to bring similar cases against member states. Art. 30 enables legal and natural persons to bring cases concerning the legality of acts, regulations, directives, decisions, or actions<sup>401</sup> of an EAC institution or of member states on the basis of such acts, regulations, directives, decisions or actions being “unlawful or ... an infringement of the provision of this Treaty”; subject to the provisions of Art. 27. Contrary to what is the case for the COMESA Court, there is no demand for exhaustion of domestic remedies. Furthermore, the EAC Court has jurisdiction over disputes between EAC and its employees, cf. Art. 31. Under certain circumstances, the EAC Court can also have jurisdiction based on agreement between the parties, cf. Art. 32 of the EAC Treaty. Under Art. 34, a court in a member state is obliged to ask for a preliminary judgment on questions of EAC law if a ruling on this matter is necessary to settle the case pending before the national court. Finally, the EAC Court may provide advisory opinions at the request of the EAC Summit, the EAC Council or a member state, cf. Art. 36.

Even though it could appear that simple “unlawfulness” of an act, directive, decision, regulation or action is sufficient for a natural or legal person to bring a case against a member state or an EAC institution (since the reference to the EAC Treaty from a normal linguistic understanding of the provision only refers to “infringements”), cf. Art. 30, it must be assumed that the unlawfulness has to follow from the EAC Treaty, cf. also the reference to Art. 27 in Art. 30. This is supported by the following quote from the EAC Court’s ruling on interim provisions in the case Professor Peter Anyang’ Nyong’o and ten others vs. the Attorney General of the Republic of Kenya and 5 others: “It is common ground that by virtue of Article 27(1) of the Treaty, this Court has jurisdiction over the interpretation and application of the Treaty. Under Article 30 of the Treaty, the Court is empowered to exercise that jurisdiction by determining the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community referred to it on the ground that it is unlawful or it infringes provisions of the Treaty”.<sup>402</sup>

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<sup>401</sup> The similar provision in the COMESA Treaty does not mention actions, see above.

<sup>402</sup> To be found on [http://www.eac.int/EACJ\\_rulling\\_on\\_injunction\\_ref\\_No1.pdf](http://www.eac.int/EACJ_rulling_on_injunction_ref_No1.pdf). The issue was also directly raised in the third case that has been decided on the merits by the EAC Court, Christopher Mtikila vs. the Attorney General of the Republic of Tanzania and the Secretary General of EAC, but the Court did not rule specifically on this issue when dismissing the case for lack of jurisdiction; to be found on [www.eac.int/EACJ\\_reference\\_No2\\_2007.pdf](http://www.eac.int/EACJ_reference_No2_2007.pdf).

It is not a condition to bring a case under Art. 30 that the person bringing the case has been personally wronged, cf. the decision on the merits in Professor Peter Anyang' Nyong'o and ten others vs. the Attorney General of the Republic of Kenya and five others.<sup>403</sup>

It is not a condition for jurisdiction that a case has neither been decided nor is in the process of being decided by another international mechanism. Conceivably, it was not assumed that such a case could ever occur, given that the main scope of the EAC Court is to interpret the EAC Treaty. See about this issue below under Miscellaneous.

### Human Rights Mandate

With respect to cases against member states, as mentioned above, the EAC Court is only authorised to deal with cases about alleged unlawfulness or infringement in relation to the EAC Treaty, cf. Arts. 27 and 30. The EAC Treaty does not contain a “*Bill of Rights*” or similar provision. As mentioned above, it does contain some fundamental principles that the member states have undertaken to abide by, including “*the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights*”, cf. Art. 7.2. Art. 6 includes “*the recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights*”.

In addition, the EAC Treaty contains some material provisions that are or could become relevant with respect to human rights. In Chapter 16, Art. 102.2, about development of human resources, science, and technology, it is stated that the member states shall “*collaborate in putting in place education and training programmes for people with special needs and other disadvantaged groups*”.

Chapter 17, Art. 104 on free movement of persons, labour and services contains provisions according to which the member states agree to adopt measures to achieve free movement of persons, etc. and to conclude a protocol on the free movement of persons, labour, services, rights of establishment and rights of residence. According to the website of the EAC,<sup>404</sup> the negotiations on such a protocol commenced in March 2006.

Chapter 22, Arts. 121-122 deal with women in development and business. These Articles give the member states certain specific obligations, including to “*through appropriate legislative and other measures ... (b) abolish legislation and discourage customs that are discriminatory*” and “*(c) promote effective education awareness programmes aimed at changing negative attitudes towards women*”.

As set out in Art. 30 of the EAC treaty, natural and legal persons may bring cases against member states based on alleged violations of the EAC Treaty by national acts, regulations, directives, decisions, or actions. It must be assumed that national acts, regulations, directives, decisions, or actions that are allegedly contrary to any of the specific provisions of the EAC Treaty, including the provision protecting women’s right not to be discriminated against, can be brought before the EAC Court. The same

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<sup>403</sup> “*It is important to note that none of the provisions in the three Articles [Arts. 28-30] requires directly or by implication the claimant to show a right or interest that was infringed and/or damage that was suffered as a consequence of the matter complained of in the reference. We are not persuaded that there is any legal basis on which this Court can import or imply such requirement into Article 30*”; to be found on [www.eac.int/EACJ\\_reference\\_No1\\_2006.pdf](http://www.eac.int/EACJ_reference_No1_2006.pdf).

<sup>404</sup> [www.eac.int](http://www.eac.int).



must be the case with respect to alleged violations of the protocol on the free movement of persons, labour, services, rights of establishment and rights of residence, once adopted and in force (the specific reference to the “*provisions of this Treaty*” in Art. 30 cannot have been meant to exclude jurisdiction with respect to EAC protocols).

The provision in Art. 27.2 giving the EAC Council the right to expand the jurisdiction of the EAC Court to include human rights, among other things, cannot be assumed to limit the jurisdiction of the EAC Court to directly consider provisions of the EAC Treaty, even if such provisions deal with human rights. The contents of Art. 27.2 could, however, be used as an argument against using the references in Arts. 6 and 7.2 to “*the maintenance of universally accepted standards of human rights*” and “*the recognition, promotion and protection of human and peoples rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights*”, etc. as a means of enabling natural and legal persons to bring cases alleging breach of said principles by member states before the EAC Court.

In any event, it remains to be seen whether the references to the Charter and to human rights and other principles in Arts. 6 and 7.2 are sufficient to enable natural and legal persons to bring cases alleging breach of said principles (in fact, alleged breach of the Charter) by member states before the EAC Court, or if such references will be found to be mere expressions of principles that are not intended to be legally binding or justiciable,<sup>405</sup> also in light of Art. 27.2. It could also be argued that since all states inevitably breach human rights, a “reasonable” number of breaches would not mean that a country had breached the principles in Art. 6 and 7.2; on the other hand, massive human rights violations, done with the full knowledge of the rulers of a country, would conceivably be a breach of such principles. In one of its decisions, the EAC Court has acknowledged that the principles in Art. 6 shall be taken into account when interpreting the specific provisions of the EAC Charter.<sup>406</sup>

With respect to the protocol that according to Art. 27.2 should be concluded to “*operationalise the extended jurisdiction*”, the EAC Secretariat has made a draft for this protocol. According to a transcript of the discussions of the EAC Legislative Assembly 28 September 2005, this draft includes provisions for original jurisdiction of the EAC Court, human rights jurisdiction, appellate jurisdiction and other jurisdiction, including alternative dispute resolution. Apparently, the draft had been discussed by the Attorney Generals of the then member states who had decided that broad consultations were necessary. It was also mentioned in the Legislative Assembly that there was a need to harmonise with the AU strategy on human rights. According to the transcript, the consultation process had been started with the draft protocol being distributed to the EAC Court, the national judiciaries, the bar associations, the national parliaments, the business communities, etc.

The EAC Treaty does not contain any specification of the sources of law that may be used by the EAC Court. This means that it is up to the EAC Court to decide on the extent to which it will take sources of law outside the EAC Treaty into consideration, e.g. when deciding on the correct understanding on the

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<sup>405</sup> As mentioned with respect to COMESA, in his presentation at the Conference of East and Southern African States on the Protocol Establishing the African Court on Human and Peoples’ Rights, 9-10 December 2003, Chidi A. Odinkalu presented the view that such treaty provisions do give the relevant court the mandate to adjudicate on human rights matters.

<sup>406</sup> Professor Peter Anyang’ Nyong’o and 10 others vs. the Attorney General of the Republic of Kenya and 5 others, found on [www.eac.int/EACJ\\_reference\\_No1\\_2006.pdf](http://www.eac.int/EACJ_reference_No1_2006.pdf), where the EAC Court stated that the provision on the election of members of the East African Legislative Assembly should be interpreted in light of Art. 6.

provision on women in the EAC Treaty. There is no requirement that the EAC judges have any knowledge of human rights law.<sup>407</sup> This is unsurprising as the main area of the EAC Treaty and, consequently, of the EAC Court is not human rights, but it does make the likelihood that the EAC judges will notice human rights issues smaller than would otherwise have been the case.

### Procedure

Based on a reading of the 2004 Rules of the EAC Court,<sup>408</sup> the procedure of the EAC Court would appear to follow normal standards. The parties are to produce written statements to the EAC Court and have right of reply. This is followed by an oral hearing, after which time the EAC Court will make its ruling.

According to Art. 42 of the EAC Treaty, the official language of the EAC Court is English. According to Art. 33, a party appearing before the Court may be represented by an advocate admitted to the superior court of a member state. In rule 15 of the 2004 Rules, it is specified that a party may also appear in person or be represented by a representative who is not a lawyer. Judgments shall be delivered in public sessions, cf. Art. 35; according to rule 58 of the 2004 Rules, the general rule is that all proceedings of the EAC Court take place in open sessions.

Witnesses may be heard during the oral pleadings, cf. rule 55 of the 2004 Rules, but the costs for this must be paid by the party requesting the witness, cf. rule 56.

The general rule is that the applicant has to pay a fee to the EAC Court to lodge a case, cf. rule 80 of the 2004 Rules. Such fees may be waived if the EAC Court is satisfied that the applicant lacks the necessary means and has a “*reasonable possibility of success*”, cf. rule 82. The fees are set out in the third schedule to the 2004 Rules. To provide an idea, the minimum fee for filing a case is USD 400. Between the parties, the general rule is that the losing party shall bear the costs, cf. rule 75.

### Remedies and Enforceability

The judgments of the EAC Court are final and binding, cf. Art. 35.1 of the EAC Treaty. According to Art. 38.3, member states and the EAC Council shall immediately take all necessary measures to implement a judgement of the EAC Court. Unlike the COMESA Court, the EAC Court does not have the direct authority to proscribe sanctions against a party that defaults in implementing a judgment.

The EAC Court may award pecuniary damages. Such awards are enforceable in member states according to their normal rules on enforceability of judgments, cf. Art. 44 of the EAC Treaty.

The EAC Court is entitled to make binding interim decisions, cf. Art. 39 of the EAC Treaty, and have in fact done so in the case of Professor Peter Anyang’ Nyong’o and 10 others vs. the Attorney General of the Republic of Kenya and 5 others. In this decision in November 2006, the EAC Court ordered the clerk of the East African Legislative Assembly and the secretary general of EAC not to recognise the

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<sup>407</sup> According to Art. 24.1 of the EAC Treaty, the judges of the EAC Court shall be persons of “*proven integrity, impartiality and independence ... who fulfil the conditions required in their own countries for the holding of such high judicial office, or who are jurists of recognised competence*”.

<sup>408</sup> These rules will have to be amended, due to the establishment of an appellate division.

nine members elected to represent Kenya in the East African Legislative Assembly as members and not to let them take part in any functions of the East African Legislative Assembly, pending final decision.<sup>409</sup>

According to Art. 38.2, once a case has been brought before the EAC Court, the member states shall refrain from actions that will aggravate the dispute or be detrimental to its resolution.

### Cooperation

No information has been found concerning the extent to which the EAC Court cooperates with other mechanisms, civil society or others. As stated above, however, some sort of consultation procedure involving civil society was also commenced in connection with the proposed protocol to increase the mandate of the EAC Court, cf. Art. 27.2 of the EAC Treaty.

### Miscellaneous

As mentioned above, EAC is one of the RECs accredited to AU as one of the “building blocks” of the African Economic Community. In this respect, there is as mentioned above collaboration between EAC and other RECs, notably COMESA and SADC. At this stage, there is no information that any such cooperation involves the EAC Court.

As mentioned above, overlapping membership could lead to more than one court considering itself competent to deal with the same case and this could, in principle, lead to conflicting results. The risk of this happening will naturally increase should a protocol increasing the mandate of the EAC Court as envisaged by Art. 27.2 of the EAC Treaty be adopted. As long as the courts of the RECs deal only with interpretation of the treaties and other documents of their “own” REC, such conflict cannot appear, but to the extent the courts of RECs (start to) consider themselves able to adjudicate on matters pertaining e.g. to the Charter (for instance because of a reference to the Charter as contained in the EAC Treaty), the risk of such conflicts exists, both between different REC courts and between such courts and the African Court and the Commission.

## **Southern African Development Community (SADC)**

### Introduction

SADC, the Southern African Development Community, was established with the signing of the Treaty of the Southern African Development Community in August 1992 in Windhoek, Namibia. The SADC Treaty was amended in August 2001. SADC is based on the Southern African Development Co-ordination Conference, SADCC, established in April 1980. Currently, SADC has 14 member states.<sup>410</sup> Of the member states, seven are also members of COMESA and some are members of other RECs.<sup>411</sup>

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<sup>409</sup> Cf. the ruling as available on [http://www.eac.int/news\\_2006\\_11\\_\\_EACJ\\_ruling\\_on\\_kenya\\_EALA\\_mps.pdf](http://www.eac.int/news_2006_11__EACJ_ruling_on_kenya_EALA_mps.pdf).

<sup>410</sup> Angola, Botswana, DR Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe.

<sup>411</sup> For a complete overview, see the penultimate section of this report.

Like ECOWAS, COMESA and EAC, SADC is one of the RECs that are to be the building stones of AEC, and it is accredited as such to the AU.<sup>412</sup>

Unlike the EAC Treaty, for instance, the SADC Treaty (which is relatively short) does not set out specific goals such as a customs union, a common market, or a political union. Rather, Art. 5 of the SADC Treaty sets out a number of objectives, such as the promotion of growth, common political values, development and employment, the fight against HIV/AIDS and other deadly diseases, the mainstreaming of gender, and a list of mostly non-specific steps to reach such goals, such as harmonisation of policies and creation of appropriate institutions. One more specific step is the development of policies to progressively eliminate obstacles to free movement of capital, labour, goods, services, and the people of the region.

According to Art. 4 of the SADC Treaty, among the principles that SADC and its member states “*shall act in accordance with*” are “*human rights, democracy and the rule of law*”. Art. 6 sets out certain “*general undertakings*”; among others that member states undertake to “*refrain from taking any measure likely to jeopardise the sustenance of its principles*”; and that member states shall not “*discriminate against any person on grounds of gender, religion, political views, race, ethnic origin, culture, ill health, disability, or such other ground as may be determined by the Summit*”.

Among the organs of SADC is the SADC Tribunal, cf. Art. 9.1. SADC also has a Summit, containing the heads of state or government; a Council, containing in principle the foreign minister of each member state; and a Secretariat. The basic provisions on the SADC Tribunal are found in Art. 16 of the SADC Treaty. According to this Article, the composition, powers, functions, procedures, and other relevant matters shall be set out in a Protocol. Such a protocol (the SADC Protocol) was signed 7 August 2000 in Windhoek. As part of the 2001 amendments of the SADC Treaty, the SADC Protocol became an integral part of the SADC Treaty; this meant that specific ratification of the SADC Protocol was no longer necessary. Rules of Procedure are attached to the SADC Protocol and constitute an integral part of the SADC Protocol, cf. Art. 23 of the SADC Protocol.

#### Purpose and Function

According to Art. 16 of the SADC Treaty, the SADC Tribunal shall “*ensure adherence to and the proper interpretation of the provisions of this Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it*”.

#### Organisation

The SADC Tribunal consists of five regular judges and five alternate judges who can be called upon to sit if a regular judge is unavailable, cf. Art. 3 of the SADC Protocol. Initially, the judges shall only sit when necessary, but the SADC Council may decide to change the SADC Court to a permanent tribunal, based on its workload, cf. Art. 6.3 of the SADC Protocol. The first judges were sworn in on 18 November 2005,<sup>413</sup> The seat of the SADC Tribunal is Windhoek,<sup>414</sup> but (like the ECOWAS Court) the

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<sup>412</sup> It roughly corresponds to the *Southern Region*, cf. the OAU 1976 decision CM/Res.464 (XXVI).

<sup>413</sup> Cf. [www.aict-ctia.org/courts\\_subreg/sadc/sadc\\_home.html](http://www.aict-ctia.org/courts_subreg/sadc/sadc_home.html).

<sup>414</sup> Cf. the website of the SADC Tribunal, [www.sadc.int/tribunal](http://www.sadc.int/tribunal)

Tribunal may in particular cases decide to sit any other place within SADC, cf. Art. 13 of the SADC Protocol.

According to Art. 9 of the SADC Protocol, the judges may not have any political or administrative function that can interfere with their impartiality or independence. A judge may only be dismissed according to the rules set out in the Rules of Procedure, cf. Art. 8.3 of the SADC Protocol. Neither the Protocol nor the Rules of Procedure contains any further rules on dismissal. Consequently, it is not clear how, if at all, a judge can be removed from his position.

The SADC Court was ready to receive cases in April 2007 and has yet to receive its first case.<sup>415</sup>

According to Art. 33 of the SADC Protocol, the funding of the SADC Tribunal shall come from the regular budget of SADC. According to the website of the SADC Tribunal, the budget is separate from the budget of the SADC Secretariat “to ensure independence and efficient operation” and is as such “subscribed to ... by the Member States”.<sup>416</sup>

### Jurisdiction

The SADC Tribunal shall have “*jurisdiction over all disputes and all applications referred to it in accordance with the Treaty and this Protocol which relate to (a) the interpretation and application of the Treaty; (b) the interpretation, application or validity of the Protocols, all subsidiary instruments adopted within the framework of the Community, and acts of the institutions of the Community; (c) all matters specifically provided for in any other agreements that States may conclude among themselves or within the community and which confer jurisdiction on the Tribunal*”, cf. Art. 14 of the SADC Protocol.

According to Art. 15.1 of the SADC Protocol, the SADC Tribunal shall “*have jurisdiction over disputes between States, and between natural or legal persons and States*”. For natural or legal persons bringing cases against states, it is a condition that domestic remedies have been exhausted, cf. Art. 15.2. With respect to disputes between SADC and member states, between SADC and natural or legal persons, and between SADC and its staff, the SADC Tribunal shall have exclusive jurisdiction, cf. Arts. 17-19. Under Art. 16, national courts in the member states may ask the SADC Tribunal for preliminary rulings on questions of SADC law. Finally, the SADC Tribunal may provide advisory opinions at the request of the SADC Summit or the SADC Council of Ministers.

It is not a condition for jurisdiction that a case has neither been decided nor is in the process of being decided by another international mechanism. Presumably, it was not assumed that such a case could ever occur, given that the main scope of the SADC Tribunal is to interpret SADC law. See about this issue below under Miscellaneous.

### Human Rights Mandate

As mentioned above, the jurisdiction of the SADC Tribunal only covers matters concerning what could be referred to as *SADC law*, meaning the interpretation and application of the SADC Treaty and all

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<sup>415</sup> Cf. [www.aict-ctia.org/courts\\_subreg/sadc/sadc\\_home.html](http://www.aict-ctia.org/courts_subreg/sadc/sadc_home.html). No cases are mentioned on the SADC website.

<sup>416</sup> Cf. [www.sadc.int/tribunal/organisation.php](http://www.sadc.int/tribunal/organisation.php).

other SADC instruments, and matters specifically referred to the Tribunal, cf. Art. 14 of the SADC Protocol. The SADC Treaty does not contain a *Bill of Rights* or similar provision. As mentioned above, it does contain some fundamental principles that the member states shall “*act in accordance with*”, such as “*human rights, democracy and the rule of law*”, cf. Art. 4 of the SADC Treaty.

In addition, the SADC Treaty contains one material provision on human rights, namely the prohibition in Art. 6 against discrimination on the grounds of gender, religion, race, etc.

On 26 August 2003, the member states signed the Charter of Fundamental Social Rights in SADC (the SADC Social Charter)<sup>417</sup> which entered into force on signature, cf. Art. 17. According to Art. 3.1, the SADC Social Charter “*embodies the recognition by governments, employers and workers in the Region of the universality and indivisibility of basic human rights proclaimed in instruments such as the United Nations Universal Declaration of Human Rights, the African Charter on Human and Peoples’ Rights, the Constitution of the ILO, the Philadelphia Declaration and other relevant international instruments*”. The member states “*undertake to observe the basic rights referred to in this Charter*”, cf. Art. 3.2.

According to the various articles of the SADC Social Charter, the member states shall “*create an enabling environment*” to ensure freedom of association and collective bargaining (Art. 4); equal treatment of men and women (Art. 6); protection of children and young people (Art. 7); livelihood and non-discrimination of elderly persons (Art. 8); assistance to disabled persons (Art. 9); social protection for workers and unemployed (Art. 10); minimum living, health and safety standards (Arts. 11-12); information, consultation and participation of workers (Art. 13); equitable remuneration (Art. 14); and education and training (Art. 15).

It follows from Art. 16 of the SADC Social Charter that the responsibility for the implementation “*lies with national tripartite institutions and regional structures*”; meaning governments, employers’ organisations and employees’ organisations, cf. Art. 2.1. This, and the emphasis on the somewhat unspecific obligation to create “*enabling environments*”, could support the argument that the SADC Social Charter does not contain judiciable obligations for the member states. This might be the case for most of the provisions; yet arguably, at least Art. 3.2, whereby the member states “*undertake to observe the basic rights referred to in this Charter*”, does contain a legal obligation on the member states with the only uncertainty being exactly which rights are “*basic*” and which are “*referred to in the Charter*”. It could also be argued that since the SADC Social Charter is not subject to a ratification procedure as is normally the case for legally binding international instruments, it is in its entirety not a legally binding document.

The Social Charter does not refer to the SADC Tribunal, but it must be assumed to fall under the “*subsidiary instruments adopted within the framework of the Community*”, cf. Art. 14 of the SADC Protocol.

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<sup>417</sup> Four member states, Angola, Botswana, DR Congo and Zambia, did not sign the SADC Social Charter during the summit in August 2003 because they needed time to consider the financial implications of the Charter, cf. Booklet 1 of Information and Strategy Guide for Asian Multinationals in Africa, [www.somo.nl/html/paginas/pdf/Garment\\_workers\\_africa\\_booklet1\\_EN.pdf](http://www.somo.nl/html/paginas/pdf/Garment_workers_africa_booklet1_EN.pdf). According to the website of SADC, Angola and Botswana still have not signed the SADC Social Charter.

SADC has adopted a large number of protocols. Unlike the SADC Social Charter, the protocols all need ratification to come into force. None of them specifically deals with human rights, but some of them contain human rights provisions. Arts. 12.1 and 12.3 of the Protocol on Culture, Information and Sports,<sup>418</sup> for instance, oblige states to take certain steps to promote indigenous languages, and Art. 20 obliges states to take “*necessary measures to ensure the freedom and independence of the media*”. The Protocol on Extradition<sup>419</sup> prohibits extradition, e.g. if there are substantial reasons to believe that the demand is made in order to prosecute a person based on race, religion, etc; or if the person has been or would be subject to torture or similar treatment or has not received or will not receive a fair trial as set out in Art. 7 of the Charter, cf. Art. 4. The Protocol on Forestry,<sup>420</sup> among other things, entitles communities dependant on forests to share in the management and the benefits, cf. Art. 4.10. Similarly, Art. 2.8 of the Protocol on Mining<sup>421</sup> sets out that the states shall “*promote economic empowerment*” of the disabled, women and indigenous peoples in the mining sector.

If a member state violates any of the specific provisions of the SADC Treaty (including the provision on discrimination in Art. 6), in the SADC Social Charter (if considered legally binding), or in a binding Protocol, it must be assumed that natural and legal persons in the SADC territory can bring such issues before the SADC Tribunal (assuming that all relevant conditions, including exhaustion of domestic remedies, have been fulfilled).

In principle, a member state will be violating Art. 4 of the SADC Treaty if it does not act in accordance with “*human rights*” and, arguably, it should therefore be possible for natural and legal persons to bring such cases before the SADC Tribunal. Unlike the COMESA Treaty and the EAC Treaty that both refer to the Charter, the reference in the SADC Treaty is not specific, but only mentions “*human rights*”. Should the SADC Tribunal consider itself mandated to adjudicate on alleged violations of Art. 4, it is entitled to use not only the SADC Treaty, protocols and subsidiary instruments, but also to “*develop its own Community jurisprudence having regard to applicable treaties, general principles and rules of public international law and any rules and principles of the law of States*”, cf. Art. 21. It must be assumed that e.g. the Charter, having been ratified by all the members of SADC, can be taken into account and, consequently, used to define “*human rights*”.

The SADC Tribunal could also decide to view the reference in Art. 4 as a non-judiciable principle, outside its scope of jurisdiction. Another possibility would be to argue that since all states inevitably breach human rights, a “reasonable” number of breaches would not mean that a country had breached the “*principle*” of acting in accordance with human rights, cf. Art. 4 of the SADC Treaty; on the other hand, massive human rights violations, committed with the full knowledge of the rulers of a country, would be a breach of such principles.

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<sup>418</sup> The Protocol on Culture, Information and Sport was signed 14 August 2001, but has yet to come into force, cf. the website of SADC, [www.sadc.int/english/documents/legal/protocols/status.php](http://www.sadc.int/english/documents/legal/protocols/status.php) (information as at 12 October 2004).

<sup>419</sup> The Protocol on Extradition was signed 3 October 2002, but has yet to come into force, cf. the website of SADC.

<sup>420</sup> The Protocol on Forestry was signed 3 October 2002, but has yet to come into force, cf. the website of SADC.

<sup>421</sup> The Protocol on Mining was signed 8 September 1997 and came into force 10 February 2000. Angola, DR Congo and Swaziland are yet to ratify/accede to this protocol, cf. the website of SADC.

### Procedure

Based on a reading of the SADC Protocol and the attached Rules of Procedure, the procedure of the SADC Tribunal would appear to follow normal standards. The parties are to produce written statements to the Tribunal and have right of reply. This is followed by an oral hearing after which time the SADC Tribunal will make its ruling.

According to Art. 22 of the SADC Protocol, the working languages of the SADC Tribunal are English, Portuguese and French.

According to Art. 27 of the SADC Protocol, a party appearing before the SADC Tribunal shall be represented by an agent. Neither the Protocol nor the Rules of Procedure contains any provision on who may be an agent for a party.

The general rule is that all proceedings of the SADC Tribunal take place in public, cf. rule 45.1 of the Rules of Procedure. Judgments are also delivered in public, cf. rule 57.

Witnesses may be heard during the oral pleadings, cf. rule 49 of the Rules of Procedure, but the party requesting the witness may have to deposit the expected costs.

The general rule is that proceedings before the SADC Tribunal are free, cf. rule 79 of the Rules of Procedure. Between the parties, the general rule is that the parties each pay their own legal costs, cf. Art. 29 of the SADC Protocol and rule 78 of the Rules of Procedure.

The SADC Tribunal may make a default decision if a duly summoned party fails to appear, cf. Art. 25 of the SADC Protocol and rule 68 of the Rules of Procedure.

### Remedies and Enforceability

The decisions and rulings of the SADC Tribunal are final, binding, and enforceable; cf. Arts. 24.3 and 32.3 of the SADC Protocol. According to Art. 32.1, judgments shall be enforced in member states in the same way as foreign judgements; and, cf. Art. 32.2, the member states and the institutions of SADC shall take all necessary measures to execute decisions of the SADC Tribunal. The SADC Tribunal does not have authority to proscribe sanctions against a party in default, but may refer such a matter to the SADC Summit for appropriate action, cf. Art. 32.5.

The SADC Tribunal is entitled to “*order the suspension of an act challenged before the Tribunal and may take other interim measures as necessary*”, cf. Art. 28 of the SADC Protocol. The President of the SADC Tribunal is to decide whether he/she will make such decision him-/herself or refer it to the SADC Tribunal, cf. rule 63 of the Rules of Procedure.

### Cooperation

According to the website of the SADC Tribunal, the SADC Tribunal envisages to attract international partners (presumably including donors) at a later stage.<sup>422</sup> No information has been found concerning the extent to which the SADC Tribunal cooperates with other mechanisms, civil society or others.

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<sup>422</sup> Cf. [www.sadc.int/tribunal/organisation.php](http://www.sadc.int/tribunal/organisation.php).



### Miscellaneous

As mentioned above, SADC is one of the RECs that are accredited to AU as one of the “building blocks” of AEC. In this respect, there is as mentioned above collaboration between SADC and other RECs, notably COMESA and EAC. At this stage, there is no information that any such cooperation involves the SADC Tribunal.

As mentioned above, overlapping membership could lead to more than one court considering itself competent to deal with the same case and this could, in principle, lead to conflicting results. If and when the courts of the RECs only deal with interpretation of the treaties and other documents of their “own” REC, such conflict cannot appear, but to the extent that the court of an REC starts to consider itself able to adjudicate on matters pertaining e.g. to the Charter (for instance because of a reference to “*human rights*” as contained in the SADC Treaty), there is a risk, both of conflicts with the courts of other RECs and with the Commission and the African Court.

## **Economic and Monetary Community of Central Africa (CEMAC)**

### Introduction

The Economic and Monetary Community of Central Africa, better known under its French acronym, CEMAC,<sup>423</sup> was established with the signing of the CEMAC Treaty 16 March 1994 in N’Djamena, Chad. It consists of the Economic Union of Central Africa, also better known under its French acronym, UEAC,<sup>424</sup> and the Monetary Union of Central Africa, more known under its French acronym, UMAC.<sup>425</sup> The constituent documents of the UEAC and the UMAC are the UEAC Convention and the UMAC Convention, entered into in Libreville, Gabon, on 5 July 1996. The member states are Cameroon, Central African Republic, Chad, Congo-Brazzaville, Equatorial Guinea, and Gabon. CEMAC is the continuation of the Customs and Economic Union of Central Africa, normally referred to using its French acronym, UDEAC,<sup>426</sup> from 1964. It appears that the documents exist only in French versions.<sup>427</sup>

In contrast to ECOWAS, COMESA, EAC, and SADC, CEMAC is not accredited to AU. The Central African REC that is accredited to AU is ECCAS, the Economic Community of Central African States. All members of CEMAC are also members of ECCAS, and one member state is a member of CEN-SAD.<sup>428</sup> On 24 January 2003, the European Union concluded a financial agreement with ECCAS and CEMAC, conditional on ECCAS and CEMAC merging into one organisation.<sup>429</sup> This merger has yet to take place.

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<sup>423</sup> Communauté Economique et Monétaire de l’Afrique Centrale.

<sup>424</sup> Union Economique de l’Afrique Centrale.

<sup>425</sup> Union Monétaire de l’Afrique Centrale.

<sup>426</sup> Union Douanière et Economique de l’Afrique Centrale.

<sup>427</sup> Even though Art. 7 of the CEMAC Treaty states that it exists in French, English and Portuguese with the French version being the authentic in case of divergences.

<sup>428</sup> For a complete overview, see the penultimate section of this report.

<sup>429</sup> Cf. ECCAS-profile from Institute for Security Studies (ISS), [www.iss.co.za/AF/RegOrg/unity\\_to\\_union/pdfs/eccas/ECCASoverview.pdf](http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/eccas/ECCASoverview.pdf).

The CEMAC Treaty is very short, only containing seven Articles. According to Art. 2, the four organs of CEMAC are UEAC, UMAC, the CEMAC Parliament, and the CEMAC Court of Justice, comprising a Legal Chamber (the CEMAC Legal Chamber) and an Audit Chamber.

According to the CEMAC Treaty, the objective of CEMAC is to promote the harmonious development of the member states within UEAC and UMAC, cf. Art. 1. The objectives of UEAC are to create a common market with free movement of goods, services, capital and persons, increase competitiveness, coordinate economic policy, and coordinate policies and take common steps within agriculture, fishing, industry, trade, tourism, research, and education, cf. Art. 2 of the UEAC Convention. The main function of UMAC is to continue the monetary union that has existed since 1945 when most of the territory of UMAC was under French rule with the Franc CFA<sup>430</sup> as the common currency.

Unlike the treaties establishing ECOWAS, COMESA, SADC, and EAC, the treaties establishing CEMAC, UEAC and UMAC do not refer to human rights or similar provisions among the principles of these organisations.

As mentioned above, one of the organs of CEMAC is the CEMAC Court. CEMAC also has, among other organs, a Parliament, a Conference of Heads of State, and a Council of Ministers. The specific provisions on the CEMAC Court can be found in the CEMAC Court Convention, dated 5 July 1996, and the CEMAC Court Statute<sup>431</sup> of 14 December 2000.

#### Purpose and Function

According to Art. 5, the CEMAC Legal Chamber shall assure the rule of law in the interpretation and application of the CEMAC Treaty and the attached conventions. According to the UEAC Convention, Art. 73, the CEMAC Court is responsible for the legal and budgetary control of the UEAC, and according to Art. 74, the CEMAC Legal Chamber shall deal with cases concerning the application of the UEAC Convention. According to Art. 2 of the CEMAC Court Convention, the CEMAC Court is responsible for the legal control and the budgetary performance of the CEMAC institutions, including assuring the respect for the provisions of the CEMAC Treaty and the UMAC and UEAC Conventions among the member states and the CEMAC institutions and organs; the control of the accounts of CEMAC; the achievement (by its decisions) of harmonisation of jurisprudence within the relevant areas and the contribution (by its advisory function) of harmonisation of the relevant national legislation; and the solution of disputes concerning its competence.

#### Organisation

The CEMAC Legal Chamber consists of six judges, elected for six years, cf. Art. 12 of the CEMAC Court Convention. The CEMAC Court was established on 25 June 1999 and has been operational since 14 December 2000.<sup>432</sup> The seat of the CEMAC Court is N'Djamena, Chad, but it may exercise its functions over all of the territory of CEMAC, cf. Art. 5 of the CEMAC Court Statute.

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<sup>430</sup> The Franc CFA (Franc des Colonies Françaises d'Afrique) is the common name used for for two different currencies, the Franc CFA used in UMAC with code XOF and the Franc CFA used in UEMOA (West Africa) with code XAF. Even though these currencies have the same name and value and are both pegged to the Euro, based on an agreement with France, they have not been freely interchangeable since 1993. Information from [fr.wikipedia.org/wiki/Franc\\_CFA](http://fr.wikipedia.org/wiki/Franc_CFA).

<sup>431</sup> Acte Additionnel no. 06/00/CEMAC-041-CCE-CJ-02.

<sup>432</sup> Cf. [www.aict-ctia.org/courts\\_subreg/cemac/cemac\\_home.html](http://www.aict-ctia.org/courts_subreg/cemac/cemac_home.html).

According to Art. 17 of the CEMAC Court Statute, a judge may not carry out any other function that may compromise his or her independence or impartiality.

The CEMAC Court has decided 22 cases and given 5 advisory opinions.<sup>433</sup>

The budget of the CEMAC Court is incorporated in the regular budget of CEMAC, cf. Art. 30 of the CEMAC Court Convention.

### Jurisdiction

The CEMAC Legal Chamber makes final (last instance) judgments in cases of violation of the CEMAC Treaty and the UEAC and UMAC Conventions; it makes final (last instance) decisions on disputes on the interpretation of the CEMAC Treaty and the UEAC and UMAC Conventions; it adjudicates as first and last instance between CEMAC and its officials; and it is court of appeal for certain cases involving the Central African Banking Commission, cf. Art. 4 of the CEMAC Court Convention. It may give advisory opinions, cf. Art. 6. According to Art. 21, it is competent in cases concerning damages incurred by the organs of CEMAC and its officials.

According to Art. 14 of the CEMAC Court Convention, the CEMAC Legal Chamber can receive cases on the violation of the CEMAC Treaty and the UEAC and UMAC Conventions from member states, organs of CEMAC, and natural and legal persons who can demonstrate a legitimate and concrete interest in a case. A party to a case may claim the illegality of any legal act of a member state or an organ of CEMAC, cf. Art. 14.

The CEMAC Legal Chamber may be asked to provide pre-judicial decisions to assist courts and similar organs in member states, cf. Art. 17; and in some cases national courts are obliged to request the interpretation by the CEMAC Legal Chamber.

### Human Rights Mandate

As mentioned above, the jurisdiction of the CEMAC Legal Chamber only covers matters concerning what could be referred to as *CEMAC law*, meaning the interpretation and application of the CEMAC Treaty and the UEAC and UMAC Conventions. Neither of these instruments contains any provisions on human rights. Consequently, the CEMAC Legal Chamber does not presently have any human rights mandate.

### Procedure

The procedure of the CEMAC Legal Chamber may be found in its Rules of Procedure of 14 December 2000.<sup>434</sup>

Based on a reading of the CEMAC Legal Chamber Rules of Procedure, the procedure of the CEMAC Legal Chamber would appear to follow normal standards. The parties are to produce written statements

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<sup>433</sup> Cf. [www.aict-ctia.org/courts\\_subreg/cemac/cemac\\_home.html](http://www.aict-ctia.org/courts_subreg/cemac/cemac_home.html).

<sup>434</sup> Acte Additionnel no. 4/00/CEMAC-041-CCE-CJ-02.

to the CEMAC Legal Chamber and have right of reply. This is followed by an oral hearing, after which time the CEMAC Legal Chamber will make its ruling.

According to Art. 6 of the CEMAC Court Statute, the working language is French.

The general rule is that proceedings of the CEMAC Legal Chamber take place in public, cf. rule 61 of the Rules of Procedure. The judgment is always delivered in public.

The losing party has to pay the costs of the case, cf. rule 91 of the Rules of Procedure. In order to bring a case, a deposit of CFA 100,000<sup>435</sup> must be made initially to cover costs, cf. rule 21.

### Remedies and Enforceability

The member states and the CEMAC organs are obliged to take all steps necessary to execute judgments of the CEMAC Legal Chamber, cf. Art. 16 of the CEMAC Court Convention. In case of non-conformity, the matter may be brought by any member state and by any organ of the CEMAC before the Conference of Heads of State.

The CEMAC Legal Chamber is entitled to make interim measures, cf. Art. 25 of the CEMAC Court Convention.

### Cooperation

No information has been provided about cooperation. See below about the proposed merger of CEMAC and ECCAS.

### Miscellaneous

As mentioned above, there have been discussions to merge CEMAC and ECCAS. In principle, ECCAS should have a court, but this court has never been established. Since the CEMAC Court is already operational, it would appear logical that in case of a merger the CEMAC Court would become the court for the merged organisation, albeit with the necessary changes.

During the summit in April 2006, it was decided to make institutional reforms within CEMAC.<sup>436</sup> As part of these reforms, changes might be made that will affect the CEMAC Court.

## **Economic Community of Central African States (ECCAS)**

The Economic Community of Central African States, ECCAS or, by its French acronym, CEEAC,<sup>437</sup> was established with the signing of the Treaty establishing the Economic Community of Central African States (the ECCAS Treaty) on 18 October 1983 in Libreville, Gabon. The ECCAS Treaty came

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<sup>435</sup> Approximately EUR 150.

<sup>436</sup> Cf. [www.aict-ctia.org/courts\\_subreg/cemac/cemac\\_home.html](http://www.aict-ctia.org/courts_subreg/cemac/cemac_home.html).

<sup>437</sup> Communauté Économique des États d'Afrique Centrale.

into force on 18 December 1984.<sup>438</sup> In the beginning, lack of funds<sup>439</sup> compromised the work of EC-CAS, and from 1992, ECCAS was largely inactive because of the conflict in the Great Lakes Area.<sup>440</sup> In 1998, steps were taken to revitalise ECCAS, and in 1999, ECCAS opened official relations with AU. ECCAS is thus accredited with AU and considered one of the building blocks of AEC, being the REC that is meant to cover the Central African Region.<sup>441</sup> The current member states are Angola, Burundi, Cameroon, Central African Republic, Chad, Congo-Brazzaville, DR Congo, Equatorial Guinea, Gabon, Rwanda, and São Tomé & Príncipe. Several of its member states are also members of other RECs<sup>442</sup>.

ECCAS aims at promoting and strengthening “*harmonious cooperation and balanced and self-sustained development in all fields of economic and social activity*”, and in order to do so, it shall abolish trade barriers; establish common external tariffs; have a common trade policy; create free movement of persons, goods, services and capital; harmonise various policies; establish a Cooperation and Development Fund; develop the least advanced countries; and carry out other relevant activities, cf. Art. 4.

Its principles, as set out in Art. 3, are to “*observe the principles of international law governing relations between States, in particular the principles of sovereignty, equality and independence of all States, good neighbourliness, non-interference in their internal affairs, non-use of force to settle disputes and the respect of the rule of law in their mutual relations*”. As can be seen, there is no reference to human rights or similar provisions.

According to Art. 7, one of the organs of ECCAS shall be a Court of Justice. Arts. 16-18 contain further provisions on this Court. According to Art. 16.2, it shall “*ensure that the law is observed in the interpretation and application of this Treaty and shall decide disputes submitted to it under this Treaty*”. This is further specified in Art. 16.3 that sets out the Court’s tasks to be to “*a) ensure the legality of the decisions, directives and regulations of Community institutions; b) decide on actions brought by a Member State or the Conference on the grounds of lack of competence, misuse of powers or infringement of an essential procedural requirement of this Treaty; c) give preliminary rulings on: - the interpretation of this Treaty; - the validity of the decisions, directives and regulations formulated by Community institutions; d) give advisory opinions on any legal matter at the request of the Conference or Council.*”. These powers may be increased by decision of the Conference of Heads of State, which is also supposed to determine membership, procedure and statutes of the Court of Justice, cf. Art. 18 of the ECCAS Treaty.

According to the website of ECCAS,<sup>443</sup> the Court is not yet functioning. Apparently, no steps have been taken to establish the Court. As mentioned above, if and when the merger between CEMAC and

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<sup>438</sup> Cf. [www.aict-ctia.org/courts\\_subreg/eccas/eccas\\_home.html](http://www.aict-ctia.org/courts_subreg/eccas/eccas_home.html).

<sup>439</sup> Due to missing payments from the member states.

<sup>440</sup> Mainly the civil war in DR Congo, which found member states on different sides.

<sup>441</sup> Cf. ECCAS profile from Institute for Security Studies (ISS), [en.wikipedia.org/wiki/Economic\\_Community\\_of\\_Central\\_African\\_States](http://en.wikipedia.org/wiki/Economic_Community_of_Central_African_States), and CAMEI/Consol.Report/(I), consolidated report of the First Conference of African Ministers of Economic Cooperation, 27-28 March 2006.

<sup>442</sup> All the members of CEMAC are for example members of ECCAS. For a complete overview, see the penultimate section of this report.

<sup>443</sup> [www.ceeac-eccas.org/index.php?lang=fr&pageId=2](http://www.ceeac-eccas.org/index.php?lang=fr&pageId=2).

ECCAS becomes a reality, it would appear logical to use the existing CEMAC Court as a court for the merged organisation.

Should the ECCAS Court of Justice one day be established, based on the current instruments of EC-CAS, it appears that it would not have any mandate to make decisions on human rights violations.

### **Arab Maghreb Union (AMU)**

The Arab Maghreb Union (AMU)<sup>444</sup> was established by signature of the AMU Treaty 17 February 1989. Its members are Algeria, Libya, Mauritania, Morocco, and Tunisia. Several of its members are also members of other RECs.<sup>445</sup> Due to various disagreements, among others between Algeria and Morocco<sup>446</sup> with respect to Western Sahara, the Council of Heads of State has not met officially since 1994,<sup>447</sup> and it would thus appear that AMU is not particularly active. AMU is accredited to AU.<sup>448</sup>

AMU was established with the long-term purpose of creating a common market with free circulation of persons, services, goods, and capital, cf. Art. 2 of the AMU Treaty. The AMU Treaty also refers to other forms of cooperation, e.g. with respect to defence and culture, cf. Art. 3.

One of the organs of AMU is a Court of Justice<sup>449</sup> with seat in Mauritania and consisting of ten judges, two from each member state, cf. Art. 13 of the AMU Treaty. According to Art. 13, the Council of Heads of State and the member states may refer cases to the AMU Court, and the AMU Court has the competence to decide on the interpretation and use of the AMU treaty and other agreements entered into within the framework of AMU; the judgments are executable and final. Apart from this, the AMU Court shall provide advice on legal questions at the request of the Council of Heads of State of AMU. There is no right for anyone but the member states and the Council of Heads of State to bring cases before the AMU Court.

The AMU Court was established in 1990, but has not heard any cases in public or publicised any decisions.<sup>450</sup>

The AMU treaty does not contain any references to human rights. On the contrary, it is a duty for the member states not to allow any activity or organisation on their soil that could endanger the security, territorial integrity or political system of any member state, cf. Art. 15 of the AMU Treaty. The reference to “political system” could be construed as applying to groups that are working with peaceful

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<sup>444</sup> The official language is Arab. It would appear that French is more widely used than English, making the name Union de Maghreb Arabe (UMA).

<sup>445</sup> For an overview, see the penultimate section of this report.

<sup>446</sup> As mentioned above, Morocco is the only African state that is not a member of the AU.

<sup>447</sup> Cf. the website of AMU, [uma.leguide.ma/en/uma.cfm](http://uma.leguide.ma/en/uma.cfm), and [en.wikipedia.org/wiki/Arab\\_Maghreb\\_Union](http://en.wikipedia.org/wiki/Arab_Maghreb_Union)

<sup>448</sup> Cf. CAMEI/Consol.Report/(I), consolidated report of the First Conference of African Ministers of Economic Cooperation.

<sup>449</sup> Called a Judicial Authority.

<sup>450</sup> Cf. [www.aict-ctia.org/courts\\_subreg/amu/amu\\_home.html](http://www.aict-ctia.org/courts_subreg/amu/amu_home.html).

means against the government of a member state; consequently, the article could be used to legitimise acts encroaching on the right to free speech and other human rights.

In conclusion, the court of the Arab Maghreb Union does not have any competence with respect to human rights, and cases cannot be brought before the court by anyone but the presiding council of AMU and the member states.

## **Inter-Governmental Authority on Development (IGAD)**

The Inter-Governmental Authority on Development (IGAD) was established on 21 March 1996 by the Agreement establishing the Inter-Governmental Authority on Development (IGAD) as a successor to the Inter-Governmental Authority on Development and Draught (IGADD). According to its website, IGAD shall be involved in food security and environmental protection, promotion and maintenance of peace and security and humanitarian affairs, and economic cooperation and integration. The current members are Djibouti, Ethiopia, Kenya, Somalia, Sudan, and Uganda with Eritrea having suspended its membership in 2007.<sup>451</sup> Several of its members are also members of other RECs.<sup>452</sup> IGAD is accredited to the AU, but does not correspond to one of the five African regions as defined by the AU.<sup>453</sup>

According to Art. 6A of the IGAD Agreement, one of the principles to which the member states reaffirm their commitment is the “*Recognition, promotion and protection of human and people’s rights in accordance with the provisions of the African Charter on Human and People’s Rights*”. IGAD does not have a court or similar body.

## **Indian Ocean Commission (IOC)**

The Indian Ocean Commission (IOC)<sup>454</sup> was established in 1982. Its purpose is to strengthen the friendly ties between the members, to strengthen their financial development, and to safeguard their interests in various relations. The current members are island states in the Indian Ocean: Comoros, Madagascar, Mauritius, Seychelles, and France as the ruling power of Réunion.<sup>455</sup> IOC is not accredited to the AU. Apart from France, all the members of IOC are also members of COMESA, and some of its members are also members of other RECs.<sup>456</sup> IOC does not have a court or similar body.

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<sup>451</sup> Cf. [en.wikipedia.org/wiki/Intergovernmental\\_Authority\\_on\\_Development](http://en.wikipedia.org/wiki/Intergovernmental_Authority_on_Development).

<sup>452</sup> All the members of IGAD, apart from Somalia, are also members of COMESA; in addition, Kenya and Uganda are members of EAC.

<sup>453</sup> Cf. CAMEI/Consol.Report/(I), consolidated report of the First Conference of African Ministers of Economic Cooperation.

<sup>454</sup> Also known under its French name and acronym, Commission de l’Océan Indien (COI).

<sup>455</sup> Information from the website of IOC, [www.coi-ioc.org](http://www.coi-ioc.org).

<sup>456</sup> For a complete overview, see the penultimate section of this report.

## **Southern African Customs Union (SACU)**

The Southern African Customs Union (SACU) was established in 1910. The current agreement governing SACU is the 2002 Southern African Customs Union (SACU) Agreement, entered into on 21 October 2002. Apart from establishing a customs union, the objectives of SACU include to facilitate the movement of goods, to enhance economic development, and to facilitate the development of common policies and strategies, cf. Art. 2 of the SACU Agreement. The current members are Botswana, Lesotho, Namibia, South Africa, and Swaziland, all members of SADC.<sup>457</sup> SACU is not accredited to the AU.<sup>458</sup>

The SACU Agreement does not contain any references to human rights. Furthermore, SACU does not have a permanent court or tribunal, but only an ad hoc tribunal that may be used to settle any disputes regarding the interpretation or application of the SACU Agreement, cf. Art. 13. While this is not absolutely clear, it would appear that only SACU and its member states can refer cases to this ad hoc tribunal.

## **Economic Community of the Great Lakes Countries (CEPGL)**

The Economic Community of the Great Lakes Countries,<sup>459</sup> better known under its French acronym CEPGL, was established on 20 September 1976 by Burundi, DR Congo and Rwanda.<sup>460</sup> CEPGL suspended its activities in 1996 due to the war in DR Congo,<sup>461</sup> but in April 2007, it was agreed to relaunch it.<sup>462</sup> The purpose of CEPGL is to assure the security of the member states and their populations; carry out mutually beneficial activities; promote trade and the circulation of goods and persons; and assure cooperation within a broad section of areas, cf. Art. 2 of the CEPGL Convention. CEPGL is not accredited to the AU and does not correspond to any of the five African regions.<sup>463</sup>

According to Arts. 24-30 of the CEPGL Convention, CEPGL shall have a permanent commission of arbitration to assure the correct interpretation and application of the CEPGL Convention. It would appear from Art. 26 that this commission can only make decisions on conflicts between member states. Moreover, the commission is not mentioned on the website of CEPGL<sup>464</sup> and would not appear to have been established. Finally, the CEPGL Convention does not contain any references to human rights.

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<sup>457</sup> In addition, Swaziland is member of COMESA.

<sup>458</sup> Cf. CAMEI/Consol.Report/(I), consolidated report of the First Conference of African Ministers of Economic Cooperation.

<sup>459</sup> In French Communauté économique des Pays des Grands Lacs.

<sup>460</sup> Burundi, DR Congo and Rwanda are all members of COMESA and ECCAS. In addition, DR Congo is a member of SADC and Burundi and Rwanda of EAC.

<sup>461</sup> Cf. D'une CEPGL à une autre : quelles alternatives dans les stratégies actuelles d'intégration et de coopération pour le développement? by Arsène Mwaka Bwenge, found on [www.codesria.org/Links/conferences/general\\_assembly11/papers/bwenge.pdf](http://www.codesria.org/Links/conferences/general_assembly11/papers/bwenge.pdf).

<sup>462</sup> Cf. article on 18 April 2007 in [/www.rwandagateway.org/article.php3?id\\_article=5121](http://www.rwandagateway.org/article.php3?id_article=5121).

<sup>463</sup> Cf. CAMEI/Consol.Report/(I), consolidated report of the First Conference of African Ministers of Economic Cooperation.

<sup>464</sup> [www.cepgl.com](http://www.cepgl.com).



## Community of Sahel-Saharan States (CEN-SAD)

The Community of Sahel-Saharan States (CEN-SAD)<sup>465</sup> was established on 4 February 1998. Currently, it has 23 member states, covering not only North African, but also West African states.<sup>466</sup> Most of its member states are also members of other RECs.<sup>467</sup> The objective of CEN-SAD is to establish a comprehensive economic union; including freedom of movement of goods, services, and persons and cooperation within education and certain other fields. CEN-SAD is accredited to the AU, but does not correspond to one of the five African regions.<sup>468</sup>

According to its website,<sup>469</sup> CEN-SAD does not have a tribunal, court or similar organ. Furthermore, no reference to human rights is contained on its website.<sup>470</sup>

## Mano River Union (MRU)

The Mano River Union<sup>471</sup> (MRU) was established on 3 October 1973 by the signing of the Mano River Declaration.<sup>472</sup> The purpose was to further the economic cooperation between the member states, including to establish a customs union.<sup>473</sup> The current members are Guinea, Liberia and Sierra Leone, countries that are all members of other RECs.<sup>474</sup> Due to the conflicts involving the member states, MRU did not function properly for a long period.<sup>475</sup> During a summit on 12 November 1998, it was decided to revive it.<sup>476</sup> A similar decision to reactivate it was taken at a summit 20 May 2004<sup>477</sup>. MRU is not accredited to the AU and does not correspond to any of the five African regions.<sup>478</sup>

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<sup>465</sup> CEN-SAD stands for the first letters in Arabic of the words Sahel and Sahara, cf. [www.africanfront.com/CEN-SAD.php](http://www.africanfront.com/CEN-SAD.php).

<sup>466</sup> The current members are Benin, Burkina Faso, Central African Republic, Chad, Côte d'Ivoire, Djibouti, Egypt, Eritrea, Gambia, Ghana, Guinea Bissau, Liberia, Libya, Mali, Morocco, Niger, Nigeria, Senegal, Sierra Leone, Somalia, Sudan, Togo, and Tunisia.

<sup>467</sup> For a complete picture, see the penultimate section of this report.

<sup>468</sup> Cf. CAMEI/Consol.Report/(I), consolidated report of the First Conference of African Ministers of Economic Cooperation.

<sup>469</sup> [www.cen-sad.org](http://www.cen-sad.org).

<sup>470</sup> In spite of various efforts, it has not been possible to locate a copy of the constituent documents.

<sup>471</sup> Mano River forms the border between Liberia and Sierra Leone, the original members.

<sup>472</sup> Cf. [unpan1.un.org/intradoc/groups/public/documents/IDEP/UNPAN010227.pdf](http://unpan1.un.org/intradoc/groups/public/documents/IDEP/UNPAN010227.pdf).

<sup>473</sup> Cf. [www.mbendi.co.za/orgs/cfbt.htm](http://www.mbendi.co.za/orgs/cfbt.htm).

<sup>474</sup> The member states are all members of ECOWAS. In addition, Liberia and Sierra Leone are members of CEN-SAD. During a summit 1 May 2007, Côte d'Ivoire expressed interest in joining MRU, cf. press release of 1 May 2007 from Sierra Leone, [www.statehouse-sl.org/pressreleases/mru-sum-conakry-2007.html](http://www.statehouse-sl.org/pressreleases/mru-sum-conakry-2007.html).

<sup>475</sup> Cf. [en.wikipedia.org/wiki/Mano\\_River\\_Union](http://en.wikipedia.org/wiki/Mano_River_Union)

<sup>476</sup> Cf. Final Communiqué, [www.sierra-leone.org/mano1.html](http://www.sierra-leone.org/mano1.html).

<sup>477</sup> Cf. [en.wikipedia.org/wiki/Mano\\_River\\_Union](http://en.wikipedia.org/wiki/Mano_River_Union).

<sup>478</sup> Cf. CAMEI/Consol.Report/(I), consolidated report of the First Conference of African Ministers of Economic Cooperation.

During a summit 1 May 2007, reactivation of MRU was again on the agenda, including the reorganisation of the MRU Secretariat.<sup>479</sup> Since MRU at this time does not have a (well-functioning) secretariat, it would seem certain that MRU does not have anything resembling a court or a tribunal.

## **Organisation for the Harmonisation of Business Law in Africa (OHADA)**

### Introduction

The Organisation for the Harmonisation of Business Law in Africa, better known under its French acronym, OHADA,<sup>480</sup> was established with the signing of the OHADA Treaty 17 October 1993 in Port Louis, Mauritius. It is open to all African countries, but its current 16 member states are mostly French-speaking and from the western part of Africa.<sup>481</sup> It is not an REC but, as the title indicates, an organisation meant to harmonise business law in Africa.<sup>482</sup> This is done by issuing so-called Uniform Acts that are adopted by unanimous vote by the member states, cf. Art. 8 of the OHADA Treaty. Uniform Acts are directly applicable in the member states and override national provisions.

The organs of OHADA are a Council of Ministers, assisted by the Office of the Permanent Secretary, and the Common Court of Justice and Arbitration (the OHADA Court), cf. Art. 3 of the OHADA Treaty. It also has a Regional Training Centre for Legal Officers. The specific provisions on the OHADA Court can be found in the Rules of Procedure, adopted 18 April 1996 in N'Djamena, and in the Arbitration Rules, adopted 11 March 1999 in Ouagadougou.

### Purpose and Function

According to Art. 14 of the OHADA Treaty, the OHADA Court is a court of final appeal with respect to the interpretation and enforcement of the OHADA Treaty, OHADA regulations, and OHADA Uniform Acts. Furthermore, any member state, as well as the OHADA Council, may consult the OHADA Court on all matters of interpretation and enforcement of said legal instruments.

With respect to arbitration, it appoints arbitrators in certain cases and makes various decisions, if necessary, cf. Arts. 21-25. No further mention will be made of the OHADA Court's role with respect to arbitration.

### Organisation

The OHADA Court consists of seven judges, elected for seven years and re-eligible once, cf. Art. 31 of the OHADA Treaty. One judge is elected each year. The OHADA Court has been operational since 18 April 1996.<sup>483</sup> Its seat is in Abidjan, Côte d'Ivoire, but it may meet in other places on the territory of a member state with the prior consent of that member state, cf. Art. 19 of the Rules of Procedure.

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<sup>479</sup> Cf. press release of 1 May 2007 from Sierra Leone, [www.statehouse-sl.org/pressreleases/mru-sum-conakry-2007.html](http://www.statehouse-sl.org/pressreleases/mru-sum-conakry-2007.html).

<sup>480</sup> Organisation pour l'Harmonisation du Droit des Affaires en Afrique.

<sup>481</sup> The members are Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo-Brazzaville, Côte d'Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea Bissau, Mali, Niger, Senegal, and Togo.

<sup>482</sup> Cf. [www.aict-ctia.org/courts\\_subreg/ohada/ohada\\_home.html](http://www.aict-ctia.org/courts_subreg/ohada/ohada_home.html).

<sup>483</sup> Cf. [www.aict-ctia.org/courts\\_subreg/cemac/cemac\\_home.html](http://www.aict-ctia.org/courts_subreg/cemac/cemac_home.html).

According to its website,<sup>484</sup> the OHADA Court has made 1,711 decisions.

The OHADA Court prepares its own budget, to be approved by the OHADA Council of Ministers, cf. Art. 45 of the OHADA Treaty.

### Jurisdiction

The appellate courts of member states, as well as the parties to cases before the appellate courts in member states, may bring cases concerning the interpretation and enforcement of the OHADA Treaty and the Uniform Acts before the OHADA Court, cf. Arts. 14-15 and 18 of the OHADA Treaty. If a national appeal court decides to refer a case to the OHADA Court, the entire case file is transferred to the OHADA Court and the national court loses its jurisdiction, cf. Art. 51 of the Rules of Procedure.

The OHADA Court may also provide advisory rulings at the request of the OHADA Council and member states, cf. Art. 14 of the OHADA Treaty and Arts. 53-58 of the Rules of Procedure. Instead of transferring the case as such, a national court may decide to request an advisory opinion on a specific matter, as necessary for it to make its own decision in a case, cf. Art. 56 of the Rules of Procedure.

### Human Rights Mandate

As mentioned above, the jurisdiction of the OHADA Court only covers matters concerning what could be referred to as *OHADA law*, meaning the interpretation and application of the OHADA Treaty, OHADA Regulations, and OHADA Uniform Acts. The OHADA Treaty does not contain any provisions on human rights. The present Uniform Acts deal with general commercial law, companies, securities, execution, release from debt, and arbitration. None of these subjects is within the core of human rights. They do, however, cover a large area relating to commerce and business, and it cannot be ruled out that e.g. cases concerning discrimination or unlawful deprivation of assets can occur. Moreover, according to Art. 2 of the OHADA Treaty, employment law can also be the subject of Uniform Acts; employment regulation can easily touch upon human rights. It is not specified in the OHADA Treaty what sources of law may be used by the OHADA Court, including whether human rights norms can be taken into account.

In conclusion, it cannot be ruled out that the OHADA Court may one day get cases touching upon human rights, but in general, the Court does not adjudicate on human rights matters.

### Procedure

The procedure of the OHADA Court may be found in its Rules of Procedure of 18 April 1996.

The proceedings before the Court shall as a general rule be in writing, cf. Art. 34 of the Rules of Procedure. At the request of a party, the OHADA Court may decide to hold oral proceedings. In that case, the oral proceedings are public, unless otherwise decided, cf. Art. 19 of the OHADA Treaty and Art. 35 of the Rules of Procedure. The rulings are given in public, cf. Art. 40 of the Rules of Procedure.

The parties are obliged to be represented by a lawyer, admitted to appear at the courts of a member state, cf. Art. 19 of the OHADA Treaty and Art. 23 of the OHADA Rules of Procedure.

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<sup>484</sup> www.ohada.com, per 18 September 2007.

The working language of OHADA is French, cf. Art. 42 of the OHADA Treaty.

Generally, the losing party has to pay the costs of a case, cf. rule 43 of the Rules of Procedure.

### Remedies and Enforceability

The judgments of the OHADA Court are final and binding, and the member states shall ensure their execution and enforcement, cf. Art. 20 of the OHADA Treaty.

### Cooperation

No information has been provided about cooperation. According to the website of the regional training centre, see below, this is supported by the donor community, but no details are provided.

### Miscellaneous

Most cases before the OHADA Court concern Côte d'Ivoire. This is probably both due to lack of knowledge among lawyers outside Côte d'Ivoire, the seat of the OHADA Court, and due to the difficulty in bringing a case before a court far from home.<sup>485</sup>

As mentioned above, OHADA has a regional training centre. This is the Ecole Régionale Supérieure de la Magistrature<sup>486</sup> in Benin. Apart from being a documentation centre, this institution provides training on business law and harmonised law to judges and other law professionals. It must be assumed that such an institution increases the knowledge of the OHADA law and the OHADA Court. This institution would appear to be unique in Africa.

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<sup>485</sup> Cf. [www.aict-ctia.org/courts\\_subreg/ohada/ohada\\_home.html](http://www.aict-ctia.org/courts_subreg/ohada/ohada_home.html).

<sup>486</sup> The website is [www.bj.refer.org/benin\\_ct/edu/ersuma/accueil.htm](http://www.bj.refer.org/benin_ct/edu/ersuma/accueil.htm).

## Overview of membership of RECs

|               | ECO WAS | UEM OA | CO-MES A | EAC | SA DC | CE-MAC | EC CAS | AMU | IG AD | IOC | SA CU | CEP GL | CEN-SAD | MRU | OHA DA |
|---------------|---------|--------|----------|-----|-------|--------|--------|-----|-------|-----|-------|--------|---------|-----|--------|
| Algeria       |         |        |          |     |       |        |        | x   |       |     |       |        |         |     |        |
| Angola        |         |        |          |     | x     |        | x      |     |       |     |       |        |         |     |        |
| Benin         | x       | x      |          |     |       |        |        |     |       |     |       |        | x       |     | x      |
| Botswana      |         |        |          |     | x     |        |        |     |       |     | x     |        |         |     |        |
| Burkina Faso  | x       | x      |          |     |       |        |        |     |       |     |       |        | x       |     | x      |
| Burundi       |         |        | x        | x   |       |        | x      |     |       |     |       | x      |         |     |        |
| Cameroon      |         |        |          |     |       | x      | x      |     |       |     |       |        |         |     | x      |
| Cape Verde    | x       |        |          |     |       |        |        |     |       |     |       |        |         |     |        |
| C.A.R.        |         |        |          |     |       | x      | x      |     |       |     |       |        | x       |     | x      |
| Chad          |         |        |          |     |       | x      | x      |     |       |     |       |        | x       |     | x      |
| Comoros       |         |        | x        |     |       |        |        |     |       | x   |       |        |         |     | x      |
| Congo-Brazza. |         |        |          |     |       | x      | x      |     |       |     |       |        |         |     | x      |
| Côte d'Ivoire | x       | x      |          |     |       |        |        |     |       |     |       |        | x       |     | x      |
| DR Congo      |         |        | x        |     | x     |        | x      |     |       |     |       | x      |         |     |        |
| Djibouti      |         |        | x        |     |       |        |        |     | x     |     |       |        | x       |     |        |
| Egypt         |         |        | x        |     |       |        |        |     |       |     |       |        | x       |     |        |
| Eritrea       |         |        | x        |     |       |        |        |     | (x)   |     |       |        | x       |     |        |
| Ethiopia      |         |        | x        |     |       |        |        |     | x     |     |       |        |         |     |        |
| Equat. Guinea |         |        |          |     |       | x      | x      |     |       |     |       |        |         |     | x      |
| Gabon         |         |        |          |     |       | x      | x      |     |       |     |       |        |         |     | x      |
| Gambia        | x       |        |          |     |       |        |        |     |       |     |       |        | x       |     |        |
| Ghana         | x       |        |          |     |       |        |        |     |       |     |       |        | x       |     |        |
| Guinea        | x       |        |          |     |       |        |        |     |       |     |       |        |         | x   | x      |
| Guinea-Bissau | x       | x      |          |     |       |        |        |     |       |     |       |        | x       |     | x      |
| Kenya         |         |        | x        | x   |       |        |        |     | x     |     |       |        |         |     |        |
| Lesotho       |         |        |          |     | x     |        |        |     |       |     | x     |        |         |     |        |
| Liberia       | x       |        |          |     |       |        |        |     |       |     |       |        | x       | x   |        |
| Libya         |         |        | x        |     |       |        |        | x   |       |     |       |        | x       |     |        |
| Madagascar    |         |        | x        |     | x     |        |        |     |       | x   |       |        |         |     |        |
| Malawi        |         |        | x        |     | x     |        |        |     |       |     |       |        |         |     |        |
| Mali          | x       | x      |          |     |       |        |        |     |       |     |       |        | x       |     | x      |
| Mauritania    |         |        |          |     |       |        |        | x   |       |     |       |        |         |     |        |

|                    | ECO<br>WAS | UEM<br>OA | CO-<br>MES<br>A | EAC | SA<br>DC | CE-<br>MAC | EC<br>CAS | AMU | IG<br>AD | IOC | SA<br>CU | CEP<br>GL | CEN-<br>SAD | MRU | OHA<br>DA |
|--------------------|------------|-----------|-----------------|-----|----------|------------|-----------|-----|----------|-----|----------|-----------|-------------|-----|-----------|
| Mauri-<br>tius     |            |           | x               |     | x        |            |           |     |          | x   |          |           |             |     |           |
| Moroc-<br>co       |            |           |                 |     |          |            |           | x   |          |     |          |           | x           |     |           |
| Mozam-<br>bique    |            |           |                 |     | x        |            |           |     |          |     |          |           |             |     |           |
| Nami-<br>bia       |            |           |                 |     | x        |            |           |     |          |     | x        |           |             |     |           |
| Niger              | x          | x         |                 |     |          |            |           |     |          |     |          |           | x           |     | x         |
| Nigeria            | x          |           |                 |     |          |            |           |     |          |     |          |           | x           |     |           |
| Rwanda             |            |           | x               | x   |          |            | x         |     |          |     |          | x         |             |     |           |
| Sahrawi<br>Rep.    |            |           |                 |     |          |            |           |     |          |     |          |           |             |     |           |
| S. Tomé<br>& Prin. |            |           |                 |     |          |            | x         |     |          |     |          |           |             |     |           |
| Senegal            | x          | x         |                 |     |          |            |           |     |          |     |          |           | x           |     | x         |
| Seychel-<br>les    |            |           | x               |     |          |            |           |     |          | x   |          |           |             |     |           |
| Sierra<br>Leone    | x          |           |                 |     |          |            |           |     |          |     |          |           | x           | x   |           |
| Somalia            |            |           |                 |     |          |            |           |     | x        |     |          |           | x           |     |           |
| South<br>Africa    |            |           |                 |     | x        |            |           |     |          |     | x        |           |             |     |           |
| Sudan              |            |           | x               |     |          |            |           |     | x        |     |          |           | x           |     |           |
| Swazi-<br>land     |            |           | x               |     | x        |            |           |     |          |     | x        |           |             |     |           |
| Tanza-<br>nia      |            |           |                 | x   | x        |            |           |     |          |     |          |           |             |     |           |
| Togo               | x          | x         |                 |     |          |            |           |     |          |     |          |           | x           |     | x         |
| Tunisia            |            |           |                 |     |          |            |           | x   |          |     |          |           | x           |     |           |
| Uganda             |            |           |                 | x   |          |            |           |     | x        |     |          |           |             |     |           |
| Zambia             |            |           | x               |     | x        |            |           |     |          |     |          |           |             |     |           |
| Zim-<br>babwe      |            |           | x               |     | x        |            |           |     |          |     |          |           |             |     |           |

**Apart from Morocco, all the above countries are members of the African Union (AU).**

ECOWAS: Economic Community of West African States (in French CEDEAO)

UEMOA: French acronym for West African Economic and Monetary Union

COMESA: Common Market for Eastern and Southern Africa

EAC: East African Community

SADC: Southern African Development Community

CEMAC: Economic and Monetary Community of Central Africa

ECCAS: Economic Community of Central African States

AMU: Arab Maghreb Union

IGAD: Inter-Governmental Authority on Development

IOC: Indian Ocean Commission

SACU: Southern African Customs Union

CEPGL: Economic Community of the Great Lakes Countries

CEN-SAD: Community of Sahel-Saharan States

MRU: Mano River Union

OHADA: Organisation for the Harmonisation of Business Law in Africa

## **5. Meetings/Interviews**

| <b>Source of Information</b>   | <b>Character of Meeting</b>  |
|--|--|
| 1. <u>Musa Gassama</u> , Deputy Director of International Services for Human Rights, Geneva, Switzerland, <a href="mailto:m.gassama@ishr-sidh.ch">m.gassama@ishr-sidh.ch</a>   | Interview, Geneva, Switzerland<br>14 November 2006                             |
| 2. <u>African Commission on Human and Peoples' Rights</u> , Banjul, The Gambia, <a href="mailto:achpr@achpr.org">achpr@achpr.org</a>   | Observing the 40 <sup>th</sup> ordinary session in Banjul, 17-23 November 2006 |
| 3. <u>Coalition for an Effective African Court on Human and Peoples Rights</u> , Coordinator Nobuntu Mbelle (see below under 13)   | Meeting, Banjul, 17 November 2006  |
| 4. <u>Frans Viljoen</u> , Coordinator, Centre for Human Rights, University of Pretoria, Pretoria, South Africa, <a href="mailto:fviljoen@hakuna.up.ac.za">fviljoen@hakuna.up.ac.za</a>   | Interview, Banjul, 18 November 2006  |
| 5. <u>Pansy Tlakula</u> , Commissioner and Special Rapporteur on Freedom of Expression, African Commission on Human and Peoples' Rights, Pretoria, South Africa, <a href="mailto:tlakulap@elections.org.za">tlakulap@elections.org.za</a>  | Interview, Banjul, 18 November 2006  |
| 6. <u>Reine Alapini-Gansou</u> , Commissioner and Special Rapporteur on Human Rights Defenders, African Commission on Human and Peoples' Rights, Cotonou, Benin, <a href="mailto:alapinir@intnet.bj">alapinir@intnet.bj</a> & <a href="mailto:alapinireine@yahoo.fr">alapinireine@yahoo.fr</a> | Interview, Banjul, 19 November 2006  |
| 7. <u>Florent Geel</u> , Programme Officer, African office of FIDH (International Federation for Human Rights), Paris, <a href="mailto:fgeel@fidh.org">fgeel@fidh.org</a>  | Interview, Banjul, 20 November 2006  |
| 8. <u>Salamata Sawadogo</u> , Chairperson of the African Commission for Human and Peoples' Rights, Dakar, Senegal, <a href="mailto:salamatas@yahoo.fr">salamatas@yahoo.fr</a>  | Interview, Banjul, 20 November 2006  |
| 9. <u>Fadzai Gwaradzimba</u> , UN Resident Coordinator and UNDP Resident Representative in The Gambia, Banjul, The Gambia, <a href="mailto:fadzai.gwaradzimba@undp.org">fadzai.gwaradzimba@undp.org</a>  | Interview, Banjul, 20 November 2006  |
| 10. <u>Hannah Forster</u> , Executive Director of The African Centre for Democracy and Human Rights Studies, Banjul, The Gambia, <a href="mailto:edir@acdhrs.org">edir@acdhrs.org</a>  | Interview, Banjul, 21 November 2006  |
| 11. <u>Tomaso Falchetta</u> , Legal Adviser – Africa, Amnesty International, International Secretariat, London, England, <a href="mailto:tfalchet@amnesty.org">tfalchet@amnesty.org</a>  | Interview, Banjul, 21 November 2006  |
| 12. Robert Eno, Officer-in-Charge (acting Secretary) for the African Commission on Human and Peoples' Rights, Banjul, The Gambia, <a href="mailto:roberteno@achpr.org">roberteno@achpr.org</a> & <a href="mailto:wundeh70@yahoo.co.uk">wundeh70@yahoo.co.uk</a>                                | Interview, Banjul, 21 November 2006  |

| <b>Source of Information</b>   | <b>Character of Meeting</b>                                  |
|--|--|
| 13. <u>Nobunto Mbelle</u> , Coordinator of the Coalition for an Effective African Court on Human and Peoples' Rights, Johannesburg, South Africa, <a href="mailto:zeke-dak@mweb.co.za">zeke-dak@mweb.co.za</a>   | Interview, Banjul, 21 November 2006                          |
| 14. <u>Abiola Ayinla</u> , Expert with the Secretariat of the African Commission on Human and Peoples' Rights, Banjul, The Gambia, <a href="mailto:bayinla@gmail.com">bayinla@gmail.com</a> & <a href="mailto:bayinla@yahoo.com">bayinla@yahoo.com</a>               | Interview, Banjul, 21 November 2006                          |
| 15. <u>Sheila B. Keetharuth</u> , Executive Director, <a href="mailto:sbkeetharuth@africaninstitute.org">sbkeetharuth@africaninstitute.org</a> , and <u>Takele Sobaka</u> , Legal Officer, Institute for Human Rights and Development in Africa, Banjul, the Gambia. | Interview, Banjul, 22 November 2006                          |
| 16. <u>Ibrahima Kane</u> , Senior Lawyer, Africa Programme, Interights, London, England, <a href="mailto:IKane@interights.org">IKane@interights.org</a>  | Interview, Banjul, 22 November 2006                          |
| 17. <u>Abdelhagi Jibril</u> , Executive Director, Darfur Relief and Documentation Centre, Geneva, Switzerland, <a href="mailto:abdelbagi@darfurcentre.ch">abdelbagi@darfurcentre.ch</a>  | Interview, Banjul, 20 November 2006                          |
| 18. <u>Charles Kamuren</u> , Chairperson of the Endorois pastoralist community, Kenya, Lake Bogoria Region, <a href="mailto:endorois@yahoo.com">endorois@yahoo.com</a>   | Interview, Banjul, 23 November 2006                          |
| 19. <u>Mumba Malila</u> , member of the African Commission on Human and Peoples' Rights and Special Rapporteur on Prisons and Conditions of Detention in Africa, Lusaka, Zambia, <a href="mailto:mumbamalila@yahoo.com">mumbamalila@yahoo.com</a>                    | Interview, Banjul, 23 November 2006                          |
| 20. <u>Bahama Tom Nyanduga</u> , member of the African Commission on Human and Peoples' Rights and Special Rapporteur on Refugees and Displaced Persons in Africa, Dar es Salaam, Tanzania, <a href="mailto:btomn@yahoo.com">btomn@yahoo.com</a>                     | Interview, Banjul, 23 November 2006                          |
| 21. <u>Margaret Sekaggya</u> , Chairperson, Uganda Human Rights Commission, Kampala, Uganda, <a href="mailto:msekaggya@yahoo.com">msekaggya@yahoo.com</a>  | Interview, Geneva, 27 November 2006                          |
| 22. <u>Mbam Diarra</u> , Permanent Secretary, Malian Human Rights Commission, <a href="mailto:cndhmali@yahoo.fr">cndhmali@yahoo.fr</a>   | Meeting (with Monique Alexis), Bamako, Mali, 5 December 2006 |
| 23. <u>Margit Thomsen</u> , Danish Ambassador to Mali, <a href="mailto:martho@um.dk">martho@um.dk</a> , and <u>Tine Anbæk Petersen</u> , Counselor, <a href="mailto:tinpet@um.dk">tinpet@um.dk</a> , Bamako, Mali  | Meeting (with Monique Alexis), Bamako, 6 December 2006       |
| 24. <u>Abdoulaye Bane</u> , then responsible for human rights issues, Ministry of Justice, Bamako, Mali, <a href="mailto:baneaf@yahoo.fr">baneaf@yahoo.fr</a>  | Meeting (with Monique Alexis), Bamako, 6 December 2006       |



### Source of Information

25. Modibo Touny Guindo, President of Labour Court of Mali and Vice President of the African Court on Human and Peoples' Rights, Bamako, Mali, [touny-guindo@yahoo.fr](mailto:touny-guindo@yahoo.fr)
26. Workshop on "Human rights provisions under the revised Ecowas Treaty and the contentious procedure before the community Court of justice", organised by the West African Bar Association and the West African Human Rights Forum (the Bamako Workshop)
27. Dr. Monika Lücke, responsible "Realising Human Rights in Development Cooperation", German Development Cooperation, GTZ, [monika.lueke@gtz.de](mailto:monika.lueke@gtz.de)

### Character of Meeting

Interview, Bamako, 7 December 2007

Participating in workshop  
Bamako, 8-9 December 2006

Meeting, Geneva, 2 March 2007