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## CURRENT CHALLENGES FACING THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

*Andreas Zimmermann / Jelena Bäumlér*

Five years after the coming into force of the Protocol on the Establishment of an African court on Human and Peoples' Rights on 15 December 2009, the court issued its first judgment.<sup>1</sup> This case highlighted the limits of the court's jurisdiction, since the case brought by a Chad national against Senegal was rejected as inadmissible. To date, Senegal, like many other African states, has not yet issued a declaration facilitating actions by individuals. As such, the court was not able to rule on the contents of the legal issues involved. The case was nevertheless the subject of some controversy: the action was based on the alleged infringement of human rights of an individual by the state of Senegal. The action itself, however, centered on the protection afforded to Hissène Habrés, who is accused of being personally responsible for the systematic torture and deaths of around 40,000 people. This is a situation that those behind the conception of the court certainly did not have in mind when they established this judicial body. Its very first case strikingly highlighted the tensions that are practically inherent in a system of human

1 | Cf. Nico Krisch, "The Establishment of an African Court on Human and Peoples' Rights", in: *ZaöRV*, 1998, 713 - 732; Vincent O. Orlu Nmehielle, *The African Human Rights System – Its Laws, Practice, and Institutions*, 2001, 259-309; David Padilla, "An African Human Rights Court: Reflections from the perspective of the Inter-American system", in: *African Human Rights Law Journal* (2002), 185 - 202; Rachel Murray, "A comparison between the African and European Courts of Human Rights", in: *African Human Rights Law Journal* (2002), 195 - 222; N. Barney Pityana, "Reflections on the African Court on Human and Peoples' Rights", in: *African Human Rights Law Journal* (2004), 121 - 129; Robert Wundeh Eno, "The jurisdiction of the African Court on Human and Peoples' Rights", in: *African Human Rights Law Journal* (2002),

rights protection centered around judicial bodies. At the same time, however, the judgment proves that the court has indeed begun its work. This article will examine the development of the African Court on Human and People's Rights (ACHPR), including a more in-depth examination of its methods and guiding principles, explore its place within the larger institutional system of human rights protection in Africa and illuminate in more detail the future importance of the court.

## **AFRICA'S JOURNEY TOWARDS THE ESTABLISHMENT OF A COURT ON HUMAN RIGHTS**

The idea of establishing an African Court of Human Rights was the subject of discussions in the Organization of African Unity (OAU) since as long ago as 1961. However, the African Charter on Human and Peoples' Rights<sup>2</sup>, the 'Banjul Charter', was not signed until the OAU summit in 1981. This did not, however, establish a court with jurisdiction in respect of any contraventions of the Charter.

On the contrary, the contracting parties were able to agree only on the creation of a Commission on Human Rights. The African Commission on Human and Peoples' Rights (African Commission) began work in 1987, a year after the entry into force of the Banjul Charter in 1986. Its task is to protect and uphold human rights; however, it is not a judicial, but rather a supervisory body, meaning that it cannot prosecute states for breaching human rights.

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The justifications cited for the creation of a Commission instead of a court were, inter alia, that the selection of a non-judicial procedure was more in keeping with African

223 - 232; Matthias Bortfeld, *Der Afrikanische Gerichtshof für Menschenrechte*, 2005; Astrid Radunski, "Die Afrikanische Union und der Afrikanische Menschengenrichtshof", in: *MenschenRechtsMagazin* 1/2005, 59 - 73; Gina Bekker, "The African Court on Human and Peoples' Rights: Safeguarding the Interests of African States", in: *Journal of African Law* (2007), 151 - 172; George Mukundi Wachira, "African Court on Human and Peoples' Rights: Ten years on and still no justice", in: *Minority Rights Group, International Report 2008*; Frans Viljoen, *International Human Rights Law in Africa*, 2007, 418 - 479.

2 | Dated 27 June 1981, 1520 UNTS 217; German translation printed in: *Europäische Grundrechte-Zeitschrift*, 1986, 677 and 1990, 348.

tradition. The fact that there was not yet sufficient political will among the African states to submit to the jurisdiction of a court is likely also to have played an important role. It was another decade before the move for a court resurfaced in 1993, this time initiated by the International Commission of Jurists with its seat in Geneva. A year later, the Secretary General of the Organization of African Unity, prompted not least by the atrocities in Rwanda, was commissioned to draw up a protocol on the establishment of an African court of human rights. The first draft was prepared in 1995 at a meeting of experts in Cape Town. Two further meetings followed in 1997 before the heads of state finally signed the protocol at the OAU summit in Ouagadougou in 1998.<sup>3</sup> However, it was another six years

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before the Protocol on the Establishment of an African Court on Human Rights actually entered into force following ratification by the Comoros, the 15th state to ratify, on 25 January 2004. To date, 24 member states of the African Union (still fewer than half) have ratified the protocol.<sup>4</sup> In the interim period, the African states decided to reform the OAU, which was established in 1963. Having achieved its central goal, which was to bring an end to Colonial rule, there was a need following the creation of the African Economic Union to consolidate the agreements on the union and the OAU Charter. The transformation of the OAU into the African Union (AU) decided in 1999 was intended to make the organization more efficient and, last but not least, to better equip it to be able to deal with human rights issues. Upon submission of the 36th ratification deed by Nigeria, the AU's Constitutive Act finally entered into force on 21 May 2001. What is interesting in this context is first and foremost that the establishment of the African Union involved the establishment of another court, the Court of Justice of the African Union, in addition to other institutions, which will be examined separately.

3 | <http://www.africa-union.org> > Documents > Treaties, Conventions & Protocols, printed in: *ZaöRV* 1998, 727 - 732.

4 | Cf. list of states that have ratified the protocol (as per: 3 February 2010), at: <http://www.africa-union.org> > Documents > Treaties, Conventions & Protocols.

## **WORKINGS OF THE AFRICAN COURT ON HUMAN RIGHTS**

### **COMPOSITION OF THE PANEL OF JUDGES AND SEAT OF THE COURT**

The Protocol on the Establishment of an African Court on Human and Peoples' Rights provides that jurists of high moral character and of recognized practical, judicial or academic competence and experience in the field of human and peoples' rights can be considered for the position of judge.<sup>5</sup> In addition to personal qualifications, the goal of having a balanced composition plays a crucial role: the judges must represent the five major African regions (South, West, East, North and Central), the various African legal systems of Islamic law, Common and Civil law, African customary law and South African Roman-Dutch law, as well as ensuring that African traditions are taken into account. Furthermore, the panel should have an equal representation of men and women (Art. 11-15 of the Protocol). Only AU states that have ratified the protocol have a right to nominate candidate judges. These states can propose up to three candidates, at least two of whom must be nationals of that state.<sup>6</sup> Thus, judges from states that are not party to the protocol can also be nominated. The judges are selected by the Assembly of the AU, that is, all 53 member states. This seems fitting since the ACHPR is an organ of the AU and other states may ratify the protocol within the six-year term of office of the judges, so that they would then also have a say in the composition of the panel of judges.

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The first eleven judges were selected on 22 January 2006 at the summit in Khartoum and inaugurated in Banjul in June of that year.<sup>7</sup> While the judges do represent the various

5 | Cf. Article 11 (1) of the Protocol.

6 | Cf. Article 12 (1) of the Protocol.

7 | Judge Gerard Niyungeko (Burundi) (President), Judge Modibo Tounty Guindo (Mali) (Vice President), Judge Fatsah Ouguergouz (Algeria), Judge Jean Emile Somda (Burkina Faso), Judge Sophia A. B. Akuffo (Ghana), Judge Kellelo Justina Mafoso-Guni (Lesotho), Judge Hamdi Faraj Fanoush (Libya), Judge Jean Mutsinzi (Rwanda), Judge El Hadji Guissé (Senegal), Judge Bernard Ngoepe (South Africa), Judge George Kanyiehemba (Uganda).

regions and legal systems, there has been occasional criticism of the lack of expertise of some judges in the field of human rights law. In addition, attention has also been drawn to the fact that only two women were nominated.<sup>8</sup>

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At the time the judges were selected, the seat of the court had not yet been decided on. Not until August 2007 were the states able to agree on Arusha in Tanzania and conclude a corresponding treaty between the Republic of Tanzania and the African Union. This location was selected based on the consideration that the court would be able to move into the International Conference Center, where the UN International Criminal Tribunal for Rwanda had worked up until that point. At that time it was not yet foreseeable that the Tribunal would need the premises until the end of 2012. This currently poses considerable difficulties for the ACHPR, since its intended premises still cannot be used in full. At present – as in other international courts – the judges, with the exception of the president, work part time only. This issue was initially the subject of hefty disputes due to fears that this would be incompatible with other professional activities, threatening the impartiality of the judges. However, primarily in order to ease pressure on financial resources, it was decided that the judges' working hours would be altered only if their workload increased. In 2008, the first two judges<sup>9</sup> left the panel, without ever having ruled on a case.

## **JURISDICTION OF THE COURT**

The Protocol on the ACHPR provides for two types of proceedings: on the one hand, contested judgments and on the other legal opinions, which can be requested by individual AU member states, executive bodies of the AU or any African organization recognized by the AU.<sup>10</sup> This article will outline its jurisdiction with regard to contested cases, which, if one goes by the experiences of the two other regional human rights' courts, are liable to account

8 | Cf. at length on this subject: Frans Viljoen, *International Human Rights Law in Africa*, 2007, 432 - 433.

9 | Article 15 (1) of the Protocol stipulates that 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.

10 | Article 4 (1) of the Protocol.

for the vast majority of cases. Of particular relevance in this context is, first and foremost, who can actually file suit (competence *ratione personae*) and, second, which breaches of rights can be subject of a case (competence *ratione materiae*).

### **JURISDICTION RATIONE PERSONAE**

Depending on who files suit, the court has mandatory jurisdiction, which every state automatically acknowledges on ratification of the Protocol. It also has discretionary jurisdiction, for which a corresponding additional declaration of recognition of jurisdiction is required. Mandatory jurisdiction applies if the proceedings are brought by

- the African Human Rights Commission,
- the state party which has lodged a complaint to the Commission;
- the state party against which the complaint has been lodged at the Commission,
- the state party whose citizen is a victim of human rights violation,
- or African intragovernmental organizations.<sup>11</sup>

In contrast, the *optional jurisdiction* applies in suits filed by individuals and by non-governmental organizations.<sup>12</sup> As the example cited earlier illustrates, these two groups can bring a case before the court only if the accused state has made a declaration accepting the competence of the Court to receive such cases.<sup>13</sup> The first two draft protocols furthermore provided that in exceptional cases or in the event of serious, systematic and grave breaches of human rights, individuals should be provided access to the court irrespective of the existence of such declaration by their home state. Ultimately, however, it was decided that a provision of this kind should not be included and that the ability to file suit should be made dependent on the submission of corresponding declarations of recognition of competence.

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11 | Cf. Article 5 (1) of the Protocol.

12 | Cf. Article 5 (3) of the Protocol.

13 | Cf. Article 34 (6) of the Protocol.

Many states were not prepared in particular to leave the decision as to the ability of individuals to file suit in the hands of the court, which would then have to decide in each individual case whether there were exceptional circumstances or if there had been serious breaches of human rights in the state concerned. The existing provision is to be welcomed on account of its clarity, provided a sufficient number of states submit such declarations. To date, however, only Mali and Burkina Faso, that is, only two of the total of 23 contracting states have done so.

In light of the fact that the states have been reluctant thus far to submit such declarations, the option for the African Human Rights Commission to initiate proceedings is all the more important. This method can be used to allow the court to rule on cases involving individuals, provided the person concerned lodges a request for proceedings with the Commission and the Commission passes the case on to the court. At the same time, it could relieve pressure on the court if the Commission forwards only cases with a certain likelihood of success. To date, however, the African Human Rights Commission has not made use of this possibility.

### **JURISDICTION RATIONE MATERIAE**

On the facts, the court has competence to rule on cases in which one of the contracting parties is accused of breaching human rights.<sup>14</sup> It is striking that suits can be based both on a breach of the Banjul Charter and on contravention of any other treaty on the protection of human rights that the state in question has ratified. On the African level in particular, this includes the Convention Governing the Specific Aspects of Refugee Problems in Africa, the African Charter on the Rights and Welfare of the Child and the Protocol to the African Charter on the Rights of Women in Africa passed in 2003. In addition, on a universal level, this includes the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights and the United Nations Convention against Torture.<sup>15</sup> It is not clear whether treaties and

14 | Cf. Articles 3 and 7 of the Protocol.

15 | Cf. OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 UNTS 45; Charter on the Rights and Welfare of the Child, ILM 28 (1989) 1448; African Charter on Human and Peoples' Rights on the Rights

conventions that do not first and foremost serve to protect human rights, such as the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere of 1976 or the Geneva Conventions dating from 1949 with their rules on humanitarian international public law<sup>16</sup> are also included.

This comprehensive material competence of the ACHPR did not by any means meet with universal approval. While the possibility of being able to base a breach of human rights on every treaty or convention signed by the state in question, resulting in a greater degree of implementation of contractual obligations for which there is not otherwise any international court, is generally a positive thing, on the other hand there is a risk that this could lead to diverging interpretation, for instance if the ACHPR reaches a different outcome from the United Nations Human Rights Committee – a legal uncertainty that could, overall, result in a weakening of these instruments.<sup>17</sup> In the interests of the effective protection of human rights, the bundling of proceedings before a court like the ACHPR ought, in principle, to be a good thing. For people whose human rights have been breached it would doubtless represent a significant hurdle if he were required to bring a case before one court to determine the breach of one treaty, while for another he would have to turn to a different judicial body. This is even truer in view of the variety of relevant bodies and institutions under the convention

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The consideration that, on the basis of this provision, (African) states could potentially be even more reluctant to ratify in the future is not an argument against this comprehensive jurisdiction clause. If states ratify treaties

of Women in Africa, Doc/OS/34c/(XXIII) Annex; International Covenant on Civil and Political Rights, 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3; Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85.

16 | Cf. Geneva Convention relative to the treatment of prisoners of war, 75 UNTS 135, Geneva Convention relative to the protection of civilian person in time of war, 75 UNTS 287.

17 | Cf. in relation to this discussion Nico Krisch, "The Establishment of an African Court on Human and Peoples' Rights", in: *ZaöRV* 1998, 713 (722 f.); Matthias Bortfeld, *Der Afrikanische Gerichtshof für Menschenrechte*, 2005, 124.



only because they do not have to fear the implementation thereof, ratification would be nothing more than lip service in any case. On the contrary this can prevent states from boasting that they have ratified a treaty without intending to honor it, because they do not have to fear the implementation in any case. Thus, the positive aspects of this provision dominate. In the interests of a harmonious system of human rights protection, however, the court should endeavor not to reach divergent conclusions in questions of interpretation that have already been settled by other institutions.

### **COURSE OF PROCEEDINGS**

The Court can try to reach an amicable settlement in a case pending before it (Art. 9 of the Protocol). If this does not appear possible, both written and oral evidence of the parties can be referred to during the case. Enquiries can be held in individual cases to clarify disputed facts and gain a direct impression of the situation (Art. 26 of the Protocol). If preliminary proceedings have been brought to a close, an oral hearing is held, which, as a rule, is conducted in public.<sup>18</sup> The parties are entitled to be represented by a legal representative of their choice and free legal representation may be provided where the interests of justice so require. (Art. 10 (2) of the Protocol).

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The court can adopt provisional measures in cases of extreme gravity and urgency<sup>19</sup>, whereby the Protocol does not contain any unequivocal provision on whether such measures are legally binding. It merely states that the parties must comply with the judgments of the court (Art. 30 of the Protocol). It has been pointed out in this context that in the Inter-American Court of Human Rights provisional measures are in all respects considered binding and that the Protocol of the ACHPR largely follows the provisions of the Inter-American Court. The express admissibility of provisional measures indicates that these are binding, particularly in view of the fact that even the European Court of Human Rights and the International Court of Justice have for several years proceeded from the assumption that provisional measures are binding.

18 | Cf. Article 10 (1) of the Protocol.

19 | Cf. Article 27 (2) of the Protocol.

Another peculiarity in the proceedings before the ACHPR is the provision providing that if a judge is a national of a state which is party to a case submitted to the Court, he/she is not permitted to hear the case (Art. 22 of the Protocol). This is in contrast to the practice of the other regional judicial bodies and the International Court of Justice, in which, through the admission of an *ad hoc* judge from the state concerned, the possibility of representation was provided for. The consideration that a judge from the accused state may have better knowledge of the situation and the legal system of his home state supports this approach. During the negotiation of the Protocol of the ACHPR, however, potential bias and the resultant influence was seen as more disadvantageous. In fact, the admission of a national judge in proceedings before the Inter-American Court of Human Rights has resulted in considerable difficulties in the past, even leading to the suspension of a case.<sup>20</sup> On the other hand, it may be easier for a state convicted of a breach of human rights to accept a judgment that a national judge was involved in.

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## **JUDGMENTS AND EXECUTION THEREOF**

The court's judgment must be rendered within ninety days of completion of the oral hearing by at least seven judges and approved by the majority (Art. 28 of the Protocol). Judges have the right to deliver a dissenting opinion. In addition to ascertaining whether there has been a breach of human rights, the ACHPR can make orders to remedy the violation or order payment of compensation or reparation (Art. 27 of the Protocol). In so doing, it is not restricted to imposing a monetary fine like the European Court of Human Rights, but can also, in line with practice in the inter-American system, order other action to be taken. Decisions of the ACHPR cannot be contested or appealed. The execution of judgments of the ACHPR is supported in particular by the fact that the monitoring of execution is incumbent upon the Executive Committee on behalf

20 | Cf. David Padilla, "An African Human Rights Court: Reflections from the perspective of the Inter-American system", in: *African Human Rights Law Journal* (2002), 185 (188).

of the AU Assembly.<sup>21</sup> Another measure liable to prove helpful in terms of “naming and shaming” is the naming of the states that have failed to comply with a judgment in the court’s annual report (Art. 31 of the Protocol). This report is submitted to the Assembly of Heads of State and Government and is made public.

### **RELATIONSHIP WITH OTHER AFRICAN INSTITUTIONS**

The ACHPR is part of a larger network of institutions and organs that, at first glance, can appear very confusing. What is particularly interesting here is the relationship between the African Commission, that is, the original supervisory body under the Banjul Charter, and the newly created African Court of Justice. Unlike in the European context, the AU acts as the umbrella for all of these institutions.

### **AMALGAMATION OF THE ACHPR AND THE AFRICAN COURT OF JUSTICE**

The African Court of Justice was created, as previously explained, in the course of the reorganization of the African Union. Since the acceptance of the relevant Protocol at the summit in Maputo in July 2003, the AU has had two courts. The relationship between the two needs to be clarified. Pursuant to Article 19 of the Protocol on the African Court of Justice<sup>22</sup>, it is responsible for disputes based on the application and interpretation of the constitutional act of the AU and treaties concluded under the auspices of the AU. All public international law disputes also fall within the jurisdiction of the court. While the African Court of Justice may first and foremost be responsible for conflicts between states concerning the interpretation of treaties and conventions of the AU, there could nevertheless be overlaps in competence, which has led to a degree of uncertainty within the African community of states.<sup>23</sup>

21 | Cf. Article 29 (2) of the Protocol. The provisions governing the Council of Ministers are set forth in Articles 10-13 OAU Charter.

22 | <http://www.africa-union.org> > Documents > Treaties, Conventions & Protocols. This has not entered into force because not enough states have ratified.

23 | Cf. N. Barney Pityana, “Reflections on the African Court on Human and Peoples’ Rights”, in: *African Human Rights Law Journal* (2004), 121 (123).

The idea of amalgamating the two courts was based on this consideration in particular, as well as the desire to alleviate the strain on financial resources. The formal process of amalgamation was completed with the acceptance of the Protocol on the African Court of Justice and Human Rights on 1 July 2008 at the 11th General Assembly of the AU in Sharm El-Sheikh. This newly created court is intended to comprise two sections: a general section and a section for human rights. A total of 16 judges will work there, whereby each chamber will have 8 judges.<sup>24</sup> The Protocol in question will, however, enter into force only once the 15th instrument of ratification treaty has been deposited. At present only two states, namely Mali and Libya, have taken this step.<sup>25</sup> Thus, it is likely to be quite some time before the amalgamation is actually implemented. The positive process of the fusion of the two courts is thus currently running in parallel to the development of the ACHPR. The Protocol of the ACHPR therefore remains decisive until it has been replaced by the new protocol.

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### **COOPERATION OR COMPETITION BETWEEN THE ACHPR AND THE AFRICAN HUMAN RIGHTS COMMISSION?**

The objective of the African Human Rights Commission is to protect human rights and the rights of the peoples and to interpret the Banjul Charter. The main weakness of the Commission is that it is not a real judicial body, but purely a supervisory body. In its proceedings, the Commission summoned the parties to appear and held enquiries in the same way as a court does.<sup>26</sup> It also decided, in a bold move, to accept individual complaints. However, it can only issue recommendations; it does not have any enforcement mechanisms and cannot order reparation or other compensation payments. In addition, the final report to the state concerned, a copy of which is also provided to the assembly of heads of state and government, is not made public.

24 | Cf. Article 16 - 19 of the Protocol on the Statute of the African Court of Justice and Human Rights.

25 | <http://www.africa-union.org> > Documents > Treaties, Conventions & Protocols.

26 | Cf. Nico Krisch, "The Establishment of an African Court on Human and Peoples' Rights", in: *ZaöRV* 1998, 713 (715).

Thus, while the ACHPR and the Commission have different methodical approaches, there are many overlaps in their material fields of operation. Pursuant to Article 2 of the Protocol, the ACHPR is intended to complement and support the work of the Commission. However, the fact that the ACHPR is not bound by decisions of the Commission and can reach a different decision in the same case indicates that a hierarchical structure in favor of the Commission is by no means intended. The legal policy expectations range from the hopes for intensive cooperation on the one hand, to fears of potential mutual blockades on the other. In contrast to European human rights protection, there have not to date been any efforts to fuse the two

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institutions. Hopes of reciprocal support are not currently being fulfilled. Thus far there has been no increase in cooperation between the two bodies. The African Commission has not yet brought a case before the ACHPR and there has been no news of any exchange of experience and procedures between the Commission and the ACHPR. The reason for this could be the Commission's fears that it will lose all importance next to a strong court, since it is paid little attention as it is. This view overlooks the potential that two strong institutions working side by side could have.

### **PRACTICE OF THE ACHPR TO DATE**

As mentioned above, the one and only case heard by the court was decided on 15 December 2009.<sup>27</sup> The background to the proceedings were the events in Chad during the period from 1982 to 1990, during the time of Hissène Habré's presidency. He is accused of massive breaches

27 | Judgment in the case of Michelot Yogogombaye vs. the Republic of Senegal, application No. 001/2008. Can Available at: [www.african-court.org](http://www.african-court.org) > Cases > Latest Judgments. The individual opinion of judge Fatsah Ouguergouz, who ultimately concurred with the judgment, criticized firstly the duration of the proceedings, which lasted more than a year from filing of the suit on 11 August 2008 until the decision was reached. His second complaint was that Articles 5 (3) and Article 34 (6) of the Protocol provide *inter alia* for the submission of a declaration. In Ouguergouz's opinion, however, this was the only prerequisite that was also exclusively an issue of jurisdiction and not of admissibility. Can be accessed at: [www.african-court.org](http://www.african-court.org) > Cases > Latest Judgments.

of human rights. The national investigation committee subsequently established concluded that during his time in office Habré ordered the systematic torture and murder of around 40,000 people, resulting in his being nicknamed the “Pinochet of Africa”. Having been ousted from his position by current president Idriss Déby in 1990, he fled to Senegal, where he lived unmolested for many years. When 25 individuals filed suit in Belgium, a Belgian judge flew to Chad to carry out investigations of his own and Belgium issued an international warrant for Habré’s arrest. The AU, however, decided against Habré’s extradition and merely called on Senegal to find a solution or alternative “African options”.

Belgium’s petition to the International Court of Justice for Habré’s extradition from Senegal by means of interlocutory order was unsuccessful. In view of Senegal’s assurances that Habré would not leave Senegal and in the expectation that Senegal itself would initiate legal proceedings, the International Court of Justice did not consider interlocutory measures necessary.<sup>28</sup> The problem here was that, at that time, Senegal did not have any legal basis justifying the prosecution of crimes committed outside of Senegalese territory. Not until 31 January 2007 did the Senegalese National Assembly retroactively enact a law permitting the prosecution of genocide, crimes against humanity, war crimes and torture in cases in which these crimes were committed outside Senegal. It was precisely for this reason that the petitioner, Michelot Yogogombaye, a Chad national currently resident in Switzerland whose relationship to Habré is still unclear, took his case to the ACHPR against the legal prosecution of Habré in Senegal. In his petition he argued that the procedure was invalid on account of the prohibition on retroactive provisions<sup>29</sup> and furthermore constituted a breach of the African Refugee Convention. In material terms, Senegal’s response was that there was no contravention of the treaties and that the petitioner did not have any legitimate interest in the case. As explained, however, the petition was not heard

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28 | Cf. IGH Belgium v. Senegal, Questions relating to the Obligation to Prosecute or Extradite, 28 May 2009.

29 | Cf. Article 7 (2) of the Banjul Charter.

nor was the case decided. The case was rejected without any oral hearing, since Senegal had not submitted a declaration accepting the court's competence to rule on cases involving individuals.

### **OUTLOOK: EFFECTIVENESS AND IMPORTANCE OF THE COURT**

If one reads the evaluations of the African Court on Human Rights, in general they highlight certain deficiencies. Criticism is often voiced regarding the fact that, to date, there has only been one case or that the court's approach is not effective enough. The fact that it took over a year before the first case was rejected on the basis of a simple admissibility criterion is certainly a valid point of criticism. Furthermore, the fact that there have not been more cases lodged and that the Commission has not yet referred a case provide cause for concern. However, this is by no means a reason to predict that the ACHPR is doomed to fail. The first steps are always the hardest, even when setting up

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a court. A glance at its sister courts shows that these encountered similar problems: the Inter-American Court of Human Rights heard its first case a whole six years after its establishment in 1980, with a further four years before the second. At the European level, the relationship between the European Human Rights Commission and the European

Court of Human Rights was not completely clear until their amalgamation. While an analysis of past difficulties is helpful, this should not lead to any overly-hasty positive or negative prognoses for the future. The path of the ACHPR and the opportunities are wide open. Ultimately, the future of the ACHPR is dependent on the will of the African states, the judges, as well as the NGOs and the Commission, not to allow themselves to be discouraged by initial difficulties.

The suggestion that the court ought to try to learn more from the other two regional judicial bodies, the European Court of Human Rights and the Inter-American Court of Human Rights, seems reasonable. At the same time, however, the court must also find its own path and, if necessary, make its own mistakes. The establishment of a genuinely African Court on Human Rights will result only

from the development of its own solutions, which both take account of the procedural peculiarities of the court and the special circumstances in Africa and is equipped to deal with these. One of the greatest challenges facing the court is likely to be how to deal with the diversity of the African continent. In contrast to its sister courts, the African Court on Human and Peoples' Rights faces the difficult task of dealing with a considerably more heterogeneous group of members.

It remains to be seen how the court will deal with these problems, in particular the lack of resources. The relationship, cooperation and delimitation of competences between it and other judicial bodies of regional unions such as the Economic Community of West African States (ECOWAS) or the South African Development Community (SADC) will need to develop over time. The hope remains that the amalgamation of the two courts of the AU will soon be complete, lending new impetus to the further development of a supranational court system in Africa. One lesson that could be learned from the history of the two sister courts, the European Court of Human Rights and the Inter-American Court of Human Rights – is, they still exist. The process of establishing a court of human rights, once initiated, will be irreversible in Africa also, and, sooner or later, will result in the further development and improvement of human rights protection in Africa, be it in the form of an “African Court of Justice and Human Rights” or in the existing form of the ACHPR.