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## African Court on Human and Peoples' Rights: an Opportunity to Strengthen Human Rights in Africa

July 2002

SUMMARY

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The Assembly of Heads of State and Government of the Organization of African Unity (OAU) adopted in June 1998 the Protocol on the Establishment of an African Court of Human and Peoples' Rights. Four years after its adoption, the Protocol establishing the Court has yet to enter into force. Article 34 of the Protocol states that it will come into force after fifteen ratifications. As at June 2002, only five States have ratified the Protocol. They are: Burkina Faso, Mali, Senegal, The Gambia and Uganda.

The Court, once established, will consider cases referred to it by the African Commission and state parties to the Protocol and, where a state party accepts such a jurisdiction, by individuals and non-governmental organizations (NGOs). An African Court is capable of enhancing the effectiveness of the Charter by supplementing and reinforcing the African Commission. Similarly, through it victims of human rights violations or their representatives would have recourse to judicial process on demand. The Court possesses the authority to issue a binding and enforceable decision in such circumstances.

This report aims to promote awareness of the Protocol and to secure the establishment of an effective, impartial and independent African Court on Human and Peoples' Rights. The report analyses the provisions of the Protocol in terms of the Court's potential to reinforce the protection of human rights in the continent.

This report summarizes a 16 page document: African Court on Human and Peoples' Rights: an Opportunity to Strengthen Human Rights in Africa (AI Index: IOR 63/001/2002) issued by Amnesty International in July 2002. Anyone wishing further details or to take action on this issue should consult the full document. An extensive range of our materials on this and other subjects is available at <http://www.amnesty.org> and Amnesty International news releases can be received by email: <http://www.web.amnesty.org/web/news.nsf/thisweek?openview>

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## **African Court on Human and Peoples' Rights: an Opportunity to Strengthen Human Rights Protection in Africa**



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# **African Court on Human and Peoples' Rights: an Opportunity to Strengthen Human Rights Protection in Africa**

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# **African Court on Human and Peoples' Rights: an Opportunity to Strengthen Human Rights Protection in Africa**

## **1. INTRODUCTION**

The Assembly of Heads of State and Government of the Organization of African Unity (OAU) adopted in 1981 the African Charter on Human and Peoples' Rights (African Charter or Charter).<sup>1</sup> The Charter which came into force on 21 October 1986 has been ratified by all the OAU member States.<sup>2</sup>

The African Charter guarantees civil, political, economic, social and cultural rights. In addition, it proclaims collective rights as well as individual duties. Specifically, the Charter includes the right to life and the integrity of the person; right to fair trial; freedom from torture, cruel, inhuman or degrading punishment; right to liberty and security of person; right to health and right to education. Unlike other international or regional human rights treaties, the Charter does not allow states to derogate from their treaty obligations even during states of emergency.<sup>3</sup>

The only mechanism created under the Charter to supervise State Parties' compliance is the African Commission on Human and Peoples' Rights (African Commission). Its four areas of mandate are: promotional activities, protective activities (including complaints), the examination of state party reports, and the interpretation of the African Charter.

Despite the international acclaim that heralded the adoption of the African Charter in 1981, and its subsequent entry into force in 1986, the demand for the reform of the African human rights mechanism began within five years of its existence. One reason for this demand is the lack of adequate or effective enforcement institutions.

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<sup>1</sup> AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS, *adopted* 27 June 1981 in Nairobi, Kenya, OAU Doc. CAB/LEG/67/3, Rev. 5, *reprinted* in I.L.M. 59 (1981).

<sup>2</sup> All African States are members of the OAU except Morocco, which withdrew from the OAU in 1976 as a result of the recognition of the Democratic Arab Sahraoui Republic.

<sup>3</sup> See for example, Communication 74/92, Commission Nationale de Droits de l' Homme et des Libertés v Chad.

While the African Commission has an elaborate promotional mandate under the African Charter, it does not possess sufficient protective powers. In fact, neither the Charter nor the Commission provides for enforceable remedies, or a mechanism for encouraging and tracking State compliance with decisions that the Commission makes. Despite some positive development in the Commission's individual complaint mechanism,<sup>4</sup> the decisions it renders are non-binding, and attract little, if any, attention from governments of Member States.

The Assembly of Heads of State and Government of the OAU has acknowledged the general ineffectiveness of the African human rights mechanism. During its summit in Tunis, Tunisia in June 1994, the Assembly adopted a resolution in which the Secretary-General of the organization was called upon to summon experts to meet on the establishment of an African Court of Human Rights.<sup>5</sup> The series of meetings and consultations that ensued produced a draft Protocol on the African Court on Human and Peoples' Rights (Protocol), which was later adopted by the OAU in Ouagadougou, Burkina Faso in June 1998.<sup>6</sup>

The Protocol was inspired by existing regional instruments, which established the European and Inter-American Human Rights Courts, the Statute of the International Court of Justice as well as the Report of the International Law Commission on the International Criminal Tribunal.<sup>7</sup>

Amnesty International supports the establishment of an African Court of Human and Peoples' Rights (African Court or Court) as a means of strengthening the regional

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<sup>4</sup> See e.g., Communication 74/92, *Commission Nationale de Droits de l'Homme et des Libertés v Chad*.

<sup>5</sup> Resolution AHG/230(XXX) 30<sup>th</sup> ordinary session of the Assembly of Heads of State and Government, Tunisia, June 1994.

<sup>6</sup> Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, OAU/LRG/AFCHPR/PROT(III), adopted by the Assembly of Heads of State and Government, 34<sup>th</sup> Ordinary Session, Burkina Faso, 8-10 June 1998.

<sup>7</sup> See EXPLANATORY NOTES TO THE PROTOCOL TO THE AFRICAN CHARTER ON THE ESTABLISHMENT OF AN AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS 1 (6-12 September, 1995), Cape Town South Africa.

mechanism for human rights in Africa.<sup>8</sup> Given the continent's history of serious human rights violations, a court of human rights is a potentially significant development in the protection of human rights at the continental level. The adoption of the Protocol by the OAU thus demonstrates a resolve by African governments to realise the spirit of the African Charter and ensure the protection of human rights in Africa.

The Court, once established, will consider cases referred to it by the African Commission and state parties to the Protocol and, where a state party accepts such a jurisdiction, by individuals and non-governmental organizations (NGOs). An African Court is capable of enhancing the effectiveness of the Charter by supplementing and reinforcing the African Commission. Similarly, through it victims of human rights violations or their representatives would have recourse to judicial process on demand. The Court possesses the authority to issue a binding and enforceable decision in such circumstances.

In addition, an African Court would provide the platform for the articulation of international legal principles at the regional level. At the same time, domestic courts in Africa will look to the Court for direction and precedents in their application of human rights instruments at the domestic level. Ultimately, the Court can be an important instrument in sustaining constitutional democracies and facilitating the fulfilment of human and peoples' rights, which are now universally recognized.

Nevertheless, the success of the African Court will, to a large extent, depend on the operational efficiency of the African Commission, as the two are designed to work together and compliment each other.<sup>9</sup> Amnesty International believes that simultaneous with efforts to establish the African Court, the OAU should endeavour to further strengthen the role, functioning and working practices of the African Commission.

Unfortunately, four years after its adoption, the Protocol establishing the Court has yet to enter into force. Article 34 of the Protocol states that it will come into force after fifteen instruments of ratification or accession have been deposited with the Secretary-General of the OAU. As at June 2002, only five States have ratified the Protocol. They are: Burkina Faso, Mali, Senegal, The Gambia and Uganda. In contrast, the Constitutive

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<sup>8</sup> See Amnesty International, *Credibility in Question: proposals for improving the efficiency and effectiveness of the African Commission on Human and Peoples' Rights*, AI Index: IOR 63/02/1998.

<sup>9</sup> See Amnesty International Organisation of African Unity *Making Human Rights a Reality for Africans*, AI Index: IOR 63/01/98.

Act of the African Union has attracted an overwhelming support from African governments in a record time: it took the Assembly of Heads of State and Government only nine months to formally establish the African Union.<sup>10</sup>

While this is a positive sign, given African leaders' expressed determination in the Constitutive Act to promote and protect human and peoples' rights, consolidate democratic institutions and culture, good governance and the rule of law, Amnesty International believes that the apparent reluctance of most African governments to commit themselves to the Protocol constitutes a step backward in the realization of these principles. African governments must begin to translate their expressed commitment into action by ratifying the Protocol, as well as accepting the competence of the Court to deal with complaints submitted by individuals and NGOs.

This report aims to promote awareness of the Protocol and to secure the establishment of an effective, impartial and independent African Court on Human and Peoples' Rights. The report analyses the provisions of the Protocol in terms of the Court's potential to reinforce the protection of human rights in the continent.

The report also examines the relationship between the African Commission and the Court in the exercise of their various mandates under the Charter and Protocol, respectively. Finally, it makes recommendations regarding the role, which the OAU political authority should play in ensuring the establishment of the Court and its effective and independent functioning.

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<sup>10</sup> See CONSTITUTIVE ACT OF THE AFRICAN UNION, adopted by the Thirty-sixth Ordinary Session of the Assembly of Heads of State and Government of the OAU on 11 July 2000 at Lome, Togo. It entered into force on 26 May 2001 during the 38<sup>th</sup> anniversary of the establishment of the OAU. The African Union, which will replace the OAU in July 2002, is modelled after the European Union. The Constitutive Act provides for some new organs that were not provided for in the Charter of the OAU, namely, the Pan-African Parliament; the Court of Justice which was initially provided for in the African Economic Community (AEC) treaty; financial institutions such as the African Central Bank, the African Monetary Fund, and the African Investment Bank. There are also Specialised technical Committees and Commissions along the lines of the OAU. See *Amnesty International, African Union: a New Opportunity for the Promotion and Protection of Human Rights in Africa*, AI Index: IOR 63/002/2002.

## **2. ESTABLISHING THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS**

### **2.1 Structure and Composition of the Court**

Article 1 of the Protocol establishes the Court, with an emphasis that it is established within the framework of the Organization of African Unity. The Court shall consist of eleven judges who must be nationals of the member states of the OAU. State parties to the Protocol may propose up to three candidates, two of which must be their own nationals. However, no two judges may be nationals of the same State.

Similarly, judges are to be elected by secret ballot from a list of candidates submitted by States parties to the Protocol. While state members of the OAU that are not parties to the Protocol are barred from nominating candidates, they nevertheless participate in the election. They are thus afforded the opportunity to comment on the suitability of candidates who may be their nationals. This would make it possible for competent judges to be elected to the Court even though they are nationals of Member states of the OAU, that have not ratified the African Charter.

Judges are elected<sup>11</sup> in an individual capacity and not as representatives of states. They must be elected from among jurists of high moral character and of recognized practical, judicial or academic competence and experience in the field of human rights. Judges are thus required to discharge their functions independently and impartially. In fact, after their election, judges must make a declaration that they would discharge their duties impartially and faithfully.

It is desirable that these criteria for selection are strictly applied to ensure that the candidates have some degree of expertise relevant to their position. While this does not in itself guarantee independence, it contributes towards the realization of a more

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<sup>11</sup> Under Article 15(1) of the Protocol, judges of the Court are to be elected to six-year term and may be re-elected only once. Similarly, the term of four judges elected at the first election would expire at the end of two years, and the term of four more judges expiring at the end of four years. Also, all judges except the President shall perform their functions on a part-time basis. However, the Assembly of the OAU may change the arrangement of part-time, as it deems appropriate. Nevertheless, while part-time appointment may be justified in the short term, perhaps because it is not envisaged that the Court will be inundated with very many cases in its early years, the realization of a full-time Court in the long term will be crucial to the Court overall effectiveness.

competent professional body.<sup>12</sup> In addition, greater participation by NGOs and consultation during the selection process at the national level would be a positive development.

The Protocol requires that adequate gender representation be taken into consideration in both nominating and electing members of the Court. This provision would encourage qualified men and women to be nominated and elected to the Court. Without a gender balance in the composition of the Court key issues relating to the violations of human rights of women are likely to be overlooked. Indeed, all states including Member States of the OAU have "committed themselves to gender balance... in all international bodies and institutions, notably by presenting and promoting more women candidates".<sup>13</sup> It is also important that the nomination process considers it necessary to achieve geographical representation and representation of different legal traditions.

The Court has a single court structure without division into chambers or grand chambers. Its judgment decided by majority shall be final and not subject to appeal. Article 23 of the Protocol provides that the Court shall examine cases brought before it if it has a quorum of at least seven judges. Under Article 22 of the Protocol, a judge who is the national of any State, which is a party to a case submitted to the Court, is excluded from hearing the case.

Article 25 of the Protocol empowers the Assembly of the OAU to determine the seat of the Court, but with input from the Court where a change of the seat of the Court is necessary. Also, the Court could convene in the territory of any Member state of the OAU when the majority of the Court considers it desirable, subject to the consent of the State concerned. However, it is important that the Court is afforded necessary facilities for it to function effectively wherever it convenes.

Under Article 20, a judge whose seat becomes vacant as a result of death or resignation must be replaced unless the remaining period of the term of the judge is less than one hundred and eighty days.

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<sup>12</sup> See Amnesty International, *Credibility in Question: proposals for improving the efficiency and effectiveness of the African Commission on Human and Peoples' Rights*, AI Index: IOR 63/02/1998.

<sup>13</sup> See Report of the Fourth World Conference on Women (Beijing, 4-15 September 1995), A/Conf.177/20, para. 299.

Unlike the situation under the African Charter where the Secretary-General of the OAU is responsible for appointing the Secretary and staff of the African Commission, the Court shall appoint its own Registrar and other staff of the registry from among nationals of Member states of the OAU. Amnesty International believes that the power of the Court to hire its staff will enhance its overall independence from the OAU.

## **2.2 Applicable Laws and Consideration of Cases**

The Court would have power to entertain cases challenging violations of the rights, including civil and political rights and economic, social and cultural rights guaranteed under the African Charter, the Protocol and relevant human rights instruments.<sup>14</sup> Article 8 of the Protocol specifies that the Rules of Procedure of the Court shall lay down the detailed conditions under which the Court shall consider cases brought before it, bearing in mind the complementarity between the Commission and the Court.

The Court is required to rule on admissibility of the cases taking into account the provisions of Article 56 of the African Charter.<sup>15</sup> Similarly, the Court may request the opinion of the Commission on admissibility of cases submitted by individuals and NGOs when deciding on their admissibility. Also, in considering cases, the Court is required to conduct its proceedings in public under Article 10(1) of the Protocol, except as may be provided for in its Rules of Procedure. However, whatever the Court decides, the protection of the interest of children may require a restriction on public hearing.

Similarly, 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. This provision is especially important given that recalcitrant States may wish to destroy or withhold crucial evidence. Under Article 26(2) of the Protocol, the Court is empowered in its discretion to receive written and oral evidence including expert testimony on the basis of which it is required to make its decision.

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<sup>14</sup> The Protocol also enjoins the Court to reach amicable settlement in a case pending before it in accordance with the provisions of the Charter.

<sup>15</sup> Article 56 prescribes among others that communications submitted to the African Commission must indicate their authors, are compatible with the African Charter and are sent after exhausting local remedies, if any. *See* text of the African Charter on Human and Peoples' Rights in Annex iii.

The Protocol provides for the choice of legal representative by a party before the Court and recommends free legal representation in the interest of justice. Given the abject poverty in many regions of Africa, Amnesty International believes the provision of free legal representation for indigent parties is essential in trying to ensure that parties irrespective of their economic situation are heard by the Court and thus contribute to the realization of fair trial. While NGOs may assist in the provision of legal assistance to those who come before the Court and may require it, the primary responsibility should be that of State parties.

In addition, the Protocol provides that any person, witnesses or representative of the parties who appear before the Court shall have all the protection and enjoy all the facilities "in accordance with international law, necessary for discharging their functions, tasks and duties in relation to the Court". This would give assurance to individuals or groups of persons that they can appear before the Court without fear of retribution.

### **2.3 Jurisdiction and Access to the Court**

The Protocol contains various shades of jurisdiction and access to the Court, ranging from adjudicatory or contentious jurisdiction to advisory jurisdiction. The contentious jurisdiction prescribed is either compulsory or optional. This is the ordinary jurisdiction of a human rights court or other international tribunal in determining contentious disputes that come before it on merit.

Under Article 3 of the Protocol, the main object of the Court's adjudicatory function is to rule on whether a State has violated any of the rights contained in the African Charter, the Protocol of the Court, or any other relevant human rights instruments ratified by the State concerned, for which the victim seeks redress. This provision has the potential of extending the jurisdiction of the Court over treaties dealing with issues of human rights applicable in Africa, such as the OAU Convention on Refugees and the African Charter on the Rights and Welfare of the Child. By exercising this jurisdiction the Court is able to apply these instruments and issue a decision on merit, which may include the award of reparations or other remedies where the Court finds a violation.

However, only the following entities have the right of direct access to the Court: the African Commission; the State party which has lodged a complaint to the Commission; the State party against which a complaint has been lodged at the Commission; the State whose citizen is a victim of human rights violations and African Intergovernmental

**Organizations.** Similarly, a State that has an interest before the Court could request permission from the Court to join in the proceedings.

Nevertheless, a prior Communication to the Commission, either by a State, or against a State, is generally required for instituting proceedings before the Court. Thus, only the African Commission has unlimited access to the Court. The Commission's unlimited access to the Court should be effectively used to refer cases and initiate new ones to the Court, especially cases which reveal the existence of a series of serious and massive violations of human and peoples' rights under the African Charter.

NGOs with observer status before the Commission and individuals may only institute cases before the Court if the State against which they want to proceed has made a declaration accepting such NGO and individual submission of cases. Without such declaration, the Court would not, under any circumstance receive any petition from an NGO or individual.

Amnesty International believes that unless States accept the jurisdiction of the Court over individual complaints, the object and purpose of the African Charter and the Protocol to make States accountable for human rights violations within their jurisdiction would be seriously undermined.

Similarly, it is important that the right of States whose citizens are victims of human rights violations to submit cases before the Court is not used to deny individuals' ability to seek a vindication of their rights, especially where the respondent State has accepted the jurisdiction of the Court to receive cases from individuals and NGOs.

Another sphere of the Court's jurisdiction is advisory. Under Article 4 of the Protocol, a member State of the OAU, the OAU, any of its organs or any African organization recognized by the OAU may request the Court to provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments. However, the subject matter of the opinion sought must not be related to a matter being examined by the African Commission.

This advisory jurisdiction would enable the Court to formally render legal opinions on issues presented before it. However, those opinions have no binding legal effect in the form of requiring positive or negative action from parties. Nevertheless, advisory opinions can go a long way to affect the conduct of States with respect to human rights. Indeed, the advisory function of the Court could prove very effective if States would

approach the Court to test the compatibility of their domestic laws with the African Charter and the Protocol.

Similarly, the advisory jurisdiction of the Court would be greatly enhanced by NGO participation, by among others providing the Court with *amicus curiae* briefs. This participation would further enrich the jurisprudence of the Court even though advisory opinions *per se* are not binding.

## 2.4 Judgements of the Court

The Court is empowered to make findings and order appropriate remedies when there is a violation of any rights, whether civil and political rights, or economic, social and cultural rights. Where the Court finds that there has been a violation of a human right, it is required under the Protocol to make appropriate orders to remedy the violation, including the payment of fair compensation. It is important that the Court avoids a restrictive interpretation of its remedial powers by ordering adequate reparation whenever the interest of justice demands.

Similarly, Article 27(2) provides that "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. The ability of the Court to grant provisional measures demonstrates the preventive function of international protection of human rights. If effectively used, it could serve as a veritable tool for ensuring human rights protection in Africa.

The Protocol also makes provisions for the judgment of the Court and its execution. The judgment of the Court decided by majority would be final and not subject to appeal. However, the Court is empowered to review its decisions in the light of new evidence under the conditions that would be set out in its Rules of Procedure. At the same time, the Court enjoys the power to interpret its decisions. In cases where the judgment of the Court is not unanimous, either in whole or in part, any judge would be entitled to deliver a separate or dissenting opinion.

The Court must however render its judgment within ninety days of having completed its deliberations. The Protocol requires that the judgment of the Court be reasoned, and must be read in open Court, due notice having been given to the parties. Regarding the execution of the judgment of the Court, States that ratify the Protocol undertake to

comply with the judgment of the Court in any case to which they are parties, and within the time limit stipulated by the Court, as well as guarantee its execution.

However, the Court's judgment must be brought to the notice of the parties involved and Member States of the OAU as well as the African Commission. The Council of Ministers of the OAU would also be notified, and shall have the responsibility of monitoring the execution of the judgment on behalf of the Assembly of Heads of State and Government. The Court does not possess any express power to ensure that its judgments are adhered to, and thus appears powerless to react when its decisions are ignored. Instead, the Court is required to submit to each regular session of the OAU Assembly, a report on its work during the previous year.

The report would include cases in which a State has not complied with the Court's judgment. The OAU Assembly must protect the integrity of the system by adopting whatever political measures that are necessary to secure compliance with the Court's judgment. It is hoped that the African Union when in place would provide the political platform to achieve this.<sup>16</sup>

## **2.5 Independence of Judges**

Amnesty International believes that the judges that will be elected must have proven competence, independence and impartiality, and be free to carry out their duties without external interference. Indeed, it is essential that judges are seen to be independent and impartial.

Article 17 of the Protocol provides that the independence of the Judges of the Court shall be fully ensured in accordance with international law. It requires judges to avoid conflict of interests by restraining them from hearing cases in which they may have previously taken part as agents, counsel, advocates for one of the parties, or as a member of a national or international court, or a commission of inquiry, or in any other capacity.

The Court will have jurisdiction to determine any dispute or doubt arising from this conflict of interest provision, given the scope of possible areas of conflicts under the Protocol. Article 17 also provides protection for judges in the performance of their

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<sup>16</sup> See *Amnesty International, African Union: a New Opportunity for the Promotion and Protection of Human Rights in Africa*, AI Index: IOR 63/002/2002.

duties by conferring on them all immunities that are extended to diplomatic agents in international law from the moment of their election and throughout their term of office. Thus, judges would not be liable for any decision or opinion issued in exercise of their function.

Article 18 of the Protocol provides that the position of the 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 his office. This provision will ensure that the judges of the Court are not engaged in activities that conflict with their role as judges. The provision in fact accords with the recommendation by the Chairpersons of the UN Treaties Bodies that: "State Parties to human rights treaties should refrain from nominating or electing to treaty bodies persons performing political functions or occupying positions which were not readily reconcilable with obligations of independent experts under the given treaty."<sup>17</sup>

The absence of a similar provision in the African Charter with regard to members of the African Commission has made it somewhat problematic to clarify what might constitute an incompatible activity of members of the Commission, especially when some members of the Commission also serve in their home governments either as ministers or ambassadors. This clearly may cast doubt on their ability to function as totally independent experts in discharging their functions.

Under Article 19 of the Protocol, a judge shall not be suspended or removed from office unless by the unanimous decision of the other judges of the Court, where the judge concerned has been found to be no longer fulfilling the requirements for judgeship of the Court. Such a decision of the Court will become final unless it is set aside by the OAU at its next session. However, this position somewhat subordinates the Court to the Assembly of the OAU, and may jeopardise its overall independence. It is the duty of all governmental and other institutions to respect and observe the independence of the judges. In this connection, State parties to the Protocol should provide adequate resources to the Court to enable it perform its functions properly.

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<sup>17</sup> Report of 8<sup>th</sup> Meeting of Chairpersons of the UN Treaty Bodies, UN General Assembly, UN Doc. A/52/507, para. 68.

## **2.6 Funding of the Court**

The Protocol also provides for the funding of the Court. In its Article 32, expenses of the Court, emoluments and allowances for judges and the budget of its registry shall be determined and borne by the OAU, in accordance with the criteria laid down by the OAU, in consultation with the Court. This is an improvement on the Article 44 of the African Charter, which merely states "provision shall be made for the emoluments and allowances of the members of the Commission in the regular budget of the Organization of African Unity." It is essential that similar priority attention be given to the funding of both the Court and the Commission if they are to function effectively.

## **3. RELATIONSHIP BETWEEN THE COURT AND THE AFRICAN COMMISSION**

As stated above, the establishment of an African Court of Human and Peoples' Rights will impact the work of the African Commission. Nevertheless, the coexistence of the Court and African Commission requires a proper clarification of the functions to be performed by each of these bodies in the new dispensation.

While the mandate of the African Commission is set out in Article 45 of the African Charter, detailing promotional, protective and other functions, Article 2 of the Protocol dealing with the relationship between the Commission and the Court does not make any specific provisions on that relationship, as regards particular functions. Rather, it generally provides that "[t]he 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'."

An inference that can be drawn from this provision is that the function of the Court is limited to the protective provisions of the Charter. Thus, it emphasises that the Court will not replace the Commission. Instead, it will strengthen its protective mandate. Similarly, the Commission would retain its protective and promotional mandate as established in the African Charter, but have access to submit cases to the Court as well.

In essence, both the Court and the Commission would share the protective mandate. There remains potential for duplication of efforts by the Commission and the Court given that Article 45(3) of the Charter vests the Commission with the power to interpret

all provisions of the Charter at the request of a State party, an institution of the OAU or an African organization recognised by the OAU.

However, the Commission's interpretative mandate is limited only to the African Charter. On the other hand, Article 3 of the Protocol extends the jurisdiction of the Court to the interpretation and application of the Charter, the Protocol, and any other relevant human rights instruments ratified by the State concerned. A dispute relating to any interpretation made by the Commission can be submitted to the Court. There is thus no doubt that the Court would occupy a primary place in the interpretation of not only the provisions of the Charter but other human rights documents that are applicable before it.

Nevertheless, to avoid dispute, unnecessary competition or duplication, it is essential that the protective function of the Commission should be exclusively vested in the Court. The Commission would thus be more effective to concern itself with promotional functions, including the consideration of State reports and facilitating dialogue with NGOs and government institutions in Member States, to encourage the incorporation of human rights standards into State policies and domestic legislation.

In addition, the division of labour would enhance cooperation and mutual reinforcement between the two institutions and ultimately contribute to the fulfilment of human and peoples' rights in Africa. The Rules of Procedure of the Court will be vital to the success or failure of the African Court as they will create the practical framework for the operation of the provisions of the Protocol and regulate the relationship between the Court and the Commission. The effective functioning of the Commission itself however is of paramount importance if this relationship is to be successful.<sup>18</sup>

#### 4. CONCLUSIONS

The African Commission has made steady albeit not remarkable attempt to entrench itself as an effective regional human rights mechanism. Despite the improvement of the African Commission over the years, its overall effectiveness is of paramount importance. Since the present system does not provide for effective remedy, the adoption in 1998 of a Protocol establishing an African Court on Human and Peoples' Rights is a welcome development. The Court will only come into force after fifteen

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<sup>18</sup> See Amnesty International, *Credibility in Question: proposals for improving the efficiency and effectiveness of the African Commission on Human and Peoples' Rights*, AI Index: IOR 63/02/1998.

instruments of ratification or accession have been deposited with the Secretary-General of the OAU.

The Court, once established would complement and reinforce the overall functions of the African Commission, and has the potential to make a difference in the promotion and protection of human and peoples' rights in Africa by providing justice in individual cases as well as in inter-state case. However, the Protocol is yet to receive the required number of ratifications as only five States are at present parties to it. The delay in putting the Court in place is unfortunate and constitutes a step backward in the realization of the African Charter and the fulfilment of the commitment expressed by the OAU in the Constitutive Act of the African Union.

Amnesty International welcomes the ratifications by Burkina Faso, Mali, Senegal, The Gambia and Uganda and urges states that are yet to do so to ratify the Protocol without further delay. In addition, states should make declarations accepting individual and NGO access to the Court. Without such declarations, the integrity of the Court would be seriously undermined.

## **5. SUMMARY OF RECOMMENDATIONS TO THE OAU/AU MEMBER STATES**

- ▶ Ratify the Protocol establishing the African Court on Human and Peoples' Rights without further delay. In addition, OAU member states, including those that have already ratified, should make declarations accepting individual and NGO access to the Court.
- ▶ Review their legislation and practice, to ensure that these are in full conformity with the Protocol. Amnesty International urges states to meet all their obligations under the African Charter.
- ▶ Ensure that the Judges that will be elected into the Court have expertises relevant to their position. States should also ensure adequate gender balance and representation of the different regions and legal systems in the OAU/African Union.
- ▶ Provide essential resources, including funding to the Court once established. The African Commission should also be given adequate resources to carry out its task effectively.
- ▶ Ensure that the Court is allowed to function independently, impartially and effectively, and to develop its own case law.
- ▶ Take all necessary steps to cooperate fully with the Court, including by according high priority to the prompt compliance with the judgments and decisions of the Court.
- ▶ Ensure that interested people are given the opportunity to be heard and to be represented by legal counsel if they cannot afford one. Also, parties and witnesses who appear before the Court should be protected and not be made to face retribution.

## **Annex i: Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of 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 two-fold 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 AHG/Res.230 (XXX) adopted by the Assembly of Heads of State and Government in June 1994 in Tunis, Tunisia, requesting the Secretary-General to convene a Government experts' meeting to ponder, in conjunction with the African Commission, over the means to enhance the efficiency of the African commission and to consider in particular the establishment of an African Court on Human and Peoples' Rights;

Noting the first and second Government legal experts' 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**

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.

In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

### **Article 4 ADVISORY OPINIONS**

At the request of a Member 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.

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

### **Article 5 ACCESS TO THE COURT**

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

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

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**

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.

The Court shall rule on the admissibility of cases taking into account the provisions of article 56 of the Charter.

The Court may consider cases or transfer them to the Commission.

### **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's 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**

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.

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.

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**

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.

No two judges shall be nationals of the same State.

## **Article 12 NOMINATIONS**

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

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

## **Article 13 LIST OF CANDIDATES**

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.

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**

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.

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.

In the election of the judges, the Assembly shall ensure that there is adequate gender representation.

## **Article 15 TERM OF OFFICE**

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.

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.

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.

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**

The independence of the judges shall be fully ensured in accordance with international law.

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.

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.

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**

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.

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

## **Article 20 VACANCIES**

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.

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.

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**

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

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

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**

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.

The office and residence of the Registrar shall be at the place where the Court has its seat.

## **Article 25 SEAT OF THE COURT**

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.

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

## **Article 26 EVIDENCE**

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.

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**

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.

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**

The Court shall render its judgment within ninety-(90)-days of having completed its deliberations.

The judgment of the Court decided by majority shall be final and not subject to appeal.

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.

The Court may interpret its own decision.

The judgment of the Court shall be read in open court, due notice having been given to the parties.

Reasons shall be given for the judgment of the Court.

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**

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.

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**

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

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

The Protocol shall come into force thirty days after fifteen instruments of ratification or accession have been deposited.

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.

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

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.

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**

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.

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.

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.

## **Annex ii: Status of Ratification of the Protocol on the Establishment of an African Court of Human and Peoples' Rights**

S: signature

R: ratification

| <b>Country</b>                   | <b>Status of ratification</b> |
|----------------------------------|-------------------------------|
| Algeria                          | S                             |
| Angola                           |                               |
| Benin                            | S                             |
| Botswana                         | S                             |
| <b>Burkina Faso</b>              | <b>R</b>                      |
| Burundi                          | S                             |
| Cameroon                         |                               |
| Cape Verde                       |                               |
| Central African Republic         |                               |
| Chad                             |                               |
| Comoros                          | S                             |
| Congo                            | S                             |
| Cote d'Ivoire                    | S                             |
| Democratic Republic of the Congo | S                             |
| Djibuti                          |                               |
| Egypt                            | S                             |
| Equatorial Guinea                | S                             |
| Eritrea                          |                               |
| Ethiopia                         | S                             |
| Gabon                            | S                             |
| <b>Gambia</b>                    | <b>R</b>                      |
| Ghana                            | S                             |
| Guinea                           |                               |
| Guinea-Bissau                    | S                             |
| Kenya                            |                               |
| Lesotho                          | S                             |

|                                         |          |
|-----------------------------------------|----------|
| <b>Liberia</b>                          | <b>S</b> |
| <b>Libya</b>                            | <b>S</b> |
| <b>Madagascar</b>                       |          |
| <b>Malawi</b>                           | <b>S</b> |
| <b>Mali</b>                             | <b>R</b> |
| <b>Mauritania</b>                       | <b>S</b> |
| <b>Mauritius</b>                        | <b>S</b> |
| <b>Mozambique</b>                       |          |
| <b>Namibia</b>                          | <b>S</b> |
| <b>Niger</b>                            |          |
| <b>Nigeria</b>                          |          |
| <b>Rwanda</b>                           | <b>S</b> |
| <b>Sahrawi Arab Democratic Republic</b> |          |
| <b>Sao Tome &amp; Principe</b>          |          |
| <b>Senegal</b>                          | <b>R</b> |
| <b>Seychelles</b>                       | <b>S</b> |
| <b>Sierra Leone</b>                     | <b>S</b> |
| <b>Somalia</b>                          |          |
| <b>South Africa</b>                     | <b>S</b> |
| <b>Sudan</b>                            | <b>S</b> |
| <b>Swaziland</b>                        |          |
| <b>Tanzania</b>                         | <b>S</b> |
| <b>Togo</b>                             | <b>S</b> |
| <b>Tunisia</b>                          | <b>S</b> |
| <b>Uganda</b>                           | <b>R</b> |
| <b>Zambia</b>                           | <b>S</b> |
| <b>Zimbabwe</b>                         | <b>S</b> |

**Annex iii:**

**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 11**

### **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.

