

The African Court on Human and Peoples' Rights: Prospects and Procedures

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The African Court on Human and Peoples' Rights:
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Table of Contents

- Introduction** _____ **1**

- 1. Chapter: Human rights protection in Africa — protagonists and backgrounds** _____ **1**
 - I. The Formation of the OAU — Africa in the Conflict of Interests** **1**
 - II. The Original Charter of the OAU — Solidarity, Sovereignty and Non-intervention** **3**
 - III. The OAU and Human Rights — a Retrospective** **5**
 - IV. The Codification of the Banjul Charter**..... **7**
 - 1. The 1979 Monrovia Conference 8
 - 2. The expert draft from Dakar 10
 - V. The AU and Human Rights — a Perspective?** **11**

- 2. Chapter: The Banjul Charter’s Human Rights Protection System — Analysis and Stocktaking** _____ **17**
 - I. The Structure of the Banjul Charter** **17**
 - II. The Preamble** **18**
 - III. Rights and Obligations** **19**
 - 1. Individual Rights 20
 - a) Non-discrimination and equality requirements 20
 - b) Civil and political rights 21
 - c) Economic, social and cultural rights 26
 - 2. Collective Rights 31
 - 3. Obligations 34
 - IV. The Commission on Human and Peoples’ Rights**..... **35**
 - 1. Organisational Framework 35
 - a) Composition 35
 - b) Election of Commissioners 38
 - c) Relationship of the Commission to the OAU 38
 - d) The Financing of the Commission 39
 - e) The Secretariat of the Commission 41
 - f) The Commission’s Relationship with NGOs 43
 - 2. The Commission’s Responsibilities 45
 - a) The promotional function 45
 - aa) Promotional measures commensurate with Art 45 No. 1 AfrCHPR 46

bb) The state reporting procedure commensurate with Art 62 AfrCHPR.....	48
b) The protective function	53
aa) Communications from contracting states (Art. 47-54 AfrCHPR)	53
bb) “Other communications” (Art. 55-59 AfrCHPR)	55
(1.) Formal prerequisite of a communication (Art. 56 AfrCHPR)	55
(2.) Entitlement of communication.....	57
(3.) The communication procedure.....	57
(4.) The Commission’s latest practice	59
(5.) The protective functionality of the complaint procedure.....	61
c) The interpretation of the Charter.....	63
d) The Commission in the protection system — interim result.....	64
3. Chapter: The Protocol to the Banjul Charter on the Establishment of the African Court	67
I. The historic-political background	67
II. The development process for the protocol.....	71
III. Protocol concept.....	73
IV. The preamble to the protocol.....	74
V. The organisation of the Court	75
1. Composition of the Court.....	75
2. Election of the judges.....	77
3. Term of office	78
4. Impartiality and incompatibility rules.....	80
5. Cessation of office	83
6. The Board.....	84
7. Seat of the Court	86
8. Financing.....	86
VI. Jurisdiction of the Court.....	87
1. Contentious jurisdiction	87
a) Waiver of a recognition of competence	88
b) Scope of jurisdiction (<i>ratione materiae</i>)	89
c) Relationship to the jurisdiction of other (quasi-) juridical bodies.....	91
2. Advisory opinions.....	93
a) Roots and divulgence of advisory opinions in international jurisdiction.....	94
b) Discretionary power	95
c) Petition authority	95
d) Subject matter of advisory opinions.....	96
aa) Jurisdictional restriction with regard to Commission investigation.....	97
bb) Relationship to the Commission’s interpretation task	98
e) Excursus: Legal consequences of opinions.....	100
VII. The judiciary process	101

1. Complaint authority	103
a) States	103
b) The Commission	106
c) Individuals and NGOs.....	106
aa) Evaluation of the African solution in an international comparison	109
bb) Involvement capacity of non-governmental protagonists in the procedural transfer through the Commission	111
d) Excursus: Interventions by third states.....	115
e) African international organisations	116
2. Admissibility of complaints.....	117
a) Protocol guidelines for individual complaints	117
aa) No Necessity of a prior Commission procedure	118
bb) Commission consultation	120
cc) The Banjul Charter’s admissibility criteria	120
(1.) No anonymity.....	121
(2.) Compatibility of the complaint with the Banjul Charter.....	122
(a) Ratione personae	123
(b) Ratione materiae	125
(c) Ratione temporis	126
(3.) Formal requests	128
(4.) Complaints supported by mass media.....	129
(5.) Local remedies rule	129
(6.) Time limit.....	134
(7.) No other settlement of dispute	135
(a) Settlement through international institutions	135
(b) Settlement through bodies of the Banjul regime — at the same time, comments pertaining to the inter-institutional relationship of the Court with the Commission	137
b) Admissibility of state complaint	141
aa) Procedural party autonomy	142
bb) Banjul Charter prerequisites with regard to transferred procedures	145
cc) Local remedies rule	145
dd) Time limit.....	146
c) Admissibility of Commission petitions.....	146
aa) Conclusion of the Commission procedure	147
bb) The implementation of own complaints.....	147
d) Admissibility of complaints from international organisations.....	150
3. Course of procedure	150
a) Principle of public trial.....	150
b) Representational regulation.....	151
c) Right to legal aid	152
d) Unhindered implementation of individual complaint procedure	154
e) Law of evidence	154
VIII. Provisional arrangements	156
IX. Procedural termination	161
1. Amicable settlement.....	161
2. Behaviour of the parties	162

3. Ruling.....	163
a) Reaching a verdict.....	163
b) Content of the ruling	165
c) Effect of rulings.....	167
aa) Legal effect.....	167
bb) Factual effect — the significance under international law.....	170
d) Implementation control mechanisms	171
aa) Public dissemination	171
bb) Ministerial implementation control.....	172
cc) Judicial reporting system.....	175
X. Other provisions.....	176
1. Termination.....	176
2. Reservations	177
3. Ratification provisions	178
4. Amendments	180
4. Chapter: Results and outlook.....	181
I. Classification of the protective procedure.....	181
1. Procedural initiation.....	181
2. Procedural Process	184
3. Procedural termination.....	185
II. Institutional classification	187
1. On the institutional scope of the AfrCtHPR	187
2. The relationship of the commission to the Court.....	188
III. On the further development of the system	189
Abstract.....	193
Bibliography.....	196
List of Abbreviations.....	225
Table of Instruments and Conventions.....	231
Table of Cases.....	233
Appendix I: The African Charter on Human and Peoples Rights.....	236
Appendix II: Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples' Rights.....	248

1. Chapter: Introduction

Africa's continental regional organisation – the former Organisation of African Unity (OAU) and today's African Union (AU) – had to put up for a long time with international criticism regarding the handling of human rights violations, to differentiate between violations beyond their own borders and such violations in which those responsible were amongst the organisation's members. Whereas in particular the circumstances in formerly colonial countries and South Africa were thematically treated in critical and detailed fashion, fundamental human rights violations among the member states have not been placed on the agenda.

When these human rights violations reached a magnitude that led to an increasing rebuke and international discreditation of the OAU, the organisation reacted in 1981 with the adoption of the African Charter on Human and People's Rights (Banjul Charter). The OAU thus established a human rights protection system which their members were supposed to be subject to, and absorbed the developments which had been previously brought into play in Europe with the European Convention of Human Rights (ECHR) and in the Americas with the Inter-American Convention of Human Rights (ACHR). As the protective body provided by the Banjul Charter, the African Commission on Human and Peoples' Rights commenced their work in 1987. Furnished with only a few purviews, its activities – in contrast to the bodies in the two corresponding regional pacts – hardly found any response.

The demands for a juridical authority became increasing louder in the face of the commission's lack of achievements. Therefore on 10 June 1998 the OAU's Heads of State and Government Conference adopted a supplementary protocol to the Banjul Charter which provides for the establishment of an African Court on Human and Peoples' Rights. The necessary quorum was achieved on 9 January 2003 after ratification by the Republic of Comoro, and the protocol entered into effect on 24 January 2004 commensurate with Article 34 Paragraph III. Its judges have been elected; its seat has been chosen and for the time being one now awaits the inauguration of the Court.

The expansion of the African protection system by adding a juridical authority is linked with great hopes and expectations — a fact which detailed study of the protocol deems appropriate. Therefore the objective of this study is to analyse the institutional, procedural and other provisions of the protocol in order to elucidate the Court's prospective operational possibilities and difficulties.

After its inauguration the African Court on Human and Peoples' Rights will not come onto

the regional stage in isolated fashion, but will be placed alongside the commission. The success or failure of this new institution will thus also considerably depend on how it can position itself in the structure of the regional protection system. The Court's spectrum of responsibilities is directly linked with those of the Commission. The relationship of the Court to the Commission is therefore a further essential aspect of the study.

Therefore, after a brief summary on the development of human rights protection on the African continent until entry into force of the Banjul Charter, the previous human rights protection system will be outlined to show the institutional environment in which the Court will operate. Especially the institutional and procedural framework of the Commission will be emphasized in this chapter.

On this basis the additional protocol to the Banjul-Charter on the Establishment of the Court will be subsequently analysed in the fourth chapter of the treatise. Here a focus will be on the organization of the Court as well as on its jurisdiction and the judicial procedure. However, for the sake of completeness all other provisions of the protocol such as ratification amendment, or termination provisions will also be portrayed.

The thesis concludes with a summary of the essential findings and an outlook on the further development of the African protection system.

2. Chapter: Human rights protection in Africa — protagonists and backgrounds

The political path towards protection of human rights and its codification commenced in Africa during a period in which the majority of African peoples were on the verge of being dismissed from colonial rule or liberating themselves.¹ In 1961, African jurists conferred in Lagos, Nigeria under the auspices of the International Commission of Jurists (ICJ) with the original objective of discussing the importance of the rule of law for the new states.² Instead, human rights protection became the focus of attention: The idea of an African human rights protection authority was provided with substance for the first time. The conference adopted a resolution known as the “Law of Lagos”³, which recommended to the African states...“*in order to give full effect of the Universal Declaration of Human Rights of 1948 [...] to study the possibility of adopting an African Convention on Human Rights in such a manner that the conclusion of this conference will be safeguarded by the creation of a court of appropriate jurisdiction and that the recourse thereto be available for all persons under the jurisdiction of the signatory states.*”⁴ But in reaction to the preceding colonisation phase, the political climate was to a great extent marked by a strong endeavour of the African states for comprehensive political emancipation. That is why the proposal of the conference to create an international monitoring body for the young states was not met with a positive response among the addressees. On the contrary, they concentrated their efforts on the fundamental reorganisation of the African continent. These efforts ultimately culminated in the creation of the OAU as a regional African organisation.

I. The Formation of the OAU — Africa in the Conflict of Interests

The political reality made such a reorganisation urgently necessary: The arbitrary colonial borders and the lacking political and administrative experience of many governments resulted in armed intrastate and inter-African conflicts, and forced the new states to define their

¹ Dahomey (today’s Benin), Ivory Coast, Gabon, Cameroon, Congo-Brazzaville, Congo-Leopoldville, Madagascar, Mali, Mauritania, Niger, Nigeria, Upper Volta (today’s Burkina Faso), Senegal, Somalia, Togo, Chad and the Central African Republic became independent in the so-called “African Year” (1960); compare: *John Iliffe*, *Africans: A History of a Continent*, Cambridge 1996, p. 327 et seqq.

² *Adama Dieng*, *Interface between Global and Regional Protection and Promotion of Human Rights: An African Perspective*, in: *Yeal Danieli, Elsa Stamatopoulou, Clarence Dias* (Eds.); *The Universal Declaration of Human Rights*, New York 1999, pp. 271-282, 273.

³ The resolution is provided by the University of Pretoria at http://www.up.ac.za/chr/ahrdb/other_OAU4.html#COM1.

⁴ Paragraph 4 of the resolution.

relations. The targeted complete decolonisation of Africa called for the closing of ranks among the already independent states.

The Congo crisis⁵ in the beginning of the 1960s threatened to split Africa into two camps: On the one side stood the socialist aligned Casablanca Group — a confederation of states which included Egypt, Algeria, Ghana, Guinea, Libya, Mali and Morocco. Under Kwame Nkrumah⁶ the Casablanca Group advocated the establishment of an African federation (“Union Government for Africa”). The mostly anti-Western aligned governments propagated the far-reaching break with the western nations as former colonial powers.⁷ The common interests of the African states – such as the struggle against apartheid, colonialism and neo-colonialism as well as socioeconomic interests – should overcome the cultural and ethnic differences and subsequently resulting divergences of interest.⁸ Ethiopia, Liberia, Nigeria, Sierra Leone, Somalia, Togo and Tunisia almost simultaneously established the Monrovia Group at the Conference of Monrovia (Liberia). This group adhered to the stability of the colonial borders. In view of the ongoing pragmatic dependencies, they spoke out in favour of a pro-Western foreign policy, but at the same time emphasised the just-obtained state sovereignty and the subsequently related necessity of non-intervention in internal affairs. This was also the reason for the categorical rejection of a political integration in an African confederation of states. Instead, the Monrovia Group advocated a looser inter-African alliance system that should devote its efforts to international cooperation in the economical, scientific, social, technical

⁵ Shortly after gaining independence, violent unrest broke out in Congo on account of ethnic conflicts and a revolt by the Congolese armed forces against their white officers. To restore order, Belgian troops who were still in the country were deployed, and additional contingents of troops were flown in — against the will of Prime Minister Lumumba. The action was interpreted as an attempt to restore Belgian rule, and provoked encroachments against the white population. The political tensions intensified when Moïse Tshombé, the premier of the Katanga province, proclaimed his province as an independent country and expressly requested Belgian military assistance. Colonel Mobutu Sese-Seko, who staged a coup in 1965 and took over power, ultimately emerged from the turmoil of the Congo crisis, *John Iliffe, Africans: A History of a Continent*, Cambridge 1996, p. 327 et seqq.

⁶ Kwame Nkrumah (1909-1972) was the first prime minister (1957-1969) and first president (1960-1966) of Ghana. He pursued a radical pan-African foreign policy which aimed at Africa’s unity and liberation. However, Nkrumah was less freedom-loving in internal affairs. His rule became increasingly dictatorial. In 1964, he introduced a one-party system and allowed himself to be elected president for life. For instance, he allowed himself to be titled in controlled press as “The Messiah”, “Star of Africa”, “Man of Destiny” und “His High Dedication”, among other things. In 1966, Nkrumah was overthrown by a military putsch and spent his final years in exile as a guest of Guinean President Sékou Touré. Compare: A. Kirk-Greene, *His Eternity, His Eccentricity or His Exemplarity*; in: *African Affairs* 90 (1991), pp. 163-187, 179.

⁷ *Nkrumah* analysed the economic situation in Africa and thus formulated the main aspect for this attitude: “Our capital flows in veritable streams in order to irrigate the overall economic system of the imperialist West. For centuries Africa was the dairy cow of the western world.” Compare: *Kwame Nkrumah, L’Afrique doit s’unir*, Accra 1962, p. 5.

⁸ *Gino Naldi, The Organisation of African Unity — an analysis of its role*, London-New York, 1989 p. 4.

and cultural sphere.⁹ Both state formations, the Casablanca Group and the Monrovia Group, rivalled each other with their partially quite contrary standpoints and vied for their adherents in the remaining states of Africa.

Based on this background, the heads of state and government of the then 32 independent states met at the initiative of Ethiopia's Emperor Haile Selassie I. in May 1963 in Addis Ababa (Ethiopia) to decide on the future coexistence of nations on the African continent. On 25 May 1963 the present heads of state, with the exception of the leaders from Togo and Morocco, signed the charter for establishment of the Organisation of African Unity.¹⁰

II. The Original Charter of the OAU — Solidarity, Sovereignty and Non-intervention

The designation of this organisation was deceptive, but nevertheless allowed the conclusion that Africa's political unity was a leitmotif for its establishment. The opposite was the case: At the foundation conference from Addis Ababa the Monrovia Group was able to prevail in the essential points with their ideas. The charter prepared by Ethiopia clearly reveals its trademark "handwriting": The charter's preamble formulates the sovereignty and territorial integrity of the acceding states as well as the necessity of non-intervention in internal affairs as the uppermost objectives of the new organisation.¹¹ The Casablanca Group's pan-African uniform objective dwindled to the mere promotion of solidarity among the member states.¹² The idea of a supranational organisation with federal structure – as Nkrumah aspired to – was thus dealt a clear renunciation. The assembly sought a compromise with the Casablanca Group in the adoption of common objectives such as the freedom of African peoples — but in particular the resolute struggle against any form of colonialism and imperialism.¹³

The distributions of power were also reflected in the arrangement of the organisational structure: The only quorate body was the "Assembly of Heads of State and Government"

⁹ *Claude E. Welch*, The OAU and Human Rights: Towards a new Definition, in: JMAS 19 (1981), pp 401-420, 402.

¹⁰ UNTS 479, p. 30.

¹¹ Paragraph 6 of the preamble: "Determined to safeguard and consolidate the hard won independence as well as the sovereignty and territorial integrity of our states". This objective was taken up once again under Art. 2 I lit. c of the charter, in which the sovereignty, territorial integrity and the independence of the member states is declared as the duty of the organisation.

¹² Paragraph IV of the preamble, Art. 2 I lit. e of the OAU charter.

¹³ Art. 2 I lit. d of the OAU charter. This objective was first taken seriously at the foundation conference, and in reference to South Africa it was militantly proclaimed that the member states maintain no diplomatic or consular relations whatsoever with the Republic of South Africa, that any trade with South Africa is to be boycotted, that harbours and airports are closed to South African ships and aircraft, and that South African aircraft will be denied fly-over permission. Compare: CIAS/Plen.2/Rev.2A, 1963, Para. 8 et seq.

(Art. VIII f). However, Art. VIII p. 2 of the OAU charter merely granted the possibility “to discuss affairs which are of general importance to Africa, to discuss the objective, and to coordinate and harmonise the general policy of the organisation.” Within the framework of its jurisdiction it was authorised to issue resolutions, but of which any legal obligation for the member states is missing.¹⁴ Consequently, the organisation also had no operative sanction possibilities. On the contrary, their resolutions merely represented recommendations of the assembly to the addressed members¹⁵. In turn, the subsequent ineffectiveness of the organisation fostered the national sovereignty of its members, since the states were deprived of any structural influence through the organisation.

Human rights were only marginally reflected in the charter. In the preamble one showed themselves “persuaded that [...] the Universal Declaration of Human Rights, to the Principles of which we reaffirm our adherence, provide[s] a solid foundation for peaceful and positive cooperation among States”. Art. II Nor. 1 e) of the charter targets an international cooperation “having due regard to [...] the Universal Declaration of Human Rights.” Apart from these general references, relevant human rights contents are found in the charter’s preamble in the avowal of the OAU regarding right to self-determination of peoples as well as freedom, equality and dignity of the individual.

And so the key issues were clearly distributed: In contrast to the sovereignty of the member states and the non-intervention principle, the observance of human rights did not belong to the OAU’s target provisions. Accordingly, the OAU’s founding fathers also did not formulate any intervention jurisdictions on the part of the Assembly of Heads of State and Government with regard to human rights matters¹⁶, and refrained from the creation of an organisationally-

¹⁴ Dieter Nohlen (Ed.), *Third World*, Reinbek 1998, p. 574; A.A.: G.K.A. *Ofusu-Amaah*, Regional Enforcement of International Obligations, in: *ZaöRV* 47 (1987), pp. 80-94, 82. The author affirms the legal force of the resolutions, but sees no possibility of respective implementation or sanction.

¹⁵ Volker Epping, *Internationale Organisationen*, in: *Knut Ipsen*, *Völkerrecht*, Munich 1999, pp. 387-474, 468 et seqq.

¹⁶ In this context, *U.O Umozurike* intends to derive a restricted right of intervention on the part of the OAU from the reference to the preamble and Art. II Para. 1 e) regarding the UN’s Universal Declaration of Human Rights from 1948 and the objectives relating to the “creation of better living conditions” (Art. II Para. 1 b)), insofar as this aims at the safeguarding of individual rights; compare *the same*: The Domestic Jurisdiction Clause in the OAU Charter, in: *African Affairs* 78 (1979), pp. 197-209, 206 et seqq. However, no competencies can be derived solely from this reference. Phillip Kunig correctly concludes from these references only that a corresponding intervention jurisdiction could develop more easily with a statutory established right than with the absence of such reference. Compare *ibid*: *Das völkerrechtliche Nichteinmischungsprinzip*, Baden-Baden 1980, p. 180. However, the emergence of such an established right presupposes a corresponding general exercise as well as a legal opinion. Wolff Heintschel von Heinegg, *Die weiteren Quellen des Völkerrechts*, in: *Knut Ipsen* (ed.), *Völkerrecht*, Munich, 1999, pp. 180-221, 183 et seqq. The following remarks may be anticipated insofar as it is maintained that neither of the two elements has become established in the practice of the OAU.

inherent human rights body.

III. The OAU and Human Rights — a Retrospective

Based on this background, it seems worth considering to what extent the existing target provisions had an effect (on their part) on the agitation of the OAU in relation to human rights matters. An insight into this may be gained with the help of some examples.

In 1972, the president of the then Republic of Central Africa, *Bokassa*¹⁷, personally led a group of soldiers into a state prison and ordered them to abuse prisoners who had been convicted of theft. Many were beaten to death, others were mutilated. *Bokassa* ordered the corpses to be exhibited so that the survivors of this orgy of violence could be led past the dead bodies. He justified this “punishment” with the fact that the presidential palace had been broken into a few days beforehand and various objects had been stolen. While a reaction on the part of the OAU on the occasion of the 10th anniversary Assembly of Heads of State and Government in Addis Ababa in the same year might have been expected, the did not come about.¹⁸

In 1973, the deposed Ugandan president *Milton Obote* wrote from his exile a letter to the OAU’s secretariat with the request to forward it to the delegates at the Assembly of Heads of State and Government. In this letter he accused – with detailed reports – *Idi Amin* of massive state-concealed human rights violations in Uganda.¹⁹ A forwarding of this letter to the assembly did not come about, however.²⁰ Instead, in 1976 the assembly emphasised *Idi Amin’s* “humanitarian role” in connection with the Israeli military action in Entebbe.²¹

Particularly serious human rights violations were reported over the course of years from the Republic of Equatorial Guinea: Under the dictatorship of President *Macias Nguema*, ca. 300,000 people, about a third of the population, left the country while fleeing the regime.

¹⁷ *Jean-Bedel Bokassa* was President of the Republic of Central Africa (1966-1976) and Emperor of the Central African Empire (1976-1979). In 1966, *Bokassa* carried out a coup and appointed himself as president. He pursued an increasingly less calculable dictatorial policy. He became president for life in 1971. In 1976, he proclaimed his country as an empire and pronounced himself as emperor under the name *Bokassa I*. He paid £ 14 million for the coronation ceremony. The per capital annual income was £ 85 (ARB 1977, 4668 BC). Absurd banknotes bore witness to the self-prescribed worship of his persona: *Bokassa* allowed himself to be revered as the first engineer, the first farmer and the best football player in the country.

¹⁸ *U.O. Umouzourike*, The Domestic Jurisdiction Clause in the OAU Charter, in: *African Affairs* 78 (1979), pp. 197-209, 199 et seqq.

¹⁹ However, since *Obote* actively worked on his political comeback from his exile, his input may be partially seen as rather self-interested and therefore may not have had a trustworthy effect.

²⁰ *Collin Legum*, The Organisation of African Unity – Success or Failure? in: *International Affairs* 52 (1975), pp. 208-219, 212.

²¹ AHG/Res. 83 (XIII), 1976, Para. 3.

After his seizure of power in 1969, *Nguema* liquidated political opponents in great numbers and reintroduced torture. Executions were organised as mass events and accompanied with pop music. He ordered political prisoners to be buried up to their heads in the ground so that they would be bitten to death by ants.²² These accusations – widely discussed in the general public – were ignored by the Assembly of Heads of State and Government. Instead, the OAU operated a coordination office for technical assistance and cooperation in Malabo (Equatorial Guinea) — without attaching any stipulation or condition whatsoever.²³ In 1974, the OAU called upon its members to provide technical assistance to Equatorial Guinea.²⁴

Also in 1974, *Mengistu Haile* overthrew the Ethiopian Emperor *Haile Selassie*, who had decisively expedited the foundation of the OAU in 1963.²⁵ *Selassie* himself and 57 high-ranking government officials were executed, although the African state group in the UN had directed a public appeal to *Mengistu* to spare the lives of the emperor and his officials.²⁶ The chairman of the Africa Group and later OAU Secretary General *Salim Ahmed Salim* referred to the “*collective concern for human life and fundamental freedom*”, but at the same time explicitly emphasised that one had “*no desire to intervene in the domestic affairs of that brother state*”.²⁷

In summary, it has to be noted that even the most serious human rights violations in member states during this long period did not even provoke discussion. This is quite remarkable, particularly since a discussion commensurate with Art. VIII of the charter was the sole possible conventional reaction of the Assembly of Heads of State and Government regarding “matters of general importance”. The fact that such human rights violations were not assigned to this category sufficiently demonstrates that up until the mid-1970’s the OAU restrictively exhausted or did not exhaust whatsoever the scope of intervention assigned to it and thus left severe human rights violations for the most part unanswered. The OAU founding principles of non-intervention in internal affairs and sovereignty were tacitly interpreted as the necessity of non-observance of human rights violations in member states. The targeted solidarity of allied states was largely restricted to silently taking note of human rights violations of the individual member states.

²² *Randall Fegley*, *Equatorial Guinea – An African Tragedy*, New York 1989, p. 82.

²³ CM/Res. 335 (XXIII), 1974.

²⁴ *Ibid.* Para. 3.

²⁵ Compare p.4 above.

²⁶ UN Doc. A/PV/2301, quoted according to *Edward Kannyo*, *The OAU and Human Rights*, in: *Yassin El Ayoty* (Ed.), *The Organization of African Unity After Twenty Years*, New York et al. 1984, pp. 155-162, 155.

²⁷ *Ibid.*

IV. The Codification of the Banjul Charter

The solidarity amongst the “brother states” was clearly broken for the first time when the 12th Assembly of Heads of State and Government was relocated to Kampala (Uganda) in 1975, although Amin’s atrocities had become more and more obvious. Botswana, Tanzania, and Zambia subsequently boycotted the assembly.²⁸ The government of Tanzania reacted the most vehemently and published their opinion²⁹ through the information ministry, which deserves closer consideration: *“It is not surprising that the whole of Africa cries out against the atrocities of the colonial and racist States. [...] But when massacres, oppression and torture are used against Africans in the independent states there is no protest anywhere in Africa. There is silence even when crimes are perpetrated by or with connivance of African Governments and the leaders of African states. [...] The OAU never makes any protest or criticism at all. [...] Now, by meeting in Kampala, the Heads of State of OAU are giving approval over what has been done, and what is still being done, by General Amin and his henchmen against the people of Uganda. [...] The reasons given by African leaders for their silence about these things is the non-interference clause in the OUA Charter. [...] Why is it legitimate to call for the isolation of South Africa because of its oppression, but illegitimate to refuse co-operation with a country like Uganda, where the Government survives because of the ruthlessness with which it kills suspected critics?”*

This concise opinion may not have had any practical effect – Idi Amin was the rotating chairman of the assembly – but for the first time an OAU member had broken the wall of silence and offered resistance. The government of Tanzania precisely analysed the OAU’s previous behaviour with regard to human rights violations amongst its member nations and exposed the organisation’s double standard. On the one hand, the OAU had set the banning of colonial-political oppression and apartheid repression from the entire continent as a founding objective, but allowed the most blatant human rights violations in its own ranks to happen unacknowledged. And so at the same time Tanzania provided an impetus that had to bring the OAU closer together — to come to terms with the human rights situation of a member state.³⁰

²⁸ Mozambique, first became independent on 15 June 1975, had for the first time the opportunity to participate as a new member of the OAU in the Assembly of Heads of State and Government, and was thus not entirely absent, but was only represented by a lower ranking delegation. Compare: *Edward Kannyo, The Banjul Charter on Human and Peoples Rights: Genesis and Political Background*, in: *Claude Welch, Ronald Meltzer* (Eds.), *Human Rights and Development in Africa*, Albany 1984, p. 134.

²⁹ Official Statement issued by Ministry of Information and Broadcasting, Dar es Salaam, 25 July 1975, quote according to *Colin Legum* (Ed.), *Africa Contemporary Record 4 (1975-1976)*, p. 22.

³⁰ *Adama Dieng, Interface between Global and Regional Protection and Promotion of Human Rights: An African Perspective*, in: *Yeal Danieli, Elsa Stamatopoulou, Clarence Dias* (Eds.), *The Universal*

The severity and sensationalism of human rights violations reached an unusual dimension (even for African proportions at that time) at the end of the 1970's. As a result of the continued silence, the African community of states even discredited itself before the world public, which increasingly politicised the respect for and evolution of human rights.³¹ Subsequently, the western community of states increasingly made provisions of developmental aid contingent on the observance of human rights in the recipient states. For instance, the US government reduced the planned economic aid for the then Central African Empire and Guinea for the years 1977 to 1979. In April 1978 the USA suspended its developmental aid for Ethiopia in order to sanction the ongoing human rights violations of the Mengistu regime. Three months later, Canada and Sweden reacted with corresponding measures for the same reason.³²

1. The 1979 Monrovia Conference

The subject of human rights was first focused on in 1979 at the 16th Summit Conference in Monrovia, Liberia. In addition to the foreign policy (and above all the economic) pressure, a decisive factor was an incident that shocked the world public: Amnesty International proved the involvement of Emperor Bokassa I. in the murder of over 100 school children between the ages of eight and 16 in Bangui, at that time Central African Empire. The reason was the refusal of the pupils to wear the school uniforms ordered by Bokassa, which were manufactured in the family-owned factory.³³ This incident prompted the 6th Franco-African

Declaration of Human Rights, New York 1999, pp. 271-282, 275.

³¹ The core points of this development were the awarding of the Nobel Peace Prize to Amnesty International in 1975, the signing of the intensive human rights CSCE Final Act from Helsinki in 1975 (Chapter VII, "Human Rights and Basic Freedoms") and the adoption of the UN Human Rights Pact in 1976. In 1977, the then US President *Jimmy Carter* commenced his involvement in matters of human rights, and placed this in the realm of international diplomacy ("Because we are free we can never be indifferent to the fate of freedom elsewhere. [...] Our commitment to human rights must be absolute." Inaugural speech by President *Carter* on 20.1.1977; compare: Department of State Bulletin, 76 (1977), p. 122; with regard to *Jimmy Carter's* human rights policy, compare: *Stephan Cohen*, Conditioning U.S. Assistance on Human Rights Practices, in: *AJIL* 76 (1982), pp. 246-279). The EC refrained from the formal integration of a guarantee of human rights at the conclusion of the second ACP-EEC Lomé Convention (Lomé II) from 1978. This mainly took place in order to avoid being bound to certain reactions in case of human rights violations. During the Cold War the ACP states were integrated in the global balance of power, and so one wanted to keep all possibilities open under any circumstances. Nevertheless, the EC made it clear during the treaty negotiations that the observance of human rights would be the basis of mutual cooperation. Compare: *Gabriele Oestreich*, Menschenrechte als Elemente der dritten AKP-EWG Konvention von Lomé, Berlin 1990, p. 83 et seqq.; see also *Peter Hilpold*, Konditionalität in den Beziehungen zwischen der EU und den AKP-Staaten: Menschenrechte, Demokratie, Rechtsstaatlichkeit und verantwortungsvolle Regierungsführung, in: *ZEuS* 5 (2002), pp. 239-254, 242 et seqq.

³² *Amadu Sesay, Olusa Ojo, Orbobolka Fasehun* (Eds.), *The OAU after Twenty Years*, Boulder 1984, p. 82.

³³ *Charles Rousseau*, Chronique des Faits internationaux, in: *RGDIP* 84 (1980), p. 361 et seqq.; *Jonathan Power*, *Amnesty International: The Human Rights Story*, Oxford 1981, pp. 82-89. Three months beforehand, hundreds of pupils and students had demonstrated against the obligation to purchase and wear

Summit Conference in May 1979 to form an investigation commission consisting of jurists from the Ivory Coast, Liberia, Rwanda, Senegal and Togo.³⁴ Their 137-page report, which was submitted to the respective heads of state and government on the eve of the Monrovia Conference, concluded with an indisputable finding: “*His [Bokassa’s] responsibility was involved. His presence at the sites is proven, his participation is quasi-certain.*”³⁵

Based on this background, the Liberian president and host of the 16th OAU Assembly of Heads of State and Government, *Tolbert*, opened the session with a speech that contained clear words on the previous OAU human rights policy. He commented “that the inviolable principle of non-intervention in internal affairs has become an excuse” for the African heads of state to also silently ignore the most blatant human rights violations”.³⁶ He warned the present heads of state that Africa’s independence, which the OAU had prescribed in its formation, would be wasted if it merely engenders poverty and brutality, and he recommended the assembly to revise the OAU original charter in order to safeguard the observance of more fundamental human rights.³⁷ It was the first time the observance of human rights had been bluntly admonished like that at an OAU assembly. This thrust paved the way for further statements with similar content from various participants: First and foremost the new president of Uganda, *Binaisa*.³⁸ He called on his colleagues to learn from Uganda’s experiences and to speak out in support of the respect of human rights.³⁹ Ultimately, the resolution AHG/115 (XVI) “*Décision sur les droits de l’homme et des peuples en Afrique*” emerged from the subsequent discussion amongst the participants, with which the OAU Secretary General was mandated to convene a conference of experts in order to prepare a draft for an African charter⁴⁰ of human rights and the rights of peoples. At the same time,

these uniforms. The investigating committee found out that the imperial guard had already killed 150 of these demonstrators: compare: Amnesty International (Edl.), Annual Report 1980, p. 125; Frankfurt 1981.

³⁴ KCA 1979, 29750 A.

³⁵ Quoted according to *Olusola Ojo, Amadu Sesay*, The OAU and Human Rights: Prospects for the 1980s and Beyond, in: HRQ 8 (1986), pp. 89-103, 93.

³⁶ Address by His Excellency *William R. Tolbert Jr.* to the 16th Summit Meeting of the OAU on 11 July 1979, Monrovia Government Printer 1979; quoted according to *Amadu Sesay, Olusa Ojo, Orbobolka Fasehun* (Eds.), The OAU after Twenty Years, p. 83.

³⁷ Address by *H.E. William R. Tolbert Jr.* to the 16th Summit meeting of the OAU on 11 July 1979, a.a.O.

³⁸ “I warn you, I am going to propose that this assembly condemn Equatorial Guinea and the Central African Empire, which massacres children, while you sit here and do nothing”, ARB 1979, 5329 B; President *Obasanjo*, Nigeria, explained this comment by *Binaisa* with his still ongoing “honeymoon” as head of state; compare: *Philip Kunig*, Das völkerrechtliche Nichteinmischungsprinzip, Baden-Baden 1981, p. 186.

³⁹ ARB 1979, 5329 B.

⁴⁰ The term “charter” was chosen instead of “convention” in order to express the fundamental significance of their regulations. Compare: *Mikuin L. Balanda*, African Charter on Human and Peoples’ Rights, in: *Konrad Ginther, Wolfgang Benedek* (Eds.), New Perspectives and Conceptions of International Law, Vienna 1983, p.137.

special attention should be paid to the bodies for promotion and protection of human rights.

2. The expert draft from Dakar

At the invitation of the OAU Secretary General and the Senegalese government, 20 legal experts and various African governmental representatives met in Dakar (Senegal) from 28.11. – 7.12.1979 in order to prepare the draft of the human rights charter. The resolved document was submitted to the OAU's Council of Justice Ministers six months later in Addis Ababa (Ethiopia) for further discussion in order to prepare a resolution proposal for the OAU's Assembly of Heads of State and Government. Nevertheless, the necessary majority was not reached in Addis Ababa, and the discussion was postponed. Only at the following meeting of the justice ministers in January 1981 in Banjul (Gambia) was the text adopted and forwarded to the OAU's Council of Ministers. On 17 June 1981, the council submitted the Banjul text without further amendments to the 18th Assembly of Heads of State and Government for acceptance.⁴¹

The main focus of attention during this conference was on the civil war and the Libyan intervention in Chad, as well as the always topical question of West Sahara. Only at the end of the assembly – shortly after midnight on 27 June 1981, when only a few heads of state were present – Gambian President Jawara finally brought up the Banjul Charter for discussion. The participants consented by acclamation without further debate.⁴²

However, the Banjul Charter commensurate with Art. 63 III would enter into force after the simple majority of the OAU members (26 out of 50 at that time) ratified the charter and had submitted the ratification documents commensurate with Art. 63 III to the General Secretariat. In principle, the binding effect of a contractual set of agreements under international law is only brought into play with the signing as authentication of the contractual text and ratification of the contract as a commitment of the ratifying states vis-à-vis the contractual partner or respective depositary.⁴³ Particularly the NGOs, but also the commission itself, persistently called for the ratification of the charter by governments which had not ratified the Charter yet. Five years after its passage, the necessary majority quorum was reached with the

⁴¹ *Edward Kannyo*, The Banjul Charter on Human and Peoples' Rights: Genesis and Political Background, in: *Claude Welch, Ronald Meltzer* (Eds.), *Human Rights and Development in Africa*, Albany 1984, p. 146 et seqq.

⁴² *Renate Meurer*, Arbeitsweise der Afrikanischen Kommission für die Rechte des Menschen und der Völker, Ausarbeitung des WDdDB No. 200/96, p. 4, unpublished.

⁴³ *Antonio Cassese*, *International Law*, Oxford 2005, p. 172; *Wolff Heintschel von Heinegg*, Die völkerrechtlichen Verträge als Hauptquelle des Völkerrechts, in: *Knut Ipsen*, *Völkerrecht*, Munich 1999, p. 92-179, 110 et seqq.

depositing of the Nigerian ratification document with the OAU's General Secretariat.⁴⁴ Three months later, on 21 October 1986, the Banjul Charter in accordance with Art. 63 II entered into force.

V. The AU and Human Rights — a Perspective?

However, the observance of human rights as it should be achieved through the Banjul Charter was merely one challenge that the OAU had to face as a continental organisation. Global political and economic marginalisation, poverty, hunger, natural disasters, civil wars and coups determine African reality to this very day. The upshot of the OAU to counteract these developments is sobering.⁴⁵ Political displeasure coupled with the organisation's legal incapacity led to the fact that disaster after disaster transpired without an effective reaction on the part of the OAU having to occur: The complete collapse in Somalia, the years of bloody disputes in Liberia, Sierra Leone, Sudan, Angola, Lesotho and Mozambique also remained disregarded, just like the wars between Ethiopia (the OAU host country) and Eritrea as well as between the Democratic Republic of Congo and the Republic of Congo. The extensive disregard of the genocide in Rwanda was merely the logical continuation of the OAU's manner of acting.

This also led to the fact that the OAU had to cede significance as a continental protagonist to regional organisations like the Economic Community of West African States (ECOWAS) and the South African Development Community (SADC), which at least endeavoured to settlement of conflicts in its member states.⁴⁶

⁴⁴ In the meantime, all OAU member states have deposited their ratification documents with the General Secretariat. Swaziland ratified in 1995, South Africa in 1996, and Ethiopia, as OAU host country, only ratified the charter in 1997 — after Ethiopia (as well as Eritrea) was explicitly called upon by the Commission of Human and the People's Rights at its 18th session to ratify the charter as quickly as possible. Compare: Final Communiqué of the 18th Ordinary Session of the African Commission on Human and Peoples' Rights, Para. 35, in: ICJ (Eds.), *The Participation of Non-Governmental Organisations in the Work of the African Commission on Human and Peoples' Rights*, Chenôve 1996, p. 188. Eritrea only ratified the charter in the beginning of 1999.

⁴⁵ Expressive in this context is the OAU's self-knowledge, which it has summarised in the NEPAD paper: "In Africa, 340 million people, or half the population, live on less than US \$1 per day. The mortality rate of children under 5 years of age is 140 per 1,000, and life expectancy at birth is only 54 years. Only 58 percent of the population have access to safe water. The rate of illiteracy for people over 15 is 41 percent. There are only 18 mainline telephones per 1,000 people in Africa, compared with 146 for the world as a whole and 567 for high-income countries." *New Partnership for Africa's Development (NEPAD)*, Para. 4 NEPAD Doc (2001), available under www.nepad.org.

⁴⁶ For instance, ECOWAS unsuccessfully intervened in Liberia and Sierra Leone; compare with the international law aspects compiled by *Jeremy Levitt*, *Humanitarian Intervention by Regional Actors in Internal Conflicts: The Cases of ECOWAS in Liberia and Sierra Leone*, in: *TICLJ* 12 (1998), p. 333-375, 363 et seqq.; *Anthony Ofofiele*, *The Legality of ECOWAS Intervention in Liberia*, in: *ColJTL* 32 (1994), pp. 381-418; *Matthew Barton*, *ECOWAS and West African Security: The New Regionalism*, in: *DPILJ* 4

The OAU also lost significance with regard to economic integration. Sub-regional organisations increasingly led the central authority in Addis Ababa to appear superfluous. The formations of these organisations since the mid-70's impressively bear witness to the OAU's deficient integrative ability: ECOWAS⁴⁷ (1975), East African Community⁴⁸ (1980), SADC⁴⁹ (1980), Economic Community of Central African States (1983), North African and Arab Maghreb Union⁵⁰ (1987) and the Common Market for East and Southern Africa⁵¹ (1994) strove towards compensating for the OAU's failures.

In 1990, the OAU attempted to bundle the economic integration by involving the sub-regional organisations even more on a continental basis through the formation of the African Economic Community (AEC)⁵². The constitutive act, the so-called Abuja Treaty,⁵³ is regarded as a milestone on the path of an institutional transformation process on the part of the OAU.⁵⁴ The treaty stipulates the establishment of the AEC as an integral organisation within the OAU, which should take place over six stages in a period of no more than 34 years.⁵⁵ Various bodies were provided for fulfilment of the treaty purpose, the creation of an "African Common Market"⁵⁶: The General Assembly, the Council of Ministers, the Pan-African Parliament, the Economic and Social Council, the Court, the General Secretariat and the Technical Committee.⁵⁷ After the entry into force of the Abuja Treaty (12.05.1994), the OAU commenced working on the basis of both treaties, the OAU Original Charter and the

(2000), pp. 79-113. In 1998, the SADC also intervened with moderate success in the civil war in Lesotho; compare: *Sehoai Santho*, Lesotho: Lessons and Challenges after SADC Intervention, in: *Diane Philander*, Monograph No. 50, Franco-South African Dialogue Sustainable Security in Africa, Pretoria 2000, pp. 54-68, 57.

⁴⁷ *Edwini Kessi*, Trade liberalisation under ECOWAS: prospects, challenges and WTO compatibility, in: *AYIL* 7 (1999), pp. 31-59.

⁴⁸ *Wilbert Kaahwa*, The Treaty Establishing the East African Community: An Overview, in: *AYIL* 7 (1999), pp. 61-81.

⁴⁹ *Muna Ndulo*, African Integration Schemes: A Case Study of the Southern African Development Community (SADC), in: *AYIL* 7 (1999), pp. 3-30.

⁵⁰ *Abdelaziz Testas*, Evaluating Participation in African Economic Integration Schemes: The Case of the North African and Arab Maghreb Union (AMU), in: *JAE* 8 (1999), pp. 108-123.

⁵¹ *Michael Gondwe*, From PTA to COMESA – the Quest for sub-regional economic integration in Eastern and Southern Africa, in: *AYIL* 6 (1999), pp. 3-22.

⁵² *Jeggan Senghor*, The Treaty Establishing the African Economic Community: An Introductory Essay, in: *AYIL* 1 (1993), pp. 183-193, 186; *Frank Ofei*, Le traite d'Abuja et les communautes economiques regionales: la CEDEAO, in: *CAAP* 52 (1999), pp. 23-30, 24; *Bankole Thomson* provides a comprehensive analysis of the contractual set of agreements, in: *Economic Integration Efforts in Africa: A Milestone – the Abuja Treaty*, in: *AJICL* 5 (1993), pp. 743-767.

⁵³ *ILM* 30 (1991) 1241.

⁵⁴ *Corinne Packer*, *Donald Rukare*, The New African Union and its Constitutive Act, in: *AJIL* 96 (2002), pp. 365-379, 369 et seqq.; *Evarist Baimu*, The African Union: Hope for better Protection of Human Rights in Africa? in: *AHRLJ*, pp. 299-314, 303.

⁵⁵ Compare: Art. 6 I Abuja Treaty.

⁵⁶ Compare: Art. 6 II lit. f Abuja Treaty.

⁵⁷ Compare: Art. 7 Abuja Treaty.

Abuja Treaty, whereby the OAU's existing bodies functioned as those of the AEC. Further bodies were not developed yet. This condition more or less suggested a fusion of both organisations.

The accelerated trend of globalisation, which started after the end of the East-West conflict, had not only created a situation in which the OAU came under pressure to rethink its strategy in view of the African economic cooperation and integration. The political challenges also had to be appropriately confronted. In 1990, the OAU summit conference passed a resolution regarding the situation in Africa in view of the global changes, and acknowledged the “real danger of marginalisation of our continent”.⁵⁸ The OAU special summit in Sirte (Libya) – which was summoned by Libya's revolutionary leader *Gaddafi* and from which the genesis of the “African Union” (AU) stemmed – concerned Africa's preparation for globalisation and the examination of “ways and means of strengthening our continental organisation to make it more effective so as to keep pace with the political, economic and social developments taking place within and outside our continent.”⁵⁹

In quite a few respects, the origin of the AU shows clear parallels to the origin of its predecessor. Of course, the historical situation was entirely different: Back then there was the euphoria of the just obtained political independence and the prospects of a free, prospering Africa, whereas at this time there was widespread economic misery, internal and international armed conflicts and the prospects of increasing marginalisation in the world. However, as in those days, there were two opposing positions with regard to achieving Africa's integration — a more radical position and a more moderate position. And like back then, the more radical position was represented with considerable involvement by a politician, *Gaddafi*,⁶⁰ whereas the more moderate position was supported by a larger number of countries grouped around South Africa, Nigeria and Algeria. *Gaddafi's* present-day positions on Africa's unity are also very similar to those of *Nkrumah* in terms of content.⁶¹

⁵⁸ AHG/Dec.2 (XVII) Rev. 1. Para. 3.

⁵⁹ Sirte Declaration at the Fourth Extraordinary Session of the Assembly of Heads of State and Government, 8-9 September 1999 in Sirte, Libya; EAHG/Draft/Decl. (IV) Rev.1, Para. 4.

⁶⁰ This particularly concerns newspaper reports about financial involvement that *Gaddafi* had shown for assertion of his ideas. For instance, he had paid the well-known continental poorhouses such as the Comoros, Guinea Bissau, Niger, Sierra Leone, the Central African Empire and Equatorial Guinea one-third of the outstanding membership subscriptions to the OAU in order to secure the voting right for these states at the Sirte Summit; compare *NZZ* from 02.03.01, p 5; *SZ* from 28.05.01, p. 4; *FAZ* from 10.07.02, p. 1 et seqq.

⁶¹ For instance, *Gaddafi* had designated the African Union project under the catchwords “United States of Africa”; compare: ARB 1999, 13677 A. But in one respect *Gaddafi* clearly differs from *Nkrumah*: He hardly had any connection to Pan-Africanism. The OAU, Africa and the African Union did not assume any considerable importance in the Libyan foreign policy until 1998. On the contrary, the integration into the

The transition process from the OAU to the AU proceeded with astounding speed: After the first Sirte conference in 1999, it took all of two years – thanks to Libyan (financial) influence – until the formation document was worked out, initialled and the minimum number of ratifications were submitted in order to allow the Constitutive Act (CA) to enter into force. In the meantime, all African states have ratified the CA. Altogether, 17 bodies shall initially realise the dealings of the AU.⁶² The ballooning of the institutional structure is connected with the amalgamation of the OAU and the AEC⁶³, which provides for precisely these institutions.

However, with the first AU Summit Conference at Durban in 2002, only three of these institutions were established: The Assembly of the Union as successor to the OAU's Assembly of Heads of State and Government, the Executive Council of Ministers as successor to the OAU's Council of Ministers and the Permanent Representatives Committee — the only new body to date, which is responsible for the AU's ongoing operations and performs preliminary work for the Executive Council.

The AU's constitutive act is explicitly based on the OAU and the Abuja Treaty and reflects their tradition accordingly. Important fundamentals of the OAU Charter, such as non-

Arabic and Islamic community was essential to *Gaddafi*. Compare: *Mary-Jane Deeb*, *Libya's Foreign Policy in North Africa*, Oxford 1991, p. 12. His international isolation after the murderous Lockerbie incident led to the fact that he showed himself to be much more conciliatory vis-à-vis western countries and at the same time intensified relations with Arabic and African states. Compare: *Birgit Jagusch*, *Mephisto auf Versöhnungskurs? Libysche Außenpolitik unter Gaddafi*, in: *BDIP* 46 (2001), pp. 1483-1490, 1485. Compare also the illustrative article "Libyen will wieder in die internationale Staatengemeinschaft zurückkehren" in the *FAZ* from 29.07.1999, p. 3. The fact that *Gaddafi* turned more strongly towards Africa – contrary to his former priority – may well lie in the fact that he found more support for his concerns there. For instance, the OAU summit conference from 1998 called into question the legality of the Lockerbie proceedings from Camp Van Zeist and called for the immediate lifting of the UN sanctions; compare: *AHG/Dec.127 (XXXIV)*. The fifth extraordinary summit conference in Sirte repeated this and furthermore resolved to establish a commission which was supposed to examine the legality of the proceedings, *EAHG/Dec. 3 (V)*. However, nothing is known to date about the formation of such a commission. A virtually complaisant hymn of praise to *Gadaffi* was adopted at the same conference — a "Special Motion of Thanks to the Leader of the Great Socialist Libyan Arab Jamahiriya Brother Muammar Al Ghaddafi" (*EAHG/Dec. 4 (V)*), in which the heads of Government also declare "that any act aimed at destabilizing and undermining the Libyan Arab Jamahiriya constitutes an affront to the collective aspiration of Africa and African peoples towards the attainment of self esteem, dignity and independence." (*Ibid.* Para. 3). Even the African Commission of Human Rights did not abstain from a laudatory opinion to the benefit of *Gaddafi*: In a "Resolution on the Immediate Lifting of Sanctions Imposed on Libya" from 7 May 2001 the commission showed themselves to be convinced "that the Government of Libya has fully complied with the resolutions of the United Nations" (Preamble Section II). Therefore the commission called on the Security Council and the United Nations to lift the sanctions against Libya (operative Section II); compare: *AHG/229/XXXVII*.

⁶² Art. 5 CA mentions in particular: Assembly of the Union, Executive Council of Ministers, Pan-African Parliament, Court, Commission, Permanent Representatives Committee, Specialized Technical Committees (altogether seven, commensurate with Art. 14 CA), Economic, Social and Cultural Council, Financial Institutions (altogether three, commensurate with Art. 19 CA).

⁶³ Compare: Art. 33 CA.

intervention in internal affairs as well as the respect for sovereignty and territorial integrity, are also ranked high in the organisational acts (Art. 3 lit. b, Art. 4 lit. a, g CA).

But the organisational acts also point the way to the future by emphasising the rights of individuals: democracy, the protection of human rights in accordance with the Banjul Charter, gender equality and the participation of the population in order to achieve “greater unity and solidarity” between the countries and peoples of Africa are adopted in the AU’s Objective and Principles Catalogue (Art. 3 lit. a, h, Art. 4 lit. c, l, m CA).

Moreover, it is remarkable that the organisational acts no longer protect excesses of autocratic domination through sovereignty barriers: Immediately in connection with the mention of the necessity of non-intervention, the right of the African Union to intervene is stated with regard to serious circumstances – namely war crimes, genocide and crimes against humanity – in a member state, when the Summit Conference has adopted an appropriate resolution (Art. 4 lit. h CA). In 1999, the OAU’s Assembly of Heads of State and Government in Algiers had already resolved to reject unconstitutional change of government in Africa.⁶⁴ The organisational acts assume this position in their Principles Catalogue, and provides for the suspension of AU activities for governments which came to power in this manner (Art. 4 lit. p und Art. 30 CA).⁶⁵

The available literature doubts whether the AU’s course of action in the future will differ significantly from that of its predecessor with regard to human rights violations amongst its member states.⁶⁶ But at least the CA brought movement into the rusty institutional structure of the Pan-African regional organisation which is responsible for the human rights protection system. At the same time, the issues clearly proceed in the right direction: In the future, at

⁶⁴ AHG/Dec. 4 (XXXVI) Para. 4. However, this intention did not prevent the subsequent military putsches in Sierra Leone, Niger and Guinea Bissau; compare: *Adenmola Abass, Mashood Baderin*, Towards effective Security and Human Rights Protection in Africa: An Assessment of the Constitutive Act of the New African Union, in: NILR 49 (2002), pp. 1-38, 7.

⁶⁵ The AU has already proven that these are not merely unused competencies: The overthrow of the Government in Madagascar was sanctioned during the foundation summit in Durban. In March 2003, the same sanctions were applied to the Central African Republic when a successful coup was carried out in the absence of the president; compare: *NZZ* from 17.03.03, p. 6; *International Herald Tribune* from 18.03.03, p. 3.

⁶⁶ Compare: *Evarist Baimu*, The African Union: Hope for better Protection of Human Rights in Africa?, in: *AHRLJ* 1 (2001), pp. 299-314, 313 et seq.; *Adenmola Abass, Mashood Baderin*, Towards effective Security and Human Rights Protection in Africa: An Assessment of the Constitutive Act of the New African Union, in: NILR 49 (2002), pp. 1-38, 37; compare also: *Nsongurua Udombana*, Can the Leopard Change its Spots? The African Union Treaty and Human Rights, in: *AUILR* 17 (2002), pp. 1177-1261, 1258; he quite vividly expresses his doubts: “The AU is a reincarnation of the OAU. As such, it is not likely to take human rights seriously – even though that is greatly desired – for the simple reason that a married woman does not recover her virginity by divorce. [...] The adoption of the AU Treaty has more to do with the hysteria of globalization than the euphoria of unity or, for that matter, human right.”

least legal hurdles can no longer be cited as an explanation for inactivity on the part of the AU in view of its powers of intervention.

3. Chapter: The Banjul Charter's Human Rights Protection System — Analysis and Stocktaking

The adoption of the “African Charter on Human and Peoples’ Rights” in June 1981 pointed the way to the future in international terms, but at the same time it was also sceptically acknowledged in reference to the OAU’s previous human rights policy. The equation of “human rights” with “peoples’ rights” already communicated in the title led to the fact that the Charter left behind the impression as if it already wanted to restrict its standardised human rights content in relative terms.⁶⁷ Before the further development of the OAU’s human rights policy up to and including the adoption of the protocol establishing the African Court of Human and Peoples’ Rights is addressed, it seems meaningful to initially analyse more precisely the system created through the Charter in order to expose the weak spots and strengths of this system. In the second section, with the help of the thus acquired results, the consideration can be reviewed as to what extent the provisions of the Human Rights Court fit into this system and close or leave open system-inherent gaps.

A more detailed study of the Banjul Charter is also important for the evaluation of the Human Rights Court’s effective possibilities: For one thing it serves as a legal source, and for another thing, the “African Commission on Human and Peoples’ Rights” – which was constituted with the Banjul Charter – continues to function as a regional human rights protection body in addition to the Human Rights Court. The following analysis shall provide an overview concerning the normative content relevant as a legal source⁶⁸, and on the other hand it shall provide results concerning the working methods and functional capability of the “African Commission on Human and Peoples’ Rights”, which enable a classification of the Human Rights Court in the existing human rights protection mechanisms.

I. The Structure of the Banjul Charter

The Charter includes a preamble and a total of 68 articles, which are divided into three main

⁶⁷ *Mahalu* sees this formulation more as the result of a compromise between political ideologies of western and socialist-aligned states. Compare: *Costa Mahalu*, Africa and Human Rights, in: *Philip Kunig, Wolfgang Benedek, Costa Mahalu* (Eds.), *Regional Protection of Human Rights by International Law: The Emerging African System*, Hamburg 1985 pp. 1-30, 26.

⁶⁸ The following consideration is thus also limited to the norms possibly relevant for the Human Rights Court, and should not represent any complete content analysis of the Banjul Charter. Several representations concerning the content of the Banjul Charter are to be found in the literature. A comprehensive representation is offered by: *Fatsah Ouguergouz*, *La Charte africaine des droits de l’homme et des peuples – Une approche juridique des droit de l’homme entre tradition et modernité*, Paris 1993.

sections: The first 29 articles include the substantive section and proclaim the “rights and obligations”. According to the titular description, the second section governs the “protective measures” and includes organisational and procedural provisions concerning the establishment of the “African Commission on Human and Peoples’ Rights”, its competencies and the procedural law. The Charter ends with the third title “General Provisions”, which includes the regulations pertaining to ratification, entry into force and condition for its supplementation.

II. The Preamble

The Preamble of the Banjul Charter, like most international agreements, prefixes the values and motivations which underly its emergence to the actual provisions.

It reminds one that “freedom, equality, justice and dignity are the essential objectives for the achievement of the legitimate aspirations of the African peoples” (Paragraph 2 of the Preamble), and explicitly endorses the obligation agreed upon by the member states — to eliminate all forms of colonialism in Africa and to coordinate their efforts in order to create better living conditions and at the same time to duly consider the Charter of the United Nations and the General Declaration of Human Rights (Paragraph 3 of the Preamble). At this point the Preamble will point out that the Banjul Charter abides by the universal standard of human rights. However, the “tradition and the values of African civilisation, which guide its attitude vis-à-vis human rights and the rights of peoples’ and shall be characteristic for them”, is taken into consideration in Paragraph 4 of the Preamble. This formulation refers to a culturally relative interpretation of human rights in the Banjul Charter. But furthermore it is stated “that on the one hand the fundamental human rights are derived from the inherent human qualities”. However, it is also recognised that “the reality and the respect for peoples’ rights should absolutely guarantee human rights” (Paragraph 5 of the Preamble). The Preamble does not comment by any means on the relationship of individual rights and collectives, but abruptly places them side by side. And so to the critics of the Charter, who fear a subordination of individual rights vis-à-vis collective rights,⁶⁹ it did not offer any counter argument.⁷⁰

⁶⁹ *Rudolf Dolzer*, Die afrikanische Banju-Charta der Rechte der Menschen und der Völker (1981), in: Deutsche UNESCO-Kommission (Eds.), Menschenrechte und “Rechte der Völker”, Munich 1983, p. 34 et seq.

⁷⁰ One of the founding fathers of the Banjul Charter, *Kéba Mbaye*, reverses this argumentation and in this connection sees the universal claim to validity of human rights, which comprises the protection of all legal

Moreover, in Paragraph 6 it is taken into consideration “that the enjoyment of rights and freedoms also entails the assumption of obligations”. In this connection the Preamble makes it clear that an obligation on the part of the individual not only exists vis-à-vis other individuals, but also vis-à-vis the state. A fundamental difference to other regional human rights systems is also seen in this regard: Obligations in the American Convention on Human Rights (ACHR) as well as in the European Convention on Human Rights (ECHR) merely related to the obligations of the states vis-à-vis their citizens.⁷¹ But this is only to be endorsed in a restrictive manner: The Preamble of the ACHR explicitly refers in Paragraph 3 to the “American Declaration of the Rights and Duties of Man”⁷², which includes a pronounced obligation catalogue of the individual vis-à-vis the state.⁷³ Of course, in contrast to the Banjul Charter the Declaration is not a treaty binding under international law. Nevertheless, the imposition of individual obligations within the scope of a human rights document is not solely an African phenomenon,⁷⁴ but it corresponds to the African community-oriented tradition.⁷⁵ At the same time, this comparison of rights and obligations reflects the antithetical ideological points of departure; the Banjul Charter bears their signature. Socialist states could hardly harmonise state theory and the emphasis of individual rights without having to fear an ideological alleviation. The granting of individual rights on the one hand and the demand of obligations on the other hand may have made it easier for the socialist states to endorse the Charter.

III. Rights and Obligations

The material content of the Banjul Charter is found in its first section under the title “Rights

⁷¹ categories, as substantiated. Compare: *Kéba Mbaye*, *Les Droits de l’Homme en Afrique*, Paris 1992, p. 175. *Richard Gittleman*, *The Banjul-Charter on Human and Peoples’ Rights: A Legal Analysis*, in: *Claude Welch, Ronald Melzer* (Eds.), *Human Rights and Development in Africa*, Albany 1984, pp. 152-176, 154.

⁷² American Declaration of the Rights and Duties of Man, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17; the text is also found under <http://www1.umn.edu/humanrts/oasinstr/zoas2dec.htm>.

⁷³ See, for instance: Art. 33 (duty to abide by the law), Art. 34 (duty to render military service or alternative civilian service), and Art. 36 (duty to render payment of taxes).

⁷⁴ Compare *Beate Rudolf*, *Völkerrechtliche Pflichten des einzelnen und Drittwirkung von Menschenrechten*, in: *Beate Rudolf/Juliane Kokott* (Eds.), “Gesellschaftsgestaltung unter dem Einfluss von Grund- und Menschenrechten”, Baden-Baden 2001, pp. 91-116, 94 et seq. (with supporting documents from the universal and regional human rights pacts).

⁷⁵ *Edem Kodjo*, *Die Afrikanische Charta der Rechte des Menschen und der Völker in ihrem historischen Zusammenhang*, in: *EuGRZ* 17 (1990), pp. 306-311, 309; *G.O. Olusanya*, *African Charter on Human and Peoples’ Rights: Some Analytical Comments and Appraisal*, in: *NJIL* 11 (1985), pp. 1-9, 5. The obligations of the individual are also expressed in most constitutions of African countries. Just to cite a small selection, the constitutions of Egypt (Art. 13, 58 et seqq.), Benin (Art. 33 to 36), Tanzania (Art. 25, 26, 27 and 28) and Zaire (Art. 28, 30 and 31) include obligations in reference to the family, the society, the state apparatus or the constitution. For further supporting documents, compare: *Gilbert Flans* (Ed.), *Constitutions of the Countries of the World*, New York, 3/2001; comp. alternatively the database <http://confinder.richmond.edu>.

and Obligations” (Art. 1 to Art. 29). It includes “Human and Peoples’ Rights” in Chapter 1 (Art. 1 to Art. 26) and the adjunctive “Obligations” in Chapter 2 (Art. 27 to Art. 29). The Banjul Charter includes all generations or respective dimensions of human rights in this first section.⁷⁶

Art. 1 AfrCHPR obligates the Charter’s contracting states to recognise the rights, obligations and freedoms and to adopt measures for their implementation. This specifically includes the obligation to incorporate the Banjul Charter as nationally applicable law.⁷⁷ Closely linked with this obligation is Art. 62 AfrCHPR, according to which the contracting states must submit a report every two years, which indicates which legal and other measures they have adopted for implementation of the rights enshrined by the Banjul Charter.⁷⁸

1. Individual Rights

Art. 3 to 18 AfrCHPR contain the catalogue of individual rights. But this allocation is not to be made unequivocally. For instance, Art. 18 in Paragraphs I and II addresses the collective rights of the family, whereas in Paragraphs III and IV it includes the rights of women, children, the elderly and the handicapped. Similarly, Art. 3 AfrCHPR is inconsistently presented: In Paragraph I, it includes an equality requirement before the law, and in Paragraph II it includes a right to equal protection through the law.

a) Non-discrimination and equality requirements

Art. 2 AfrCHPR formulates a general equality and non-discrimination requirement with regard to the rights ensured through the Banjul Charter, “without any differentiation such as race, ethnic group, skin colour, language, sex, religion, political or other opinion, national or social origin, wealth or other status”. The provision hardly differs from the corresponding

⁷⁶ This categorisation of human rights goes back to *Karel Vasak*. The first generation of human rights accordingly encompasses political rights, and the second generation comprises economic, social and cultural rights. Vasak spoke of “solidarity rights” in the third generation. Compare: *Karel Vasak*, Pour les droits de l’homme de la troisième génération: Les droits solidarité. Lesson inaugural, dixième session d’enseignement, Strasbourg 1979, p. 17. This development has been particularly criticised by the western side with varying rationale. *Franz Nuscheler* feared an inflation of human rights to the “right to everything” through “an orgy of ideals”, which is superfluous because it is devoid of content. Compare *Nuscheler*: Das ‘Recht auf Entwicklung’. Fortschritt oder Danaergeschenk?; in: *DGVN* (Eds.), Blaue Reihe No. 67, Bonn 1966, p. 13. Others absolutely reject the legal character of this third generation of human rights. Compare: *Winfried Brugger*, Menschenrechte und Staatsgewalt, in: *Christian Chwaszeca, Wolfgang Kerstin* (Eds.), Politische Philosophie der internationalen Beziehungen, Frankfurt 1998, p. 154 et seqq.

⁷⁷ *Gino Naldi*, The Organization of African Unity – An Analysis of its Role, New York 1989, p. 114; *Philip Kunig*, The Protection of Human Rights by International Law in Africa, in: *GYIL* 25 (1982), pp. 138-168, 151.

⁷⁸ Statements pertaining to state reporting methods follow further below.

equality requirements of other human rights documents.⁷⁹ The equality tenet naturally does not formulate any independent protective right, but can only be understood in connection with the rights included in the Banjul Charter. However, Art. 2 AfrCHPR is so openly composed that that the Court might use it to review actually permissible restrictions of the guaranteed rights granted in the Charter by the signatory states insofar as these restrictions themselves do not meet the equality requirement. As a result, the Human Rights Court is given the possibility – so much may be anticipated – to review the partially considerable restriction leeway of the provisions at least with regard to the discriminatory effect in a specific case. Art. 3 I AfrCHPR substantiates the non-discrimination requirement and specifies, as mentioned, the equality before the law.

b) Civil and political rights

In contrast to Paragraph I, Art. 3 II includes a subjective right. This is aimed at equal protection through the law.⁸⁰ And so, if taken literally, a right to legal protection as well as a right to equal treatment is also included. As a result, Art. 3 II AfrCHPR presents the Court of Human Rights within the scope of its function with the possibility to also review individual judiciary acts for any discriminatory verdicts or judicial proceedings. The right to legal protection is only put in concrete terms in Art. 7 AfrCHPR.

The inviolability of the individual is guaranteed through Art. 4 AfrCHPR.⁸¹ The addendum that nobody may be *arbitrarily* robbed of this right takes into account the fact that in many African nations the death penalty is a legitimate criminal law sanction.⁸² A signatory state should not violate any international agreements as the result of a lawful condemnation to death.⁸³

⁷⁹ Compare: Art. 1 ACHR, Art. 14 ECHR.

⁸⁰ Compare: Art. 23, 24 ACHR.

⁸¹ Compare: Art. 4 ACHR, Art. 2 ECHR.

⁸² Compare: *Etienne-Richard Mbaya*, A la recherche du noyau intangible dans la Charte Africaine, in: *Patrice Meyer-Bisch* (Ed.), *Le noyau intangible des droits de l'homme*, Fribourg 1989, pp. 207-226, 221. The death penalty is only officially abolished in eight African nations. Compare: Amnesty International Report AFR 01/03/97 p.2. For development of the death penalty on the African continent, see also: *William Schabas*, *The Abolition of the Death Penalty in International Law*, 3rd Edition, Cambridge 2002, p. 356 et seqq.

⁸³ A corresponding restriction is also found in the ACHR (compare: Art. 4 Para. 1 p. 1 ACHR) and in the ECHR (Art. 2 Para. 1 p. 2) for the same reason. However, the death penalty was entirely abolished through Protocol No. 6 to the ECHR. All contracting States of the Council of Europe have signed the protocol, only San Marino has not yet ratified it. Compare: <http://conventions.coe.int/treaty/EN/cadreprincipal.htm>. In contrast to the Banjul Charter, the ACHR stringently restricts the imposition of the death penalty, and only allows it for the most serious crimes, but prohibits it for political criminal offences and for culprits who are pregnant, or who were younger than 18 or older than 70 at the time of the incident. It also prohibits the reintroduction of the death penalty in states in which it was abolished. For instance, Gambia, which abolished the death penalty in 1993, reintroduced it after the military putsch in 1995 (Amnesty International

Art. 5 AfrCHPR guarantees the respect of human dignity and prohibits any form of exploitation and degradation, in particular slavery, slave trade, torture as well as cruel, inhumane or humiliating punishment and treatment. The latter passage is particularly noteworthy, since in some African nations corporal punishment has survived in the criminal law systems.⁸⁴ And so the Court of Human Rights has considerable latitude in this connection. In other respects the provision is for the most part oriented towards the international standard.⁸⁵

Art. 6 AfrCHPR protects the right of individuals to freedom and security and also prohibits imprisonment without predetermined reason for punishment.⁸⁶ African reality was further emphasised by virtue of the fact that *arbitrary* arrest or detention is particularly prohibited. But in contrast to comparable provisions, the rights of the detainees are not vested.⁸⁷ Of particular relevance here is the lack of a right to review of a detention order, a claim for damages after unlawful imprisonment and a right to the immediate notification of the reasons for detention. The Charter also does not include any right to free legal defence for the destitute, as the two other regional covenants formulate.⁸⁸ The lack of rights for detainees is a clear deficiency of the Banjul Charter which the Court of Human Rights cannot compensate through more far-reaching interpretation of the Charter.

The right to due process of law and procedural laws are vested in Art. 7 AfrCHPR.⁸⁹ The weaknesses of Art. 6 AfrCHPR are not compensated, however. To be emphasised here is the

Report AFR 01/03/97, loc. cit.). In particular, the prohibition of political execution would be a desirable supplement to the Banjul Charter, especially since the imposition of the death penalty for political criminal offences is also still provided for and also practiced today in many African nations. The most prominent example in recent times was the execution of *Ken Saro-Wiwas* and eight other Ogoni leaders in 1995 for “oppositional resistance” in Nigeria.

⁸⁴ Corporal punishment (“caning” or “flogging”) is for offences which are suspended with prison sentence from six months and is provided for individuals up to age 45, and can occur in addition to or instead of other penalties. Compare: *Alan Miller*, *The Nigerian Penal System*, London 1997, p. 305 et seqq. In particular, draconic penalties are imposed after the introduction of Sharia law in northern Nigeria. For instance, a Sharia court in the northern federal state of Kebbi sentenced a 15 year old juvenile to lose his right hand on account of theft amounting to about 30 USD. A young girl was sentenced by the Sharia court in the federal state of Zamfara to 100 lashes of the whip for premarital sexual intercourse - the accused had spoken about rape. Compare: FAZ from 4.8.2001, p. 5.

⁸⁵ Compare: Art. 5 I, II ACHR, Art. 3, 4 ECHR.

⁸⁶ Compare: Art. 7 I, II, III ACHR, Art. 5 ECHR.

⁸⁷ Compare: Art. 7 IV – VII, Art. 5 ECHR.

⁸⁸ Compare Art. 6 III c ECHR, Art. 8 II e ACHR. Moreover, Art. 6 III e ECHR explicitly endorses the right to a free interpreter insofar as the accused does not understand the court's language of negotiations or else cannot express themselves. The free service of an interpreter is also not contingent on whether the accused is actually impecunious. It is definitively formulated to confront the risk that the accused abstains from the consultation of an interpreter due to fear of his or her own costs and experiences a disadvantageous court hearing as a result. Compare: *Mark Villinger*, *Handbuch der Europäischen Menschenrechtskonvention*, 2nd Edition, Zurich 1999, Ed. No.: 519.

⁸⁹ Compare: Art. 8 ACHR, Art. 6 ECHR.

determination in Paragraph 2 Sentence 2, which says that a penalty may not be imposed collectively, but only personally against the perpetrator.⁹⁰

Art. 8 AfrCHPR guarantees the right of freedom of conscience, freedom of religion and freedom to choose an occupation, which can be respectively restricted for reasons of public safety and order, however.⁹¹ When citing comparable norms, in particular Art. 18 III ICCPR, it is conspicuous that not merely the public exercise of these rights is subject to these restriction possibilities in the Banjul Charter, but the entire extent of protection. In particular, public safety and order is a hardly tangible criterion, and opens up a broad, hard to contain justification spectrum for interventions in the protected legal positions.

The right to information and freedom of opinion is laid down in Art. 9 AfrCHPR.

The freedom of the press, as also in the other regional and universal human rights pacts, is not mentioned in particular. However, it is generally seen as a *condicio sine qua non* of the freedom of information⁹², so that it is to be perceived as comprised within the scope of protection of Art. 9 AfrCHPR.⁹³

The freedom of association is laid down in Art. 10 AfrCHPR. Everyone is granted the right “to freely associate with others within the scope of the laws” (Paragraph I). In comparison with the international standard, it is also conspicuous in this provision that “laws” are devoid of specification and can restrict the right of association without the review latitude of a judicial instance.⁹⁴ All comparable provisions presuppose qualified laws which are capable of restricting the freedom of association in a permissible manner. Only the restriction possibilities for associations of police and armed forces remain unaffected by these requirements. Even here the protection of the Banjul Charter does not correspond to the international standard. Art. 10 II AfrCHPR includes the correlative notion of negative freedom of association. However, this comes under the express proviso of the solidarity obligation in Art. 29 AfrCHPR and thus seems to be for the most part worthless.

⁹⁰ A comparable provision is not found in the ECHR. Here *Kunig* sees a fundamental difference of the African understanding as opposed to the European-American understanding of human rights, where collective responsibility per se is rejected and an explicit determination is therefore unnecessary. Compare: *Philip Kunig*, The Protection of Human Rights by International Law in Africa, in: GYIL 25 (1982), pp. 138-168, 152. However, Art. 5 III ACHR – which includes a corresponding provision – is overlooked. Therefore a difference of the European-American understanding of human rights with regard to the African understanding cannot be ascertained without further ado in this provision.

⁹¹ Compare: Art. 12 ACHR, Art. 9 ECHR.

⁹² In the concurring opinion in the ruling of the matter *Barthold* versus Germany, judge *Pettiti* formulated: “Freedom of expression in its true dimension is the right to receive and to impart information and ideas on political issues as well as on other areas of public interest”. Compare: Series A 90 concurring opinion.

⁹³ *Kenneth Acheampong*, Freedom of Expression, including Freedom of the Press, under the African Charter on Human and Peoples’ Rights, in: LLJ 10 (1997), pp. 57-73, 66.

⁹⁴ Compare: Art. 16 ACHR, Art. 11 ECHR.

The freedom of association is also guaranteed through Art. 11 AfrCHPR and also comes under the provision of legality. Although conditions are placed on the restrictive laws – these must be applied in the interest of national and public security, national health, the morality and the rights and freedoms of others – this enumeration is not conclusive: The addendum “in particular” makes it clear that a gateway for manifold restriction possibilities in harmony with the Banjul Charter is also provided here. However, the freedom of association is subject to similar restrictions in all comparable international human rights documents, although with conclusive enumeration.⁹⁵

The freedom of movement is granted without limit in Art. 12 I AfrCHPR. And so the Banjul Charter exceeds the scope of protection of the two other regional covenants.⁹⁶ The ACHR⁹⁷ as well as the ECHR⁹⁸ permit the restriction of freedom of movement through simple law. The right “to leave any country, including one’s own and to return to one’s own country”, is manifested in Art. 12 II AfrCHPR and comes under qualified provision of legality. The Banjul Charter’s restriction possibility for the entry of one’s own citizens is unique in the international comparison.⁹⁹ Art 12 III AfrCHPR includes the right to asylum from persecution, which comes under the proviso of national legislation as well as international convention¹⁰⁰. Insofar as the prerequisites for the right to asylum are concerned, the Banjul Charter offers more extensive protection than, for instance, the ACHR, which determines in Art. 22 VII ACHR that right of asylum presupposes “persecution on account of political criminal offences or related normal criminal offences”. Art. 12 IV and V AfrCHPR belong together in terms of content. Paragraph IV specifies that a foreigner who is lawfully residing in the sovereign territory of a contracting state may only be expelled on account of a lawful decision. Paragraph V is of particular relevance for the purview of the Banjul Charter: It prohibits the mass expulsion of foreigners¹⁰¹ and – in contrast to the corresponding

⁹⁵ Compare: Art. 15 ACHR, Art. 11 ECHR.

⁹⁶ A limitless guarantee of the freedom of movement seems to be questionable, however. There are a vast number of reasons which must inevitably lead to the restriction of the freedom of movement: For instance, in the event of a catastrophe, probationary conditions or with regard to individuals in military service. That the Charter has not devoted any attention whatsoever to these necessary restrictions ultimately leads to the fact that produces its own non-compliance in this regard.

⁹⁷ Art. 22 I ACHR.

⁹⁸ Art. 2 III SP IV ECHR.

⁹⁹ In contrast, Art. 3 II of the Fourth Protocol to the ECHR explicitly excludes such a proviso.

¹⁰⁰ Reference is made here to the “OAU Convention governing the Specific Aspects of Refugees” of 10 September 1969, CAB/LEG/24.3 (in force since 20 June 1974).

¹⁰¹ The mass expulsion of foreigners and stateless individuals has always been a central problem of the human rights situation in Africa. In 1970, Ghana expelled all foreigners because of excessively high unemployment. All Liberians were expelled from the Ivory Coast and all Nigerians were expelled from Zaire in 1971 for political reasons. All foreigners were expelled from the Congo in 1977. Nigeria expelled

international provisions¹⁰² – specifies the scope of protection which also extends to ethnic or religious groups.

Art. 13 I AfrCHPR guarantees every citizen the right to freely participate in the administration of public affairs, either directly or through a representative. But this right can only be exercised under observation of legal provisions. And so the Banjul charter takes into consideration the fact that the majority of the OAU's member states are based on one-party systems. For this reason the scope of protection of Art. 13 I AfrCHPR is narrower than the comparable provisions.¹⁰³ The ACHR also permits legal restrictions of this right, but only under the qualified prerequisites of Art. 23 II ACHR (provisions which refer to age, citizenship, residence, language, education, legal capacity, mental capacity or criminal convictions). For citizens from dictatorial or one-party states an appeal to the African Human Rights Court with reference to Art. 13 I AfrCHPR appears to be virtually impossible because of the quasi unlimited restriction possibilities. Only in liberal-democratically oriented states can citizens successfully claim a violation of Art. 13 I AfrCHPR.

Art. 14 AfrCHPR guarantees the right to ownership and only permits an intervention in the public interest or in the interest of the community welfare, which has to be in accordance with the provisions of the corresponding laws. Therefore, in addition to the public interest or the community welfare, a lawful expropriation requires the existence of expropriation laws or laws from which an expropriation authorisation emerges. But the lack of a right to appropriate compensation upon expropriation is remarkable in comparison with the corresponding right of the ACHR¹⁰⁴. The ECHR did not explicitly acknowledge such a right to compensation in the corresponding provision¹⁰⁵, but this is read into the provision by the European Court of Human Rights (ECtHR) as a prerequisite for compensation.¹⁰⁶ In its obligation catalogue¹⁰⁷, the Banjul Charter leaves the obligation to payment of taxes¹⁰⁸ unaffected from this right to

all Ghanaians from the country in 1984. Compare: *Obinna Okere*, The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights, in: HRQ 6 (1984), pp. 141-159, 147. Nothing has changed in the present era. The most recent examples were the "repatriation" of Ethiopians from Eritrea in the course of the border conflict and the expulsion of all Tutsis from the Congo to Rwanda. Compare: *Heidelberger Institut für internationale Konfliktforschung* (Eds.), *Konfliktbarometer 1998*, p. 23 et seqq.

¹⁰² Compare: Art. 22 IX ACHR, Art. 4 SP 4 ECHR.

¹⁰³ Compare: Art. 3 SP 1 ECHR, Art. 23 ACHR.

¹⁰⁴ Compare: Art. 21 II ACHR.

¹⁰⁵ Compare: Art. 1 I SP 1 ECHR.

¹⁰⁶ Compare the ruling in the case *Lithgow et al. versus United Kingdom*, Series A 120, para. 120. But according to the ECtHR this does not mean that full compensation is granted, but that a consideration has to be made between the severity of the measure and the objective to be achieved.

¹⁰⁷ For reference to the Banjul Charter's obligation catalogue, see below.

¹⁰⁸ Compare Art. 29 No. 6 AfrCHPR.

ownership.

And so the catalogue of civil and political rights encompasses a series of fundamental individual rights, as they are also included in the universal and regional human rights documents. However, the guaranteed rights are provided with a large number of barrier clauses which enable the national legislature to penetrate far into the respective standard range of protection.

c) Economic, social and cultural rights

In addition to civil and political rights, a series of economic, social and cultural rights (hereinafter referred to as ESC rights) are codified in the Banjul Charter. In the terminology coined by Vasak¹⁰⁹ this concerns second generation human rights. Art. 15 AfrCHPR grants every individual a right to work under fair and satisfactory conditions and a right to equal pay for equal work. Art. 16 AfrCHPR guarantees a right to physical and mental health, and Art. 17 AfrCHPR also includes a right to education and to participation in cultural life. It is noteworthy that all rights are not citizen-related, which is absolutely relevant in view of the refugee problem in many African countries¹¹⁰.

The comparison of international law documents which guarantee social, economic and cultural rights on a universal and regional level allow one to recognise a distinct gradation in relation to the governmental duty to act: In Section I of the European Social Charter¹¹¹, the contracting states have merely “consented, with all appropriate means [...], to pursue a policy which is designed to create suitable prerequisites” which shall guarantee the exercise of rights. The ACHR¹¹² already provides that the states “take measures [...] which have the objective of gradually achieving the full realisation of economic, social and cultural rights through legislation or other suitable means”. The International Covenant on Economic, Social and Cultural Rights (ICESCR) decidedly formulates in Art. 2 I that every contracting state undertakes “to take measures by exhausting all of its possibilities in order to gradually achieve – with all suitable means, particularly through legislative measures – the complete implementation of the rights mentioned in the covenant.” On the other hand, these rights are

¹⁰⁹ Compare: Footnote 76 above.

¹¹⁰ According to the UNHCR, there are 3.6 million refugees in Africa (status: July 2006). For example, among these refugees there are approximately 180,000 in Ethiopia, Guinea and Uganda, 510,000 in Tanzania, 215,000 in Zambia and 203,000 in Kenya; compare: www.unhcr.de. Not included in these figures are the numerous domestic refugees (1.3 million) who do not enjoy any legal advantage in this connection, however.

¹¹¹ European Social Charter from 18.10.1961.

¹¹² Art. 26 ACHR.

less nebulously arranged in the Banjul Charter, but formulated as completely actionable. Art. 1 AfrCHPR collaterally obligates the states “to take legislative and other measures pertaining to the implementation” of all rights, obligations and freedoms.

In connection with the state reports, these rights are still relatively well-manageable for the Commission because they open up the possibility to gain an insight into the reality of life in the reporting state through specific questions, and to occasionally provide fresh impetus to an area through improvement proposals which lie beyond the realm of civil and political fundamental rights. This does not merely concern showing the reporting state its shortcomings, but actually pointing out the possibilities and necessities of a legal provision concerning certain subject matter, for instance in the realm of maternity protection¹¹³, health care¹¹⁴, working life¹¹⁵ or education¹¹⁶.

But apart from their acknowledged quality as human rights, the social, economic and cultural rights always pose the issue of their justiciability¹¹⁷. The comparatively unequivocal

¹¹³ For instance, the contracting states are urged within the scope of the state reporting procedure with regard Art. 15 und 16 AfrCHPR to report on measures for prenatal and postnatal health care, special care for working mothers (payment, protection against unlawful dismissal), measures regarding protection for mothers working in agriculture or in family enterprises and relief measures for unmarried mothers. Compare: Guidelines for National Periodic Reports, 2nd Annual Activity Report of the African Commission on Human and Peoples' Rights, 1988-1989, ACHPR/RPT/2nd Annex II para. II A 29.

¹¹⁴ With reference to the state report from Zimbabwe at the 21st session, a commissioner noted “that it would appear President Mugabe has decided to eliminate homosexuality in order to avoid a further spread of AIDS. [...] I should like to know what the present legal situation is in Zimbabwe today.” *Rachel Murray*, Minutes of the 21st session, p. 75, unpublished.

¹¹⁵ From the states it is expected that they report on measures in the private and public sector which particularly comprise an appropriate remuneration, social security, vocational training possibilities and job security. Legal and collectively agreed provisions regarding working times, overtime, paid holiday leave, public holidays and payment in the event of illness shall also be communicated. Compare: Guidelines for National Periodic Reports, 2nd Annual Activity Report of the African Commission on Human and Peoples' Rights, 1988-1989, ACHPR/RPT/2nd Annexe II para. II B 54(b) and II 9 (b).

¹¹⁶ In this connection, amongst other things, measures are taken into consideration which ensure a free and generally accessible basic education and further vocational training, with any sex-related discrimination becoming impossible. In addition, such provisions which ensure that individuals can establish educational institutes shall be communicated. Compare: Guidelines for National Periodic Reports, *ibid* para. II B. In this connection, at the 21st session a commissioner commented with regard to the Zimbabwe state report that private school institutes provide a lower educational standard: “You say on private land, the schools are substandard, but nothing can be done about it because they are on private land. Doesn't the state have power to legislate over such matters of public concern on private land? And in answering that you may want to consider whether if murder is committed on private land, the state would be silent about it.” *Rachel Murray*, Minutes of the 21st session, p.74, unpublished.

¹¹⁷ The term “justiciability” is not uniformly applied in the jurisprudence literature, which necessitates a clarification for the following statements. Sometimes it only means that mechanisms exist for implementation and/or observation of rights (compare: *Michael Addo*, Justiciability Re-examined, in: *Ralph Beddard, Dilys Hill* (Eds.), *Economic, Social and Cultural Rights. Progress and Achievements*, London et al. 1992, pp. 93-117, 95). “Justiciability” is elsewhere described as the quality of a legal standard to be reviewed in a juridical or quasi-juridical monitoring mode (according to *E.W. Vierdag*, *Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights*, in: *NYIL* 11 (1978), pp. 69-105, 76 et seqq.). For *Scheinin* these are two facets of the definition of “justiciability” (*Martin Scheinin*, *Direct Applicability of Economic, Social and Cultural Rights*, in: *Krzysztof Drzewicki*

formulation of the rights in the Banjul Charter is also not capable of changing this.

This issue is pivotal in connection with their enforcement before the African Human Rights Court. Also noteworthy in this connection is the fact that up to now no possibility exists – neither on the regional nor on the universal level – to censure the violation of economic, social and cultural rights in an appellate procedure, let alone to implement these rights with the aid of juridical assistance.¹¹⁸ In this context the African regional system uncritically entered and still enters terra incognita. The Commission – unimpressed by legal qualms – suggested not shrinking back from the submission of notifications which censure a violation of ESC rights because there were uncertainties with regard to the actionable content of these rights.¹¹⁹

Uncertainty with regard to the justiciability of ESC rights exists in two ways:

For one thing, they are so vague and exhortatory formulated that a court can hardly sift out their actual content with regard to their applications in a specific case. More clearly expressed: How satisfactorily must working conditions be in order to apply as satisfactory working conditions as defined by Art. 15 I AfrCHPR?¹²⁰

Secondly, these rights are contingent on resources in terms of content, i.e. they revolve around the question of how much money is to be spent for which purposes, and not instead for other purposes. This is a question which actually is not to be answered through the judiciary, but

(Ed.). *Social Rights as Human Rights*, Turku 1994, pp. 73-87, 82). This notion at issue is exclusively applied according to the second understanding, since the justiciability of ESC rights in the Banjul Charter would be undoubtedly affirmed according to the first explanation of the term.

¹¹⁸ However, at the moment a draft of an additional protocol to the ICESCR is being worked out, which shall permit individual complaints before the Committee on Economic, Social and Cultural Rights. Compare: Report of the Committee on Economic, Social and Cultural Rights to the Commission on Human Rights on a draft protocol for the consideration of communications in relation to the International Covenant on Economic, Social and Cultural Rights E/CN.4/1997/105.

¹¹⁹ For instance, before the NGO conference which was held in preparation for the 28th session of the Commission (23.10-6.11.2000) in Cotonou (Benin), Commissioner *Pityana* also explicitly called on the present NGO community to utilise the existing mechanisms in the notification process for economic, social and cultural rights in order to exhaust the entire regulatory content of the Banjul Charter. The Commission itself could not be active in a *sua sponte* sense, but required a commensurate occasion. This was more important than achieving clarity as to which legal nature befits these rights. *Rachel Murray*, Minutes of the 28th Session, p. 64, unpublished.

¹²⁰ Although it has to be noted that a growing number of cases concerning ESC rights is under consideration of judicial instances. I.e. the South African Supreme Court has recently decided on questions concerning the right of housing (enshrined in Art. 20 of the South African Constitution) and has chosen a differentiated approach: It has demanded from the government to set up “a coherent public housing program directed towards the progressive realization of the right of access to adequate housing within the state’s available means”. (*South Africa v Grootboom*, 2001 (1) SA 46 (CC) (South Africa)) The Court continues, however, that “[the] precise contours and content of the measures to be adopted are primarily a matter for the Legislature and the Executive. They must, however, ensure that the measures they adopt are reasonable.” In the authors view, this approach just shelves the problem. The question, if measures are “reasonable” again is not a judicial one. Where there is no money, no judgement can demand to spend it.

through the executive and legislative entities, and therefore the judiciary solution represents a certain interruption with regard to the principle of separation of powers. This question naturally gains explosiveness the less money is available to be spent.¹²¹

In the jurisprudential debate, the opinion has prevailed that two aspects in particular are of special relevance in the legal treatment of ESC rights in relation to their justiciability: According to the literature, authors unanimously agree that ESC rights imply certain “core obligations” despite their incalculable scope.¹²² These vary on their part from right to right, and must be developed by the Human Rights Court. The second aspect, which has already been laid down in the so-called “Limburg Principles”, also seems to be significant in this connection:¹²³ ESC rights can be explicitly taken into account if their governmental guarantee violates the ban on discrimination.¹²⁴

And so with regard to the application of ESC rights, the Human Rights Court is on the brink of a mostly undeveloped field that provides it with enormous possibilities: It can define the core areas of ESC rights by liberating them from their corset of informality and lending them appropriate justiciability. As a result, it would underscore their normative character and reflect the homogeneity and interdependence of the different human rights generations. In this way, the ESC rights would guarantee a minimum standard that imposes certain obligations on the states under consideration of the actually available resources.¹²⁵ Thus considered, the ESC rights in the poor states of Africa – in which the anyway meagre resources are either siphoned off by an elite minority, flow into pompous buildings as national status symbols or the armaments apparatus is magnified at the cost of the population’s vested infrastructural

¹²¹ Michael Dennis, David Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should there be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?*, in: *AJIL* 98 (2004) pp. 462-515, 514.

¹²² Compare: Peter Baehr, *Human Rights - Universality in Practice*, New York 1999, p. 35, Katarina Tomasevski, *Justiciability of Economic, Social and Cultural Rights*, in: *ICJR* 55 (1995), pp. 203-219, 208. The contents of these “core obligations” were also not specified on her part. In the case of the European Social Charter, the committee of experts pointed out the obligations of the individual contracting state on the basis of its special economic situation: Baehr, loc. cit.; however, such a development cannot be seen on a universal level.

¹²³ The so-called “Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights” were adopted within the scope of a conference initiated by the ICJ, which was supposed to specify the contents and scope of the ESC rights included in the ICESCR. The “Limburg Principles” are quoted in HRQ 9 (1986), p. 131 et seqq.

¹²⁴ National and international courts and tribunals from all over the world already make use of this aspect of ESC rights. Comp. Center of Housing Rights and Evictions (Ed.), *Leading Cases on Economic, Social and Cultural Rights: Summeries*, 2006, this extensive collection of jurisprudence is available under www.cohre.org/litigation.

¹²⁵ Bruno Simma, “Der Ausschuß für wirtschaftliche, soziale und kulturelle Rechte” (CESCR), in: *VN* 37 (1989), pp. 191-196, 194.

rights¹²⁶ – have a potentially major political and legal importance. The question as to whether a state complies with an obligatory ruling is a completely different matter and also may not be ignored by the Human Rights Court. But this should not change anything with regard to the fact that the Human Rights Court examines the adequacy of governmental compliance measures and compiles criteria which ensure the contractual implementation.

Moreover, outside of these core areas the Human Rights Court can determine the discriminatory non-granting of ESC rights and work towards a uniform economic, social and cultural development within the realm of its further contents. However, such a progressive application of ESC rights requires special care and thoroughness from the Human Rights Court: The contracting states may not be imposed anything impossible through its ruling. The extent of discretionary powers with reference to the implementation of ESC rights, which is much more narrowly composed with regard to civil and political rights, must be retained by the Human Rights Court within reasonable limits. In the practical application, rulings in this rather “exotic” human rights sphere must also be particularly clearly formulated and well-founded in terms of content in order to convince the addressees of its implementation.

At any rate, the Commission's experiences in the contradictory dealings with ESC rights to date are not suitable as an orientation guide: The processing of corresponding notifications which reached the Commission failed due to the cooperative refusal of the respectively affected states.¹²⁷ Following their practice with regard to non-participation of states in the notification procedure, of regarding the statement of affairs presented by the complainant as undisputed¹²⁸; the Commission determined general violations of ESC rights and called on the corresponding state in a likewise general manner “to draw all the legal consequences arising from the present decision”.¹²⁹

The international value of these statements is naturally very limited for the application of the material content of ESC rights under these circumstances. Here it is once again shown that the involvement of the states as international standard providers and simultaneous addressees of these standards is existential for the legal development through application and interpretation

¹²⁶ The conduct of the Ethiopian Government (i.e. the AU's host country) in the border conflict with Eritrea may serve as an illustration: In the summer of 1999, eight million people in Ethiopia were threatened with starvation on account of a three-year drought, whereas the Government in Addis Ababa provided an estimated 600 million US dollars for defence spending in the 1998/1999 budgetary year. After this situation had been criticised on the diplomatic level by Germany, Ethiopia recalled its ambassador from Bonn for consultations due to “anti-Ethiopian propaganda”. Compare: *Hungerkatastrophe in Ostafrika*, in: the *Tagesspiegel* from 17.2.2000, p. 13.

¹²⁷ Joined Communications 25/89, 47/90, 56/91, 100/93 vs. Zaire; Communication.

¹²⁸ [Loc. Cit.], also Communication; 60/91 vs. Nigeria; 87/93 vs. Nigeria; 101/93 vs. Nigeria.

¹²⁹ Communication 159/96 vs. Angola, Merits.

instances.

2. Collective Rights

The Banjul Charter includes a novelty in the sphere of international human rights codification.¹³⁰ It is the only convention which guarantees the collective rights (third-generation rights, as characterised by *Vasak's* terminology) as positive rights.¹³¹ For one thing, the Charter formulates a collective equality requirement (Art. 19 AfrCHPR) and specifically guarantees the “rights of peoples” to self-determination (Art. 20 I AfrCHPR), liberation from colonial foreign rule (Art. 20 II), to political, economical and cultural support in the liberation struggle (Art. 20 III AfrCHPR), to free disposal of the riches and mineral resources (Art. 21 I AfrCHPR), to lawful recovery of its property and adequate compensation in the event of unlawful removal of these riches (Art. 21 II AfrCHPR), to development and consistent involvement in the common heritage of mankind (Art. 22 III AfrCHPR), to national and international peace (Art. 23 I AfrCHPR) and to a satisfactory environment (Art. 24 AfrCHPR). Even this brief overview clearly illustrates how less substantial and vague the individual collective rights are formulated. This also came about with full intention: Firstly, not to endanger the ratification of the Banjul Charter through the outbreak of further disagreements; and secondly to give the Commission the latitude for a dynamic treatment of this [at that time] still very young legal category.¹³² However, this opportunity did not ensue for the Commission, with one exception¹³³, and so the original ambiguities consciously

¹³⁰ At this point, only the third-generation rights shall be addressed insofar as they are necessary for the question of their effect for the Human Rights Court. A detailed discussion of the development and problems in connection with third-generation human rights is not an element of this study and would lead too far. The numerous amount of literature is referred to, e.g.: *Arming Bethel*, Die Menschenrechte der Dritten Generation, Aachen 1991; *Christian Tomuschat*, Rights of People, in: *Yvo Hangartner, Stefan Trechsel* (Eds.), FS Hans Haug, Bern 1986, pp. 337-354; very differentiated: *Wolfgang Benedek*, Peoples' Rights and Individual Duties as Special Features of the African Charter on Human and Peoples' Rights, in: *Philip Kunig, Wolfgang Benedek, Costa Mahalu* (Eds.), Regional Protection of Human Rights by International Law: The Emerging African System, Baden-Baden 1985, pp. 59-94; compare also the treatises in *James Crawford*, The Rights of Peoples, Oxford 1988.

¹³¹ One exception is to be made here in reference to the right to self-determination. This is already laid down in the two human rights covenants from 1966 and is meanwhile binding as a customary law or as a general legal principle — and is mainly perceived with *ius cogens* character. Compare: *Karl-Josef Partsch*, Menschenrechte und Rechte der Völker, in: VN 34 (1986), pp. 153-161, 154.

¹³² *Kéba Mbaye*, Les Droits de l'Homme en Afrique, p. 173.

¹³³ With the Communication 75/95 Katangese Peoples' Congress vs. Zaire the petitioner attempted under reference to Art. 20 I AfrCHPR to assert the right of the Katangese population to self-determination, since the Government of Zaire suppressed the province's endeavours towards independence. The Commission determined that the right to self-determination can be awarded substance in different ways: Through independence, self-Government, federalism, confederacy or any other form of relationship which corresponds to the wishes of the affected population, but which stands in complete unison with other acknowledged principles. The Commission saw itself as obligated to maintain Zaire's independence and territorial integrity, and merely examined whether the members of the ethnic group were denied the right

accepted still exist.

And so the material content of the third-generation rights laid down remains completely shapeless. Insofar as they are not typical de-colonisation rights, virtually every statement of affairs may be subsumed in terms of content under one of their statements of fact.¹³⁴

Therefore the enforceability of their contents is negated in the literature. This is partially associated with the accusation that legal-political requirements are clad in juridical claims.¹³⁵

They are also partially qualified as prerequisite rights in the sense of a link between state sovereignty and individual human rights.¹³⁶

Apart from the problem of their concretion in terms of content, further unresolved questions – which ensue from the nature of the solidarity rights in connection with their justiciability – are posed in relation to the application of these provisions through the Human Rights Court, and two other components are featured in addition to the uncertainties in relation to ESC rights: Who is the beneficiary of these rights? Who is obligated by them?

The “people” are favoured through the solidarity rights of the Banjul Charter. The Commission circumvented its definition in the only case presented to it, and merely implied that the petitioners are potentially favoured.¹³⁷ In terms of jurisprudence, this term is approached in different ways. It is partially understood to be a community which is not even amenable to the external definition, because it identifies itself from historical, political and social roots as “people”.¹³⁸ According to this view, every ethnic group could invoke the “peoples’ rights”, irrespective of what constitutes the core of its solidarity. In view of the manifold ethnic, religious and cultural differentiation possibilities in every single African country, this open term would lead to an incalculable amount of potential subjectivities with regard to these rights. For this reason the peoples’ quality through mere self-identification is

to participate in the management of public affairs (Art. 13 I AfrCHPR). After this review, the Commission rejected the complaint as unjustified, and recommended the complainant to assert the right to self-determination in another variation which is compatible with the principles of sovereignty and integrity. Compare: “*Institut pour les Droits Humains et le Développement*” (Eds.), *Compilation des Décisions de la Commission Africaine des droits de l’Homme et des Peuples*, p. 39 et seqq.

¹³⁴ Compare: *Christian Tomuschat*, Solidarity Rights (Development, Peace, Environment, Humanitarian Assistance), in: *Rudolf Bernhardt* (Ed.), *Encyclopaedia of Public International Law*, Bd. IV, Amsterdam et al. 1995, pp. 460-467, 463.

¹³⁵ *Martin Hacker*, Völkerrecht und Nord-Süd Problematik vor der Generalversammlung, in: VN 2 (1980), pp. 41-47, 45; similarly: *Christian Tomuschat*, Das Recht auf Entwicklung, in: GYIL 25 (1982), pp. 85-112, 100.

¹³⁶ *Norman Paech/Gerhard Stuby*, *Machtpolitik und Völkerrecht*, Baden-Baden, 1994, p. 547 et al.

¹³⁷ “Que les Katangais comptent un ou plusieurs groupes ethniques, la question n’est pas là dans ce cas d’espèce.” Compare: “*Institut pour les Droits Humains et le Développement*” (Eds.), “*Compilation des Décisions de la Commission Africaine des droits de l’Homme et des Peuples*”, p. 39 et seqq.

¹³⁸ “Un euple ne se définit pas. Il s’identifie.” Compare: *Kéba Mbaye*, *Les Droit de l’Homme en Afrique*, Paris 1990, p. 173.

impracticable. The contrary approach understands the term “people” under reference to the motivation to create homogeneous nations – the “national folk” – within the existing colonial borders.¹³⁹ This is substantiated with the peoples’ right of self-determination guaranteed in Art. 20 I AfrCHPR. To classify ethnic groups as “people” and thus the beneficiaries of solidarity rights would be diametrically opposed to the AU principles of sovereignty and territorial integrity. On the other hand, this position also does not deal with all aspects of the heterogeneity prevailing in Africa within the various national folk.¹⁴⁰ The ICJ, in collaboration with the UNESCO Committee of Counsellors on Peoples’ Rights, endeavoured towards a compromise and at the same time a manageability of third-generation rights, and listed the six following criteria, which shall fulfil the meaning of the term “people”. First of all, a “people” must associate a common history; secondly, it must be ethnically integrated; thirdly, it must show cultural and linguistic commonalities; and fourthly, it also has to show religious and ideological commonalities. Fifthly, the “people” must be comprehensible in geographic terms; and sixthly, must show a certain minimum number.¹⁴¹

Whether these criteria would actually be helpful to the Human Rights Court in any application of the law may be doubted just like the question as to whether the Human Rights Court can infer the subject matter of a guarantee from these rights. The manifold scientific views on this topic follow the multiple structures of third-generation rights. Therefore an authoritative legal interpretation would always have to put up with the accusation of arbitrariness. The further the Human Rights Court penetrates in these amorphous areas, the more it has to anticipate that its legal findings remain unheard, because they find no acceptance amongst the addressees. The “rights of peoples” are moral guiding principles which partially cover basic human needs, and partially ensue from the value orientation of the international relationship or the political objectives of states under the realm of developing countries. What these rights are lacking is their enforceability. But this is necessary, even if they are juridically asserted. The Human Rights Court’s dealings with these rights will thus prove to be extremely problematic. It is

¹³⁹ Compare: *Rudolf Dolzer*, Die afrikanische Banjul-Charta der Rechte der Menschen und der Völker, in: Deutsche UNESCO-Kommission (Eds.), *Menschenrechte und ‘Rechte der Völker’*, Munich 1983, p. 28; *Karl-Josef Partsch*, The Enforcement of Human Rights and Peoples’ Rights: Observations and their Reciprocal Relation, in: *Rudolf Bernhardt, John Anthony Jolowicz* (Eds.), *International Enforcement of Human Rights*, Berlin et al. 1987, pp. 25-29, 28; differentiating according to individual rights: *James Crawford*, The Rights of Peoples: “Peoples” or “Governments”, in: *James Crawford* (Eds.), *The Rights of Peoples*, Oxford 1988, pp. 55-69, 58 et seqq.

¹⁴⁰ *Julia Swanson*, The Emergence of New Rights in the African Charter, in: NYLSJICL 12 (1991), pp. 307-333, 315; *Richard Kiwanuka*, The Meaning of “People” in the African Charter on Human and Peoples’ Rights, in: AJIL 82 (1988), pp. 80-101, 84.

¹⁴¹ Compare: *Gino Naldi*, *The Organization of African Unity – An Analysis of its Role*, New York 1989, p. 125.

regrettable that of all legal bodies, the African Human Rights Court is the first implementation authority for third-generation rights over which the shadow of uncertainty looms over the nature, content, obligors and holders of rights. Like the codification of ESC rights in the Banjul Charter, the collective rights within the scope of state reports before the Commission may also prove to be positive; but as a basis for a judicial review they are – unlike the ESC rights – entirely unsuitable.¹⁴² Already when dealing with ESC rights the Human Rights Court has to apply a considerable extent of innovative ability and persuasive power in order to make sure its ruling are being implemented. The judicial review of third-generation rights involves the risk that its legal decisions lose their seriousness, and possible even appear as mere fantasy rulings.

3. Obligations

In addition to individual rights, the Banjul Charter also codifies individual obligations as another special feature of the international treaty.¹⁴³ These include abstractly kept obligations vis-à-vis the family, the state and the international community (Art. 27 AfrCHPR) as well as the obligation to respect and to promote fellow human beings (Art. 28 AfrCHPR). Art. 29 AfrCHPR partially specifies these obligations and includes, for instance, the obligation to provide one's national community with one's intellectual and physical abilities, not to endanger the national security, to defend the territorial integrity, to employ one's workforce and to pay the statutory taxes.

The obligation catalogue may hardly gain significance for the African Human Rights Court. This has its obvious cause in the fact that individual obligations are defined and enforced on the state level within the scope of national personal sovereignty and cannot be pursued within the scope of international proceedings.¹⁴⁴ At any rate, they could be cited by the Human Rights Court to specify the protective scope of individual rights. It appears that this has never occurred, at least not in the practice of the Commission.

¹⁴² This difference is also illustrated by the efforts to adopt a facultative protocol to the ICESCR that provides a similar control mechanism like that of the ICCPR. A draft protocol is already at hand, and is an object of discussion. Compare: Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, E/CN.4/1997/105; compare also: *Nowak*, The need for an optional protocol to the International Covenant on Economic, Social and Cultural Rights, in: RICJ 55 (1995), pp. 153-165, 156 et seqq.; NJCM Commentary on the Draft Optional Protocol to the International Convention on Economic, Social and Cultural Rights, in: NJCM-bulletin 23 (1998), pp. 237-244.

¹⁴³ Compare concerning the position of the individual in international law, *Antonio Cassese*, International Law, Oxford 2005, pp. 144 et seqq; *Beate Rudolf*, Völkerrechtliche Pflichten des einzelnen und Drittwirkung von Menschenrechten, in: *same/Juliane Kokott* (Eds.), Gesellschaftsgestaltung unter dem Einfluss von Grund- und Menschenrechten, Baden-Baden 2001, pp. 91-116, 92 et seqq.

¹⁴⁴ *Rachel Murray*, The African Commission on Human and Peoples' Rights, Oxford 2000, p. 112.

IV. The Commission on Human and Peoples' Rights

Section 2 of the Banjul Charter includes under the heading “Protective Measures” the provisions concerning the “African Commission on Human and Peoples' Rights” (Commission). The organisational provisions are codified in Chapter 1 (Art. 30 to 44 AfrCHPR). Chapter 2 assigns the Commission its responsibilities (Art. 45 AfrCHPR). Chapter 3 includes the procedural section (Art. 46 to Art. 59 AfrCHPR), and Chapter 4 defines the principles to be applied by the Commission (Art. 60 to Art. 63 AfrCHPR).

The Commission represents the only protective body that the Banjul Charter originally provides for. It is supposed to work towards the implementation of the Charter in the contracting states, safeguard the observance of its provisions and offer assistance with the solution on a supranational level in the event of conflict. The Human Rights Court is made available to the Commission after entry into force of the additional protocol. The future African human rights protection system thus follows the corresponding organisational terms with the American human rights protection system, which also provides for a Commission and a Human Rights Court. However, the Commission was abolished with the Eleventh Protocol to the European Human Rights Convention and replaced through the Standing European Court of Human Rights (ECtHR). At this point it is shown on which organisational basis the Commission stands, which personnel and material resources are available to the Commission, with which competencies it is equipped and how it makes use of these.

1. Organisational Framework

First of all, the organisational framework in which it functions is the basis for an evaluation of the Commission. The concomitant provisions are found in Art. 30 to 68 AfrCHPR.

a) Composition

Commensurate with Art. 31 I AfrCHPR, the Commission consists of eleven members, who are selected “amongst African personalities of utmost standing” and “who are well-known for their high morals, integrity, impartiality and expertise in the realm of human and peoples' rights, whereby the involvement of individuals with legal experience is to be taken into special consideration.”¹⁴⁵ But the fact that the factual prerequisites are so vaguely maintained also results in the fact that rather unqualified members also belong to the Commission,

¹⁴⁵ In the inter-American system, the commissioners must be “personalities of high ethical character and must have acknowledged expertise in the realm of human rights” (Art. 34 ACHR). A provision concerning the qualification of commissioners is lacking in the European system.

which due to the marginal number of commissioners¹⁴⁶ becomes immediately evident.¹⁴⁷ The Banjul Charter does not call for any geographical consideration with regard to the composition.¹⁴⁸ There is also no provision on the consideration of a balance of sexes within the Commission. The Commission consisted of men up until 1993. Since the 10th Session (1991), the participating NGOs thus formulated the urgent demand to also involve women as commissioners.¹⁴⁹

Much more serious, however, is the lack of an incompatibility provision in the Banjul Charter, which could safeguard the independence of Commission members. Of course, with the advice “it is not desirable to have the Headquarters of the Commission where political and administrative organs are located”, the Commission recommended that the OAU’s “Assembly of Heads of State and Government” emphasise their independence from the mother organisation through the fact that its headquarters should not be located in Addis Ababa, Ethiopia, but in Banjul, Gambia.¹⁵⁰ But this did not point the way towards the future political independence of the commissioners. This resulted in the fact that many members belonged and still belong to the Commission, whose profession is clearly incompatible with the responsibilities of a commissioner for human rights.—¹⁵¹ For instance, Commissioner Moleleki Mokama (1987-1993) was Chief Public Prosecutor in Botswana, and Commissioner

¹⁴⁶ Commensurate with Art. 20 ECHR (former version), one member per contracting state belongs to the European Commission on Human Rights. The Council of Europe had 41 members when the Commission was abolished. The Inter-American Commission on Human Rights consists of only seven members (Art. 34 ACHR).

¹⁴⁷ For instance, the current commissioner from Malawi (*Vera Chirwa*) is to be assessed as such a “miscasting”. She was obviously recommended and elected as recognition for her personal fate. (together with her husband, she had been sentenced to death as a political prisoner under the Banda regime in Malawi). Under pressure from the African Commission (Communication 78/92, *AI vs. Malawi*), the sentence was commuted to life imprisonment. Her husband lost his life as a result of torture during the prison sentence. Unfortunately, she lacks a legal educational background. At the 28th Session of the Commission she restricted her remarks to current topics (Ethiopia-Eritrea conflict or the domestic political disturbances in the Ivory Coast), thus appealing to the conflict parties to engage in altruism and to obey the Ten Commandments, since human rights violations would not even emerge then. *Rachel Murray*, Minutes of the 28st session, p. 24, unpublished.

¹⁴⁸ But an equitable geographical distribution has always been observed in de facto terms. At the moment, three commissioners come from West Africa, two from Central Africa, three from North Africa, one from East Africa and two come from southern Africa.

¹⁴⁹ *Evelyn Ankumah*, *The African Commission on Human and Peoples' Rights*, The Hague 1996, p. 16; in the meantime, four women are members of the Commission.

¹⁵⁰ Recommendation on the Headquarters of the African Commission on Human and Peoples' Rights, Libreville, 28 April 1988, printed in: *Recommendations and Resolutions*, Banjul 1998, p. 7; another reason for the recommendation was that Gambia's democratic development should be honoured. Moreover, Ethiopia only ratified the Banjul charter in 1997, whereas the president of Gambia (*Jarawa*) had strongly advocated the adoption of the Charter.

¹⁵¹ In contrast to the secretariat employees, the commissioners only perform their duty on a part-time basis, and otherwise pursue their original profession. Compare: *U. Oji Umozurike*, *The African Charter on Human and Peoples' Rights*, The Hague, 1997, p. 69.

Alexis Gabou¹⁵² (1987-1993) was Minister of the Interior in Congo. The professions of Commissioner Janaiba Johm (Chief Public Prosecutor in Gambia) and Commissioner Mohammed Ben Salem (Tunisian Ambassador in Ankara) can hardly be described as compatible with the position of an independent commissioner in the current staffing. This situation is a regular object of criticism on the part of the NGOs.¹⁵³ On the other hand, the Commission rejects this criticism and arguments with the advantages which such a position would render in the home country for the promotion of human rights.¹⁵⁴ In other respects, the impartiality would already be safeguarded through Art. 109 of the Commission's Rules of Procedure (RP)¹⁵⁵. Accordingly, no member of the commission may take part in the handling of communications if he or she has a personal interest in the case, or is involved in any decision which is in connection with the complaint. Furthermore, it is stated against the objection that the commissioners belong to the Commission as individuals commensurate with Art. 31 II AfrCHPR, and take the official oath to fulfil their obligations "impartially and conscientiously" in accordance with Art. 38 AfrCHPR.

This does not go down well: The success or failure of a merely quasi-legal body is particularly contingent on its outwardly effective independence. It is the guarantor for the impartiality of the arbitration and thus an essential factor for the persuasive powers of its content. As a result, the Commission loses – independent of the actual quality of its work – its credibility in the same extent as its independence may be doubted.

Of course, apart from the fact that the "Assembly of Heads of State and Government" elects the members of the Commission, the Commission cannot be accused of not adhering to incompatibility rules which are not included in the Charter. However, it allowed opportunities to create a remedy within the scope of its self-administration to expire without being exploited.

For instance, the incompatibility rules of Art. 109 RP are excessively geared towards the

¹⁵² Therefore *Gabou* was repeatedly called on by NGOs to resign. He refused to do so, but at the same time he was absent without excuse from several sessions. He was not re-elected when Congo once again put him up for the next election. Compare: *Evelyn Ankumah*, *The African Commission on Human and Peoples' Rights*, The Hague 1996, pp. 15 and 18.

¹⁵³ *Renate Meuer, Renate Mahnke*, 200/96 WDdDBT, p. 9, unpublished.

¹⁵⁴ *Evelyn Ankumah*, loc. cit.; in fact, there is a case in which a commissioner took advantage of his influence through his position in the home country and was able to bring about a consensus. Compare: *Henry Kalenga v. Zambia*, Communication No. 11/88, printed in "*Compilation des Décisions de la Commission Africaine des Droits de l'Homme et des Peuples, Institut pour les Droits Humains et le Développement*" (Eds.), Banjul, 1999, p. 6.

¹⁵⁵ The Rules of Procedure (RP) were adopted in 1988 during the Second Session of the Commission in Dakar, Senegal. A slightly modified version has been valid since 6.10.1995. Insofar as nothing else is designated, the article numbers refer to this new version. Compare: Revised Rules of Procedure, printed in: *AJICL* 8 (1996) 4, pp. 978 –1003.

discernment of the concerned commissioner instead of making an unequivocal statement that a commissioner is excluded from any handling of communications and state reports which pertain to his own country. The Commission could also recommend the OAU's "Assembly of Heads of State and Government" to adopt independence and incompatibility guidelines which would then have to be heeded during the election of commissioners. At any rate, the current status of the Commission is incompatible with the responsibilities of an independent semi-judicial body.

b) Election of Commissioners

The members of the Commission are elected via secret ballot by the "Conference of Heads of State and Government" from a list compiled by the contracting states to the Banjul Charter (Art. 33 AfrCHPR). The contracting states can each propose at most two candidates, of which only one may come from their own country, but both candidates must be citizens of a contracting state to the Banjul Charter (Art. 34 AfrCHPR). At the latest four months before the election of the commissioners the Secretary General of the OAI calls on the contracting states to submit their proposals. At the latest one month before the election, the Secretary General conveys the list of candidates to the heads of state and government (Art. 35 AfrCHPR). The term of office amounts to six years. During the first election, four members of the Commission were only elected for two years, and another three members were only elected for four years (Art. 36 AfrCHPR), whereby one commissioner's term of office was determined by lot (Art. 37 AfrCHPR).

After the Banjul Charter entered into force on 21 October 1986 commensurate with Art. 63 III AfrCHPR, the members of the Commission were elected by the OAU's following (23rd) "Conference of Heads of State and Government" on 29 July 1987, and the Commission was thus constituted.

c) Relationship of the Commission to the OAU

The position which a body assumes in the overall structure of an international institution is of great importance for the validity claim of its resolutions.¹⁵⁶ The Commission was set up as a sub-organisation of the OAU (Art. 30 AfrCHPR). The specification of its organisational relationship with the mother organisation is partially found in the Banjul Charter and partially in the Standing Orders.

¹⁵⁶ *Herbert Miehsler, On the Authority of Findings of International Institutions*, in: *Christoph Schreuer* (Ed.), *Autorität und internationale Ordnung*, Berlin 1979, pp. 34-61, 47.

The supreme decision-making body of the OAU and AU, respectively, is the “Assembly of Heads of State and Government”. As already stated, it elects the commissioners in accordance with the provisions of Art. 31 to 37 AfrCHPR. It decides on amendments and extensions to the Banjul Charter (Art. 68 AfrCHPR). Furthermore, the Assembly handles the annual activity report of the Commission (Art. 54 AfrCHPR), and can additionally assign specific responsibilities (Art. 45 No. 4 AfrCHPR).¹⁵⁷ But above all, the Assembly also decides on cases of massive human rights violations brought forward by the Commission (more on this further below). The Secretary General of the OAU or the AU Commission President functions as a link between the plenary body of the OAU and the Commission (Art. 35, 47 and 49 AfrCHPR). He has the opportunity to take part in the Commission’s sessions and to address the Commission, but without having a right to vote (Art. 42 V AfrCHPR). Furthermore, he appoints the Commission Secretary and provides personnel and facilities which are necessary for the fulfilment of the Commission’s responsibilities.

The relevance of the individual provisions for fulfilment of responsibilities through the Commission is most clearly disclosed in connection with their functional exercise in the course of this consideration. But it can be stated in advance that the narrow organisational and procedural integration with the mother organisation – in particular, the fact that the Commission does not have the final decision-making authority within the scope of its own processes – substantially diminishes the weight of its decisions.

d) The Financing of the Commission

Even the financial resources which are provided to an institution by the carrier organisation always have an indicative effect for the fundamental significance it is intended for. As far as that is concerned, a consideration permits conclusions pertaining to the political importance of the Commission within the OAU/AU.

The Banjul Charter provides that the costs for personnel and material resources are to be defrayed from the regular budget of the OAU/AU (Art. 41, 44 AfrCHPR). The agreed budget shares its fate with the other items included in the total budget: Its disbursement is always with the proviso that the member states of the OAU/AU provide their contribution to the organisation. The deficient payment habits of member states of international organisations with regard to their contractual obligations are certainly a widespread phenomenon and no African peculiarity; but it is particularly evident with the member states of the OAU/AU:

¹⁵⁷ However, up to now the “Assembly of Heads of State and Government” still has not made use of the possibility of expansion of responsibilities; Communication of the Commission Secretariat (January 2007).

Many states always transfer only partial amounts, whereas others have not paid any contributions for over ten years.¹⁵⁸ The Commission's budget is only disbursed proportionately, and therefore stagnates at best on a low level. For instance, in the 1996/1997 financial year only 576,000 US\$ were paid out to the Commission.¹⁵⁹ For this reason the prescribed length of meetings had to be cut, special meetings for current reasons could not be conducted,¹⁶⁰ and unscheduled flights of chairmen were not even able to be financed. In the initial years, the secretariat was hardly able to carry out the constituency-level work at the very least.

The Commission attempted to put things right by asking the Secretary General of the OAU for permission to also be able to accept foreign donations.¹⁶¹ Since the OAU is itself a beneficiary of extra-African donors,¹⁶² this permission was immediately granted. In the meantime, the Commission sessions are “financially accompanied”¹⁶³ by the Ford Foundation, and western NGOs assume the extraordinary travel expenses of the commissioners.¹⁶⁴ Five employees of the secretariat are financed with Danish assistance. The African Society (London) pays three employees and publishes the semi-annual “Review of the African Commission”. The European Union provides the necessary funds for the publication and distribution of the Banjul Charter as well as guidelines in different languages for the utilisation of the Commission. The resulting dependence of the Commission on extra-

¹⁵⁸ For instance, 17 states had already lost their voting right in the organisation because they did not reduce their contribution arrears. Compare SZ from 1.3.1996, p. 4. The suspension of voting right is a frequently utilised means of international organisations in order to persuade their members to fulfil their payment obligations. Compare: *Henry Schermers, Niels Bokker* (Eds.), *International Institutional Law*, The Hague et al., 1996, §§ 1455 et seqq.; *Philippe Sands/Pierre Klein*, *Bowett's Law of International Institutions*, London 2001, pp. 576 et seqq; 541 et seqq. *Ignatz Seidl-Hohenfeldern, Gerhard Loibl*, *Das Recht der Internationalen Organisationen einschließlich der Supranationalen Gemeinschaften*, Cologne et al., 1996 § 2010. This sanction had an effect with regard to the willingness of its members to pay: The Sudan paid its membership fees for two years in the amount of 900,000 US\$ because it absolutely wanted to secure the voting right for the summit meeting in Yaoundé, Cameroon. The contribution arrears diminished from US\$ 57.8 million (1995) to US\$ 36.5 million (1996). But this was still the equivalent of more than twice the total annual budget of the OAU (US\$ 29 million). Compare: *Erfolg der OAU mit Strafkatalog* in: FAZ from 21.06.1996, p. 9.

¹⁵⁹ This is equivalent to 1.95% of the OAU's total budget. Compare: *Amnesty International, Organization of African Unity – Making Human Rights a Reality for Africans*, 1998, p. 3.

¹⁶⁰ Compare: *Amnesty International, Organization of African Unity – Making Human Rights a Reality for Africans*, IOR 63/01/98, August 1998, p. 8.

¹⁶¹ Recommendation on the Financial Rules and Regulations governing the Functioning of the African Commission on Human and Peoples' Rights, para. 6, printed in *ACHPR – Resolutions and Recommendations*, Banjul 1998, p. 8 et seqq.

¹⁶² *Evelyn Ankumah*, *The African Commission on Human and People's Rights*, The Hague, 1996, p.28.

¹⁶³ Compare: *Ford Foundation, Annual Report 1999*, p.89. The Ford Foundation also makes it possible for representatives of African NGOs to take part in Commission meetings.

¹⁶⁴ For instance, all trips of the Special Rapporteurs on Prisons and Conditions are organised and completely financed by the Norwegian Agency for Development and Cooperation (NORAD) as well as by Penal Reform International (PRI). Communication from PRI, Paris.

African governmental, intergovernmental and non-governmental sponsors is frequently criticised.¹⁶⁵ Even the thesis that the Commission, as a body supported by extra-African protagonists, is merely a bridgehead for culturally-foreign influences is detrimental to its reputation.

Anyhow, this form of financing contains the advantage that the system-immanent dependency of the Commission on the AU/OAU as a carrier organisation is at least reduced in financial terms. The implementation of politically disagreeable Commission activities can in this way at least not be hindered by the fact that no disbursement of funds takes place. And so political influence would have to be undertaken more openly, which makes it much more difficult at the same time. Nevertheless, despite external donations, the financial situation of the Commission is desolate and hinders the Commission in the effective implementation of its responsibilities. The UN High Commissioner for Human Rights, who assessed the marginal financial resources as the main obstacle to the realisation of its work, also ascertained this fact.¹⁶⁶

e) The Secretariat of the Commission

Since the Commission only meets for two sessions a year,¹⁶⁷ the preparation and follow-up through the standing secretariat in Banjul, Gambia, is of crucial importance to the effectiveness of the Commission's work. The Commission Secretary is appointed by the Secretary General of the OAU commensurate with Art. 41 AfrCHPR in conjunction with Art. 22 No. 2 RP, and is not appointed by the Commission itself. In accordance with the Commission chairman, the Secretary is in charge of the secretariat operation, supports the members of the Commission in their work, serves as an intermediary for communications which arrive at the Commission and administers the archive.¹⁶⁸ Furthermore, the secretariat makes tape recordings of the sessions and keeps them in safe custody,¹⁶⁹ produces minutes on

¹⁶⁵ Vehemently, for instance by *Evelyn Ankumah*, *The African Commission on Human and Peoples' Rights*, The Hague 1996, p. 34 et seqq. She argues that as an independent body the Commission should also not be influenced by NGOs. In addition, she fears that "northern material dominance over Africa could result in the marginalization of Africans in the development of an effective human rights system for Africa" (p. 36). The mother organisation also has a conflicting relationship with foreign assistance. A member of the OAU Eminent Persons Advisory Panel is quoted as saying: "We don't need external financing because we don't want outsiders to control us". Compare: *Baffour Ankumah*, *Funding the Union*, in: *New African* 408 (June 2002), p. 15.

¹⁶⁶ UN Doc. E/CN.4/1999/93, para. 6.

¹⁶⁷ Compare: Art 2 RP.

¹⁶⁸ Compare: Art. 23 RP.

¹⁶⁹ Compare: Art. 38 RP.

the results of the sessions and sends them to the participants.¹⁷⁰

For years on end this was the Commission's organisational Achilles' heel and stood more in its way than by its side during the fulfilment of its responsibilities: The first Commission Secretary obviously fulfilled neither the personal nor the professional prerequisites which such a position necessitates. Instructions were not followed, documents – amongst other things, an individual communication – were lost, translations were missing, letters were not forwarded,¹⁷¹ sessions were only deficiently prepared and available resources were not utilised. As a consequence of personal involvement – the OAU Secretary General appointed the Commission Secretary – the Commission itself could not replace an obviously flawed Secretary. Only upon the massive criticism of the NGOs – which unanimously called for his removal during the 12th Session of the Commission, because he proved himself to be the main obstacle to the work of the Commission¹⁷² – did a representative of the OAU Secretary General appear at the following session to form an impression of the situation. As a result, the Secretary was replaced by the General Secretariat.¹⁷³

In other respects, the inadequate financing through the OAU – particularly in the Secretariat realm – takes its toll: The Secretariat did not even have a copier or fax at its disposal during the first five years.¹⁷⁴ Continuous understaffing is another reason which has a negative effect on the Secretariat's work and thus on the results of the Commission.

¹⁷⁰ Compare: Art. 39 RP.

¹⁷¹ Incidentally, this problem also still crops up today — with far-reaching consequences. For instance, the London-based NGO "Interrights" submitted a communication against Botswana in which, amongst other things, it criticises that a woman condemned to death by the High Court of Botswana was not confronted with the crime, but the burden of proof for her innocence was communicated. This communication was submitted on 7.3.01 to the Secretariat per letter, fax and e-mail after prior telephonic notice. The Commission was urged to take provisional measures commensurate with Art. 111 RP due to the "pressing need for urgent intervention". The occurrence remained unheeded for three weeks until the Secretariat forwarded the matter to the responsible commissioner who immediately addressed a fax to the president of Botswana on 29.3.01, and urged him "by virtue of Rule 111 (3) of the Commission's Rules of Procedure to ensure a stay of execution of the sentence imposed on Mrs. Bosch". Mrs. Bosch was hanged on 30.3.01. Upon the inquiry from Interrights during the 31st Session in Pretoria as to why the provisional order had not been complied with, Commissioner *Pytiana*, who subsequently dealt with the Government of Botswana in this matter, responded: "According to the Government of the Republic of Botswana, the letter has not been received. We have no reason to doubt this." The question as to why the matter was not handled for weeks on end in the Secretariat remained unanswered. The dossier is available with the author.

¹⁷² Compare: ICJ (Eds.), *The Participation of Non-Governmental Organizations in the Work of the African Commission on Human and Peoples' Rights*, Geneva 1996, p. 30.

¹⁷³ *Wolfgang Benedek*, *Durchsetzung von Rechten des Menschen und der Völker in Afrika auf regionaler und nationaler Ebene*, in: *ZaöRV* 54 (1994), pp. 150-181, 157.

¹⁷⁴ *Claude Welch*, *The African Commission on Human and Peoples' Rights: A Five-Year Report and Assessment*, in: *HRQ* 14 (1992), pp. 43-61, 55.

f) The Commission's Relationship with NGOs

From this difficult organisational situation it also ensues that the Commission cogently depends on the assistance of NGOs with regard to its activity. On the one hand, it hardly has the resources at its disposal in order to investigate human rights violations on the scene or to procure evidence, and on the other hand it may not deal with communications which "exclusively relate to information which is disseminated by the mass media".¹⁷⁵ In contrast to other regional human rights institutions¹⁷⁶, NGOs can apply for observer status before the Commission and thus intensively participate in the work of the Commission.¹⁷⁷ Then they have the right to participate in the Commission's public sessions and to request the inclusion of certain items in the agenda.¹⁷⁸ Whereas the Commission's first sessions were still for the most part confidential, the agenda in this connection changed upon the pressure of the NGOs. The collaboration of the NGOs comes about above all through comments on the human rights situation in the home country or other African countries, and through involvement in the review of periodic state reports¹⁷⁹ regarding the human rights situation.¹⁸⁰ At the same time, the statements of the reporting states are compared with those of the NGOs (so-called "shadow reports") by the Commission, which prevents the fact that the states take advantage of the Commission's floor as a mere advertising platform through palliative reports.

¹⁷⁵ Compare: Art. 56 I No. 4 AfrCHPR.

¹⁷⁶ In the European system, NGOs can acquire so-called "Consultative Status", but this does not grant the extensive possibilities like an "Observer Status" before the African Commission. In the inter-American system, no formal recognition is provided for NGOs, even though in practice an interaction between the protective bodies with NGOs frequently occurs. Compare: *Martin Ölz*, Non-Governmental Organizations in Regional Human Rights Systems, in: *ColHRLRev* 28 (1997), pp. 307-374, 336 et seqq., 355 et seqq.

¹⁷⁷ Art. 75 RP; at the present time (mid-2006), 267 NGOs have observer status. The first two NGOs which were awarded observer status were Amnesty International and the ICJ (in 1988). Compare: List of organizations granted observer status with the African Commission on Human and Peoples' Rights DOC/OS (XXIX) 213b.

¹⁷⁸ Art. 76 RP.

¹⁷⁹ Art. 62 AfrCHPR.

¹⁸⁰ In the meantime, however, many of the 267 recognised NGOs have withdrawn into passivity. They neither avail themselves of their right to participation in the sessions as observer nor provide written petitions or submit communications in accordance with Art. 55 AfrCHPR. In order to strengthen the cooperation with all NGOs, the Commission resolved at the 11th Session in Tunis (2 to 9 March 1992) that all NGOs with observer status shall prepare reports every two years, from which the activities and objectives of the respective NGO ensue. This should also serve as a certain form of quality control, since the Commission accused several NGOs of pursuing fundraising efforts with the observer status, and then diverting the financial means for this purpose. Many (127) for the most part regionally operating, very specialised NGOs have not submitted any report to date. Compare: Status of Submission of NGO Activity Reports as of 30th March 2001, DOC/OS (XXIX)/213b. This circumstance prompted the Commission to pronounce an ultimatum at its 24th Session in Banjul (22 to 31 October 1998), and to demand the submission of reports by the 27th Session (27 April to 11 May 2000 in Algiers) with the reference that otherwise the observer status of the tardy NGO would be withdrawn. Compare: Resolution on the Cooperation between the African Commission on Human and Peoples' Rights and NGOs having Observer Status with the Commission, Banjul 31st October 1998. The Commission has not put this threat into action yet.

Moreover, the NGOs obtain another essential responsibility for the work of the commission: Neither the Banjul Charter nor the Commission's rules of procedure call for a direct gravamen. Thus, to be a victim of a human right violation is not necessary to be entitled to file a complaint. It follows that third parties, in particular NGOs, can also submit communications on behalf of the victim. This is decidedly expedient, since an NGO is much more familiar with the proceedings before the Commission than a victim's lawyer or even the victim himself/herself. At the same time, it is noteworthy that contrary to the otherwise customary tendency in Africa to avoid extra-African influences on its own legal culture, there is no restriction for African NGOs,¹⁸¹ and so international NGOs are also authorised to lodge complaints. In reality, this is extremely advantageous, particularly since special difficulties are frequently associated with regard to African NGOs bringing their own government before the Commission, since they are frequently exposed to reprisals which impede their other work. This is why national NGOs occasionally use international NGOs in order to take advantage of their independence, professionalism and reputation.¹⁸² Moreover, NGOs which publicly pursue their work are not based in all OAU member states.¹⁸³

In an effort to strengthen the involvement of African NGOs, the ICJ, in alternation with the African Society of Human Rights, has since the 10th Session of the Commission always sponsored a three-day NGO workshop before the commencement of the Commission session, in which representatives of the Commission also take part.¹⁸⁴ For one thing, the African NGOs are thus introduced to the Commission's working method. For another thing, this NGO community discusses supra-national concerns and presents the results and resolutions of the Commission during its session. An impression concerning the importance of NGOs for the Commission's work is also gained by a look at the communications submitted to the Commission: Far more than half (66) of the communications decided up to 2003 were submitted by NGOs. In turn, 48 were attributed to international NGOs and only 18 were

¹⁸¹ But this only applies restrictively to NGOs with an entirely extra-African effective radius: The petition of the Bangladesh Human Rights Commission was discussed at length at the 28th Session, because Commissioner Pytiana did not see any necessity to grant observer status to an NGO from Bangladesh. *Rachel Murray*, Report of the 28th Session, p 12; unpublished.

¹⁸² *Wolfgang Benedek*, *Durchsetzung von Rechten des Menschen und der Völker in Afrika auf regionaler und nationaler Ebene*, in: *ZaöRV* 54 (1994), pp. 150-181, 167.

¹⁸³ *Claude Welch*, *The Organization of African Unity and the Promotion of Human Rights*, in: *JMAS* 29 (1991), pp. 535-555, 553 et seqq.

¹⁸⁴ Compare *Martin Ölz*, *Non-Governmental Organizations in Regional Human Rights Systems*, in: *ColHRRev* 28 (1997), pp. 308-374, 365. The resolutions and recommendations of the first ten workshops can be found in: ICJ (Eds.), *The Participation of Non-Governmental Organisations in the Work of the African Commission on Human and Peoples' Rights*, Geneva 1996.

attributed to African NGOs.¹⁸⁵ *Benedek* ranks the cooperation with the NGOs amongst the “most fruitful developments in the work of the Commission”.¹⁸⁶ He is to be agreed without restriction. The critiques and suggestions of the NGO community provided and still provide important stimuli for the working method of the Commission, and thus also for the positive further development of its results. They have ensured that the Commission works more transparently, and obvious weaknesses – such as the Secretariat – have been tackled and partially eliminated. The function of NGOs as counsel to the victim can also not be overrated.

2. The Commission's Responsibilities

The most important criteria for the evaluation of an international human rights body are for one thing the competencies which have been intended by the supporting organisation, and for another thing the manner in which the body makes use of these competencies. Both aspects will be scrutinised in this section. The result constitutes the basis for answering the question regarding which place the Human Rights Court will assume in the African human rights protection mechanism, and in what way it takes advantage of the Commission's merits and can balance weaknesses.

The Banjul Charter assigns the following responsibilities to the Commission: The promotion and the protection of human and peoples' rights, the interpretation of the Banjul Charter as well as those responsibilities which are delegated to it by the “Conference of Heads of State and Government”.¹⁸⁷ Since the OAU's plenary body still has not made any use of this last possibility to this very date (mid-2006),¹⁸⁸ only the three first-mentioned functions are relevant to the study undertaken here.

a) The promotional function

How the promotion of human rights through the Commission has to look like exactly is only partially specified in the Banjul Charter. Accordingly, it is incumbent on the Commission to

¹⁸⁵ Compare: *Institut pour les Droits Humains et le Développement* (Eds.), *Compilation des Décisions de la Commission Africaine des Droits de l'Homme et des Peuples*, Banjul 2000; With regard to the involvement of NGOs in the development of human rights in Africa, see: *Harry Scoble*, *Human Rights Non-Governmental Organizations in Black Africa: Problems and Prospects in the Wake of the Banjul-Charter*, in: *Claude Welch, Ronald Meltzer* (Eds.), *Human Rights and Development in Africa*, Albany 1984, pp. 177 - 203.

¹⁸⁶ *Wolfgang Benedek*, *Durchsetzung von Rechten des Menschen und der Völker in Afrika auf regionaler und nationaler Ebene*, in: *ZaöRV* 54 (1994), pp. 150-181, 155.

¹⁸⁷ Compare: Art. 45 AfrCHPR.

¹⁸⁸ *Umozurike* states in this connection that in 1992 the Commission had monitored the presidential election in Mali. Compare: *U.O. Umozurike*, *Six Years of the African Commission on Human and Peoples' Rights*, in: *Festschrift Bernhardt*, pp. 635-645, 637. However, this came about at the request of the Government of Mali and was not an assignment of duties from the OAU's “Assembly of Heads of State and Government”.

gather documents on human rights problems in Africa, to undertake research efforts on this topic, to organise seminars and conferences, to disseminate information, to support national and international human rights institutions and – “should the case arise” – to provide opinions and advice to governments.¹⁸⁹ In addition, the Commission shall work out rules for integration of human rights, by which the African governments can orient themselves during their legislative activity.¹⁹⁰ In other respects, the Commission's cooperation with other African and international institutions dealing with the protection of human rights is desirable.¹⁹¹ Another promotional function is the state reporting procedure, which the Banjul Charter governs in Art. 62 AfrCHPR. Accordingly, every two years the signatory states have to submit a report on the measures taken as well as progress and difficulties with regard to the implementation of the Charter.

aa) Promotional measures commensurate with Art 45 No. 1 AfrCHPR

The Commission's promotional measures according to Art. 45 No. 1 AfrCHPR are complex and depend, at least theoretically, on an action plan which the Commission prepares in order to concretise its assigned responsibilities.¹⁹² The African states are divided amongst the eleven commissioners with regard to the promotional activity: Each is responsible for the promotion of human rights and the Banjul Charter in up to six nations.¹⁹³

Problematic in this connection is the fact that the commissioners pursue their activity on a part time basis, and therefore they cannot befittingly expedite the promotion of human rights outside of the session. It is obvious that human rights can only be promoted by the commissioners on a limited basis during a two-week session in the manner prescribed by Art. 45 No. 1 AfrCHPR. This is why the balance of the promotional measures turns out to be rather meagre.¹⁹⁴ Up until 1998 there were a number of countries which a commissioner had

¹⁸⁹ Compare: Art. 45 No. 1 a) AfrCHPR.

¹⁹⁰ Compare: Art. 45 No. 1 b) AfrCHPR.

¹⁹¹ Compare: Art. 45 No. 1 c) AfrCHPR; these promotional activities explicitly formulated in the Banjul Charter alone make the gross discrepancy between the Commission's financial endowment and responsibilities obvious and underscore the urgent necessity for a productive and widespread cooperation of the Commission with the NGO community.

¹⁹² The current plan concerns the “Mauritius Plan of Action”, which the Commission adopted on 21 October 1996 in Mauritius.

¹⁹³ *U.O. Umozurike*, Six Years of the African Commission on Human and Peoples' Rights, in: “*FS Bernhardt*”, pp. 635-64, 636.

¹⁹⁴ Perhaps the most noteworthy promotional measure as defined by Art. 45 No. 1 AfrCHPR was to rate the proclamation of 21 October, the anniversary of the Banjul Charter's entry into force, as “African Day of Human Rights”. Compare: Resolution on the Celebration of an African Day of Human Rights, 5th Ordinary Session, 1989, Benghazi, Libya. The OAU's “Conference of Heads of State and Government” supported this proposal and advised its members to celebrate the anniversary “by organising activities aimed at

never set foot in.¹⁹⁵ Especially in nations such as Kenya, where – contrary to Art. 25 AfrCHPR – the ratification of the Banjul Charter had not even been announced to the population,¹⁹⁶ a more intensive and well-planned deployment of the responsible commissioner would have been desirable.

The Commission has only reluctantly carried out the documentation and information mandate. Up until 1994 the Commission did not even have a registry or documentary department.¹⁹⁷ This also resulted in the fact that the scarce time in the periodic sessions was squandered for useless repetitions, since the corresponding documents were not duly archived.¹⁹⁸

Of course, the commissioners participate in numerous international seminars and visit African universities now and then, but these activities are only insufficiently communicated by the Commission itself.¹⁹⁹ On the other hand, the African press does not show enough self-interest in the Commission's activities in order to compensate for the information deficit.

The Commission attempted to respond to this deplorable state of affairs in its action plan (Mauritius Plan of Action):²⁰⁰ Special importance shall be attached to the presence of journalists at the ordinary sessions. Workshops for journalists shall expedite the communications of the Banjul Charter and the Commission's mode of operation in the African media, particularly in radio. The Banjul Charter shall also be translated into African languages and be increasingly distributed to interested parties. Special human rights courses shall be prepared for African jurists and a "Human Rights Award" shall be set up for deserving activists. The documentation department shall install a basic inventory of literature pertaining to human rights, international law, African constitutions, court decisions of human rights and international human rights periodicals. In addition, the action plan also includes a

promoting human and peoples' rights". Compare: Resolution on the African Commission on Human and Peoples' Rights, 27th Ordinary Session, Abuja, Nigeria, 1991, AHG/Res.202(XXVII); both resolutions are printed in: African Commission on Human and Peoples' Rights, Recommendations and Resolutions, Gambia 1998.

¹⁹⁵ Compare: Geographical Distribution of Countries Among Commissioners for Promotional Activities, DOC/OS/36e (XXIII).

¹⁹⁶ *Wolfgang Benedek*, Durchsetzung von Rechten des Menschen und der Völker in Afrika auf regionaler und nationaler Ebene, in: *ZaöRV* 54 (1994), pp. 150-181, 175.

¹⁹⁷ *Rachel Murray*, The African Commission on Human and Peoples' Rights and International Law, Oxford 2000, p. 15.

¹⁹⁸ Compare: Amnesty International, *Credibility in Question*, IOR 63/02/98, p. 9.

¹⁹⁹ Normally they are listed as a summary annexe to the annual activity reports. An explicit report on a seminar is prepared on an extremely rare basis. For instance, Conclusions and Recommendations of the Seminar on National Implementation of ACHPR into Internal Legal Systems in Africa, in: Sixth Annual Activity Report ACHPR/RPT/6th Annexe VIII, Final Report on the African Conference on Journalists and Human Rights in Africa, *ibid*, Annexe IX. But the annual reports are not easily accessible for everyone. With the activities of the Commission organised by international NGOs the reports are compiled by the concerned organisation itself, printed and passed on to the Commission.

²⁰⁰ Compare: African Commission on Human and Peoples' Rights, Mauritius Plan of Action p. 4 et seqq.

supporting programme for strengthening the Secretariat area and the Commission's protective mandate.

Even this brief insight into the Mauritius Plan of Action sufficiently shows that the Commission is not nearly able to come to terms with the manifold responsibilities. The reasons for this lie for one thing in the Commission's insufficient endowment: First of all, all targeted objectives signify an enormous financial expenditure which the Commission can hardly bear. For another thing, the objectives are so vaguely formulated that a tangible result is still not in sight. Another reason for the prospective failure of the plan is also the lacking attention which is also shown by the Commission. A systematic approach by the individual commissioners is not recognisable. This may also be due to the fact that the plan itself sets no priorities and above all things explains no personal responsibilities.

Last but not least, the commissioners purely and simply lack the time to intensively dedicate themselves to the promotional tasks, since the main emphasis of their activity lies in the handling of communications and the implementation of the state reporting procedure. This is also why no reference is made to the plan in the periodic sessions. Therefore the upshot of the Commission cannot turn out to be very positive: Most of the objectives in connection with the promotion of human rights will be found again in the follow-up plan which the Commission will prepare at the end of 2007. On the whole, the Commission's working methods insofar as its responsibilities ensuing from Art. 45 No. 1 lit. a AfrCHPR are concerned, are capable of and in need of optimisation in many respects.

However, this does not apply to the assignment of duties ensuing from Art. 45 No. 1 lit. c AfrCHPR, the cooperation with institutions which deal with the promotion and the protection of human rights.²⁰¹ As mentioned, however, this is not due to the Commission in the first place, but rather to the involved NGOs. The responsibility ensuing from Art. 45 No. 1 lit. b AfrCHPR, to work out principles and rules pertaining to the solution of legal problems in connection with human rights, according to which African governments can align themselves, is in direct conjunction with the interpretation responsibility ensuing from Art. 45 No. 3 AfrCHPR. Therefore it will be explained at a later point.

bb) The state reporting procedure commensurate with Art 62 AfrCHPR

In comparison with the manifold complaint procedures in the realm of human rights protection, the preparation of state reports and their review constitute the control modality

²⁰¹ Compare: The statements pertaining to the Commission's relationship with NGOs, above p.

with the lowest encroachment effect on state sovereignty.²⁰² For this reason state reports are a widespread and stable method for the implementation of contractual human rights obligations²⁰³ and are also applied in the African regional system.²⁰⁴ Commensurate with Art. 62 AfrCHPR, the contracting states are obligated, every two years since the Banjul Charter's entry into force, to submit a report on the legal and other measures which they have taken for implementation of the rights guaranteed by the Banjul Charter.²⁰⁵

The Banjul Charter itself does not determine which body deals with the state reports; neither does Art. 45 include any assignment of competence for the Commission concerning this. But at its third Session, the Commission recommended the "Assembly of Heads of State and Government" to officially make it responsible for the examination of the state reports and at the same time authorise it to prepare guidelines for the submission of state reports.²⁰⁶ The "Conference of Heads of State and Government" complied with this request at its 24th

²⁰² Compare: *Christian Tomuschat*, Human Rights Petitions and Individual Complaints, in: *Rüdiger Wolfrum* (Ed.), United Nations, Vol. I, Munich 1995, pp. 619-627, 623 et seqq.

²⁰³ Reporting systems are found in the following universal instruments: Art. 22 of the Convention on Forced and Compulsory Labour (UNTS 39, 55); Art 21 of the Convention concerning suppression of human trafficking and the exploitation of prostitutes from 21.05.1950 (UNTS 93, 217), Art. 18 et seqq. of the New York Convention on the Political Rights of the Woman from 31.03.1953 (UNTS 193, 135), Art. 7 of the Convention against Discrimination in the Teaching System from 15.12.1960 (UNTS 429, 93), Art. 9 of the International Convention concerning Elimination of any Form of Racial Discrimination (ICERD) 07.03.1966 (UNTS 660, 195) Art. 40 ICCPR from 19.12.1966 (UNTS 999, 171) Art. 16 et seqq. ICESCR from 19.12.1966 (UNTS 993, 3), Art. VII et seqq. of the International Convention on Fighting and Punishment of the Crime of Apartheid from 30.11.1973 (UNTS 1015, 243), Art. 19 of the Convention against Torture and other Cruel, Inhuman or Humiliating Treatment (anti-torture convention) from 10.12.1984 (GAOR, 39th Session Resolutions, p. 197), Art. 12 of the International Convention against Apartheid in Sports from 10.12.1985 (A/Res 40/64, Annexe, p. 115 et seqq.), Art. 44 of the Convention on the Rights of the Child from 20.11.1989 (A/Res 44/25, Annexe, p. 3 et seqq.), Art. 73 of the International Convention regarding the Rights of all Migrant Workers and their Family Members (migrant worker convention) from 18.12.1990 (not in force yet) (A/Res 45/158). On a regional level, state reporting systems exist in Art. 57 ECHR, Art. 21 et seqq. of the European Social Charter and in Art. 42 ACHR. The University of Potsdam Human Rights Centre dealt with the various state reporting systems at its 3rd Colloquium in 1996; compare: *Eckard Klein* (Ed.), *The Monitoring System of Human Rights Treaty Obligations*, Berlin 1998.

²⁰⁴ With regard to state reporting system, compare: *Felice Gaer*, First Fruits - Reporting by States under the African Charter on Human and Peoples' Rights, in: NQHR 10 (1992), p. 29-42; *Messelech Worku*, Entwicklungstendenzen des regionalen Menschenrechtsschutzes – Die Afrikanische Charta der Rechte des Menschen und der Völker, Berlin 2000, p. 118 et seqq.

²⁰⁵ Normally, three objectives are differentiated in the state reporting procedure: The instruction concerning measures which are taken for implementation of the rights included in the treaty, the instruction concerning the progress of their implementation and the communication concerning difficulties in the implementation. Compare: *Gerd Oberleitner*, Reporting Obligations under Regional Human Rights Conventions, in: *AJPIL* 49 (1995), p. 291-313, 296. Art. 62 AfrCHPR only addresses the first objective in this connection. However, the Commission has addressed this abridgement as far as possible within the scope of its rules of procedure (standing orders), and expanded the reporting obligation to include the progress in the implementation as well as – insofar as it is possible – to include the inhibitory factors of implementation. Compare: Art. 81 I RP [new version].

²⁰⁶ Compare: Recommendation on Periodic Reports, 1st Activity Report, Annexe IX.

Session.²⁰⁷ As a result, the Commission included the state reporting procedure in its rules of procedure²⁰⁸ and developed guidelines regarding the form and content of reports, which they adopted at their fourth Session.²⁰⁹

The Commission described the urgent objective of this state reporting procedure as the establishment of a “constructive dialogue” between the reporting state and the monitoring body.²¹⁰ This dialogue is not to be understood as a confrontation, and the questions posed to the state representatives are not to be understood as an attack, but as positive and beneficial criticism in relation to the human rights situation and the legal situation in the respective country. The Commission and the reporting state are partners with regard to an objective, namely the promotion of human rights.²¹¹

In order to achieve this objective, the Commission installed guidelines, which the states shall keep to with regard to the preparation of state reports.²¹² The procedure is oriented towards the reporting systems on the UN level, such as the committees of the ICCPR (Art. 40 ICCPR) and the ICESCR (Art. 16 ICESCR).²¹³ After ratification of the Charter and expiry of two years, the states first have to submit an initial report which is the basis for the treatment of the following periodic reports. In this initial report, the governments are expected to present the fundamental conditions for the complete implementation of the rights included in the Banjul Charter. Accordingly, the Commission differentiated between the individual legal categories included in the Banjul Charter for the guidelines for the initial and periodic reports, and described in extreme detail which information it anticipated with regard to the individual rights and freedoms.

First of all, the initial report shall summarily include how the rights and freedoms in the reporting state are protected by constitutional and simple legal norms, whether they can be asserted directly from the Banjul Charter before national courts, or whether they first have to be implemented into national law, which legal protection possibilities are open to citizens and

²⁰⁷ Compare: *Felice Gaer*, First Fruits: Reporting by State under the African Charter on Human and Peoples' Rights, in: NQHR 10 (1992), p. 29-42, 30.

²⁰⁸ Art. 81 to 86 RP

²⁰⁹ Compare: 3rd Annual Activity Report, Guidelines for National Periodic Reports, AFR/COM/HPR/ACTVY/RPT (III) Annexe IV.

²¹⁰ “The urgent desire of the Commission is that this system of periodic reports would create a channel for constructive dialogue between the states and itself on Human and Peoples' Rights.” Compare: Introduction to the African Guidelines for National Periodic Reports, 2nd Activity Report, Annexe VII.

²¹¹ According to Commissioner *Badawi* at the 9th Session of the Commission; compare: *Astrid Danielsen*, The State Reporting Procedure under the African Charter, Copenhagen 1994, p. 16.

²¹² Compare: Guidelines for National Periodic Reports, AFR/COM/HPR. 5 (IV).

²¹³ *Gerd Oberleitner*, Reporting Obligations under Regional Human Rights Conventions: The African and European Human Rights System in a Comparative Perspective, in: *AJPIL* 49 (1995), p. 291-313, 291.

which other measures the state has taken in order to safeguard the compliance with these rights. Furthermore, the initial report shall provide insight on restrictive provisions as well as advances and difficulties with regard to the implementation of the Banjul Charter.²¹⁴ All information in the report is to be substantiated by the concerned state through enclosure of the corresponding legal texts and other expressive documents.

After this basic report, a periodic report concerning advances, impediments and planned projects – which also takes into consideration the Commission's comments and suggestions with regard to the preceding report – is to be submitted every two years.²¹⁵

Gaer assesses the guidelines catalogue as “more confusing than helpful”.²¹⁶ This criticism is not to be rejected out of hand: The guidelines are partially unsystematic²¹⁷, unbalanced²¹⁸ and overloaded with repetitions, which complicates the preparation of a report oriented towards these guidelines. The Commission has endeavoured not to omit any aspects in the catalogue in order to obtain the most comprehensive response from the reporting states,²¹⁹ but it has overrated this intention in proportion to the catalogue's other objective, namely to present a clear and lucid guideline for state reports.

The submitted state reports are publicly handled in the course of the Commission sessions, and are available as freely accessible documents from the Commission Secretariat.²²⁰ The reports shall be presented by a delegation of the states which subsequently answers the questions of the commissioners. But what actually sounds like a productive stage for an objective discussion regarding cooperative formulation of problem solutions usually proves to be very arduous in reality. There are several reasons for this: For one thing, this lies in the submitted state reports and the willingness of the states to cooperate. Quite frequently, these can only partially or unsatisfactorily meet the claims predetermined by the Commission. Up

²¹⁴ Compare: Guidelines for National Periodic Reports, I No. 1 to 5.

²¹⁵ Compare: Guidelines for National Periodic Reports, I No. 7 to 9.

²¹⁶ *Felice Gaer*, First Fruits: State Reporting Procedure under the African Charter on Human and Peoples' Rights, in: NQHR 10 (1992), p. 29-42, 31.

²¹⁷ For instance, they incorporate the individual right to participation in cultural life of one's own community (Art. 17 II AfrCHPR) in people's rights, Guidelines for National Periodic Reports, III No. 14.

²¹⁸ The catalogue neglects civil and political rights in favour of economic, social and cultural rights and in favour of peoples' rights. This conclusion is permitted already by the extent to which the individual legal categories are addressed in the guidelines: Two pages for the political and civil rights, ten pages for the economic, social and cultural rights and five pages for peoples' rights.

²¹⁹ This has certainly also led to the fact that the catalogue also includes guidelines for a section of the report on the suppression and punishment of the crime of apartheid and the elimination of any form of discrimination against the woman; Guidelines for National Periodic Reports, VI and VII; both are legal areas which the Banjul Charter does not even provide any reporting obligation for.

²²⁰ Compare: Art. 82 RP.

until today many countries have not even submitted the basic report,²²¹ whereas others have not delivered any periodic reports²²² or did not present their reports verbally before the Commission,²²³ — which noticeably inhibits the dialogue. Up to now, only nine states have met the requirements and submitted all reports, even if they were not submitted and presented punctually.²²⁴ Some submitted reports can be evaluated at most as persiflage with at most rudimentary content, or no material content whatsoever.²²⁵ This disregard on the part of most states with regard to their obligations ensuing from the Banjul Charter permits clear conclusions as to the general political will for support of the Commission and thus the African protective system.

Picking up the thread of the stated relevance of NGOs for the Commission's work, their involvement, particularly in the procedure according to Art. 62 AfrCHPR, assumes major significance. The NGOs provide the commissioners with information or alternative state reports (shadow reports) which would not be otherwise accessible to the Commission. As a result, they enable a far more effective questioning of government representatives through the commissioners. NGOs cannot interrupt during the lectures of the delegates, but after the questions of the commissioners they have the opportunity to speak and publicly draw attention to their point of view. This may also ensue in unproductive talks in which the state and NGO representatives heap reciprocal defamations on each other, but also constructive dialogues in which one attempts to approach existing problems. But on the whole it must be

²²¹ This includes nearly half of the OAU's members, namely 24 nations (Botswana, Cameroon, Central African Republic, Comoro Republic, Congo (Brazzaville), Democratic Republic of Congo, Ivory Coast, Djibouti, Equatorial Guinea, Ethiopia, Gabon, Guinea-Bissau, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mauritania, Niger, Sao Tome & Principe, Sierra Leone, Somalia and Zambia). Compare: Status of Submission of Periodic Reports by State Parties, DOC/OS (XXVIII) 184 a.

²²² 15 states: Algeria, Angola, Cape Verde, Guinea, Mauritius, Mozambique, Nigeria, Seychelles, Sudan, Tanzania, Togo, Gambia (as the Commission's host country), Senegal, Tunisia, Zimbabwe; loc. cit.

²²³ Benin, Egypt, Ghana und Namibia; loc. cit. For one thing, this results from the lack of cooperative willingness on the part of the states. For instance, no Government representative from Benin who could present the national report at the intended time was able to be found at the 27th Session in Cotonou, Benin. Only shortly before the conclusion of the session the minister of justice had to present the report (completely unprepared) and answer the questions of the commissioners. But on the other hand, organisational incompetence on the part of the Commission also plays a role: The Commission repeatedly failed to inform Government representatives about the pending handling of the respective state reports. Compare: *Astrid Danielsen*, *The State Reporting Procedure under the African Charter*, Copenhagen 1994, p. 88 et seqq.

²²⁴ Burkina Faso, Burundi, Chad, Mali, Libya, Rwanda, Swaziland, South Africa and Uganda; loc. cit.

²²⁵ For instance, the first version of the initial report from Nigeria, which was incidentally three years overdue, included – in addition to a cover letter – only excerpts from the Nigerian constitution. The report comprised all of four pages. The first report from Ghana contained (on five and a half pages) the description of only 11 legal bills since 1961 — and included neither voucher copies nor more far-reaching information. Compare: *Astrid Danielsen*, *The State Reporting Procedure under the African Charter*, Copenhagen 1994, p. 76 et seqq.

balanced that the state reporting procedure according to Art. 62 AfrCHPR and Art. 81-86 RP suffers under substantial organisational deficiencies, and in its present expression the requirements of a fruitful, constructive and comprehensive dialogue between the Commission, governments and NGOs are only met on a restrictive basis. Nevertheless, the idea of a consensus-promoting dialogue seems to be the right starting point for a necessary change process, and is at least capable of development with the state reporting procedure. But in the future the Commission has to muster much more time and energy in order to gradually dismantle the political displeasures on the part of the governments.

b) The protective function

The Commission's second responsibility is the protection of human and peoples' rights in accordance with Art. 45 No. 2 AfrCHPR. This competence is the more important one in view of the study's initial question: Since the Commission performs quasi-judicial duties with the protective function, the existing system can be isolated and evaluated in terms of its actual protective effect with the help of the following consideration. In this context, whatever protective mechanisms are provided for – and to what extent their protective effect withstands the Commission's dependency on other bodies of the OAU or political realities – shall be presented.

The Banjul Charter provides for two types of communications which initiate a protective procedure before the Commission: The communications from contracting states (Art. 47-54 AfrCHPR) and "other communications" (Art. 55-59 AfrCHPR). The authors of the Banjul Charter refrained from enumerating those authorised to lodge complaints with the expression "other communications". This should certainly prevent the fact that after the adoption of the Charter, the governments were deterred from its ratification because they could be pulled by too many sides into a procedure before the Commission. Nevertheless, with this formulation one wanted to at least keep a door open for an individual complaint procedure, since the political situation in the inception period did not allow this.²²⁶

aa) Communications from contracting states (Art. 47-54 AfrCHPR)

The procedure on account of a state communication can be initiated through two occasions: For one thing, through the communication of two states due to the fact that their bilateral negotiations concerning a state of affairs – which entails a violation of the provisions of the

²²⁶ Compare: *Kéba Mbaye*, *Les droits de l'Homme en Afrique*, Paris 1993, p. 248 et seqq.

Banjul Charter – have failed, combined with the request to the Commission for mediation (Art. 47, 48 AfrCHPR). *Mbaye* sees this possibility as a typical expression of African consensus-oriented conflict solution.²²⁷ For another thing, the unilateral communication of a state to the Commission is also possible. In this case, one state is of the opinion that another state has violated the provisions of the Banjul Charter (Art. 49 AfrCHPR). In view of artificial colonial creation of frontiers in Africa, this possibility of state complaint – particularly with regard to violation of collective rights – can acquire decisive importance if, for instance, one's own ethnic group in the neighbouring state is the victim of genocide or is otherwise persecuted or discriminated against.²²⁸

Although there would be no dearth of such occasions, not a single state complaint has been lodged to this very day.²²⁹ Not the least due to the marginal political respect which the Commission experiences as a protective institute from AU member states, it is not surprising that the Commission has still not been presented with any consensual communication in accordance with Art. 47, 48 AfrCHPR. Even a communication commensurate with Art. 49 AfrCHPR, which would present a direct affront to a member country of the AU, seems rather unlikely in light of the sensibility of diplomatic relations.²³⁰ The dissent between intended protective possibilities and effects and the political reality comes to light with regard to the institute of state complaints. For this reason the protective mechanism has been up to now characterised by complete insignificance for the development of the African human rights protection system. This is why the “other communications” are befitting of practical relevance.

²²⁷ Compare: *Kéba Mbaye, Les droits de l'Homme en Afrique*, Paris 1993, p. 164.

²²⁸ *Wolfgang Benedek, Durchsetzung von Rechten des Menschen und der Völker in Afrika auf regionaler und nationaler Ebene*, in: *ZaöRV* 54 (1994), p. 150-181, 158.

²²⁹ Communication from the Commission Secretariat in March 2006; the inter-American human rights protection system, which also provides for a state grievance procedure, acts in exactly the same way. The instrument of state grievance has only been utilised under the ECHR: Up to the present time eleven state grievances have been brought before litigation. For an overview see: *Jochen Abr. Frowein*, Rd. No. 2 to Art. 24, in: *Jochen Abr. Frowein, Wolfgang Peukert* (Eds.), *Europäische Menschenrechtskonvention - ECHR-Kommentar*, 2nd edition, Kehl et al. 1996; whose list – with the exception of a complaint from Denmark against Turkey from 1997, which was not listed – is still up to date (for the latter refer to: *EuGRZ* 27 (2000), p. 619.).

²³⁰ However, this restraint is also noticeable with all other human rights state grievance procedures. Compare the very detailed overview in *Scott Leckie, The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?*, in: *HRQ* 10 (1988), p. 249-303, 271 et seqq. As a further reason for the lacking utilisation of the state grievance procedure, *Leckie* cites the considerable financial, logistical and temporal resources which such procedures demanded from complainant states; compare: loc. cit. p. 254. The comparatively highest utilisation of the state grievance procedure is recorded in the ECHR regime. Compare: *Søren Prebensen, Inter-State Complaints under Treaty Provisions – The Experience under the European Convention on Human Rights*, in: *HRLJ* 20 (1999), p. 446-455, 446.

bb) “Other communications” (Art. 55-59 AfrCHPR)

With the “other communications” the fathers of the Banjul Charter have created a complaint procedure which left the Commission decisive contextual competencies with regard to the precise sequence of this procedure. Only the periphery of this procedure has been explicitly governed in the Banjul Charter, which shall find a brief consideration for the time being. It will be addressed in the following as to how the Commission has worked out the procedure and puts it into practice.

(1.) Formal prerequisite of a communication (Art. 56 AfrCHPR)

First of all, the Banjul Charter determines that the Commission only deals with a communication if the author is recognisable, even if this author requests anonymity (Art. 56 No. 1 AfrCHPR). This requirement is expanded through Art. 104 No. 1 a) RP, which also calls for the statement of age, occupation and the address of the complainant.²³¹ However, the Commission has made it clear that at the same time this does not have to mean that those actually aggrieved must be mentioned by name.²³² The Banjul Charter does not impose any further prerequisite on the author's personal data. In particular, there is no admissibility prerequisite that the complainant is a national of a contracting state or an African state. As a result, the Banjul Charter enables a complaint procedure with worldwide access.²³³ Furthermore, in accordance with Art. 56 No. 2 AfrCHPR, the communication must be compatible with the Charter of the OAU and the Banjul Charter. Moreover, commensurate with Art. 56 No. 3 AfrCHPR, the communication may not be written in a disparaging or insulting language against the concerned state and its institutions or vis-à-vis the OAU. Commensurate with Art 56 No. 4 AfrCHPR, communications which exclusively ensue from mass media messages are also inadmissible. This provision also speaks for the Commission's interpretation that the aggrieved party and the author of the communication need not be the

²³¹ At any rate, despite mentioning names, the non-mention of the address led to the inadmissibility of the communication. Compare: Communication No. 70/92 *Ibrahima Dioumessi, Sekou Kandé, Ousmane Kaba vs. Guinea*, printed in: *Institut pour les droits Humains et le Développement* (Eds.), *Compilation des Décisions de la Commission Africaine des Droits de l'Homme et des Peuples*, Banjul 2000, p. 71. As a reason, the Commission indicated that all attempts by the secretariat to ascertain a valid address had failed, and that the author of the communication could not take part in the procedure without a postal address. However, all other requirements of the rules of procedure are basically not necessary to prevent anonymity and to ensure an orderly procedural sequence. Therefore, in case of doubt, it seems very questionable as to whether a complainant is actually obligated to mention more than just his name and his address.

²³² “The African Charter requires that communications indicate their authors, these authors need not be the victims or their family”, Communication No. 25/89, quoted according to: *Chidi Odinkalu, Camilla Christensen*, *The African Commission on Human and Peoples' Rights: The Development of its Non-State Communication Procedure*, in: HRQ 20 (2998), p. 235-280, 250.

²³³ Up to now the Commission has received 357 such communications (status: April 2008).

same individual, because with the term “not exclusively” it is made clear that a direct involvement of the author is not necessary, but that the author merely has to present more detailed information than he has obtained from the mass media. This provision again emphasises the considerable relevance which the NGOs are also befitting from this scope of activity of the Commission, since only they are able to inform themselves on the scene unbureaucratically. Furthermore, Art. 56 No. 5 AfrCHPR determines that – insofar as it is available – the communication can only be submitted after exhaustion of domestic legal recourse, unless this appellate procedure obviously takes an unduly long time.²³⁴ The underdeveloped juridical practice in some African countries is counterbalanced with these restrictions. In addition, the communication has to be submitted “within a reasonable period” after exhaustion of domestic legal recourse or in the absence of such legal recourse or, in the event of an unforeseeable decision, after the period which the Commission establishes (Art. 56 No. 6 AfrCHPR). Art. 56 I No. 7 AfrCHPR also precludes the admissibility of the communication if it “comprises a case that has already been settled in conformity with the principles of the Charter of the United Nations or the Banjul Charter.” On a universal level, the Human Rights Committee of the United Nations²³⁵ and – after entry into force of the Supplementary Protocol to the Convention concerning Elimination of any Form of Discrimination Against the Woman, which provides for the introduction of an individual complaint procedure – the CEDAW Commission²³⁶ also come into question as relevant instruments for settlement of a dispute.

This “*ne bis in idem*” principle shall prevent duplicity and inconsistencies in one and the same matter before various bodies; therefore there are also appropriate provisions in the corresponding regional human rights conventions.²³⁷

And so no formal prerequisites are imposed on the admissibility of “another communication” by the Banjul Charter itself. On the contrary: The situation in Africa is taken into account in a special way by virtue of the fact that the Commission can refrain from the prerequisite of the exhausting of legal recourse and by not predetermining any direct exclusion deadline, and the

²³⁴ In the past, the Commission has shown itself to be forbearing in this regard. Compare with practical examples: *Chidi Odinkalu*, The Individual Complaints Procedure of the African Commission on Human and Peoples' Rights: A Preliminary Assessment, in: TLCP 8 (1998), p. 359-405, 382 et seqq.

²³⁵ *Fatsah Ouguergouz*, La Charte Africaine des Droits de l'Homme et des Peuples, Paris 1993, p. 336.

²³⁶ An individual complaint before the rest of the treaty monitoring bodies of other universal human rights codifications – such as the Committee on Economic, Social and Cultural Rights, the Committee against Torture, the Committee on the Elimination of Racial Discrimination and the Committee on the Rights of the Child – is inadmissible.

²³⁷ Compare: Art 46 I lit. c ACHR, Art. 27 I lit. b [current version] ECHR or Art. 35 II lit. b [new version] ECHR, respectively.

Commission is also granted discretion in this connection.

(2.) Entitlement of communication

Since the Banjul Charter does not address the question of who is entitled to file a communication, it was up to the Commission to close this gap. In its rules of procedure the Commission has decided on the broadest possibility and stated that individuals as well as NGOs can submit communications (Art. 114 RP [current version]).²³⁸ This possibility of popular complaint has a special value in developing regions: NGOs can thus take over the advocate function for victims who are not able to call the Commission on their own because of lacking legal knowledge or financial capacity. In comparison with its procedure in the subsequent years this decision on the part of the Commission is to be described as unusually bold, since for quite a while it has refrained from fully utilising its latitude let alone pushing its limits.

(3.) The communication procedure

The actual procedure of “other communications” starts when a communication is declared as admissible. It is only imprecisely and vaguely formulated by the Banjul Charter. Art. 58 I AfrCHPR stipulates that a further procedure takes place if, after consultation, the Commission gains the impression “that one or more communications obviously refer to special cases which are indicative of a vast number of massive or serious violations of human rights”. In this connection the Commission also stood before a procedural rule that was unclear, complicated and in need of interpretation. And here they also decided in favour of an interpretation which would enable the further procedural sequence for a spectrum of communications that was as broad as possible. Therefore a vast number of violations with regard to a majority of those concerned as well as with regard to repeated violations vis-à-vis an individual are available. The violation can be intrinsically massive or this character can

²³⁸ In the literature it is doubted whether the Commission was even authorised to such a decision. *Benedek* and *Murray* see the sole basis for an individual communication under the prerequisites of Art. 58 AfrCHPR. Compare: *Wolfgang Benedek*, The African Charter on Human and Peoples' Rights: How to make it more effective, in: NQHR 11 (1993), pp. 25-40, 31 or *Rachel Murray*, Decisions by the African Commission on Individual Communications under the African Charter on Human and Peoples' Rights, in: ICLQ 46 (1997), pp. 408-415, 412 et seqq. On the other hand, *Udeme Essien* draws a clear line between Art. 56 and Art. 58 AfrCHPR, and construes two different competencies from that point of view. Compare *ibid*: The African Commission on Human and Peoples' Rights: Eleven Years After, in: BHRLR 93 (2000), pp. 93-110 (103 et seqq.). In reference to the dispute status, see: *Chidi Odinkalu, Camilla Christensen*, The African Commission on Human and Peoples' Rights: The Development of its Non-State Communication Procedure, in: HRQ 20 (1998), pp. 235-280, 240. However, in the meanwhile 20-year practice of the Commission, no party has ever questioned its jurisdiction, which makes the dispute appear to be merely academic.

develop only through special circumstances.²³⁹ This almost formal juridical differentiation has far-reaching consequences: It enables the continued procedural course of individual communication in which the violation is criticised individually.

Only after the communication has been declared admissible does the Commission inform the concerned government commensurate with Art. 117 RP and ask for an opinion. But in reality, this designated possibility of participation has the disadvantage that the actual procedure stagnates if the concerned state does not respond.²⁴⁰ Meanwhile, in the event of definitive absent response, the Commission has thus moved on to concluding the consultation on the basis of the evidence available to it.²⁴¹ If the Commission comes to the conclusion that the prerequisites of Art. 58 I AfrCHPR are at hand, it either submits recommendations in order to resolve the existing conflict situation or merely determines the violation of rights.²⁴² It subsequently conveys the results of its consultation to the concerned state and the “Assembly of Heads of State and Government”.²⁴³ Commensurate with Art. 58 II AfrCHPR, the latter one can petition the Commission for a detailed inquiry into the matter, and commensurate with Art. 120 No. 3 RP, the Commission can assign this inquiry to a special correspondent from its midst or a task force. In urgent cases, such an inquiry can also be ordered by the Secretary General of the OAU (Art. 58 III AfrCHPR). Both have never occurred.

In harmony with the principles of the OAU, Art. 59 I AfrCHPR orders the absolute confidentiality of all “measures taken in the course of the procedure”, unless the “Conference of Heads of State and Government” explicitly determines something else. Only the Commission’s annual activity report is released for publication after it has been reviewed by the Conference (Art. 59 III AfrCHPR).²⁴⁴ On the other hand, all consultations concerning

²³⁹ Keba Mbaye, “*Les Droits de l’Homme en Afrique*”, Paris 1993, p. 248 et seq. ; *U.O. Umzurike*, Six Years of the African Commission on Human and Peoples’ Rights, in: *FS Bernhardt*, pp. 635-645, 642.

²⁴⁰ At its 13th Session the Commission resolved to communicate the notifications if necessary by diplomatic means via the OAU’s General Secretariat in order to verify receipt. This decision took into account the fact that many states prolonged the procedure through mere denial of the reception. Compare: *Wolfgang Benedek*, *Durchsetzung von Rechten des Menschen und der Völker in Afrika auf regionaler und nationaler Ebene*, in: *ZaöRV* 54 (1994), pp. 150-181, 159.

²⁴¹ This approach is covered through Art. 119 No. 4 RP.

²⁴² In a more recent decision, the Commission expressed for the first time its expectation that these recommendations will be followed. For instance, in the communication procedure 211/98 *Legal Resources/Zambia* it determined a convention violation, called on the Government to bring its laws into conformity with the Banjul Charter, and – this is the special feature – called on the Government to explain in the subsequent state report how the recommendation has been implemented. It remains to be seen whether a practice for a follow-up procedure will be developed with regard to the decisions.

²⁴³ Art. 120 No. 2 RP.

²⁴⁴ This fact repeatedly encounters strong resistance within the ranks of NGOs. For instance, Amnesty International proposed that a Paragraph IV should be added to Art. 59 which explicitly empowers the Commission to publish all other reports according to its own notion. Compare: Amnesty International,

incoming communications, and all evidentiary submissions and proof are undertaken in private session under exclusion of the general public. For a long time, the resolutions and all data pertaining to the communication were still inaccessible after conclusion of the procedure. In the past, the strict compliance with these confidentiality provisions in conjunction with an unnecessarily restrictive interpretation of these provisions through the Commission led to the fact that not even a relative protection of the victim through publicity was guaranteed²⁴⁵ But since 1994 the Commission's practice in this connection has promisingly changed. This subject shall be briefly broached in the following.

(4.) The Commission's latest practice

The starting point for the modified understanding of confidentiality is the interpretation of the "measure" in the protective procedure (Art. 59 AfrCHPR), since only this comes under the confidentiality provision. This interpretation should emerge as narrowly as possible, since particularly the publicity of a procedure can cause a state to align its behaviour with international obligations. For instance, *Benedek* argues that the mere compilation of a report and the included recommendations should not be evaluated as such "measures".²⁴⁶ The modified practice is ascertainable starting from the 15th Session of the Commission. South Africa and Rwanda could be pilloried without political risk: South Africa was still not a member of the OAU, and the procedures in Rwanda showed an exorbitant extent of human rights violations — even for African circumstances. South Africa was called on to put a stop to racist violence and to accept the election result as soon as the elections had been judged as fair and free by the international election observation commission.²⁴⁷ Rwanda was censured because of massive human rights violations and extralegal executions, international organisations were called on to intervene, and the special correspondent for extralegal and arbitrary executions was instructed to report on the situation in Rwanda in the following session.²⁴⁸

Observations on Possible Reforms of the African Charter on Human and Peoples' Rights, London 1993, p. 4.

²⁴⁵ *Mugwanya* describes these confidential provisions as a "ghost that has dangerously assailed the human rights project". Compare *George Mugwanya*, *Realizing Universal Human Rights Norms through Regional Human Rights Mechanisms: Reinvigorating the African System*, in: *IICLR* 9 (1999) pp. 35-50, 48 et seqq.

²⁴⁶ *Wolfgang Benedek*, *Durchsetzung von Rechten des Menschen und der Völker in Afrika auf regionaler und nationaler Eben*, in: *ZaöRV* 54 (1994), pp. 150-181, 160.

²⁴⁷ Resolution on South Africa from the 15th Ordinary Session of the African Commission on Human and Peoples' Rights, 18-27 April 1994, Banjul, Gambia, printed in: *African Commission on Human and Peoples' Rights, Recommendations and Resolutions*, Banjul 1998, p. 24.

²⁴⁸ Resolution on the Situation in Rwanda of the 15th Ordinary Session of the African Commission on Human and Peoples' Rights, 18-27 April 1994 Banjul, Gambia, printed in: *African Commission on Human and*

The Commission took another essential step at this session: As mentioned, up to the then point in time, all information which had any connection whatsoever with “other communications” were kept confidential under reference to Art. 59 I AfrCHPR. However, an annexe was added to the report of the 15th Session, which for the first time provided insight concerning pending and already concluded communications. The names of complainants, the reason for the complaint, the contracting states concerned and quite a bit of information regarding the course of the procedure were included. Such procedural reports are obligatory elements of the annual action report which is published in accordance with Article 59 III AfrCHPR after it has been reviewed by the “Conference of Heads of State and Government”. But up to this point in time the Commission has refrained from capitalising on these reports and from attempting to ease the confidentiality provisions through the back door. And so the Commission’s annual action report, including all sensitive information in the annexe, was available to the “Conference of Heads of State and Government”. It was now faced with the decision of rejecting the report commensurate with Art. 59 III AfrCHPR and insisting on the adherence to confidentiality or yielding to the Commission. With regard to the first alternative, it would have further curtailed the Commission’s anyhow hardly existing authority before the individual states, and moreover presented itself as an assembly of reactionaries. For this reason it released without objection the annual report in the version submitted by the Commission. Since that time, further communication procedures have been published as an annexe in every report. But the Commission’s practice of dealing with the communications in non-public session is unchanged.

After this initial emancipation, the Commission vehemently condemned the military putsch in the host country Gambia at its 16th Session as a “flagrant and grave violation of the right of the Gambian Peoples to freely choose their government”, and unmistakably called on the military government “to transfer power to freely elected representatives of the people”.²⁴⁹ At its ensuing session the Commission adopted a resolution on the situation in Sudan, in which referred to the gross human rights violations of the Sudanese government and called on the government to immediately take all necessary steps to safeguard the observance of human

²⁴⁹ Peoples’ Rights; Recommendations and Resolutions, Banjul 1998, p. 23. Resolution on The Gambia from the 16th Ordinary Session of the African Commission on Human and Peoples’ Rights, 25 October – 3 November 1994, Banjul, Gambia, printed in: African Commission on Human and Peoples’ Rights; Recommendations and Resolutions, Banjul 1998, p. 30. A communication from Gambia’s overthrown head of state – who criticised the most varying violations of the Banjul Charter through the military Government – reached the Commission in this connection. The Commission heaved the communication with several difficulties above the admissibility threshold and determined quite a few violations of rights. Compare: 147/95.

rights.²⁵⁰ At the same opportunity the Commission adopted a resolution pertaining to the situation in Nigeria, and called on the Nigerian military government to restore the rule of law, to respect freedom of speech and freedom of the press, to grant protection of minorities and to release all political prisoners.²⁵¹ In this connection the Commission referred to the case of *Ken Saro-Wiwa*, which provoked considerable international attention. The Nigerian government subsequently lodged a protest with the Commission, saying this body violated the confidentiality provisions of Art. 58, 59 AfrCHPR through the resolution. The Commission pointed out that the resolutions did not come under the definition of “measures” as defined by Art. 59 I AfrCHPR, because this provision only referred to the protective procedures as such and the resolution was not in any connection with a pending communication.²⁵² Moreover, in connection with the *Saro-Wiwa* problem, the Commission took a historic step when it called its first Special Session on the human rights situation in a member country, vehemently criticised the human rights situation in Nigeria, and announced that it would communicate a report on the matter to the UN Secretary General and to the High Commissioner for Human Rights.²⁵³

And so the Commission is on the best route to overcome its – partially self-erected – barriers with regard to the confidentiality of measures, and is gradually losing the shyness before unequivocal words and decisive approach.

(5.) The protective functionality of the complaint procedure

The distribution of competencies between the Commission and the “Assembly of Heads of State and Government” presented above has different consequences in the protective procedure: For one thing, it is another obstacle on the long procedural route, since the Conference only meets once a year, and is therefore only able to make a decision on the arrangement of a detailed inquiry on an annual cycle. But much more serious is the fact that with the Commission’s finding of justice, the concerned states accrue absolutely no legal

²⁵⁰ Resolution on Sudan, 17th Ordinary Session of the African Commission on Human and Peoples’ Rights, 13-22 March 1995 Lomé, Togo, printed in: *ibid*, p. 32.

²⁵¹ Resolution on Nigeria, 17th Ordinary Session of the African Commission on Human and Peoples’ Rights, 13-22 March 1995, Lomé, Togo, printed in: *ibid*, p. 34.

²⁵² “There is no bar on resolutions of the Commission being disseminated however the Commission sees fit”, Account of Internal Legislation of Nigeria and the dispositions of the African Charter on Human and Peoples’ Rights, Doc. II/ES/ACHPR/4 No. 7, quoted according to: *Rachel Murray*, *The African Commission on Human and Peoples’ Rights and International Law*, Oxford 2002, p. 172.

²⁵³ Final Communiqué of the 2nd Extra-Ordinary Session (the first was held regarding the issue of the Commission’s host country) of the African Commission on Human and Peoples’ Rights, 18-19 December, Kampala, Uganda, printed in: ICJ (Eds.), *The Participation of Non-Governmental Organisations in the Work of the African Commission on Human and Peoples’ Rights*, Geneva 1996, p. 207 et seqq.

obligations much less sanctions due to their non-compliance. Here lies the decisive weakness of the protective system. On top of that is the fact that the states are frequently no more impressed by the transmittal of the Commission's findings of justice and recommendations due to its absence of legal authority than by the proclamations of various NGOs which call for the observance of human rights.²⁵⁴

The further procedure also does not promise any distinct increase of protective effect. As soon as the Commission calls in the "Conference of Heads of State and Government", the situation assumes a political character: Two decisions on the political level ensue as to whether a detailed inquiry even comes about and whether, if necessary, a conclusive recommendation is submitted to the Conference. On top of that is the fact that a political body – in which a series of authorities responsible for human rights violations have a voting right – decides in this procedure. As a result, up to now there has also been no resolution adopted with which the Commission has been called on to engage in detailed inquiries. Therefore a comparison between these so-called "in-depth studies" and normal consultations cannot be made.²⁵⁵ Of course, the Conference has still also not adopted any conclusive recommendation of the Commission let alone adopted a resolution regarding human rights violations in a member state. Therefore the protective effect of the further procedure approaches nil value.

In principle, publicity remains in de facto terms as the Commission's only "weapon" in order to exert the pressure of the general public on governments and to achieve a certain degree of protective effect. However, the Banjul Charter also intended to defuse this means as much as possible and leave it in the hands of the mother organisation. But the credibility of an international human rights authority stands and falls with the public presentation of its findings, which conveys trust to the citizens and commands the respect of the governments.²⁵⁶

²⁵⁴ The Commission aptly emphasised this circumstance and in a consideration regarding the strengthening of the protective mechanism referred to the "difficulties in which the Commission found itself in the course of the past years vis-à-vis the attitude of State Parties [...] has been to generally ignore its recommendations.", Compare: Non-Compliance of State Parties to adopted Recommendations of the African Commission: A Legal Approach, Doc/OS/35(b) (XXIII).

²⁵⁵ *Murray* argues in this connection that the implementation of a detailed inquiry would also be possible without the OAU's request, since Art. 46 AfrCHPR stipulates that the Commission is allowed to "make use of all appropriate inquiry methods". Compare: *Rachel Murray*, Serious or Massive Violations under the African Charter on Human and Peoples' Rights: A Comparison with the Inter-American and European Mechanism, in: NQHR 17 (1999), pp. 109-133, 122.

²⁵⁶ With regard to the effect of the general public as means to put pressure on implementation, compare: *Nanette Dumas*, Enforcement of Human Rights Standards: An International Human Rights Court and Other Proposals, in: HICLRev (1990), pp. 585-608, 607; *Joseph Warioba*, Monitoring Compliance with and Enforcement of Binding Decisions of International Courts, in: Max Planck UNYB 5 (2001), pp. 41-52, 50 et seqq.; also very graphic: *David Weissbrodt*, *Maria Bartolomei*, The Effectiveness of International Human Rights Pressures: The Case of Argentina 1976-1983, in: MinnLRev 75 (1991), pp. 1009-1035, 1030

But the pressure of the general public is insufficient as the only protective effect. The desired effects do not ensue: The AU heads of state neither pass on this pressure to the concerned state nor do western states normally respond with sanctions. A state in which human rights violations have been determined thus does not perceive itself as subject to any serious foreign or economic political constraints which could cause it to take action. Domestic political pressure is also insufficiently created through this form of public relations, since the annual reports – along with the “shame register” – may well be freely accessible documents, but these must be requested by the Commission. Suitable multipliers are required to make them known to a broad public. However, as explained above, the cooperation of the Commission with the African press is less fruitful. On the whole, this publicity is rather an opportunity for states which take advantage of the cooperation with the Commission in order to suitably position themselves before the small circle of interested insiders in matters of human rights and to present themselves as constitutional and freedom-loving nations.²⁵⁷

c) The interpretation of the Charter

The third responsibility intended for the Commission encompasses the interpretation of the Banjul Charter. And so it also takes over classic-judicial responsibilities. Art. 45 No. 3 AfrCHPR stipulates that the Commission interprets all provisions of the Banjul Charter “at the request of a contracting party, a body of the OAU or an organisation recognised by the OAU”. But in view of the above findings with regard to the willingness of the states and other bodies of the OAU to cooperate it is no longer astonishing that not a single inquiry of this nature has reached the Commission. In this connection, Art. 45 No. 1 b) AfrCHPR additionally instructs the Commission to formulate in writing “principles and rules for solution of legal problems in connection with human and peoples’ rights, on which the African governments can expand with their legislative activity”. The Commission ignored this responsibility up until 1992. At its 11th Session in Tunis (March 1992) it dealt with the judicial rights guaranteed in the Banjul Charter (Art. 7 AfrCHPR), and adopted a resolution in which it concretises the provision on the basis of the international standard.²⁵⁸ On the same occasion it concretised the rights of freedom of assembly and freedom of association (Art. 20,

et seqq.

²⁵⁷ For instance, the Commission evaluates as a success the fact that more and more states invite the Commission to hold its periodic sessions there. At the 31st Session in Pretoria the Commission received official invitations straightaway from three national delegations.

²⁵⁸ Resolution on the Right to Recourse and Fair Trial, 11th Ordinary Session of the African Commission on Human and Peoples’ Rights, Tunis 2-9 March 1992, printed in: African Commission on Human and Peoples’ Rights, Recommendations and Resolutions, Banjul 1998, p. 16.

21 AfrCHPR), and called on the governments not to truncate these rights through their legislation.²⁵⁹ In 1995, the Commission adopted a resolution on anti-personnel mines, and stated that the utilisation of such land mines represents a violation of Art. 4 AfrCHPR (Right to life and physical intactness).²⁶⁰ And so the interpretations made until now are rather sporadic and have hardly met any response amongst the addressees. The handling of communications and state reports are in the foreground of the Commission's work. Up to now, scarce time and lacking preparatory work have prevented the Commission from being able to devote enough energy to this task. This is why up to now a tangible further development of the rights guaranteed in the Banjul Charter has not been brought about through the interpretation of the Banjul Charter's provisions.

d) The Commission in the protection system — interim result

The preceding chapter examined which responsibilities are intended for the Commission, with which competencies it is provided, and in which manner it faces these responsibilities and applies its competencies.

Insofar as the Commission's promotional responsibility is concerned, it has been determined that the absolutely meaningful projects and concepts regarding sensitisation and better understanding for the problem field human rights and regarding continental dissemination of the Banjul Charter frequently stagnate in their realisation due to financial scarcity or never get beyond the idea phase. But since this area has a special importance for Africa, the absence of perceivable successes is particularly regrettable here. The promising state reporting procedure, which is based on the idea of a consensus-promoting dialogue, frequently does not exhibit the desired successes due to lack of willingness to cooperate amongst the states. As a reverse side to the fundamental ideas of this consensual procedure there is also no operative handling on the part of the Commission to force the states to collaboration. The Commission's only applicable means is its powers of persuasion. Here it lacks the time to overcome lacking political will through the application of appropriate persistence.

With regard to its protective responsibility the Commission lacks the institutional competencies in order to bring about a direct protective effect, because it merely submits a

²⁵⁹ Resolution on the Right to Freedom of Assembly and Association, 11th Ordinary Session of the African Commission on Human and Peoples' Rights, Tunis 2-9 March 1992, printed in: African Commission on Human and Peoples' Rights, Recommendations and Resolutions, Banjul 1998, p. 17.

²⁶⁰ Resolution on Anti-personnel Land Mines, 17th Ordinary Session of the African Commission on Human and Peoples' Rights, 13-22 March 1995, Lomé, Togo, printed in: African Commission on Human and Peoples' Rights, Recommendations and Resolutions, Banjul 1998, p. 37.

recommendation to the concerned states and can only draw the AU's attention to the situation. As a result, an indirect protective effect does not ensue either, since the Commission does not have enough political weight which could bring the concerned states to voluntary implementation of its recommendations.

A more far-reaching protective effect does not emerge from the politicised second phase of the procedure, since first of all the AU lacks the political will, and secondly, any decision would proceed without consequences as long as the organisation would not also threaten and implement sanctions in the event of contravention.

The Commission cannot sufficiently comply with the protective responsibility in two aspects due to lack of competency: On the one hand, it can hardly ensure protection of the victim since it is always dependent on political goodwill; and on the other side, it is therefore also not able to establish any case law that could prevent comparable violations in the future. Competency and protective responsibility are not only incongruent here, but devolve far apart from each other.

As the Commission's only applicable means of exerting pressure, publicity is also not suitable for expanding the required domestic and foreign political pressure which could overcome the lacking cooperative will of many states. This is also due to the fact that these means are not adequately utilised by the Commission, and much information may be theoretically accessible but is hard to procure in reality.

Nevertheless, in this point the Commission has gone through a remarkable emancipation, since it extensively sidestepped the original intention of the confidentiality provisions and has meanwhile institutionalised this detour. Moreover, the Commission has established precedents which have been met with approval even in the ranks of the OAU. As a result, it increases its trustworthiness vis-à-vis the general public, and gains maturity vis-à-vis political bodies of the OAU, since it acquires the right to take an independent position on such human rights issues.

The Commission's interpretation responsibility does not show any competence weaknesses (the Commission could in its own discretion pursue any further development of the law within the scope of Art. 45 No. 1 b) AfrCHPR), but up to now it has not in practice devoted itself in a form which entailed recognisable results. The main reason for the hesitant utilisation of this possibility lies once again in the Commission's work overload.

In addition to the Commission's individual institutional weaknesses, it can be summarised that a simultaneous fruitful implementation of all the organisational responsibilities intended for it appears to be impossible: The modestly measured period which is available to the

Commission at the actual working sessions is not nearly enough to cope with this workload. Deficient financial and personnel resources prevent the permanent Secretariat from being assigned corresponding responsibilities for independent implementation.

Based on this background, the Protocol on the Establishment of the Human Rights Court shall be examined in the following chapter.

4. Chapter: The Protocol to the Banjul Charter on the Establishment of the African Court

The Commission will be supported by the Court after its inauguration. The African protective system will be given a completely different face through the expansion by a fully-judicial authority. The individual provisions of the Protocol on the Establishment of the Court will be analysed in the following. In particular, it will be shown which institutional and procedural provisions the Court is based upon and what effects they have. Building on this, an assessment can be made as to whether and to what extent the court will be able to compensate for the aforementioned inadequacies in the African human rights protection system.

After a brief outline on the political background and the evolutionary history of the protocol, the institutional range of norms will be examined for this purpose. The competencies of the Court and the procedural provisions shall be taken into consideration afterwards. After all, the so-called “other provisions” – which will also be taken into consideration – are also relevant.

I. The historic-political background

The geopolitical changes since the end of the East-West conflict also had a decisive influence on the political landscape of the African continent. Two of these aspects are of special importance for the OAU’s mode of procedure with regard to human rights.

The upheavals in Eastern Europe led to an increased democratisation pressure which many regimes could not resist.²⁶¹ In 1990, the student protests in Benin, which forced the Marxist one-party system to resign²⁶² and paved the way for a multiparty system²⁶³, set the ball rolling. This incident triggered a veritable wave of democratisation in Africa, which took along a vast number of states.²⁶⁴ This resulted in a staffing in the “Conference of Heads of

²⁶¹ Special influence is also attached here to the inglorious end of the Ceausescu regime in Rumania, which showed a great catalyst effect in the countries of Africa. Comp. *Joachim Betz, Volker Matthies*, Dritte Welt im Abseits? Folgen der Ost-West-Entspannung, in: *ibid* (Eds.), Jahrbuch Dritte Welt 1991, Munich 1990, p. 39.

²⁶² The pressure was flanked by the credit freeze which France, as a former colonial power, was able to impose on the Kerekou regime without having to expect its own losses in light of Benin’s marginal economic importance. Comp. *Stefan Brüne*, Die französische Afrika-Politik, Baden-Baden 1995, p. 143.

²⁶³ Keesing’s Record of World Events (KRWE) 1990, pp. 37238 et seqq. *Dieter Nohlen* (Ed.), Third World, Reinbek 1998, p. 90.

²⁶⁴ In 1998, nine of the political systems on the continent were considered to be independent, 18 others as semi-independent and only 21 as authoritarian; in 1989, this ratio was 2 to 3 to 43. Comp. *Stefan Mair*, Democratization in Africa, in: *Der Überblick*, 2/99, pp. 50-54, 50. Unfortunately, this process was not characterised by uniform continuity. The numerous military putsches in the meantime – for instance, in Niger, Gambia, Sierra Leone, Congo, and recently in the Central African Republic and Mauritius – are severe setbacks in this development. In other respects, even in most countries in which multiparty

State and Government” that was adapted to the changed circumstances: Quite a few autocrats and dictators were replaced in the OAU’s decision-making body through more progressive heads.²⁶⁵

In addition to this obvious effect, the end of global bipolarity had a political-economic effect that must be mentioned in this connection: In the East, the support for the countries of the Third World ceased abruptly and irreplaceably, since the former Eastern Bloc states found themselves more or less as financially developing nations in the new economic order after the collapse of the Soviet Union.²⁶⁶ The former socialist-aligned countries of Africa now sought – in addition to the former Bloc partners – financial and economic assistance in the West, which reduced the development aid resources in light of the stagnating economies and budgetary problems.

On the other hand, the political interest of donor countries in the West towards strategic zones of influence for containing communism lapsed with the global ideological confrontation. The loss of the strategic importance of African countries was accompanied by the loss of their political significance, and thus the interest of the West in development-political cooperation. Most of the states in Africa were already marginalised in economic terms. At the same time, the economic support of dictatorial and totalitarian systems justified with global political

democracies prevail, neo-patrimonial structures and deficient understanding of basic democracy are to be observed; this casts doubt on the actual content of the democratisation. This is why “Afro-pessimism” has gained adherents in the realm of political science, who attempt to formulate this phenomenon with terms such as “delegation democracies”, “democratic dictatorships”, “patrimonial democracies” and “façade democracies”. Comp. *Gero Erdmann*, Hoffnung für die Demokratisierung in Afrika? Stand und Perspektiven, in: JEP 16 (2000), pp. 111-129, 116 et seqq. For instance, in 1993 the Government of Equatorial Guinea permitted the establishment of political parties, but made the deposit of 150,000 US dollars (with a per capita annual income of 350 US dollars) for the electoral commission as a prerequisite for recognition. The Governments of Ghana, Guinea, Niger and Tanzania proceeded in a similar manner in order to keep the political opposition within manageable limits. Comp. *Akwasi Aidoo*, Africa: Democracy without Human Rights, in: HRQ 15 (1993), pp. 703-715, 708. But the democratic reality also frequently turned out to be difficult in the actual positive direction. For instance, in 1998 the 103rd political party was established in the Republic of Benin (5.6 million inhabitants); compare: African Research Bulletin (ARB) 13251 A.

²⁶⁵ Other states (14) took precautions against the protests and implemented reforms from above in order to remain in power through cosmetic corrections in the constitution or to re-legitimise them through superficially fair elections. And so dictators such as *Daniel arap Moi* (Kenya), *Omar Bongo* (Gabon) and *Gnassingbé Eyadéma* (Togo) survived this wave of democratisation. Comp. *Rainer Tetzlaff*, Afrika zwischen Demokratisierung und Staatszerfall, in: Aus Politik und Zeitgeschichte, B 21/98, pp. 3-15, 11. But since they had to provide at least a democratic outward appearance, they also changed their behaviour within the organisation.

²⁶⁶ In 1988, the development aid of the Eastern Bloc states – in particular the Soviet Union – to the socialist-oriented developing countries amounted to only 4.7 billion US dollars (of which 70 % flowed into the member states of the Council of Mutual Economic Aid (COMECON)), but it secured the survival of countries such as Mozambique, Angola and Ethiopia. Comp. *Stephan Klingebiehl*, Nach dem Ost-West-Konflikt: Chancen und Risiken für die Dritte Welt, in: epd-Dritte-Welt-Information, 1/1993, pp. 1-8, 2.

considerations increasingly came under domestic political pressure in the donor countries.²⁶⁷ The USA, Japan, France, Great Britain and Germany set up criteria the fulfilment of which was coupled with the development aid.²⁶⁸ These included political pluralism, the compliance with the rule of law, the fight against corruption, the granting of freedom of the press and the observance of human rights.²⁶⁹ Unlike the bilateral donors, the World Bank – in accordance with its statutes (Art. IV, Sect. 10 of the World Bank Convention,²⁷⁰ which constitutes a ban on intervention in domestic affairs) – is not provided with political influence possibilities through its financial policy, but it focuses on good governance²⁷¹ and accountability.²⁷² Despite the ban on intervention in its statutes, in practice there are cases in which the World Bank has reacted in financial-political terms to human rights violations in cooperation states: In 1974, for instance, loans to Uganda were suspended in view of the atrocities of the Amin regime, and the liquidation of all credits was stopped.²⁷³

²⁶⁷ Comp. *Franz Nuscheler*, *Entwicklungspolitik*, 4th edition, Bonn 1996, p. 24.

²⁶⁸ Such measures had considerable importance particularly in countries where foreign financial assistance had a major share of GNP. These were above all states which were characterised by subsistence agriculture. Countries such as Nigeria or Zaire, in which the revenue sources were secured through oil, gold and diamond exports, were less impressed by the termination of development cooperation. Comp. *Heiko Meinhardt*, *Externe Akteure und Demokratisierung in Afrika*, Hamburg 2001, p. 51. Moreover, the economic interests of western countries in mineral-rich “kleptocracies” (or also individual western oil companies such as Elf-Aquitaine in Congo or the Shell concern in Nigeria) complicated an effective disciplining of such countries through embargo measures. Comp. *Rolf Hanisch*, *Internationale Demokratieförderung: Gründe, Motive, Instrumente, Möglichkeiten und Grenzen*, in: *ibid* (Ed.), *Demokratieexport in die Länder des Südens*, Hamburg 1996, pp. 3-91, 48.

²⁶⁹ Comp. *David Williams*, “good governance” and the Ideology of Transformation, in: *William Hale, Eberhard Kienle* (Eds.), *After the Cold War: Security and Democracy in Africa and Asia*, New York 1997, pp. 227-249, 229.

²⁷⁰ UNTS 2, 134.

²⁷¹ The concept “good governance” has been specifically developed by the World Bank in order to sidestep the ban on non-intervention in internal affairs. It encompasses a series of prerequisites to which the assistance to developing countries is linked within the scope of the conditionality of the standby credits. For instance, this includes a more efficient, transparent public sector, constitutional structures, pluralism and freedom of the press. Comp. *Adrian Leftwich*, *Democracy and Development*, Cambridge 1996, p.17.

²⁷² With regard to these criteria, compare: *Dana Clark*, *The World Bank and Human Rights: The Need for Greater Accountability*, in: *HarvHRJ* 15 2002, pp. 205-226, 220 et seqq. Whereas the World Bank is oriented towards the procedural technocratic approach to these key terms, and thus quite pragmatically makes the underlying conditions of Governmental and administration processes the subject of discussion under further exclusion of political implications, the OECD nations by contrast expand the governance agenda by explicit political demands such as the demand for democracy and the observance of human rights. Comp. *Philipp Dann*, *Accountability in Development Aid Law: The World Bank, UNDP and Emerging Structures of Transnational Oversight*, in: *ARV* 44 (2006) pp 381-405, 390 et seq.; *Olaf Nielinger*, *Democracy and good governance in Africa*, Hamburg 1998, p. 105 et seqq. This is why critics accuse the World Bank of insufficiently combating the lack of political participation as well as political and social injustices in many recipient states. Comp. *Robin Broad, John Cavanagh, Walden Bello*, *Der Markt ist nicht genug*, in: *John Cavanagh, Marcos Arruda, Daphne Wysham* (Eds.), *50 Jahre Weltbank und IWF*, Hamburg 1994, pp. 21-35, 22; *Korinna Horta*, *Rhetoric and Reality: Human Rights and the World Bank*, *HarvHRJ* 12 (2006), pp. 227-243, 231 et seqq., with examples of questionable World Bank projects in Africa’s dictatorial regimes.

²⁷³ Comp. with further examples: *Victoria Marmorstein*, *World Bank Power to Consider Human Rights*

And so many African states immediately felt compelled to enter into development-political competition due to two aspects: Since they were no longer considered by the Eastern Bloc states, the socialist-aligned states had to turn towards new creditors and accept their conditions. The former western-oriented states were now in competition with the former socialist states, whereas the western donor countries linked political demands with the development aid. The de-ideologisation – and with that the scarcity of development-political assistance of the donor countries – additionally intensified this competitive pressure.

Since all African states are represented in the OAU, the OAU's political activism in matters of human rights was also subjected to change. The first step is found in a declaration by the "Conference of Heads of State and Government" on the political and socioeconomical situation in Africa according to the fundamental changes in the world.²⁷⁴ There the responsibility of governments for Africa's development is recognised, and it is stated that "a political environment, which guarantees human rights and the observance of the rule of law assures high standards of probity and accountability particularly on the part of those who hold public office. In addition, popular-based political process ensures the involvement of all, including, in particular, women and youth in the development efforts." This declaration constituted the foundation for the "Declaration on the introduction of a mechanism for conflict prevention, management and solution within the OAU" that was adopted in 1993.²⁷⁵ Contrary to the otherwise sacrosanct principle of nonintervention, the central body of the Conflict Management Division has specific intervention competencies in the event of conflict.²⁷⁶ *Kioko* sees the declaration from 1990 as the intellectual basis for the establishment of a Court.²⁷⁷ The altered awareness in matters of human rights was also manifested on the ministerial level. The "Cairo Agenda for Action on Relaunching Africa's Socioeconomic Transformation" was resolved at an extraordinary session of the Council of Ministers in 1994

Factors in Loan Decisions, in: JILE 13 (1978), pp. 113-136, 128; for the legal basis of this development, compare: *John Ciociari*, The Lawful Scope of Human Rights Criteria in World Bank Credit Decisions, in: CorILJ 33 (2000), pp. 331-371, 342 et seqq.

²⁷⁴ Assembly of Heads of State and Government, 26th Ordinary Session, 9-11 July 1990, Addis Ababa, Ethiopia, AHG/Decl. 1 (XXVI).

²⁷⁵ Until then the field of conflict management on the African continent was determined by and contingent on extra-African interests: In 1992, the Portuguese Government mediated the peace treaty between the parties in Angola; between 1991 and 1992 Italy paved the way for the truce in the Mozambique civil war; the USA intervened in Ethiopia (1992) and Somalia (1993). Comp. *Cedric de Coning*, The Role of the OAU in Conflict Management in Africa, in: Conflict Management, Peacekeeping and Peace-building 10 (1997), www.iss.co.za/Pubs/Monographs/No10/deConing.html.

²⁷⁶ The United Nations Economic Commission for Africa provides an overview on the mode of operation and backgrounds of this mechanism at www.uneca.org.

²⁷⁷ *Ben Kioko*, The Road to the African Court on Human and Peoples' Rights, in: ASICL 10 (1998), pp. 70-86, 73.

and recommended to the “Conference of Heads of State and Government” for adoption.²⁷⁸ In the agenda, the importance of the declaration from 1990 is once again underscored, and it is recommended “to launch programmes to promote national unity, especially through the politics of inclusion and a culture of tolerance among the various segments of our peoples and among the countries in Africa, based on the principles of respect of human rights and dignity, free and fair elections, as well as respect for freedom of the press, speech, association and conscience”.

II. The development process for the protocol

The demand for a juridical authority within the African protective system was clearly formulated in 1991 at the first NGO Workshop.²⁷⁹ The NGOs provided similar recommendations at the following workshops. In 1993, the ICJ organised a seminar in Dakar, Senegal, in which Commission representatives also participated. The seminar recommended the OAU Secretary General to ask the “Conference of Heads of State and Government” for permission to prepare a protocol on the establishment of an African Court, since “it goes without saying that efforts toward obtaining the international protection of human rights in Africa [...] will remain unfinished if Africa does not establish a genuine human rights jurisdiction.”²⁸⁰ The OAU General Secretariat did not take up this request, but in June 1994 the OAU’s “Assembly of Heads of State and Government” adopted a resolution at its 30th Session in Tunis, which called on the OAU Secretary General “to convene a meeting of government experts to ponder in conjunction with the African Commission on Human and Peoples’ Rights over the means to enhance the efficiency of the Commission in considering particularly the establishment of an African Court on Human and Peoples’ Rights“.²⁸¹

In cooperation with the government of South Africa, the OAU Secretary General subsequently organised a conference of experts in Cape Town from 6 to 12 September

²⁷⁸ The agenda was adopted at the following session of the “Conference of Heads of State and Government” in 1995.

²⁷⁹ “Given the problems facing the African Commission and the un-exhausted potential with the mandate of the commission, it is considered appropriate that the question regarding the establishment of an African Court of Human and Peoples’ Rights be deferred at the present time.” Conclusions and Recommendations of the First NGO Workshop, para. 9, printed in: ICJ (Eds.), *The Participation of Non-Governmental Organisations in the Work of the African Commission on Human and Peoples’ Rights*, Geneva 1996, p. 22; with regard to the role of NGO’s within the scope of the pre-history to the protocol, compare: *Martin Ötz, Die NGOs im Recht des internationalen Menschenrechtsschutzes*, Vienna 2002, p. 376 et seqq.

²⁸⁰ ICJ (Eds.), *Summary Report of the Days of Reflection on the African Charter and the African Commission*, Dakar, Senegal, 13-15 January 1993, p. 8.

²⁸¹ AHG/Res. 230 (XXX), para. 4.

1995.²⁸² The group of experts²⁸³ discussed a preliminary draft which African jurists had prepared with the support of the ICJ and other NGOs, and adopted the first draft of a protocol to the Banjul Charter (Cape Town Draft).²⁸⁴ This was sent from the OAU General Secretariat to all member states with the request to send back suggestions for change and comments as promptly as possible. The suggestions should then be forwarded together with the draft to the next rotational (64th) Session of the OAU's "Council of Ministers"²⁸⁵ for adoption of a resolution so that it could be submitted to the "Conference of Heads of State and Government" for final adoption.

However, the ministerial conference postponed the deliberation of the protocol draft to its following meeting from 24 to 28 February in Tripoli, Libya, since only very few member states complied with the request of the General Secretariat to submit an opinion and therefore wanted to give the Council of Ministers more response time.²⁸⁶ At this (65th) Session, the ministerial conference resolved the text to be revised once again by the group of experts, whereby the already submitted comments and annotations should be taken into consideration.²⁸⁷

The OAU Secretary General subsequently organised the second conference of experts, which was held in Nouakchott, Mauritania, from 11 to 14 April 1997.²⁸⁸ The text was once again modified (Nouakchott Draft) and recommended by the group of experts for adoption by the "Conference of Heads of State and Government", which was supposed to take place in Harare, Zimbabwe in June 1997. The Council Minister, who prepared this conference, once again dealt with the protocol draft at the 66th Session, and determined that there was still insufficient response on the part of the member states. Therefore he once again called on the governments of the member states to send in their annotations and suggestions for change. At

²⁸² *Mutoy Mubiala*, Vers la Création d'une cour Africaine des Droits de l'Homme et des Peuples, in: Congo – Afrique, 1998, pp. 83-92, 84.

²⁸³ Present were 56 participants, among them 23 representatives of African states. Comp. Report of the Government Experts' Meeting on the Establishment of an African Court of Human and Peoples' Rights, para. II; printed in: ICJ (Eds.), The Participation of NGOs in the Work of 6th African Commission on Human and Peoples' Rights, Geneva 1996, p. 252.

²⁸⁴ Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights, Doc. OAU/LEG/EXP/AFCHPR/PRO(1) Rev. 1, printed in: RADIC 8 (1996), p. 493 et seqq. and ZaöRV 58 (1998), p. 727 et seqq.

²⁸⁵ 64th Session from 1 to 5 July 1997 in Yaoundé, Cameroon.

²⁸⁶ *Ibrahim Badawi*, Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, in: RADIC 9 (1997), pp. 943-952, 944.

²⁸⁷ CM/326(LXV).

²⁸⁸ Report of the Second Government Legal Expert Meeting, (OAU/LEG/EXP/AFCHPR/RPT(II) Rev. 1; The diminishing interest of the OAU states in the protocol is expressed in the limited number of participants at this conference: only three people were present. Comp. *Mutoy Mubiala*, Vers la Création d'une Cour Africaine de Droits de l'Homme et des Peuples, in: Congo-Afrique, 1998, pp. 83-92, 85.

the same time, he empowered the General Secretary to organise a third conference of experts, in which diplomatic representatives of the member states should also participate so that the final version of the protocol could come about²⁸⁹ and be passed on to the Conference Ministers.²⁹⁰ Subsequently, the text once again had to be passed on for the fourth time to the Council of Ministers for resolution in order to ultimately submit it to the OAU's "Assembly of Heads of State and Government" for adoption.²⁹¹

The third conference of experts met from 8 to 11 December in Addis Ababa, Ethiopia, once again modified the text (Addis Ababa Draft), and passed it on as directed to the Conference Ministers, which was also held in Addis Ababa on the next day. The justice ministers made a few amendments and eventually recommended the draft to the Council of Ministers for adoption.²⁹² In June 1998, this final version without further amendments passed the 68th Session of the Council of Ministers in Ouagadougou, Burkina Faso, which forwarded it to the "Conference of Heads of State and Government". This group signed the protocol in the same month.²⁹³

This unusual procedure had its relevant cause in the lack of interest with which the governments of the member states responded to the protocol. Since the extension of the response phase through the Council of Ministers had more or less no effect, the advocates of the protocol had to bring in the big guns: The assignment of diplomatic representatives to the third meeting of experts as well as the specially created Conference Ministers also served to force the member states to grapple with the protocol at all.

III. Protocol concept

It is certainly attributable to this complicated development process that the protocol's composition lacks stringency and structure: The preamble is followed by an initial institutional section in Articles 1 und 2. Articles 3 to 10 include jurisdictional and procedural provisions. Organisational provisions are once again found in Articles 11 to 25. Another

²⁸⁹ The Conference Ministers had been specifically called into being for this purpose. Comp. *Ibrahim Badawi*, Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights, in: RADIC 9 (1997), pp. 943-952, 945; *Mutoy Mubiala*, Vers la Création d'une Cour Africaine des Droits de l'Homme et des Peuples, in: Congo-Afrique, 1998, pp. 83-92, 84.

²⁹⁰ Doc Amb/Cttrr/Rpt (V).

²⁹¹ CM/Dec. 348 (LXVI).

²⁹² Communiqué by the Ministers and Attorneys-General of the Member States of the OAU; compare: Report of the Secretary General on the Conference of Ministers/Attorneys-General on the Draft Protocol on the Establishment of an African Court on Human and Peoples' Rights, CM/2051 (LXVII) Annexe 1.

²⁹³ 34th Session from 8 to 10 June 1998 in Addis Ababa.

procedural section follows (Art. 26 to 31), followed by two organisational provisions again (Art. 32 and 33). Articles 34 and 35 include general provisions concerning ratification and amendments. The consideration of the protocol undertaken here does not follow the succession of its provisions, but rather its systematic togetherness.

IV. The preamble to the protocol

The preamble prefixes the protocol in its first paragraph: That freedom, equality, justice, peace and dignity are the essential objectives for implementation of the justified wishes of African peoples. Paragraph II confirms that the Banjul Charter adheres to the rights, freedoms and obligations of people and nations which have been resolved in declarations, conventions or other instruments by the OAU or other international organisations. Here the preamble already points out that not just the provisions of the Banjul Charter are available as a legal source. In addition, Paragraph III recognises that the Banjul Charter is based on a double objective: On one hand the promotion and on the other hand the protection of the rights, freedoms and obligations of people and nations. The previous efforts of the Commission are acknowledged in Paragraph IV. This may even be understood as a delicate reference that its efforts can certainly not be described as sufficient. Paragraph VII is clearer: It shows the firm conviction to be able to achieve these two objectives of the Banjul Charter only through the establishment of a Court of Human Rights “to complement and reinforce the functions of the African Commission on Human and Peoples’ Rights”²⁹⁴. The fundamental relationship of the Court with the Commission is addressed here: It shall complete and strengthen the Commission’s functions. As a result, a second protective institution is created, which appears alongside the Commission.²⁹⁵ Paragraph V of the Preamble is reminiscent of the resolution (AHG/Res.230 (XXX)) in which the General Secretariat is supposed to convene the first conference of experts. Paragraph VI then also mentions the three conferences of experts in which the protocol was prepared.

²⁹⁴ Preamble Paragraph VII.

²⁹⁵ This corresponds to the protective system in the ACHR: Commensurate with Art. 33 ACHR, the Inter-American Human Rights Commission and the Inter-American Court for Human Rights function as responsible protective bodies. The European protective system has changed in this connection since the entry into force of the 11th Supplementary Protocol to the Human Rights Convention (1.11.1998): The European Human Rights Commission was abolished in favour of the European Court for Human Rights.

V. The organisation of the Court

Article 1²⁹⁶ specifies that the Court is established within the OAU, whose organisation, competencies and procedural rules are stipulated in the protocol. Article 2 governs the relationship of the Court with the Commission by specifying that the Court complements the protective mandate that has been assigned to the Commission by the Banjul Charter in accordance with the protocol's provisions. And so the arrangement is anything but detailed or definitive. However, the formulation "complement" indicates that a co-ordination of both bodies is assumed with regard to the protective responsibilities. This also ensues from the protocols of the conferences of experts²⁹⁷ and ministerial conferences.²⁹⁸ A certain degree of conflict potential always emerges from such a co-ordination. Which problems are faced and how the protocol attempts to counteract them will become clear in the course of the consideration with the help of the respective provisions.

1. Composition of the Court

Commensurate with Article 11, eleven judges belong to the Court. They must be citizens of OAU member states and possess personal qualities of the utmost reputation from the ranks of jurists, and also dispose of acknowledged practical, legal or academic expertise and experience from the realm of human and peoples' rights. The formulation of such claims contributes to the quality of the Court and thus that of its judicial decisions.²⁹⁹

The relationship between the organisation's member states and the number of judges corresponds – provided that the protocol is ratified by all contracting states – to the inter-American protective system.³⁰⁰ On the other hand, the ECHR specifies that the number of judges corresponds to the number of contracting states.³⁰¹ The arrangement made in the protocol is certainly meaningful for the African protective system: For one thing, it lacks an

²⁹⁶ Articles without more detailed specifications refer to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights, compare Annexe I.

²⁹⁷ "In this context, the meeting reached a consensus that the proposed court will not replace the commission but would complement and reinforce its mandate." Comp. Report of the Government Expert Meeting on the Establishment of an African Court on Human and Peoples' Rights, OAU/LEG/EXP/African Commission on Human and Peoples' Rights/HPR (I), para. 17.

²⁹⁸ "The court will not replace the commission nor will it be hierarchically superior to the Commission. Indeed, the court will complement the protective mandate of the Commission." Comp. Report of the Secretary-General on the Draft Protocol on the Establishment of an African Court on Human and Peoples' Rights, Council of Ministers, 65th Ordinary Session, CM/1996 (LXV), para. 9.

²⁹⁹ *Jens Meyer-Ladewig*, ECHR-Commentary, Baden-Baden 2003, Art. 22, Rd. No.: 2.

³⁰⁰ The ACHR provides for seven judges (Art. 52 I ACHR). However, the OAS also has only 35 member states, whereas the OAU has 53.

³⁰¹ Art. 20 ECHR (in the version as amended by the 11th Supplementary Protocol).

arrangement corresponding to Art. 27 II ECHR in the protocol, according to which the national judge of a participating party is automatically a member of the panel deliberating the case. For this reason, a number of judges corresponding to the quantity of member states is not necessary for the African Court. For another thing, a Court staffed with 52 judges – in the optimal case – would necessitate an enormous administrative apparatus which the AU would with certainty not be able to finance.

The arrangement that the judges merely have to be citizens of the mother organisation's member states³⁰² and not members of contracting parties also follows the inter-American system.³⁰³ This particularly has the pragmatic advantage – particularly in the phase in which very few states have ratified the protocol – that the nominating states are not dependent on the domestic personnel resources, which are not sufficiently available in some countries, either on account of their size or their deficient educational system. Moreover, Art. 11 II specifies that not more than one citizen each from one and the same state may belong to the Court. This corresponds to the provisions of the ACHR³⁰⁴ and – with restrictions – also the ECHR.³⁰⁵

What has always been criticised with regard to the composition of the Commission is positively included in the protocol: The progressive equality of rights has been manifested in Art. 14 II, which specifies that a well-balanced ratio of sexes is to be heeded during the process of nomination. The arrangement is extended in Art. 14 II, in which it is incumbent upon the “Conference of Heads of State and Government” “to ensure that there is adequate gender representation”. In the event that the nominations of states do not show any well-balanced ratio, it is up to the Conference to correct this. The arrangement found here is unique in international comparison³⁰⁶ and sends an important signal, particularly for Africa: The

³⁰² Comp. Art. 52 I ACHR.

³⁰³ The ECHR entirely refrains from such a requirement, however. For instance, the Principality of Liechtenstein has already nominated a Canadian (Professor *MacDonald*), whom the Parliamentary Assembly has also elected as a judge. Comp. *Hans Christian Krüger*, *Die Auswahl der Richter für den neuen Europäischen Gerichtshof für Menschenrechte*, in: *EuGRZ* 24 (1997), pp. 397-401, 398. However, such an arrangement would be inconceivable in the protocol, since the African legal culture has not yet concluded its self-discovery process and frequently attempts to avert extra-African influences. Comp. *Evelyn Ankumah*, *The African Commission on Human and Peoples' Rights*, The Hague 1996, p. 36.

³⁰⁴ Comp. Art. 52 II ACHR.

³⁰⁵ After entry into force of the 11th Supplementary Protocol, the ECHR refrains from an explicit ban in order to make allowances for the fact that the election of a judge to the European Court for Human Rights should not be made contingent on a criterion such as citizenship. Comp. *Hans Christian Krüger*, *Die Auswahl der Richter für den neuen Europäischen Gerichtshof für Menschenrechte*, in: *EuGRZ* 24 (1997), pp. 397-401, 399. However, the guidelines to the reform protocol recommend that nevertheless in principle two judges of the same nationality should not belong to the Court. Comp. “*Erläuternder Bericht zu Protokoll No. 11 zur europäischen Menschenrechtskonvention*”, Item 59, printed in: *EuGRZ* 1994 p. 333.

³⁰⁶ Such an arrangement would also be desirable for the two other regional protective systems: For instance, only nine female judges (out of 44 positions) currently serve at the European Court for Human Rights.

consistent continuation of the process of equality of rights started in Africa is shown here. A well-balanced official staffing will ensure that the rights of the woman, which have been neglected for a long time, are appropriately taken into consideration. In other respects, during the selection the “Conference of Heads of State and Government” also has to ensure the representation of the regions and Africa’s legal traditions within the judiciary.³⁰⁷ Here the protocol has also formulated with positive rights the practices which have in the meantime been exercised without statutory basis during the staffing of the commission.

2. Election of the judges

The election process is governed by Art. 12 to 14. It has been mentioned above that adequate gender representation shall be ensured already during the process of nomination according to Art. 12 I. The contracting States to the protocol may nominate up to three candidates, whereof at least two must be nationals of the proposing state. This procedure equals the Inter-American protection system.³⁰⁸ Contracting states to the ECHR, in contrast, may list up to three candidates but there is no nationality requirement whatsoever.³⁰⁹

According to Art. 13 I, after entry into force of the protocol the contracting states have been asked by the Commission of the AU to nominate the candidates within 90 days upon receipt of the request. Thereupon, the Secretary General provided the member states of the AU – not only the contracting states – with a list of nominees (Art. 13 II). The involvement of all member states has two reasons: First, as stated above, the protocol allows contracting states to the Protocol to nominate candidates from other countries.³¹⁰ As a result, states whose citizens were nominated have a legitimate interest to be informed on this nomination. Secondly, according to Art. 14 I the candidates are being elected by the Assembly of Heads of States and Governments of the AU, and thus by all member states of the AU. Therefore the identities of the candidates have to be revealed beforehand.

Comp. Council of Europe information at <http://www.echr.coe.int>. On the other hand, until 2000 there has been only one single female judge at the Inter-American Court. Nowadays three female judges serve at the Court; comp. OAS information, http://www.corteidh.or.cr/composiciones_antiores.cfm; see also: *Jo Pasqualucci*, Sonia Picado, First Woman Judge on the Inter-American Court of Human Rights, in: HRQ 17 (1995), pp. 794-806, 797.

³⁰⁷ Art. 14 II.

³⁰⁸ Art. 53 ACHR.

³⁰⁹ Art. 22 I ECHR.

³¹⁰ A view on the elected judges reveals, however, that no contracting State has made use of this possibility. The judges are without exception nationals of contracting parties to the protocol: Mr. Fatsah Ouguergouz, President (Algeria), Mr. Jean Emile Somda (Burkina Faso), Mr. Gerard Niyungeko (Burundi), Ms Sophia A.B. Akuffo (Ghana), Mrs. Kellelo Justina Masafu-Guni (Lesotho), Mr. Hamdi Faraj Fanoush (Libya), Mr. Modibo Tounty Guindo (Mali), Mr. Jean Mutsinzi (Rwanda), Mr. El Hadji Guissé (Sénégal), Mr. Bernard NGOepe (South Africa), Mr. George W. Kanyeihamba (Uganda).

The judges shall be elected by secret ballot, while the Assembly is obliged to ensure that there is representation of the main regions of Africa and that there is adequate gender representation (Art. 14 II, III).

Considering the initial election which took place on 22nd January 2006, it must be noticed that the Assembly has not completely implemented the requirements of the protocol concerning the nomination and election procedure. Only two female judges have been nominated and elected. However, the main regions of Africa are represented within the board.

3. Term of office

According to Art. 15 I the judges are elected for a period of six years and can be re-elected only once. This corresponds to the Inter-American provision which also orders a six year period of office and the singular re-election possibility.³¹¹ Upon entry into force of the 11th additional protocol to the ECHR the term of office has been curtailed from formerly nine³¹² to now six years while at the same time restrictions concerning the re-election have been totally dismissed.³¹³ The six year period of term is to some extent criticized to be determined too shortly. Judges needed, according to the respective arguments, in practice at least two years to get familiarized with their position with the effect that a short term office regulation weakened the efficiency of a Court.³¹⁴ On the other hand, it cannot be denied that a long term of office of nine or more years contains the danger that an insufficiently qualified judge occupies the position and thus hampers the effective work of the chamber over this long period of time. The African provision in question seems to seek a compromise between the two possible embodiments of the term of office and their respective advantages and disadvantages.

This is also true for the restricted re-election possibility in Art. 15 I. Unrestricted re-election possibility bears the advantage that qualified judges can be preserved for the Court, while it runs the risk that Governments try to put pressure on judges with reference to their upcoming election. A vivid example in this connection is the case of the former judge at the ECtHR *Pantîru* from Moldavia who defied the pressure of its home country during a pending complaint procedure and voted against Moldavia. *Pantîru's* re-election has afterwards been

³¹¹ Art. 54 ACHR.

³¹² Art. 40 I ECHR [current version].

³¹³ Art. 23 I ECHR.

³¹⁴ Comp. *Norbert Engel*, Status, Ausstattung und Personalhoheit des Inter-Amerikanischen und des Europäischen Gerichtshofes für Menschenrechte, in: *EuGRZ* 30 (2003), pp 122-133, at p. 129 with regard to the former european provision.

circumvented by Moldavia under obscure circumstances and he was sued for obviously constructed malfeasances.³¹⁵ The protocol's terms regulation minimizes comparable dangers while at the same time allows a qualified judge to keep his/her position for a twelve year period of time.

In order to avoid that a change of judges interferes with the Court's administration of business the terms of four judges elected at the first election expire at the end of two years while the terms of four more judges expire at the end of four years (Art. 15 I).³¹⁶ A judge elected to replace a judge whose term of office has not expired shall hold office for the remainder of the predecessor's term (Art. 15 II). This provision ensures the synchronism of the election periods and the AU does not permanently have to go through a costly and complex nomination and election procedure for a single judge who replaces another during his current term of office.

According to Art. 15 IV all judges except the President perform their functions on a part-time basis. On this crucial point the African Court again follows the example of its Inter-American counterpart which likewise operates on a part-time basis. However, this was also the case with its European counterpart until its transformation into a permanent Court after entry into force of protocol 11. This functional metamorphose was one of the key issues of the reformation process.³¹⁷ The shape of the African Court was object of circumstantial discussion during the development process for the protocol. One objection against a part-time Court was the fear of the delegates that judges could lose their impartiality should they hold another position. The suggestion was to either reduce the number of judges to seven and create a permanent Court or to appoint at least a few additional judges to work permanently beside the President. The proponents of the present configuration of the Court argued that the lack of money precluded a permanent Court and, moreover, the expected case load would not justify a permanent Court for the beginning.³¹⁸ The ministers agreed on a compromise: They voted for the part-time court but incorporated into Art. 15 VI the wording that "the Assembly may change this arrangement as it deems appropriate."

³¹⁵ *Norbert Engel*, Status, Ausstattung und Personalhoheit des Inter-Amerikanischen und des Europäischen Gerichtshofes für Menschenrechte, in: *EuGRZ* 30 (2003), pp 122-133, at p. 130, comp. also the country report „Moldavia“ of the International Helsinki Federation of Human Rights of 2002, p. 235, available under www.ihf-hr.org.

³¹⁶ A corresponding provision can be found in the ACHR (Art. 54 ACHR, comp. *Scott Davidson*, *The Inter-American Human Rights System*, Dartmouth 1997, p 124) and for the same reasons in Art. 23 I ECHR.

³¹⁷ *Volker Schlette*, Das neue Rechtsschutzsystem der europäischen Menschenrechtskonvention, in: *ZaöRV* 56 (1996) pp. 905-976, at pp. 935 et seqq.

³¹⁸ Comp. *Ibrahim Badawi*, Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, in: *RADIC*, 9 (1997), pp. 943-952, at. 948.

This decision for a part time operating Court has several impacts: the most apparent is the length of the complaint procedures. The examination of a complaint extends significantly if the competent body works part-time only.³¹⁹ The trouble to schedule parties, their representatives, witnesses and amici curiae concordantly are well known in all legal systems. In Africa these difficulties are striking due to incapable infrastructure.³²⁰ Should the Court like the Commission hold its sessions twice a year any minor aberration of the plan would lead to a prolongation of the complaint procedure for a period of six months. In this vein procedural delays of a couple of years may occur without any factual reasons. This would reduce the legal protection effect significantly.³²¹

Art. 15 VI at least shows the development goal of the protocol. One may thus hope that the case load of the Court will justify a permanent judicial body soon and that the Assembly will grade the African Court up to a permanently operating.

4. Impartiality and incompatibility rules

Provisions on the impartiality and incompatibility are spread in the protocol. It has been mentioned that according to Art. 11 the judges are elected in an individual capacity and therefore perform their office without any external order. After their election, the judges of

³¹⁹ Judge *Picardi* of the IACtHR describes this effect as „very frustrating, indeed“. Judge *Buergethal* adds another negative consequence by answering the question if a part-time court downgrades the quality of the findings: “The answer is yes. [...] Usually it is very frustrating because we really do not have much time to think about an opinion.” Comp. *Linda Frost*, *The Evolution of the Inter-American Court of Human Rights: Reflections of Present and Former Judges*, in: HRQ 14 (1992) pp. 171-205, at pp. 187 et seq.

³²⁰ E.g. Commissioner *Umozurike* could not attend the 2nd extra-ordinary session of the African Commission concerning the human rights situation in Nigeria “due to communication problems.” Comp. 9th Annual Activity Report of the African Commission on Human and Peoples’ Rights 1995/1996, AHG 20/207 (XXXII), p. 4.

³²¹ One of the most ostensive Communications of the African Commission in this regard was the complaint on behalf of Ken Saro-Wiwa and other Ogoni leaders: In September 1994 the first communication reached the Commissions’ Secretariat alleging a violations of the right to life and fair trial considering the death penalty which was imposed on all defendants by a Nigerian drumhead court martial. On its 16th session in October 1994 the Commission dealt with the Communication for the first time but deferred its decision on the admissibility to its next session to obtain more information from the Nigerian Government. On its 17th session in March 1995 the Commission declared the Communications as admissible and deferred the matter to its next session because the Nigerian Government had not shown any reaction to the Commissions requests for information. The Commission therefore invited the Nigerian Government to send a representative to its next session to promote the deliberation of the matter. Since this representative did not show up the Commission decided to send an on-site mission to Nigeria and deferred the Communication to its next session. On its 19th session (April 1996) the Commission heard the oral pleadings of the complainants and the Nigerian representative but deferred its decision again to wait for the results of the planned on-site mission. This mission was finally set up in March 1997. The mission came up with results in November 1997. On its 23rd session in April 1998 “la Commission, du fait du manque de temps, n’a pas pu prendre une decision sur ces communications.” On its 24th session the Commission decided on the merits and held the communications as founded and the Banjul Charter as violated by Nigeria. Ken Saro-Wiwa and the Ogoni leaders had been executed by a shooting command three years ago (November 10th 1995).

the Court have to make a solemn declaration to discharge their duties impartially and faithfully (Art. 16). Moreover, Art. 17 I guarantees the independence of the judges³²² “in accordance with international law”.³²³ A judge must not hear a case in which he/she has previously taken part as agent, counsel or advocate for one of the parties or as a member of a national or international court or a commission of enquiry or in any other capacity. Any doubt on this point shall be settled by decision of the Court.³²⁴

Another way to ensure the independence of judges is to grant immunities.³²⁵ These are conferred upon the judges by Art. 17 IV: “The judges of the Court shall enjoy, from the moment of their election and throughout their term of office, the immunities extended to diplomatic agents in accordance with international law.” International law applicable in this conjunction is the Vienna Convention on Diplomatic Relations (VCD).³²⁶ Of special relevance are Artt. 26 to 36 which grant absolute immunity from criminal proceedings and constricted immunity from civil processes under the jurisdiction of the host country.³²⁷ The personal immunity is distinguishable to the functional. Personal immunities granted by the protocol – in divergence to Art. 39 VCD - are effective within the time limits laid down in Art. 17 III (“throughout their term of office”). However, with regard to the functional immunity Art. 17 IV declares that the judges must not be held liable for any decision or opinion issued in the exercise of their functions. It has unlimited after-effect according to Art. 39 II 2 VCD.

Immunities for the judges do not suffice to ensure the neutral and objective process conduct. Also Rules of incompatibility are necessary to safeguard these attributes and also to document the independence of the Court and therefore strengthen the authority of its judgements.

³²² The Cape Town Draft contained a much more illustrative wording on the very spot: “The Court shall decide matters before it impartially, on the basis of facts and in accordance with law, without any restrictions, undue influence, inducement, pressure, threat or interference, direct or indirect, from any quarter or for any reason.” (Art. 15 I Cape Town Draft). Tunisia regarded this wording as “excessive”. States would deem as “potentially guilty parties; comp. Observations and Comments of the Government of Tunisia on the Draft protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples Rights, CM/1996 (LXV) Annex III (e) p. 4. The Nouackchott Conference met these concerns and diffused the wording.

³²³ Here the protocol refers to Art 14 I CCPR. This provision enshrines the liberal maxim of the separation of powers and especially the independence of justice, comp. *Manfred Nowak*, CCPR Commentary, Art 14 No 2.

³²⁴ Art. 17 II.

³²⁵ *Wenckstern* assumes that a high judgeship has to be connected with adequate attributes of prestige and honourableness to appear attractive for the most capable persons. Insofar the vanity of the jurists - according to *Wenckstern* - is also met by granting diplomatic immunities. Comp. *Manfred Wenckstern*, Immunity of International Organisations, in: *Handbuch des internationalen Zivilverfahrensrechts* Bd. II/1, p. 213.

³²⁶ UNTS Vol. 500 pp. 95 et seqq.

³²⁷ Comp. the restrictions of Art. 31 I VCR.

Art. 18 declares the position of judge of the Court as incompatible with any activity that might interfere with the independence or impartiality of such a judge or the demands of the office as determined in the Rules of Procedure of the Court. The protocol thus leaves it to the Court to profile the requirements for the impartiality of its judges. In reverse, it is up to the Assembly of Heads of States and Governments to anticipate these requirements when nominating and electing the first bench of the Court.

According to Art. 22 a judge is excluded from a case if he/she is national of any State which is party to a case submitted to the Court. Thus the fathers of the protocol here have decided in favour for the *nemo debet esse judex in causa sua* doctrine and against the mode of the other regional pacts. The ACHR expressly governs that if a judge is a national of any of the States Parties to a case, he shall retain his right to hear that case.³²⁸ The ECHR on the other hand provides that the judge with the citizenship of the State party *ex officio* is member of the competent chamber that hears the case. Should no titular judge obtain the citizenship of the State Party concerned it has to appoint another person to take part in the hearings as an ad-hoc judge.³²⁹ This regulation assures that the Court gets a substantiated state of knowledge of the law system and domestic laws of the State Parties.³³⁰

Krisch assumes that the *modus operandi* of the protocol might be a reaction to the negative experiences with the members of the African Commission who were accused of prejudice time and again.³³¹ However, the embodiment of the African provision has different roots: Originally the Cape Town Draft provided for a provision according to which a judge retained his rights to hear the case even if his country of citizenship was party to it.³³² The Governments of Egypt, Burkina Faso, Sierra Leone and Madagascar all raised the objection that in this case States that are not represented in the bench would have to obtain the right to appoint an ad-hoc judge. To avoid this complex and complicated procedure the Nouackchott Conference modified this provision into its converse.³³³

³²⁸ Art. 55 I ACHR. In order to redress balance, however, Art. 55 II provides that in these cases the other State Party has the right to appoint a person of its choice as an ad-hoc judge.

³²⁹ Art. 27 II ECHR. In contrast to the respective provision of the ACHR, it is obligatory under the ECHR to appoint an ad-hoc judge.

³³⁰ *Scott Davidson*, *The Interamerican Human Rights System*, Dartmouth 1997, p. 128; *Callewaert*, No. 7 to Art. 27, in: *Pettiti, Decaux, Imbert* (Eds.) *La Convention Européenne des droits de l'Homme*, p. 756.

³³¹ *Nico Krisch*, *The Establishment of an African Court on Human and Peoples Rights*, in: *ZaöRV* 58 (1998), pp 713-726; at p 717; similar: *Inger Österdahl*, *The Jurisdiction Ratione Materiae of the African Court on Human and Peoples' Rights*, in: *RACHPR* 7 (1998), pp. 132-150, at 135.

³³² Art. 19 I Cape Town Draft.

³³³ Report of the Second Government Legal Expert meeting on the Establishment of an African Court on Human and Peoples' Rights, OAU/LEG/EXP/ACHPR/HPR/RPT(2). para. 39.

5. Cessation of office

A judge can only be suspended or removed from office by the unanimous decision of the other judges if he/she has been found to be no longer fulfilling the required conditions to be a judge of the Court.³³⁴ According to Art. 10 II such a decision, however, does not become final until it is set aside by the Assembly at its next session. The Assembly therefore functions as the ultimate resort concerning the suspension of a judge. Whereas according to Art. 73 ACHR in the Inter-American system the disciplinary power over the judges also lies in the hands of the OAS assembly, the ECHR excludes political bodies from the decision on the question whether or not a judge is to be suspended.³³⁵ Also the Cape Town Draft came up with significant different wording at this place: “Such judgement of the Court [on the suspension of a judge] shall be final and take effect immediately.”³³⁶ However, Nigeria and Tunisia objected that it was the Assembly after all that was responsible for the election of the judges and consequently it had to keep this responsibility for their removal. These deliberations led to the respective revision of the provision.³³⁷

The adopted version does not seem to be felicitous because of two aspects: Firstly, the authority of the Court is weakened since it depends on political backup in urgent self-administrative matters such as the suspension of a judge. More important, if a judge has been found incapable by all his/her colleagues, what would be the effect if the assembly countermanded this decision? The work flow and processes of the bench would be severely deranged since the judge concerned would have to stand against ten opposing colleagues for the rest of his/her term of office.³³⁸ Moreover, Art. 10 II does not clarify the status of the judge concerned between the decision of the other judges and the assembly (that only holds one annual meeting).³³⁹ Thus the question arises if the judge concerned is allowed to take part

³³⁴ Art. 19 I.

³³⁵ Comp. Art. 24 ECHR (here only a two-thirds-majority of the judges is necessary in contrast to the prerequisite of unanimity under the Protocol.) However, *Scott Davidson* stresses, that the commensurate with Art. 73 ACHR any sanctions against judges must be approved not only by a two-third majority vote of the assembly but also of the Parties to the Convention which prevents political interferences of singular disaffected State Parties, *Scott Davidson*, *The Interamerican Human Rights System*, Dartmouth 1997, p. 131.

³³⁶ Art. 17 II Cape Town Draft.

³³⁷ Report of the Second Governmental Legal Expert Meeting on the Establishment of an African Court on Human and Peoples’ Rights OAU/LEG/EXP/AFCHPR/RPT(2) para 36.

³³⁸ On this account Nigeria suggested to discharge the Court completely from any such decision and to assign this competence to the assembly exclusively, Report of the Third Governmental Legal Expert Meeting (enlarged to include Diplomats) on the establishment of an African Court on Human and Peoples Rights, OAU/LEG/EXP/AFCHPR/RPT(III) Rev. 1 para 25.

³³⁹ *Gino Naldi, Konstantin Magliveras*, the proposed African Court on Human and Peoples’ Rights: Evaluation and Comparison, in: *RADC* 8 (1996), pp. 944-970, at 947.

in the ongoing proceedings until the assembly has decided on the suspension. If the answer is positive, it needs to be answered if the decision of the assembly is effective *ex nunc* or *ex tunc* and in the latter case whether the interim decisions of the Court with the contribution of the later suspended judge remain valid. From this perspective the former version of the provision appeared to be more consistent while at the same time less complicated in its consequences.

6. The Board

According to Art. 23 the Court shall examine cases brought before it, if it has a quorum of at least seven judges. Since according to Art. 11 the Court consists of eleven judges it follows that there will be only a single board to consider the complaints.

However, the Cape Town Draft still allowed the Court to constitute two chambers each of which manned by at least five judges „if the necessity arises“.³⁴⁰ Tunisia saw the problem that there was no institution that would reassign the judges to the new chambers and determine each chamber’s competencies.³⁴¹ Although the conference of ministers discarded this demur and pointed out that these matters should be solved by the Court’s rules of procedure „where it properly belongs“³⁴² the Nouackchott Conference deleted this addendum according to which the Court could be split up into two chambers.³⁴³

Envisioning only one chamber the protocol follows its Inter-American counterpart. The IACtHR is quorate with five (from a total of seven) judges.³⁴⁴ The ECHR on the other hand has refined the chamber system after entry into force of the 11th protocol: the Court sits in committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges, depending on the state of procedure.³⁴⁵ Especially the creation of the Grand Chamber which on the hand is responsible for inter state complaints and such individual complaints that raise serious questions affecting the interpretation of the Convention, or where the resolution of a question before the Chamber might have a result inconsistent with a

³⁴⁰ Art. 20 Cape Town Draft.

³⁴¹ Observations and Comments of the Government of Tunisia on the Draft Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, Art. 20, CM/1996(LXV)Annex III (e) p. 2.

³⁴² Report of the Secretary General on the Draft Protocol on the Establishment of an African Court on Human and Peoples’ Rights, Council of Ministers 65th Ordinary Session, CM/1996(LXV) para 30.

³⁴³ Report of the Second Governmental Legal Expert meeting on the Establishment of an African Court on Human and Peoples’ Rights, OAU/LEG/EXP/AFCHPR/RPT(2), para 40.

³⁴⁴ Art. 23 I Statute of the Inter-American Court of Human Rights.

³⁴⁵ Art. 27-32 ECHR, comp. for an overview on the deliberation procedure and competencies of the Chambers and Committees *Mark Villinger*, The 11th additional protocol in practice, in: SZIER (1999) pp. 79-95, at p. 81 et seqq.

judgment previously delivered by the Court³⁴⁶ and on the other hand quasi functions as a Chamber of appeal „in exceptional cases“³⁴⁷ is seen as a fundamental novum in the scope of the Court’s reform.³⁴⁸ Such a detailed chamber system surely would not fit the needs of the African Court. However, it must nevertheless be doubted that the provision in force displays the best solution: The Commission underlined in its comments to the Nouackchott Draft that it would not be wise to lay down a fix quorum of seven judges for each stage of the procedure since the record of the Commissions deliberations showed that it faced difficulties every now and then to reach the necessary quorum.³⁴⁹ Secondly, this stare quorum would foreclose any division of work of the Court however natured, since all present judges would be bound to the single chamber.³⁵⁰ These objections remained unheard, however. The provision of the Cape Town Draft surely was more adaptive; should the caseload of the Court become unbearable for one chamber one day instead of a mere internal decision of the Court the complicated diplomatic process of an amendment of the protocol would have to be started by the member States.

However, the Court might bypass the terminatory character of Art. 23 for certain phases of the complaint procedure. Starting point of such a deliberation is a narrow interpretation of the wording „examine“ in Art. 23: The Court should consider the possibility to exclude at least the handling of apparently inadmissible complaints from the scope of Art. 23. The Chamber would be discharged at least insofar and could spare its time for deliberations on legally comprehensive complaints.³⁵¹

³⁴⁶ Art. 30, 31 ECHR.

³⁴⁷ Art. 43 ECHR.

³⁴⁸ Comp. *Volker Schlette*, Das neue Rechtsschutzsystem der europäischen Menschenrechtskonvention in: *ZaÖRV* 56 (1996) pp. 905-976, at p. 950 et seq.; *Andrew Drzembczewski*, The Internal Organisation of the European Court of Human Rights, in: *LHRQ* 3 (1999) pp. 109-128, at 110 et seq.

³⁴⁹ Art. 43 III AfrCHPR also constitutes the quorum of seven with regard to the Commission. However, at its 16th session only eight Commissioners could take part two of whom became sick during the deliberations. The Commission proceeded with the session nonetheless, *Evelyn Ankumah*, The African Commission on Human and Peoples’ Rights, The Hague 1996, p. 50. The Commission decided on the merits of nine communications, declared five as admissible and rejected seven more as inadmissible, comp. Final Communiqué of the 16th Session of the African Commission on Human and Peoples’ Rights, 25 October – 3rd November 1994, para 47. Such a modus operandi is equivocal even for a quasi judicial organ like the Commission. For the Court it would be absolutely intolerable since it would cast doubts on any decision of the chamber.

³⁵⁰ Report of the Secretary General on the Draft Protocol on the Establishment of Human and Peoples’ Rights, Council of Ministers, 66th Ordinary Session, CM/2020(LXVI)1997, para. 18.

³⁵¹ It was expected in the course of the reformation of the European system that the Committees would declare up to 95 percent of the complaints (terminatory) as inadmissible before they are being considered by the Chamber, *Alistair Mowbray*, Reform of the Control System of the European Convention of Human Rights, in: *Public Law* 1994 (p540-552, at 547; *same*, A New European Court of Human Rights, in *Public Law*, 1993, pp. 419-426, at 424. The Committees have fully complied with these expectations: 95,9 percent of the complaints have been declared inadmissible in 2006, comp. www.echr.coe.int/

7. Seat of the Court

The seat of the Court is not governed by the protocol itself. Instead Art. 25 I assigns the States parties to the protocol to determine the seat of the Court. The wording of Art. 25 is nearly identical with Art. 58 I ACHR. While all member States of the AU are involved in the election process of the judges, only ratifying States select the seat of the Court.³⁵²

Although Senegal has not only been the first to ratify the protocol but has expressly given notice of its interest to become the host country of the Court the States parties agreed upon Arusha, Tanzania, as its seat. While the proximity of Senegal to Gambia, the host country of the Commission, undoubtedly would have facilitated the co-operation between the two institutions³⁵³ there was first and foremost one aspect that militated in favour of Tanzania: the Court could utilize the facilities developed for the International Criminal Tribunal for Rwanda which is based in Arusha and is supposed to have completed its mandate by the end of 2008.³⁵⁴

However, in congruence with its Inter-American correspondent, according to Art. 25 I the African Court may convene in the territory of any Member State of the AU when the majority of the Court considers it desirable, and with the prior consent of the State concerned.

The seat of the Court can only be changed by the Assembly of the AU „after due consultation with the Court“.³⁵⁵ It remains remarkable in this context, that concerning the initial decision only the States parties to the protocol are entitled to vote whereas in case of a change of seat the whole assembly has voting power.³⁵⁶

8. Financing

According to Art. 32 the expenses of the Court, the emoluments and allowances for the judges as well as the budget of its registry, shall be determined and borne by the AU, in accordance

statisticalinformation.htm.

³⁵² While the Nouackchott Draft has entitled the complete assembly to decide on the seat of the Court, the third Expert Conference added the endorsement „from among States parties to the protocol“, comp. Report of the Third government Legal Expert Meeting (enlarged to include Diplomats) on the Establishment of an African Court on Human and Peoples' Rights, OAU/LEG/EXP/ACHPR/RPT.(III) Rev. 1 para 30.

³⁵³ Even in the Inter-American system the distance between the Commission (Washington, USA) and the Court (San José, Costa Rica) hinders the concerted performance of their common task and is jointly responsible for their lacking concurrence, comp. *Victor Rodriguez, David Marc, The Development of the Inter-American Human Rights System: A Historical Perspective and a Modern Day Critique*, in: NYLSJHR 16 (2006) pp. 593-633, at p. 622.

³⁵⁴ Comp. Completion strategy of the International Criminal Tribunal for Rwanda, available under www.ictr.org.

³⁵⁵ Art. 25 II.

³⁵⁶ It is conjecturable that the third Expert Meeting has utterly overlooked to revise the second paragraph of Art. 25 after having amended its first; comp. footnote 352. However the field of application of Art. 25 II is so narrow that this mere editorial mistake will most probably never have any effect.

with criteria laid down by the AU in consultation with the Court.

Since the AU has to budget the costs, all AU members pay for the Court according to their institutional financial obligations. This has the advantage that a ratification of the protocol does not result in additional financial claims of the mother organization for the state concerned.³⁵⁷ On the other hand, because of the financial undersupply of the AU³⁵⁸ the costs of the Court will lead to a congruent shortage for other cost units of the AU, such as the Commission. Secondly, the allocation from the AU will most probably be everything but generous. The Court will therefore share the fate of the Commission and have to rely on foreign benefits.

VI. Jurisdiction of the Court

After the presentation of the Court's organization, it shall now be investigated as to how its jurisdictions have been defined. In this connection the protocol differentiates between two areas of jurisdiction: Contentious jurisdiction (Art. 3) and advisory opinion (Art. 4).

1. Contentious jurisdiction

With regard to jurisdiction, Art. 3 I specifies that this includes all cases and disputes which are submitted to the Court, and which have the interpretation and application of the Banjul Charter as well as the protocol and any other human rights instruments (that have been ratified by the concerned states) as content. In the event of ambiguities, the Court itself shall decide (commensurate with Art. 3 II) whether the matter is subject to its jurisdiction or not.³⁵⁹

³⁵⁷ In 1990 the current president of the Commission, *Umzurike*, argued with this point in his letter to all Heads of States and Governments of these countries that still had not ratified the Banjul Charter: „As we go through the latest list of ratifications, we notice that Your Excellency's State is not yet included. That does not imply that you are not concerned with the activities of the Commission. Your Excellency's State helps to fund the Commission through its contribution to the OAU [...] What remains therefore is to formally recognize your interest, obligations and responsibilities under the Charter. I am convinced, Your Excellency, that it will be in furtherance of Your Excellency's States' role in Africa to ratify the Charter and give formal recognition to the activities you are already performing in furthering the promotion and protection of human rights, printed in: 3rd Activity Report, Annex II.

³⁵⁸ However, the AU tried to generate its budget in any possible way. The Eminent Persons Advisory Panel had proposed the African Diaspora should contribute 10 USD per month for the benefit of the AU. It is also debated to tax 1 USD on every intercontinental flight from and to Africa, comp. *Baffour Ankomah*. Funding the Union, in: *New African*, 408 (June 2002) p 15.

³⁵⁹ In this connection, the Ivorian Government argued that with this provision the Court is the “judge of its own cause”. Therefore they proposed consulting the Commission – which should decide about such cases – in the event of such ambiguities. Comp. Comments of the Embassy of Côte d'Ivoire in Ethiopia, CM/1996 (LXV) Annex III (h). Such a proposal is out of the question, since the competence of the court would depend on the Commission. However, the jurisdictional competence normally lies with the judiciary authority. The PCIJ has already stated in this connection that “as a general rule, any body possessing jurisdictional powers has the right in the first place itself to determine the extent of its own jurisdiction”. Comp. Interpretation of the Greco-Turkish Agreement, 1928 B 16, p. 20. Senegal's proposal remained also

a) Waiver of a recognition of competence

The jurisdiction of the Court is already given if they have the matter at hand and if this relates to the said subject matter. And with that the African Court differs significantly from its Inter-American counterpart. The ACHR makes the jurisdiction of the Court contingent on whether the involved state has recognised this through special declaration.³⁶⁰ Such a declaration can be issued unconditionally, with reciprocity proviso, for a specific period or for specific cases.³⁶¹ The advantageousness of the African provision in contrast to the American cannot be underscored enough.

The protocol on the establishment of an African Court of Human Rights would be nearly worthless with a provision corresponding to the ACHR. Since the establishment of the Inter-American Court was an integral component of the ACHR, at least the obligation to accept the material portion was achieved through the mere ratification of the ACHR even if the signature states did not accept the jurisdiction of the Court. But with a reservation of consent concerning the jurisdiction of the African Court, the mere ratification of the protocol – insofar as the protection of human rights is concerned – would be to a great without any effect. However, the current version of Art. 3 I was by no means undisputed. In particular, Tunisia saw the sovereignty of the states as endangered, and proposed to incorporate such a reservation of consent.³⁶² Fortunately, neither the Conference of Experts³⁶³ nor the

completely ignored.

³⁶⁰ Art. 62 III ACHR, comp. *Scott Davidson*, *The Inter-American Human Rights System*, Dartmouth 1997, pp 205 seqq.

³⁶¹ Compare Art. 62 II ACHR; up until today (end of 2006), 22 out of 35 OAS member states have issued the “Recognition of Competence”. Meanwhile, Peru had attempted to revoke this recognition during a procedure (*Castillo Pertuzzi v. Peru*, ruling from 30.5.1999). The Peruvian president *Fujimori* perceived “that the Court was infringing on Peru’s sovereignty”, because the Court ruled that Peru arranged its national security and order law in conformity with the convention. Comp. *Monica Tinta*, *Individual Human Rights v. State Sovereignty: The Case of Peru’s Withdrawal from the Contentious Jurisdiction of the Inter-American Court of Human Rights*, in: *LJIL* 13 (2000), pp. 985-996, 988; see also: *Douglass Cassel*, *Peru withdraws from the Court – will the Inter-American Human Rights System meet the challenge?*; in: *HRLJ* 20 (1999), pp. 167-175. However, in its ruling the Court did not consider the mere revocation as an *actus contrarius*. The Convention does not provide for the separate revocation of the declaration of consent; the termination of the entire Convention is only open to the contracting states commensurate with Art. 78 ACHR. The Court obviously relied on the fact that Peru would shrink back from the political announcement effect that a complete withdrawal from the American Convention on Human Rights would have. In retrospect, it was correct with regard to this risky assessment. In this case, the president of the European Court for Human Rights also explicitly approved the legal opinion of the Inter-American Court in a letter to his American colleagues. Comp. Press Announcement from the Inter-American Court from 2.10.1999; CDH-CP13/99, <http://www1.umn.edu/humanrts/iachr/pr23-99.html>.

³⁶² “Regarding the court’s jurisdiction in matters and in view of the fact that those subject to such jurisdiction are sovereign States, it is vital to provide that such jurisdiction can only apply to States which at the time of signing or acceding to the protocol, do accept that it shall be fully binding and mandatory.” Comp. Observations and Comments of the Government of Tunisia on the Draft Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court of Human and Peoples’ Rights, CM/1996(LXV) Annexe III (e), p. 2.

Conference of Ministers was convinced by the necessity of this restriction.³⁶⁴

b) Scope of jurisdiction (*ratione materiae*)

Commensurate with Art. 3 I, the jurisdiction of the Court covers the provisions of the Banjul Charter, the additional protocol and also other relevant human rights instruments, which are ratified by the concerned states. Therefore the jurisdiction of the African Court exceeds that of the other regional courts of human rights: The Inter-American Court³⁶⁵ and the European Court for Human Rights³⁶⁶ are only responsible for cases which pertain to the respective human rights convention. The ECHR only explicitly includes the supplementary protocols in this connection.

At the same time, the question is posed as to what is exactly meant by “any other human rights instruments”. In this regard, *Österdahl* states that the formulation “instruments” goes much further than the term “treaties”, because it not only encompasses binding international law conventions, but all written human rights documents as well as mere declarations.³⁶⁷ In light of the clear wording of Art. 3 I, which clarifies that the human rights instruments must be ratified by the respective states, such a conclusion appears untenable, however. With a ratification a state declares that it is bound through a binding treaty under international law (Art. 2 I lit. b VCLT).³⁶⁸ However, mere declarations do not engender any obligations under international law. As a result, they are not able to be ratified. Therefore they cannot be subsumed under the term “other human rights instruments”.³⁶⁹

³⁶³ The Cape Town Conference of Experts clearly recognised that “such a provision would nullify the effectiveness of the Court”. Comp. Report of the Secretary-General on the Draft Protocol on the Establishment of an African Court on Human and Peoples’ Rights, CM/1996 (LXV) para. 20.

³⁶⁴ Even Tunisia ultimately signed the protocol in the current version, even though it has not yet been ratified. Comp. Status of Signature/Ratification/Accession – OAU Human Rights Treaties, Doc/OS(XXVIII)/INF.25.

³⁶⁵ The Inter-American Court can prepare advisory opinions under the prerequisites of Art. 64 ACHR as well as concerning provisions of other agreements which pertain to the protection of human rights in the American states, but the contentious jurisdiction applies only to the Convention (Art. 62 III ACHR).

³⁶⁶ Comp. Art. 32 I ECHR.

³⁶⁷ *Inger Österdahl*, The Jurisdiction Ratione Materiae of the African Court of Human and Peoples’ Rights: A comparative Critique, in: RACHPR 7 (1998), pp. 132-150, 136.

³⁶⁸ Comp. *Antonio Cassese*, International Law, Oxford 2005, p. 170; *Wolf Heintschel von Heinegg*, Die völkerrechtlichen Verträge als Hauptrechtsquelle des Völkerrechts, in: Knut Ipsen (Ed), Völkerrecht, 4th Edition, Munich 1999, pp. 92-179, 110.

³⁶⁹ At this point, *Österdahl* also addresses the matter of how this term is to be understood. In his opinion, three possibilities come into consideration: First of all, the other human rights instrument that the Court wants to apply must be ratified by all of the protocol’s contracting states. Secondly, the protocol’s contracting parties must be the same as those of the other instrument; or thirdly, the states against which a complaint has been filed, or respectively, if a state lodges the complaint, it must have ratified the other instrument. Comp.: *Inger Österdahl*, The Jurisdiction Ratione Materiae of the African Court of Human and Peoples’ Rights, in: RACHPR 7 (1998), pp. 132-150, 139. The first two possibilities of interpretation clearly miss the matter. They would limit the scope of application to such an extent that its inclusion in the protocol

In contrast to the Inter-American Court, which has the competence to issue advisory opinions regarding other such agreements which pertain to protection – especially in the American states³⁷⁰ –, the African Court is not regionally bound.³⁷¹ And so regional African as well as universal agreements come into consideration as the basis of opinions and rulings: For one thing, on a universal level this includes the human rights pacts, but for instance also the Convention on elimination of any form of discrimination against the woman³⁷², the convention against torture and other cruel, inhuman or humiliating treatment or punishment³⁷³ and the convention on the rights of the child.³⁷⁴ Relevant regional agreements include the African Charter on the Rights and Welfare of the Child,³⁷⁵ the OAU Convention on Refugees³⁷⁶ and, after entry into force, the protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.³⁷⁷

However, references to human rights are also found in African economic pacts. For instance, in the treaty on the establishment of the Economic Community of West African States³⁷⁸ (ECOWAS Treaty) such rights which are also in connection with economic collaboration are particularly formulated. This includes rights pertaining to entry, residence and

would not be justifiable. The only comprehensibly possibility remains with a limitation of the third interpretation. The human rights instrument must be ratified by the state against which the complaint has been lodged.

³⁷⁰ The IACtHR's first advisory opinion (Other Treaties) especially dealt with the question what exactly is meant by the phrase in Art. 64 I ACHR "other treaties concerning the protection of human rights in the American states" Comp. hereunto *Scott Davidson*, *The Inter-American Human Rights System*, Dartmouth 1997, pp. 232 et seqq., 243 et seq.

³⁷¹ Only the Nouakchott Draft defines at the same point the jurisdiction of the Court for "any other applicable African human rights instrument". Comp. Art. 3 I Nouakchott Draft. This restriction was only removed at the Third Conference of Experts in Addis Ababa. At the same time, the clarifying formulation was adopted with respect to the fact that the instruments must be ratified. These substantial amendments were only tersely commented on in the conference protocol: "These Articles [Art. 3 and 4] were adopted unanimously with minor amendments"; compare: Report of the Third Government Legal Expert Meeting (enlarged to include Diplomats) on the Establishment of an African Court on Human and Peoples' Rights, OAU/LEG/EXP/AFCHPR/RPT.(III) Rev. 1, para.16.

³⁷² 1249 UNTS 13.

³⁷³ ILM 24 (1985) 535.

³⁷⁴ ILM 28 (1989) 1448.

³⁷⁵ 999 UNTS 171; comp. also: *Frans Viljoen*, *Supra-national human rights instruments for the protection of children in Africa*, in: *CILSA* 31 (1998), pp. 199-215.

³⁷⁶ 1001 UNTS 45; comp. also: *Chibinga Chintu*, *Refugees - eternally displaced?*, in: *SAHRR* 6 (2000), pp. 2-12.

³⁷⁷ Doc/OS/34c/(XXIII) Annex; this protocol draft concretises the rights included in the Banjul Charter, especially the rights of women. It bluntly addresses many problem situations in Africa: For instance, it prohibits, amongst other things, any genital mutilation and infibulation; and for one thing, it massively strengthens the political rights, but also the woman's rights in marriage. Compare also: *Martin Semalulu Nsibirwa*, *A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, in: *AHRLJ* 1 (2001), pp. 40-57.

³⁷⁸ Members of ECOWAS are 15 West African states (Benin, Burkina Faso, Ivory Coast, Gambia, Ghana, Guinea, Guinea-Bissau, Cape Verde, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo). With regard to the development and objective of ECOWAS, comp.: *Dirk van den Boom*, *Regionale Kooperation in Westafrika: Politik und Probleme der ECOWAS*, Hamburg 1996, p. 10 et. seqq.

employment.³⁷⁹ But particularly to be emphasised are the freedom of information and press rights which are documented in the agreement and which otherwise exceed the customary protection on a regional African level.³⁸⁰ However, in contrast to the Banjul Charter, it must be stated that the ECOWAS Treaty does not assign any individual rights solely from the wording, but only obligates the states amongst each other.³⁸¹ Therefore a Court jurisdiction for standards from the ECOWAS Treaty also only comes into question if a violation of these standards is denounced by ECOWAS contracting parties. However, it is problematic that the ECOWAS has created a separate, fully-adjudicating monitoring body with the Community Court.³⁸² In other respects, other universal and regional human rights conventions applicable to the African Court also provide specific monitoring mechanisms which handle complaints.³⁸³

c) Relationship to the jurisdiction of other (quasi-) juridical bodies

With the jurisdictional extension of Art. 3 I to all ratified human rights instruments the risk increases that various international bodies will enact irreconcilable decisions. This would, in turn, have negative effects on the uniformity of the international law system.³⁸⁴

³⁷⁹ Comp. Art. 59 ECOWAS Treaty, including the appurtenant protocol: A/SP/1/7/86; both printed in: AJICL 8 (1996), pp. 187 et. seqq and pp. 228 et seqq. (respectively).

³⁸⁰ Comp. Art. 66 ECOWAS Treaty. Also particularly in view of the recent intensification of provisions regarding the press in the western countries of Africa (Togo, Ivory Coast and Guinea), these provisions have an enhanced importance. With regard to the freedom of the press situation in Africa, see the 2006 Annual Report of the organisation “*Reporters sans Frontières*” under <http://www.rsf.org/>.

³⁸¹ An individual justification under international law is regularly provided only if the individual is granted the authority to demand a specific action or omission through an international law standard. Comp. *Antonio Cassese*, *International Law*, Oxford 2005, p. 146; *Shigeki Miyazaki*, *Internationaler Schutz der Menschenrechte und Völkerrechtsunmittelbarkeit*, in: FS Hermann Mosler, pp. 581-597, 586.

³⁸² Art. 15 ECOWAS Treaty: The Court was first inaugurated in August 2000, although the convention amendment which provided for the establishment of the Court already entered into force in 1993. Comp. *Kofi Oteng Kufur*, *Securing Compliance with the Judgements of the ECOWAS Court*, in: AJICL 8 (1996), pp. 1-11, 2. The Court only adopted its rules of procedure a year later. Comp. ECOWAS Court adopts Rules of Procedure, in: *The Guardian* (Lagos, Nigeria) from 9.8.2001, p. 3.

³⁸³ On a regional level, this is the African Charter on the Rights and Welfare of the Child, where the specially created protective committee can also obtain individual communications (Art. 44 of the Charter); on the universal level, provisions concerning individual grievances are stipulated in the following conventions: 1. Facultative Protocol to the ICCPR, Art. 14 RDC, Art. 22 Anti-torture Convention, Art. 77 of the Migrant Worker Convention, Art. 34 ECHR, and Art 44. ACHR. After entry into force of the Supplementary Protocol to the Convention concerning the Elimination of any Form of Racial Discrimination of the Woman, individual grievances can also be submitted to the CEDAW Commission. In the meantime, efforts have also been made to introduce an individual grievance procedure before the East African Court, the judiciary body of the East African Community. Comp. *The East African* from 03.03.03, p. 4.

³⁸⁴ Comp. *Jonathan Charney*, *International Law and Multiple International Tribunals*, in: RdC 271 (1998), pp. 101-373, 134; *ibid.* *The Impact on the International Legal System of the Growth of International Courts and Tribunals*, in: NYUJILP 31 (1999), pp. 697-708, 699; as far as international organisations are concerned, *Ignatz Seidl-Hohenfeldern* and *Gerhard Loibl* see the danger here “that their right flutters here”. Comp. *ibid.*: *Das Recht der Internationalen Organisationen einschließlich der Supranationalen Gemeinschaften*, 6th Edition, Cologne et al, 1996, § 1372. The President of the ICJ has outlined the problem as follows:

The protocol did not react to these difficulties — despite the extensively arranged competence of the Court’s *ratio materiae*. For instance, in contrast to the Commission’s interpretations, which merely apply provisions of the Banjul Charter, the Community Court could be seen as the more pertinent institution for human rights questions arising from the ECOWAS Treaty.³⁸⁵ The rest of the monitoring bodies utilised through the concerned treaty could also most likely be referred to and judged via its interpretation.

The Inter-American Court of Human Rights argued in its opinion on “other treaties” that the possibility of colliding decisions exists in every national legal system in which not all courts are hierarchically structured; from that point of view, conflicts cannot be avoided. On an international law level, this risk of preparing opinions on all legal issues already exists through the competence of the ICJ, for which a different body is originally responsible.³⁸⁶ Actually, the first argument is not really convincing: Whereas on the national level court decisions can be asserted in terms of sovereignty and the intended effect can be lent by the states authorities, in light of the deficit of enforcement in international law, decisions from international law institutions live from their clarity and unanimity. Both of these aspects are severely restricted through contradictory decisions.

But the Inter-American Court also recognises that in its case there is no serious risk of collision, because contradictions could only emerge within the scope of advisory opinions in which the legal binding force of rulings is missing.³⁸⁷ But the situation with regard to contentious jurisdiction is different in the African system.³⁸⁸ This is why *Österdahl* sees the interpretation of such universal human rights conventions – but also all regional pacts which show human rights references – through the Court as inept, and recommends that they should only be inspired by them; but any direct application should be avoided.³⁸⁹

“Overlapping jurisdiction also exacerbates the risk of conflicting jurisprudence [...]. [T]he proliferation of international courts gives rise to a serious risk of conflicting jurisprudence, as the same rule of law might be given different interpretations in different cases.” Address by H.E. Judge *Gilbert Guillaume*, President of the International Court to the United Nations General Assembly, 26 October 2000 A/55/PV.41, agenda item 13, <http://www.un.org/documents/ga/docs/55/pv/a55pv41.pdf>.

³⁸⁵ On top of that is the fact that Art. 22 I ECOWAS Protocol provides for the jurisdictional exclusivity of the ECOWAS Court: “No dispute regarding interpretation or application of the provisions of the Treaty may be referred to any other form of settlement except that which is provided for by the Treaty or this Protocol.”

³⁸⁶ Opinion of the Inter-American Court from 24.09.1982, No. OC-1/82 on “other treaties” which are subject to the jurisdiction of the Court for rendering an opinion (Art. 64 ACHR); printed in: *EuGRZ* 11 (1984), pp. 196-202 No. 51; in the original: Inter-American Court of Human Rights, Series A 1982, p. 1 et seqq. para. 51, available under <http://www.corteidh.or.cr/>. Compare *Scott Davidson*, *The Inter-American Human Rights System*, Dartmouth 1997, pp. 243 et seqq, also: *M. C. Parker*, “Other Treaties”: The Inter-American Court of Human Rights Defines its Jurisdiction, in: *AULRev* 33 (1983), pp. 211-246.

³⁸⁷ Regarding the binding effect of advisory opinions, see below p. 103 et seq.

³⁸⁸ For the binding force of rulings, see below p. 174 et seqq.

³⁸⁹ *Inger Österdahl*, *The Jurisdiction Rationae Materiae of the African Court of Human and Peoples’ Rights*,

On the other hand, such an extensive jurisdiction of the Court is to be warmly greeted. For instance, the multifariously codified human rights can thus be petitioned before a single agency, and must not be asserted before the respective committees in the far-distant jungle of the United Nations' monitoring bodies. This bundled competence can contribute a great deal towards harmonisation and standardisation of human rights adjudication in the African system. At the same time, it strengthens the weight of the Court as a regional, comprehensively responsible instance in matters of human rights, and thus reinforces the tenor of its rulings. But the Court must itself encounter the risk of colliding decisions, and if at all possible avoid any contradictoriness in the interpretations. The predictability of judicial decisions is quite essential in international law. States can only be motivated through this "guarantee of legal certainty" to voluntarily submit to the jurisdiction of international adjudicating bodies.³⁹⁰ So that its course remains calculable, the Court should – as soon as it is posed with a question of interpretation by another human rights instrument – scrutinise whether this has already been handled by any respectively responsible monitoring body. If this is the case, it also gains credibility on the universal level and has an effect on the unity of the international legal system, if it sufficiently refers to its views and insofar as its factual prejudicial effect³⁹¹ is accepted, and as it is either assumed or otherwise a divergence has been substantially justified.³⁹²

2. Advisory opinions

Art. 4 I specifies that at the request of an OAU member state, the OAU itself, one of its bodies or another African organisation recognised by the OAU can prepare an opinion on any legal matter in reference to the Banjul Charter or any other relevant human rights instrument. And

in: RACHPR 7 (1998), pp. 132-150, 137 et seq.

³⁹⁰ Compare also: *August Reinisch*, Richterrecht im Völkerrecht?, in: JRP 9 (2001), pp. 294-303, 302; he argues that central elements of legal certainty such as stability and predictability – and even a "*stare decisis*" on the part of the judiciary would necessitate an international adjudicatory body.

³⁹¹ Although in international law there is no "*stare decisis*" as in Anglo-American law, the judiciary (with its authority) has the same effect on subsequent decisions or a different decision-making body; comp. *Malcom Shaw*, *International Law*, 4th Edition, Cambridge 1997, p. 86. *Shabtai Rosenne* also expounds on the decisions of the ICJ concerning this matter: "While there is no formal hierarchy of international courts and tribunals, the pre-eminence of the Permanent Court and the present International Court is today generally accepted. Any other international adjudicatory body which ignored relevant dicta and decisions of the International Court would jeopardize its credibility"; compare *ibid.* *The Law and Practice of the International Court 1920-1996*, The Hague 1997, p. 1609 et seq. However, the ICJ is very cautious with regard to the legal qualification of its judiciary. For instance, it hardly proceeded any further in the Teheran hostage case, in which it described its preliminary decision as "settled jurisprudence". Compare the only monographic work concerning the question of precedence through ICJ rulings: *Mohamed Shabuddeen*, *Precedent in the World Court*, Cambridge 1996, p. 154 et seq.

³⁹² See also: *Karin Oellers-Frahm*, Multiplication of International Courts and Tribunals and Conflicting Jurisdiction – Problems and Solutions, in: Max Planck UNYB 5 (2001), pp. 67-104, 102.

so it is left up to the Court as to whether it complies with the request for preparation of an opinion or rejects this request. The opinions are to be substantiated in accordance with Art. 4 II. While doing so, every judge is empowered to render a dissenting opinion.

In contrast to the competence concerning contentious jurisdiction, the protocol no longer makes any reference to this jurisdiction on the part of the Court. For this reason the procedure, insofar as it is governed in Art. 4, has already been discussed at this point.

a) Roots and divulgence of advisory opinions in international jurisdiction

The approach to provide an international judicial organ not only with the competence for contentious jurisdiction but also to clarify abstract legal questions, originates from the continental-European legal realm whereas it was uncommon for the anglo-American.³⁹³ The PCIJ was the first international court to be granted the competence to issue advisory opinions beyond pending legal disputes.³⁹⁴ Its successor, the ICJ, again was entrusted with this function.³⁹⁵ Apart from the ICJ, only three international judicial organs have been consigned to issue advisory opinions. Among those are the ITLOS³⁹⁶ and both of the regional human rights Courts ECtHR³⁹⁷ and IACtHR³⁹⁸. However, amongst those organs the procedural configuration concerning the petition authority (*ratione personae*) and the competence *ratione materiae* differs significantly. While especially the advisory opinion procedure before the ICJ holds manifold complications, the admissibility of a petition to issue an opinion before one of the regional Courts is less complicated. This is due to the fact that the jurisdiction of the ICJ as the “World Court” is nearly overarching whereas the other Courts only consider a small field of international law (Regional Human Rights Law and, respectively, Law of the Sea). Therefore, the ICJ is much more sensitive towards the decision of whether or not to issue an opinion upon request. The ICJ sees the danger, that “the Court [...] could intervene in any question related to the constitutional rights and the activities of any of the main bodies of the United Nations or specialised agencies, or on any problem of the interrelations between

³⁹³ Felix Amerasinghe, *Jurisdiction of International Tribunals*; The Hague 2003, p. 503; Michla Pomerance in: Muller, Raic (eds), *The international Court*, p 272; Comp. for the different views on advisory opinions Manley Hudson, in: *HarvLRev* 37 (1924), pp. 971 et seqq.

³⁹⁴ Art 14 Charta of the League of Nations. Comp. concerning the drafting history in this connection Michla Pomerance, *The Advisory Function of the International Court in the League and the UN* Eras, Baltimore 1973, pp. 25 et seqq.

³⁹⁵ Art. 96 UNC, Art. 65 et seqq. ICJ Statute.

³⁹⁶ Art. 191 ITLOS Statute.

³⁹⁷ Art. 47 ECHR.

³⁹⁸ Art. 64 ACHR.

States under the pretext of receiving a request for advisory opinions”³⁹⁹ Here, the Courts refers to the danger of political malpractice of the applicant.⁴⁰⁰

b) Discretionary power

To counteract this danger some Courts have the procedural power to dismiss an application. Apart from the ICJ, whose broad scope of jurisdiction makes this absolutely necessary, only the European Court of Human Rights has this kind of discretionary power. The Inter-American Court of Human Rights as well as the ITLOS pursuant to the respective conventional provision are obliged to comply with a request to render an advisory opinion.⁴⁰¹ The African Court, however, has been given the discretionary power whether or not to render an opinion by the protocol, as follows from the wording of Art. 4 I: “The Court may provide an opinion”. In light of the international advisory practice it is doubtful that the Court will ever make use of this power. While there was no application for an advisory opinion before the European Court until now whatsoever, the ICJ has never refused an application on account of its discretion but always rendered the requested advisory opinion.⁴⁰²

c) Petition authority

The enumeration of those authorised to petition already indicates peculiarities. Not only all bodies of the OAU,⁴⁰³ but also all OAU members as well as the protocol’s non-ratifying

³⁹⁹ Application for review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion ICJ Reports, 1987, para 439.

⁴⁰⁰ ICJ Judge *Winiarski* holds that „the formal addressee of the opinion may be the organ which requested it, but the real addressees were the Parties [...], the Organisation and public opinion”. Peace Treaties Case, ICJ Reports 1950, p 57 (Dissenting opinion).

⁴⁰¹ Although Art. 64 ACHR clearly does not envisage discretionary power by its wording, the IACtHR has denied to issue an opinion which referred to a question pending before the IACHR. The IACtHR gave systematical reasons for its competence to dismiss the application: “The Court believes that a reply to the questions presented by Costa Rica, could produce, under the guise of an advisory opinion, a determination of contentious matters not yet referred to the Court, without providing the victims with the opportunity to participate in the proceedings. Such a result would distort the Convention system. Contentious proceedings provide, by definition, a venue where matters can be discussed and confronted in a much more direct way than in advisory proceedings. This is an opportunity which cannot be denied to individuals in contentious proceedings who do not participate in the later proceedings. Whereas the interest of individuals in contentious proceedings are represented by the Commission the latter may have different interests to uphold in advisory proceedings.” Advisory Opinion No. 12, OC-12/91, Series A No. 12, para 28. Comp. *Scott Davidson*, The Inter-American Human Rights System, Dartmouth 1997, p. 237, 241 et seq.

⁴⁰² *Felix Amerasinghe*, Jurisdiction of International Tribunals; The Hague 2003, p. 538; Comp. *Georges Abi-Saab*, On discretion: Reflections on the Nature of the Consultive Function of the International Court, in: *Boissons, Sands* (eds.) International Law, The International Court and Nuclear Weapons, Cambridge 1999, pp. 36-50, who at p 49 remarks with regard to the nuclear weapons opinion that the ICJ has given up its discretion: “One thus can reasonable conclude that in spite of its formal tribute to tradition the 1996 advisory opinion has hammered yet another, if not the last coffin of the theory of discretion.”

⁴⁰³ The wording, “the OAU or one of its bodies”, is misleading, since international organisations are only capable of acting through one of their bodies. Comp. *Knut Ipsen*, *Völkerrecht*, 4th Edition, Munich 1999, §

parties – and for another thing all African organisations recognised by the OAU – are authorised to file a petition.⁴⁰⁴ In comparison with the other regional courts for human rights, in particular with the European Court for Human Rights, this is a very wide range of entities authorised to file a petition.⁴⁰⁵

In particular, those authorised – from “any African organisation recognised by the OAU” – to file a petition pose questions in this connection. It cannot be gathered from the wording whether IGOs or NGOs are meant by this. It is merely conspicuous that the protocol clearly differentiates at other points between NGOs and IGOs.⁴⁰⁶ The *travaux préparatoires* are also not capable of eliminating this uncertainty. If this uncertainty is referred to in the jurisprudence, NGOs are perceived as included under reference to the identical passage in Art. 45 III AfrCHPR, which the Commission cites for interpretation of the Charter.⁴⁰⁷

As a result, this interpretation would increase the probability that the Court is presented with legal questions from which it can develop a fruitful human rights jurisdiction.

d) Subject matter of advisory opinions

Commensurate with Art. 4 I, all matters pertaining to the Banjul Charter and any other relevant human rights instrument are the subject matter of advisory opinions. Insofar as the subject matter of advisory opinions is concerned, it differs from that of contentious jurisdiction due to the fact that the requirement for ratification of the human rights instrument has been refrained from. But moreover, since it concerns mere advisory opinions, of which no binding effect is due, hardly any problems ensue. States that file petitions for advisory opinions in all probability merely refer to human rights instruments which they have ratified

6 No. 14. A distinction between the bodies created through the OAU's foundation charter (Art. VII: Conference of Heads of State and Government, Council of Ministers, General Secretariat, Mediation and Arbitration Commission) and bodies created through further agreements (for instance, the Commission for Human Rights) should possibly be elucidated here.

⁴⁰⁴ Only African IGOs, but not NGOs are meant in this case. This ensues in connection with Art. 5 III, which explicitly speaks of non-Governmental organisations. For instance, the aforementioned ECOWAS, the East African Community (EAC), the Southern African Development Community (SADC) and the Economic Community of Central African States (CEEAC) come into question as organisations authorised to file a petition. On the other hand, entities not authorised to file a petition (due to lack of continental affiliation) are organisations such as the League of Arab States — even if a majority of the members are African states.

⁴⁰⁵ Commensurate with Art. 47 I ECHR, only the Committee of Ministers is authorised to file a petition before the European Court. All OAS members and the bodies of the OAS are also authorised to file a petition before the Inter-American Court, but not other organisations (Art. 64 I ACHR).

⁴⁰⁶ Comp. Art. 5 I lit. e and Art. 5 III.

⁴⁰⁷ Comp. Nico Krisch, *The Establishment of an African Court on Human and Peoples' Rights*, in: ZaÖRV 58 (1998), pp. 713-726, 718; Martin Ölz, *Die NGOs Im Recht des internationalen Menschenrechtsschutzes*, Vienna 2002, p. 376 et seqq.; as both are under reference to Evelyn Ankumah who explains that the Commission has already interpreted Charter provisions at the request of NGOs. Compare *ibid*: *The African Commission on Human and Peoples' Rights*, The Hague et al, 1996, p. 26.

or according to which they intend to comply with.

With regard to the jurisdiction of the Court in matters of opinion, the ACHR has incorporated an interesting aspect, which is unfortunately not found again in the African protocol: “At the request of a member state of the organisation [the OAS], the Court can prepare an opinion for this state in relation to the compatibility of the provisions of its internal law with the aforementioned international law convention.”⁴⁰⁸ The wording of Art. 4 I does not preclude the request for such an opinion, but the explicit reference to this useful possibility would be advantageous.⁴⁰⁹ But on account of the OAU-sacrosanct principle of non-intervention, the need of African states for such an assessment of the national legal system through an international committee is probably not especially pronounced.⁴¹⁰ It might also not be awakened through an explicit reference to this possibility. This is why the lack of this reference will hardly have any negative practical repercussions.

aa) Jurisdictional restriction with regard to Commission investigation

Commensurate with Art. 4 I 2, matters⁴¹¹ which are associated⁴¹² with an object of investigation through the Commission are excluded from the jurisdiction of the Court for opinions. On the one hand, an investigation through the Commission takes place if questions regarding the interpretation of the Banjul Charter are submitted or if it performs interpretation work of its own initiative; but on the other hand, also as soon as a communication is at hand. This means that a blocking effect for the opinion-related jurisdiction of the Court also

⁴⁰⁸ Art. 64 II ACHR; comp. *Scott Davidson*, *The Inter-American Human Rights System*, Dartmouth 1997, p. 249 et seqq. The Inter-American Court has been granted discretionary power by the Convention in this conjunction.

⁴⁰⁹ For instance, the clause has led to many adaptations of national legal systems in the Inter-American region. Not only Costa Rica – which can be ascribed the pioneering role in matters of human rights protection in America – has adapted its press laws after review through the IACtHR. Comp. *Jo Pasqualucci*, *Advisory Practice of the Inter-American Court of Human Rights*, in: *StJIL* 38 (2002), pp. 241-288, 285. Even Guatemala, at that time still under the military regime of General Rios Montt, discontinued (after an opinion) the implementation of executions, which had been ordered by military courts beyond any rule of law. Comp. *Charles Moyer, David Padilla*, *Executions in Guatemala as Decreed by the Courts of Special Jurisdictions in 1982-83: A Case Study*, in: *HRQ* 6 (1984), pp. 507-518, 509.

⁴¹⁰ For instance, also: *Gino Naldi, Konstantin Magliveras*, *Reinforcing the African System of Human Rights: The Protocol on the Establishment of a Regional Court of Human and Peoples’ Rights*, in: *NQHR* 16 (1998) 4, pp. 431-456, 440.

⁴¹¹ This restriction was not included in the Cape Town Draft, but was only added at the Third Conference of Experts. Comp. *Report of the Third Government Legal Experts Meeting (Enlarged to include Diplomats) on the Establishment of the African Court on Human and Peoples’ Rights (OAU/LEG/EXP/AFCHPR/RPT. (III)*, para. 16.

⁴¹² The European Court is much more restricted in its opinion competence. For instance, it may neither prepare opinions on matters, which relate to the content or the extent of rights in the ECHR and the appurtenant protocols, or on such matters which the Court or the Committee of Ministers could decide due to proceedings introduced in accordance with the ECHR. Comp. Art. 47 II ECHR (new version).

emerges as soon as a communication – the content of which tallies with that of the opinion to be prepared through the Court – is available to the Commission. This is an attempt by the protocol to establish the intended coordination of the Court and the Commission and also to avoid duplicities. This attempt has not been completely successful for several reasons: A coordination of both bodies was reached to the extent that the petitioner can optionally request the compilation of an opinion before the Commission as well as the Court.⁴¹³ However, the restriction of the Court's jurisdiction does not achieve the desired effect. For one thing, only the Court's jurisdiction for opinions is restricted, but not that of the Commission in the event that the Court is concerned with a question. For another thing, only such matters which are currently being handled by the Commission are excluded from the Court's jurisdiction with regard to opinions.⁴¹⁴ As soon as this treatment found its conclusion, the Court's jurisdiction with regard to the same matter of opinion is revived. This can lead to duplicity as well conflicting results. Therefore this provision for the realm of opinions does not lead to any unequivocal jurisdictional separation between the Court and the Commission, and only insufficiently prevents possible conflicts or duplicities. But since the Court itself can decide on the acceptance of an opinion petition, it is left with the possibility to take these omissions into consideration. Nevertheless, the relationship between the Commission's interpretation task and the Court's opinion competence remains open.

bb) Relationship to the Commission's interpretation task

The commission's interpretation task is bipartite. Art. 45 AfrCHPR assigns the Commission [in No. 1 b)] the task of formulating written principles and provisions for solving legal problems in connection with human rights and the rights of peoples', in which the African governments can build on during their legislative activity. In Art. 45 No. 3, the Commission is instructed – at the request of a contracting parts, a body of the OAU or another organisation recognised by the OAU – to interpret all provisions of the Banjul Charter.

With regard to the initial development of the Commission's interpretation task commensurate with Art. 45 No. 1 b) AfrCHPR, there is a technical-procedural difference to the Court's opinion competence: In contrast to the Commission, the Court cannot interpret or put in concrete terms provisions of the Banjul charter of its own accord, but is thus restricted to the

⁴¹³ Nevertheless, only the Court is entitled to a right of rejection, but not the Commission. Comp. Art. 45 No. 3 AfrCHPR.

⁴¹⁴ Art. 4 I: “[...], provided that the subject matter is not related to a matter being examined by the Commission”.

cases submitted. However, in terms of content this results in a considerable (only theoretical up to now, due to lack of demand) intersection — as soon as the Court must interpret a provision in connection with a complaint at hand, and which has already been handled by the Commission. Art. 45 No. 3 AfrCHPR assigns the Commission to interpret all provisions of the Banjul Charter on request. Even though no authorised entity has made use of this possibility, the same contextual intersection as in Art. 45 No. 1 b) AfrCHPR ensues.

However, the Court's interpretation competence encompasses – commensurate with Art. 4 I and in contrast with that of the Commission – not just the provisions of the Banjul Charter, but also that of the protocol and “any other relevant human rights instrument(s)”. And so this precludes an overlapping of competence, at least with regard to all provisions which are not manifested in the Banjul Charter, but does not solve the remaining potential conflict.

Therefore the relationship of the Commission's interpretational efforts with those of the Court is problematic. Of course, Art. 2 points out that the Court merely supplements – and does not completely assume – the Commission's protective task, and an intended equalisation of the Court and the Commission would also necessitate observance of the provisional interpretative efforts. Art. 4 I suggests that the judicial opinions exclude such matters which are already being handled through the Commission.

But various reasons speak against an observance obligation on the part of the Court: For one thing, international law interpretational efforts which are not undertaken in a contradictory procedure are formally seen as powerless, since they lack a legal binding effect. Moreover, the Court's institutional status speaks against its obligation to observance of interpretational works of a mere quasi-judiciary body like the Commission.

And so the Commission's interpretational efforts are not formally capable in any way whatsoever of imposing restrictions on the Court; yet the Commission should treat this entity with utmost respect. The parallelism of human rights interpretation is absolutely necessary if one intends to achieve acceptance. Moreover, the interpretations must offer reliable legal guidelines which endure throughout the sphere of the recognising institution. Art. 45 No. 1 b) AfrCHPR particularly illustrates this necessity, which binds the Commission's interpretational competence to a purpose: The formulations should serve the African governments as an orientation resource during the formation of their national legislative activity in conformity with human rights. It would be very detrimental to the system if the behavioural pattern placed on the Court by the Commission is invalidated through divergent interpretations.

e) Excursus: Legal consequences of opinions

In this connection, the question is posed with regard to the general effect of advisory opinions from international bodies. The Inter-American Court explicitly stated in relation to its opinion competence that opinions do not display a binding effect comparable with a ruling.⁴¹⁵ Also the ICJ has stated: “an advisory opinion is strictly advisory and an opinion.”⁴¹⁶ This also corresponds to the prevailing opinion in the realm of jurisprudence.⁴¹⁷ Formally considered, an advisory opinion lacks formal⁴¹⁸ as well as material⁴¹⁹ validity.

Notwithstanding, even interpretations of international judicial organs, whether they are binding or not, enjoy a high level of expressiveness.⁴²⁰ “In practice”, according to ICJ Judge *Zoricic*, “an advisory opinion [...] in regard to a dispute between States is nothing else than an unenforceable judgement.”⁴²¹ Judge *Azevedo* even assigns “an enforceability sui generis somewhat in the nature of a verdict or a writ” to the opinions.⁴²² The ICJ, by nature, tries to prevent its opinions from being considered as a worthless law report. It therefore has taken into account the probable reaction of States concerned while issuing the opinion. The ICJ recognizes that “the consent of an interested State continues to be relevant, not for the Courts competence, but for the appreciation of the propriety of giving an opinion.[...] In certain circumstances, such lack of consent may render the giving of an advisory opinion incompatible with the Courts judicial character.”⁴²³ As stated above, the ICJ has not found this necessary until this very day.⁴²⁴

Another consideration shows that opinions despite their lacking binding force may be very

⁴¹⁵ Compare its opinion on “other treaties”: see footnote 386 above on page 95.

⁴¹⁶ Peace Treaties Opinion, ICJ Reports 1950, at p. 71.

⁴¹⁷ Comp: *Hugh Thirlway*, Advisory opinions of international Courts, in: *Rudolf Bernhardt* (Ed.), *Encyclopaedia of Public International Law*, Vol. I, Amsterdam et al. 1995, pp. 38-48, 38. In contrast, Costa Rica’s constitutional court advocates a noteworthy divergent opinion, that the state which has assigned the task perceives the advisory opinion as binding. Comp. *Pedro Nikken*, “*La Función Consultativa de la Corte Iberoamericana de Derechos Humanos*”, San José, 2001, p. 178 with corresponding verification of adjudication.

⁴¹⁸ The content of the formal validity is that the decision can no longer be affected with legal remedies. Thus said, the formal validity impedes the continuation of the dispute in the same procedure, and ensures the survival and the content of the judicial ruling for the future. Comp. *Walther Habscheid*, *Rechtsvergleichende Bemerkungen zum Problem der materiellen Rechtskraft des Zivilurteils*, in: *FS Charalambos Fragistas*, pp. 527-556 (p. 530). This principle is also considered as a general legal principle in international law. Comp. *Alfred Verdross*, *Bruno Simma*, *Universelles Völkerrecht*, Berlin 1984, § 601, p. 383 (with other addenda).

⁴¹⁹ Material validity gives rise to the fact that the same matter in dispute cannot be the content of a new procedure. And so material validity precludes that a formal, legally binding ruling is influenced through a renewed procedure. Comp. *Walther Habscheid*, loc. cit.

⁴²⁰ *Felix Amerasinghe*, *Jurisdiction of International Tribunals*; The Hague 2003, p. 509.

⁴²¹ Peace treaties Advisory Opinion, ICJ Reports 1950, p 101.

⁴²² Peace treaties Advisory Opinion, ICJ Reports 1950, p 186 et seq.

⁴²³ Western Sahara Advisory Opinion, ICJ Reports 1975, p 25.

⁴²⁴ Comp. footnote 402 above at page 99.

valuable for the development of international law: Even for binding judgements on the international law level there is hardly any possibility of sanctions in the event of non-compliance with a ruling, much less its compulsory implementation. The non-compliance with the rulings of an international judiciary body at best infringes upon international law of contract, yet the plausibility of rulings contributes a great deal more to their general acceptance than the mere prospect of the violation of a treaty.⁴²⁵ This is why opinions must not inevitably possess a lower weight than rulings.

However, the only basis for the authority of non-authoritarian acts of interpretation is their rationality.⁴²⁶ And so their observance lives from their persuasive power. For one thing, this emerges from the authority of the recognising institution, but for another thing also decisively the contextual comprehensibility and unanimity of the decision within the concerned legal realm. Thus, an advisory opinion – like an *obiter dictum* – becomes a jurisdictional connecting point and because of references in reasons given for other judgements, an advisory opinion garners a very far-reaching efficacy, which may entail the acceptance of the protagonists under the jurisdiction of the recognising institution. However, in international law the authoritative power of an advisory opinion, just like that of a binding judgement, stands and falls together with the degree of the protagonists' acceptance of the recognising institution.

VII. The judiciary process

The protocol's rules of procedure have a multifarious importance. For one thing, contentious jurisdiction in practice will be the essential point of intersection between the Court and the Commission. Insofar, the protocol defines the relationship between both institutions.

On the other hand, the mode of operation and effectiveness of a judiciary body are crucially dependent on the procedural configuration of its competencies. This can neutralise any promising jurisdictional power of the body, or otherwise lend it a far-reaching radius of action.

In addition, the proceeding is not only a means to reach a verdict, but it also develops side effects which can lend it a considerable value added: And so a rational and comprehensible configured process is an essential factor for the legitimacy of the procedural entity's decision-

⁴²⁵ Also, *Juliane Kokott*, *Das Interamerikanische System zum Schutz der Menschenrechte*, Heidelberg 1986, p. 154.

⁴²⁶ *Robert Jennings*, *The Judicial Function and the Rule of Law in International Relations*, in: FS Robert Ago Vol. III, Milan 1987, pp. 139-161, 145.

making.⁴²⁷ At the same time, a court procedure that follows the principles of “due process” – irrespective of its outcome – improves the acceptance of the ruling, and is partially able to supersede material justice.⁴²⁸ The orientation towards “due process” is of essential significance — particularly for human rights protective entities which also monitor the adherence to the respective conventionally-guaranteed fundamental rights of justice.⁴²⁹ Of course, no international procedural law exists in the sense of a homogeneous regulatory matter,⁴³⁰ but the scientific formulation of a broad court rulings under international law has certainly crystallised into procedural standards which embody the “rule of law” before international tribunals and courts.⁴³¹ They are described as “minimum procedural standards”⁴³², “principles of judicial procedure”⁴³³ or as “fundamental procedural norms”⁴³⁴. Amongst these standards are the impartiality of the recognising entity, the procedural equality of the parties to the dispute and the transparency of the proceedings.⁴³⁵

And so three aspects are the focus of the following investigation: For one thing, this pertains

⁴²⁷ Comp. *Jürgen Habermas*, *Wie ist Legitimität durch Legalität möglich?* In: *Kritische Justiz* 20 (1987), pp. 1-16; he states that the rationality of a legally institutionalised procedure should vouch for the moral validity of the procedurally achieved results. *Niklas Luhmann* even sees the pivotal task in the legitimating function of the procedure, and thus entirely shoves aside the procedural function which helps to arrive at the result. Comp. *ibid*: *Legitimation durch Verfahren*, 2nd Edition, Darmstadt 1989, p. 121.

⁴²⁸ This aspect is the topic of legal-sociological and social-psychological procedural justice research. The procedural result is more easily accepted by the procedural loser, even if he (she/it) is not convinced of the correctness of the decision, insofar as the loser experienced the procedure as fair and just, and was allowed to present arguments. Comp. *Klaus Köhl*, *Verfahrensgerechtigkeit*, in: *ZfRSoz* 14 (1993), pp. 1-34, 20; *Allan Lind*, *Tom Tylor*, *The social psychology of Procedural Justice*, New York 1988, p. 52.

⁴²⁹ Comp. *Raimond Brescia*, *Procedural Justice and International Human Rights: Towards a Procedural Jurisprudence for Human Rights Tribunals*, in: *YJIL* 18 (1993), pp. 559-605, 566 et seq.

⁴³⁰ *Hugh Thirlway*, *Procedure of international courts and tribunals*, in: *Rudolf Bernhardt* (Ed.), *Encyclopaedia of Public International Law*, Vol. III, Amsterdam et al. 1995 pp. 1128-1133, 1128, *ibid*.; *Procedural Law and the International Court*, in: *FS Jennings*, pp. 389-405, 389; *Natasha Affolder*: *Tadic*, the anonymous witness and the sources of International Procedural Law, in: *MJIL* 19 (1998), pp. 445-494, p. 448. The fact that procedural rules in international law receive less attention than material might also lie in the ICJ’s assessment that it does not enjoy the same relative importance before international courts as before national courts. For instance, in the *Palestine Concessions* case the PCIJ stated: “The Court, whose jurisdiction is international, is not bound to attach matters of form the same degree of importance which they might have in municipal law” (PCIJ Series A No. 2, p. 34). The ICJ confirmed this approach in its decision in the *Northern Cameroon* case through consenting reference to the aforementioned passage. Comp. *ICJ Reports* 1963, p. 15 et seq., 28.

⁴³¹ *Kenneth Carlston*, *The Process of International Arbitration*, New York, 1946; *V.S. Mani*, *International Adjudication: Procedural Aspects*, New Delhi, 1980; *Bin Cheng*, *General Principles of Law as applied by international Courts and Tribunals*, 2nd Edition, Cambridge 1993.

⁴³² *Kenneth Carlston*, *The Process of International Arbitration* New York, 1946, p. 36.

⁴³³ *Bin Cheng*, *General Principles of Law as applied by international Courts and Tribunals*, 2nd Edition, Cambridge 1993, p. 258.

⁴³⁴ *V.S. Mani*, *International Adjudication: Procedural Aspects*, New Delhi, 1980, p. 19.

⁴³⁵ *Ernst-Ulrich Petersmann* also counts – without corresponding substantiations from the realm of international court rulings – the requirements of “completeness of the procedural rules, [...] democratic legitimacy and enforceability of the rules”; compare *ibid*: *How to promote the international rule of Law*, in: *JIEL* 1 (1998), pp. 25-48, 26.

to the question of how the relationship of the Court with the Commission was procedurally configured. It is also to be examined whether the procedure contributes towards the legitimation of the Court and its rulings, or whether it appears worthy of critique under this point of view. Lastly, it shall be examined whether the procedure comes up to the aforementioned criteria of “due process”.

1. Complaint authority

In this context, who is even authorised to submit complaints before the Court and participate as a party to the proceedings possesses special relevance. This depends on what extent the Court can provide direct individual protection, and to what extent it can develop a beneficial human rights jurisprudence from the cases presented to it. This is why this question was amongst the most contentious regulatory areas in the developmental phase of the protocol.

The ultimate answer is found in Art. 5, which definitively enumerates those authorised to lodge a complaint. There a differentiation is made between states, international organisations, the Commission as well as NGOs and individuals.

a) States

The prerequisites under which states can turn to the Court with a complaint are specified in Art. 5 I lit. b to d. First of all, amongst those authorised to lodge a complaint are contracting states which have already submitted a complaint⁴³⁶ before the Commission (Art. 5 I lit. b) — i.e. have initiated a communications procedure commensurate with Art. 47 AfrCHPR. In accordance with Art. 5 I lit. c, the states against which the communications procedure has been brought against are also authorised to lodge a complaint.

As stated above,⁴³⁷ the Banjul charter provides two types of communications procedures: One that can be initiated through states, and one that can be initiated by individuals and NGOs. Of course, the protocol does not expressly separate the circumstances here, but it ensues from the connection that — according to Art. 5 I c) — only such states against which a state communication procedure is underway, but not such states against which individuals have initiated procedures are authorised to lodge a complaint.⁴³⁸ This is logical, since a state

⁴³⁶ In contrast to the Banjul Charter, which at this point uses the euphemism “communications”, the protocol creates conceptual clarity with the expression “complaints”. However, this was only brought about at the last Conference of Experts.

⁴³⁷ See above chapter II.

⁴³⁸ Art. 5 I c authorises “the state party against which the complaint has been lodged with the Commission”. “The complaint” refers in this connection to Art. 5 I b, which authorises the state “which has lodged a complaint to the Commission.”.

complaint before the Court concerns a contradictory procedure with which one governmental protagonist objects to another, but does not concern a state party which can defend itself against an individual complaint. The state against which an individual communication has been submitted before the Commission commensurate with Art. 55 AfrCHPR only has the possibility to refute the infringement of which it is accused by the complainant. However, the concerned state does not have the possibility to seek quasi legal protection against the individual's accusations before the Court. At any rate, it is conceivable that a state applies with the Court for an advisory opinion on the compatibility of its behaviour with the convention in question. However, in this case it would have to be noted that the Court cannot prepare such an opinion as long as the Commission is entrusted with the case.⁴³⁹

In addition to these transferred procedural introductions, the protocol (by virtue of Art. 5 I d) provides states whose citizens have been the victim of a human rights violation the possibility of direct complaint before the Court. This nationality requirement is a serious difference to the state communications procedure before the Commission and the state complaints procedure of other regional pacts — but also other universal conventions, which all renounce a direct interest of the state lodging the complaint.⁴⁴⁰

This renunciation is connected with the “*ordre public* function”, which is ascribed to human rights treaties:⁴⁴¹ With state complaints the state lodging the complaint intends that the party opposing the complaint exercises its public authority in a conventional manner, and, if necessary, adapts its legal system or its legal or administrative practice to the convention provisions. The struggle against individual human rights violations and thus the protection of the individual is only a side effect.⁴⁴² And so the state complaint works towards the establishment of an objective order and towards the development of uniform standards. Insofar as that is concerned, the instrument of state complaint reflects in a special way the

⁴³⁹ Comp. Art 4 I.

⁴⁴⁰ Comp. Art. 45 I ACHR, 33 ECHR SP 11. On a universal level: Art. 11 I Convention on the Elimination of any form of Racial Discrimination; Art. 41 ICCPR, Art. 42 SP ICCPR; Art. 21 Anti-torture Convention; Art. 13 Convention against Apartheid in Sport; Art. 76 Migrant Worker Convention (not yet in force).

⁴⁴¹ Essential hereto is the decision of the European Commission for Human Rights in the case of Austria vs. Italy (Yb. 4, 1961, p. 116 et seqq.), in which it came to the conclusion that the contracting states do not concede reciprocal rights and obligations for the purpose of safeguarding the respective national interests, but wanted to establish a common “*ordre public*” in the purview of the ECHR (loc. cit. p. 140). Art. 60 V VCLT, which precludes the suspension or termination of treaties as a permissible response to a substantial treaty violation in “treaties with humanitarian character”, is also set forth in order to substantiate the objective order which human rights treaties unfurl. This prohibition is attributable to the fact that – due to the “*erga omnes*” character of such conventions – any suspension or termination would not only apply to the defaulting state, but also third states. Comp. *Walter Kälin*, Menschenrechtsverträge als Gewährleistung einer objektiven Ordnung, in: BDGV 33 (1994), pp. 9-48, 10.

⁴⁴² *Katrin Weschke*, Internationale Instrumente zur Durchsetzung der Menschenrechte, Berlin 2001, p. 17.

“*erga omnes* nature” of contractually guaranteed human rights.⁴⁴³ For this reason, a direct interest of the state lodging the complaint – as is depicted by the nationality of a victim of human rights violations – is entirely renounced with regard to the admissibility of a state complaint.⁴⁴⁴

The Banjul Charter’s state complaint procedure was also accordingly conceived. In particular, the difference to the communications procedure before the Commission – which for its part does not provide any nationality criterion in harmony with the international standard – makes the protocol’s provision appear as little coherent: According to the wording of the protocol, states can alternatively criticise the violation of the human rights of single individuals before the Commission (as a communication commensurate with Art. 47 or 49 AfrCHPR) as well as a complaint before the Court (commensurate with Art. 5 I lit. d). However, if states intend to proceed against an abstract violation of human rights in contracting states and enforce the objective guarantee of codified human rights, Art. 5 I lit. d blocks the direct path to the Court, whereas Art. 5 I lit. b unblocks access again after the initiation of a corresponding Commission procedure.

No pertinent justification whatsoever for this incoherency can be found in the negotiation protocol. On the contrary: The possibility of direct complaint was only included very late in the protocol. Only the Nouakchott Draft provided state complaints for states which have either initiated a Commission procedure or were the object of such a procedure.⁴⁴⁵ In light of the restraint of the states (repeatedly criticised by the delegations and legal experts within the scope of the Nouakchott Conference) with regard to the recourse of the Commission procedure⁴⁴⁶, it may certainly be presumed that this provision was intended as an activation function in relation to the state complaints and that states should be offered a further possibility of international discussion. At any rate, this did not succeed through the final version of Art. 5 I lit. d.

⁴⁴³ Wolfram Karl speaks very aptly in this connection of the “*erga omnes partes* nature”, since only the corresponding parties to the convention are entitled to the right of state complaint. Compare *ibid*: “*Besonderheiten der internationalen Kontrollverfahren zum Schutz der Menschenrechte*”, in: BDGV 33 (1994), pp. 83-122, 108.

⁴⁴⁴ The admissibility of (state) complaints against abstract infringements through an adverse legal position or a general practice finds its procedural equivalent in the relaxation of requirements pertaining to the exhaustion of legal recourse. Comp. Jochen Abr. Frowein, No. 10 to Art. 24 in: Jochen Abr. Frowein, Wolfgang Peukert (eds.), “*Europäische Menschenrechtskonvention - ECHR-Kommentar*”, 2nd Edition, Kehl et al, 1996; D. Harris, M. O’Boyle, C. Warbrick, *Law of the European Convention on Human Rights*, London 1995, p. 613 et seq.

⁴⁴⁵ Comp. Art 5 I lit. b and lit. c Nouakchott Draft.

⁴⁴⁶ Report of the Second Governmental Legal Expert Meeting on the Establishment of an African Court on Human and Peoples’ Rights, OAU/LEG/EXR/AFCHPR/RPT(2) para. 23.

In addition, the restriction of the complaint subject matter in Art. 5 I lit. d to the complainant's citizens who are able to be individualised ("state parties whose *citizen is a victim*") appears to preclude a state complaint which purports the violation of the human rights of entire ethnic peoples or citizens. This would also contradict the objective character of the control process. Unlike the individual protection procedure that focuses on the interests of the individual, the state complaint procedure is directed at the compliance with a legal system that is in conformity with a convention. Insofar as that is concerned, a restriction of the state complaint to violations with regard to citizens who are able to be individualised (as suggested in Art. 5 I lit. d) is outlandish in the realm of human rights control mechanisms. Such a requirement is relevant within the scope of state responsibility; more precisely said: within the realm of diplomatic protection.⁴⁴⁷

In summary, it must be stated (with regard to the "direct complaint by states" featured in the protocol) that it lacks a meaningful concept. The complaint procedure formulated by Art. 5 I lit. d presents itself less as a human rights control instrument, but rather as a regional procedure for enforcement of diplomatic protection.

b) The Commission

Commensurate with Art. 5 I lit. a, the Commission itself is entitled to refer cases to the Court. The human rights commissions in all regional human rights pacts are or were entitled to this right.⁴⁴⁸ With regard to passing on the procedure through involved states, there is a significant difference in the case of the Commission: The Commission can not only be concerned with state complaints, but above all with individual complaints (according to African terminology, with "other communications").⁴⁴⁹ This opens up a very broad scope of application for the submission of cases through the Commission.

c) Individuals and NGOs

The most controversial question in the entire protocol was that pertaining to the complaint authority of individuals and NGOs. At the same time, its reply was of vital importance for the future of the Court. The consultative states were confronted at this point with partially

⁴⁴⁷ Compare with the so-called "Genuine Link" to *Wilhelm Karl Keck*, Diplomatic Protection, in: *Rudolf Bernhardt* (Ed.), *Encyclopaedia of Public International Law*, Vol. I, Amsterdam et al, 1995, Vol. I, pp. 1045-1067, 1049; *Antonio Cassese*, *International Law*, Oxford 2005, p. 376; *Kay Hailbronner*, *Der Staat und der Einzelne als Völkerrechtssubjekt*, in: *Wolfgang Graf Vitzthum* (Ed.), *Völkerrecht*, 2nd Edition, Berlin 2001, p. 161-266, 203 et seq.

⁴⁴⁸ Comp. Art. 61 I ACHR, Art. 48 a) ECHR (current version).

⁴⁴⁹ See above chapter II.

diametrical views, which substantially compounded arriving at a compromise. The Cape Town Draft provided for (in Art. 6 I, under the heading: “Exceptional Jurisdiction”) a complaint authority procedure for individuals, NGOs and even pluralities of individuals “on exceptional grounds” — without the fact that these entities had to have previously brought about a communications procedure before the Commission in accordance with Art. 55 AfrCHPR.⁴⁵⁰ “Exceptional grounds” thus had to be at hand for the direct access to the Court only. As a result, Art. 6 I of the Cape Town Draft implied the general application authority of individuals, NGOs, and pluralities of individuals’ — without the fact that these entities had been mentioned in the actual regulation concerning the application authority (Art. 5 of the Cape Town Draft). The merely implied regulation of decisive questions seems to be a popular stylistic device in the African process of human rights codification. Even the fathers of the Banjul Charter formulated the statutory basis of the individual communication so innocently and hedged in by clauses that the present-day communications procedure before the Commission was only recognisable with a great deal of imagination and optimism. According to one of the authors this was their precise intention.⁴⁵¹

Whereas the provision of Art. 6 I Cape Town Draft was perceived as too restrictive and the meaninglessness of these “exceptional grounds” were criticised from the NGO side,⁴⁵² it received antagonistic and broader criticism from the state side: Quite a few state representatives saw the risk that the Court will be inundated by individual complaints and recommended “that Article 6 [...] in the present wording reduces, if not removes, the importance and the effectiveness of the Commission”.⁴⁵³ During the Nouakchott Conference it became clear that this very broad access possibility was not to be asserted for individuals and NGOs. State representatives distanced themselves all too clearly from the original version. Many states – and quite vehemently, Nigeria and Sudan – advocated the possibilities of more narrowly formulating an individual or popular complaint, and also making it contingent on a special declaration of consent.⁴⁵⁴ The legal experts attempted to defuse the provision during the Conference: Only in “urgent cases or serious, systematic or massive

⁴⁵⁰ Comp. Art. 6 Cape Town Draft, OAU/LEG/EXP/ACHPR/HPR (I).

⁴⁵¹ Comp. Keba Mbaye, “les Droits de l’Homme en Afrique”, Paris 1992, p. 237.

⁴⁵² Statements on the viewpoint of NGOs pertaining to the respective procedural state, insofar as nothing else is featured, were made by *Okontubo Ige*, Legal Officer for Africa at the ICJ.

⁴⁵³ Commentary of the Ministry of Foreign Affairs of Burkina Faso. Similar: Commentary of the Embassy of the Republic of Madagascar to Ethiopia, Report of the Secretary General on the Draft Protocol on the Establishment of an African Court on Human and Peoples’ Rights, CM/1996 (LXV) Annexe III (c) and Annexe III (i), respectively.

⁴⁵⁴ Report of the Second Governmental Legal Expert Meeting on the Establishment of an African Court on Human and Peoples’ Rights, OAU/LEG/EXR/AFCHPR/RPT (2).

violations of human rights” should individuals and NGOs be authorised to lodge a complaint. Moreover, complaining NGOs had to possess observer status before the Commission. Before the Court could decide on the presentation of these prerequisites, it had to obtain the Commission’s opinion. In addition, a complaint through individuals and NGOs presupposed the defendant’s prior declaration of consent.⁴⁵⁵

The NGO forum protested with all its might against this draft, and rightly argued that the previous anticipation of a decision by the Commission – particularly in the cases mentioned by Art. 6 I of the Nouakchott Draft – were unreasonable and nonsensical. Cases of greater urgency or systematic human rights violations should not be postponed by the Court in order to consult the Commission (which only sits on a semi-annual basis). It also turned out that to date only individual and popular complaints in accordance with Art. 55 AfrCHPR arrived at the Commission, so that de facto only this group was functionally able to petition the Court. The prerequisites under which individuals and NGOs are enabled to such involvement should for this reason not be set too high.

The Commission also expressed itself similarly in the following Conference of Ministers. They opposed an obligatory consultation of the Commission (slotted in ahead, with regard to the admissibility of a complaint) through the Court, and recommended not to make the jurisdiction pertaining to such complaints contingent on any other prerequisite than the overall ratification of the protocol.⁴⁵⁶ However, these qualms found no response at the Third Conference of Experts.

Art. 5 III formulates the ultimate solution: “The Court may entitle relevant Non Governmental Organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with Article 34 VI of this Protocol.”

Nothing else but a declaration of consent clause is concealed behind Article 34 VI. And so the Court’s jurisdiction for individual and popular complaints is facultative and now depends on whether the contracting state renders a special declaration during the ratification or at a later point in time with Art. 5 III. Of the previous ratifying nations, only one state (Burkina Faso) has submitted a corresponding declaration of consent to date.

Many authors see a decisive weakness of the protocol in this provision.⁴⁵⁷ At first glance, an

⁴⁵⁵ Comp. Art. 6 Nouakchott Draft, OAU/LEG/EXP/AFCHPR/PROT (2).

⁴⁵⁶ CM/2020 (LXVI) Annexe III para. 1.

⁴⁵⁷ *Makau Mutua*, The African Human Rights Court: a two-legged Stool?, in: HRQ 21 (1999), pp. 342-363, 355; the author perceives it as a “terrible blow to the standing and reputation of the court”; similar: *Nsongurua Udombana*, Towards the African Court on Human and Peoples’ Rights, in: YHRDLJ 3 (2000), pp. 85-110, 88; the author assesses the provision as a “serious shortcoming to the Court’s jurisdiction”.

unrestricted possibility of complaint for individuals and NGOs before the Court would certainly be desirable. For one thing, it would offer increased protection of the individual, and for another thing it would present the Court with the opportunity to develop a wide spectrum of human rights jurisprudence. On the other hand, during the expert conferences it had become all too clear that the vast majority of potential contracting states simply does not want such a possibility of complaint that is incalculable for them. The sovereignty protection of a facultative clause facilitates the ratification of the protocol for many states.⁴⁵⁸ In turn, this is not only vital for the inauguration of the Court, but its jurisdictional breadth is decisively contingent on how many breaches of the law will be pending before the Court. Nonetheless, complaints can be filed against states — if not directly by individuals or NGOs, at least through the intervention of the Commission before the Court. If the Commission receives an individual communication in accordance with Art. 55 AfrCHPR, the path towards the Court is open via Art. 5 I lit. a. It is not even forced through the protocol to bring a separate procedure to conclusion, but the case can be immediately presented to the Court.

The provision arrived at is therefore quite advantageous: Individual and popular complaints can be brought before the Commission in a roundabout way, whereas the facultative clause unfurls an appeasing effect and thus facilitates the ratification of the protocol for states which do not have an all too great interest in the further development of regional human rights protection systems.⁴⁵⁹

aa) Evaluation of the African solution in an international comparison

The *ratione personae* competence of the African Court also need not shy away from international comparison: Individuals have no application authority whatsoever before the Inter-American Court; “only the contracting states and the Commission have the right to present a case before the Court”.⁴⁶⁰ After the abolition of the European Human Rights Commission, every natural person, non-governmental organisation or group of individuals is authorised to bring a case before the European Court of Human Rights. However, only the violation of personal rights can be criticised within the ECHR’s legal protection

⁴⁵⁸ Comp. Patricia Schneider, *Internationale Gerichtsbarkeit als Instrument friedlicher Streitbeilegung*, Baden-Baden 2003, p. 153; she states that “the more obligatory the jurisdiction of a Court is, the lesser is the willingness of states to submit themselves to the jurisdiction”.

⁴⁵⁹ Also: Laura San Martín Sánchez de Muniáin, *Comentarios acerca de la Creación de un Tribunal Africano de Derechos Humanos y de los Pueblos*, in: ADI 15 (1999), pp. 505-528, 520.

⁴⁶⁰ Comp. Art. 61 ACHR. Manuel Vargas, *Individual Access to the Inter-American Court of Human Rights*, in: NYUJILP 16 (1984), pp. 601-617, 604 et seqq.; points out possibilities of individual influence before the Inter-American Court, but these possibilities are exhausted in applications to the Commission, and defendant states in various stages of the complaint procedure involve the Court with the case.

framework.⁴⁶¹ As a result, a complaint authority for NGOs which would like to allege a violation of another person's rights is ruled out.

But NGOs enjoy exactly this capacity before the African Court. The considerable importance of the NGOs in the African human rights protection system has already been pointed out.⁴⁶²

As far as the African Court is concerned, the involvement of NGOs and therefore their active legitimation is also imperative in order to be able to have a functional effect. The involvement takes place either indirectly, through communications to the Commission commensurate with Art. 55 AfrCHPR (which, if necessary, forwards this to the Court), or – after corresponding declaration of consent – also directly through the complaint before the Court .

In this connection, it is also worth mentioning that Art. 5 III merely specifies that the complaining NGOs must have observer status before the Commission. And so the Commission has a decisive influence on the circle of actively legitimised NGOs. However, in light of the amount of NGOs with this status⁴⁶³ this cannot be seen as a restriction of the active legitimation that is particularly worth mentioning. On the contrary, it seems to be more important that the protocol has refrained from making the active legitimation of NGOs contingent on their affiliation with a signatory state or a member state of the AU. This was vehemently demanded in order to counter the “risk of inundation of the Court by applications of international watchdogs”.⁴⁶⁴ However, it has already been stated that particularly the large internationally active NGOs such as Amnesty, International PEN or the ICJ possess a very important role in the African protection system due to their structural arrangement and independence. It would have been extremely disadvantageous to do without their involvement, whereby one would have excluded them from the development process from the very beginning through an admissibility criterion such as nationality.

The advantageousness of the “popular action” or popular complaint possibility also cannot be emphasised enough in view of the individual protective effect. Most popular communications submitted before the African Commission criticise infringements of such individuals who either for actual or personal reasons are not able to look for legal protection on their own. On the other hand, the disadvantages which popular complaints normally entail – namely an

⁴⁶¹ Comp. Art. 34 ECHR (new version).

⁴⁶² See also the statements concerning the relationship of NGOs with the Commission, above on page 44 et seqq.

⁴⁶³ At the moment (end of 2006), 267 NGOs have observer status before the Commission.

⁴⁶⁴ Comments of the Ministry of Foreign Affairs, International and Regional Cooperation of the Republic of Mauritius, CM/1996(LXV) Annexe III (a).

immense number of complaints – come to bear⁴⁶⁵ neither before the African Human Rights Commission, nor do they diminish the Court’s capacity for work.

Before entry into force of the 11th Supplementary Protocol, the situation looked completely different under the ECHR, and corresponded to the still current provisions of the ACHR. Only contracting parties and the Commission had the right to bring a case before the European Court.⁴⁶⁶ For individuals there was only the possibility to lodge a complaint with the Human Rights Commission. But this was only possible if the concerned contracting state “had rendered a declaration, according to which it recognised the jurisdiction of the Commission in this area”.⁴⁶⁷ And so the facultative clause already took effect with procedures before the Commission. Fortunately, the Banjul Charter did not necessitate any declaration of consent to bring individual complaints before the Commission. But insofar as the African Court is concerned, the negative attitude of many African states vis-à-vis the individual and popular complaint possibility on account of the protocol’s facultative clause (Art. 34 VI) will initially lead to the fact that the direct path to the Court is frequently blocked for individuals and NGOs. Then it is the Commission’s task to bring any received communications as a procedure before the Court. This is why the question is posed as to which procedural status the complainants have before the Court if an individual complaint will be transferred to the Court through the Commission.

bb) Involvement capacity of non-governmental protagonists in the procedural transfer through the Commission

The procedural rights of individual complainants – whose complaint was not submitted to the Court by the Commission – are not included in the protocol. But at the same time this also concerns the Court’s procedural affairs and thus self-government affairs, which the Court must clarify within the framework of its rules of procedure (RP). This is why it has a decisive influence on the complainant’s procedural position. In view of the fact that in the foreseeable

⁴⁶⁵ In contrast to the African Commission, the vast number of incoming complaints with the European Commission led to a massive work overload: Whereas only 404 complaints were registered in 1981, there were already 2,037 in 1993. Four years later there were 4,750 complaints. The number of the not yet registered complaints in 1997 was pegged at over 12,000; Comp. <http://www.echr.coe.int> (General Information). The admissibility of popular complaints would have without a doubt completely torpedoed the functional capacity of the Commission.

⁴⁶⁶ Comp. Art. 48 and 44 ECHR (current version). After entry into force of the 9th Supplementary Protocol, individuals could apply to the Court, after the Commission procedure was concluded. Comp. Art. 44 and 48 ECHR in the version of the 9th Supplementary Protocol; compare also: *Andreas Kley*, *Schafft das 9. Zusatz Protokoll zur ECHR vor dem Europäischen Gerichtshof für Menschenrechte Waffengleichheit zwischen Beschwerdeführer und betroffenem Staat?*, *AJP* 2 (1993), pp. 1482-1487, 1485.

⁴⁶⁷ Comp. Art. 25 I p. 1 ECHR (current version).

future few states will submit the declaration of consent commensurate with Art. 34 VI — and individuals and NGOs will therefore have only very restricted direct access to the Court, the position of the individual in case of transmitted complaints is of decisive importance for the Court's mode of operation. A strong complainant position relieves the burden on the Commission with regard to procedural preparation and management, safeguards the observance of individual interest, and thus leads to more effective legal protection through the African Court.

A look at the development in Europe⁴⁶⁸ shows the spectrum of possibilities: Under the ECHR, which provided for no complaint authority whatsoever before entry into force of the 9th Supplementary Protocol, the Rules of procedure of the European Court of Human Rights (RP ECtHR) were very restrictive with regard to the consideration of individuals. In the original standing orders, the individual was not even directly mentioned as the victim of the human rights violation being treated; for instance, a mention would have granted the individual a personal right of application or speech. However, the Court had stated (in a case already brought before it, against the objection of Ireland as the defendant state) that the Commission, as guardian of the public interest, is allowed to inform the Court about the views of the complainant in the case at issue.⁴⁶⁹ The Commission delegation undertook this task through reading the comments of the aggrieved parties in the oral hearing.⁴⁷⁰ Ten years later, the Commission delegates in the “Vagrancy” case availed themselves of a procedural possibility granted to them via Art. 29 I RP ECtHR — according to which they “may, if they so desire, have the assistance of any person of their choice”. The lawyer of the complainant and victim offered this assistance to the Commission delegation.⁴⁷¹ As such he enjoyed a

⁴⁶⁸ A rough but broadly formulated overview of the individual procedural capacity on the international level is found in *Antonio Trindade*, *The Consolidation of the Procedural Capacity of Individuals in the Evolution of the International Protection of Human Rights: Present State and Perspectives at the Turn of the Century*, in: *ColHRRev* 30 (1998), pp. 1 – 27, p. 16 et seqq.

⁴⁶⁹ *Lawless v. Ireland* from 14.11.1960, Series A 1 (Preliminary Objection rejected), para. 15-16: “[...] the Court must bear in mind its duty to safeguard the interests of the individual, who may not be a party to any court proceedings, and [...] the whole of the proceedings in the Court, as laid down in the Convention and the Rules of Court are upon issues which concern the applicant; [...] accordingly, it is in the interests of the proper administration that the Court should have knowledge of and, if need be, take into consideration the applicant's point of view; [...] the Commission [...] as the defender of the public interests, is entitled of its own accord, even if it does not share them, to make the applicant's view as a means of throwing light on the points at issue”. Compare also: *D.J. Harris, M. O'Boyle, C. Warbrick* (eds.), *Law of the European Convention on Human Rights*, London et al, 1955, p. 659 et seqq.; *P. van Dijk, G.J.H. van Hoof* (eds.), *Theory and Practice of the European Convention on Human Rights*, The Hague 1998, p. 228 et seqq.

⁴⁷⁰ *Paul Mahoney*, *Developments in the Procedure of the European Court of Human Rights: the Revised Rules of the Court*, in: *YEL* 3 (1983), pp. 127-167, 129.

⁴⁷¹ *De Wilde, Ooms and Versyp (“Vagrancy”) v. Belgium* from 18.11.1970 (Question of Procedure), Series A 12.

right of speech commensurate with Art. 37 RP ECtHR. The representative of the Belgian government firmly objected to this procedure of the Commission delegation. The application of Art. 29 I RP ECtHR completely drained Art. 44 ECHR (current version), according to which only states and the Commission were allowed to invoke. Moreover: Such a procedure “would defeat [...] the whole spirit of the Convention under which [...] individuals may not plead before the court.”⁴⁷² The Court dismissed this objection,⁴⁷³ but stated that the assisting person is under strict supervision of the delegates.⁴⁷⁴ The Commission delegation subsequently proceeded to submit the complainant’s statements as a Commission document, and allowed themselves to be accompanied by the complainant’s lawyer in the oral hearing.⁴⁷⁵ In the procedural practice this led to the fact that the lawyer was able to submit contextual facts in a relatively unbound manner, and was thus also able to present the complainant’s standpoint.⁴⁷⁶

In 1983, the European Court of Human Rights reacted to this development and reformed its standing orders, in which it gave the complainant substantially more consideration: In Art. 30 RP ECtHR (new version), the complainant was granted a formal participatory status, which corresponded to the previous procedural practice. The complainant had the right to be represented by a lawyer or another person allowed by the president of the ECtHR. Art. 40 I RP ECtHR (new version) even enabled the complainant to file applications for a hearing of evidence. As a result, the complainant was not only passively represented, but could also co-arrange the procedural course. The compatibility of these provisions with Art. 44 ECHR (current version) – according to which individual complainants are not capable of being a party to legal proceedings – is difficult to bring about, and can only be achieved with a restrictive interpretation of the capacity to be a party to legal proceedings.⁴⁷⁷ Therefore the

⁴⁷² loc. cit.

⁴⁷³ But not unanimous: Judge *Favre* distanced himself from the Court’s ruling, and declared the Commission’s ruling as incompatible with Art. 44 ECHR; compare: loc. cit. (Dissenting Opinion).

⁴⁷⁴ “Whereas, in consequence, the person assisting the Delegates must restrict himself in his statements to presenting to the Court explanations on points indicated to him by the Delegates, and this always subject to the control and responsibility of the Delegates; Whereas it is the duty of the Delegates to ensure the observance of this fundamental requirement by any person assisting them, in order to avoid any situation inconsistent with Article 44 of the Convention”; loc. cit.

⁴⁷⁵ If the complainant was a lawyer, he himself was also authorised as a Commission assistant as defined by Art. 29 I RP. Comp. *Paul Mahoney*, Developments in the Procedure of the European Court of Human Rights: the Revised Rules of the Court, in: YEL 3 (1983), p. 127-167, 130 et al.

⁴⁷⁶ Comp. *Frank Schellenberg*, Das Verfahren vor der Europäischen Menschenrechtskommission und dem Europäischen Gerichtshof für Menschenrechte, Frankfurt/M 1983, p. 214.

⁴⁷⁷ Whereas the English version of Art. 44 ECHR absolutely allowed such an interpretation (“Only the High Contracting Parties and the Commission shall have the right to bring a case before the Court”), the French version cast doubt on this possibility (“*Seules les Haute Parties Contractantes et la Commission ont qualité ou se présenter devant la Cour*”).

purport of this “party capacity” is merely the capacity to initiate a procedure before the Court or to terminate through withdrawal of the action, settlement or acknowledgement. In this manner the ECtHR circumvented the individual complainant’s constitutive restrictions as far as possible in accordance with Art. 44 ECHR (current version).

Similarly, the IACHR recently allowed the individual complainant to participate in its procedure. In 1996, it amended its standing orders⁴⁷⁸ and added an article that allowed the procedural representative of the victim or their next of kin to independently make statements and file motions for admission of evidence with regard to the question of compensation (Art. 23 RP IACHR [current version]). And so the IACHR responded to the victim’s considerable vested interest insofar as the indemnification for injustice suffered is concerned. Shortly after this amendment of the standing orders, the procedural status of the individual complainant was extensively expanded through a further amendment, which has only been in force since 1 June 2001⁴⁷⁹: Since the complaint has been allowed, the victims themselves, their relatives or their procedural representative can now make their own statements and file their own motions for admission of evidence throughout the entire procedure.⁴⁸⁰ As a result, individual complainants are not only procedurally involved in the matter of indemnification (which is more or less answered as an annexe to the proceedings in the main action), but even in the actual procedure.

This development offers the African Court a valuable orientation resource. As far as possible, it should absolutely make use of the opportunity to intensively incorporate the actual complainant into the judicial procedure via the rules of procedure. The consent clause of Art. 34 VI would be to a large extent annulled in its negative repercussions if – despite lacking active legitimation and involvement capability before the Court – individuals or NGOs were to possess quasi procedural management authority. The African Commission took a long time until it gradually began to exploit the room to manoeuvre in its standing orders relinquished by the Banjul Charter. Nevertheless, the Court is in the advantageous situation of not having to position itself for the time being as a regional human rights protection body — an unknown working model on the African continent up until the inauguration of the Commission. Insofar

⁴⁷⁸ The rules of procedure were adopted on 16 September 1996 with effect from 1 January 1997; available under www.lumn.edu/humanrts/iachr/rule1-97.htm.

⁴⁷⁹ New rules of procedure available under www.cidh.oas.org/Básicos/basic18.htm.

⁴⁸⁰ Art. 23 I RP IACtHR (new version): However, if several victims or relatives or procedural representatives take part in the process, they must agree on one spokesman who is authorised as the sole procedural management representative. If no agreement is reached, the Court decides; compare: Art 23 II, III RP IACtHR (new version).

as that is concerned, the Commission has prepared the ground well. Therefore it should be possible for the Court to progressively plug the protocol's existing gaps in the sense of an effective judiciary protective process.

d) Excursus: Interventions by third states

Art. 5 II allows third states to apply with the Court for admission as an intervening (third) party “when a State Party has an interest in a case”. This provision is formulated in an extremely vague manner. In the course of negotiations it has even lost contrast: The Nouakchott Draft necessitated a “legal interest” – which was also not further specified, however – for a possible third-party intervention.⁴⁸¹ On this score, it was concluded that – in relation to the treatment of interventions commensurate with Art. 62 ICJ Statute⁴⁸² – the Court could orient itself towards the methodology of the ICJ.⁴⁸³ This is comparatively severe: “The court should only admit such intervention if, in its opinion, the existence of this interest is sufficiently demonstrated.”⁴⁸⁴ In addition, the third-party intervention is only allowed with the ICJ as long as and insofar as the legal interest of the intervening third-party relates to the case. In the handling of other aspects they lose their participatory status.⁴⁸⁵ But since the protocol sufficiently allows any interest to apply for a third-party intervention, the Court has a free hand as to whether it allows this or not. Incidentally, within the framework of its standing orders the Court can draft more precise criteria for this interest, and make the admission contingent on its observance.

In comparison with the provisions of the corresponding regional pacts, the protocol presents itself as extremely intervention-friendly: The ACHR does not even provide for such a third-party intervention; the ECHR enables only an optional participation of the complainant's state of origin in accordance with Art. 36 I ECHR.⁴⁸⁶ In the interest of the administration the president of the Court can give further contracting parties or other concerned individuals who are not complainants the opportunity to comment and to participate in the oral hearings.⁴⁸⁷ On

⁴⁸¹ Comp. Art. 5 II Nouakchott Draft, OAU/LEG/EXP/AFCHPR/PROT (2). The provision was reformulated at the Third Conference of Experts. But the minutes of the meeting do not give any indication of an explanation.

⁴⁸² Statute of the International Court from 26.6.1945, UNCIO 15, pp. 335 et seqq.

⁴⁸³ *Gino Naldi, Konstantin Magliveras*, The proposed African Court of Human and Peoples' Rights, in: RADIC 8 (1996), pp. 944-970, 950.

⁴⁸⁴ As already featured in the PCIJ “Wimbledon Decision”, Series A, No. 1 (1923), p. 12.

⁴⁸⁵ *Shabtai Rosenne*, Intervention in the International Court, Dordrecht, Boston, London 1993, p. 149; *ibid.*, The Law and Practice of the International Court 1920-1996, The Hague et al., 1997, p. 1526.

⁴⁸⁶ The state of origin is then entitled to submit written comments and to participate in the oral hearings.

⁴⁸⁷ These rights can be granted in conformity with Art. 61 IV RP ECtHR, subject to conditions and stipulations.

the other hand, the protocol's provision is especially preferable for the young African Court, which after its inauguration will surely not be the focal point of continental interest. This is why – particularly at the outset of its activity – third-party intervention applications should be granted as much as possible in order to enlarge its radius of action and its international response. In view of the fact that African states regularly exercise restraint when it comes to taking a position against the human rights policy of other member states, such applications will be kept within narrow limits anyway — if they are even placed!

Naldi and *Magliveras* obviously see this differently, when they state (as a disadvantage of the possibility of third-party intervention) that an examination of “legal interest” could have led to substantial procedural delays. With the renunciation of the legal interest aspect in the resolved protocol, they perceive the considerable danger that states would excessively utilise their right to third-party intervention to intentionally impede the work of the Court.⁴⁸⁸ In view of the previous indifference of the states in the African legal protection system, this danger hardly exists, and the Court may await it calmly. Another danger, namely the non-compliance with the Court through the African community of states, weighs much heavier in comparison.

e) **African international organisations**

In the international comparison, the protocol contains another unique component, as it also provides African IGOs with party status in accordance with Art. 5 I lit. e. Unlike Art. 4, which only enumerates those authorised to file applications for advisory opinions, Art. 5 grants authority “to submit cases to the Court” — i.e. makes references to the litigious procedure. This provision seems initially bewildering. Neither is an IGO contracting party to the Banjul Charter or to any other applicable treaty, nor is the protocol technically prepared for the accession of an IGO.⁴⁸⁹ And so African IGOs can themselves be bound in terms of content to a human rights codification, which asserts the vested rights therein. With this provision IGOs are granted a procedural legal position which is linked neither with a procedurally nor a materially corresponding obligation. And so in terms of contractual law it concerns a provision for the benefit of third parties, and thus the regulatory purview of Art. 36 VCLT IO. It ensues from Art. 36 Para. I VCLT IO that such a provision is admissible if the beneficiary IGO consents positively and within its own relevantly aligned organisational provisions.⁴⁹⁰

⁴⁸⁸ Comp. *Gino Naldi, Konstantin Magliveras*, Reinforcing the African System of Human Rights: The Protocol on the Establishing of a Regional Court of Human and Peoples' Rights, in: NQHR 16 (1998), pp. 431-456, 438.

⁴⁸⁹ See also below on p. 185 et seq.

⁴⁹⁰ The requirement of positive consent is an essential divergence to the corresponding provision of VCLT,

Unlike the state complaint, the complaint possibility of international organisations underscores the objective character of the complaint procedure, since even the element of reciprocity is renounced here. Art. 36 Para. II VCLT IO counteracts any abuse of this procedural position, which includes the obligation for a third-party beneficiary IGO to observe the exercise of these rights in the commitments stipulated in the treaty.

One may wonder whether the relevance of this provision can ever be proven. When considered optimistically, perhaps the institutional transformation of the African regional organisation – which shows a certain proximity to the European system⁴⁹¹ – will lead to a similar discussion as to how it will be managed in Europe with regard to a potential accession of the European Union to the ECHR.⁴⁹² At any rate, provisions pertaining to “party capacity” have been provided for in the protocol.

2. Admissibility of complaints

Admissibility prerequisites of the judiciary procedure are only sporadically found in the protocol. The Court must specify within the framework of its standing orders exactly which obligations are necessary for the admissibility of a complaint. Which prerequisites the protocol provides, what latitude remains with the Court and how this is to be meaningfully utilised is examined at this juncture.

a) Protocol guidelines for individual complaints

The protocol addresses the admissibility prerequisites in Art. 6. However, this merely deals with complaints in accordance with Art. 5 III — i.e. with individual or popular complaints. The protocol explicitly refers to Art. 5 III only in Art. 6 I; however, the admissibility criteria of Art. 56 AfrCHPR – which in turn only apply to “other” non-governmental communications – are applied via Art. 6 II. The admissibility of other possible complaints, for instance through the Commission or contracting parties, is not treated in Art. 6.⁴⁹³ This also shows the

which formulates a refutable assumption of consent that third states accept the legal positions granted to them through the foreign treaty. The reason lies in the IGO’s fundamentally restricted power to act. The rules of assumption could lift this restriction, in which case any required resolutions from specific bodies and specially provided majority decisions are avoided if necessary. Comp. *Eckart Klein, Matthias Pichstein*, *Das Vertragsrecht Internationaler Organisationen*, Berlin 1985, p. 34.

⁴⁹¹ Compare also chapter I.

⁴⁹² See, for instance: *Rudolf Bernhardt*, *Probleme des Beitritts der Europäischen Gemeinschaft zur Europäischen Menschenrechtskonvention*, in: FS Everlin, Baden-Baden 1995, pp. 103-111; *Christoph Grabenwarter*, *Europäische Menschenrechtskonvention*, Munich 2003, p. 40 et seq.; encompassing: *Sebastian Winkler*, *Der Beitritt der Europäischen Gemeinschaften zur Europäischen Menschenrechtskonvention*, Baden-Baden 2000.

⁴⁹³ This also shows the historical consideration: In the initial version of the protocol under the heading “Exceptional Jurisdiction”, Art. 6 contained only the prerequisites pertaining to the admissibility of the

importance that has been attached to the individual complaint in comparison with the remaining complaint possibilities during the protocol's establishment process.

aa) No Necessity of a prior Commission procedure

The question as to whether individuals must have gone through the Commission procedure before they can bring the matter before the Court has great importance in this connection. The institutional integration of both human rights protection bodies largely depends on that, this question determines the Commission's future relationship with the Court. The ACHR⁴⁹⁴ as well as the ECHR⁴⁹⁵ presuppose the prior conclusion of the procedure before the Commission before the path to the Court can be taken. Before the African arrangement in this matter is considered, it seems helpful to elucidate the meaning and purpose of such inserted Commission procedures.

These Commission procedures are essentially ascribed two functions: First of all, they should relieve the burden on the respective Court. They fulfil this task by investigating the relevant facts and drawing up a final report that shall provide the Court with a qualified legal opinion.⁴⁹⁶ Secondly, an intermediary role devolves upon the Commission.⁴⁹⁷ A commission procedure is not confrontationally arranged in the manner that is a court procedure. It enables the involved states to avoid a procedure before the Court and to settle the dispute amicably.

The protocol does not (in terms of positive law) govern the question regarding a prior implementation of a Commission procedure, which in view of its procedural importance leads to the inference that the conclusion of a communications procedure before the Commission is not an admissibility prerequisite in the African system. The preparatory works to the protocol also allow this conclusion. Art. 8 II of the Nouakchott Draft formulated the exact opposite: "The Court shall not consider a case originating under the provisions of Article 55 of the Charter until the Commission has considered the matter and prepared a report." This

individual or popular complaint. Comp. Art. 6 Cape Town Draft, OAU/LEG/EXP/AFCHPR/PROT (1).
⁴⁹⁴ Comp. Art. 61 II ACHR. However, it is to be noted that individuals do not enjoy any complaint authority before the Inter-American Court; therefore the provision applies to the complaint-authorized states and the Commission. Even a waiver of the Commission procedure by the respondent State has been ruled out by the IACtHR, comp. *Scott Davidson*, *The Inter-American Human Rights System*, Dartmouth 1997, p 185.

⁴⁹⁵ Comp. Art. 47 ECHR (current version).

⁴⁹⁶ This function ensued for the European Commission from Art. 28 No. 1 lit. a ECHR (current version); compare: *D.J. Harris, M. O'Boyle, C. Warbrick* (eds.), *Law of the European Convention on Human Rights*, London et al., 1955, p. 574. For the Inter-American Commission this ensues from Art. 48 I b ACHR; comp. *Scott Davidson*, *The Inter-American Human Rights System*, Dartmouth 1997, p 143 with regard to the IACtHR's ruling in the Gallardo Case; also: *Juliane Kokott*, *Das interamerikanische System zum Schutz der Menschenrechte*, Berlin et al., 1986, p. 124.

⁴⁹⁷ Art. 28 Nr. 2, 47 ECHR (current version); Art. 48 I lit. f, 49 ACHR.

requirement was omitted without replacement after extensive debate at the Third Conference of Experts.⁴⁹⁸ With regard to how many other admissibility prerequisites (which were predetermined in the first versions of the protocol), these were also left up to the Court for clarification in its rules of procedure. The reason for this does not clearly emerge from the minutes of the meeting.

However, in view of its fundamental functionality presented above, the African system is also not at all designed for a pre-slotted commission procedure: For one thing, in light of its own work overload the Commission is not at all able to provide meaningful and effective relief work for the Court through investigation of facts and legal processing. This is why a compulsory pre-inserted commission procedure would not live up to the realities. It would lead to doubling of the work and binding resources which the human rights entities in Africa simply could not miss without nullifying their results. Procedures would be protracted to such an extent that an individual protective function on the part of the Court would be omitted from the very outset.⁴⁹⁹

The second function of a preliminary procedure – the possibility of a consensual settlement of dispute – also does not justify the pre-insertion of a commission procedure. The procedure before the African Court is also not entirely arranged in a confrontational manner. In Art. 9, the Court was expressly shown the possibility “to reach an amicable settlement in a case pending before it”. And so the Commission is not the only entity in which an amicable settlement of dispute can take place through mediation. Therefore neither involved states nor individuals will be cut off from a friendly settlement because of a lacking preliminary procedure.

The fundamental functionality of a commissional preliminary procedure in the case of the African protection system is substantially restricted for these reasons: As long as the individual access remains closed through a lacking declaration of acceptance (Art. 34 VI), the African Commission constitutes the only channel for individuals to set the protective system in motion anyway. A one-time rendered declaration must be able to substantiate the absolutely necessary division of labour between both protective entities if it should not lead to a slackening of the system. It is also incompatible with the coordination amongst the bodies targeted with the protocol, to regard the communications procedure before the Commission as

⁴⁹⁸ Comp. Report of the Third Government Legal Expert Meeting (enlarged to include Diplomats) on the Establishment of an African Court on Human and Peoples’ Rights, OAU/LEG/EXP/AFCHPR/RPT (III) Rev. 1, para. 19.

⁴⁹⁹ Former judge of the IACtHR *Piza* even speaks of the „impediment of the Commission“ in this context, comp. *Scott Davidson*, *The Inter-American Human Rights System*, Dartmouth 1997, p 192.

merely a preliminary procedure whose importance is exhausted in the fulfilment of an admissibility criterion. Therefore it is to be hoped that the Court will refrain from a pre-inserted commission procedure during the preparation of its standing orders.

bb) Commission consultation

Art. 6 I specifies that with regard to the question of admissibility of an individual or popular complaint commensurate with Art. 5 III, the Court can obtain the opinion of the Commission, which shall send this as quickly as possible to the Court. Here the protocol attempts once again to emphasise the jurisdictional interconnection between Commission and Court. But this provision does not contain a greater regulatory depth. A Commission consultation, which should seem necessary to the Court whatever the question may be, would also surely have been possible without an explicit reference in the protocol.

This provision also possibly has less of its own contextual importance, but rather explains itself from its historical context. It is the result (more precisely said: the ‘remnant’) of the dispute concerning the question of the complaint authority of individuals. Art. 6 I initially included the very widely formulated complaint possibility for individuals and NGOs with “exceptional grounds”. After the first drafts for arrangement of the complaint authority were met with widespread criticism, the state representatives attempted to constrict access to the Court as much as possible for individuals and NGOs. This also included a Court obligation to prior consultation of the Commission as soon as an individual complaint has been submitted. This obligation, which had already substantially protracted the admissibility procedure, was transformed into a mere possibility of consulting the Court within the framework of a dispute.⁵⁰⁰ Therefore Art. 6 I has only a very limited importance and a rather declaratory effect for the question regarding admissibility of an individual complaint.

cc) The Banjul Charter’s admissibility criteria

However, Art. 6 II is not lacking in far-reaching purport: There it is specified that the Court decides on the admissibility of an individual complaint, and therefore must take into consideration the provisions of Art. 56 AfrCHPR. Art. 56 AfrCHPR stipulates under which prerequisites a so-called “other communication” is admissible to the Commission. The formulation of Art. 6 II, “the Court shall rule on the admissibility of cases *taking into account* the provisions of Article 56” indicates that the Court – unlike the Commission, which

⁵⁰⁰ Report of the Conference of Ministers/Attorneys General on the Establishment of an African Court on Human and Peoples’ Rights, Annexe II, OAU/LEG/MIN/AFCHPR/PROT. (I) Rev.2.

compulsorily has to observe the provision – is not bound to these admissibility criteria in every case, but that in exceptional cases it can refrain from the precise observance of these criteria and can declare the case to be admissible.⁵⁰¹ This presents the Court with the possibility of a dynamic interpretation in order to heave such complaints with minor technical or procedural deficiencies over the threshold of admissibility.

(1.) No anonymity

Article 56 No. 1 AfrCHPR specifies that the complaint must indicate the author, even if this person requests anonymity. This provision concerns an internationally recognised procedural prerequisite which should prevent the fact that a judiciary body or its registry has to grapple with querulous complaints.⁵⁰² On the other hand, there are a series of understandable reasons which justify a legitimate interest of the complaint's author to withhold his/her identity in the process. The standing orders of ECtHR considered this circumstance in Art. 37 III, which gives the complainant the opportunity to apply for the confidentiality of his/her personal data. Such an application must be submitted separately, and is granted by court presidents only in justified exceptional cases. In the event of a granted application, the complainant is only referred to in the procedural course with anonymous initials (X or Y).⁵⁰³ The Inter-American Commission for Human Rights faces this interest quite clearly: Even in the original application the complainant shall communicate whether he/she would like to disclose his/her identity or not to the corresponding state (Art. 28 b RP IACHR). Passing on the data in the course of the procedure is only considered if the complainant has given his/her explicit consent to this (Art. 30 II 1 RP IACHR).⁵⁰⁴ However, the African Commission's rules of procedure no longer provide such a possibility for the author of a communication.⁵⁰⁵

However, the Court would inspire confidence and fulfil its protective function if it assured the confidentiality of the complainant's personal data in exceptionally special cases. To be considered in this context are complaints in which case the victim himself/herself does not file

⁵⁰¹ Also: *Gino Naldi and Konstantin Magliveras*, Reinforcing the African System of Human Rights: The Protocol on the Establishment of a Regional Court of Human and Peoples' Rights, in: NQHR 16 (1998), pp. 431-456, 441.

⁵⁰² *Lisa Wiesler*, Die Rechtsschutzeinrichtungen der Europäischen Menschenrechtskonvention, Tübingen 1961, p. 42.

⁵⁰³ *Philip Leach*, Taking a Case to the European Court of Human Rights, London 2001, p. 23.

⁵⁰⁴ The IACHR's application form (available online) also includes a heading in which the complainant's confidentiality request is anticipated through a presetting. Comp. <http://www.cidh.org/email9.asp>.

⁵⁰⁵ However, the first version of the African Commission's rules of procedure still specified the confidentiality of personal data without further examination, as soon as an applicant requested this. Comp. Art. 114 No. 3 a RP (old version). In the new version of the rules of procedure, this possibility was expunged, and instead tightened the requirements with regard to the scope of personal data.

the complaint: An anonymity requirement would be absurd in this case, since at any rate the identity of the complainant must be known to the defendant state so that any infringement can be brought to an end or redressed at all⁵⁰⁶ — but this data should be submitted by a third party, which in the event of the disclosure of identity has to reckon with substantial impediments in the course of procedural preparation or other repressive measures through the defendant state. This is especially pertinent, since the protocol as well as the Banjul Charter lack a provision according to which contracting states are obligated to ensure the utilisation of regional complaint procedures before the Commission or the Court, and to refrain from any hindrance.⁵⁰⁷ But as long as individual complaints only reach the Court via the Commission (because the protocol's facultative clause blocks direct access for individuals), a complainant will not be able to lay claim to any confidentiality of their data anyway.

However, due to the admissibility of popular complaints, not the naming of the victim by name before the Court, but only that of the complainant will also be necessary, as the Commission has also recognised.⁵⁰⁸

(2.) Compatibility of the complaint with the Banjul Charter

According to Art. 56 I No. 2 AfrCHPR, the complaint must be compatible with the Banjul Charter. Due to the extensive jurisdiction of the Court, under which (commensurate with Art. 3 I) not just the Banjul Charter falls, but also “any other relevant human rights instrument”, the Court must adapt this admissibility prerequisite to its jurisdictional purview. A complaint can be personally (*ratione personae*), locally (*ratione loci*), factually (*ratione materiae*) and temporally (*ratione temporis*) incompatible with the underlying convention. These formal criteria of admissibility examination partially overlap with other admissibility criteria such as the jurisdiction of the Court and the complainant's active legitimation. However, the practice of international judiciary panel shows that decisions on formal questions are not infrequently substantiated on a general basis, instead of being justified with the respective procedural provision.⁵⁰⁹

⁵⁰⁶ With regard to the question of confidentiality in the Commission procedure, compare also: *Evelyn Ankumah: The African Commission on Human and Peoples' Rights*, The Hague 1996, p. 62.

⁵⁰⁷ For instance, Art. 34 II ECHR includes such a provision. In other respects, the Council of Europe adopted a separate convention in which the rights of individuals involved in proceedings before the ECtHR are formulated in detail. Comp. European Agreement relating to persons participating in proceedings of the European Court of Human Rights, ETS 161. Before the entry into force of the 11th Supplementary Protocol, this was known as the European Agreement relating to persons participating in proceedings of the European Commission and Court of Human Rights, ETS 067.

⁵⁰⁸ Comp. above footnote 232 on page 57.

⁵⁰⁹ For instance, the European Commission did not differentiate between the question regarding whether a

(a) Ratione personae

The personal incompatibility of the individual complaint with the convention can lie in the identity of the complainant or the appellant (*ratione personae*).

First of all, in accordance with Art. 5 III, any natural person is capable of being a party to legal proceedings. The criteria to be capable of being a party to legal proceedings – i.e. the capacity to take necessary procedural actions or to undertake such actions through a procedural representative – are not specified. According to national procedural law, they generally depend on the legal capacity of those seeking legal protection.⁵¹⁰ Whereas a handling differentiated in accordance with fundamental rights has evolved in the realm of German constitutional jurisdiction,⁵¹¹ the European institutions have always examined complaints pertaining to juveniles⁵¹² or individuals with limited legal capacity⁵¹³ without making a problem out of the capacity of being a party to legal proceedings. This is also adequate in view of the special protective purpose of human rights codifications, which go beyond those of civil law or public-law standards, and which simply do not grant any fundamental legal positions. Therefore the African Court should proceed accordingly in comparable cases. At any rate, the protocol does not contain any obstructive procedural specifications.

In addition, any NGO with observer status before the Commission is capable of being a party to legal proceedings. A lacking or disallowed observer status thus leads to inadmissibility of the complaint due to lack of “party capacity”. Therefore, should the Commission carry out its notice to disallow observer status to such NGOs which do not meet their reporting obligations,⁵¹⁴ 120 out of the present-day 247 recognised NGOs could lose their observer status, and with that their active legitimation.⁵¹⁵

The capacity of juristic persons (legal entities) to be a party to legal proceedings is governed

complaint is admissible because the examination was lacking or because the complaint was not in conformity with the ECHR; compare: *P. van Dijk, G.J.H. van Hoof* (Ed.), *Theory and Practice of the European Convention on Human Rights*, The Hague 1998, p. 108. The African Commission also merely generally refers to Art. 56 AfrCHPR in decisions concerning formal matters. Comp. Communication 9/88 (International Lawyers Committee for Family Reunification / Ethiopia).

⁵¹⁰ Compare also: § 62 *Vwgo* [Rules of the Administrative Courts], §§ 51-58 *SPO* [Code of Civil Procedure], § 58 *Fgo* [Tax Court Code], § 71 *SGG* [Federal Social Court Law].

⁵¹¹ Comp. *BVerfGE* 1, 87 (89); see also: *Christian Pestalozza*, *Verfassungsprozessrecht*, 3rd Edition, Munich, p. 172.

⁵¹² As per the Commission in the matter *Nielsen vs. Denmark*, KOM 10929/84, report from 12.03.1987 (ÖJZ 1989, p. 666 et seqq.).

⁵¹³ Compare, for instance: *Winterwerp vs. The Netherlands*, ruling from 24.10.1997 (EuGRZ 1979, p. 650 et seqq.).

⁵¹⁴ Comp. above footnote 180 on page 45.

⁵¹⁵ Comp. Status of Submission of NGO Activity Reports DOC/OS (XXIX)/123b.

neither in the protocol nor in the Banjul Charter. Whereas the protocol in Art. 5 III only speaks of individuals, the Banjul Charter has deliberately spared the matter of “party capacity” in “other procedures” and left the matter up to the Commission for clarification.⁵¹⁶ Therefore legal entities can be recognised as capable of being a party to legal proceedings with any difficulties, and thus without being in contradiction to Art. 56 AfrCHPR, even though this has not yet come about due to lack of applicable practice.

On the other hand, the Court first has to apply Art. 5 III insofar as active legitimation is concerned, and is thus faced with the problem that legal entities are not to be regarded as “individuals”. Nevertheless, it should be possible for the Court to examine violations of the rights of legal entities, insofar as their ‘party-capable’ legal representative files an orderly complaint. This speaks in favour of the fact that neither the protocol nor the Banjul Charter requires a personal gravamen on the part of the complainant for active legitimation.⁵¹⁷ The protocol namely assigns “all cases and disputes [...] concerning the [...] application of the Charter, this Protocol or any other relevant human rights instrument” to the Court. (Art. 3). The assertion of personal rights is thereby not necessary. As a result, this jurisdiction of the Court also encompasses all cases which are a matter of disputes concerning the legal positions of juristic persons. For instance, freedom of speech, freedom of religion (in the event of churches organised under private law), guarantee of ownership or procedural laws can be applicable to legal entities. The fact that the protocol did not award any “party capacity” to legal entities may not therefore stand in the way of the assertion of their rights through a representative capable of being a party to legal proceedings.⁵¹⁸ In other respects, a procedural transfer would also be conceivable if the legal entity has brought a communications procedure

⁵¹⁶ In contrast to this, “any non-Governmental legal entity that is recognised in one or more member states of the organisation” (Art. 44 ACHR) has the possibility under the ACHR to lodge complaints. Also under the ECHR, any “non-Governmental organisation or group of individuals” (Art. 35 SP 11 ECHR) can turn to the Court. This includes legal entities, as well as incorporated and unincorporated associations and churches organised under private law. Comp. *Clare Ovey, Robin White*, *The European Convention on Human Rights*, Oxford 2006, p. 482; *Wolfgang Peukert*, No. 16 to Art. 25 in: *Jochen Abr. Frowein, Wolfgang Peukert* (eds.), *Europäische Menschenrechtskonvention*, Kehl et al., 1996.

⁵¹⁷ This is a noteworthy difference to Art. 34 ECHR SP 11: The complainant must present substantiated and conclusive evidence here, through which the affected sovereign act or the affected omission of sovereign action in the conventionally guaranteed right is violated and thus directly affected. If this gravamen is lacking, the *rationae personae* complaint will be dismissed as incompatible with the convention. Comp. *Clare Ovey, Robin White*, *The European Convention on Human Rights*, Oxford 2006, p. 482; *Wolfgang Peukert*, No. 20, 28 to Art. 25 in: *Jochen Abr. Frowein, Wolfgang Peukert* (eds.), *Europäische Menschenrechtskonvention*, Kehl et al. 1996; *Jens Meyer-Ladewig*, *ECHR-Commentary*, Baden-Baden 2003, No. 10 et seqq. to Art. 34. The lack of this requirement is also compulsory in view of the admissibility of popular complaints in the African system.

⁵¹⁸ See also: *John Mubangizi, Andreas O’Shea*, *An African Court on Human and Peoples’ Rights*, in: *SAYIL 24* (1999) pp: 256-269, 265.

before the Commission.

Moreover, the inadmissibility of the *ratione personae* complaint can ensue from Art. 56 No. 2 AfrCHPR if the complaint is directed at a state which is not a contracting state to the Banjul Charter. But since the jurisdiction of the Court also extends to other human rights instruments, this prerequisite must also be applied to rights asserted from other conventions. If a complaint is directed at a state that did not ratify the protocol or has not recognised the jurisdiction of the Court commensurate with Art. 34 VI, this also leads to inadmissibility of the *ratione personae* complaint.

In addition, the appellant's lacking passive legitimation – i.e. their lacking legal jurisdiction with regard to the rights at issue – leads to *ratione materiae* inadmissibility. For instance, this is the case with complaints which address breaches of the law against other individuals or non-governmental legal entities.

(b) Ratione materiae

The competence *ratione materiae* is not explicitly mentioned in the protocol and in the Banjul Charter. However, it ensues from the competence assignment of Art. 3 I that the Court only deals with cases which include disputes concerning the protocol, the Banjul Charter or other ratified human rights codifications. This expresses the matter of course that the Court can only monitor the conventions put under its control for their adherence. The *ratio materiae* competence is an admissibility criterion that deals with the question of alleged human rights violation and thus indirectly with the material object of the complaint.

Ratione materiae incompatible with the Banjul Charter or with the human rights instrument to be applied are thus complaints (if they assert rights or criticise infringements) which are not included in the underlying convention or are prohibited by the respective convention. For instance, the Commission received several communications in which only general misconduct like corruption as such, rudeness or immorality of citizens and state functional institutions were criticised.⁵¹⁹ But the limit as to whether such complaints are already inadmissible under *ratione materiae* or are otherwise merely unfounded is fluid and nebulous.⁵²⁰ Therefore, in the

⁵¹⁹ Comp. Communication 1/88 (*Frederick Korvah vs. Liberia*), Communication 104/93 (Centre for the Independence of Judges and Lawyers / Algeria).

⁵²⁰ *P. van Dijk and G.J.H. van Hoof* (eds.), *Theory and Practice of the European Convention on Human Rights*, 2nd Edition, The Hague 1990. p. 163 et seq.; *Laurids Mikaelsen*, *European Protection of Human Rights*, Germantown 1980, p. 154; *James Fawcett*, *The Application of the European Convention on Human Rights*, Oxford 1969, p. 313; *Frede Castberg*, *The European Convention on Human Rights*, Leiden 1974, p. 62; compare also: *Frank Schellenberg*, *Das Verfahren vor der Europäischen Kommission und dem Europäischen Gerichtshof für Menschenrechte*, Frankfurt 1983, p. 40 et seq.

event of doubt it seems more meaningful not to act prematurely in the admissibility decision regarding the material-legal compatibility of the complaint with the convention.

(c) Ratione temporis

A regional court of human rights can only decide on a complaint if the underlying alleged infringement occurred at a point in time whilst the court was responsible for complaints against the concerned state (competence *ratione temporis*).⁵²¹

In principle, international treaties do not develop any retroactive effect if the set of agreements does not explicitly stipulate something else.⁵²² This is why a complaint before the African Court is thus *ratione temporis* incompatible with the Banjul Charter, and thus inadmissible, if the asserted infringement occurred temporally through the state before its legal obligation to the convention.

But since the jurisdiction of the African Court only comes into play after the legal obligation of states to the underlying human rights convention anyway, the question is posed as to how to proceed with complaints which have their temporal origin after the legally binding effect of the basic convention, but before ratification of the supplementary protocol through the corresponding state party.

In view of the fact that the corresponding human rights codifications explicitly provide the possibility to preclude such a retroactive effect through submission of an appropriate proviso,⁵²³ it seems only logical in such cases to fundamentally assume a retroactive effect up until entry of obligations from the underlying convention.⁵²⁴ After all, upon entry of the binding effect the contracting state has to assume the obligation to protection of the rights included in the convention, irrespective of whether it has undersigned the Supplementary Protocol or not. This is why the granting of procedural rights cannot have any influence on the *ratione temporis* competence.

It must also accordingly apply for the case at hand that a contracting state only subsequently

⁵²¹ In this connection, the *ratione temporis* competence is less the consequence of conventional regulations, but rather the product of general rules of international (contractual) law. Comp. *Marc-André Eissen*, *Jurisprudence de la Commission européenne des Droits de l'Homme - Décisions en matière de compétence ratione temporis*, in: AFDI 9 (1963), pp. 722-734, 723.

⁵²² Comp. Art 28 VCLT.

⁵²³ Comp. Art. 62 II ACHR, Art. 25 II and Art. 46 II ECHR (current version).

⁵²⁴ *Jo Pasqualucci* even sees this legal consequence as an international law principle; compare *ibid*: Preliminary Objections before the Inter-American Court of Human Rights: Legitimate Issues, Illegitimate Tactics, in: VirgJIL 40 (1999), pp. 1-114, 40. Also *van Dijk and van Hoof* assume – under reference to decisions of the European Commission for Human Rights – a fundamental retroactive effect up to the entry of the binding effects of the basic convention. Comp. *ibid.* (eds.), *Theory and Practice of the European Convention on Human Rights*, The Hague, 3rd Edition 1998, p. 13.

ratifies the facultative clause for individual complaints, and the basis of the individual complain lies before this point in time. The fact that the individual is only enabled the possibility of direct complaint through submission of the declaration of acceptance in according with Art. 34 VI does not release the state from its previous obligation to safeguard the compliance with the codified human rights. The declaration of acceptance is in other respects a question of ratio personae competence, and is not in connection with the question of when the asserted infringement has occurred.

The protocol does not explicitly provide that a contracting state can preclude the retroactive effect. But this is also not necessary in order to present a proviso with regard to the retroactive effect. In terms of international contractual law, the presentation of provisos during the ratification of a convention or subsequent accession only precludes this if the convention explicitly prohibits this, and only permits specific provisos to which the concerned proviso does not belong or otherwise the proviso is incompatible with the object of the treaty.⁵²⁵ The protocol does not prohibit any provisos, nor does it permit only certain provisos. The fact that the corresponding regional pacts explicitly show the possibility of a retroactive effect exclusion proviso⁵²⁶ make it clear that such a proviso is not directed at their objective, and is therefore compatible. This is why the contracting states can effectively present a retroactive effect proviso upon the ratification of the protocol⁵²⁷, and thus withhold the ratio temporis competence for past infringements.⁵²⁸

However, the requirement for the restriction of this possibility then ensues if the repercussions of an infringing intervention which occurs before the jurisdictional inauguration also still persist afterwards. For instance, complaints which entail a lasting professional disbarment or a lasting imprisonment are to be thought of here. In the European and Inter-American system in such cases it was always assumed that the rationae temporis competence is given.⁵²⁹ This is also easy for the African Court to advocate on account of the topical binding effect of the

⁵²⁵ Comp. Art. 19 lit. a to c VCLT.

⁵²⁶ Comp. Art. 62 II ACHR, Art. 25 II, 46 II ECHR (current version) in conjunction with Art. 6 SP 11.

⁵²⁷ However, this did not take place in the states which have ratified the protocol up to the current point in time.

⁵²⁸ But through a proviso they cannot limit the Court's jurisdiction with regard to complaints that criticise human rights violations which have occurred after ratification of the protocol or after submission of the declaration of acceptance. This would contradict the objective and purpose of the treaty and thus violate Art. 19 lit. c VCLT. Comp. *Jo Pasqualucci*, Preliminary Objections before the Inter-American Court of Human Rights: Legitimate Issues, Illegitimate Tactics, in: *VirgJIL* 40 (1999), pp. 1-114, 42.

⁵²⁹ Comp. *Stefan Trechsel*, *Die Europäische Menschenrechtskonvention - Ihr Schutz der persönlichen Freiheit und die schweizerischen Strafprozessrechte*, Bern 1974, p. 79 et seq. The case of *Blake vs. Guatemala* (Ser. C No. 27) is referred to with regard to the Inter-American practice, whereby the Court explicitly states that "the lack of jurisdiction rationae temporis does not apply to continuous crimes" (loc. cit. para. 24).

protocol's procedural law provisions.⁵³⁰

On the other hand, it may well appear differently for the mere non-elimination of the consequences of an earlier intervention. To assume a ratio temporis competence here would signify the temporal scope of the Court's jurisdiction against the effectively declared will of the contracting states, insofar as they have presented a retroactive effect proviso.

(3.) Formal requests

With the general reference to the Banjul Charter's criteria, an admissibility provision – which is unique in international comparison – makes its arrival in the procedure before the Court. Art. 56 I No. 3 AfrCHPR requires an inadmissibility decision on the part of the Court for complaints which “written in disparaging or defamatory language against the concerned state and its institutions or vis-à-vis the OAU”. An international institution should be entrusted to independently discipline obscene complainants in the course of the proceedings. The insertion of this provision in the Banjul Charter's admissibility catalogue illustrates the fear of the at that time young African states to experience a loss of prestige through the communications procedure. The Commission, which also had to apply this provision, subsequently took exaggerated consideration and presented itself as remarkably stringent in this respect.⁵³¹ As a result, it unnecessarily stifled the access to a communications procedure. In this connection, the Commission underestimated the fact that the term “communication” constitutes nothing different than a euphemism for “complaint”. Complaints – especially insofar as violations of human rights are concerned – also frequently include unequivocal words which are supposed to underscore the respective concern or also otherwise ill-considered (due to the circumstances of the case) but excusable statements which a complainant got carried away with. This is why indiscriminately dismissing the entire complaint as inadmissible is definitely counterproductive to individual protection.⁵³² Not only in the interest of individual

⁵³⁰ However, in this constellation a ratifying state also has the possibility to effectively preclude the ratio temporis competence through producing an appropriately formulated proviso. Comp. Tom Zwart, *The Admissibility of Human Rights Petitions - The Case Law of the European Commission of Human Rights and the Human Rights Committee*, Dordrecht et al. 1996, p. 135.

⁵³¹ For instance, a communication – in which the torture of prisoners and the withholding of their food was criticised – was dismissed as inadmissible at the request of the Cameroon delegates under reference to Art. 56 No. 3 AfrCHPR, because it contained sentences such as “*Paul Biya* (Cameroon's president at that time) must respond to crimes against humanity” and “30 years of the criminal neo-colonial regime incarnated the *dou Ahidjo* (predecessor)/*Biya*”. Comp. Communication No. 65/92 “*Ligue Camarounaise des Droits de l'Homme / Kamerun*”, printed in: “*Institut pour les Droits Humains et le Développement*” (eds.), “*Compilation des Décisions de la Commission Africaine des Droits de l'Homme et des Peuples*”, Banjul 2000, p. 105 et seqq.

⁵³² See also: P. van Dijk and G.J.H. van Hoof (eds.), *Theory and Practice of the European Convention on*

protection, but also not to rob itself of the substantive legal substance of the complaint, the Court should show tolerance in the application of this provision, particularly since the question regarding when the admissibility prerequisite is fulfilled lies within its discretion. In other respects, like any adjudicating court, it retains the liberty to correct behavioural grievances of those involved in the proceedings through judicial reference. In addition, the Court could consider adjourning the proceedings for as long as the complainant's improper behaviour persists, instead of immediately employing the inadmissibility decision as a disciplinary measure. On the other hand, the inadmissibility can be easily advocated with regard to continued infraction on the part of the complainant.

(4.) Complaints supported by mass media

In Art. 56 I No. 4 AfrCHPR, the Banjul Charter's catalogue provides for the inadmissibility of complaints which "are exclusively based on news which has been disseminated by the mass media". In view of the possibility of popular complaint, this admissibility provision should prevent the fact that communications procedures – whose material content cannot be verified by the complainant in any way whatsoever – are opened before the Commission. This provision has never proven to be problematic in the communications procedure before the Commission, and will also probably not do so in the judiciary proceedings. This is a matter of course with regard to complaints which those allegedly affected by human rights violations submit on their own. Even NGOs which criticise third-party infringements have always met this requirement in the Commission practice, since the organisations active in the regional protection system are either in direct connection with the victim or obtain their information from the respective national representatives. In other respects, the provision also does not prohibit the reference to media information. In several communications procedures, the Commission itself has taken "judicial notice" of specific circumstances in the concerned country via media reportage, and regarded this information as given facts in its substantiation.⁵³³

(5.) Local remedies rule

Human Rights, 2nd Edition, The Hague 1990. p. 70 with regard to the practice of the European Commission. In this connection, it is to be added that in cases entailing defamatory or offensive statements on the part of the complainant, the European Human Rights Commission normally first of all issued a warning and suggested correcting the concerned passages in order not to have to dismiss the complaint as abusive. Compare in particular the decisions pertaining to the complaints 2724/66 (C 22, 94) and 6029/73 (C 44, 134).

⁵³³ Evelyn Ankumah, *The African Commission on Human and Peoples' Rights*, The Hague et al. 1996, p. 64.

Art. 56 I No. 5 AfrCHPR specifies that a communications procedure can only be initiated if the domestic legal recourse – insofar as it is available – has been exhausted, unless this appellate procedure takes an unduly long time. The rule pertaining to the exhaustion of domestic legal remedies (*local remedies rule*) is a principle recognised under international law⁵³⁴, and became established in human rights conventions from the right of diplomatic protection.⁵³⁵ The state acting contrary to the convention must be provided beforehand with the opportunity to remedy the human rights violations caused by its bodies and authorities with its own means and within its own legal system before it has to answer for its actions under international law.⁵³⁶ The governmental institutions can also ensure a comprehensive preliminary examination of the actual and legal aspects of a complaint, and thus substantially facilitate the compatibility examination of the national legal situation with regard to convention obligations through an international body. Another essential reason for the *local remedies rule* is the exoneration of the international legal protection bodies, which are supposed to protect them against premature and thus possibly superfluous utilisation.⁵³⁷

This filter function turned out to be particularly effective for international human rights institutions and for complainants as a particularly difficult procedural hurdle to take. For instance, the European Commission declared almost half of all complaints as inadmissible due to the non-exhaustion of the domestic appellate procedure,⁵³⁸ whereas the rule is handled

⁵³⁴ The ICJ described the *local remedies rule* in the “Internal Trade” case as a “well-established rule in customary international law”. Comp. ICJ Reports 1959 p. 27. The PCIJ had already presupposed this principle as existing. Compare the rulings: A 20, p. 1 (Serbian Bonds case) and A/B 76, p. 18 (Panevezys-Saldutiskis Railway case).

⁵³⁵ Compare, for instance: Art. 35 I ECHR, Art. 46 I lit. a ACHR, Art. 5 II lit. b of the facultative protocol to the ICCPR. With regard to the origin of this rule in the law of diplomatic protection; compare: *Matthias Herdegen*, Diplomatischer Schutz und die Erschöpfung von Rechtsbehelfen, in: *Georg Ress/Torsten Stein* (eds.), *Der diplomatische Schutz im Völker- und Europarecht*, Baden-Baden 1996, pp. 63-71, 63 et seq.; *Felix Amerasinghe*, *Local Remedies in International Law*, Cambridge 1990, p. 53 et seqq. With regard to the influence on the realm of human rights protection, *ibid.*, p. 76 et seqq.; also: *Jost Delbrück*, *The Exhaustion of Local Remedies and the International Protection of Human Rights*, in: FS Partsch, pp. 213-231, 217 et seqq.; compare also: *Rudolf Bernhardt*, *Die Erschöpfung der innerstaatlichen legal remedies vor der Anrufung internationaler Organe zum Schutz der Menschenrechte, insbesondere des Europäischen Gerichtshofs für Menschenrechte*, in: FS *Dietrich Rauschning*, Cologne 2001, pp. 293-300, 293 et seq.

⁵³⁶ The sovereignty principle and the general international law prohibition of the intervention in internal affairs signifies for the legal remedies rule above all protection of the Governmental legal system and the Governmental jurisdiction vis-à-vis external influences. Comp. *Scott Davidson*, *The Inter-American Human Rights System*, Dartmouth 1997, p. 158 with reference to the Gallardo Case; *Georg Dahm*, *Die Subsidiarität des internationalen Rechtsschutzes*, in: FS Hans Döle, Vol. 2 pp. 3-33, p. 8.

⁵³⁷ *Ulrich Giebler*, *Die Erschöpfung der innerstaatlichen Rechtsbehelfe als Zulässigkeitsvoraussetzung der Menschenrechtsbeschwerde*, Marburg 1972, p. 43.

⁵³⁸ While doing so, it developed a very detailed arbitral practice in relation to the individual case, of which the individual facets shall not be addressed in more detail at this juncture. A particularly comprehensive overview is offered by *Tom Zwart*, *The Admissibility of Human Rights Petitions*, Dordrecht et al. 1994, p. 189 et seqq.; see also: *Christoph Grabenwarter*, *Europäische Menschenrechtskonvention*, Munich 2003, p. 73 et seqq.

more flexibly by the Inter-American Commission.⁵³⁹

The restrictions of the applicability of the *local remedies rule* to available legal remedies of adequate duration in Art. 56 I No. 5 AfrCHPR corresponds with the general right of diplomatic protection that limits the *local remedies rule* merely to effective domestic procedures.⁵⁴⁰ These exceptions illustrate that the possibility of states to invoke the prior exhaustion of domestic legal course corresponds to the obligation to ensure effective legal protection for the individuals through an independent judiciary, which results from the fundamental judiciary rights of Art. 7 AfrCHPR.

The African Commission even expanded the exceptions to the *local remedies rule* with reference to Art. 7 AfrCHPR via the pure wording of Art. 56 I No. 5 AfrCHPR. In its decision against Malawi it stated that the exhaustion of domestic legal recourse is not necessary insofar as laws or the legal practice violate the obligation from Art. 7 AfrCHPR.⁵⁴¹ Such an interpretation offers the African Court – via the admissibility hurdle of Art. 56 I No. 5 AfrCHPR – the possibility to lodge complaints against states whose executive branch constantly intervenes in the judicial procedure or whose legal system does not meet the requirements of a fair procedure, and which have not undertaken domestic legal recourse for this reason.

Moreover, the Commission recognises another exception to this requirement, which explains the nature of the matter and which will also be applied by the Court in the respective complaint procedure due to the fundamental parallelism of the admissibility prerequisites: The language thus entails complaints which concern general cases of human rights violations. To presuppose the exhaustion of legal recourse for all questionable cases would make such a procedure impossible. The Commission's standing orders do not differentiate between general and individual cases. But this differentiation crystallised from the Commission practice in connection with the *local remedies rule*.⁵⁴² In general cases of human rights violations, the chances of success for a domestic procedure are restricted from the very beginning due to a

⁵³⁹ Comp. *Scott Davidson*, *The Inter-American Human Rights System*, Dartmouth 1997, pp 158 et seq.; *Juliane Kokott*, *Das interamerikanische System zum Schutz der Menschenrechte*, Berlin et al. 1986, p. 67.

⁵⁴⁰ Comp. *Karl Doehring*, *Local Remedies, Exhaustion of*, in: *Rudolf Bernhardt* (Ed.), *Encyclopaedia of Public International Law*, Vol. II, Amsterdam et al. 1995, pp. 238-241, 239 et seq. The local remedies provision of the ECHR (Art. 35 I SP 11 ECHR) merely refers to the general principals of international law, whereas Art. 46 II ACHR elaborates the exceptions in a more detailed manner, but basically arrives at the same material restrictions (lack of a fair procedure, denial and unjustified delay of procedure).

⁵⁴¹ For instance, in the case of *Chiume and Africa Watch vs. Malawi*, Malawi's national courts were of the opinion "that there is no smoke without fire"; 7th Activity Report, p. 15 et seq. In other words, the charge already implies the criminal misconduct of the accused.

⁵⁴² Comp. Communications 27/89, 46/91, 49/91, 99/93.

potential governmental toleration more proximate than with individual cases. Moreover, for instance in cases pertaining to laws which violate human rights or administrative practice, a remedy can be provided at best in a particular case, but cannot change any legislative measure or administrative practice. This is why an appropriate exception to the local remedies requirement is adopted in the Inter-American⁵⁴³ as well as (with a few restrictions) in the European human rights protection system⁵⁴⁴.

The African Commission recently developed a remarkable exception. In several decisions they renounced the implementation of domestic procedures because out of justified fear of reprisals the complainant either went into hiding in his own country⁵⁴⁵ or otherwise fled abroad.⁵⁴⁶ With this exception the African Commission has created a unique possibility to circumvent the *local remedies rule*,⁵⁴⁷ which substantially deviates from its legal foundation

⁵⁴³ The *local remedies rule* was first introduced in 1965 within the framework of an amendment of the IACHR's statutes, which juristically arranged the Commission procedure and should also extend to cases of individual human rights violations and its competencies with regard to individual complaints. From that point of view it is only logical that the Commission only applies this requirement to such cases and not to cases of general human rights violations which it already handled without prior exhaustion of domestic legal recourse under the 1960 statute. Comp. Case 1684 (Brazil), printed in: *Thomas Buergenthal, Robert Norris, Dinah Shelton, Protecting Human Rights in the Americas*, 2nd edition, Kehl et al. 1986, p. 126 et seqq.

⁵⁴⁴ The *local remedies rule* is not applied before the ECHR, particularly with regard to state complaints which do not address the violation of rights of a specific person, but are generally addressed against laws or administrative practices which are contradictory to the convention. If, on the other hand, the agencies responsible for the convention violation are to be identified, domestic procedures must be taken against them. Exacting demands are also placed on such an administrative practice by gearing towards a general approval of the higher supervisory authorities. Comp. *Wolfgang Peukert*, No. 2 et seqq. to Art. 26 in: *Jochen Abr. Frowein, Wolfgang Peukert* (eds.), "*Europäische Menschenrechtskonvention*", 2nd Edition, Kehl 1996.

⁵⁴⁵ "The Commission noted that the complainant's client is in hiding and still fears for his life. [...] Given the above situation, and the constructive notice the Commission has about the prevailing situation under the Nigerian military regime, the Commission decided that it would not be proper to insist on the fulfillment of this requirement." Comp. Communication 205/97 para. 13, printed in: *Institute for Human Rights and Development* (eds.), *Compilation of Decisions of the African Commission on Human and Peoples' Rights*, Dakar 2002, p. 283.

⁵⁴⁶ "In this particular case the Commission found that Mr. Wiwa was unable to pursue any domestic remedy following his flight [for fear of his life] to the Republic of Benin." Comp. Communication 251/98 para. 24; "Relying on its case law (see Communication 215/98), the Commission finds that the complainant is unable to pursue any domestic remedy following his flight to the Democratic Republic of Congo for fear of his life." Comp. Communication 232/99 para. 19; both printed in: *loc. cit.* p. 280 et seqq. or p. 146 et seqq.

⁵⁴⁷ However, at the request of the Inter-American Human Rights Commission, the Inter-American Court had to deal with the question regarding whether to make an exception to the principle of exhaustion of legal recourse, if, first of all, the complainant cannot come up with sufficient financial means to take legal recourse, or secondly, if the complainant is thus prevented from legal counsel because the lawyers refuse assumption of a mandate due to fear of reprisals. Comp. Advisory Opinion of August 10, 1990, OC-11/90, *Exceptions to the Exhaustion of Domestic Remedies in Cases of Indigence or Inability to Obtain Legal Representation because of a Generalized Fear within the Legal Community*, HRLJ 12 (1991) 20 et seqq. Whereas the IACtHR clearly and positively resolves the first question with the reference that "any state that does not provide indigents with counsel free of charge, cannot, therefore later assert that appropriate remedies existed but were not exhausted" (*ibid.* para. 26), it presented itself in a much more covered manner with regard to the second question: "It is clear that the test to be applied must be whether legal

(Art. 56 I No. 5 AfrCHPR), and therefore attests to a high degree of institutional emancipation. This meanwhile consolidated arbitral practice also presents the Court with the possibility to adequately consider the repressive and instable political environment in several African states in the matter of exhaustion of legal recourse. In other respects, this exemption provision is more than adequate: A complainant is not reasonably expected to exhaust the national legal recourse at the risk of his/her life or his/her health, as conversely it may not be to the advantage of states with repressive regimes that they restrain the path of legal recourse for those seeking legal protection through threatened coercive measures. States which invoke the *local remedies rule* in such constellations before an international human rights body act inconsistently, and it is great credit to the Commission that they have already paved the way for the Court to adequately confront this contradictoriness.

However, the Commission has not eliminated a different (in Africa, an exorbitant, frequently occurring phenomenon) national procedural impediment: Namely the non-exhaustion of governmental legal remedies due to financial necessity. As it stood on the verge of this problem, the Commission explicitly decided against it.⁵⁴⁸ The Commission feared such an exception would lead to an overload with so many cases that they would no longer be able to cope with this.⁵⁴⁹ This decision falls severely behind the international standard, which is particularly regrettable in view of the vast number of theoretically lodged complaints before the African Commission.

In the Inter-American protection system, in which the majority of contracting parties are also developing or threshold countries, and in which a considerable percentage of the population therefore lives below the poverty line, an exception to the *local remedies rule* is expressly recognised in this connection.⁵⁵⁰

Of course, the African Commission is to be granted that – in contrast to the Inter-American or even the European human rights institutions – it suffers to a great extent from financial and personnel need, and is therefore forced to select the incoming communications. But shifting the standard onto the complainant's financial situation is certainly not the most objective way

representation was necessary in order to exhaust the appropriate remedies, and whether such representation was in fact available" (ibid. para. 38). And although the IACtHR did not provide any unequivocal answer, it signalled its willingness to examine such complaints which the Commission would pass on to it in a particular case, and thus to take the possibility of such an exception into thorough consideration, comp. *Scott Davidson*, *The Inter-American Human Rights System*, Dartmouth 1997, pp 166 et seqq.

⁵⁴⁸ Communication 97/93, printed in: Institute for Human Rights and Development (eds.), *Compilation of Decisions of the African Commission on Human and Peoples' Rights*, Dakar 2002, p. 17.

⁵⁴⁹ Comp. *Evelyn Ankumah*, *The African Commission on Human and Peoples' Rights*, The Hague et al. 1996, p. 69; under reference to the Commission's considerations regarding the legal cause during its 16th Session.

⁵⁵⁰ Compare with the corresponding opinion of the IACtHR OC-11/90; footnote 547 above on p. 137.

to a meaningful and necessary selection, and may also not conform to the standards which the Banjul Charter itself sets.⁵⁵¹ This becomes particularly clear if the equality principle from Art. 2 AfrCHPR is taken into account: “Everyone has a right to enjoy the rights and liberties recognised and guaranteed in this Charter, without distinction [...] of social origin, means or other status.” But Art. 3 AfrCHPR, which also ensures equality before the law and guarantees the right to equal protection through the law, is hard to bring into accord with this practice. The African Court should urgently change this arbitral practice. Indeed, the protocol provides that a free legal assistance is ensured in a judicial procedure “where the interests so require.”⁵⁵² It would be nonsensical to fundamentally intend to ensure legal aid in one’s own court procedure, and at the same time to actually exclude rightful claimants from the utilisation of legal aid in the process of complaint dismissal on account of non-exhaustion of domestic legal recourse due to financial necessity.

(6.) Time limit

If a complainant has exhaustively taken national legal recourse, the Court can deal with his/her complaint commensurate with Art. 56 I No. 6 AfrCHPR only under the further prerequisite that this is pending within a reasonable period of time after the exhaustion of legal recourse, or in the absence of such legal recourse or in the event of an unforeseeable decision after the point in time which the Court determines. This extremely elastic time limit provision differs significantly from the procedural arrangement of the corresponding regional courts of justice, which have a strict six-month period as a standard.⁵⁵³ Instead, it allows the African Court – as well as even the Commission – every liberty to decide on the admissibility of complaints, which under other regional regimes would have long since had to have been dismissed as lapsed. As a result, the Court can determine its own complaint time limits and scale its standards to such an extent that endless human rights questions (not already in the admissibility stage) escape through setting a time limit on the complaint. In consideration of the fact that the time limit constitutes a main reason for inadmissibility of complaints before

⁵⁵¹ Of course, as a body of the Banjul Charter the Commission itself is not a contracting party, and is not bound in its actions to the provisions of the Charter. But it is obvious that human rights protection bodies can only expect an observance of their standard setting from contracting parties if it also adheres to this. In this sense, see also: *Andrew Butler*, *Legal Aid before Human Rights Treaty Monitoring Bodies*, in: ICLQ 49 (2000), pp. 360-389, 383.

⁵⁵² Art. 10 II 2.

⁵⁵³ Comp. Art. 46 I lit. b ACHR, 35 I ECHR SP 11. But it is thanks to this circumstance that the originally provided admissibility prerequisites have been generally position in the Court’s rules of procedure, and thus the arrangement has been placed in their hands. Only the Noakchott Draft provided a three-month time limit after conclusion of obligatory Commission procedure; compare: Art. 8 III Nouakchott Draft.

the ECtHR, the protocol's reference to the time limit provision of Art. 56 AfrCHPR has to be seen as very generous. This has not even brought about a single inadmissibility decision in the Commission practice, and is also extremely flexibly applicable in the judicial procedure — i.e. overall a heartening and beneficial divergence from the international admissibility standard.

(7.) No other settlement of dispute

As a final admissibility criterion, Art. 56 I No. 7 AfrCHPR specifies that cases which have already been settled by the concerned states in accordance with the principles of the Charter of the United Nations, the OAU Charter or the Banjul Charter may not be brought before the Court. And so the provision differentiates between regime-internal settlements of disputes and such which have been settled by other international institutions.

(a) Settlement through international institutions

In the latter respect, this provision should guarantee the formal and substantial legal force of decisions by international judiciary panels, insofar as they result in this and avoid duplicities. In other respects, it also secures the respect of formerly promulgated decisions and prevents their erosion through conflicting decisions. In the international comparison, the arrangement in the Banjul Charter complies the least with these protective objectives: The ECHR as well as the ACHR provide for the inadmissibility of a complaint as soon as this “has already been submitted to another international investigative body” (Art. 35 II lit. b ECHR SP 11) or insofar as “the petition or communication [...] is pending decision in another international law procedure” (Art. 46 I lit. c) ACHR).⁵⁵⁴ And so the starting point in time is always the acceptance of the complaint in the respective international procedure (pending suit)⁵⁵⁵ and not the settlement of the dispute (as in the Banjul Charter).

Therefore, according to the wording of Art. 56 I No. 7 AfrCHPR, the mere pendency does not actually stand in the way of the admissibility procedure of a complaint before the Court. Nevertheless, in its heretofore only relevant case the Commission already decided to declare the communication inadmissible due to the pendency of a procedure with another

⁵⁵⁴ Although the Inter-American Commission may consider complaints as admissible despite their pending before other international bodies as long as these procedures do not end up in an “effective settlement”. However, the exact meaning of this constraint remains unclear, comp. *Scott Davidson*, *The Inter-American Human Rights System*, Dartmouth 1997, pp. 170 et. seqq.

⁵⁵⁵ Comp. *Wolfgang Peukert*, No. 19 to Art. 27 in: *Jochen Abr. Frowein, Wolfgang Peukert* (eds.), *ECHR-Kommentar*, 2nd Edition, Kehl et al. 1996; *Christoph Grabenwarter*, *Europäische Menschenrechtskonvention*, Munich 2003, p. 97; *Juliane Kokott*, *Das interamerikanische System zum Schutz der Menschenrechte*, Berlin et al. 1986, p. 74.

institution.⁵⁵⁶ Of course, the Commission's decision may be understandable (it obviously did not want to dissociate itself from the international standard and undermine the authority of the other international body through acceptance of the procedure), but it thus restricted the provisions of the Banjul Charter at the expense of individual protection. If taken literally, Art. 56 I No. 7 AfrCHPR is not even geared towards the final decision of another international judiciary panel, but towards the actual settlement of the dispute — i.e. towards the governmental implementation of the decision, if necessary.

The retention of the Commission's decision would have two disadvantages: For one thing, it would lead to the fact that states which do not carry out this implementation in a manner that is contrary to international law would not have to fear a renewed examination of the matter before the African Court. Insofar as that is concerned, the *ne bis in idem* principle would benefit them to a certain extent,⁵⁵⁷ although they did not comply (or did not comply in due time) with the decision of the initially adjudicating judiciary panel.

For another thing, in the event of dismissal for reasons of inadmissibility through the other international adjudicating body, the individual seeking legal protection would be burdened with the risk that disadvantages would emerge from the utilisation of several legal protection bodies with different admissibility prerequisites, since this obstructs any other international legal protection through the recourse of first instance. In the event of a dismissal of a complaint as unfounded, the individual also runs the risk of losing the rights they are entitled to because they are guaranteed in conventions which do not include the ratio materiae competence of the adjudicating first instance. But this also contradicts the assumptive intention of the regime member states, which have ultimately ratified various conventions with different monitoring bodies in order to offer the individual particularly comprehensive protection.

The African Court, which is at least given the procedural possibility of a renewed procedure,

⁵⁵⁶ Communication 69/92, Amnesty International v. Tunisia, printed in: Institute for Human Rights and Development (eds.), *Compilation of Decisions of the African Commission on Human and Peoples' Rights*, Dakar 2002, p. 357.

⁵⁵⁷ The *ne bis in idem* principle is even seen by *Francois Monconduit*, (*La Commission Européenne des Droits de l'Homme*, Leiden 1965, p. 342 et seq.) and *Jo Pasqualucci*, (*Preliminary Objections before the Inter-American Court of Human Rights: Legitimate Issues, Illegitimate Tactics*, in: *VirgJIL* 40 (1999) pp. 1-114, 59) as the basis of the respective inadmissibility provision. However, the basic principle has its main area of application in the (national and international) law of criminal procedure, where it brings about a *ne bis in idem* effect for the benefit of the individual. Insofar as that is concerned, states are less in need of protection than before human rights bodies, in which case only the facts of the case they themselves consented to will be decided upon. This is why only very limited importance is attached to the basic principle on the international state level. Compare also: *Juliane Kokott*, "*Das interamerikanische System zum Schutz der Menschenrechte*", Berlin et al. 1986, p. 73, footnote 306.

should therefore not dismiss a complaint— which is pending before another regime – as inadmissible without having seen it. It can meet the aforementioned protection objectives (legal security and legal unanimity in international systems) by waiting on the decision of the respective judiciary panel and acknowledging it accordingly. If necessary, its importance can be strengthened even more through the reference in its own procedure.

However, only such institutions whose decisions display legal force or lead to an otherwise individually case-related settlement of a dispute were allowed to come into question from the very beginning as potentially conflicting bodies.⁵⁵⁸ Nevertheless, this admissibility prerequisite is extremely problematic, since many international protective procedures frequently lead to a mere recommendation or a report instead of a ruling, and thus have a more marginal legal protection effect.⁵⁵⁹

(b) Settlement through bodies of the Banjul regime — at the same time, comments on the inter-institutional relationship of the Court with the Commission

Art. 56 I No. 7 AfrCHPR also precludes disputes settled on a regime-internal basis as the admissible subject matter of a complaint before the Court. This initially means that the Court does not deal with complaints which have already been submitted to it — which corresponds to the general legal principle of *res judicata*, and according to which the legally-binding adjudicated matters cannot be brought before the Court again.⁵⁶⁰ The consensus of complaints is at hand if the complainant as well as the subject matter of the complaint and the underlying facts of the case is identical.⁵⁶¹ In contrast to the provision of the ECHR and ACHR, the Banjul Charter does not specifically mention an exception to the additional appearance of new evidentiary facts,⁵⁶² but insofar as new facts are available or insofar as an inadmissibility criterion (such as the non-exhaustion of domestic legal recourse) is omitted, this does not

⁵⁵⁸ Comp. *Robert Norris*, Bringing a Human Rights Petition before the Inter-American Commission, in: SCILR 20 (1980), pp. 733-771 (743); *Juliane Kokott*, loc. cit. p. 75.

⁵⁵⁹ See also: Christoph Grabenwarter, *Europäische Menschenrechtskonvention*, Munich 2003, p. 97.

⁵⁶⁰ See also: Art. 47 lit. d Alt. 1 ACHR, Art. 35 I lit. b Alt. 1 ECHR SP 11; with the legal situation in other international adjudicating bodies: *Bin Cheng*, *General Principles of Law as applied by International Courts and Tribunals*, Cambridge 1993, p. 336 et seqq.

⁵⁶¹ *Christoph Grabenwarter*, *Europäische Menschenrechtskonvention*, Munich 2003, p. 95; compare also the definition of the European Human Rights Commission: “*lorsqu’il y a identité d’objet, de partie et de cause*”, E 202/56 YEC 1, 1900.

⁵⁶² “The Court does not deal with an individual complaint lodged in accordance with Article 34, which has already been submitted to another international investigative body, and *does not contain any new facts*”, Art. 35 II lit. b ECHR SP 11; “The Commission dismisses the communication submitted in accordance with Art. 44, if the communication is *essentially identical* with a petition/communication previously examined by another international organisation”, Art. 47 lit. d ACHR (emphasis in *italics* by author).

particularly concern identical complaints, since they are based on an expanded statement of affairs. In other respects, Art 28 II of the protocol specifies that “the Court may review its own decision in the light of new evidence [...]”. Thus said, the protocol restricts the binding effects of rulings for cases in which new facts justify a readmission. As a consequence, the admissibility of such readmission procedures cannot fail because of Art. 56 I No. 7 AfrCHPR. But this admissibility rule additionally concerns the much more complex issue regarding whether the path to the Court – insofar it has even been paved for individuals through special state declaration in accordance with Art. 34 VI – is blocked through a prior utilisation of the Commission. Two constellations are possible in this connection: First of all, the individual communication could be dismissed by the Commission as inadmissible or as unfounded, and the complainant could subsequently submit the matter to the Court. Secondly, a complainant (successful before the Commission) could bring the matter before the Court because the infringement determined by the Commission has not been remedied by the contracting state. According to the wording of Art. 56 I No. 7 AfrCHPR, the latter constellation is not particularly to be regarded as a settlement. But on the contrary, it is to be regarded as the continuation of a dispute, even if this has already been juristically processed by the Commission as part of the Banjul regime.

On the other hand, a dismissal of an individual communication through the Commission raises the much more fundamental question as to whether the Court can function quasi as an instance of appeal or appellate court for Commission decisions. If a communication from the African Commission has been dismissed as inadmissible or unfounded, the wording of Art. 56 I No. 7 AfrCHPR in the two original versions (“*des cas qui ont été réglés*”/“cases which have been settled”) cannot be quoted — no matter whether a settlement of dispute is to be assumed or not in these cases.

However, Art. 56 AfrCHPR originally also includes only admissibility prerequisites for the single-stage procedure before the Commission, and was not conceived to govern the legal relationship between the Commission and the new Court. Insofar as that is concerned, the solution of the problem must be geared towards the protocol itself and the most meaningful constellation must be determined via legal comparison. But the African legal protection bodies have a unique relationship with each other, which complicates a comparative solution with regard to this aspect.

This uniqueness is above all substantiated in the fact that in the former dual European protection system and in the Inter-American protection system individuals had – or respectively, have – no possibility whatsoever to review a decision of the respective

Commission before the Court, because they enjoyed – or respectively, enjoy – no standing before the respective Court whatsoever.⁵⁶³ The respective Commission had to bring individual complaints before the Court, which precluded a conflict situation.

In preparatory works to the protocol it became clear that no hierarchy should emerge between both protective entities in favour of the Court.⁵⁶⁴ But such a hierarchy would be the result if the Court were to once again advise on communications already denied by the Commission within the framework of a complaint procedure. On the other hand, the Court is supposed to complement and strengthen the Commission's functions in accordance with Paragraph VII of the preamble to the protocol. The fundamental difference in the effectiveness between the Commission procedure and the Court procedure is that the first procedure ends with the Commission's mere recommendations, whereas the second procedure leads to a final judgement. From that point of view it can be argued that a successfully implemented Commission procedure is strengthened by a further Court procedure in its effect, and therefore with such a second procedure the Court fulfils its task from Art. 2: "to complement the protective mandate of the Commission".

On the other hand, no successfully implemented communications procedures are called into question here,⁵⁶⁵ but rather cases in which the complaint has either been dismissed as unfounded or as inadmissible by the Commission — i.e. in which either admissibility prerequisites were not given or otherwise the Commission did not recognise any infringement. But the Court's task to complement the protective mandate of the Commission sorts itself out, insofar as this is not even mandated. In accordance with the principle of complementarity, an individual complaint which contains the judicial review of decisions by the Commission must be considered as settled on a regime-internal basis (as defined by Art. 56 I No. 7 AfrCHPR), and therefore must be declared inadmissible as it could be finally

⁵⁶³ This only changed in the European system with the entry into force of the 9th Supplementary Protocol to the ECHR, which also enabled access to the Court for individuals insofar as the complaint-opposing state had ratified the protocol. But in this case an appeal possibility was created for such cases which raise a "serious question of interpretation or application of the convention" (Art. 48 II ECHR SP 9). Moreover, the prior passage of Commission procedures was necessary, and a hierarchical coordination of both bodies was not even intended. Comp. Council of Europe, Protocol No. 9 to the Convention for the Protection of Human Rights and Fundamental Freedoms - Explanatory Report, Strasbourg, 1990, p. 7.

⁵⁶⁴ "The court will not replace the commission, nor will it be hierarchically superior to the Commission. Indeed, the court will complement the protective mandate of the Commission." Comp. Report of the Secretary-General on the Draft Protocol on the Establishment of an African Court on Human and Peoples' Rights, Council of Ministers, 65th Ordinary Session, CM/1996 (LXV), para. 9

⁵⁶⁵ As presented above, such complaints which had the non-compliance with Commission recommendations as content were able to be considered either as not settled (as defined by Art. 56 I No. 7 AfrCHPR) or as extended statement of affairs, and thus (as complaints not identical with the Commission communication) declared as admissible.

rejected within the framework of the Commission's examination competence. On the other hand, if in such cases the Court deems the dispute to be admissible as a complaint, it sets itself up as the last instance, and establishes a hierarchy between itself and the Commission, although the protocol is construed to prevent such a hierarchy. This was also relinquished to the Court for observance during the preparation of its rules of procedure.⁵⁶⁶

As for the question regarding whether an individual communication dismissed by the Commission can be submitted to the Court, it is decisive whether the Commission was conclusively able to settle the dispute within the framework of its examination competencies. Since the same substantive law – namely the admissibility prerequisites of Art. 56 AfrCHPR – is to be applied with admissibility decisions before both bodies, a dismissal of a communication through the Commission is to be treated as inadmissible as a dispute already settled on a regime-internal basis, and its renewed review before the Court is not admissible insofar as no new facts emerge — i.e. particularly since no grounds for inadmissibility are left out.

The inadmissibility prevents the examination in the matter. It no longer depends on a potential human rights violation. It makes the Court's responsibility to strengthen the protective mandate of the Commission superfluous, since in the event of inadmissible communications this entity is not particularly called upon for protection of human rights through the examination of human rights violations.

On the other hand, however, the Court can handle a communication which was declared as admissible by the Commission but was dismissed as unfounded. Here the Court can quite certainly supplement the protective mandate of the Commission, since it has a much broader substantive competence spectrum than the Commission. Whereas this entity can only determine violations of the Banjul Charter's provisions, the Court's competence *ratione materiae* also encompasses "any other relevant human rights instrument ratified by the States concerned" (Art. 3 I).⁵⁶⁷ This is why the principle of complementarity would also not be avoided, because the examination in the matter before the Court can apply to other legal levels than those before the commission. In other respects, the individual would be withheld from the assertion of any rights arising from other relevant agreements, if his/her complaint were to be dismissed by the Court as inadmissible, since the Commission did not determine

⁵⁶⁶ Compare with Art. 8: "The Rules of Procedure 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.*"

⁵⁶⁷ Comp. *ratione materiae* competence above on p.92 et seq.

any violation of rights under the Banjul Charter.

But in conclusion it is to be maintained that the constellations treated in this connection may have very little practical relevance, since there is no discernible reason for individuals to initiate a Commission procedure if they could just as easily lodge a complaint before the Court. The scope of application is restricted to cases in which an individual communication was brought before the Commission and the state opposing the complaint only ratifies the facultative clause of Art. 34 VI afterwards. At any rate, during the drafting of its rules of procedure the Court should make sure not to diminish the institutional integrity of the Commission, and to respect its decisions instead of allowing a possible unrestricted examination competence.⁵⁶⁸

b) Admissibility of state complaint

In view of the (up to this very day non-existent) state communication practice before the Commission, the state complaint procedure before the Court will hardly acquire any significance within the foreseeable future, yet the procedure should be elucidated for the sake of completeness.

Typically, the protocol includes no specifications whatsoever for the admissibility procedure with regard to complaints which have been initiated by other entities capable of being a party to legal proceedings (other than individuals). This is unusual in comparison with the other regional pacts – which prescribe a series of admissibility prerequisites for state complaints⁵⁶⁹ – as well as in view of the state communications provided by the Banjul Charter, for which specific requirements are also provided.⁵⁷⁰

⁵⁶⁸ The earlier practice of the European Court can also serve as a negative example in this regard. It insisted, against the resistance of the Commission, on its competence to also decide on admissibility issues within the framework of the Commission procedures, compare the ruling in the *De Wilde* case from 18.6.1971, Series A Vol. 12 para. 47 et seqq. (50). Paradoxically, this only came to bear as soon as it was submitted by the Commission as a complaint deemed to be admissible, since the determination of inadmissibility through the Commission was final and prevented a further judicial procedure. This led to the unilateral granting of a “legal remedy” for the contracting state opposing the complaint, since only this entity had an interest in the renewed examination of a positive admissibility decision. Comp. *Wolfgang Peukert*, No. 2 to Art. 27 in: *Jochen Abr. Frowein, Wolfgang Peukert* (eds.), *ECHR-Kommentar*, 2nd Edition, Kehl et al. 1996; *Frank Schellenberg*, *Das Verfahren vor der Europäischen Kommission und dem Europäischen Gerichtshof für Menschenrechte*, Frankfurt 1983, p. 179 et seqq.

⁵⁶⁹ The most elaborate admissibility catalogue for state complaints was provided by the ACHR in Art. 46, which – with the exception of the provisions concerning personal data of the complainant – is identical with the provisions for individual communications. The ECHR also provides (in Art. 35 I SP 11 for state complaints) for the exhaustion of domestic legal recourse and a time limit of six months.

⁵⁷⁰ Art. 47, 48, 50 AfrCHPR and Art 49, 50 AfrCHPR; with regard to the state complain procedure, see above on p. 50 et seq.

aa) Procedural party autonomy

The complaint authority with regard to state complaints before the African Court differs significantly from the rest of the regional systems. The ACHR as well as formerly the ECHR requires the prior invocation of the respective Commission and the prior conclusion of this procedure as a prerequisite for the Court to investigate a matter.⁵⁷¹

The protocol completely refrained from the intervention of the Commission with the initiation of a direct state complaint in accordance with Art. 5 I lit. d.

But even with the transferred state communications in accordance with Art. 5 I lit. b and c there is no addendum in the protocol which prescribes the conclusion of the respective Commission procedure. Art. 5 I lit. b and c can thus be understood to such an extent that the concerned procedure before the African Commission does not have to be concluded before the Court can be invoked by the parties.

This interpretation also corresponds to the historical consideration. Art. 8 I of the Cape Town Draft provided for the inadmissibility of state complaints “originating under the provisions of Article 49 of the Charter until such time that the Commission has prepared a report in terms of Article 52 of the Charter”. And so the prior conclusion of the Commission procedure was presupposed for the admissibility. In addition, Art. 8 III of the Cape Town Draft required the observance of a three-month time limit after conveyance of the Commission report. After intensive discussion, the last Conference of Experts in Addis Ababa decided in favour of the deletion of these prerequisites. In other respects, Art. 8 was quite rightfully deemed to be unsystematic and unnecessary.⁵⁷² Indeed, the provision seemed to be hardly practicable: Under the title “Conditions for Considering Communications” it incoherently governed the prerequisites for state complaints which originated in a communication in accordance with Art 49 AfrCHPR as well as for individual complaints which were assessed before the Commission in accordance with Art. 55 AfrCHPR. However, it did not specify such admissibility criteria for state complaints in accordance with Art. 47 AfrCHPR and for complaints which would be submitted by the Commission or IGOs.

The article was therefore deleted without replacement, and the matters of admissibility have now been placed in the hands of the Court, in which case the Court’s rules of procedure are referred to in the final version of Art. 8. At the same time, the article was also systematised by

⁵⁷¹ Comp. Art. 61 II ACHR and Art. 47 ECHR (current version), respectively.

⁵⁷² Report on the Third Government Legal Expert Meeting (enlarged to include Diplomats) on the Establishment of the African Court on Human and Peoples’ Rights, OAU/LEG/EXP/AFCHPR/RPT. (III) Rev.1, para. 19.

name and renamed “Consideration of Cases”. Previous efforts to determine the admissibility criteria pertaining to state, Commission and IGO complaints were completely abandoned.

And so at this juncture it must be stated that the protocol – unlike the corresponding regional pacts – not only provides for a direct complaint in accordance with Art. 5 I lit. d (without any intervention on the part of the Commission), but also does not require the prior conclusion of the Commission procedure with regard to the transferred state complaint. Therefore, according to the provision specified in the protocol, states can also submit their complaint to the Court in the ongoing Commission procedure in accordance with Art. 5 lit. b and c.

But how do these deviations make themselves felt? In particular, the state complaint procedure before the Commission has an arbitral character. Art. 52 AfrCHPR explicitly obligates the Commission to bring about an amicable settlement. But at any rate, an actual adjudication of the dispute does take place in the form of an opinion (Art. 53 AfrCHPR), but not through an obligatory judgement. As far as that is concerned, the state complaint before the Commission is systematically arranged as a procedure that is submitted before the adjudication procedure. However, the decision concerning the implementation of this preliminary procedure is placed in the hands of the opposing parties through the provision made in the protocol.

If a state (against which a complaint is lodged before the Commission) itself brings a case before the Court before the procedure has been concluded, this is unproblematic. Based on its own decision, in which it abandons the preliminary procedure, it accepts the possibility of an incriminating ruling.

The matter is to be assessed differently if a contracting party – which initially brought a state complaint procedure before the Commission – submits the matter to the Court in accordance with Art. 5 I lit. b, or if it refers the matter directly in accordance with Art. 5 I lit. d. In these cases a state is summoned before the adjudicating body against its will. As a result, it is deprived of the possibility to informally discontinue its infringements in a non-contradictory procedural sequence (and thus for the most part without loss of prestige) and thereby avert judicial proceedings.

Such considerations could be useful to unwilling states as a reason to delay the ratification of the protocol. On the other hand, with the decision of a state in favour of the establishment of an International Court, the ratifying parties necessarily incur the risk of themselves being affected by its mode of operation. Based on this general background, states which expect a loss of sovereignty through the adjudication of the Court will therefore more than likely refrain from the ratification of the protocol than be discouraged by the possibility for a

complaint to be lodged directly before the Court via Art. 5 I. This consideration is academic anyway, particularly in light of the fact that the Commission does not have a single state complaint at hand, which it could have passed on to the Court or could have lodged directly before the Court.

But the implications which this provision shows for the relationship between the Court and the Commission are interesting. The Commission's quasi-judiciary responsibility is massively devaluated through the party autonomy which is granted in Art. 5 I⁵⁷³ — less through the freedom of choice before the submission of a complaint as rather the abstract possibility of parties to discharge the Commission in every procedural stage of the process and to call in the Court. This curtails the Commission's institutional integrity and authority. Since the potential positive effects which would emanate from this provision – for instance, the easing of the Commission's workload or a faster conclusion of the procedure – will probably not be brought to bear due to lack of practical application, this arrangement of admissibility is not to be assessed as optimal. The Commission (which is already politically underweight anyway) would not have to be procedurally depreciated at a point in which no actually noticeable advantages whatsoever are created as a countermove for the African human rights protection. In other respects, the protocol will not live up to its objective of establishing an institutional parity relationship with this party autonomy. It is also little understandable that Art. 4 rules out the Court's advisory opinion jurisdiction for such issues which are being handled by the Commission, whereas a state complaint procedure can be transferred by the parties at any time in the process from the Commission to the Court.

On the other hand, the protocol has positioned the detailed rules of procedure through Art. 8 in the Court's standing orders, and left this with extensive free hand in the arrangement (compare Art. 33). Here the Court is left with the possibility to counteract this devaluation of the Commission in procedurally technical terms and to qualify or eliminate the party autonomy granted by the protocol.

⁵⁷³ To prevent this was the argumentation of the advocates of the original provision, which provided for the Commission's prior conclusion: "in Article 8, the jurisdiction of the Commission is outlined and does not include a conciliatory role similar to the role played, for instance, by the European Human Rights Commission, which strives to seek an amicable solution before issuing, if it fails, an opinion on the liability of the defending Member State". Comp. Observations and Comments of the Government of Tunisia on the Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, CM/1996 (LXV) Annexe III (e), p. 3. Through the original version of Art. 8 of the Cape Town Draft, the Commission's institutional importance was strengthened to the extent that state complainants were deprived of their party autonomy. However, this original version also entailed considerable disadvantages: Individual complaints were likewise only admissible as soon as a Commission procedure was concluded. Regarding this matter see also below on p. 122 et seqq.

bb) Banjul Charter prerequisites with regard to transferred procedures

The Banjul Charter's admissibility prerequisites for the corresponding procedure before the Commission must be at hand, at least for states which are involved in a state communications procedure before the Commission and subsequently turn to the Court — i.e. in cases pertaining to Art. 5 I lit. b (states which have lodged a state complaint before the Commission) and Art. 5 I lit. c AfrCHPR (states against which a complaint is lodged before the Commission). However, as stated above, the Court should specify in its rules of procedure that the respective Commission procedure has to be concluded in order to preserve the Commission's institutional integrity.

It also follows that the decision on the admissibility of a state communications procedure is to be made by the Commission. In this connection, the necessity was already presented that the Court respects the admissibility decision once it has been made by the Commission. And so as soon as a complaint spoken of in this context reaches the Court, the judicial re-examination concerning the existence of admissibility criteria which the Banjul Charter provides for state communications would be extremely counterproductive to the development of a uniform African human rights standard, since this would immediately intervene in the Commission's original sphere of competence.

cc) Local remedies rule

The prerequisites which the Court could examine within the framework of the admissibility of a state complaint are to be gathered from the realm of international practice due to lack of provisions in the protocol. This is why there should be no initial doubt that the *local remedies rule* is accepted into the admissibility catalogue as an expression of procedural prerequisites in keeping with customary international law. In terms of legal conventions, this principle is already embodied in all multilateral human rights instruments which provide for a state complain procedure.⁵⁷⁴ The Banjul Charter is also oriented towards this international standard with regard to state communications procedures.⁵⁷⁵ And so there is no reason for the African Court to deviate from this standard in its rules of procedure. The protection under international law is always of a subsidiary nature, and has to give way to national legal

⁵⁷⁴ Comp. Art. 46 I lit. a ACHR, Art. 35 I ECHR SP 11, Art. 41 I lit. c ICCPR, Art. 11 III of the Convention concerning the Elimination of any Form of Racial Discrimination, Art. 21 I lit. c of the Anti-torture Convention; and Art. 76 Migrant Worker Convention.

⁵⁷⁵ Comp. Art. 50 AfrCHPR.

remedies.⁵⁷⁶ A state that provides an effective legal protection system through its legal system has a right that this system is exhausted before it has to be justified on the international level.⁵⁷⁷ A differing provision in the Court's rules of procedure could possibly present a further impediment for ratification-willing AU member states.

dd) Time limit

Amongst the human rights conventions, only the ECHR has specified the requirement of an observance of a time limit.⁵⁷⁸ No preclusive period is planned for state petitions before all other international convention bodies.⁵⁷⁹ This is why a time limit for complaints may also not be of particular relevance to the African Court — particularly in view of the fact that African human rights instruments also traditionally attach no considerable value to the compliance with stricter time limits for complaints, possibly also because of their comparably minor utilisation.⁵⁸⁰ This is why the Court will not make use of a specified preclusive period in order not to unnecessarily restrict access to the state complaint procedure, which is unlikely anyway.

c) Admissibility of Commission petitions

As mentioned, there are also no provisions in the protocol for the admissibility prerequisites with regard to Commission petitions. However, as an integral component of the protection systems it would also not be advisable to give the Commission a catalogue of formal prerequisites which its petitions would have to fulfil.

⁵⁷⁶ Comp. *Georg Dahm*, Die Subsidiarität des internationalen Rechtsschutzes, in: FS Hans Döle, Vol. 2 pp. 3-33, p. 6.

⁵⁷⁷ *Scott Davidson*, The Inter-American Human Rights System, Dartmouth 1997, p 158.

⁵⁷⁸ Comp. Art. 35 I ECHR SP 11.

⁵⁷⁹ The observance of a time limit for the admissibility of a corresponding state complaint is not required before the IACtHR, the Human Rights Committee, the Committee against Torture, the Committee on the Elimination of Discrimination against Women, the Committee on the Elimination of Racial Discrimination, the Committee on the Rights of the Child or the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families; compare the overview with *Scott Leckie*, The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking, in: HRQ 10 (1988), p. 302 et seq. (249-303).

⁵⁸⁰ In addition to the Banjul Charter and the protocol, the African Charter on the Rights and Welfare of the Child also refrains from the provision of a time limit for complaints (compare Art. 44 I). But it is to be noted that the introduction of a time limit for complaints for states was certainly discussed in the preparatory work of the protocol. In particular, Madagascar was of the opinion that a three-month time limit is necessary. Comp. Commentary of the Embassy of the Republic of Madagascar to Ethiopia, Report of the Secretary General on the Draft Protocol on the Establishment of an African Court on Human and Peoples' Rights, CM/1996 (LXV) Annexe III (i).

aa) Conclusion of the Commission procedure

Here the absence of a provision in the protocol concerning the prior conclusion of a Commission procedure also leads to comparable questions as with regard to party-related procedural transfers. States can be prevented from the implementation of a consensus-oriented preliminary procedure through the passing-on of an ongoing communications procedure. But in the case of transfer through the Commission the protocol's provisions state that an independent decision of the Commission justifies passing on the procedure to the Court at any stage. As directed, the Court shall supplement and reinforce the Commission's protective functions (Preamble Section VII, Art. 2). Therefore as an originally responsible protective body the Commission has to have the possibility to activate this supplementation of its function and to initiate the full judiciary procedure as soon as it deems it to be opportune. Particularly in cases in which a fast and effective response from regional protective bodies is necessary to prevent severe, irreparable damage, it can be useful from the Commission's point of view to immediately pass the matter on to the Court.

bb) The implementation of own complaints

The protocol does not include any provision regarding the question as to whether the Commission is only authorised to lodge a complaint if either a state complaint or otherwise an individual complaint is at hand. And so it is not specified as to whether it can merely transfer a procedure or otherwise also invoke the Court *sua sponte* and is able to open up a new procedure. As already mentioned, the conclusion of the Commission procedure is always necessary in the Inter-American as well as in the European regional system⁵⁸¹ before a complaint authorisation before the Court can even come about.

But precisely in the African Court's protocol this is not the case, and so the conclusion is obvious not to make the admissibility of a Commission petition contingent on a complaint procedure at hand from the Commission. This conclusion also ensues from the above-stated arguments pertaining to the functional supplementation through the Court and its parity relationship with the Commission. The Commission shall not merely remain a "toothless" body slotted in ahead of the actual judicial proceedings. On the contrary, its own functions shall be substantiated and reinforced with the inauguration of the Court (Art. 2, Section VII of

⁵⁸¹ In the European system, the application authority of the European Human Rights Commission on account of the reciprocity proviso of Art. 46 II ECHR (current version) was granted only if it concerned a procedure that has been initiated through individual complaint. Comp. *Frank Schellenberg*, *Das Verfahren vor der Europäischen Kommission und dem Europäischen Gerichtshof für Menschenrechte*, Frankfurt 1993, p. 174 et seq.

the preamble).

That is why the constellations are to be considered in which an independent opening of procedures before the Court seems possible. At the same time, the rebuke for infringements which refer to the institution of the Commission must be distinguished from those which are perpetrated through an infringement against individuals (or, if applicable, vis-à-vis third-party states).

During the realisation of its responsibilities in accordance with the Banjul Charter, the Commission is frequently confronted with the difficulty that states do not comply with requests within the framework of the communications procedure according to Art. 55 AfrCHPR and ignore its arrangements.⁵⁸² According to the Banjul Charter, the contracting states also do not enter into any explicit obligation to comply with the final recommendations of the Commission. And so a treaty violation which the Commission could rebuke before the Court is not at hand in such cases.

But the matter at hand is different with regard to the failure to comply with its provisional measures. In a communications procedure against Nigeria, the Commission determined that the failure to comply with the provisional measures represents a violation of Art. 1 AfrCHPR.⁵⁸³ This view is quite justifiable.⁵⁸⁴ After all, the arrangement of provisional measures is a type of safeguarding arrangement which is supposed to maintain the status quo

⁵⁸² Impressive insofar the Commission's self-knowledge in its own study "Non-Compliance of State Parties to adopted Recommendations of the African Commission: A Legal Approach", para. 7: "The aim of this study is to propose series of solutions for the Commission's consideration whilst highlighting the difficulties in which the Commission found itself in the course of the past years vis-à-vis the attitude of State Parties, which with the exception of Cameroon, has been to generally ignore its recommendations." In other words: Only Cameroon had shown respect for the Commission's findings.

⁵⁸³ Comp. Communications 137/94, 139/94, 154/96 and 161/96 against Nigeria, para. 112, printed in: *Compilation des Décisions de la Commission Africaine des Droits de l'Homme et des Peuples*, Institut pour les Droits Humaines et le Développement (eds.), Banjul 2000, p. 184 et seq.

⁵⁸⁴ The ECtHR saw this differently. In the Cruz-Varaz case (ruling from 20 March 1991, Series A 201, p. 36, EuGRZ 18 (1991), pp. 203-216), the Court denied the binding effect of the European Commission's provisional measures because the competence to undertake such measures could not be inferred from the Commission itself, but only from the Commission's rules of procedure (Art. 36 [current version]). Unlike the Commission, the Court (with ten to nine votes) saw no treaty violation in the non-compliance with the measure, since the possibility of issuing provisional measures is not stipulated in conventional terms, but can only be inferred through the rules of procedure. The ruling has been frequently and rightfully criticised in the literature under reference to the meaning and purpose of the convention, namely the protection of people with the goal of effective realisation of codified rights. Comp. *Lawrence Collins*, Provisional and Protective Measures in International Litigation, in: RdC 234 (1992) III, pp. 13-298, 190 et seqq.; *Karin Oellers-Frahm*, Zur Verbindlichkeit einstweiliger Anordnungen der Europäischen Kommission für Menschenrechte, in: EuGRZ 18 (1991), pp. 197-199, 198 et seq.; *Rudolf Bernhardt*, Interim Measures under the European Convention on Human Rights, in: *ibid.* (eds.), Interim Measures indicated by International Courts, Heidelberg 1994, pp. 95-114, 100 et seq.; *P. van Dijk, G.J.H. van Hoof* (Eds.), Theory and Practice of the European Convention on Human Rights, The Hague 1998, p. 62; *Jochen Abr. Frowein* No. 52 to Art. 25 in: *Jochen Abr. Frowein, Wolfgang Peukert* (eds.), ECHR-Kommentar, 2nd Edition, Kehl et al. 1996.

up until the decision-making. Of course, the provisional measures lack the formal legal force, but their observance is indispensable for the implementation of a communication procedure which the concerned state voluntarily submitted to through ratification. This is why to assume an infringement upon non-compliance with these safeguarding measures seems to be understandable. However, implementation or sanction mechanisms are not available to the Commission.

Naturally in this case the Commission could transfer the entire communications procedure. But this entailed the disadvantage that the Court would then have to conclude the entire procedure on its own, and would have to determine a violation of subjective rights, instead of merely examining the infringement through non-compliance with the Commission's directives. Based on this background, a recourse to the Court – and thus an active legitimation of the Commission *sua sponte* – is quite justified, and corresponds to the protocol's intention, since only in this way can the Commission perform its protective task in a strengthened manner. The Court's competence *ratione materiae* also thoroughly allows such a consideration. The procedural objects of contentious jurisdiction commensurate with Art. 3 are namely "all cases and disputes [...] concerning the interpretation and application of the Charter". This also includes disputes concerning the observance of obligations beyond the actual human rights catalogue of the Banjul Charter.

And so in such cases the Commission must be entitled to an original complaint authorisation. This is also why an active legitimation of the Commission is to be seen as positive — if the Commission would like to proceed against a contracting state which does not comply with its other obligations ensuing from the Banjul Charter (for instance, the non-compliance with provisional arrangements or perhaps also the obligation regarding submission of state reports in accordance with Art. 62 AfrCHPR⁵⁸⁵).⁵⁸⁶ This would be an entirely new form of utilisation of an international court of human rights. With the existing mechanisms the courts are restricted to the implementation of transferred or direct *individual* or *state* complaints. For instance, in the case of the ECHR, the respective Commission always participated in the legal procedure, yet it could and can not lodge an actual *Commission complaint*.

⁵⁸⁵ However, in terms of content such a complaint would be questionable, since the state complaint procedure in a non-contradictory dispute with the concerned state particularly serves to remedy difficulties and problems with regard to the implementation of characteristic provisions. A complaint targeted at the submission of a state report would seem to be counterproductive.

⁵⁸⁶ See also: *Frans Viljoen*, Some Arguments in favour of and some against an African Court of Human and Peoples' Rights, in: ASICL 10 (1998), pp. 1-21, 11; also: *Ota Amoah*, The African Charter on Human and Peoples' Rights – An Effective Weapon for Human Rights? RADIC 4 (1992), pp. 226-245, 239.

However, another question is whether the Commission also has an original complaint authorisation in cases in which it claims a violation of human rights, but there is no communication at hand in accordance with Art. 55 AfrCHPR. Of course, there exists not just an individual interest, but in view of the *ordre publique* function of the regional pact there is also a public interest in the granting of human rights, and the Commission is mandated in Art. 30 AfrCHPR with the protection as well as with the promotion of human rights. Nevertheless, to ascribe it a function as ‘ombudsman’ is highly problematic: After inauguration of the Court, the Commission retains all competencies, including the responsibility for receipt of communications in accordance with Art. 55 AfrCHPR and state complaints. This also obligates the Commission to strict neutrality beyond the realm of judicial activity. A change of function quasi to public prosecutor of human rights violations before the African Court is not to be brought into harmony with this requirement. For instance, the Commission itself has emphasised that it can only respond very generally to human rights violations – but not specifically – as long as a communication in accordance with Art. 55 AfrCHPR is not at hand.

d) Admissibility of complaints from international organisations

It can only be conjectured as to which requirements are to be arranged for the admissibility of a complaint. But the *local remedies rule* may undoubtedly be utilised as a routine legal admissibility prerequisite with human rights violations. Since no IGO is a contracting party to the Banjul Charter, the prior implementation of a Commission procedure as an admissibility criterion is ruled out from the very beginning. But in view of the novel aspect of this procedure, it remains to be seen whether the Court specifies further admissibility criteria.

3. Course of procedure

The protocol only pays perfunctory attention to the course of the further procedure. Thus said, the actual formulation is incumbent upon the Court, which has to govern the procedure within the framework of its rules of procedure.⁵⁸⁷

a) Principle of public trial

One of the most momentous procedural differences of the judicial procedure for communication procedure before the AfrCHPR – that provides for strict confidentiality during the treatment of communications⁵⁸⁸ – is laid down in Art. 10 II: “The Court shall

⁵⁸⁷ Art. 8.

⁵⁸⁸ Art. 106 RP AfrCHPR.

conduct its proceedings in public.” The fact that the protocol codifies the principle of public trial and does not place it (like other rules of procedure) up to the Court shows which degree of relative importance was attributed to this regulation. The principle of public trial also applies to the IACtHR and the ECtHR, but is also merely laid down in the standing orders there.⁵⁸⁹

Art. 10 was provided with the article designation “Hearings and Representation” (notionally “proceedings”); however, not only is the oral hearing recorded by Art. 10 II, but also the written proceedings. Therefore it is also to be assumed that all documents within the scope of a procedure are to be made immediately accessible to the public, and the principle of public trial gain acceptance for all procedural stages.⁵⁹⁰

The stigma of achieving results – the legality of which is not discernible behind closed doors in obscure proceedings – is supposed to be removed with this regulation from the African legal protection system. The Commission has already attempted to do this, but is strongly truncated by its own procedural guidelines. The entire communication procedure is closed to the public, only completed proceedings are published. The proceedings before the Court seem to be much more promising under this aspect: Not only the rulings must be published, but the procedural approach also has to be understandable so that the administration of justice yields a self-contained human rights concept that offers orientation and establishes legal security.

Art. 10 I 2 gives the Court the possibility to exclude the public from proceedings insofar as this is provided in the standing orders. This is a practical regulation that allows the parties involved in the dispute to file an appropriate request, of which the Court decides. For instance, if a complainant or appellee strives for a conciliatory solution, the exclusion of the general public could facilitate an amicable settlement.

b) Representational regulation

Commensurate with Art. 10 II, any party can be represented by a legal adviser of their choice. A special qualification for the representative, for instance special knowledge of the law,⁵⁹¹ is not called for. Presumably this takes into account the fact that many representatives would not fulfil such a prerequisite. If one concludes from the experiences of the Commission, NGOs

⁵⁸⁹ Art. 14 RP IACtHR; Art. 33 RP ECtHR.

⁵⁹⁰ This is also the modus operandi for the ECtHR. The documents in a complaint matter can be perused by the interested general public at the Court’s seat in Strasbourg; compare: *Mark Villinger*, Handbuch der Europäischen Menschenrechtskonvention, No.: 197.

⁵⁹¹ However, this is demanded for in Art. 36 RP ECtHR concerning advisors and representatives in the proceedings before the ECtHR.

would frequently appear on behalf of an individual before the Court, and only in rare cases do their representatives possess special knowledge of the law.

A legal adviser can perceive all tasks which are incumbent upon the complainant. However, pursuant to Art. 10 II, the utilisation of a legal adviser before the AfrCtHPR is not obligatory.⁵⁹² It ensues that the complainant retains the capacity to personally plead in every procedural stage.

c) Right to legal aid

In light of the complex formal and substantive issues of potential legal matters before the Court, any procedure entails a fundamental risk that a structural inequality emerges between the individual complainant and the appellee state party, which can appear before the Court with the support of its entire juridical apparatus. This particularly applies if a complainant does not have sufficient financial means to establish a certain equality of “legal weaponry” through professionally qualified legal counsel. Also in light of the fact that a procedure before the Court requires the prior exhaustion of legal recourse and thus entails substantial financial expenditures on the part of the complainant, the legal assertion of convention rights is threatened with failure due to lack of funds.

In contrast to the Banjul Charter, the protocol reacted to this danger and determined in Art. 10 II 2 that “free legal representation may be provided where the interests of justice so require”. The protocol follows the European system with the right to legal aid.⁵⁹³ A right such as in proceedings before the AfrCHPR is not provided for in the Inter-American protection system.⁵⁹⁴

The protocol pursues a noble – but in terms of its purview, a hard to achieve – objective with

⁵⁹² Unlike before the ECtHR, where the complainant at least has to be represented at oral hearings (Art. 36 1111 RP ECtHR); compare: *Mark Villinger*, Handbuch der Europäischen Menschenrechtskonvention, Zurich 1999, p. 134 et seqq.; *Harris, O’Boyle, Warbrick*, Law of the European Convention on Human Rights, London 1995, p. 664 et seqq.

⁵⁹³ Comp. Chapter X (Art. 91 et seqq.) RP ECtHR.

⁵⁹⁴ With reference to the Inter-American system, *Scott Davidson* argues with the fact that “many of the claims are fact driven and do not require precise legal analysis, and so [...] applicants do not necessarily suffer greatly from the lack of legal assistance”; cited in *Andrew Butler*, Legal Aid before Human Rights Treaty Monitoring Bodies, in: ICLQ 49 (2000), p. 362, footnote 7. This is certainly true. However, the lack of a right to legal aid in the Inter-American system nevertheless is a shortcoming in the system. On the one hand, the procedural standards of a human rights monitoring body should serve national legal systems as an orientation which the Inter-American system surely does not in this concern. On the other hand, in contrast to the ECtHR, the IACtHR does not even award successful complainants the incurred procedural costs as compensation; compare: *Dinah Shelton*, Remedies in International Human Rights Law, Oxford 1999, p. 307. This is remarkable insofar as the IACtHR itself estimated the costs for implementation of a procedure before the Inter-American human rights bodies at \$80,000. Compare *same*, Future Remedies in the Inter-American System, in: ASIL Proceedings 92 (1998) pp 202-206, at p. 204.

this provision: the realisation of rights for the indigent. The difficulty lies in the fact that the Court could not initially make arrangements in its own proceedings, but had to configure the national proceedings so that this provision achieved its objective. Indeed, the Commission does not recognise the non-exhaustion of legal recourse due to financial necessity as an exception to the local remedies rule, because it fears being inundated with complaints otherwise.⁵⁹⁵ Therefore the legal route to the Commission is blocked for individuals if they have not pursued national means of legal resource due to lack of funds. If impoverishment does not entail lack of rights and the Banjul Charter loses credibility as a result (as Art. 10 II 2 seeks to prevent), the Court has to resort to other selection standards in order to prevent a paralysis through an excess of work. Correspondingly, the AfrCHPR would have to adapt its practice of adjudication in order to ensure a coherency of admissibility criteria.

The greatest significance of the right to legal aid ensuing from Art. 10 II 2 also lies here. Indeed, the financial assistance provided by the Court is surely not enough to be able to “buy” highly-qualified legal advice for the complainants. The payments in the European system have already been measured so low⁵⁹⁶ that a qualified procedural representative needs another motivation to present a case before the ECtHR. In the literature, the rates are assessed as “not generous”⁵⁹⁷, “meagre if not derisory”⁵⁹⁸, and “a little more than a nominal payment”⁵⁹⁹. Such assessments may be understated for the African Court’s future regulation of costs. This is why the right to legal aid stipulated in Art. 10 II 2 is more than likely due less to the effect that complainants receive legal aid than they otherwise would not have received; on the contrary, the consequence is that the non-exhaustion of legal recourse due to financial necessity cannot be assessed by the Court as a reason for inadmissibility, without this contradicting Art. 10 II 2.

In other respects, the granting of the right to legal aid has a further fundamental advantage; however, this can only be taken into account if the financial configuration allows it: The decision-making on the part of a judiciary body will be made much easier if both sides are competently represented, since a majority of juridical argumentation work is performed by procedural representatives, and the judiciary authority only has to examine their decisional

⁵⁹⁵ Concerning the *local remedies rule* comp. above on pp. 134 et seqq.

⁵⁹⁶ Comp. the overview at *Andrew Butler*, *Legal Aid before Human Rights Treaty Bodies*, in: ICLQ 49 (2000), pp. 360-389, at p. 365.

⁵⁹⁷ *Nikolaos Sansonetis*, *Costs and Expenses*, in: *Ronald Macdonald, Franz Matscher, Herbert Petzold* (Eds.), *The European System for the Protection of Human Rights*, Dordrecht et al. 1993, pp. 755-773, 762.

⁵⁹⁸ *D.J. Harris, M. O’Boyle, C. Warbrick*, *Law of the European Convention and Human Rights*, London 1995, p. 665.

⁵⁹⁹ *Luke Clements*, *European Human Rights: Taking a Case under the Convention*, London 1994, p. 97.

relevance.⁶⁰⁰ But in light of the anticipated extreme shortage of finances, it cannot be expected that juridical competence can be bought with the right to legal aid. Therefore one hopes that the Court acquires a sufficient reputation in order to promise university lecturers, lawyers and other qualified personnel a correspondingly high gain in prestige for their representation that compensates the financial disadvantage.

d) Unhindered implementation of individual complaint procedure

The protocol grants any person, witnesses or representatives who appear before the Court the protection and all facilitations which are necessary for exercise of their function and for fulfilment of their obligation vis-à-vis the Court.⁶⁰¹ This obligation is a special characterisation of the cooperative obligation which the contracting states undertake with regard to the judicial proceedings.⁶⁰² It targets the unhindered implementation of the judicial procedure which the states have already been subject to through ratification of the protocol and, should the occasion arise, through submission of a declaration pursuant to Art. 34 VI with regard to the right of individuals to file a complaint. The deliberate hindrance of the judicial procedure is thus already inadmissible according to general international law, since it represents a treaty infringement.

The protection of Art. 10 III includes any individual who is of relevance in a procedure, i.e. the natural parties, their legal counsel, witnesses and experts. This general reference to provisions of international law may have the advantage vis-à-vis detailed regulatory immunity provisions (such as those also enacted by the Council of Europe in a separate agreement⁶⁰³) — that there is no ensuing deterrent effect which could further decelerate the ratification.

e) Law of evidence

Naturally the Court has to determine the relevant facts in order to examine whether a conventional infringement exists. At the same time, commensurate with Art. 26 II, it initially takes into account the petitions of the involved parties. But insofar as it deems necessary, it

⁶⁰⁰ The former President of the European Commission, *Humphrey Waldock*, has put it like this: “Legal aid is essential not only to from the point of view of fairness to the individual but also from the point of view of the effective discharge of the Commission’s responsibilities under the Convention. For the Commission will be in a much better position to give a correct decision, if both sides of a case have been adequately presented to it by the parties.“, YEC 1963, p. 91.

⁶⁰¹ Art. 10 III.

⁶⁰² Comp. Art. 26 I.

⁶⁰³ Comp. the European Agreement relating to Persons participating in Proceedings of the European Commission and Court of Human Rights (ETS 67) or, upon entry into force of Protocol 11, the European Agreement relating to Persons participating in Proceedings of the European Court of Human Rights (ETS 161), respectively.

can conduct its own ascertainment of facts. Thus said, the principle of judicial investigation applies to the Court in restricted form: It is not bound to the motions for the admission of evidence; insofar as it does not deem the admissions of the parties to be sufficient, it officially investigates the facts.

International law lends international bodies only limited competencies, which can substantially compound an official ascertainment of facts. This is why the taking of evidence essentially depends on the willingness of the involved states to cooperate and to give offers of proof.⁶⁰⁴ Since these entities take on the role of “defendant” in human rights complaints procedures insofar as they appear as appellees, their unrestricted cooperation cannot always be assumed. On the contrary: The proceedings before the AfrCHPR clearly show that states are frequently not even willing to officially take cognizance of the pendency of a procedure⁶⁰⁵, that they submit their admission with substantial delay⁶⁰⁶, or otherwise do not respond to enquiries at all.⁶⁰⁷ However, this phenomenon is not restricted to African Countries but is widely spread in international human rights proceedings.⁶⁰⁸

Therefore this fact is to be appropriately taken into account for the apportionment of the burden of proof. Otherwise not only particularly renitent parties would be favoured and cooperatively adversely affected, but complainants from corresponding states would also have to fear a procedural discrimination in addition to the already suffered (at least claimed) human rights violation. The AfrCHPR responded to this difficulty by regarding the admissions of the party filing the complaint as given, insofar as they are not contested by the state. This practice may not have particularly influenced the respective states, since the Commission procedure only concludes with nonbinding recommendations. The certain view of risking an incriminating, legally binding ruling – if enquires are not responded to – could contribute towards a willingness to cooperate, however. For instance, the ECtHR also accepts a reversal of the burden of proof in the event of cases – in which only the government has access to essential information – if they belatedly submit (or do not submit at all) the information

⁶⁰⁴ Unfortunately, the obligations of the states with regard to the hearing of evidence in international judicial proceedings (especially Articles 10 and 11) – which were already provided for in the Harvard Draft on Judicial Assistance (1939) – were never applied. This is why in actuality the proposals sacrificed nothing. Compare: *J.G. Rogers, A.H. Feller (Reporters)*, Research in International Law under the Auspices of the aculty of the Harvard Law School, in: AJIL 33 (1939) Supplement, in particular pp. 104 et seqq.

⁶⁰⁵ Comp. complaint procedures 59/91; 60/91; 87/93; 101/93.

⁶⁰⁶ Comp. complaint procedures 27/89; 46/91; 49/91; 99/93.

⁶⁰⁷ Comp. complaint procedures 219/98; 201/97; 74/92; 40/90.

⁶⁰⁸ *Scott Davidson*, The Inter-American Human Rights System, Dartmouth 1997, p 144.

without justified reason.⁶⁰⁹

In order to secure the cooperation of the states, they are obligated in accordance with Art. 26 I 2 to grant all necessary facilitations for implementation of the investigations.

Article 26 II conclusively defines the law of evidence – i.e. the Court makes its decision on the basis of oral and written evidence as well as expert opinions. Thus said, the law of evidence is by no means treated in detail by the protocol. Usually such regulatory objects are also counted amongst the autonomous organisational realm of the international authority⁶¹⁰, so that their detailed formulation is to be undertaken by the Court within the scope of its standing orders.

The remarkable aspects of this provision also seems to be less due to the evidentiary components than the participatory obligation which were imposed on the states through Section I with regard to the implementation of official hearing of evidence. The fact that on-site missions are not accepted or intentionally boycotted is amongst the negative experiences of the Commission's work. With Art. 26 I 2 the Court is directly provided with a conventionally demandable obligation to cooperate which can positively influence its results.

VIII. Provisional arrangements

Like virtually all international judicial bodies, the AfrCtHPR has the possibility to make provisional arrangements.⁶¹¹ Provisional arrangements are defined as court orders which govern the extra-procedural conduct of parties with regard to the judicial decision throughout the duration of the pending suit.⁶¹² The protocol devotes itself to this complex in Art. 27 II: “In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary.”

Thus said, the procedure of provisional arrangement is at least opened *ex officio* in accordance

⁶⁰⁹ *Jens Meyer-Ladewig*, ECHR Commentary, Baden-Baden, 2003, No. 3, Art. 38.

⁶¹⁰ *Mojtaba Kazazi*, Burden of Proof and Related Issues – A study on Evidence before International Tribunals, The Hague et al. 1996, pp. 176 et seqq., 177.

⁶¹¹ Compare the heretofore exhaustive representation in *Jerzy Sztucki*, Interim Measures in the Hague Court, Boston 1983, pp. 4-11. The judicial bodies inaugurated thereafter also have regular access to such a possibility; merely compare Art. 26 RP Iran-US Claims Tribunal; Art. 89 et seqq. RP ITLOS; amongst the exceptions are the various human rights committees, which in comparison with the protective authorities of the regional pacts feature much fewer intervention competencies (Committee on the Rights of the Child; Human Rights Committee; Committee on Economic, Social and Cultural Rights; Committee on the Elimination of Racial Discrimination; Committee on the Elimination of Discrimination against Women; Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families). Only the Committee against Torture can arrange provisional measures (Art. 109 RP).

⁶¹² *Karin Oellers-Frahm*, Die einstweilige Anordnung in der internationalen Gerichtsbarkeit, Berlin et al. 1975, p. 11.

with Art. 27 II and not via party motion. Since the provisional measure can only occur after submission of a complaint, the parties themselves most probably will refer to the necessity of the measure. Whether the Court expands Art. 27 II within the framework of its standing orders and grants the parties involved in the proceedings a formal right to file a motion⁶¹³ (or not) may not be of importance to the decision regarding the issuance of a provisional arrangement.⁶¹⁴

Bernhardt explains that provisional measures would have to be the exception in international human rights protection procedures.⁶¹⁵ In principle, complaints procedures are construed to examine past human rights violations. Only in isolated cases a previous claimed human rights violation had a present-day effect in a manner that would call for the provisional measures.⁶¹⁶ This exception is based on the consideration that provisional measures usually have to occur before conclusion of the admissibility examination. But since over 90 percent of the submitted complaints would be rejected as inadmissible, an extensive handling of the provisional measures would damage the legitimate interests of the affected state if the inadmissibility or groundlessness of the complaint is brought out in retrospect.⁶¹⁷

This view may be applicable for the legal protection within the ECHR regime; however, in the two other regional systems the structural differences lead to a different conclusion. The chairperson of the AfrCHPR summarised this structural difference as follows: “Most of the cases that the European system processes relate to arrest and detention guarantees and fair administration of justice, and not the chilling and harrowing violations in other parts of the world.”⁶¹⁸

⁶¹³ Comp. Art. 39 RP ECtHR; Art. 25 I RP IACtHR; Art. 37 RP ICJ.

⁶¹⁴ The AfrCHPR did not provide the individual with a formal right to file a request for a provisional measure, yet in practise it only acts when the complainant has asked for it.

⁶¹⁵ *Rudolf Bernhardt*, Interim Measures under the European Convention on Human Rights, in: *same*. (Ed.), Interim Measures indicated by International Courts, Berlin et al. 1994, pp. 95-114, 102.

⁶¹⁶ *Ibid.* pp. 97, 101 with reference to extradition or expulsion cases, comp. To this also *Hans Christian Krüger*, Vorläufige Maßnahmen nach Art. 35 der Verfahrensordnung der Europäischen Kommission für Menschenrechte (insbesondere in Ausweisungs- und Auslieferungsfällen), in: *EuGRZ* 23 (1996), pp. 246-349, 347 et seq.

⁶¹⁷ *Rudolf Bernhardt*, Interim Measures under the European Convention on Human Rights, in: *same* (Eds.), Interim Measures indicated by International Courts, Berlin 1994, pp. 95-114, 102.

⁶¹⁸ *Dankwa*, Conference on Regional Systems of Human Rights Protection in Africa, the Americas and Europe, in: *HRLJ* 13 (1992), pp. 314-326, p. 316. However, this structural difference does not mean that provisional measures of decisive importance in the ECHR regime cannot also arise for the concerned individuals. But these cases are overwhelmingly limited to extradition cases through which the complainants risk death or maltreatment. In at least three cases (*Cruz Varas*, *DS*, *SN* and *BT vs. France*; *Mansio vs. Sweden*) the disregard for the provisional arrangement of the European Commission through the state party led to torture and inhumane treatment of the complainants: *Hannah Garry*, When Procedure Involves Matters of Life and Death: Interim Measures and the European Convention of Human Rights, in: *EPL* 7 (2001), pp. 399-432, p. 420.

The classification of the pending complaints before the IACHR also reflects this reality: over 70 percent of the 800 cases with which the Commission was occupied in 1996 denounced a violation of the right to life and/or physical integrity. In only five months it applied for 26 provisional arrangements in order to protect people whose lives were in danger.⁶¹⁹ This proportion is not sensational to such an extent before the AfrCHPR, but out of the 288 submitted communications, at least 60 concerned such cases in which a comparable violation of rights was denounced. Yet the African Commission makes relatively cautious use of the instrument of provisional arrangement.⁶²⁰ Nevertheless, the order of provisional arrangement is the only means at the disposal of a human rights authority, for instance to delay the enforcement of death penalties or to attain the protection of witnesses. This is why provisional arrangements can play a significant role in the practice of the African Court.

The cardinal question in connection with interim provisions of international authorities is always that pertaining to their legal repercussions for the addressees. The ICJ for the first time authoritatively affirmed the long since contentious question regarding whether provisional arrangements of the Court had a legally binding effect⁶²¹ in its *La Grand* case.⁶²² This question is assessed quite differently amongst the regional courts of human rights. In the Inter-American system, the legally binding effect of provisional decisions by the IACtHR is called into question neither by the literature nor the concerned states.⁶²³ The situation is

⁶¹⁹ Comisión Interamericana de Derechos Humanos, Seminario sobre el Sistema Interamericana de Promoción y Protección de los Derechos Humanos 2 al 4 de Diciembre de 1996, Conclusiones de la Comisión Interamericana de Derechos Humanos y Minutas de las Exposiciones Realizadas por los Participantes, OAE/Ser/L/V/II.95, Doc. 28, para 14. More restrictive in this conception *John Macdonald*, Interim Measures in International Law, with special reference to the European System for the Protection of Human Rights, in: *ZaÖRV* 53 (1992), pp. 703-740, 721.

⁶²⁰ Communication 60/91 vs. Nigeria; Joined Communications 93/92, 88/93, 91/93 vs. Togo; Communication 87/93 vs. Nigeria; Joined Communications 140/94, 141/94, 145/95 vs. Nigeria. Comp. On the practice of the African Commission *Gino Naldi*, Interim Measures of Protection in the African System for the Protection of Human and Peoples' Rights, in: *AHRLJ* 2 (2002), pp. 1-10, 6 et seqq.

⁶²¹ Comp. *Jerome Elkind*, Interim Protection: A Functional Approach, The Hague, et al. 1981, pp. 25 et seqq.; *Lawrence Collins*, Provisional and Protective Measures in International Litigation, in: *RdC* 243 (1992 III), pp. 13-238, 216 et seqq.; *Karin Oellers-Frahm*, Die einstweilige Anordnung in der internationalen Gerichtsbarkeit, Berlin et al. 1975, 105 et seqq.; *same* Interim Measures of Protection, in: *Rudolf Bernhardt* (Ed.), *Encyclopedia of Public International Law*, Bd. II, Amsterdam et al. 1995, pp. 1027-1034, 1029; *Hugh Thirlway*, The Indication of Provisional Measures by the International Court, in: *Rudolf Bernhardt* (Eds.), *Interim Measures indicated by International Courts*, Berlin et al. 1994, pp. 1-36, 28 et seqq. *Jerzy Sztucki*, Interim Measures in the Hague Court, Boston et al. 1983, pp. 280 et seqq.

⁶²² Comp. hereonto *Karin Oellers-Frahm*, Der Internationale Gerichtshof stärkt die Stellung des Individuums im Völkerrecht und klärt wichtige Fragen der internationalen Gerichtsbarkeit, in: *NJW* 54 (2001), pp. 3688-3690, 3689; *Jochen Abr. Frowein*, Provisional Measures by the International Court – The *LaGrand* case, in: *ZaöRV* 62 (2002), pp. 55-60, 57; comprehensive on this decision: *Robert Jennings*, The *LaGrand* Case, in: *LPICT* 1 (2002), pp. 13-54, on the question of the legal effect pp. 29-36.

⁶²³ *Jo Pasqualucci*, Provisional Measures in the Inter-American Human Rights System: An Innovative Development in International Law, in: *VandJTL* 26 (1993), pp. 803-863, 847

different in the European system: In the Cruz Varas case, the ECtHR had to cope with the binding effect of provisional decisions in the ECHR regime. It came to the conclusion – with a scant majority of ten to nine votes – that the provisional arrangements are not legally binding.⁶²⁴

What are the reasons for these different assessments, and what conclusions are to be drawn for these provisional arrangements on the part of the African Court? First of all, the legal assessment of the question pertaining to the binding effect of provisional measures has to take into account the various wordings. Based on the formulation of Art. 41 of the ICJ statutes, “The Court shall have the power to *indicate*, if it considers that circumstances so require, any provisional measures which *ought to be taken* to preserve the respective rights of either party”, the conclusion was repeatedly drawn that they entailed no compliance obligation for the addressees as a consequence.⁶²⁵ Since the corresponding provision of the European Commission for Human Rights was similarly softly formulated, the ECtHR also put forward the wording argument in the Cruz Varas case against a binding effect of the provisional measures.⁶²⁶

In comparison with the competence of the IACtHR regarding the issuance of provisional measures, Art. 63 II ACHR states in much more unambiguous language: “The Court *shall adopt* such provisional measures as it deems pertinent.” In demarcation to the provisions of the ECHR and also corresponding to the provisions of the ICJ Statute, this formulation is also concluded with regard to the binding effect of the provisional measures of the IACtHR.⁶²⁷ In consideration of the fact that Art. 27 II was formulated in the same wording as Art. 63 II ACHR, this initially also speaks in favour of the binding effects of provisional arrangements through the African Court.

⁶²⁴ Judgement of 20 March 1991, Series A 201, para 102: „The Court considers that the power to order binding interim measures cannot be inferred from either Article 25 I in fine, or from other sources. It lies within the appreciation of the Contracting Parties to decide whether it is expedient to remedy this situation by adopting a new provision notwithstanding the wide practice of good faith compliance.“ comp. footnote 584 above on p. 154.

⁶²⁵ Comp. Jerzy Sztucki, *Interim Measures in the Hague Court*, Boston 1983, pp. 263 et seqq., 280-287; Gerald Fitzmaurice, *The Law and Procedure of the International Court*, Vol II, Cambridge 1986, p. 548.

⁶²⁶ „[...] Rule 36 cannot be considered to give rise to a binding obligation on Contracting Parties. Indeed this is reflected in the wording [...] of Rule 36 itself (“may indicate any interim measure the adoption of which seems desirable”).” Cruz Varas vs. Sweden, judgement of 20 March 1991, Series A 201 para. 98.

⁶²⁷ Comp. Jo Pasqualucci, *Provisional Measures in the Inter-American Human Rights system: An Innovative Development in International Law*, in: VandJTL 26 (1993), pp. 803-863, 848 et seq.; in favour of the same differentiation by wording, Michael Addo, *Interim Measures under the Vienna Convention on Consular Relations*, in: EJIL 10 (1999), pp. 713-132, 723; less decided but tending towards the same direction Karin Oellers-Frahm, *Die einstweilige Anordnung in der Internationalen Gerichtsbarkeit*, Berlin et al. 1975, p. 108.

In other respects, the ECtHR based the rejection of the binding effect on the fact that the ECHR itself did not embrace the competence to enact provisional measures, and such measures can only be gathered from the RP.⁶²⁸ But since the competence of the African Court can rest on its conventional basis – exactly like that of the IACtHR – and not merely on procedural rules, this also speaks in favour of a legally binding effect of its provisional arrangements.

The systematic interpretation of Art. 27 II does not lead to any other result. Whereas the position of Art. 41 ICJ Statute was cited – under Section III (“Procedure”) instead of Section II (“Competences”) – as an additional argument against the binding effect of its measures,⁶²⁹ the methodology of Art. 27 II makes the opposite conclusion obvious. The provisional measures are governed in the same provision as the content of the rulings. This leads to the conclusion that the same legal importance is to be attached to them.

Moreover, it is to be pointed out that the AfrCHPR also sees its provisional measures as obligating.⁶³⁰ And this is the case, although the Banjul Charter does not contain any corresponding provision; but the issuance of provisional arrangements is only based on Art. 111 RP. Moreover, Art 111 RP is so mildly formulated that at first glance a binding effect is not even self-evident, but merely a functional approach to justify it: “The Commission *may inform* the State party concerned *of its view* on the appropriateness of taking provisional measures to avoid irreparable damage being caused to the victim of the alleged violation.”⁶³¹ But the fact that this interpretation of the Commission remained uncontested on the part of the state surely was not due to their understanding, but was rather due to their non-cognizance. The Commission’s decision was at least greeted in the literature.⁶³² As welcome as this interpretation may well be, the Commission rendered less persuasive contextual work in order to substantiate their view.⁶³³

⁶²⁸ „In the absence of a provision in the Convention for interim measures an indication given under Rule 36 cannot be considered to give rise to a binding obligation on Contracting Parties.“, Cruz Varas vs. Sweden, judgement of 20 March 1991, Series A 201 para. 98.

⁶²⁹ Comp. *Jerome Elkind*, Interim Protection, A Functional Approach, The Hague, et al. 1981, p. 155 et seq.

⁶³⁰ The Commission assessed Nigerias non-compliance with a provisional measures as a breach of Art. 1 AfrCHPR; compare hereunto above p. 154.

⁶³¹ In fact, this softness equals the respective provisions of the United Nations Human Rights Committee (Art. 86). However, no binding effect is attached to the HRC’s provisional measures, comp. *Scott Davidson*, Procedure under the Optional Protocol, in: *same*, Alex Conte, Richardo Burchill (Eds.), Defining civil and political Rights: the Jurisprudence of the United Nations Human Rights Committee, Aldershot 2004, pp. 17-32, 27.

⁶³² *Gino Naldi*, Interim Measures of Protection in the African System for the Protection of Human and Peoples’ Rights, in: AHR LJ 2 (2002), pp. 1-10, 8.

⁶³³ The Commission commented this important step lapidaryly: „Rule 111 of the Commission’s Rules of procedure aims at preventing irreparable damage being caused to a complaint before the Commission.

On the other hand, the AfrCtHPR is in the advantageous position of being provided with a comparatively broad legal foundation for the binding force of its provisional measures. Therefore, just like the IACtHR, it should not even question the binding force of its provisional arrangements and characterise its claim of compliance in this manner.

IX. Procedural termination

As a rule, contradictory proceedings can be terminated on the part of the parties as well as through the judiciary authority. At the first opportunity, the protocol governs only the amicable settlement and lastly the promulgation of a ruling. All other forms of procedural termination – such as the withdrawal of complaint, an acknowledgement or the possibilities of the judicial deletion of a complaint upon factual abandonment of a complaint – are not addressed, and therefore are to be procedurally organised by the Court.

1. Amicable settlement

First of all, Art. 9 declares that the Court can work towards an amicable settlement between the parties. This settlement can be brought about in any procedural stage. The reference to an amicable settlement in a lawsuit appears to be somewhat out of place insofar as the violation of fundamental human rights is concerned. On the other hand, for instance, the amount of a compensatory sum for damages suffered is definitely an object that can be added as an appropriate solution for the complainants in the course of an amicable settlement.⁶³⁴ However, an individually negotiated compensation can be considered as insufficient insofar as a state is not willing to redress a conventional violation through unconventional law or an administrative practice. Therefore Art. 9 specifies that an amicable settlement only comes into consideration in conformity with the Banjul Charter.⁶³⁵

In a two-stage legal protection system, the responsibility of bringing about an amicable settlement through negotiations with the involved parties is normally exclusively incumbent

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. [...] That this is a violation of the Charter is an understatement." Comp. Communication No. 137/94, 139/94, 154/94, 161/97, para. 115 et seq., abgedruckt in: *Compilation des Décisions de la Commission Africaine des Droits de l'Homme et des Peuples*, Institut pour les Droits Humaines et le Développement (Hrsg), Banjul 2000, pp. 184 et seqq. The Commission did not, however, dismantle the (seeming) contradiction that although its findings and recommendations have no binding effect, their provisional measures still have to be obeyed to.

⁶³⁴ A. C. Kiss, *La Fonction de Conciliation*, in: HRJ 2 (1969), pp. 221-233, 225.

⁶³⁵ The IACHR has in Art 41 RP put it more vividly: „The Commission may terminate its intervention in the friendly settlement procedure if it finds that [...] any of the parties does not display the willingness to reach a friendly settlement based on respect for human rights.“

on the respective commission,⁶³⁶ since – in contrast to the Court – the human rights commissions are not juridical authorities, and the actual purpose of the amicable settlement consists of precisely avoiding a juridical dispute.⁶³⁷

In the African system, the parties involved in the dispute have two different authorities – the Commission as well as the Court – before which they have the possibility to seek an amicable settlement. But this may not initially result in any major consequences in a two-stage procedure, since the conciliatory responsibility still devolves upon the Commission: In fact, the main motivation for states to reach an amicable settlement is omitted as soon as the matter is pending before the International Court.⁶³⁸

On the contrary, the fact that this conciliatory element was nevertheless explicitly accepted in the judiciary proceedings before the AfrCtHPR testifies to a certain duplication of function within the protection system, which takes into account the fact that the two-stage as well as the single-stage protective process is provided for. In single-stage full judiciary proceedings it can be absolutely meaningful for antagonistic states to show willingness to cooperate, since the judicial ruling concerning a conventional violation can be avoided and a face-saving solution can be added to the legal dispute.

2. Behaviour of the parties

The procedural termination through behaviour of the parties – for instance, through formal withdrawal or mere abandonment of the complaint – is not governed in the protocol. This is why it must be taken into consideration by the Court within the scope of its standing orders. Since the parties involved in the dispute are unrestrictedly entitled to litigation, it has to be possible for them to autonomously decide on the further pursuit of a complaint. This always involves the risk of a possible unconventional influence of the adversarial states on the complainants. It will not always be possible in conventional bodies to examine whether their

⁶³⁶ Comp. Art. 48 I lit. f ACHR, Art. 28 lit. b ECHR (current version).

⁶³⁷ Comp. the judgement of the IACtHR in the Gallardo Case, Ser. A No. G101/81, para 24: „The Court lacks the power to discharge the important function of promoting friendly settlements, within a broad conciliatory framework, that the Convention assigns to the Commission precisely because it is not a juridical body.“, comp. also *Jo Pasqualucci*, Preliminary objections before the Inter-American Court of Human Rights: Legitimate Issues And Illegitimate Tactics, in: *VirgJIL* 40 (1999), pp. 1-114, 80 et seq. , *Hans Krüger/Carl Noørgaard*, Reflections concerning friendly settlement under the European Convention on Human Rights, in: FS Gérard Wiarda, Köln 1988, 329-335, 329; comp. concerning the legal questions in the Gallardo case and the jurisdiction of the IACtHR *Thomas Buergenthal*, The European and Inter-American Human Rights Court: Beneficial Interaction, in: FS Ryssdal, Köln et al. 2000, pp. 123-133, 127 et seq.; also: *Scott Davidson*, The Inter-American Human Rights System, Dartmouth 1997, p 143 et seq.

⁶³⁸ Comp. *Michael O'Boyle*, The Legacy of the Commission to the new Court under the eleventh Protocol, in: *EHRLRev* 3 (1997), pp. 211-228, 220 et seq.

decision actually rests on a free manifestation of will.⁶³⁹ However, the necessary admissibility of a unilateral procedural termination already follows from the fact that a procedure without the cooperation of the parties is only practicable under considerable difficulties. This is why it is also procedurally laid down in the European as well as the Inter-American system.⁶⁴⁰ In order to keep a procedure particularly worthy of litigation, the provisions provide that the procedural termination can be refrained from if general importance is attached to it.⁶⁴¹ This is why an appropriate configuration through the AfrCtHPR is self-evident.

3. Ruling

During the judgement of an international judicial authority, considerable importance is to be attached to its decision on the merits. The questions pertaining to how and in which manner their rulings came about, which contents they can have, how they take effect and above all how their effectiveness is secured provide decisive references to the body's possibilities of effect. The protocol governs this complex with the provisions of Articles 27-31.

a) Reaching a verdict

Commensurate with Art. 28 I, a ruling should be made within 90 days after conclusion of deliberations. This provision was first adopted at the Nouakchott Conference in order to take the principle of procedural acceleration into consideration.⁶⁴² None of the corresponding courts faces such a deadline. It is also doubtful that an effect of procedural acceleration actually ensues. For one thing, it basically sets a false point of departure for this purpose: the time-consuming judgment phase is not the mere execution of the ruling, but rather the decision-making. In turn, no deadline can be set on the basis of practical considerations and the unpredictability of the effort involved. For another thing, a deadline is always optional as long as its commencement is not stipulated, but lies in the discretion of the regulatory addressees. The "conclusion of considerations" mentioned by Art. 28 I is such a hardly fixable commencement of deadline. It is incumbent upon the Court to decide when considerations are concluded. This is why this deadline provision may hardly have any practical effects on the procedural duration.

⁶³⁹ However, in cases in which no amicable settlement has been reached, but the communication petitioner still did not attend the proceedings, the AfrCHPR has merely determined that the communication will be deleted from the register; for instance, compare the communications: 93/93; 108/93; 201/97.

⁶⁴⁰ Art. 37 ECHR, Art. 52 RP IACtHR, Art. 52 RP IACHR.

⁶⁴¹ Art. 37 II ECHR, Art. 64 RP ECtHR (judgement in default); Art. 52 RP IACtHR and Art. 52 RP IACHR, comp. *Scott Davidson*, *The Inter-American Human Rights System*, Dartmouth 1997, p 144.

⁶⁴² Report of the Secretary General on the Draft Protocol on the Establishment of an African Court on Human and Peoples' Rights, OAU/LEG/EXP/AFC/HPR/RPT (2), para. 43.

The ruling will be made through a majority decision of the chamber, in accordance with Art. 28 II. The protocol does not present a provision in case of parity. The IACtHR⁶⁴³ as well as the ECtHR⁶⁴⁴, but also other international judiciary authorities,⁶⁴⁵ provide the respective presiding judges with the then deciding vote. This rule will most probably be implemented in the rules of procedure of the African Court.

Art. 28 III expresses the matter of course that every ruling has to be justified. The importance of the reasons given for the judgement has been repeatedly referred to. If the tenor is essentially decisive for the parties involved in the dispute, the value of a ruling (in terms of international law) lies in its rationale. It reflects the legal views of the Court in a generalised manner so that it can garner importance beyond the actual proceedings.

In the event that a ruling does not reproduce the unanimous opinion of the judicature, Art. 28 VII provides the possibility for every judge to render a dissenting opinion or separate reasons for the judgment. Such a possibility is provided in virtually all international arbitral and judicial proceedings.⁶⁴⁶

In the Sunday Times lawsuit, the ECtHR explicitly opposed the objection that dissenting opinions weaken the authority of a judicial decision.⁶⁴⁷ But even if one would like to impute more persuasive power to a unanimous ruling than a controversial ruling through dissenting opinions⁶⁴⁸, it still must be noted that the possibility of a dissenting opinion entails considerable advantages. It is the continuation of the independence of the judiciary, and takes its authoritative claim into consideration. The individual judges must be given the opportunity

⁶⁴³ Comp. Art. 23 III IACtHR Statute.

⁶⁴⁴ Comp. Art. 23 I RP ECtHR.

⁶⁴⁵ Art. 55 II ICJ Statute, Art. 29 II ITLOS Statute.

⁶⁴⁶ Comp. Art. 66 II ACHR, Art. 45 II ECtHR, Art. 57 ICJ Statute, Art. 33 ITLOS Statute.

⁶⁴⁷ „Thirdly, the Government referred to their promise to introduce legislation amending the law of contempt of court and to the small majorities by which both Commission and Court arrived at their conclusions. However, these features are not relevant for the examination of the present claims: the Contracting States concerned are in any event under an obligation to adjust their domestic law to the requirements of the Convention and *no consequence in law attaches to the size of the majority by which*, in accordance with the relevant provisions (Articles 34 and 51 par. 2 of the Convention and Rule 20 par. 1 of the Rules of Court), *Commission and Court arrive at their decisions.*“, Sunday Times vs. United Kingdom, judgement of 6 November 1980, para 16.

⁶⁴⁸ For instance, *Georg Röss*, in: FS Mosler, p. 733, who states that the integrative ability of the ECJ is also attributed to the fact that *no dissenting votes* are permissible (see footnote 62 there); *Jörg Polakiewicz*, *Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte*, Berlin 1993, p. 353; *J.G. Merrills*, *The Development of International Law by the European Court of Human Rights*, Manchester 1988, p. 36. Dissenting: *Rolf Lamprecht*, *Richter contra Richter: Abweichende Meinungen und ihre Bedeutung für die Rechtskultur*, Baden-Baden 1992, p. 39, who comes to the following conclusion: “The fictitious unanimity of the traditional characterisation, but also any other decision both have authority in the sense of powers of self-assertiveness, even if they should come into existence merely with an outwardly visible narrow majority. Both must endeavour to assert authority in the sense of persuasive power.”

to express their legal opinion in the same manner as the majority of the judicature has expressed through the reasons given for the judgement. In addition, dissenting opinions provide insight concerning the essential contents of the deliberations, and thus substantially contribute to the understanding of a ruling and its rationale.⁶⁴⁹

Subsequent to the principle of public proceedings, Art. 28 V specifies that a reading is to be read out in public after the promulgation date has been duly announced to the parties to the dispute.

b) Content of the ruling

Art. 27 I formulates the possible contents of the ruling as follows: “If the Court finds that there has been a violation of a human or people’s right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.”

Thus said, the tenor of the ruling encompasses three elements: For one thing, the Court establishes whether a conventional violation is at hand. In this case, the ruling does not differ from the other courts of human rights or controlling authorities. This determinant portion of the decision is inseparably connected with the function of a control body⁶⁵⁰ – to monitor the compliance with the conventions⁶⁵¹. The determination of conventional adversity is an inevitable prerequisite for a more far-reaching contextual tenor.

The second essential content of the ruling can be a claim concerning reparation to be paid or appropriate compensation. The adversarial state can thus be adjudicated to fulfilment of a certain obligation vis-à-vis the complainant. Insofar as that is concerned, this portion of the

⁶⁴⁹ *J.G. Merrills: The Development of International Law by the European Court of Human Rights*, Manchester 1988, p. 34. See also the comments of the ICJ in the advisory procedure: Application for Review of Judgment No. 333 of the United Nations Administrative Tribunal, ICJ Reports 1987, p. 18 et seqq, 45, para. 49: “In order to interpret or elucidate a judgement it is both permissible and advisable to take into account any dissenting or other opinions appended to the judgment. Declarations or opinions drafted by members of a tribunal at the time of a decision, and appended thereto, may contribute to the clarification of the decision.” With regard to the development of the permissibility of dissenting opinions in ICJ proceedings, see *Edvard Hambro*, Dissenting and Individual Opinion in the International Court, in: *ZaöRV* 17 (1956), pp. 229-248. *Christoph Grabenwarter* states that the function of dissenting opinions before the ECtHR also had the task to elucidate that the legal system is the subject matter of the conventional procedure; compare *same*, Die Bedeutung der “Dissenting Opinion” in der Praxis des Europäischen Gerichtshofs für Menschenrechte, in: *JRP* 7 (1999), pp. 16-24, p. 18; *same*, Europäische Menschenrechtskonvention, Munich 2003, p. 109; *Luzius Wildhaber*, concurs, *same*, Opinions Dissidentes et concordantes de juges individuel à la Court Européenne des droit de l’Homme, in: *FS Valticos*, pp. 529-535, 529. However, this function of dissenting votes in the African system is not taken into account in light of the fact that the matter proceeds according to the doctrine of *nemo iudex in causa sua* (Art. 22).

⁶⁵⁰ Comp. Art. 63 I ACHR, Art. 41 ECHR.

⁶⁵¹ Comp. Art. 58 II AfrCHPR, Art. 50 ACHR, Art. 5 IV FP 1 IPbPR, Art. 13 I CERD, comp. *Katrin Weschke*, Internationale Instrumente zur Durchsetzung der Menschenrechte, Berlin 2001, pp. 22 et seq.

ruling is to be qualified as a “performance judgement”.⁶⁵² In contrast to the competences of the Commission, this is a remarkable advance.⁶⁵³ However, the performance judgement is widespread in the practice of the regional human rights regimes: the ECtHR as well as the IACtHR can specify payments through ruling.⁶⁵⁴ Within the scope of their performance judgements, both judicial bodies take into consideration not just the complainant’s material damage, but also immaterial damages.⁶⁵⁵ But in contrast to the ACHR, the ECHR only provides for special cases (commensurate with Art. 41) in which “the interstate right of those involved only [provides] imperfect reparation of a high contractually conclusive portion”. Such a restriction is also not foreseen for the AfrCtHPR. This exonerates it from a corresponding justification obligation with regard to the approval of compensation, which would represent another public denunciation of the participating states in addition to the mere conventional violation.

The orientation of the protocol towards Art. 63 I ACHR also becomes clear in the third possible ruling category. Like the IACtHR, the AfrCtHPR can also issue “appropriate orders” regarding how the determined conventional violation is to be redressed.⁶⁵⁶ The ECtHR is not entitled to such a competence within the scope of its rulings; it is restricted to the mere determination of a conventional violation. The ECtHR’s ruling may not include instructions or references as to how the involved state has to proceed with regard to the determined

⁶⁵² Comp. *Walter Schmidt*, *Die Wirkungen der Entscheidungen der europäischen Menschenrechtsorgane*, Zürich 1974 p. 119; *Hans Stöcker*, *Die Wirkungen der Urteile des Europäischen Gerichtshofs für Menschenrechte in der Bundesrepublik*, in: *NJW* 1982, pp. 1905-1909, 1908; *Michael Traßl*, *Die Wiedergutmachung von Menschenrechtsverletzungen und die deutsche Rechtssprechung*, Berlin 1993, p. 212; *Dieter Kilian*, *Die Bindungswirkung der Entscheidungen des Europäischen Gerichtshofs für Menschenrechte*, Mannheim 1993, pp. 99 et seq.

⁶⁵³ In particular, the Commission also recently endeavoured to take into account the need for compensation in their decisions. However, in light of its jurisdictional limitations, it is restricted to the mere reference within the scope of its concluding recommendations. Once the Commission had determined violations of conventional rights, it regularly flanked these determinations with comments such as “The Commission invites the Government to take all necessary steps to comply with its obligations under the Charter”, or “The Commission urges the Government to bring its laws in conformity with the provisions of the Charter”. In the Communication 218/98, the Commission called for the first time (and to date the only time) to compensate the victim, but left the amount open (“The Commission requests the Government of the Federal Republic of Nigeria to compensate the victims, as appropriate”). There are no findings available concerning the implementation of this recommendation, however.

⁶⁵⁴ Art. 41 ECHR, Art. 63 I 2 ACHR.

⁶⁵⁵ Comp. *Ulrich Zwach*, *Die Leistungsurteile des Europäischen Gerichtshofs für Menschenrechte*, Stuttgart 1996, pp. 122 et seqq., with references to findings of both organs on pp. 149 et seqq.

⁶⁵⁶ In the first drafts of the protocol this imitation was even more obvious. Art. 24 Nouackchott Draft was formulae identical with Art. 63 I ACHR: „The Court may also order, that the consequences of the measure or situation that constituted the breach of such rights be remedied and that fair compensation or reparation be paid or made to the injured party“. The Governments of Sudan and Ethiopia successfully pleaded for the deletion of this paragraph and argued that it had to be up to the respondent State party to implement the judgement.

conventional violation.⁶⁵⁷ On the other hand, after determination of a conventional violation, the AfrCtHPR is allowed to impose on the involved states through a ruling with detailed specifications, such as how the conventionality is to be restored. As a result, there is no direct influence on the governmental legal system or the act of state, and the rulings have no cassation effect. But the order to undertake concrete actions is pronounced. This goes far beyond the mere determination of a conventional violation or beyond the mere granting of a payment. As far as that is concerned, it appears legitimate to qualify the ruling of the African Court as a “forming judgment”. It arranges a contested legal relationship within the scope of what is possible under international law by establishing a direct and concrete obligation (under international law) for the addressees to internally implement the measures determined in the ruling. Such a far-reaching juridical competence is astounding if one takes into account the high degree of relative importance which state sovereignty assumes in the Court’s sphere of activity.

c) Effect of rulings

The decisions of an international judicial authority have an effect in two directions. For one thing, they are inherent in the effects on which the contracting parties have come to an understanding in the constitutional document – i.e. the legal effects for the parties involved in the dispute. But in addition to that such a decision also has a purely factual influence that can surpass the actual decision. The factual efficiency depends on various factors: First of all, this includes the authority of the court of decision, comprehensibility of the rulings, the unanimity of the adjudication, and naturally the will of the contracting parties to implement.⁶⁵⁸

aa) Legal effect

The legal effects of the Court’s rulings can be divided into formal and substantive aspects. Commensurate with Art. 28 II, the ruling is “final and not subject to appeal”. As a result, Art. 28 II assigns the ruling an effect which is described in domestic law as formal *res judicata* (legal force).⁶⁵⁹ Therefore the ruling is no longer commutable with legal remedies (appeals)

⁶⁵⁷ Georg Röss, Die europäische Menschenrechtskonvention und die Vertragsstaaten: Die Wirkungen der Urteile des Europäischen Gerichtshofs für Menschenrechte im innerstaatlichen Recht und vor innerstaatlichen Gerichten, in: Irene Maier (Ed.), Europäischer Menschenrechtsschutz: Schranken und Wirkungen, Frankfurt 1982, pp. 227-287, 234.

⁶⁵⁸ Comp. hereunto Herbert Mieser, On the Authority of Findings of International Institutions, in: Christoph Schreuer (Ed.), Autorität und internationale Ordnung, Berlin 1979, pp. 35-61, 44 et seqq.

⁶⁵⁹ Georg Röss, Die europäische Menschenrechtskonvention und die Vertragsstaaten: Die Wirkungen der Urteile des Europäischen Gerichtshofs für Menschenrechte im innerstaatlichen Recht und vor innerstaatlichen Gerichten, in: Irene Maier (Ed.), Europäischer Menschenrechtsschutz: Schranken und

and is protected in its existence. But the formal *res judicata* does not make the ruling irrevocable. That ensues from Art. 28 Section III, according to which a procedure can be resumed if new facts necessitate this.⁶⁶⁰

A successful resumption of proceedings breaks through the formal legal force, since it replaces the original decision through another decision, which is promulgated on the basis of complete or corrected findings of fact.⁶⁶¹

Art. 30 establishes the substantive *res judicata* of the ruling, in which case the provision obligates the contracting states involved in the dispute to comply with the ruling and to guarantee its timely implementation. The rulings of an international judicial body bind the involved states as subjects of international law. Their effects are thus also restricted to the international law level.⁶⁶² At the same time, the states are basically free in the selection of means for implementation of the ruling,⁶⁶³ but are responsible under international law for this implementation.⁶⁶⁴ Accordingly, multilateral agreements are frequently restricted – just like the ECHR – to specifying that international rulings are to be observed by the affected states.⁶⁶⁵ An exception to this is constituted by Art. 68 II ACHR, whereby the portion of the ruling specifies the compensatory payments to the affected state by declaring them to be immediately enforceable in accordance with nation-state enforcement law. It may well be doubted that this exception is more advantageous vis-à-vis the rule. The effectiveness of this provision namely depends on how and, if necessary, whether rulings can be enforced against the state machinery in the individual nations.⁶⁶⁶

Wirkungen, Frankfurt 1982, pp. 227-287, 231.

⁶⁶⁰ This possibility of resumption was adopted quite late in the protocol so that the legal force does not conflict with the actual legal situation; compare: Report of the Third Governmental Legal Experts Meeting on the Establishment of an African Court of Human and People's Rights, OAU/LEG/EXP/AFCHPR/RPT (III) Rev. 1, para 31.

⁶⁶¹ *Frank Schellenberg*, Das Verfahren vor der Europäischen Kommission und dem europäischen Gerichtshof für Menschenrechte, Frankfurt 1983, pp. 239 et seq.; also comp. *Karel Vasak*, La Convention européenne des Droits de l'Homme, Paris 1964, p. 185.

⁶⁶² *Hermann Mosler*, Judgements of International Courts and Tribunals, in: *Rudolf Bernhardt* (Eds.), Encyclopedia of Public International Law, Bd. III, Amsterdam et al. 1995, pp. 31-38, 32; *same* Supra-National Judicial Decisions and National Courts, in: *HICLRev* 4 (1980), pp. 425-451, 448; *Andrea Giardina*, La mise en oeuvre au niveau national des arrêts et décisions internationaux, *RdC* 165 (1979), pp. 233-344, 247 et seq.

⁶⁶³ *Andrea Giardina*, La mise en oeuvre au niveau national des arrêts et décisions internationaux, *RdC* 165 (1979), pp. 233-344, 248.

⁶⁶⁴ The ILC Draft on State Responsibility provided a special statutory provision for this kind of breach of international law in Art. 21: „There is a breach by a State of an international obligation requiring it to achieve, by means of its own choice, a specified result if, by the conduct adopted, the State does not achieve the result required of it by that obligation.“ The obligations resulting from judgements are such *obligation of result*, comp. *YBILC* 1980 Vol II (Part 2), p. 32.

⁶⁶⁵ Comp. i.e. Art. 94 I ChUN; Art. 46 I ECHR.

⁶⁶⁶ Compare *Thomas Buergenthal*, The Inter-American System for the Protection of Human Rights, in: *EuGRZ*

In objective terms, the substantive *res judicata* of a ruling undeniably applies to its tenor. The substantive *res judicata* of the mere determination of a conventional violation leads to introducing legally necessary steps for the affected state in order to redress the conventional violation. But it is by no means clear which immediate obligation a declaratory judgement entails.⁶⁶⁷

Therefore this obligation can be flanked through the “appropriate orders” which the Court can issue. The substantive *res judicata* also applies to them. Since the ruling itself is not capable of having an effect on the act of state in question, an international legal obligation ensues for performance of the legally required measures. And so the “appropriate orders” may restrict the fundamental freedom of choice of the states with regard to the implementation of the ruling.⁶⁶⁸ At the same time, this lead to an effectiveness of legal protection, since the implementation of the ruling can be monitored far better through the affected state than by means of mere determination of the conventional violation.⁶⁶⁹ In the same way, the granting of compensation increases as a portion of the tenor in substantive *res judicata*, which obligates the concerned states to performance.

It is firmly entrenched in international practice that immediate legal obligations arising from legal disputes cannot be imposed on states that have been involved in the dispute.⁶⁷⁰ The substantive *res judicata* commensurate with Art. 30 merely obliges the involved parties — i.e. it has a subjective *inter partes* effect. Commensurate with Art. 5 II, those involved in a dispute are – in addition to the complainant and appellee state – intervening parties, so that

11 (1984), pp. 169-189, 179. For instance, the Headquarters Agreement with Costa Rica contains a remarkable provision concerning the domestic effect of the IACtHR’s decisions: Commensurate with Art. 27 of the agreement, decisions of the Court and, if necessary, its presiding judges, have the same effect as those of the courts of Costa Rica as soon as they have been communicated to the responsible executive and judiciary bodies; compare *ibid*, printed in: AJIL 76 (1982), p. 240. Regarding this problem in general, compare *Mary Ellen O’Connell*, Prospects for Enforcing Monetary Judgements of the International Court of Justice in: VirgJIL 30 (1990); pp. 891-921, 895 et seqq.

⁶⁶⁷ *Georg Röss*, Die europäische Menschenrechtskonvention und die Vertragsstaaten: Die Wirkungen der Urteile des Europäischen Gerichtshofs für Menschenrechte im innerstaatlichen Recht und vor innerstaatlichen Gerichten, in: *Irene Maier* (Ed.), *Europäischer Menschenrechtsschutz: Schranken und Wirkungen*, Frankfurt 1982, pp. 227-287, 234; *D. Harris, M. O’Boyle, C. Warbrick*, *Law of the European Convention on Human Rights*, London 1995 p. 700. The ECtHR stated in *Marcks vs. Belgium* „[the judgement] leaves to the state the choice of the means to be utilised in its domestic system for performance of its obligation under Article 53.“ para. 58.

⁶⁶⁸ I.e. the IACtHR has declared a national criminal proceeding as invalid in a case against Peru and ordered a reform of the Peruvian military criminal law (*Castillo Petruzzi v. Peru*, judgement of 30 May 1999), comp. on the reaction of Peru footnote 361 above on p. 91.

⁶⁶⁹ Also *Nico Krisch*, The Establishment of an African Court on Human and Peoples’ Rights, in: *ZaÖRV* 58 (1998), pp. 713-726, 721.

⁶⁷⁰ Comp. already *Louis Delbez*, *Les Principes Généraux du Contentieux International*, Paris 1962, p. 135, who qualifies the *inter-partes* effect of *res iudicata* as the „grande règle de l’autorité relative de la chose jugée“ qualifiziert. Cop. also *Hermann Mosler*, *Supra-National Judicial Decisions and National Courts*, in: *HICLRev* 4 (1981), pp. 425-472, 454, 464.

they are also covered by the effect of the ruling.

bb) Factual effect — the significance under international law

Beyond the isolated case, the decisions of an international judiciary body can display effects which are not to be qualified as legal, but rather as factual.⁶⁷¹

Rulings have an orientation effect because the legal opinions expressed by a monitoring body assume a special significance for the interpretation by addresses of the applied provisions and standards.⁶⁷² *Wildhaber* even assumes that to a certain extent the “prejudicial structure participates in the obligation of the basic agreement under international law”,⁶⁷³ since the authority intended for conventional bodies in proceedings related to arriving at and concretising human rights includes the judgement that exceeds the elucidation of conventional obligations in the isolated case.⁶⁷⁴

The comments regarding the institutional and procedural portion provide various indicators which point out that the rulings of the AfrCtHPR can also have an effect in this direction. At least its rulings will be able to offer much more orientation than the concluding recommendations of the Commission.

First of all, its form plays a substantial role for the factual effect of an “institutional act”.⁶⁷⁵

Whereas the decisions of the AfrCHPR were provided as mere recommendations with no compliance claim, the protocol specifies (in Articles 28 I and 30) the factual authority of the judgment together with the legal aspects in which the rulings will be declared final and absolute. As a result, the legal opinions of the Court have the greatest possible claim to authority under international law.⁶⁷⁶

In other respects, the authority of the decision of an international institution essentially

⁶⁷¹ *Christoph Schreuer*, The Authority of international judicial practice in Domestic Courts, in: ICLQ 23 (1974), pp. 681-708, p. 695, who states that the effects of a finding „cannot be adequately perceived in terms of a dichotomy of binding and non-binding although such a concept of legal obligation is tempting in its apparent logical simplicity; it’s often misleading and does not reflect social realities.“

⁶⁷² *Georg Röss*, Wirkung und Beachtung der judgements und Entscheidungen der Straßburger Konventionsorgane, in: EuGRZ 23 (1996), pp. 350-353, 350.

⁶⁷³ *Luzius Wildhaber*, Erfahrungen mit der Europäischen Menschenrechtskonvention, in: Schweizerischer Juristenverein 112 (1979), pp. 316-387, 355.

⁶⁷⁴ Comp. auch *Christoph Grabenwarter*, Europäische Menschenrechtskonvention, Munich 2003, p. 118.

⁶⁷⁵ Comp. *Herbert Miehsler*, On the Authority of Findings of International Institutions, in: *Christoph Schreuer*, Autorität und internationale Ordnung, Berlin 1976, pp. 35-62, 46.

⁶⁷⁶ Compare also *Kéba Mbaye*, Les droits de l’homme en Afrique, Paris 1993, p.75, who states “L’efficacité du résultat dépend de la forme juridique que ce résultat emprunte. La forme la plus parfaite est certainement le jugement.” This applies irrespective of the question as to whether – in addition to the tenor – the explanations of the ruling will be encompassed by the legal force, since the explanations form the basis for the res judicata ruling. The factual effect of the rationale is therefore not directly linked to the legal.

depends on its level of familiarity and the public opinion.⁶⁷⁷ In contrast to the Commission procedure, the principle of public trial is applicable before the AfrCtHPR. The transparency makes the procedure not only more credible, but it also ensures that it will be transported in terms of content, and as a result the Court can definitely gain in terms of profile. If the Court manages to win over the general public, this would make a state action that diverges from its legal opinions appear unattractive for governments, since they would thereby oppose this public opinion.

However, the intensity of factual efficiency is not foreseeable. In addition to the contextual quality of the rulings, the fulfilment of the compliance claim of a ruling through its addressees is an essential element of the factual effect.⁶⁷⁸ In turn, this is also connected with the judicial enforcement competences of a Court. The more restricted these are configured, the more the decisions will be disregarded.⁶⁷⁹ The practice of the Commission has made this more than clear. Therefore an attempt was made in the protocol to secure the effectiveness of the judicial ruling.

d) Implementation control mechanisms

Three mechanisms are provided for this purpose: the public dissemination of its rulings, the implementation control through the Council of Ministers as well as a judicial reporting system.

aa) Public dissemination

Art. 29 I obligates the Court not only to promulgate the ruling to the parties involved in the dispute, but also to pass it on to the Commission as well as the member states of the AU. Once again, the fact that the greatest possible form of dissemination was selected is astounding. And so not only the ratifying parties, but all AU member states will be notified of the outcome of a procedure. The rulings will be read aloud in public and published so that they are perusable at any time. However, with the active routing of rulings the AU member

⁶⁷⁷ Ulrich Fastenrath, *Lücken im Völkerrecht*, Berlin 1991, p. 196; Herbert Miehser, *On the Authority of Findings of International Institutions*, in: Christoph Schreuer (Eds.), *Autorität und internationale Ordnung*, Berlin 1979, pp. 35-61, 54 et seq.

⁶⁷⁸ A classic example in this context is the fate of the Central American Court. In the second case adjudicated by the Court, Nicaragua rejected the implementation of the ruling. It terminated the agreement and thus brought about a quick end of the Central American Court. Compare Erich Kraske, *Der Mittelamerikanische Gerichtshof*, in: AVR 2 (1950), pp. 169-207, 187 et seqq; Manley Hudson, *The Central American Court of Justice*, in: AJIL 26 (1932), pp. 759-786, 785; Christian Tomuschat, in: *Berhnaard Mosler* (Eds.), *Judicial Settlement of International Disputes*, p. 315 et seqq.

⁶⁷⁹ Comp. Patricia Schneider, *Internationale Gerichtsbarkeit als Instrument friedlicher Streitbeilegung*, Baden-Baden 2003, pp. 153 et seq.

states will also be included in the work of the Court without their express will. This international publicity brought about by the AfrCtHPR increases the implementation pressure on the concerned governmental party.⁶⁸⁰ The fact that this point has been placed in the protocol, and – unlike in the ACHR and the ECHR – was not left up to the Court⁶⁸¹ once again bears witness to the importance attached to the public disclosure principle in the work of the AfrCtHPR.

bb) Ministerial implementation control

In other respects, it is the responsibility of the Conference of Heads of State and Government to monitor the implementation of the ruling, which is realised in accordance with Art. 39 II from the Conference of Ministers. The Committee of Ministers was abolished within the framework of the transformation process from the OAU to the AU. The Executive Council of Ministers of the Union (ECM) has taken over its responsibilities.

Due to concern that the Court's rulings could remain unheeded, the authors of the protocol (exceptionally) did not orient themselves towards the Inter-American regime – such a monitoring mechanism is not provided for there – in this connection, but rather towards the ECHR system. Art. 46 II ECHR provides that the Committee of Ministers of the Council of Europe monitors the implementation of the ECtHR's rulings.

Commensurate with Art. 10 of the Constitutive Act, the ECM is comprised of the foreign ministers or of other ministers or government officials of the member states. It regularly confers at least twice a year,⁶⁸² and also meets for extraordinary sessions at the request of a member and with the approval of a two-thirds majority.

Commensurate with Art. 13 II AC in conjunction with Art. 9 II lit. c RP ECM, the ECM is responsible for tasks which are delegated to it by the Assembly of Heads of State and Government. This includes the monitoring of the implementation of judicial rulings in accordance with Art. 29 II of the protocol (which anticipates this delegation). However, it is unlikely that the ECM itself executes (and does not delegate) this task. The implementation control possibly necessitates clear words – which are rarely selected in the circle of high-

⁶⁸⁰ Concerning publicity as an enforcement mechanism comp. *Nanette Dumas*, Enforcement of Human Rights Standards: An International Human Rights Court and Other Proposals, in: *HICLRev* (1990), pp. 585-608, 607; *Joseph Warioba*, Monitoring Compliance with and Enforcement of Binding Decisions of International Courts, in: *Max Planck UNYB* 5 (2001), pp. 41-52, 50 et seq.; very vividly also *David Weissbrodt*, *Maria Bartolomei*, The Effectiveness of International Human Rights Pressures: The Case of Argentina 1976-1983, in: *MinnLRev* 75 (1991), pp. 1009-1035, 1030 et seqq.

⁶⁸¹ The ECtHR does not send the executed rulings directly to the concerned third-party states. However, based on its RP the IACtHR also sends the rulings to the contracting states, Art. 57 VI RP IACtHR.

⁶⁸² Art. 8 I RP ECM.

ranking diplomats – to the concerned state. The Committee of Ministers of the Council of Europe also delegated its monitoring task arising from Art. 54 ECHR (current version) to its advisory body, the Directorate of Human Rights.⁶⁸³ And so if there was a reason for scrutiny, this would not be undertaken in the upper circles of diplomacy, but on a lower level. *Lamprecht* aptly summarised this: “Indeed, if there is a reason to doubt whether the measures taken by a state as a consequence of a Court judgement are pertinent or sufficient, there is little chance of such doubt being expressed by the representative of other states. This uncomfortable task is left to the Directorate of Human Rights.”⁶⁸⁴

A referral of this diplomatically precarious task is also practical from another point of view: It is by no means assured that a political body consisting of diplomatic representatives is even professionally qualified to review the legislative or administrative implementation of a ruling for its completeness.⁶⁸⁵

In accordance with Art. 21 CA, the ECM is supported by the Permanent Representatives Committee (PRC), an auxiliary body consisting of permanent representatives of the member countries. The ECM can delegate the task of implementation control to this committee commensurate with Art. 5 IV RP ECM in conjunction with Art. 4 I lit. c. RP PRC.⁶⁸⁶ In accordance with Art. 26 RP PRC, PRC decisions are not binding until acceptance through the ECM. And so the PRC itself could not conclusively determine whether a ruling has been implemented or not. Only the ECM is entitled to this competence.

In accordance with Art. 34 I RP ECM, such decisions can be promulgated in three different forms:

Regulations, which are binding for member states and immediately applicable. Directives, which are only binding with regard to the objectives to be achieved (the choice of the form and means are left up to the domestic agencies, however), and other decisions (recommendations, resolutions, opinions and so forth) which have no binding effect.⁶⁸⁷

The question regarding in which form the decisions are promulgated is essential for their

⁶⁸³ *D. Harris, M. O’Boyle, C. Warbrick*, Law of the European Convention on Human Rights, London 1995, p. 700.

⁶⁸⁴ *Peter Leuprecht*, The Protection of Human Rights by Political Bodies – The Example of the Committee of Ministers of the Council of Europe, in: FS Ermacora, pp. 95-108, 106.

⁶⁸⁵ *D. Harris, M. O’Boyle, C. Warbrick*, Law of the European Convention on Human Rights, London 1995, p. 702.

⁶⁸⁶ Alternatively, the PRC may set up its own committees and put them in charge with special tasks (Art. 5 I lit. u RP ECM).

⁶⁸⁷ As far as that is concerned, the ECM’s forms of decisions are conspicuously reminiscent of the Community institutions of the EU. Compare: Art. 249 EGV; also: *Thomas Oppermann*, *Europarecht*, 2005, p. 204 et seqq.; *Stefan Hobe*, *Europarecht*, p. 37 et seqq.

effectiveness. In fact, the non-compliance with regulations and directives can entail severe sanctions after confirmation through the Assembly of Heads of State and Government (Art. 32 II RP ECM in conjunction with Art. 23 CT).⁶⁸⁸ However, the non-compliance with other decisions is at least not legally capable of being sanctioned. Therefore, it is to be anticipated that implementation control acts will not be undertaken through the ECM in binding forms of handling. Otherwise the judicial ruling would experience such a political reevaluation that seems virtually out of the question.

It is doubted in the literature whether the monitoring of the implementation of rulings through the AU essentially contributes towards their compliance through the addressees. *Naldi* and *Magliveras* assume that the monitoring could be exhausted in the mere starting of a file.⁶⁸⁹ On the other hand, the experiences within the scope of the ECHR show that the political monitoring of implementation can be quite effective.⁶⁹⁰ The activities of the Committee with regard to the monitoring of implementation provide an impressive image of the interlocking of judicial controls with political enforcement. The Committee of Ministers perceives its task via the Directorate of Human Rights as a quasi “buffer institution” with extreme emphasis, and also does not shrink back from unequivocal opinions. Its interim resolution in the *Loizidou* case may serve as an expressive example, in which Turkey had initially rejected the implementation of a ruling. First of all, the Committee emphasised “that the failure on the part of High Contracting Parties to comply with a judgement of the Court is unprecedented”.⁶⁹¹ Further more, it declared “that the refusal of Turkey to execute the judgment of the Court demonstrates a manifest disregard for its international obligations, both as a High Contracting Party to the Convention and as a Member State of the Council of Europe”.⁶⁹² The Committee “in view of the gravity of the matter, strongly insists that Turkey comply fully and without any further delay with the European Court of Human Rights’ judgement of 28 July 1998.”⁶⁹³ It remains to be seen whether the AfrCtHPR will also experience such a political

⁶⁸⁸ In the event of non-compliance with decisions, Art. 26 II RP of the Assembly of Heads of State and Government provides for “denial of transport and communication with other Member States, and other measures of a political and economic nature to be determined by the Assembly”.

⁶⁸⁹ *Gino Naldi, Konstantin Magliveras*, Reinforcing the African System of Human Rights: The Protocol on the Establishment of an African Court of Human and Peoples’ Rights, in: NQHR 4 (1998), pp. 431-456, 452.

⁶⁹⁰ *Peter Leuprecht*, The Protection of Human Rights by Political Bodies – The Example of the Committee of Ministers of the Council of Europe, in: FS Ermacora, pp. 95-108, 104; *D. Harris, M. O’Boyle, C. Warbrick*, Law of the European Convention on Human Rights, London 1995, p. 702, who conclude that „[The] record of the Committee of Ministers [...] can be seen as more than satisfactory“.

⁶⁹¹ Interim Resolution DH (2000) 105 concerning the judgement of the European Court of Human Rights of 28 July 1998 in the case of *Loizidou* against Turkey vom 24. Juli 2000, Abs. VI.

⁶⁹² *Ibid.* Abs. VII.

⁶⁹³ *Ibid.* Abs. VIII.

strengthening through the ECM. At any rate, a look at the experiences of the IACtHR bears witness to the exact opposite: In its annual report, the IACtHR explicitly referred the General Assembly to the fact that Honduras rejected the implementation of the ruling in the Velasquez Rodriguez case, and retained the compensation awarded through the ruling.⁶⁹⁴ But this was not even mentioned with a word in the report which was adopted in the resolution of the General Assembly.⁶⁹⁵ The IACtHR also had to experience the lack of support on the part of the OAS in the Trinidad and Tobago case. Trinidad and Tobago disregarded provisional arrangements issued by the Court, which ordered the postponement of the enforcement of several death penalties until final decision on the compatibility of respective criminal proceedings with the ACHR.⁶⁹⁶ The General Assembly rejected any cooperation and – despite the protests of the IACtHR⁶⁹⁷ – did not even include the matter in its own agenda.⁶⁹⁸

cc) **Judicial reporting system**

As the final control mechanism, the protocol in Art. 31 specifies that the Court submits a report on its work of the preceding period to every ordinary session of the General Assembly. While doing so, it shall particularly refer to cases in which states have not implemented rulings of the Court.⁶⁹⁹ The IACtHR proceeds similarly in accordance with Art. 65 ACHR. By contrast, the ECHR only provides for the monitoring control through the Council of Ministers, but does not include any judicial reporting procedure.

⁶⁹⁴ Annual Report of the Inter-American Court 1990, pp. 85 et seqq.

⁶⁹⁵ This, however, was not mentioned in the Court's following annual report, comp.. Annual Report of the Inter-American Court 1991, p. 11.

⁶⁹⁶ James et al. Case vs. Trinidad and Tobago, Annual Report of the Inter-American Commission of Human Rights 1998, S 70.

⁶⁹⁷ Comp. the press announcement of the Court of 1 June 1999, CDH-CP 5/99: „Hemos notado con profunda preocupación que en la parte resolutive de las recomendaciones emitidas por la Comisión de Asuntos Jurídicos y Políticos y por el Consejo Permanente de la Organización a la Asamblea General en relación con el Informe Anual de la Corte correspondiente al año 1998, no se hace mención a la recomendación de la Corte antes mencionada.“

⁶⁹⁸ Also astounding in this connection is the decision of the Privy Council, Trinidad and Tobago's highest appellate court with seat in London, in which it is specified that the Court exceeded its competence, and that Trinidad and Tobago had acted in a lawful manner: “The Court's order of 25th May 1999 was made without jurisdiction and, insofar as it was an interim order pending further decision, was empty of consent”. Compare: Privy Counsel Appeal No. 31 of 1999, available at www.privacy-council.org.uk. With regard to the Privy Council institution, compare: *Aidan O'Neill*, Judicial Politics and the Judicial Committee – the Devolution of the Privy Counsel, in: MLRev 64 (2001), p. 604 et seqq.;

⁶⁹⁹ During the Third Conference of Experts, the Government of Sudan had pressed for a provision, according to which a state that had not undertaken the implementation of a ruling must be informed before the report is passed on to the General Assembly. However, the proposal was not answered. Compare: Report of the Third Governmental Legal Experts Meeting on the Establishment of an African Court of Human and Peoples' Rights, OAU/LEG/EXP/AFCHPR/RPT. (III) Rev. 1, para. 43.

X. Other provisions

The protocol contains only two final provisions. The ratification and the amendment procedure. However, two essential questions are not taken into consideration: the question pertaining to the presentation of possible reservations, and the question pertaining to possibility of termination. In the absence of any other contractual provisions, these questions are to be evaluated according to the VCLT.⁷⁰⁰

1. Termination

Termination clauses are provided for in the ECHR⁷⁰¹ as well as in the ACHR⁷⁰². If a corresponding provision is missing, such as in the protocol, a reciprocal termination commensurate with Art. 56 VCLT is only possible if all contracting parties want the termination despite the lack of a provision, or if a right of termination can be derived due to the nature of the agreement.

However, the *travaux préparatoires* is not an indication that a possibility of termination shall exist. Termination was not even a subject of discussion. In other respects, neither the Banjul Charter nor the African Charter on the Rights and Welfare of the Child or the Draft Protocol to the African Charter on the Rights of Women in Africa provide a termination clause. The question remains as to whether a right of termination can be derived due to the nature of the agreement. Listed by way of example in this connection are trade agreements and agreements which contain military assistance obligations.⁷⁰³ Agreements which go beyond the mere exchange of relations between the contracting parties and aim at bringing about the protection of a particular common interest are not to be attributed to this category, however.⁷⁰⁴ And so agreements with human rights content hardly offer any room for the assumption of an implicit unilateral right of termination.⁷⁰⁵ This is why termination is only permissible if all other

⁷⁰⁰ *Antonio Cassese*, International Law, Oxford 2005, p 170.

⁷⁰¹ Art. 65 ECHR, which for one thing provides for a minimum term of five years and a notice period of six months, and for another thing explicitly specifies that a termination has no effect on the ongoing proceedings.

⁷⁰² Compare Art. 78 ACHR, in which a five year minimum term (but no notice period) is specified. Ongoing proceedings are also left unaffected by a termination here.

⁷⁰³ Comp. *Ian Sinclair*, The Vienna Convention on the Law of Treaties, Manchester 1984, p. 186.

⁷⁰⁴ *Feist*, Kündigung, Rücktritt und Suspendierung von multilateralen Verträgen, p. 198; the *argumentum e contrario* rightly sees the exceptional character of free right of determination reinforced through the fact that many agreements expressly call for termination clauses; the states thus governed this possibility if they chose to do so, and in other respects it is assumed that there is no fundamental right of termination; compare also *Dahm, Delbrück, Wolfrum*, Völkerrecht, p. 718; *Anthony Aust*, Modern Treaty Law and Practice, p. 233 et seqq.

⁷⁰⁵ Comp. concerning the CCPR *Manfred Nowak*, CCPR Commentary, Kehl 1989, Introduction, No. 25 with further references.

contracting states approve it.

With the above-mentioned argumentation, the revocation of a declaration of acceptance under Art. 34 VI may also prove to be impermissible for individual and popular complaints under the competence of the Court. The IACHR had to answer precisely this question in a heretofore unique case. Peru wanted to withdraw its declaration of submission as a response to a procedure.⁷⁰⁶ But in its ruling the Court did not allow the mere revocation as an *actus contrarius*. In accordance with Art. 78, the ACHR provides for only the termination of the entire convention, but not the separate revocation of the declaration of acceptance. The ECtHR also publicly joined this perception.⁷⁰⁷ Since the protocol provides for neither the possibility of termination nor the revocation of the declaration of acceptance, such an action is not considered to be permissible.

2. Reservations

The presentation of reservations with regard to a set of agreements under international law is fundamentally permissible within the scope of Art. 19 VCLT, in which case narrower limits have developed for human rights agreements in the literature⁷⁰⁸ as well as in the judicature.⁷⁰⁹ This is connected with the *ordre publique* character of such agreements, which are essentially not particularly based on a reciprocal obligation of states, but an obligation vis-à-vis the convention community.⁷¹⁰ At any rate, the previous ratifying parties did not present any reservations, and thus serve as good examples for the future contracting states.

⁷⁰⁶ Castillo Pertuzzi v. Peru, judgement of 30 May 1999, Series C No. 52.

⁷⁰⁷ Compare the substantiation above. However, an incident in 1938 is to be referred to in this connection: Paraguay withdrew its declaration of submission under the jurisdiction of the statutes of the Permanent Court, but without terminating the statute. The Secretary General of the League of Nations informed all contracting parties to the statute which had submitted a declaration of submission. Only six states protested against Paraguay's action and did not recognise the withdrawal. Compare *Kelvin Widdows*, The Unilateral Denunciation of Treaties containing no Declaration Clause, in: BYIL 53 (1982), pp. 83-114, 97.

⁷⁰⁸ Comp. *Thomas Giegerich*, Vorbehalte zu Menschenrechtsabkommen: Zulässigkeit, Gültigkeit und Prüfungskompetenz von Vertragsgremien, in: ZaöRV 55 (1995), pp. 713-777, 717; *Bernhard Graefrath*, Vorbehalte zu Menschenrechtsverträgen – neue Projekte und alte Streitfragen, in: HuV 9 (1996), pp. 68-75, 70 et seq.; *Monika Bauer*, Vorbehalte zu Menschenrechtsverträgen, Munich 1994, pp. 74 et seqq. Especially on the reservation of reciprocity *Francesco Pausi/Catherine Sevcenko*, Treaty Reservations and the Economics of Article 21 (1) d of the Vienna Convention, in: BerkJIL 21 (2003), pp. 1-25, 20 et seqq.

⁷⁰⁹ Comp. *Catherine Redgewell*, Universality of Integrity? Some reflections on Reservations to General Multilateral Treaties, in: *Scott Davidson* (Ed.), The Law of Treaties, Aldershot 2004, pp. 231-282, 250; *Thomas Giegerich*, Treaties, Reservations, in: *Rudolf Bernhardt* (Eds.), Encyclopedia of Public International Law, Bd. IV, Amsterdam et al. 1995, pp. 965-980, 976 et seqq.

⁷¹⁰ The Human Rights Committee stated in a General Document the situation: „Such treaties [...] are not a web of inter-State exchanges of mutual obligations, They concern the endowment with individuals with rights“ CCPR/C/21/Rev.1/Add.6 (General Comment), para. 17; vgl. Antonio Cassese, International Law, Oxford 2004, p 175; *Bernhard Graefrath*, Vorbehalte zu Menschenrechtsverträgen – neue Projekte und alte Streitfragen, in: HuV 9 (1996), pp. 68-75, 70 et seq.

3. Ratification provisions

Commensurate with Art. 34 I, the protocol is only available to contracting states of the Banjul Charter for signature and ratification. This provision is inevitable, since the protocol supplements the Banjul Charter and thus cannot be ratified on an isolated basis. But since all AU member states have ratified the Banjul Charter, the circle of potential contracting states corresponds to all member states of the AU.

However, the provision is vague under consideration of the fact that (in accordance with Art. 5 I lit. e) African IGOs can also present cases to the Court. They are not taken into account in the ratification provisions – in other respects, no more than in the drafting of text in all other provisions, which address only states or contracting states; for instance instead of addressing “High Contracting Parties”. At any rate, since the Banjul Charter is also not technically prepared for the accession of IGOs, a special accession protocol would have to be adopted in this connection.⁷¹¹ But this could have been avoided – at least for the protocol – with the right choice of wording and the consideration of IGOs as possible ratifying parties.

Multilateral agreements usually provide that the contractual documents are to be submitted to a depositary agency, which keeps them in safe custody.⁷¹² The protocol (Art. 34 II) has entrusted the General Secretariat of the OAU – or its successor respectively, the AU Commission – with this responsibility.

Art. 34 III specifies the minimum number of ratifications (15) which the protocol allows to be enacted. The number of necessary ratifications was a controversial topic during the preliminary works to the protocol. The original draft only provided for 11 ratifications (Art. 31 III Cape Town Draft). During the Nouakchott Conference, Tunisia and Algeria vehemently advocated adopting a two-thirds majority of the OAU members. According to this proposal, the required number of ratifications would have amounted to 36. Nigeria called for at least half of the OAU members, i.e. 27 ratifications.⁷¹³ Such a provision would have indefinitely prolonged the anyhow sluggish ratification process. The protocol would have been predestined as a “stillbirth” with the acceptance of these amendments. The arguments from

⁷¹¹ With regard to the necessary content of such an accession protocol in relation to the European system, compare *Heribert Golsong*, in: *EuGRZ* 6 (1979), p. 73 et seqq.; compare also *Christoph Grabenwarter*, *Europäische Menschenrechtskonvention*, Munich 2003, p. 41 et seqq.; *Sebastian Winkler*, *Der Beitritt der Europäischen Gemeinschaften zur Europäischen Menschenrechtskonvention*, Baden-Baden 2000, p. 46 et seqq.

⁷¹² *Shabtai Rosenne*, *Treaties, Conclusion and Entry into Force*, in: *Rudolf Bernhardt* (Eds.), *Encyclopedia of Public International Law*, Bd. IV, Amsterdam et al. 1995, pp. 932-935, 934.

⁷¹³ *Comp. Report of the Secretary General on the Draft Protocol on the Establishment of an African Court on Human and Peoples' Rights*, OAU/LEG/EXP/AFC/HPR/RPT (2), para. 48.

Nigeria and Tunisia for their proposals can also be described with good reason as flimsy: the agreement is “too important to require a lesser number”.⁷¹⁴ Nigeria voted for a greater number of ratifying parties “to make the Court more credible”.⁷¹⁵

Since no consensus was able to be reached, the General Secretariat informed the Assembly about the other contractual practices within the framework of the OAU, which was not able to predetermine a clear line, however. The required number of ratifications of the 17 agreements concluded within the framework of the OAU ranged from nine to two-thirds of the member states.⁷¹⁶ All other delegations also let it be known that they would not accept a greater number than 15. Since no consensus was able to be reached, the now valid version was adopted in the consensus procedure. Nigeria and Tunisia presented their reservations to the protocol.

The ratification of the protocol has proceeded much slower than hoped for after the signing of the protocol. The protocol has been available for signature since the end of the 34th Session of the OAU’s Heads of State and Government on 10 June 1998. Up until today, 35 states have signed; but the required quorum was only reached in December 2003.⁷¹⁷ The protocol entered into force on 25 January 2004.

Commensurate with Art. 34 III, the entry into force is planned for 30 days after deposition of the 15th ratification or accession document. With the introduction of a delay period after deposition of the required number of ratification documents, the depositary agency will be given the possibility to govern in advance the administrative matters of entry into force with regard to multilateral agreements.⁷¹⁸ Since a subsequent accession of a state does not constitute any high administrative expenditure, the protocol also enters into force for the acceding state on the direct date of the deposition of the ratification document (Art. 34 IV). The Commission president informs all AU member states about the protocol’s entry into force (Art. 34 V).

The provision on the declaration of acceptance pertaining to the Court’s jurisdiction for individual and popular actions was also incorporated in the ratification provisions. Together

⁷¹⁴ Loc.cit.

⁷¹⁵ Third Government Legal expert Meeting on the Establishment of the African Court on Human and Peoples’ Rights, OAU/LEG/EXP/AFCHPR/RPT.(III) Rev.1, para 34.

⁷¹⁶ Comp. Report of the Secretary General on the Draft Protocol on the Establishment of an African Court on Human and Peoples’ Rights, OAU/LEG/EXP/AFC/HPR/RPT (2), para. 50.

⁷¹⁷ Status of Signature/Ratification/Accession – OAU Treaties, DOC/OS (XXIX)/INF.33.

⁷¹⁸ *Shabtai Rosenne*, Treaties, Conclusion and Entry into Force, in: *Rudolf Bernhardt* (Eds.), *Encyclopedia of Public International Law*, Bd. IV, Amsterdam et al. 1995, pp. 932-935, 935; *Anthony Aust*, *Modern Treaty Law and Practice*, Cambridge 2000, p. 135.

with the ratification, or at a later point in time, the contracting parties can submit an appropriate declaration of acceptance to the Commission presidents (Art. 34 VI). In accordance with Art. 34 VII, only the contracting parties will be notified of this submission. Out of the previous ratifying parties, only Burkina Faso has submitted a declaration of acceptance up to now.

4. Amendments

Amendment applications can be submitted to the AU Commission from the contracting parties (Art. 35 I) as well as from the Court (Art. 35 II). The General Assembly can adopt these amendment proposals with a simple majority decision, after all contracting states have been informed and the Court has had an opportunity to comment in the event of an amendment application from a contracting state.

According to international contract law, adopted amendments only take effect for the parties which have accepted the amendments.⁷¹⁹ This ensues from Art. 35 III, which insofar as that is concerned, merely reproduces international law. But in addition to that, Art. 35 III declares that the amendment enters into force for any contracting state that notifies the AU Commission of its declaration of acceptance. This provision has to be described as a failure. In fact, it can lead to a situation in which only very few contracting states – should the occasion arise, also only one – are bound to the amendment.⁷²⁰ Depending on the extent of the contractual amendment, this can lead to a disproportionately high expenditure for the Court, since it would have to observe the corresponding amendments in relation to the pertinent contracting state; whereas in other respects the old contractual structure would have to be applied. If several amendments were to be resolved, there would be a risk that the contractual structure breaks down completely. But in this case it rather concerns a technical inaccuracy, which will probably not have any influence on the Court's working method. This formulation was the practice with multilateral agreements within the framework of the AU, and up until today has not led to discernible difficulties due to lack of purview.

⁷¹⁹ Art. 40 IV i.c.w. 30 IV lit. b VCLT, comp. *Wolff Heintschel von Heinegg*, Die völkerrechtlichen Verträge als Hauptrechtsquelle des Völkerrechts, in: *Knut Ipsen* (Ed.), *Völkerrecht*, Munich 1999, pp. 92-179, 138.

⁷²⁰ For instance, this is why Art. 76 ACHR specifies a two-thirds majority of the contracting states in order to lend validity to an amendment.

5. Chapter: Results and outlook

The preceding analysis of the protocol has served the purpose of exploring its normative content in order to show the potential efficacy of the AfrCtHPR. This took place on the basis of the protocol's respective provisions. This analysis also enables the new African system to be examined in the context of regional human rights protection, as it is characterised through the already existing protection mechanisms. For this purpose, the system-determining procedural and institutional components of the regional pacts will now be outlined coherently in order to elucidate the significant differences of the new African system in comparison with other regional mechanisms.

I. Classification of the protective procedure

Three phases can be distinguished in all judicial procedures: the initiation phase, the actual course of procedure and adjudication. These stages are given varying importance for the appraisal of the efficacy of a protective entity, whereby the greatest importance is to be attributed to the realms of procedural initiation and procedural termination, since they decide on the issues regarding who can even have recourse to the entity, and which possibilities have been granted to the entity within the scope of law enforcement.

1. Procedural initiation

States appear as complainants before the IACtHR if they file a complaint against another contracting state. First of all, they have to file a complaint before the IACHR, but they can independently – i.e. without the involvement of the IACHR – make a complaint pending. In addition, only the IACHR can initiate a judicial protective procedure by transferring a procedure (that it has been concluded) to the Court. For one thing, contracting states are in turn authorised to file a complaint before the IACHR; but on the other hand, individuals are also entitled to do so. Therefore individual complaints can be brought before the IACtHR exclusively via the IACHR.

Nevertheless, the ACHR itself does not provide for any compulsory jurisdiction of the IACtHR. On the contrary, it requires an additional declaration of acceptance on the part of the contracting states through which the jurisdiction is to be recognised (Art. 62 ACHR). In relation to state complaints, this also applies to the jurisdiction of the IACHR, whose quasi jurisdiction also has to be recognised separately (Art. 45 I ACHR). Therefore a governmental complainant can only bring a matter before the Court if the appellant state has submitted declarations of acceptance to both entities. Lacking submission under the IACHR leads to the

fact that an obligatory preliminary procedure cannot take place, and therefore the complaint cannot even reach the Court. Lacking submission under the jurisdiction of the IACtHR results in the fact that the protective procedure ends before the IACHR, and can no longer be authoritatively adjudicated.

However, individual complaints before the IACHR are not possible without additional recognition of competence. This is noteworthy, since individual complaints also constitute the vast majority of pending procedures in the Inter-American system⁷²¹, and therefore the purpose pursued with a declaration of acceptance – curbing the quasi-judiciary control through the IACHR – comes up empty-handed if it is restricted merely to the extremely rare state complaints (such as through Art. 45 I ACHR).

The European system took a very similar approach as the basis for its original version, which (as the oldest regional human rights protection system) was to a certain extent the inspiration for the American system. The ECtHR (under the current version of the ECHR) could also only be applied to by states and the European Commission of Human Rights (Articles 44, 48 ECHR, current version).

Complaints were able to be brought before the ECHR from state parties as well as from individual citizens. Just like in the Inter-American system, individuals received access to judicial protective procedures only through the intervention of the Commission. But unlike the Inter-American system, the European counterpart raised a double jurisdictional barrier — not for state complaints, but for individual complaints. The jurisdiction of the ECHR⁷²² as well as the jurisdiction of the ECtHR⁷²³ were only established through submission of an appropriate declaration of acceptance. That meant the states could accede to the ECHR, but the validity of the control system – at least for the virtually solely relevant realm of individual complaints – was for the most part precluded.⁷²⁴

⁷²¹ As a matter of fact, there has not even been a single State complaint until this very day.

⁷²² Art. 25 I ECHR (current version).

⁷²³ Art. 46 ECHR (current version).

⁷²⁴ In the end, all member states recognised the decisional competences of the ECHR and the ECtHR, and since 1993 it has been a ‘political compulsory exercise’ – for states which want to join the Council of Europe – to join the ECHR, and to comprehensively recognise the control system: “Such accession presupposes that the applicant country has brought its institutions and legal system into line with the basic principles of democracy, the rule of law and respect for human rights. The people’s representatives must have been chosen by means of free and fair elections based on universal suffrage. Guaranteed freedom of expression and notably of the media, protection of national minorities and observance of the principles of international law must remain, in our view, decisive criteria for assessing any application for membership. An undertaking to sign the European Convention on Human Rights and accept the Convention’s supervisory machinery in its entirety within a short period is also fundamental. We are resolved to ensure full compliance with the commitments accepted by all member States within the Council of Europe”, comp. Vienna Declaration of 9 October 1993, available on www.coe.int.

The access of the individual to the judicial control mechanism was only granted with entry into force of the 9th Supplementary Protocol to the ECHR for states which had ratified the additional protocol. The individual only garnered unrestricted capacity to be a party to legal proceedings before the ECtHR with entry into force of the 11th Supplementary Protocol.

Based on this background, if one considers the legal fundamentals of the AfrCtHPR, considerable differences to the two other regional systems are conspicuous in the procedural initiation stage. The most important difference lies in the provision of Art. 5, which enumerates those entitled to lodge complaints. As in any regional system, this includes the contracting states as well as the AfrCHPR. But a decisive aspect at this point is that the jurisdiction of the AfrCtHPR is also open to individual and popular complaints.⁷²⁵ Of course, this presupposes a separate jurisdictional commencement through presentation of a declaration of acceptance commensurate with Art. 34 VI, but this circumstance – unlike in the two corresponding regional packs – shall not prove to be a long-term obstacle, due to the following considerations:

First, the quasi-jurisdiction of the AfrCHPR for individual complaints (in the terminology of the Banjul Charter: “other communications”) is already established with the ratification of the Banjul Charter, and requires no further declaration of acceptance through the contracting states. And so individuals can initiate a complaint procedure before the AfrCHPR at any time; this entity can then transfer the procedure to the AfrCtHPR. This corresponds to the legal situation under the ACHR. But there is a fundamental difference to the ACHR as well as the ECHR (current version): No further declaration of acceptance on the part of member states is required for the transfer of the complaint through the AfrCHPR to the regional Court, since the restriction rule of Art. 34 VI only pertains to direct complaints through individuals and NGOs. For complaints from states and the AfrCHPR, the mere ratification of the protocol establishes the *ratione personae* competence of the AfrCtHPR. Ratifying parties to the protocol can thus no longer be protected against transferred individual communications. As a result, the AfrCHPR obtains a catalyst effect which allows the Court to adjudicate over individual complaints, without the appellee state having to render a declaration of acceptance concerning individual complaint procedures. This difference may have far-reaching repercussions, since it was a long way for the IACtHR and the ECtHR until the first individual complaint had cleared the various jurisdictional hurdles. Insofar as that is concerned, the African system, which lagged behind in the international comparison until the

⁷²⁵ Art. 5 III.

establishment of the AfrCtHPR, was further developed with remarkable progress, and as a result has left the ACHR and the ECHR (in its original version) behind with regard to the procedural initiation.

2. Procedural Process

While the material handling of the complaint goes on in front of all courts of human rights relatively uniformly, a noteworthy procedural distinction can be found in the scope of the admissibility requirements which on the one hand serve as a filter for the respective regional court, on the other hand however depending on the legal set-up also complicate the claim to legal help and thus protect the treaty states from legal examination of their acts of state. Referred of here is the admissibility requirement of the obligatory completion of a commission procedure prior to a court procedure.

Before the IACtHR, which anyway can only be accessed by the IACHR and the treaty states, the completion of a preliminary proceeding through the IACHR is an inalienable admission criteria, even if the states involved waive this procedure. Therefore, the complaint without prior commissional procedure will be dismissed as inadmissible. The same is true for the former regulations of the ECHR: Art. 47 ECHR (current version) constituted the completion of the commission process as an indispensable requirement for calling up the ECtHR.

The case is different under the new Banjul system. State claimants have, in contrast to the ACHR and the ECHR (current versions), a direct right to file a complaint to the Court without previous invocation of the AfrCHPR. The protocol however does not leave it with this – in view of the state complaints which are hardly to be expected almost emerging negligence – simplified process. Also individual claimants profit from this functional independence of the two protective procedures. In order to initiate a complaint before the AfrCtHPR as an individual, the appeal to the AfrCHPR is necessary as long as the involved state party has not submitted its declaration of acceptance according to Art. 34 VI and thus opened the competence *ratione personae* of the AfrCtHPR for individuals. The completion of this commission process, however, is not listed in the protocol as compulsory and therefore dispensable. That has the advantage that the AfrCHPR can forward a procedure at its own discretion at any time to the AfrCtHPR and thus if necessary can function quasi as an acceptance office for the AfrCtHPR, which merely catalyses the court procedure. Laying a claim before the AfrCHPR is a moot issue for individuals as soon as they have the *locus standi* before the Court through corresponding declarations of acceptance, since in the protocol also no commissary preliminary process is fixed as a requirement for admission for an individual complaint as well as for state complaints.

Also this modification of the international standard, the renouncement of a prior commission proceeding thus of an access restriction which is time and cost intensive clarifies the progressiveness of the system change in the African human rights protection.

3. Procedural termination

In the procedural termination phase, the cardinal question arises when terminating by verdict. It concerns both, the content and the method of implementation, in order to ensure that the judgement is being given effect.

The competence to assess a violation of the convention is common to all human rights Courts.⁷²⁶ It is then the spirit of a judiciary control function and a condition precedent for more comprehensive content of the rulings. Besides this declaratory part, all verdicted states can also have obligations to perform imposed upon them that are aimed at the compensation of the complainant for the injustice suffered.⁷²⁷ For judgments passed in action for performance, however, the ECtHR is limited to cases in which the “internal law of the High Contracting Party concerned allows only partial reparation to be made”.⁷²⁸ This limitation affects neither the IACtHR nor the AfrCtHPR. The legal options of ECtHR end with this declaratory ruling and judgement passed in action for performance. The IACtHR, on the other hand, is still entitled to arrange by ruling “that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied”.⁷²⁹ Thus the IACtHR can, beyond the recognition of simple monetary compensation, also arrange the concrete remedy of consequences by the state opposing the claim. The arrangement competence of the AfrCtHPR, on the other hand, exceeds not only that of the ECtHR, but also of the IACtHR. It is under obligation “[to] make appropriate orders to remedy the violation [...]”.⁷³⁰ Thus, the AfrCtHPR is not limited to the aspect of remedy of the consequence as is the IACtHR,⁷³¹ but rather can issue orders that are aimed at correction of the violation of rights as such. Thus the AfrCtHPR is entitled to largely dictate the domestic implementation of the adjudicated

⁷²⁶ Art. 63 I ACHR; Art. 41 ECHR; Art. 50 ECHR (current version); Art. 27 I.

⁷²⁷ Art. 63 I ACHR; Art. 41 ECHR; Art. 50 ECHR (current version); Art. 27 I.

⁷²⁸ Art. 41 ECHR; Art. 50 ECHR (current version).

⁷²⁹ Art. 63 I ACHR.

⁷³⁰ Art. 27 I.

⁷³¹ In legal practice, however, the IACtHR exceeds this limitation and, among other things, organizes implementation measures that go beyond pure remedy of consequences. In the case of *Alochoetoe vs. Suriname* (Series C No. 15), for example, IACtHR has, in addition to the promise of pecuniary compensation, ruled that a school and a hospital be established in order to ensure that families of victims killed by Governmental troops will continue to be provided for in future. It also ordered Suriname to establish a foundation for the compensation amount to ensure the money is used usefully for the families of the victims and distributed as needed.

obligations. Also, in this respect, the AfrCtHPR is superior in competence to its two regional sister institutions.

The competence to pronounce a judgement, however, only describes a partial aspect of the power of a judiciary organ. Equally essential are the mechanisms that ensure that the rulings are actually carried out. The legal force of the rulings⁷³² and the obligations of the concerned member states to carry them out⁷³³, as conventionally anchored in all systems, are not sufficient in light of the international enforcement deficit. All conventions therefore have provisions made for implementation controls, but these appear to be arranged differently: the IACtHR signs with sole responsibility for the supervision of the ruling enforcement. It is bound and at the same time limited to inform the OAS of the cases in which a judged member state has not met its obligation of enforcement in its annual reports from the general assembly.⁷³⁴ The supervision of the ruling of the ECtHR, in contrast, takes place on the political level by the Minister Committee.⁷³⁵ In contrast to the regulations of the ACHR, there is no provision for an individual follow-up system for the ECtHR.

For the rulings of the AfrCtHPR, both approaches are combined: the Minister Council of the AU (EMC) is given the task according to Art. 29 II to ensure the ruling is enforced by the convicted contractual state. At the same time, the AfrCtHPR is obliged to present a report to the annual general assembly of the AU, which must give information as to whether a convicted state has not met its obligations of implementation. This is where the special nature of the African system lies. The enforcement of the ruling is not only supervised by a political instance; the Court itself is substantially involved in the enforcement control. This supervision mechanism by the ECM on the one hand and the Court on the other should make it significantly difficult for the ECM to allow breaches of contract to go unmentioned in favour of diplomatic considerations or not be pursued to the full extent. In its supervision, the ECM must constantly expect the Court to submit a different assessment of the state of implementation to the general assembly. The supervision control by the Court should therefore also have an objectifying effect on the work of the ECM and make its supervision more effective if it does not want to see it subject to the reproach of the AfrCtHPR that it is not fulfilling its supervisory duty. Inasmuch, the AfrCtHPR does not only supervise the actual implementation by the convicted member states, but also the supervisory function of the

⁷³² Art. 44 ECHR; Art. 52 ECHR (current version); Art. 67 ECHR; Art. 28 II.

⁷³³ Art. 68 I ACHR; Art. 46 I ECHR; Art. 53 ECHR (current version).; Art. 29.

⁷³⁴ Art. 65 ACHR.

⁷³⁵ Art. 54 ECHR (current version); Art. 46 II ECHR.

ECM. This interlacing of the protection systems sounds convincing at least “on paper”, and is certainly advantageous in comparison to the more restrictive methods of ruling supervision of the IACtHR and the ECtHR. One may hope that even convicted contractual states can be convinced of this, yet it appears in no way assured in light of the so far widespread resistance to implementation relating to recommendations from the commission.

II. Institutional classification

While the institutional scope of the AfrCtHPR largely follows the example of the IACtHR, the contractual protection institutions AfrCHPR and AfrCtHPR have a unique relationship to each other.

1. On the institutional scope of the AfrCtHPR

With the modification of the ECtHR by the 11th Supplementary Protocol, the European human rights protection system has left the traditional path of the dual approach of the protection system and introduced a full-time court for the protection of human rights that is undoubtedly the most advanced of its kind. Therefore, only the ECtHR in its original form is comparable with the institutional scope of the AfrCtHPR. Nevertheless, specific organizational elements of the ECtHR are not found in the protocol. Instead, the organizational regulations for the AfrCtHPR show a distinct orientation to the ACHR. While the number of judges in the ECtHR is the same as that of the contractual states of the Council of Europe, only eleven judge positions are provided for in the AfrCtHPR, which in proportion to the number of the states in the parent organization is equivalent to the IACtHR, which has seven judges. From this follows the next similarity of the two Courts of Justice, which distinguishes them from the original ECtHR: the large number of judges with the ECtHR led to it being divided in different chambers,⁷³⁶ while both the IACtHR and the AfrCtHPR are intended as one-chamber courts.⁷³⁷ Also, the tenure of office for African judges follows the example of IACtHR with only six years,⁷³⁸ where nine years have been prescribed for judges on the ECtHR.⁷³⁹ Likewise, the ACHR is equivalent to the form of the protocol on the selection of judges. While the ECHR almost entirely does away with this field of regulation,

⁷³⁶ Art. 43 ECHR (current version).

⁷³⁷ Art. 56 ACHR; Art. 23.

⁷³⁸ Art. 54 I ACHR; Art. 15.

⁷³⁹ Art. 40 I ECHR (current version).

the ACHR and the protocol specify the modalities of selection in detail.⁷⁴⁰ What is remarkably advanced in this context, however, is the stress of the protocol on the ensuring of gender equality both in the nomination and the selection process.⁷⁴¹

2. The relationship of the commission to the Court

The relationship of the human rights commissions to the respective courts of human rights significantly characterizes the protection system and the possibilities of its development. While a clear, yet rigid relationship between the two protective institutions underlies both the ACHR and the ECHR (current version), the protocol appears more nebulous, yet also more flexible in this regard.

This becomes clear when one looks at the procedural law function of the IACHR and the former ECHR. This is, or was, limited to performing the preliminary proceedings before the court procedure and, where necessary, to the forwarding of claims to the Court. The commissions should primarily be trial courts and conduct an initial legal appraisal of the claim. At the same time, the commission procedure has a conciliatory element to it, since it is aimed at bringing about an amicable settlement. These functions of the commissions find their procedural nature in the strict necessity of their pre-trial use as an admissibility criterion for legal proceedings before the court. Only a successfully concluded commission procedure opens the way to the Court, the consequence being an immanent interweaving of both bodies, which is intractably anchored in the convention. While the multi-phased nature of the protection system resulting from this leads to a clear distribution of responsibility and duties, it also leads to considerable procedural redundancy,⁷⁴² thus hindering a dynamic development of the system. This becomes particularly clear if one bears in mind that the institutional complexity of the former ECHR has been seen as a significant inhibiting factor in the effectiveness of the European protection system,⁷⁴³ which could only be eliminated by completely reforming the ECHR.

If one looks at the specifications of the protocol for the AfrCtHPR, one sees a completely different picture, which leaves all possibilities of development open. In the new protection system, both bodies – the AfrCHPR and the AfrCtHPR – work alongside and entangled with

⁷⁴⁰ Art. 53 ACHR; Art. 12, 13, 14.

⁷⁴¹ Art. 12 I, 14 II.

⁷⁴² Comp. *Scott Davidson*, *The Inter-American Human Rights System*, Dartmouth 1997, p 195 with regard to the Inter-American system, who states that “it may be arguable that the tardiness of proceedings under the [American] Convention may, in itself, be a denial of Justice to individual petitioners”.

⁷⁴³ *Volker Schlette*, *Das neue Rechtsschutzsystem der europäischen Menschenrechtskonvention*, in: *ZaöRV* 56 (1996), pp. 905-976; 917.

each other. The protocol does not lead to a clear distribution of duties, however. Quite the opposite: the responsibilities of both bodies, both regarding the individual adjudicates and the interpretation work by assessment, are practically identical, even if the Court has been equipped with a somewhat broader scope of competence. This does involve the risk of redundancy and overlapping of responsibilities, yet the two institutions could independently counter this by coordinating the performance of their competences with each other.

The essential element of the new protection system, however, is the institutional independence of both bodies. This is achieved by doing without adopting the concluded Commission procedure as an admissibility prerequisite for a complaint procedure before the Court. This is also where the most remarkable difference lies from the two other regional pacts, in which, as illustrated, the legal procedure is – or was in the case of the ECtHR – only possible after performing Commission preliminary proceedings. The overlapping of responsibilities of both African protection bodies is therefore remarkably high. Structurally, however, their institutional interweaving remains very low.

III. On the further development of the system

These statutory specifications put both protection bodies in the position to dynamize the African protection system on their own and thus catch up with the already established systems. In their collaboration, they can mostly do without a procedural interweaving and avert conflicts of competence.

Until such time as direct access to the court is opened to individual complainants by ratification of the facultative clause, the commission first has an essential activation role, since only this way can individual claims be checked by the court. In light of the fact that state claims are not expected in the foreseeable future, it is the commission upon which the effectiveness of the Court's work, the scope of its jurisdiction and thus its international weight depend, especially in the first years after its inauguration. Already in this development phase, the protection system under the Banjul Charter appears extremely promising, the more so given that the AfrCHPR can transfer an individual complaint procedure to the AfrCtHPR and thus bring about a final ruling without having to complete its own proceedings.

The dynamization of the system sets in as soon as the AfrCHPR withdraws from its protective function, once it has “pushed” the new system. Then, there remains no room for it any longer in the scope of the claims procedure, as long as the Court has established original competence

ratione personae for individual claims by ratification of the facultative clause. The AfrCHPR is then only of very indirect relevance to the procedure,⁷⁴⁴ its active participation, on the other hand, is procedurally no longer necessary. As a consequence, there will be a low-resource, protection-boosting single phase of the protection system before the AfrCtHPR, in contrast to the two other regional pacts where the procedural association of the institutions and the rigid multi-phase nature of the system hinder such a development.

When the initialization phase is over and the AfrCHPR has done its duty, by transferred procedure, to put the AfrCtHPR in the position to bind contracting states by a ruling, it should be clear to these states that the ratification of the facultative clause is no longer a great concession, but brings with it a gain of image. States have so far been reluctant to accept unrestricted individual direct access to the court, while they perceived the option for making claims with the AfrCHPR as less intervening.

It is up to the Commission to make it clear that this is a false impression. Especially in the beginning phase, the cooperation of commission and Court is therefore essential. If the wrong path is taken here, and the commission insists upon its responsibilities and does not include the Court accordingly, this will have fatal effects on the development of the protection system. The Court could then require as much time as the commission until it can work more or less successfully.

The potential for problems in such institutional cooperation can be seen in the Inter-American protection system. There, too, the IACHR functions primarily as an independent protection body, and a Court was adjuncted upon the entry into force of the ACHR. Since the IACtHR can exclusively process transferred procedures, it is even more dependent on cooperation with the commission than the AfrCtHPR. The IACHR, however, is still extremely reticent on forwarding processes.⁷⁴⁵ From the part of the Court, it has already been voiced that this must be connected with a certain protectiveness of the commission, which must be defending its competences.⁷⁴⁶ Even in the earlier ECHR regime, it was rumoured that the commission

⁷⁴⁴ This is especially true for complaints by NGO's since these must have observer status before the Commission in order to file a suit, Art. 5 III.

⁷⁴⁵ The inter-American commission achieved an average of 500 petitions per year; cf. *Cecilai Medina*, *The Inter-American Commission of Human Rights and the Inter-American Court of Human Rights: elections of a Joint Vecture*, in: IIRQ 12 (1990), pp. 439-464, 448. In the first ten years of its existence, only four claims made it through to the Court, one of which Costa Rica lodged against itself. Only from 1998 this practice of the commission seems to have slightly changed. Until today, however, the Court has only been able to decide upon 61 proceedings; comp. http://www.corteidh.or.cr/seriecing/index_serie_c_ing.html.

⁷⁴⁶ Comp. the statements of former judges Buergenthal, Nikken, Tovar and Nieto in the interview with *Lynda Frost*, *The Evolution of the Inter-American Court of Human Rights: Reflections of Present and Former Judges*, in: IIRQ 14 (1992), pp. 171-205, 177 et seq; comp. also *Scott Davidson*, *The Inter-American*

wanted to “starve out”⁷⁴⁷ the Court in that it presented no more cases to it. Such a development should be avoided in Africa if one wishes to achieve effective positioning of the new protection system.

Especially the relatively small quantity of cases compared to the other regional protective courts requires the cooperative treatment of these claims so that the new Court can position itself.⁷⁴⁸ Moreover, it would be unreasonable for the AfrCHPR to exploit the legal content of a complaint it has received and hazard the consequence that its finding – as usual – remain unheard by the addressee while at the same time a legal procedure before the AfrCtHPR is available that considerably increases the chances for the implementation of the legal decision. However, the conduct of the Commission during the entire development process towards the protocol does not give the impression that it does not shut itself off from the redistribution of duties illustrated here: it championed vehemently – if unsuccessfully – for a direct access to be possible for individual complainants without obligatory declaration. In all of its regular meetings, in the scope of the state reporting procedure, the state delegations were explicitly called upon to ratify the protocol as soon as possible, if they have not yet done so. Quite inquisitively, it is demanded what reasons exist for non-ratification. In nearly every final resolution, participants are reminded to ratify soon, and the existing contractual states are positively mentioned for their participation.⁷⁴⁹ This raises hope for the full cooperation of the Commission, even though it accepts its own loss of importance in the long term.

Conflicts of competence and work redundancy can incidentally be most easily avoided if the commission counters them with retraction. If such a clear distribution of work can be achieved, this has the great advantage for the AfrCHPR that it can fulfil its promotional function significantly more intensively. Resources – especially time – would be freed up,

Human Rights System, Dartmouth 1997, p 192, underscoring the “strong frustrations” of the judges in this concern.

⁷⁴⁷ *Norbert Engel*, Status, Ausstattung und Personalhoheit des Inter-Amerikanischen und Europäischen Gerichtshofs für Menschenrechte, in: EuGRZ 30 (2003) 4-6, pp. 122-133, p. 131.

⁷⁴⁸ In this sense, also the self-appraisal of the ICJ: “in reality, the future of the Court depends on the extent of recourse to it by states.” International Court (Ed), *The International Court. Questions and Answers about the Principal Judicial Organ of the United Nations*, p. 68.

⁷⁴⁹ Comp. only the resolution on the ratification of the protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ rights of 16 May 2002. Comp. in this context also the press release of the AfrCHPR on the occasion of the coming into effect of the Protocol of 23/01/04, in which it is stated, inter alia “The African Commission is pleased with this memorable advent and hails the significant contribution it has received from the States Parties and the community of the defenders of human rights, who spared no efforts to move forward the process of formulation, adoption and ratification of this invaluable instrument.” The contractual states of the Banjul-Charta were called upon to ratify: “The African Committee on Human and Peoples’ Rights makes an urgent appeal to the States Parties that have not yet ratified the said Protocol to do so as expeditiously as possible in order to give this important human rights protection instrument a truly pan-African scope”.

which it could use for intensifying state reporting, conducting state investigations or promoting civil society projects.

What the new protection system will surely not be able to do to a great extent is to create individual justice. The system is still not powerful enough for that. Moreover, it can only concern working towards a protection system that unfolds its effectiveness even apart from the direct utilization of the protective bodies. The primary duty of the protective system is therefore to create a coherence of human rights and congruence of standards in its sphere of influence that has an orientating effect. The high regard of the Court and its findings of justice shall contribute towards a human rights concept and standardization being implemented in the African system.

Flanked by the constitutive changes to the African regional organization, the institutional expansion by addition of the Court is a significant improvement on the African human rights regime and a hopeful sign of its future development.

Abstract

This thesis focuses on the establishment and operation of the latest regional Human Rights Court: The African Court on Human and Peoples' Rights.

For the development of human rights protection mechanisms within regional organizations the governments of the member states are of special relevance. They pull the strings to either foster and develop a system or to disrupt it. Therefore, following a brief historical introduction, the first chapter gives an overview of the regional African organization, the former Organization of African Unity (OAU) and today's African Union (AU) which was instrumental in the establishment of the African Human Rights System and has now enhanced it by adding a judicial authority.

However, it will become clear that it has taken a long time for the OAU to put human rights violations within the borders of its own member states on its agenda: Not until there was increasing international pressure due to never-ending excrescences of violence in the dictatorial regimes in Africa did the OAU carefully attend to this matter in the late 1970s. Its efforts culminated in the adoption of the African Charter on Human and Peoples' Rights (the eponymous Banjul Charter) which entered into force in 1981. The body for the protection created by the Charter was the African Commission on Human and Peoples' Rights which took up its function in 1987.

Since the newly established African Court is not supposed to replace the Commission but rather to strengthen it, the Court operates in concert with the Commission. Therefore the old protection system will still be applicable which deems a portrayal of the system in the following chapter necessary. Here, it will be outlined, that the competences of the Commission remain very limited and that its judicial impact on the State parties involved in its protection procedures has been nearly nil up to this very day.

Against this background the next chapter focuses on the Protocol to the Banjul-Charter establishing the African Court on Human and Peoples' Rights. First, the historical-political background and the protocol's juridical formulation process are examined. Here it will be shown that the end of global bipolarity has had a remarkable impact on the political protagonists in Africa with the effect that the increasing demands for a human rights Court within the OAU no

longer remained completely unheard. It will also be outlined that the path towards the adoption of the protocol has been long and difficult.

After a short survey of the organisational structure of the Court it will become clear that the protocol follows to a large extent its Inter-American counterpart concerning the institutional embodiment. However, a remarkable and, in international comparison, a unique achievement has also been achieved by the institutional regulations by making gender equality one of the key issues to encompass when it comes to the nomination and election of judges.

The following chapters outline the jurisdiction of the Court and the judicial process before the Court. In this connection the admissibility criteria will be highlighted in which two remarkable regulations stand out: First, it will become clear that in contrast to other regional human rights courts individuals and NGOs alike are entitled to file a complaint with the African Court (even though initially with the help of the Commission, since the protocol makes the complaint authority of individuals and NGOs dependent of a special declaration of acceptance of the State Parties concerned). Moreover, also unique compared to international two-tier human rights procedures, the protocol does not include a provision according to which a complainant would be obliged to go through a prior Commission procedure before filing a complaint with the Court. Individual complainants rather have direct access to the Court once a declaration of acceptance has been submitted by a State Party to the protocol.

Following short remarks on the competence of the Court to issue provisional measures which, among other things, reveal that these measures have, in contrast to those of the ECtHR, binding effect the procedural termination of a complaint comes into focus. Here, the possible contents of the rulings and the control mechanisms for their implementation are being contemplated in a detailed fashion. This last aspect most probably will have great influence on the fate of the Court since the Commission for its part had to a large extent no success due to the fact that it had no conventional implementation procedures to rely on. Therefore, in the vast majority of cases the findings of the Commission trailed off without any State Party concerned paying any attention to it.

The drafters of the protocol establishing the Court obviously have learned this lesson since the protocol provides for a quite remarkable implementation mechanism that may be able to impose political and legal pressure alike on State Parties if the Court deems that they have not properly complied with a Court's ruling. Even sanctions within the African Union against a recalcitrant State

come into question from a legal point of view – a quantum leap regarding the legal situation under the Banjul Charter.

The last chapter rehearses the main findings of the thesis and concludes with a positive outlook on the future development of the African human rights system.

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List of Abbreviations

ACHR	American Charter of Human Rights
ADI	Anuario de Derecho Internacional
AFDI	Annuaire Francais de Droit International
AfrCmHPR	African Commission on Human and Peoples' Rights
AfrCHPR	African Charta on Human and Peoples' Rights
AfrCtHPR	African Court on Human and Peoples' Rights
AHRLJ	African Human Rights Law Journal
AJICL	African Journal of International and Comparative Law
AJIL	American Journal of International Law
AJP	Aktuelle Juristische Praxis
AJPIL	Austrian Journal of Public and International Law
ALRev	Alabama Law Review
Annual Survey ICL	Annual Survey of International and Comparative Law
ARB	African Research Bulletin
ASICL	African Society of International and Comparative Law
AU	African Union
AULRev	American University Law Review
AVR	Archiv des Völkerrechts
AYIL	African Yearbook of International Law

BDGV	Berichte der Deutschen Gesellschaft für Völkerrecht
BerkJIL	Berkeley Journal of International Law
BVerfGE	Entscheidungen des Bundesverfassungsgerichts
BYIL	British Yearbook of International Law
ChJIL	Chicago Journal of International Law
ChUN	Charter of the United Nations
CILSA	The Comparative and International Law Journal of Southern Africa
ColHRLRev	Columbia Human Rights Law Review
ColJTL	Columbia Journal of Transnational Law
CorILJ	Cornell International Law Journal
E + Z	Entwicklung und Zusammenarbeit
ECHR	European Charter of Human Rights
ECtHR	European Court of Human Rights
EHRLRev	European Human Rights Law Review
EJIL	European Journal of International Law
ELRev	European Law Review
EPIL	Encyclopedia of Public International Law
EPL	European Public Law
ETS	European Treaty Series
EuGRZ	Europäische Grundrechte-Zeitschrift
FAZ	Frankfurter Allgemeine Zeitung
GYIL	German Yearbook of International Law
HarvHRJ	Harvard Human Rights Journal

HICLRev	Hastings International and Comparative Law Review
HRJ	Human Rights Journal/Revue des Droits de l'Homme
HRQ	Human Rights Quarterly
HuV	Humanitäres Völkerrecht
HYIL	Hague Yearbook of International Law
IACtHR	Interamerican Court of Human Rights
ICJ	International Commission of Jurists
ICJR	The Review of the International Commission of Jurists
ICLQ	International and Comparative Law Quarterly
IICLR	Indiana International & Comparative Law Review
ILM	International Legal Materials
JAE	Journal of African Economies
JAR	Jahrbuch für Afrikanisches Recht
JEP	Journal für Entwicklungspolitik
JIEL	Journal of International Economic Law
JILE	Journal of International Law and Economics
JMAS	The Journal of Modern African Studies
JRP	Journal für Rechtspolitik
KCA	Keesing's Contemporary Archives since 1987 Keesing's Record of World Events (KRWE)
KRWE	Keesing's Record of World Events

LHRQ	Latvian Human Rights Quarterly
LLJ	Lesotho Law Journal
LPICT	Law and Practice of International Courts and Tribunals
Max Planck UNYB	Max Planck Yearbook of United Nations Law
MLRev	The Modern Law Review
NILR	Netherlands International Law Review
NJCM	Nederlands Juristen Comite voor de Mensenrechten
NJIL	Nigerian Journal of International Law
NJW	Neue Juristische Wochenschrift
NQHR	Netherland Quarterly of Human Rights
NYIL	Netherland's Yearbook of International Law
NYLSJHR	New York Law School Journal of Human Rights
NYUJILP	New York University Journal of international Law & Politics
NZZ	Neue Züricher Zeitung
OAU	Organization of African Unity
PRI	Penal Reform International
RACHPR	Review of the African Commission on Human and Peoples' Rights
RADIC	Revue Africaine de Droit International et Comparative
RdC	Recueil de Cours
RGDIP	Revue Générale de Droit International Public

RIDU	Rivista Internazionale dei Diritti dell'Uomo
RUDH	Revue Universelle des Droits de l'Homme
SAHRR	Southern Africa Human Rights Review
StJIL	Stanford Journal of International Law
SZ	Süddeutsche Zeitung
SP	Supplementary Protocol
SZIER	Schweizerische Zeitschrift für internationales und europäisches Recht
TICLJ	Temple International and Comparative Law Journal
TLCP	Transnational Law & Contemporary Problems
UMICLRev	University of Miami International & Comparative Law Review
UN	United Nations
UNCIO	United Nations Conference on International Organization
UNTS	United Nations Treaty Series
VandJTL	Vanderbilt Journal of Transnational Law
VirgJIL	Virginia Journal of International Law
VRÜ	Verfassung und Recht in Übersee
WDdDB	Wissenschaftlicher Dienst des deutschen Bundestages
WiscILJ	Wisconsin International Law Journal
YBILC	Yearbook of the International Law Commission

YEC	Yearbook of the European Convention of Human Rights
YEL	Yearbook of European Law
YHRDLJ	Yale Human Rights & Development Law Journal
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZEuS	Zeitschrift für Europarechtliche Studien
ZfRSoz	Zeitschrift für Rechtssoziologie

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- Convention on Forced and Compulsory Labour of 28 June 1930, UNTS 39, 55
- European Convention of Human Rights of 11 April 1950, UNTS 213, 222
- International Convention concerning Elimination of any Form of Racial Discrimination (ICERD) of 7 March 1966 (UNTS 660, 195)
- International Convention on Fighting and Punishment of the Crime of Apartheid of 30 November 1973, UNTS 1015, 243
- International Covenant on Economic, Social and Cultural Rights of 16 December 1966, UNTS 993, 3
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AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

PREAMBLE

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

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

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

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

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

Recognizing on the one hand, that fundamental human rights stem from the attitudes of human beings, which justifies their international protection and on the other hand that the reality and respect of peoples' rights should necessarily guarantee human rights;

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

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

Conscious of their duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neo-colonialism, apartheid, zionism and to dismantle aggressive foreign military bases and all forms of discrimination, language, religion or political opinions;

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

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

HAVE AGREED AS FOLLOWS :

PART 1

RIGHTS AND DUTIES

CHAPTER 1

HUMAN AND PEOPLES' RIGHTS

ARTICLE 1

The Member States of the Organisation of African Unity, parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.

ARTICLE 2

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

ARTICLE 3

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

ARTICLE 4

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

ARTICLE 5

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

ARTICLE 6

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

ARTICLE 7

1. Every individual shall have the right to have his cause heard. This comprises:
 - a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
 - b) The right to be presumed innocent until proved guilty by a competent court or tribunal;

c) The right to defence, including the right to be defended by counsel of his choice;

d) The right to be tried within a reasonable time by an impartial court or tribunal.

2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

ARTICLE 8

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

ARTICLE 9

1 Every individual shall have the right to receive information.

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

ARTICLE 10

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

2. Subject to the obligation of solidarity provided for in Article 29, no one may be compelled to join an association.

ARTICLE 11

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

ARTICLE 12

1. Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.

2. Every individual shall have the right to leave any country including his own, and to return to his country.

This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.

3. Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions.

4. A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.

5. The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.

ARTICLE 13

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

2. Every citizen shall have the right of equal access to the public service of the country.
3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

ARTICLE 14

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

ARTICLE 15

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

ARTICLE 16

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

ARTICLE 17

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

ARTICLE 18

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

ARTICLE 19

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

ARTICLE 20

1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.

2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.

3. All peoples shall have the right to the assistance of the State Parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

ARTICLE 21

1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.

2. In case of spoliation, the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.

3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.

4. State Parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African Unity and solidarity.

5. State Parties to the present Charter shall undertake to eliminate all forms of foreign exploitation particularly that practised by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.

Article 22

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

ARTICLE 23

1. All peoples shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organisation of African Unity shall govern relations between States.

2. For the purpose of strengthening peace, solidarity and friendly relations, State Parties to the present Charter shall ensure that:

a) any individual enjoying the right of asylum under Article 12 of the present Charter shall not engage in subversive activities against his country of origin or any other State Party to the present Charter;

b) their territories shall not be used as bases for subversive or terrorist activities against the people of any other State Party to the present Charter.

ARTICLE 24

All peoples shall have the right to a general satisfactory environment favourable to their development.

ARTICLE 25

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

ARTICLE 26

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

CHAPTER 2

DUTIES

ARTICLE 27

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

ARTICLE 28

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

ARTICLE 29

The individual shall also have the duty:

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

PART 11

MEASURES OF SAFEGUARD

CHAPTER 1

ESTABLISHMENT AND ORGANISATION OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

ARTICLE 30

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

ARTICLE 31

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

ARTICLE 32

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

ARTICLE 33

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

ARTICLE 34

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

ARTICLE 35

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

ARTICLE 36

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

ARTICLE 37

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

ARTICLE 38

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

ARTICLE 39

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

ARTICLE 40

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

ARTICLE 41

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

ARTICLE 42

1. The Commission shall elect its Chairman and Vice Chairman for a two-year period. They shall be eligible for re-election.
2. The Commission shall lay down its rules of procedure.
3. Seven members shall form the quorum.
4. In case of an equality of votes, the Chairman shall have a casting vote.
5. The Secretary General may attend the meetings of the Commission. He shall neither participate in deliberations nor shall he be entitled to vote. The Chairman of the Commission may, however, invite him to speak.

ARTICLE 43

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

ARTICLE 44

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

CHAPTER II

MANDATE OF THE COMMISSION

ARTICLE 45

The functions of the Commission shall be:

1. To promote human and peoples' rights and in particular:

a) to collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organise seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights and, should the case arise, give its views or make recommendations to Governments.

b) to formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislation.

c) cooperate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.

2. Ensure the protection of human and peoples' rights under conditions laid down by the present Charter.

3. Interpret all the provisions of the present Charter at the request of a State Party, an institution of the OAU or an African Organisation recognised by the OAU.

4. Perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government.

CHAPTER 111

PROCEDURE OF THE COMMISSION

ARTICLE 46

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

COMMUNICATION FROM STATES

ARTICLE 47

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

ARTICLE 48

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

ARTICLE 49

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

ARTICLE 50

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

ARTICLE 51

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

ARTICLE 52

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

ARTICLE 53

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

ARTICLE 54

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

ARTICLE 55

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

ARTICLE 56

Communications relating to Human and Peoples' rights referred to in Article 55 received by the Commission, shall be considered if they:

1. Indicate their authors even if the latter requests anonymity,
2. Are compatible with the Charter of the Organisation of African Unity or with the present Charter,
3. Are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organisation of African Unity,
4. Are not based exclusively on news disseminated through the mass media,
5. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged,
6. Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized with the matter, and

7. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organisation of African Unity or the provisions of the present Charter.

ARTICLE 57

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

ARTICLE 58

1. When it appears after deliberations of the Commission that one or more Communications apparently relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights, the Commission shall draw the attention of the Assembly of Heads of State and Government to these special cases.

2. The Assembly of Heads of State and Government may then request the Commission to undertake an in-depth study of these cases and make a factual report, accompanied by its finding and recommendations.

3. A case of emergency duly noticed by the Commission shall be submitted by the latter to the Chairman of the Assembly of Heads of State and Government who may request an in-depth study.

ARTICLE 59

1. All measures taken within the provisions of the present Chapter shall remain confidential until the Assembly of Heads of State and Government shall otherwise decide.

2. However the report shall be published by the Chairman of the Commission upon the decision of the Assembly of Heads of State and Government.

3. The report on the activities of the Commission shall be published by its Chairman after it has been considered by the Assembly of Heads of State and Government.

CHAPTER IV

APPLICABLE PRINCIPLES

ARTICLE 60

The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on Human and Peoples' Rights, the Charter of the United Nations, the Charter of the Organisation of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of Human and Peoples' Rights, as well as from the provisions of various instruments adopted within the Specialised Agencies of the United Nations of which the Parties to the present Charter are members.

ARTICLE 61

The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognised by Member States of the Organisation of African Unity, African practices consistent with international norms on Human and Peoples' Rights, customs generally accepted as law, general principles of law recognised by African States as well as legal precedents and doctrine.

ARTICLE 62

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

ARTICLE 63

1. The present Charter shall be open to signature, ratification or adherence of the Member States of the Organisation of African Unity.
2. The instruments of ratification or adherence to the present Charter shall be deposited with the Secretary General of the Organisation of African Unity.
3. The present Charter shall come into force three months after the reception by the Secretary General of the instruments of ratification or adherence of a simple majority of the Member States of the Organisation of African Unity.

PART 111

GENERAL PROVISIONS

ARTICLE 64

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

ARTICLE 65

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

ARTICLE 66

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

ARTICLE 67

The Secretary General of the Organisation of African Unity shall inform members of the Organisation of the deposit of each instrument of ratification or adherence.

ARTICLE 68

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

PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES` RIGHTS ON THE ESTABLISHMENT OF AN AFRICAN COURT ON HUMAN AND PEOPLES` RIGHTS

The Member States of the Organization of African Unity hereinafter referred to as the OAU, States Parties to the African Charter on Human and Peoples` Rights.

Considering that the Charter of the Organization of African Unity recognizes that freedom, equality, justice, peace and dignity are essential objectives for the achievement of the legitimate aspirations of the African Peoples;

Noting that the African Charter on Human and Peoples` Rights reaffirms adherence to the principles of Human and Peoples` Rights, freedoms and duties contained in the declarations, conventions and other instruments adopted by the Organization of African Unity, and other international organizations;

Recognizing that the twofold objective of the African Commission on Human and Peoples` Rights is to ensure on the one hand promotion and on the other protection of Human and Peoples` Rights, freedom and duties;

Recognizing further, the efforts of the African Charter on Human and Peoples` Rights in the promotion and protection of Human and Peoples` Rights since its inception in 1987;

Recalling resolution AHGéRes.230 (XXX) adopted by the Assembly of Heads of State and Government in June 1994 in Tunis, Tunisia, requesting the Secretary-General to convene a Government experts` meeting to ponder, in conjunction with the African Commission, over the means to enhance the efficiency of the African commission and to consider in particular the establishment of an African Court on Human and Peoples` Rights;

Noting the first and second Government legal experts` meeting held respectively in Cape Town, South Africa (September, 1995) and Nouakchott, Mauritania (April 1997), and the third Government Legal Experts meeting held in Addis Ababa, Ethiopia (December, 1997), which was enlarged to include Diplomats;

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

HAVE AGREED AS FOLLOWS:

Article 1 ESTABLISHMENT OF THE COURT

There shall be established within the Organization of African Unity an African Court Human and Peoples` Rights hereinafter referred to as "the Court", the organization, jurisdiction and functioning of which shall be governed by the present Protocol.

Article 2 RELATIONSHIP BETWEEN THE COURT AND THE COMMISSION

The Court shall, bearing in mind the provisions of this Protocol, complement the protective mandate of the African Commission on Human and Peoples` Rights hereinafter referred to as "the Commission", conferred upon it by the African Charter on Human and Peoples` Rights, hereinafter referred to as "the Charter".

Article 3 JURISDICTION

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

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

Article 4 ADVISORY OPINIONS

1. At the request of a Member State of the OAU, the OAU, any of its organs, or any African organization recognized by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or any

other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission.

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

Article 5 ACCESS TO THE COURT

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

- a) The Commission
- b) The State Party which had lodged a complaint to the Commission
- c) The State Party against which the complaint has been lodged at the Commission
- d) The State Party whose citizen is a victim of human rights violation
- e) African Intergovernmental Organizations

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

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

Article 6 ADMISSIBILITY OF CASES

1. The Court, when deciding on the admissibility of a case instituted under article 5 (3) of this Protocol, may request the opinion of the Commission which shall give it as soon as possible.

2. The Court shall rule on the admissibility of cases taking into account the provisions of article 56 of the Charter.

3. The Court may consider cases or transfer them to the Commission.

Article 7 SOURCES OF LAW

The Court shall apply the provision of the Charter and any other relevant human rights instruments ratified by the States concerned.

Article 8 CONSIDERATION OF CASES

The Rules of Procedure of the Court shall lay down the detailed conditions under which the Court shall consider cases brought before it, bearing in mind the complementarity between the Commission and the Court.

Article 9 AMICABLE SETTLEMENT

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

Article 10 HEARINGS AND REPRESENTATION

1. The Court shall conduct its proceedings in public. The Court may, however, conduct proceedings in camera as may be provided for in the Rules of Procedure.

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

3. 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.

Article 11 COMPOSITION

1. The Court shall consist of eleven judges, nationals of Member States of the OAU, elected in an individual capacity from among jurists of high moral character and of recognized practical, judicial or academic competence and experience in the field of human and peoples' rights.

2. No two judges shall be nationals of the same State.

Article 12 NOMINATIONS

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

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

Article 13 LIST OF CANDIDATES

1. Upon entry into force of this Protocol, the Secretary-general of the OAU shall request each State Party to the Protocol to present, within ninety (90) days of such a request, its nominees for the office of judge of the Court.

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

Article 14 ELECTIONS

1. The judges of the Court shall be elected by secret ballot by the Assembly from the list referred to in Article 13 (2) of the present Protocol.

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

3. In the election of the judges, the Assembly shall ensure that there is adequate gender representation.

Article 15 TERM OF OFFICE

1. The judges of the Court shall be elected for a period of six years and may be re-elected only once. The terms of four judges elected at the first election shall expire at the end of two years, and the terms of four more judges shall expire at the end of four years.

2. The judges whose terms are to expire at the end of the initial periods of two and four years shall be chosen by lot to be drawn by the Secretary-General of the OAU immediately after the first election has been completed.

3. A judge elected to replace a judge whose term of office has not expired shall hold office for the remainder of the predecessor's term.

4. All judges except the President shall perform their functions on a part-time basis. However, the Assembly may change this arrangement as it deems appropriate.

Article 16 OATH OF OFFICE

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

Article 17 INDEPENDENCE

1. The independence of the judges shall be fully ensured in accordance with international law.

2. No judge may hear any case in which the same judge has previously taken part as agent, counsel or advocate for one of the parties or as a member of a national or international court or a commission of enquiry or in any other capacity. Any doubt on this point shall be settled by decision of the Court.

3. The judges of the Court shall enjoy, from the moment of their election and throughout their term of office, the immunities extended to diplomatic agents in accordance with international law.

4. At no time shall the judges of the Court be held liable for any decision or opinion issued in the exercise of their functions.

Article 18 INCOMPATIBILITY

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

Article 19 CESSATION OF OFFICE

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

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

Article 20 VACANCIES

1. In case of death or resignation of a judge of the Court, the President of the Court shall immediately inform the Secretary General of the Organization of African Unity, who shall declare the seat vacant from the date of death or from the date on which the resignation takes effect.

2. The Assembly shall replace the judge whose office became vacant unless the remaining period of the term is less than one hundred and eighty (180) days.

3. The same procedure and considerations as set out in Articles 12, 13 and 14 shall be followed for the filling of vacancies.

Article 21 PRESIDENCY OF THE COURT

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

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

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

Article 22 EXCLUSION

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

Article 23 QUORUM

The Court shall examine cases brought before it, if it has a quorum of at least seven judges.

Article 24 REGISTRY OF THE COURT

1. The Court shall appoint its own Registrar and other staff of the registry from among nationals of Member States of the OAU according to the Rules of Procedure.

2. The office and residence of the Registrar shall be at the place where the Court has its seat.

Article 25 SEAT OF THE COURT

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

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

Article 26 EVIDENCE

1. The Court shall hear submissions by all parties and if deemed necessary, hold an enquiry. The States concerned shall assist by providing relevant facilities for the efficient handling of the case.

2. The Court may receive written and oral evidence including expert testimony and shall make its decision on the basis of such evidence.

Article 27 FINDINGS

1. If the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.
2. In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary.

Article 28 JUDGMENT

1. The Court shall render its judgment within ninety (90) days of having completed its deliberations.
2. The judgment of the Court decided by majority shall be final and not subject to appeal.
3. Without prejudice to sub-article 2 above, the Court may review its decision in the light of new evidence under conditions to be set out in the Rules of Procedure.
4. The Court may interpret its own decision.
5. The judgment of the Court shall be read in open court, due notice having been given to the parties.
6. Reasons shall be given for the judgment of the Court.
7. If the judgment of the court does not represent, in whole or in part, the unanimous decision of the judges, any judge shall be entitled to deliver a separate or dissenting opinion.

Article 29 NOTIFICATION OF JUDGMENT

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

Article 30 EXECUTION OF JUDGMENT

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

Article 31 REPORT

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

Article 32 BUDGET

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

Article 33 RULES OF PROCEDURE

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

Article 34 RATIFICATION

1. This Protocol shall be open for signature and ratification or accession by any State Party to the Charter.
2. The instrument of ratification or accession to the present Protocol shall be deposited with the Secretary-General of the OAU.
3. The Protocol shall come into force thirty days after fifteen instruments of ratification or accession have been deposited.
4. For any State Party ratifying or acceding subsequently, the present Protocol shall come into force in respect

of that State on the date of the deposit of its instrument of ratification or accession.

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

6. At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5 (3) of this Protocol. The Court shall not receive any petition under article 5 (3) involving a State Party which has not made such a declaration.

7. Declarations made under sub-article (6) above shall be deposited with the Secretary-General, who shall transmit copies thereof to the State parties.

Article 35 AMENDMENTS

1. The present Protocol may be amended if a State Party to the Protocol makes a written request to that effect to the Secretary-General of the OAU. The Assembly may adopt, by simple majority, the draft amendment after all the State Parties to the present Protocol have been duly informed of it and the Court has given its opinion on the amendment.

2. The Court shall also be entitled to propose such amendments to the present Protocol as it may deem necessary, through the Secretary-General of the OAU.

3. The amendment shall come into force for each State Party which has accepted it thirty days after the Secretary-General of the OAU has received notice of the acceptance.