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**EXECUTIVE COUNCIL**  
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**REPORT ON THE DECISION OF THE ASSEMBLY OF THE UNION**  
**TO MERGE THE AFRICAN COURT ON HUMAN AND**  
**PEOPLES' RIGHTS AND THE COURT OF JUSTICE**  
**OF THE AFRICAN UNION**

**REPORT ON THE DECISION OF THE ASSEMBLY OF THE UNION TO  
MERGE THE AFRICAN COURT ON HUMAN AND  
PEOPLES' RIGHTS AND THE COURT OF JUSTICE  
OF THE AFRICAN UNION**

**I. INTRODUCTION**

1. By its decision **Assembly/AU/Dec.45 (III)**, the Assembly during its Third Ordinary Session held in Addis Ababa from 6-8 July, 2004 decided *inter alia* that the African Court on Human and Peoples' Rights (African Court) and the Court of Justice of the African Union (AU Court) should be integrated into one Court. The decision, which was proposed by the Bureau of the Third Ordinary Session of the Assembly, was based on the need to rationalize the two Courts and make them efficient and cost effective. The Assembly further directed the Chairperson of the Commission to work out the modalities of implementing the decision.

**II. CONTEXTUALISING THE DECISION**

**3.2.** In adopting decision **Assembly/AU/Dec.45 (III)**, the Assembly did so bearing in mind the recommendations of the Executive Council on the operationalisation of the African Court. The Executive Council had adopted and recommended the following draft decision for consideration by the Assembly:

***“ The Assembly:***

- 1. TAKES NOTE of the Recommendations of the Executive Council;***
- 2. DECIDES that the elections of the Judges of the Court should take place during the Sixth Ordinary Session of the Executive Council in February/March 2005;***
- 3. DECIDES to delegate its power to appoint the judges, approve the budget, determine the structure of the Registry of the Court and the seat of the Court to the Executive Council to enable the latter undertake***

*these actions at its Sixth Ordinary Session in February/March 2005.”*

3. In the summary of the Chairperson of the Assembly, President Olesegun Obasanjo, stated as follows: **“We looked at the danger of proliferation of organs of this organization and the danger of not having enough funds to do what we should do and just proliferating organs. Today, we are told that even the offices of the Chairperson of the Commission and the Commissioners are not fully equipped and in doing that, we said there are a number of organs in the Constitutive Act of our Union; one of them is the Court of Justice. And we say, why shouldn’t the Court of Justice also take along with it the Court on Human and Peoples’ Rights so that we have a Court of Justice which will have a division, if you like, for border issues, a division for human rights issues, a division for cross border criminal issues or whatever. And the consensus at that meeting is that, that is probably the way we should go. Again to start looking at things .....with a new sight with the benefit of our present experience and our known situation. Now if that is the case..... I will suggest in that case, that the Decision on the Operationalisation of the African Court on Human and Peoples’ Rights should be removed for now. Alright? That is done.”**

4. At the end, the Assembly, in its decision **Assembly/AU/Dec.45 (III)**, decided as follows:

**“ 4. FURTHER DECIDES that the African Court on Human and Peoples’ Rights and the Court of Justice should be integrated into one Court;**

**5. REQUESTS the Chairperson to work out the modalities on implementing Paragraph 4 above and submit a report to our next Ordinary Session.”**

5. The decision should be seen within the context of the ongoing exercise within the AU of institutional rationalization and with the view to introduce coherence and make AU institutions more efficient and cost effective. This exercise is a necessity considering that the budgets of all the organs operating under the aegis of the OAU are an integral part of the AU budget.

6. The effect of decision **Assembly/AU/Dec.45 (III)** was to suspend the operationalisation of the African Court temporarily until such time as the Assembly has decided on the way forward on the basis of recommendations to be submitted by the Commission on the matter. Indeed, it has been argued that since States Parties to the Protocol were part of the decision, they have, therefore, consented to the suspension of the process that is otherwise required by the Protocol (*lex posterior derogat, etc.*). Furthermore, the Assembly is the supreme organ of the Union (Article 6(2) of the Constitutive Act) and is the equivalent of the Assembly of States Parties in other legal regimes, even though it is composed of both States Parties and non-States Parties to OAU/AU treaties. It has a role under the African Court and the Court of Justice Protocols of electing judges, deciding on the budget of the institution, adopting amendments to the treaties, etc.

### **III. ISSUES INVOLVED**

7. In implementing this decision, the Commission has had to address a number of issues. Among these, the following could be mentioned:

- The two Courts have different jurisdictional bases. The African Court on Human and Peoples' Rights was established to complement the protective mandate of the African Commission on Human and Peoples' Rights. According to Article 3 of its Protocol, its jurisdiction 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*". On the other hand, the Court of Justice of the African Union has a broad jurisdiction extending over all AU treaties and conventions, and other issues concerning international law, including bilateral issues between the Member States. Some human rights activists have expressed the fear that the merger of the two Courts would delay and thus compromise the human rights mandate of the African Court.
- The two Courts are at different stages of development. While the Protocol relating to the Establishment of the African Court on Human and Peoples' Rights is already in force, having received the necessary number of ratifications on 25 January 2004, the Protocol on the Court of Justice, which was adopted on July 29, 2003 has so far received only five (5) ratifications, and it may

take time before the necessary fifteen (15) ratifications are obtained. Consequently, the merger is likely to have the effect of delaying somewhat the implementation mechanism for judicial protection of human rights in Africa.

- The composition and expertise required in the two Courts are different. While to be elected to the African Court on Human and Peoples' Rights an individual is required under Article 11(1) of the Protocol to be "... *among jurists of high moral character and of recognized practical, judicial or academic competence and experience in the field of human and peoples' rights*"; for the Court of Justice the qualification is more general. Under Article 4 of the Protocol, [Judges shall be] "... *elected from among persons of high moral character, who possess the necessary qualifications required in their respective countries for appointment to the highest judicial offices, or are jurists of recognized competence in international law*". They may thus, not have the necessary expertise in human rights. It may, therefore, be argued that the merger of the two Courts may be at the expense of compromising expertise in human rights.
- There are also a number of procedural differences between the African Court and the AU Court. For instance, the provisions concerning the relationship between the Court and the African Commission on Human and Peoples' Rights (Articles 2, 4, 5 (1a), 6(3) and 8). Furthermore, the Rules of Procedure of human rights courts are usually different from those of international courts and tribunals. For example, the former have to adopt special provisions concerning burden of proof, different from the basic principle in international law, *actori incumbit probatio*, because of the inequality of the parties before a human rights court unless it is assumed that the parties will be States, which assumption is not borne out by the experience of the African Commission on Human and Peoples' Rights.

8. However, while these arguments are certainly weighty and need careful consideration, they are certainly not insurmountable and need not prevent the process of integration of the two courts. The following arguments can be offered in support of the decision:

- While the African Court on Human and Peoples' Rights is restricted to human rights issues, the Court of Justice of the

African Union is not precluded from handling cases touching on human rights. The main competence/jurisdiction of the Court under Article 19 of the Protocol is the “ ... *interpretation and application of the [Constitutive] Act...*” It will be noted that the objectives of the Constitutive Act in Article 3 paragraphs (g) and (h) as well as its Principles in Article 4 paragraphs (h), (m), (n) and (o) are concerned with various aspects of the protection of human rights. So the Court of Justice could also be intimately concerned with human rights issues. Indeed, this possible overlap of mandate is already a matter of concern in the European system where the European Court of Justice has established jurisdiction over European Community Law with regard to human rights, whilst the European Court of Human Rights bases its jurisdiction on the articles of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The AU Court and the African Court are likely to find themselves in similar circumstances.

- While it is true that the two Courts are at different stages of development, it really just requires the political will of all the Member States, including those that have already ratified the Protocol to the African Court on Human and Peoples’ Rights to deposit their instruments of ratification for effecting the merged Court to enter into force soon. We are convinced that the political will exists.
- While the expertise required in both cases may be different, judges trained in international law are adept at dealing with matters they may not consider themselves as experts. It is in this spirit that the International Court of Justice is able to handle all types of cases brought before it in such varied fields as diplomatic law, Law of the Sea, boundary disputes, trade disputes, etc. As will be suggested later, in the election of the judges to the merged Court, Member States may be required to take into account specific qualifications on human rights for some of the candidates, who if elected could form the core of judges for the Special Chamber on human rights.
- The integration of the two courts is welcome because judgements of the AU Court are enforceable with sanctions according to article 52 (2) of the Protocol whereas judgements of

the African Court may most probably not be enforceable in that manner.

- The merger of the two courts will introduce some amount of coherence and cost effectiveness in the AU institutions that are judicial or have quasi-judicial functions and deal with human rights or related issues. These institutions are the African Commission on Human and Peoples' Rights, the African Committee of Experts on the Rights and Welfare of the Child, the African Court on Human and Peoples' Rights and the Court of Justice. As far as the cost effectiveness is concerned, it should be noted that each of these institutions except the Child Committee have their own Secretariat, and are composed of 11 members or judges each. In the specific case of the two Courts, the President of each of the Court is required to perform his functions on a full time basis. Thus, each president is entitled to the necessary facilities such as offices, residences, cars, household staff, salaries, home leave, medical, education and other allowances, payable internationally to special appointees of their status. Additionally, the other members/judges of the four organs would be entitled to air and local transportation during sessions, DSA, medical allowance, honorarium, etc.
- The African Court if operationalised as is has the potential of being relegated to the position of a poor cousin of the Court of Justice which, according to Article 2 of its Protocol, is the Principal Judicial Organ of the African Union.
- We are convinced that a well-resourced and effective Court that has competence to deal with human rights issues is in the interest of human rights. However, it is important that whatever option is chosen to effect the merger does not delay unduly the operationalisation of a mechanism for the protection of human rights.

#### IV. **POSSIBLE SOLUTIONS**

9. To integrate the two Courts, various options may be considered two of which come to mind.

10. **Option 1:** The adoption of a new Protocol to establish a new integrated Court. Such a Protocol would consist of all the main or relevant

elements from the Protocol on the African Court and the Protocol on the AU Court. Thus, the new Protocol would replace the existing Protocols. This option would, however, be time consuming and would result in delaying the establishment of the new Court, which would be unfortunate.

11. It would also be problematic since the Protocol on the African Court has already entered into force. It would require the abrogation of the Protocol, and its replacement by the single Act incorporating both protocols. It is doubtful whether the Assembly in its decision intended this course of action and, furthermore, this approach has the unpredictable factor of reopening everything for renegotiation, including the limited access to the African Court by individuals and NGOs.

12. **Option 2:** Maintain the integrity of the jurisdiction of both Courts while making it possible to administer the protocols through the same Court by way of special Chambers. This would require consequential amendments of the two Protocols through the elaboration of a short and simple Protocol. It will, however, be necessary in the process to address the issues raised above, to ensure that the intended purposes of the two Courts are not compromised by their merger, and that, as far as possible, their objectives will still be possible to realize. This option is not without some difficulties. Clever and careful drafting will be required to deal with situations where some Member States decide to commit themselves through signature and ratification/accession to the African Court part of the integrated court but not to the AU Court part and vice versa. However, this is clearly the only feasible option taking into account that the Assembly did not obviously intend to delay the operationalisation of a human rights mechanism.

13. It is, therefore, proposed that the necessary amendments to both the Protocol on the African Court and the Protocol on the AU Court be incorporated in a new Protocol to be adopted by the Assembly of the Union. Member States will, therefore, be expected to sign and ratify all the three Protocols.

14. The merged Court will be expected to exercise the jurisdiction of the African Court or that of the AU Court respectively, depending on the type of dispute before it and utilizing the mechanism of Special Chambers and the relevant Protocol. To ensure that there will be the number of judges with the requisite skills at any one time as necessary, it is proposed that the number of Judges in the merged Court be fixed at seventeen (17) instead of the current number of eleven (11) for each court. Out of these,

five (5) Judges, one from each region, will be elected from among jurists of “...recognized practical, judicial or academic competence and experience in the field of human and peoples’ rights...” as currently required in Article 11 of the Protocol on the African Court. Those judges will form the nucleus of a Special Chamber on Human and Peoples’ Rights, to be established in the merged Court. One of the Deputy Registrar(s) envisaged in Article 48 of the AU Court, will be charged with the responsibility of administrative matters of the Special Chamber on Human and Peoples’ Rights.

## **V. RECOMMENDATIONS**

15. The Commission recommends that the merger be effected by way of Option II above, namely, through a short and simple Protocol that could be quickly negotiated by Member States and easily piloted through the process of signature and ratification/accession.

## **VI. WAY FORWARD**

~~15.16.~~ The AU commission will convene a small meeting of distinguished African jurists and scholars in early January to assist the Commission in this endeavour. Thereafter, the Commission will internalise the recommendations and convene a meeting of the Permanent Representatives Committee and legal experts in mid January to consider the recommendations and the Draft legal instrument that will have been elaborated.

17. The recommendations and the Draft legal instrument shall be submitted for the consideration of the Sixth Ordinary Session of the Executive Council and the Fourth Ordinary Session of the Assembly of the Union scheduled for Abuja, Nigeria, from 27 to 31 January 2005.

**DRAFT PROTOCOL ON THE INTEGRATION OF THE AFRICAN COURT  
ON HUMAN AND PEOPLES' RIGHTS AND THE COURT OF JUSTICE OF  
THE AFRICAN UNION**

The Member States of the African Union, States Parties to the Protocol on the establishment of the African Court on Human and Peoples' Rights and the Protocol of the Court of Justice of the African Union:

**CONSIDERING** that the Constitutive Act established the Court of Justice of the African Union as the principal judicial organ of the Union, but that the Court is not yet operational;

**NOTING** that the Protocol on the establishment of the African Court on Human and Peoples' Rights entered into force on 25 January 2004, but has not yet become operational;

**RECALLING** Decision Assembly/AU/Dec.45 (III) adopted by the Third Ordinary Session of the Assembly of the Union meeting in Addis Ababa, Ethiopia from 6 to 8 July 2004 to integrate the African Court on Human and Peoples' Rights and the Court of Justice of the African Union into one court, and requesting the Chairperson of the Commission to work out the modalities for implementing that decision;

**REAFFIRMING** the commitment of the Union to the strengthening and enhancement of the protection of human and peoples' rights in Africa;

**RECOGNIZING** that the integration of the two courts will enhance their capacity to attain the objectives of the two courts and of the Union as a whole;

**FURTHER RECOGNISING** that the decision to integrate the two courts was based on the need to rationalize the judicial structures of the Union and to make them more efficient and cost effective; and

**FIRMLY CONVINCED** of the urgent need for the early operationalization of the Court of Justice of the African Union that is created by the integration of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union;

**HAVE AGREED AS FOLLOWS:**

**Article 1: DEFINITIONS**

In this Protocol, unless otherwise specifically stated:

“Assembly ” means the Assembly of Heads of State and Government of the Union;

“African Court” means the African Court on Human and Peoples’ Rights;

“AU Court” means the Court of Justice of the Union;

“Chamber” means a Chamber of the Court established in accordance with this Protocol and the Rules of Court;

“Commission” means the Commission of the Union;

“Court” means the African Court on Human and Peoples’ Rights and the Court of Justice of the African Union operating under the title of the Court of Justice of the African Union

“President” means the President of the Court;

“Regions” means the geographical regions into which the continent of Africa, at any time, is divided in accordance with to a decision of the Assembly;

“Rules of Court” means the Rules made under Articles 33 and 58 respectively of the Protocols on the African Court and the AU Court;

“Vice-President” means the person or persons elected as such in accordance with Article 21 of the Protocol on the African Court.

**ARTICLE 2 ESTABLISHMENT OF THE COURT**

1. Article 1 of the Protocol on the African Court and Article 2 paragraph (1) of the Protocol of the AU Court are deleted and replaced with the following:

“The Court hereby established shall function in accordance with the provisions of the Protocol on the African Court and Protocol of the AU Court.”

2. In Article 2 paragraph (2) of the Protocol of the AU Court, after “...judicial organ of the Union”, the insertion of the words “and shall be committed to the promotion of justice and protection of human and peoples’ rights in Africa.”

3. The insertion of a new paragraph 3 in the Protocol of the AU Court as follows: “The Court shall be constituted by a Specialized Human and Peoples’ Rights Judicial Division established under this Protocol and any other Judicial Division (s) established by decision of the Assembly after obtaining the opinion of the Court or upon recommendation of the Court and which shall operate under the provisions of this Protocol.”

### **ARTICLE 3: ACCESS TO THE COURT**

In Article 5 paragraph 1 of the Protocol on the African Court, the insertion of a new subparagraph (b) with consequential renumbering of the sub-paragraphs:

(b) The African Committee of Experts on the Rights and Welfare of the Child

### **ARTICLE 4: COMPOSITION**

1. In Article 3 paragraph 1 of the Protocol of the AU Court (Composition), the substitution of eleven (11) with fifteen (15) and after “...nationals of State Parties”, the insertion of the words “at least seven (7) of whom shall have competence in human and peoples’ rights law.”

2. In Article 3, the insertion of a new paragraph 2 with consequential renumbering of the paragraphs: “At least seven (7) out of the fifteen (15) judges shall be women.”

3. Article 11 of the Protocol on the African Court shall be deleted.

**ARTICLE 5: QUALIFICATIONS**

The deletion of Article 4 of the Protocol of the AU Court (Qualifications) and insertion of two (2) new paragraphs as follows:

1. The Court shall be composed of impartial and independent Judges elected in an individual capacity from among jurists of high moral character.

2. A judge of the Court shall possess the necessary practical, judicial or academic qualifications required in his or her country for appointment to the highest judicial offices, or shall be a jurist of recognized competence and experience in the field of international law and/or human and peoples' rights law.

**ARTICLE 6: SUBMISSION OF CANDIDATES**

Deletion of Article 12 paragraphs 1 and 2 of the Protocol on the African Court, and Article 5 paragraphs 2 and 3 of the Protocol of the AU Court and insertion of a new paragraph as follows: "Each State Party may nominate up to two (2) of its nationals as candidates possessing the required qualifications stipulated in this Protocol, at least one (1) of whom shall be a woman."

**ARTICLE 7: TERM OF OFFICE**

The deletion of Article 15 paragraphs 1 and 2 of the Protocol on the African Court.

**ARTICLE 8: OATH OF OFFICE**

The deletion of Article 16 of the Protocol on the African Court.

**ARTICLE 9: PRESIDENCY OF THE COURT**

Article 10 of Protocol of the AU Court shall be deleted.

**ARTICLE 10: RESIGNATION, SUSPENSION AND REMOVAL FROM OFFICE**

1. Article 11 paragraphs 1, 3, and 4 of the Protocol of the AU Court shall be amended to read as follows:

- a) In Article 11 paragraph 1 the addition of a last sentence as follows: “The resignation shall take effect thirty (30) days after notification to the Chairperson of the Assembly.”
- b) In Article 11 paragraph 3, the insertion after “The President shall communicate” of the words “in writing, the resignation, or...”
- c) In Article 11 paragraph 4, the replacement by the following: “A recommendation of the Court to suspend or remove a judge shall take effect upon its endorsement by the Assembly.”

2. Article 19 of the Protocol on the African Court shall be deleted and replaced by Article 11 of the Protocol of the AU Court as amended above.

**ARTICLE 11: VACANCIES**

1. In Article 12 of the Protocol of the AU Court, the insertion of a new paragraph 3 with consequential renumbering of the sub paragraphs:

“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”

2. Article 20 of the Protocol on the African Court shall be deleted and replaced by Article 12 of the Protocol of the AU Court as amended above.

**ARTICLE 12: INDEPENDENCE**

1. In Article 13 paragraph 2 of the Protocol of the AU Court after “No Judge may participate in the decision of any case in which he or she has” the insertion of the words “an interest or where he or she has”...

2. In Article 17 paragraph 2 of the Protocol on the African Court, after the “the same judge has”... the insertion of the words “an interest or where he or she has”...

### **ARTICLE 13: QUORUM**

1. In Article 16 paragraph 1 of the Protocol of the AU Court, after “except where it” the insertion of the words “sits as a Division, as a Chamber or where it...”

2. In Article 16 paragraph 2 of the Protocol of the AU Court delete the words “Except when sitting in Chamber..”.

3. Insert a new paragraph 3 in Article 16 of the Protocol of the AU Court as follows: “The quorum for a specialized judicial division shall be at least five (5) judges.

4. Article 16 (3) of the Protocol of the AU Court shall become paragraph 4.

### **ARTICLE 14: SIGNATURE AND RATIFICATION OR ACCESSION**

1. This Protocol shall be open to signature and ratification or accession by Member States in accordance with their respective constitutional procedures.

2. The Instruments of ratification shall be deposited with the Chairperson of the Commission.

3. Any Member State acceding to this Protocol after its entry into force shall deposit the instrument of accession with the Chairperson of the Commission.

4. At the time of ratification, or accession to this Protocol or at any time thereafter, a State may declare in writing that its ratification or accession shall be taken to also amount to ratification of or accession to the Protocol on the African Court and/or the Protocol of the AU Court as the case may be.

5. A State making a declaration under paragraph 4 shall deposit such declaration with the Chairperson of the Commission, who shall transmit copies thereof to the States Parties.

**ARTICLE 15: ENTRY INTO FORCE**

1. This Protocol shall provisionally enter into force thirty (30) days after being signed by at least fifteen (15) Member States.

2. It shall finally enter into force thirty (30) days after the deposit of the instrument of ratification by fifteen (15) Member States.

**ARTICLE 16: REVIEW OF THE PROTOCOL**

Five years after the entry into force of this Protocol, a Conference of States Parties shall be held to review the functioning of the Court and to elaborate a single legal instrument relating thereto.

**REPORT OF A BRAINSTORMING SESSION INVOLVING A GROUP OF  
JURISTS AND THE COMMISSION ON THE INTEGRATION OF THE  
AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS AND THE  
COURT OF JUSTICE OF THE AFRICAN UNION**

**I. INTRODUCTION**

1. The Assembly of the Union meeting in its Third Ordinary Session held in Addis Ababa, Ethiopia in July 2004 adopted decision **Assembly/AU/Dec.45 (III)** in which it *inter alia* decided that the African Court on Human and Peoples' Rights (African Court) and the Court of Justice of the African Union (AU Court) should be integrated into one Court and requested the Chairperson of the Commission to work out the modalities on the integration of the two courts.

2. In implementing the above-mentioned decision, the Commission undertook a study and came up with a number of recommendations relating to the integration process of the two courts. Furthermore, the Commission decided to bring together a group of Eminent African Jurists with broad experience in international Law and judicial institutions to undertake a brainstorming session on the modalities of integrating the African Court and the AU Court into one Court. The following eminent jurists participated:

- i) Mr. Hassan Diallo (The Gambia): The Prosecutor, ICTR, (former Attorney General);
- ii) Mr. Adama Dieng (Senegal): Assistant UN Secretary General and Registrar, ICTR (former Secretary General, International Commission of Jurists in which capacity he worked closely in the development of the Protocol on the African Court of Human Rights and the Protocol on the AU Court of Justice);
- iii) Prof. Shadrack Gutto (South Africa): International Lawyer and Director at the Centre for African Renaissance Studies, University of South Africa;
- iv) Mr. Richard Nzerem (Nigeria): Legislative Drafting Expert and Acting Director Institute for Advanced Legal Studies, London, UK (who assisted the Office of the Legal Counsel in the elaboration of the first draft legal instrument);

- v) Dr. Angela Mello (Mozambique): Human Rights Lawyer and Member of the African Commission on Human and Peoples' Rights;
- vi) Mr. Sanaa Ahmed Khalil (Egypt): International Human Rights Lawyer.

3. Mr. Placide Lenga, President of the Supreme Court of the Republic of Congo and Justice A. Pillay, Chief Justice of the Supreme Court of the Republic of Mauritius were unable to attend, due to other pressing commitments.

## **II. MEETING OF THE GROUP OF JURISTS**

4. The Group of jurists met in Addis Ababa, Ethiopia, at the AU Headquarters on 13 and 14 January 2005 to consider the report of the Commission and to make appropriate recommendations. The Group of jurists, the Legal Counsel and other officers of the Commission held extensive discussions on the options proposed by the Commission and looked into the possibility of having options other than those proposed by the Commission.

5. The Group of jurists took note of the decision of the Assembly and the need for the African Union to rationalize its institutional framework and consolidate the organs established. It also took note of the fact that the decision of the Assembly did not intend to delay the operationalization of the African Court on Human and Peoples' Rights or to undermine the previous commitments made by Member States in the field of strengthening the system of protection of human rights in Africa. The Group therefore concluded that it was important for the process of integrating of the two courts to be as expeditious as possible and that the African Court on Human and Peoples' Rights should be operationalized without delay.

6. However, in considering the matter, the Group of jurists also took note of the fact that there were a number of legal and technical difficulties, most of which were set out in the Report of the Commission, that would derive from the implementation of the Assembly decision, among which:

- The Assembly has the power to adopt AU Treaties, however signature and ratification or accession is the prerogative of individual Member States;
- There is a distinction in international law between the rights of State Parties and those of non State Parties;
- The Protocol on the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights adopted on 9 June 1998 entered into force on 25 January 2004 while the Protocol of the Court of Justice adopted in July 2003 has not yet entered into force;
- The number of State Parties to the two (2) Protocols are different;<sup>1</sup>
- The provisions relating to issues such as submission of cases, jurisdiction, qualifications of judges, etc. contained in the two (2) Protocols are not similar in all respects;
- Article 35 of the Protocol on the African Court requires that before the Protocol is amended, the Court has to give its opinion on the proposed amendment(s) and in view of the fact that with the entry into force of the Protocol, the African Court has come into existence *de jure* and therefore, its opinion would be required;
- The name of the Court might have to be changed in order to reflect that the African Court on Human and Peoples' Rights and the AU Court are being integrated to avoid creating the perception that the African Court is simply being subordinated to or absorbed by the AU Court;
- There will be need to amend both the AU Court Protocol and the African Court on Human and Peoples' Rights Protocol;

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<sup>1</sup> The following nineteen (19) Member States have ratified the Protocol on the African Court on Human and Peoples' Rights: Algeria, Burkina Faso, Burundi, Côte d'Ivoire, Comoros, Gabon, The Gambia, Libya, Lesotho, Mali, Mozambique, Mauritius, Nigeria, Niger, Rwanda, South Africa, Senegal, Togo and Uganda.

The following six (6) Member States have ratified the Protocol of the AU Court of Justice: Comoros, Lesotho, Mali, Mauritania, Mauritius, Rwanda and South Africa.

- The introduction of the new Protocol will increase the number of legal instruments that would have to be signed and ratified or acceded to by Member States, since they will have to be Parties to all three (3) Protocols;

7. Having taken note of the practical and conceptual difficulties and guided by the principle that the implementation of the human rights mechanism already in existence should not be delayed or marginalised, the Group of jurists made the following recommendations:

- It is important for Africa to develop its own legal regimes, institutions and systems in order to satisfy the specific needs of the continent and as part of the progressive development of international law but in keeping with established international legal norms and general principles;
- That the integration of the courts should be implemented through the second of the options discussed in the Report on the Decision of the Assembly to merge the two courts;
- Thus, the integration of the courts should involve the creation of a system under which the African Court would become a specialized division (called the Specialized Human and Peoples' Rights Judicial Division) of a single court, namely the Court of Justice of the Union, for which provision has already been made in the Constitutive Act and the Protocol of the Court of Justice of the African Union;
- The integrated court should function in accordance with the provisions of the Protocol on the African Court as well as the Protocol of the AU Court and should be committed to the promotion of justice and the rule of law and the protection of human and peoples';
- The integrated court should be composed of fifteen (15) judges, seven (7) of whom should have specific competence in human and peoples' rights and at least seven (7) of whom should be women;

- The administrative structures and arrangements for the court should be unified. Accordingly, the court should have a single budget, be serviced by the same registry and should be headed by one President;
- The integration of the two courts should be effected through a new protocol amending certain provisions of the AU Court Protocol and the Protocol on the African Court;
- The new protocol should not seek to make substantive changes and should endeavour only to effect the changes necessary to combine the functions of the two courts. Consequently, the draft protocol deals with matters such as the structure of the court, its composition, rights of access, the qualifications of the judges and the nomination and election procedures;
- On ratifying the new protocol, a State has the option of making a declaration to indicate that the ratification is effective also in respect of the African Court Protocol and/or the AU Court Protocol; and
- The process of integration therefore involves the creation of one court with jurisdiction in general matters of AU law as envisaged in the AU Court Protocol and jurisdiction to adjudicate on matters of human and peoples' rights as provided for in the African Court Protocol.

8. At the end of the meeting, the group of Jurists expressed their appreciation to the Commission for the opportunity offered to them to contribute to the development of the important instrument relating to the merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union.

2005

# Report on the Decision of the Assembly of the Union to Merge the African court on human and peoples' rights and the court of justice of the African Union

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