



Africa's New Human Rights Court: Whistling in the Wind?

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Summary points

- Human rights abuses on a massive scale continue to afflict the lives of millions of people across the continent of Africa. As in other parts of the world, the obstacles in pursuing justice are currently insurmountable for most victims.
- Against this troubling backdrop, the African Union (AU) has decided to add a human rights section to its new court which has been agreed upon but not yet set up. This court is called the African Court of Justice and Human Rights.
- In the meantime, another pan-African human rights court, the African Court on Human and Peoples' Rights, has recently opened in Arusha, Tanzania. This court will be wound down to make way for the African Court of Justice and Human Rights but is expected to operate for the next few years at least.
- These two courts represent the third instalment in efforts since the Second World War to create regional human rights courts. Because they have broad powers to enforce socio-economic rights and the collective rights of peoples, they may be setting an example for new developments around the world.
- This briefing paper focuses on the African Court of Justice and Human Rights, but it also explains key features of the interim African Court on Human and Peoples' Rights. It addresses questions including:
 - Can victims of human rights abuses bring cases?
 - Will the Court be able to try African heads of state?
 - Will governments comply with judgments?

Introduction

The long dream of a human rights court for Africa is nearly a reality. In mid-2008, African leaders voted to establish an African Court of Justice and Human Rights to serve as the main judicial organ of the African Union (AU). The Court will have two sections, one of which will be devoted exclusively to human rights matters.

The legal agreement establishing the Court is now open for signature and ratification by African states. This is usually a lengthy process, and the Court is not expected to become operational for a number of years. However, in a curious twist, a second pan-African human rights court – which came into being in 2004 but which will be wound down to make way for the permanent Court – is almost ready to hear cases during the interim period.

These developments are the result of decades of agitation in Africa for a regional human rights system on a par with those established for Europe and the Americas. But significant differences exist. For example, the African Court of Justice and Human Rights is able to consider a greater variety of human rights cases than its European and inter-American counterparts. In addition to hearing ‘classic’ cases of torture and other abuses of civil and political rights, it has power to tackle violations of socio-economic rights, and may also enforce the collective rights of ‘peoples’ over such matters as their economic, social and cultural development, and use of their natural resources.

By far the most controversial feature of the Court is the difficulty of bringing cases. Human rights activists lobbied hard for direct access to be given to individuals and non-governmental organizations (NGOs), but this was resisted by African governments. As a consequence, individuals and NGOs are only able to bring cases in their own right if the state against which they are complaining has signed a special declaration accepting the competence of the

Court to hear cases brought via this route. Accessing the Court will therefore be very difficult for most victims of human rights abuses in Africa.

The decision to grant automatic standing only to states and a limited range of African institutions has raised serious questions about the willingness of African states to submit themselves to judicial scrutiny in the field of human rights. When this reluctance is added to the sheer scale of human rights abuses across this continent and the still doubtful effectiveness of the AU itself, the challenges confronting this Court begin to look very grave.

This briefing paper explains the Court and its complicated genesis, and explores the formidable challenges it will face in its early years.

Africa's human rights record

Headlines about human rights in Africa usually make for grim reading. Authoritarian regimes, collapsed states, civil and ethnic violence, grinding poverty, violent abuse and discrimination against women, child soldiers, the HIV/AIDS pandemic and other human tragedies are the mainstay of international coverage. In its 2008 report on the state of the world's human rights, Amnesty International concluded gloomily that the ‘human rights promised in the Universal Declaration [of Human Rights] are far from being a reality for all the people of Africa’.¹ Nevertheless, there is much more to the human rights story in Africa than a litany of abuses.

“Human rights have a rich history in modern Africa, having fuelled the anti-colonial struggle, and the battle against apartheid”

1. Amnesty International, *Amnesty International Report 2008 – The State of the World's Human Rights* (London: Amnesty International, 2008), 3.

Human rights have a rich history in modern Africa, having fuelled the anti-colonial struggle, and the battle against apartheid. They have also played a central role in the critique of repressive regimes that too often filled the political vacuum following independence. Civil society continues to use human rights as a rallying call – there are now hundreds of human rights NGOs flourishing on the continent, holding governments to account and promoting the rights of oppressed and disadvantaged people.

While conflict and repression in many states including the Democratic Republic of the Congo, Sudan, Somalia and Zimbabwe continue to be a source of major concern, a culture of respect for human rights is taking root in other parts of the continent. For example, Botswana has come to be recognized as a beacon of democracy, as has Ghana where recent presidential elections were tense but ultimately peaceful. These two states, together with Liberia and Zambia, were recently praised by Human Rights Watch for supporting human rights initiatives at the international level as well.² Progress in some other states may be more piecemeal, but is nevertheless important. Literacy rates are on the rise among young people in states including Nigeria and Benin, while Morocco has managed to reduce its child mortality rate by more than two-thirds since 1980. In the past few years Rwanda, Senegal and Liberia have all joined a growing list of states to have abolished the death penalty.

There are many unsung ways in which African states are developing best practice in terms of human rights protection. For example, South Africa has developed strong constitutional protections for economic and social rights, while Namibian legislators are working to create the most progressive anti-torture legislation in the world. Liberia has broken new ground with an all-women peace-keeping force which aims to bring security to the country's women, a huge proportion of whom have been raped

as a consequence of the country's brutal civil war and its aftermath.

In recent decades, governments across Africa have begun to create dedicated human rights bodies tasked with promoting and protecting human rights at the national level. There are now more than two dozen national human rights institutions (NHRIs) in Africa, 16 of which are recognized as compliant with international standards (known as the 'Paris Principles') on the status and responsibilities of such bodies.

Human rights and the African unity agenda

The importance of human rights has been increasingly acknowledged by the intergovernmental bodies that have striven for African unity since the 1960s. The founding instrument of the African Union (the Constitutive Act) lists the promotion and protection of human rights among the AU's key objectives and provides that the AU itself shall function in accordance with human rights principles. This represents an almost seismic shift since the days of its predecessor body, the Organization of African Unity (OAU), which was committed to 'non-interference' in the internal affairs of states and rarely engaged with human rights issues.

Since its creation in 2002, the AU has been justifiably criticized for being slow to act against persistent human rights violators. However, the previous dogmatic approach to preserving state sovereignty may be beginning to fade in some quarters, as the deployment of AU peace-keeping forces to conflict zones in Burundi and Somalia demonstrates. Moreover, it appears that the idea of human rights has started to gain legitimacy among the political classes, even if compliance in practice is still a major problem. For example, attempts by the Sudanese President Omar al-Bashir to assume the rotating Chairmanship of the AU in both 2006 and 2007 were successfully blocked because of concerns over human rights abuses in the Darfur region (see also Box 2).

2. Human Rights Watch, *World Report 2009 – Events of 2008* (New York: Human Rights Watch, 2009), 3.

The key regional human rights treaty for Africa is the African Charter on Human and Peoples' Rights ('the Charter' or 'the African Charter').³ Adopted in 1981 under the auspices of the OAU, the Charter recognizes a broad range of civil, political, economic, social and cultural rights, as well as group rights and a range of duties for individuals.

Many within Africa have long lamented the shortcomings of the Commission. It is chronically under-resourced and the quality of its jurisprudence has been variable.

It also established an African Commission on Human and Peoples' Rights ('the Commission' or the 'African Commission'), which was the first major pan-African human rights institution. The Commission has functioned since 1987 and is headquartered in Banjul in the Gambia. It is quasi-judicial and can hear individual complaints but its decisions are not binding. In this regard, the Commission is similar to some of the UN bodies that monitor implementation of international human rights treaties.

Many within Africa have long lamented the shortcomings of the Commission. It is chronically under-resourced and the quality of its jurisprudence has been variable. Independence has also been a problem – a number of past members served concurrently as government ministers and ambassadors, and the Commission's recommendations are often ignored. Despite a much-noted pattern of improve-

ments in recent years – for example new standards have been set for membership and the Commission's decisions have become increasingly sophisticated – these failings have provided an impetus for a court which can issue binding decisions.

Over the years some progress has been made at a sub-regional level. Africa's various sub-regional cooperation bodies have mandates that include human rights. For example, the Court of Justice of the Economic Community of West African States (ECOWAS) has jurisdiction to hear human rights cases, and recently made headlines after finding Niger responsible for failing to protect a young woman from slavery.⁴ However human rights are not the main focus for this Court, which primarily exists to interpret the ECOWAS treaty and to resolve disputes between member states. These developments, while important, have not dampened enthusiasm for a human rights court with a continental reach.

A tale of two courts

The African Court on Human and Peoples' Rights

Agreement was reached in June 1998 to create an African Court on Human and Peoples' Rights to complement and reinforce the remit of the Commission. This Court was formally established by a Protocol to the Charter adopted in 1998.⁵ The Protocol entered into force in 2004, and the Court finally came into being in 2006 when the first set of judges was appointed.

There was competition among African states to host this Court, but Tanzania ultimately prevailed. It has offered the premises in Arusha of the International Criminal Tribunal for Rwanda (ICTR), which is expected to cease operations in the next few years.

To date the Court has had a number of preparatory sessions – the judges have agreed a programme of

3. The African Charter on Human and Peoples' Rights (also known as the 'Banjul Charter') is available at http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/Banjul%20Charter.pdf.

4. *Hadjatou Mani Koraou v The Republic of Niger*, ECOWAS Community Court of Justice, ECW/CCJ/JUD/06/08, 27 October 2008. An unofficial English translation of the judgment is available at <http://www.interights.org/view-document/index.htm?id=533>.

5. The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights is available at http://www.achpr.org/english/_info/court_en.html.

work, and have begun to meet with members of the Commission and judges from some of the sub-regional courts to discuss their working relationships. In June 2008, the Court developed rules of procedure which are to be harmonized with those of the Commission. A registry has recently been established and current predictions are that the Court will hear its first case later in 2009.

While planning for the Court was still under way, the then Chairperson of the AU Assembly (the top decision-making body of the AU, comprising heads of state and government), President Olusegun Obasanjo of Nigeria, revived an earlier idea (previously rejected by the Executive Council of the AU) to merge this Court with the African Court of Justice. The AU's Constitutive Act identifies the African Court of Justice as the principal judicial organ of the AU and, at the time of President Obasanjo's suggestion, it was also in the process of being set up.⁶ President Obasanjo's arguments for merging the two courts included cost savings and a need to rationalize pan-African institutions.

The African Court of Justice and Human Rights

President Obasanjo's suggestion was accepted, and in July 2004 the AU Assembly agreed to merge the African Court on Human and Peoples' Rights with the African Court of Justice. This decision was highly controversial. Among those to voice concern was the Commission, which warned that the two courts had 'essentially different mandates and litigants' and that the decision could have 'a negative impact on the establishment of an effective African Court on Human and Peoples' Rights'.⁷

Nevertheless, a Protocol establishing a merged court called the African Court of Justice and Human Rights was finally adopted by the AU Assembly at the

11th AU Summit in June–July 2008.⁸ This new agreement (the 'merger agreement') replaces the earlier Protocols establishing the two separate courts, and makes clear that the merged Court will be the principal judicial organ of the AU. The merger agreement is now open for signature and ratification by member states of the AU, and will enter into force 30 days after 15 states have deposited their instruments of ratification. In November 2008, Guinea became the first state to sign the merger agreement, although it has not ratified it yet.

The merged Court has two sections: a general section for disputes over matters such as the powers of the AU and breaches of states' treaty obligations, and a human rights section which will hear cases against states for violations of human rights. Only the human rights section may hear cases concerning human and peoples' rights.

Advantages of the merger include:

- It is cost-efficient – maintaining one court instead of two will save millions of dollars each year for the cash-strapped AU.
- Human rights may achieve heightened status within the AU now that they form an important focus for the AU's principal judicial organ.
- It avoids the problem of the (partially) duplicate human rights jurisdiction of the African Court on Human and Peoples' Rights and the African Court of Justice.
- It makes it more likely that human rights will permeate all of the jurisprudence of the Court. This is especially interesting to observers in the light of increasing overlap in the case law of the European Court of Human Rights (set up by the Council of Europe) and the European Court of Justice (set up by the European Union); merger

6. The Protocol of the Court of Justice of the African Union was adopted on 11 July 2003 and is available at <http://www.africa-union.org/root/AU/Documents/Treaties/Text/Protocol%20to%20the%20African%20Court%20of%20Justice%20-%20Maputo.pdf>.

7. African Commission on Human and Peoples' Rights, Res.76(XXXVII)05: Resolution on the Establishment of an Effective African Court on Human and Peoples' Rights, adopted in Banjul, the Gambia on 11 May 2005.

8. The Protocol on the Statute of the African Court of Justice and Human Rights is available at <http://www.africa-union.org/root/au/Documents/Treaties/text/Protocol%20on%20the%20Merged%20Court%20-%20EN.pdf>.

of the two African courts is likely to stimulate cross-pollination of this sort from the outset.

- AU member states are more likely to submit to judicial oversight of their human rights performance because they will want access to the Court's general dispute resolution services, and it is not possible to sign up to the Court while opting out of its human rights jurisdiction. (Note that although the Protocol establishing the African Court on Human and Peoples' Rights entered into force in 2004, it has been ratified by fewer than half of the AU's member states.)
- Potentially stronger enforcement – the agreement establishing the new merged Court contains stronger provisions on enforcement. Among other things, it clarifies that the AU Assembly may impose political and economic sanctions on states which have failed to comply with any judgment of the Court.

Disadvantages of the merger include:

- A chaotic beginning to Africa's new human rights enforcement machinery – the fact that two separate regional human rights courts are being established at the same time is sure to generate confusion within Africa and beyond.
- A risk that the human rights section of the merged Court will acquire 'second class' status – human rights issues may be perceived as less significant than the border disputes and other matters of 'high state' which are likely to occupy the general section.

Temporary co-existence

Despite the merger agreement, efforts are still under way to make the African Court on Human and Peoples' Rights operational, pending the creation of the permanent court. The AU Assembly took a decision to this effect at the 5th AU Summit in July 2005, following intense pressure from NGOs who feared that protracted negotiations over the merger agree-

ment would cause unacceptable delays in securing a functioning human rights court or that, worse still, these negotiations would collapse, thus potentially derailing the entire project to create a pan-African human rights court. This has led to a slightly perplexing situation whereby the end is already firmly in sight for the recently opened African Court on Human and Peoples' Rights.

As soon as the merger agreement enters into force, all cases being heard by the African Court on Human and Peoples' Rights will be transferred across to the human rights section of the African Court of Justice and Human Rights. The judges of the African Court on Human and Peoples' Rights will be stood down at this point, though it is possible that some will be appointed to serve in the human rights section of the permanent court.

Therefore, on paper at least, Africa now has two human rights courts: the African Court on Human and Peoples' Rights (henceforth referred to as the 'interim Court'), which will soon begin to hear cases, and the African Court of Justice and Human Rights, which will replace it as soon as it is ready to do so.

The remainder of this briefing paper focuses primarily on the latter Court (henceforth referred to as the 'permanent Court'), as the court which will endure, but also refers where appropriate to the interim Court.

What will the permanent Court do?

The key task of the human rights section of the permanent Court (and of the interim Court) is to hear cases brought against African states for failure to respect human rights. It is able to issue binding judgments in such cases and, where violations are found, may award compensation and other remedies to victims.

The Court may also issue advisory opinions on more general questions of human rights law (the interim Court also has this power). Such opinions are a relatively small focus for comparable courts in other parts of the world; however, the failure to grant direct access to individuals and NGOs (see below)

may mean these will become a staple component of the Court's workload.

What rights will it enforce?

The permanent Court (and over the next few years the interim Court) will be the ultimate, but not exclusive, guardian of the 1981 African Charter on Human and Peoples' Rights. This treaty entered into force in 1986 and, somewhat remarkably, all African states – with the sole exception of Morocco which is not a member of the AU – have ratified it.

The African Charter is notable in a number of respects. It was drafted by African jurists who worked hard to reconcile universal human rights standards with an African understanding of the relationship between the individual and the community. Hence the Charter combines a traditional focus on individual rights with explicit protections for the collective rights of peoples, and an insistence that the enjoyment of rights implies 'the performance of duties on the part of everyone'.

‘The African Charter was drafted by African jurists who worked hard to reconcile universal human rights standards with an African understanding of the relationship between the individual and the community’

In terms of individual rights, the African Charter protects civil and political rights (such as the right to liberty, freedom of expression and the prohibition of torture) as well as economic, social and cultural

rights (such as the right to health and the right to work). This is a major contrast with the European Convention on Human Rights, which focuses almost exclusively on civil and political rights.

The African Commission has developed some of the world's leading decisions on economic, social and cultural rights. For example, in a famous case the Commission found that Nigeria had violated the right to health by failing to protect the indigenous Ogoni people from the harmful effects of oil extraction, including the contamination of land and waterways, by companies operating in the Niger Delta. The Commission considered the destruction of Ogoni villages and food sources by government security forces and concluded that there had also been violations of the rights to housing and food. Neither of these rights is expressly protected by the Charter but the Commission identified them as essential components of other rights including the right to health.⁹

These and other cases are of vital importance because they convincingly refute arguments peddled by many governments, including the UK government, that social, economic and cultural rights, by their nature, cannot be dealt with by courts.

The Commission has also applied civil and political rights to a wide range of situations including mass expulsions, torture, extrajudicial killings, arbitrary detentions, bans on political activity, sham trials, religious persecution and discrimination on many grounds including race and national origin. Cases recently concluded by the Commission have involved:

- Rounding up, detention in squalid conditions and mass deportation of hundreds of Gambian workers by Angola in 2004 – the Gambia was found to have violated many rights including freedom of movement, the right to liberty, the right not to be treated in an inhuman and degrading way, and the right to work.¹⁰

9. *The Social and Economic Rights Action Center for Economic and Social Rights and the Center for Economic and Social Rights v. Nigeria*, African Commission on Human and Peoples' Rights, Communication No. 155/96 (2001).

10. *Institute for Human Rights and Development in Africa v. Republic of Angola*, African Commission on Human and Peoples' Rights, Communication No. 292/2004 (2007).

- Detention incommunicado without trial of at least 11 journalists by Eritrea – Eritrea was found to have violated rights including freedom of expression, the right to liberty and the right to a fair trial.¹¹
- A clemency order passed by the government of Zimbabwe in 2000 prohibiting prosecution and setting free perpetrators of ‘politically motivated crimes’ including abductions, forced imprisonment, and destruction of property – Zimbabwe was found to have violated the right to judicial protection and the right to a fair trial.¹²

Uniquely among regional human rights treaties, the African Charter also protects collective or group rights, including the right to self-determination, the right to development, and the right of peoples freely

to dispose of their wealth and natural resources. Although collective rights are recognized by the United Nations (for example in the Declaration on the Rights of Indigenous Peoples, adopted by the UN General Assembly in September 2007), their translation into a legally enforceable treaty is an African achievement.

In the Ogoni case described above, the Commission ruled that Nigeria had violated the rights of the Ogoni people to a healthy environment and to dispose of the natural wealth and resources in their homeland. More recently, the Commission considered the actions of Burundi, Rwanda and Uganda in deploying armed forces to the eastern provinces of the Democratic Republic of the Congo (DRC) from 1998 onwards and found that these violated the rights of the peoples of the DRC to peace and security, self-determination and cultural development.¹³

Box 1: Rights protected by the African Charter on Human and Peoples' Rights

Individual civil and political rights

- Non-discrimination and equal protection
- Right to life
- Prohibition of exploitation and slavery
- Prohibition of torture and ill-treatment
- Right to liberty and security
- Right to a fair trial
- Freedom of conscience and religion
- Right to information and freedom of expression
- Freedom of association
- Freedom of assembly
- Freedom of movement
- Right to seek asylum
- Prohibition of mass expulsion
- Right to participate in the government of one's country, including the right to vote

Individual economic, social and cultural rights

- Right to property
- Right to work
- Right to health
- Right to education
- Right to take part in the cultural life of the community
- Protection of the family unit
- Right to housing
- Right to food

Peoples' rights

- Equality of peoples
- Right to existence and self-determination
- Right to dispose of wealth and natural resources
- Right to development
- Right to peace and security
- Right to a healthy environment

11. Article 19 v Eritrea, African Commission on Human and Peoples' Rights, Communication No. 275/2003 (2007).

12. Zimbabwe Human Rights NGO Forum v Zimbabwe, African Commission on Human and Peoples' Rights, Communication No. 245/2002 (2006).

13. Democratic Republic of Congo v. Burundi, Rwanda and Uganda, African Commission on Human and Peoples' Rights, Communication No. 227/99 (2006).

The Charter also imposes duties on individuals, including a duty to 'respect and consider others' without discrimination, a duty to pay taxes, and a duty not to compromise the security of the state. Although these duties have rarely been considered by the African Commission, they have recently become a discussion point in the UK following an announcement that the government plans to introduce a British Bill of Rights and Responsibilities.

In contrast to the European Court of Human Rights and the Inter-American Court of Human Rights, both of which are restricted to enforcing a single treaty each, the permanent Court also has power to hear complaints involving the African Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, as well as 'any other legal instrument relating to human rights' ratified by a state against which a complaint has been brought.

This catch-all provision means that the Court may enforce international human rights treaties such as the International Covenant on Civil and Political Rights, or the UN Convention against Torture, provided these have been ratified by the state concerned. Some legal experts have suggested that

reservations to the merger agreement are highly likely in this regard.

Who may bring cases?

The question of who can bring cases in the human rights section of the permanent Court is obviously crucial as this, more than any other factor, will determine the flow of human rights cases to the Court.

Unfortunately, at a very late stage in negotiations African states voted to deny automatic standing to individual victims of human rights abuses and NGOs. According to the terms of the final merger agreement, individuals and NGOs only have direct access to the Court if the state against which they are complaining has lodged a special declaration accepting the competence of the Court to hear human rights cases brought in this way. NGOs face the additional hurdle of requiring accreditation to the AU or to its organs. It constitutes a major difference between this Court and the European Court of Human Rights, where direct access for individuals (and NGOs and other entities which can show they themselves are a 'victim' of human rights abuse) is now compulsory.

This development was orchestrated by a group of states including Egypt and Tunisia and seems to have

Box 2: International crimes

A burning question is whether or not the permanent Court will be able to try international crimes. Some human rights activists had wanted the Court to have criminal jurisdiction to challenge the culture of impunity, especially among military and political elites in parts of Africa. It was not given this jurisdiction; in theory, however, this could change in the future, since there is a mechanism whereby the AU Assembly may extend the Court's jurisdiction. Recently there has been some discussion within the AU about granting the interim Court power to try serious international crimes.

In the meantime, trials before the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone are ongoing for international crimes committed during the

Rwandan genocide and the Sierra Leone civil war respectively. Both of these courts have been established on an ad hoc basis and will be wound down eventually.

Otherwise the International Criminal Court (ICC) in the Hague, a permanent court, will continue to be the main international forum for criminal prosecutions against leaders from Africa and elsewhere accused of war crimes, crimes against humanity and genocide. Thirty African states are parties to the ICC Statute, although the recent controversy over the Chief Prosecutor's application for an arrest warrant for President al-Bashir of Sudan may lead to some reluctance to cooperate with the ICC. It remains to be seen whether this will catalyse support for dealing with these issues within Africa instead.

been motivated mostly by a distrust of human rights NGOs. The African Commission has long permitted NGOs to bring cases under the African Charter, even where they are not directly affected by the alleged violation (in other words, unlike in the European Court of Human Rights, standing is not restricted to 'victims'). This reflects the fact that victims and their families are often precluded from bringing cases on their own behalf because of illiteracy and poverty, fear of reprisals or the enormous scale of some human rights violations on the continent. In practice, NGOs have become the main complainants at the African Commission.

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In June 2008, the Coalition for an Effective African Court on Human and Peoples' Rights sent an open letter to the AU Assembly and Executive Council condemning the denial of direct access to individuals in particular as 'a step back in access to justice for all in Africa [that] dilutes the effectiveness of the continental judicial system and runs contrary to the provisions on access to justice in several international human rights instruments'.¹⁴

The Coalition's criticisms appear justified in the light of experience with the interim Court. The Protocol establishing this Court contains a similar

mechanism allowing states to permit individuals and NGOs to launch cases against them. However, of the 24 states that have ratified this Protocol to date, only two – Mali and Burkina Faso – have entered the necessary declaration allowing such access.

Entities which have direct access to the human rights section of the permanent Court include state parties to the merger agreement; the African Commission; the African Committee of Experts on the Rights and Welfare of the Child (established under the African Charter on the Rights and Welfare of the Child); African intergovernmental organizations accredited to the AU or to its organs; and African NHRIs.

It is unlikely in practice that states will bring many cases against each other (the African Commission has only heard one case brought in this way – the case referred to above, brought by the DRC against Burundi, Rwanda and Uganda), and experts predict that the majority of cases will come to both of the new human rights courts via the African Commission. Intensive efforts to build strong working relationships between the Commission and the interim Court, and to standardize their rules of procedure, are a reflection of this. A comparison may be drawn here with the Inter-American Court of Human Rights (to which individuals and NGOs do not have direct access), where the vast majority of cases are referred by the Inter-American Commission on Human Rights, a body which has a broadly similar role to that of the African Commission.

It is also hoped that African NHRIs will become important conduits of cases to the permanent Court (they lack standing before the interim Court). Although the effectiveness and independence of some NHRIs are questionable, their domestic focus makes them well placed to identify suitable cases. The more effective African NHRIs are likely to use the Court as a lever when pressuring governments to comply with human rights standards.

14. Coalition for an Effective African Court on Human and Peoples' Rights, *Open Letter to the AU Assembly of Heads of State and Government, 11th Ordinary Session, and the Executive Council of Ministers, 13th Ordinary Session, 20 June 2008*. Available at http://www.africancourtcoalition.org/editorial.asp?page_id=141.

Against whom may cases be brought?

Complaints may only be brought against states which are parties to the agreements establishing each of the courts. And, as with other regional human rights courts, these complaints must be brought against the states themselves, and not individual leaders. For

example, any case relating to human rights abuses in Zimbabwe would need to be brought against the state of Zimbabwe, and not President Robert Mugabe or any of his colleagues (assuming that Zimbabwe ratifies the merger agreement; it has so far failed to ratify the Protocol establishing the interim Court).

Box 3: Other key features of the Court

Where will the Court sit?

The permanent Court will assume the premises of the interim Court in Arusha, Tanzania.

Both of the new courts are able to hold sessions in AU member states, provided that the state concerned consents to this.

Who are the judges?

Judges will not be appointed to the permanent Court until the merger agreement enters into force. The Court will comprise 16 judges; eight of these must be experts in human rights law.

The interim Court has 11 judges. The current President of the Court is Judge Jean Mutsinzi, a former President of the Supreme Court of Justice of Rwanda (and former Secretary of the African Commission), and the Vice President is Judge Sophia Akuffo, a judge of the Supreme Court of Ghana.

When appointing judges to the permanent Court, the AU Assembly is required to ensure that there is an equitable representation of the regions of Africa, the principal legal traditions of the continent, and also gender. The same requirements apply to the appointment of judges to the interim Court.

With respect to gender, Africa has been a leader for some time now. The AU has been committed to gender parity since its inception, and today half of the members of the AU Commission^a are women. In terms of the pan-African human rights machinery, seven of the 11 current

members of the African Commission are women, and the African Committee of Experts on the Rights and Welfare of the Child also has a majority of women members. However, there has been criticism of the fact that only two of the 11 judges currently sitting on the interim Court are women.

Although the independence of the judges is theoretically guaranteed for both courts, in fact all will serve on a part-time basis, with the exception of the President and Vice President of the permanent Court, and the President of the interim Court. They are prohibited from taking other roles which would conflict with their duties; however, divided loyalties may be a problem in practice.

Can the decisions of the Court be appealed?

No, judgments of the two African human rights courts are final and cannot be appealed, though revisions are possible if new facts come to light.

How can compliance be ensured?

Judgments of the permanent Court are binding and states are obliged by the merger agreement to 'guarantee' their execution (these requirements also exist in relation to the interim Court). Compliance will be monitored by the Court itself and any failure by a state to implement a judgment may be referred to the AU Assembly, which will decide on the action to be taken. Crucially, the Assembly has power to impose sanctions – including economic sanctions^b – on any non-compliant state, though this is likely to be invoked only in exceptional circumstances.

a. Not to be confused with the African Commission: the AU Commission, soon to be renamed the AU Authority, is the AU's secretariat.

b. Only political sanctions are available to the Council of Europe when supervising execution of the European Court of Human Rights' judgments.

This focus on state responsibility distinguishes international human rights law from international criminal law, which recognizes individual responsibility for international crimes. This fundamental difference in approach is one reason why some experts are hesitant about international criminal jurisdiction being granted to either of the new courts.

When will cases start to be heard?

It may be many years before cases can be brought to the permanent Court. Judges cannot be appointed and a registry cannot be opened until the merger agreement enters into force. As at March 2009, approximately ten states have signed the merger agreement, though none have ratified it yet.

In the meantime, as explained above, human rights cases may be brought before the interim Court. This Court recently appointed a Registrar and is now able to accept applications. For cases to be admissible before this Court, individual and NGO applicants need to show that they have exhausted local remedies or explain why this would take an inordinate amount of time.

International significance

It is often forgotten that there is no worldwide human rights court. The International Criminal Court has criminal jurisdiction over genocide, crimes against humanity and war crimes, but it is not, strictly speaking, a human rights court. There are UN committees tasked with monitoring compliance with international human rights treaties, and some of these can hear complaints from individuals, but these committees are not courts and their decisions are not binding. In this context, human rights courts which cover different regions of the world have assumed great importance.

Together, the two new African human rights courts represent the third instalment in attempts since the Second World War to create human rights courts at the regional level. The European Court of Human Rights (which enforces the European Convention on Human Rights) was set up in 1959, and the Inter-

American Court of Human Rights (which enforces the American Convention on Human Rights) was established in 1979. Currently, Southeast Asian states are working through the Association of South-East Asian Nations (ASEAN) to create a human rights mechanism for their region, which could potentially include a court, but this is still at an early stage.

‘The future international significance of the African courts will almost certainly depend on the quality of the case law they generate’

The future international significance of the African courts will almost certainly depend on the quality of the case law they generate. As discussed above, the African Charter innovates in a number of important areas, for example in relation to socio-economic rights and group rights, and the further development of jurisprudence in these areas is sure to be watched closely by courts and lawyers from across the world.

Challenges

The challenges facing both of the new African human rights courts are breathtaking.

Over the next few months, energies will continue to be directed towards preparing the interim Court for its first cases. In practical terms, the premises for this Court still need to be adapted and basic support systems for the registry and judges need to be put in place. Also key is the need to clarify as soon as possible the Court's relationship and division of labour with the African Commission. In the early days after judges were appointed to this Court, relations between the two bodies were difficult, but a constructive dialogue has now been achieved and efforts to elaborate the complementary roles of these institutions are firmly under way.

The Commission will retain its important role in promoting human rights in Africa and will continue to monitor state compliance with the African Charter via routine reporting and other processes including special rapporteurs. Moreover, so long as access to each of the new courts remains difficult for individuals and NGOs, the Commission will continue to be a first port of call for human rights cases against states (it will also be the main forum for cases against states which are not parties to the agreements which set up the new courts).

As explained above, referrals by the Commission are likely to be the major source of cases for both of the courts, though the precise methods whereby cases will be transmitted remain to be worked out. The new rules of procedure for the Commission, harmonized with those of the interim Court, will be a critical step in this regard. Further work is also required to clarify the relationship between the courts and the various sub-regional courts with human rights jurisdiction referred to above, and to deal with the significant potential for 'forum-shopping'.

Looking further ahead, the challenges facing both of the new courts include:

- *Merger* – there is a risk that momentum and institutional learning will be lost as the interim Court winds down to make way for the permanent Court.
- *Coverage* – while all AU member states have ratified the African Charter, and are thus subject to oversight by the African Commission, to date only 24 states have ratified the Protocol establishing the interim Court, and none have ratified the merger agreement establishing the permanent Court. A ratification campaign is urgently required to ensure AU-wide coverage for both courts.
- *Accessibility* – as discussed above, the barriers erected by states for individual victims as well as NGOs seeking to bring cases will be a major impediment to the effectiveness of both of the courts. It remains to be seen whether more African states can be convinced to lodge declarations acknowledging the competence of the courts to hear cases brought by individuals and NGOs. Protection programmes and other forms of support for victims and witnesses, as well as availability of free legal aid, are also essential if access to the courts is to be meaningful.
- *Awareness* – the enormous size of Africa in geographical and population terms coupled with widespread illiteracy means that raising awareness of these new courts at the grassroots level will prove very challenging. It is important that the courts hold sessions outside Tanzania and undertake promotional visits to member states; however, the awareness-raising efforts of civil society and NHRIs will almost certainly be pivotal. The Coalition for an Effective African Court on Human and Peoples' Rights has laid important groundwork by establishing focal points in East Africa, Southern Africa, West Africa, Central Africa, North Africa and Lusophone Africa.
- *Funding* – African states have a poor record of providing adequate funding to the continent's human rights institutions and this may become a problem for the courts, especially if they attract a high case load.
- *Compliance* – a true test of the success of these courts will be the level of state compliance with their judgments. The experience to date of the African Commission does not augur well, though there is some evidence that this body's new focus on follow-up has yielded improvements. As explained above, seemingly robust monitoring processes have been created for the new courts, though their effectiveness ultimately hinges on the political willingness of African states, acting through the AU Assembly, to impose sanctions where necessary. A leading study on the African Commission revealed that the lack of any effective follow-up system had been a key cause of low compliance with the admittedly non-binding recommendations of

this body.¹⁵ However, this same study also concluded that it is political rather than legal factors that are most likely to determine compliance levels. Herein lies the major dilemma confronting both of Africa's new continental human rights courts: while African states are clearly willing to create pan-African institutions designed to safeguard human rights, they may lack the political will to submit themselves to true scrutiny by these bodies, as battles over access suggest, or to reform their practices when these are found to have violated human rights. Of course this problem is not unique to Africa, as demonstrated by the challenge of securing compliance by states such as Russia and Turkey with judgments of the European Court of Human Rights.

- *Poor health of the AU* – the jury is still out on the effectiveness of the AU generally and there is much scepticism about its ability to deliver solutions when confronted with large-scale human rights abuses. This can be expected to cause problems for the courts given their dependency on the AU Assembly to compel execution of their judgments.
- *Context of egregious human rights violations* – the magnitude of human rights problems in Africa is arguably the greatest challenge facing the new courts. Clearly the courts will only be able to touch the tip of this iceberg with the cases they hear and the remedies they order. Moreover, there are no guarantees that the most serious cases will reach them. As discussed, even if victims of grave abuses know about the courts, they (and any NGOs supporting them) will probably lack standing anyway. For many victims, this will merely compound a pre-existing situation of powerlessness and their inability or disinclination to submit themselves to the ordeal of litigation.

Conclusion

The worth of any institution designed to tackle human rights abuses must ultimately be evaluated by its ability to make a difference on the ground for victims and potential victims. The reality is that, like the AU itself, the African Court of Justice and Human Rights will be very distant from the lives of African people, and judging by the decision to deny direct access for individuals and NGOs, this may be just what many African governments intend.

‘In spite of the many challenges confronting it, this Court deserves to be welcomed as an important step forward in the quest for accountability for human rights abuses in Africa’

Initial progress has been slow, as the interim African Court on Human and Peoples' Rights establishes itself and then closes down to make way for the permanent African Court of Justice and Human Rights. Much work is needed to raise awareness of both courts at the grassroots level, and to coordinate the referral of cases from feeder institutions such as the African Commission and NHRIs. Civil society will need to apply relentless pressure to ensure both that states comply with judgments, and that the AU Assembly fulfils its important oversight role. It is vital that states are also encouraged by NGOs, NHRIs and other actors to accept the competence of the courts to hear cases filed by individual victims and NGOs.

Taking a long view, prospects for the permanent Court appear more promising. The experience of the European Court of Human Rights suggests that opportunities to strengthen the Court will arise as it

15. Frans Viljoen and Lurette Louw, 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights 1994-2004', *American Journal of International Law* Vol. 101:1 (2007), 1–34.

becomes an embedded part of regional governance. And the AU's heightened emphasis on human rights gives some cause for hope that political conditions are shifting, albeit falteringly, in favour of human rights protection. The Court is also poised to play a leading role in the development of international

discourse about the protection of economic, social and cultural rights and the collective rights of peoples. Thus, in spite of the many challenges confronting it, this Court deserves to be welcomed as an important step forward in the quest for accountability for human rights abuses in Africa.

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Cover image: Judges of the African Court on Human and Peoples' Rights and members of the Coalition for an Effective African Court on Human and Peoples' Rights

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