

African courts and the African Commission on Human and Peoples' Rights

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Introduction

Since the adoption of the Constitutive Act of the African Union (AU), Africa has been busy constructing a highly complicated institutional architecture designed to ensure justice for the victims of human and peoples' rights violations, as well as for states within the AU. Prior to the Constitutive Act (*the Act*), the only body that victims of human rights violations could turn to for relief was the African Commission on Human and Peoples' Rights (*the African Commission*). There was no forum on the African continent to handle the numerous conflicts and disputes between states and between individuals and their states. The African Commission has already rendered several decisions on alleged violations of human and peoples' rights – the most notable being *SERAC & Another v Nigeria*¹ regarding alleged violation by Nigeria of development-related rights in the restive region of the Niger Delta. This Communication is historical in a number of ways. After being repeatedly attacked for being toothless, the Commission tried to prove its worth through this Communication. Among other things, it pigeonholed and read some of the missing rights into the Charter before it went on to find the respondent guilty of violating them.²

One of the greatest challenges, however, is the implementation of African Commission decisions or recommendations. Victims of human rights violations that have received redress from the Commission have not really appreciated it. There has been nothing tangible or concrete from the Commission pronouncements in instances where a State is found to have violated a guaranteed right. Though this is a universal concern in that other instruments including United Nations-based human rights instruments are mocked by states, the problem with the

¹ *Communication No. 155/2001 SERAC & Another v Nigeria* (2001), 15th Annual Activity Report: 2000–2002.

² Some of these rights not expressly provided for in the Charter but which the Commission 'read' into the instrument involve rights to food, hunting, etc. With this progressive interpretation, SERAC expanded the scope and range of the rights which States are bound to uphold under the Charter.

African Commission is that the Charter denied it teeth with which to bite those found to have flouted it. This has been an extremely frustrating experience for the victims. Therefore, both the African Court on Human and Peoples' Rights and the African Court of Justice have been welcomed as important additions to the largely timorous Commission. Unfortunately, things move rather too fast in Africa. The two Courts, even before opening their doors to the general public, have already been replaced by the African Union. This has been a breathtaking experience by advocates of human and peoples' rights on the continent. Before a full assessment of the impact of the African human rights Court and of the Court of Justice is possible, the AU has discontinued them and in their place introduced the single African Court of Justice and Human Rights. At this rate, though one must be hopeful, it is not easy to tell whether the new outfit – the African Court of Justice and Human Rights – will last.

Evolution of the justice architecture in the AU

The Lomé (Togo) 2000 Constitutive Act³ of the AU was a major turning point in the quest for development, justice, human rights, the rule of law and good governance. Against the background of the Organisation of the African Unity (OAU) Charter of 1963, which explicitly excluded a court or justice institution in its architecture, the Constitutive Act was a major step forward. Democratisation of the continent towards the late 1990s right to the beginning of the new millennium gave impetus to the idea of continental justice as part of the mechanism for peace, security and stability in Africa. The Constitutive Act made specific provision for the establishment of an African Court of Justice charged with hearing, among other things, all cases relating to interpretation or application of the Act as well as any treaties adopted within the AU framework. A year before the adoption of the Protocol establishing the African human rights Court, Arthur Anthony asked the question on everybody's lips: Why would a judicial organ be anathema to African states?⁴ This was echoed by Yemi Akinseye-George as he welcomed the Protocol after its adoption, describing it as “the missing link in the African human rights mechanism”.⁵ But the African human rights Court is now gone. It is unbelievable that, after all this waiting, the Court disappeared without anyone

³ Available at www.african-union.org; last accessed 12 April 2009. All 53 AU member states have ratified the Constitutive Act repealing the 40-year-old OAU Charter and replacing it with the AU.

⁴ Anthony (1997).

⁵ Akinseye-George [2001/2002].

ever having seen the inside of the judges' chambers. Before any lawyer or non-governmental organisation (NGO) had had the opportunity to do battle in any of the courtrooms, the Court is gone. The Protocol for the new Court has just been posted to the AU website, where it is awaiting signature, ratification and accession by AU member states.⁶ Once the new Protocol has come into force, it will establish an entirely new structure.

The new African Court of Justice and Human Rights has been the subject of discussion within the corridors of the AU for nearly a decade. During deliberations towards the Protocol of the former African Court of Justice, some of the delegates started questioning the wisdom of having so many institutions of justice, given the paucity of resources in the AU. By 2003, when the issue was being discussed, the Protocol establishing the African human rights Court⁷ – although not yet in force – was nevertheless open for signature by AU member states. It was against this background that some of the delegates queried the advisability of having two courts.

Besides the 'resources argument', the equally important point was raised that, although the two courts were different in their make-up – one being for State disputes, the other for human rights disputes – there were potential areas of common jurisdiction; and that they were not in fact totally different from each other. The African Court of Justice, for instance, also enjoyed jurisdiction, albeit limited, in matters of human rights such as the freedom of movement by nationals of a member state in the territory of another member state. Similarly, it enjoyed jurisdiction to enforce the right to property. There are many other examples to illustrate the common jurisdiction that was going to define relations between the two courts. Therefore, there were genuine fears that potential for duplication existed if the AU went ahead with the task of establishing distinct judicial bodies, as was the case. The merger of the two courts was considered at various levels in the AU, therefore. Ordinary Sessions of the Assembly of

⁶ As at the time of going to print, 14 states had signed the Protocol, but none had ratified it yet. The Protocol will enter into force 30 days after the deposit of the instruments of ratification by 15 member states. Of the 14 signatories, Guinea was the first to sign.

⁷ Predictably, the African human rights Court, during its short lifespan, nevertheless managed to attract rich scholarly comment; see e.g. African Society of International and Comparative Law (1999:59–69); Akinyese-George (ibid.); Amnesty International (2002, 2004); Anthony (1997); Badawi (1997, 2002); George (1998); Hansungule (2002, 2006); Murray (2002); Mutua (1999).

Heads of State and Government held in July 2004 and July 2005 in Addis Ababa, Ethiopia, and Sirte, Libya, respectively, considered the issue. In both cases, the authorities were convinced of the necessity of going ahead with the merger.⁸

When the AU made public its intention to merge the two courts, reaction from the international community was not supportive. International human rights bodies including Amnesty International openly castigated the idea and accused the AU of reneging on its commitment to provide a strong human rights court which, it argued, was a desideratum in a continent marred with systematic abuses of human rights.⁹ Amnesty International also raised a number of valid arguments in support of keeping the status quo, including the logistical issues of what to do with the instruments of ratification or accession already in possession of the AU, especially in respect of the Protocol to the African human rights Court. However, the AU ignored all the calls, advice and criticism levelled against it and went ahead with producing the new Protocol and the Statute of the African Court of Justice and Human Rights (the *merger Protocol*) – the subject of this chapter.

At the Summit of the Eleventh Ordinary Session of the AU held in Sharm El-Sheikh, Egypt, in July 2008, the Assembly of Heads of State and Government formally adopted the resolution that provided the political basis for the merger Protocol establishing the new Court.¹⁰ Established in Article 2 of the Protocol, the new Court is governed by two main instruments, i.e. the Protocol and the Statute of the African Court of Justice and Human Rights itself (*the Statute*). This is a distinctive additionality to prevailing practice where an institution is usually established by only one instrument – often a Protocol – rather than two.

As indicated above, the Protocol deals with ‘establishment and transitional matters’. Specifically, it replaces the previous two Courts, establishes the single African Court of Justice and Human Rights in place of the two other Courts, and, for the avoidance of doubt, clarifies that –

[r]eferences made to the “Court of Justice” in the Constitutive Act of the African Union shall be read as references to the “African Court of Justice and Human Rights” established under Article 2 of this Protocol.

⁸ Decisions Assembly/AU/Dec.45 (111) and Assembly/AU/Dec.83 (V), respectively adopted at its Third (6–8 July 2004, Addis Ababa, Ethiopia) and Fifth (4–5 July 2005, Sirte, Libya); see www.african-union.org; last accessed 10 April 2009.

⁹ www.amnesty.org; last accessed 10 April 2009.

¹⁰ www.africa-union.org; last accessed 10 April 2009.

The Protocol also deals with the term of office of incumbent Judges of the African human rights Court, cases pending before the latter Court, the Registrar, and the provisional validity of the 1998 Protocol. Finally, Articles 8 and 9 provide for fresh signatures, ratification, accession, and entry into force of both the Protocol and the Statute.

The African Court of Justice and Human Rights

The Protocol on the Statute of the African Court of Justice and Human Rights

Even before the two continental Courts – the African human rights Court and the AU-Constitutive-Act-based African Court of Justice – had opened their doors to the public, they had been scrapped and their places taken over by the African Court of Justice and Human Rights.

There is now only one Court instead of the two originally anticipated for the African continent. The merged Court is to be known by the double-barrelled name of *African Court of Justice and Human Rights*. This is probably the first time in the international community that a court has been established by states with a two-pronged objective to provide for justice and human rights under one roof, so to speak. There are parallels for this model of justice structure in domestic legal systems, but not in international justice: the latter field is accustomed to operating the two concepts separately. Although the two cross paths once in a while in the course of trying to fix a dispute within the jurisdiction of a Court, this is not an intentional and deliberate procedure set out in Statutes and Protocols, as is the case with the African Court of Justice and Human Rights.

Domestic legal systems in the various jurisdictions often provide for a hierarchical structure by which a High Court will have different Chambers dealing with separate issues such as family matters, commercial matters, and human rights matters. A similar structure may prevail at the level of a Supreme or Apex Court. But this is not familiar in international law – especially in the context in which the African Union is establishing the two court functions of justice and human rights under one law or protocol. Therefore, Africa has scored a first with the double-jurisdiction Court it seeks to establish for the continent once the merger Protocol just unveiled to AU member states for their signature, ratification and accession comes into force.

However, the merger Protocol has only been made available on the AU website. Consequently, it has not yet attracted the attention of many of the 53 AU member states. By 1 April 2009, only 14 countries had signed the Protocol, and none had ratified it.

Article 9(1) of the merger Protocol provides that –

[T]he present protocol and the Statute annexed to it shall enter into force thirty (30) days after the deposit of the instruments of ratification by fifteen (15) Member States.

In basic terms, this means that although the former African Human and Peoples' Rights Court ought to have started hearing cases when its Protocol came into force on 25 January 2004, victims of human rights violations will now have to wait a little longer to allow the new Court to become operational after its Protocol enters into force. The first problem this would have caused has been avoided in a rather ironic way: the now replaced African human rights Court had not actually been seized of any case since its establishment. It is like the Court and potential victims were 'waiting' for the merger of the two courts before invoking the sacred jurisdiction to start entertaining complaints. It would have caused logistical nightmares to process the merger and the replacement this entailed had the Court already started hearing cases.

Article 1 of the merger Protocol, which decrees the replacement of the 1998 and 2003 Protocols, provides as follows:

The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted on 10 June 1998 in Ouagadougou, Burkina Faso and which entered into force on 25 January 2004, and the Protocol on the Court of Justice of the African Union, adopted on 11 July 2003 in Maputo, Mozambique, are hereby **replaced** by the present Protocol and Statute annexed as its integral part hereto, subject to the provisions of Article 5, 7 and 9 of this Protocol. [Emphasis added]

Similarly, albeit clumsily, Article 2 on establishment provides the following:

The African Court on Human and Peoples' Rights established by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union established by the Constitutive Act of the African Union, are hereby **merged** into a

single Court and established as “The African Court of Justice and Human Rights”.
[Emphasis added]

These provisions raise several difficult questions. For instance, what does “replacement” entail? Do the ratifications and accessions rendered by states to both Protocols suddenly become a nullity and, therefore, of no legal consequence? Could this not have been foreseen and, therefore, avoided? Fortunately, Chapter 11 entitled “Transitional Provisions” in the merger Protocol allows for the continuation of the *modus operandi* till after the coming into force of the new Protocol. This necessitated the saving clause on incumbent Judges spelt out in Article 4, as follows:

The term of office of the Judges of the African Court on Human and Peoples' Rights shall end following the election of the Judges of the African Court of Justice and Human Rights.

Specifically, the Protocol states that –

... the Judges shall remain in office until the newly elected Judges of the African Court of Justice and Human Rights are sworn in.

Similarly, the new Protocol has addressed the issue of pending cases – even though there are none at the moment – in Article 5:

Cases pending before the African Court on Human and Peoples' Rights that have not been concluded before the entry into force of the present Protocol, shall be transferred to the Human Rights Section of the African Court of Justice and Human Rights on the understanding that such cases shall be dealt with in accordance with the protocol to the [African Court on Human and Peoples' Rights] on the establishment of the African Court of Justice and Human Rights.

Therefore, any cases that are pending (of which there are none at the moment) and any that may yet be brought by parties before the new Protocol comes into force “shall be transferred to the Human Rights Section” of the new Court; and because they may have been brought to the African human rights Court based on the 1998 Ouagadougou Protocol, they are to be dealt with not on the basis of the new merger Protocol but its own founding Protocol. Therefore, in spite of Article 1 which provides that the two respective Protocols on the African human rights Court and on the African Court of Justice have been replaced, in respect

of the “cases pending before the African human rights Court, the replacement does not affect ongoing cases even after the new Court has become operational. In fact, Article 7 of the merger Protocol on the provisional validity of the 1998 Ouagadougou Protocol provides that the latter –

... shall remain in force for a transitional period not exceeding one (1) year or any other period determined by the Assembly, after entry into force of the present Protocol, to enable the African Court on Human and Peoples' Rights to take the necessary measures for the transfer of its prerogatives, assets, rights and obligations to the African Court of Justice and Human Rights.

In spite of these elaborations, the word *replaced* itself needs to be elaborated to clarify the situation, otherwise the new Court will be marred by the confusion pursuant to the new Protocol and Statute. The merger of the two previous Courts raises several other issues. For instance, what exactly is the meaning of a *merger* in respect of the two Courts under one Court? Why did the AU not take the route of leaving it open for states that had already ratified the Protocols establishing the two Courts to carry over their instruments and deem them deposited for the new Court, instead of asking them to start the process afresh? It is also interesting that the word *peoples* is missing from some of the provisions of the merger Protocol, which makes it appear that the new Court is interested only in ‘human’ and not ‘peoples’ rights, while the African Charter on Human and Peoples’ Rights upon which the Court will seek to enforce its human rights mandate specifically includes “peoples’ rights”.

Substantive provisions of the Protocol and Statute of the African Court of Justice and Human Rights

Substantive provisions regulating the Court are provided for either in the Statute or in the Annex to the Protocol. The two predecessor Courts were directly regulated by their founding Protocols.

The Statute is a voluminous instrument, comprising 7 long chapters and 60 articles. The chapters seek to regulate matters such as the definition of the Court’s functions, establishing its organisation, and setting out the structure of the governance system regulating the Court. The chapters also set out the issues of the Court’s competences, including its jurisdiction; who is eligible to submit cases to the Court, and what law applies to such cases; the procedure governing Court proceedings; and the relationship with the Assembly.

The composition of the Court

When compared with the structure of Judges' representation in the former two Courts, there have been some modifications on the number and origin of Judges appointed to serve in the new Court. Both the African Commission and the African human rights Court provide for 11 Commissioners and Judges, which is the same number for the Committee on the Rights of the Child. Article 3 of the Statute of the new Court provides for 16 Judges and, since this number may be reviewed by the Assembly, it is subject to change. Of course, the 16 appointed Judges are to be AU states parties; this differs from the European practice of recruiting at least one Judge from outside Europe. The principle of geographical representation is now one of the conditions for composing the Court, as stated in paragraph 3 of Article 3 of the Statute for the new Court:

Each geographical region ... shall ... where possible be represented by three (3) Judges except the Western Region which shall have four (4) Judges.

It is particularly important that, in Article 4, the Statute sets out the specific conditions for election as a Judge to the Court, as follows:

The Court shall be composed of impartial and independent Judges elected from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are juris-consults of recognised competence and experience in international law and/or[...] human rights law.

The addition of "or human rights law" is extremely important due to the dual nature of the mandate of the Court both as a 'court of justice' and a 'court of human rights'. If properly interpreted and applied, Article 4 should enable the Court to attract persons with experience from both African judiciaries, as well as from among the finest academic experts on international law and human rights. In respect to the appointments of the Judges to the African Court of Human and Peoples' Rights, clearly other considerations than merely individual competence and qualification were taken into account.¹¹

¹¹ Normally, States would look for, among other things, political correctness of the individuals to pick from the Bench and recommend for international appointment. There are several instances in which Judges, though actually qualified and possessing the necessary experience for appointment to an international position, nevertheless are hand-picked by responsible authorities instead of subjecting them to the internal rigorous identification process the

However, Article 4 does not address one of the most important conditions for identifying capable Judges, particularly if they come from the ranks of practising judges in national jurisdictions. It is crucially important to make sure that Judges on the continental Court, besides subjecting them to the same process in internal law pertaining to their appointment to the judicial office, come from jurisdictions that are noted for jealously safeguarding the rule of law. Both the Protocol and Statute should have been adamant in insisting that only States that are notorious for fiercely upholding the rule of law will be allowed to nominate Judges. Instead, Article 4 emphasises the personality of the person to compete for judgeship on the Court, but not the conditions under which that judge operates in his/her national jurisdiction. In other words, there should be something in the Statute that requires a certain minimum standard to apply to states parties in terms of levels of democracy and the rule of law as a condition for them to qualify for nominating a practising Judge to the new continental Court.

Nonetheless, there are some known shortcomings that the Statute addresses. Article 7(1) of the Statute, for example, has corrected a previous inconsistency: the election of Judges is now the responsibility of the Executive Council and not the Summit of Heads of State and Government, as was the case in the two replaced Courts. Although past treaties provided for the Heads of State and Government to conduct the elections, in practice this was performed by their ministers in the Executive Council. Now, this anomaly has been rectified. The Executive Council will elect the Judges while the Assembly execute the appointments of the successful parties submitted to them by the Executive Council.

As regards the right to vote, it is not enough simply to be a state party to the Protocol and Statute. In addition, the state party concerned must be entitled at the time of the election to 'voting rights'. Based on Article 23 of the Constitutive Act, some member states have lost their voting rights for a number of reasons, including failure to implement decisions of the AU and its organs, and being in default in the payment of their subscriptions. Article 7(4) and (5) enjoin the Assembly to ensure equitable representation of the regions, the principal legal

principles of good governance would require. We could not find any evidence either from fellow judges or law societies in which the internal consultation process was invoked in respect of the identification and nomination of some of the Judges. Normally, this is left to the political authorities on the basis of extraneous grounds to identify and formally nominate the candidates for election by the continental body without prior recourse to the peers of the nominated Judge as to his or her suitability.

traditions of the continent, and gender. Therefore, both the Executive Council and the Assembly (politicians) have a role to play in the appointment and removal of Judges. Though emphasis as regards the removal of Judges has been placed on their peers, at least in the early stages, in the final analysis the decision to remove a Judge has to be sanctioned by the Assembly or Executive Council,¹² which has the potential for political fall-out in cases where the Judge's state does not accept the Court's decision.

Besides reiterating the principle of independence in the Protocols of the replaced Courts, Article 12(2) adds that "[t]he Court shall act impartially, fairly and justly". In paragraph 3 it goes on to insist that, "[i]n the performance of the judicial functions and duties, the Court and its Judges shall not be subject to the direction or control of any person or body". This is an important injunction – given Africa's charades of justice. A recent example of this is the current case of *Prosecutor v Jacob Zuma*¹³ in South Africa, in which charges have been withdrawn due to alleged interference by members of the Executive in the judicial process. It is a routine in many African countries for the Executive branch of government to dictate, direct or control the judiciary in order to have a predictable outcome.

The structure of the new Court

The structure of the new Court is defined in the Statute. Article 16 provides as follows:

The Court shall have two (2) Sections: a General Affairs Section composed of eight (8) Judges and a Human Rights Section composed of eight (8) Judges.

The General Affairs Section has competence to hear all cases brought to it in accordance with Article 28, with the exception of cases dealing with human and peoples' rights issues; conversely, as expected, the Human Rights Section does not deal with general affairs. Besides sitting as a Section, the Court shall have power to empanel as a Full Court, and any Section may refer a case to the Full Court. It is also provided that either of the two Sections may constitute one or several Chambers. In other words, the Court hierarchy is required to comprise a

¹² Articles 9 and 10 of the Statute.

¹³ *Prosecutor v Jacob Zuma* (2005). For more on the case, see the following South African papers: *Business Day*, 17 April 2009; *Mail & Guardian*, 9 April 2009; *Sunday Times*, 5 April 2009; *The Times*, 17 April 2009.

Full Court, the General Affairs Section, the Human Rights Section, and Chambers constituted by either of the Sections.

Article 28 referred to above provides for the competence of the Court, as follows:

The Court shall have jurisdiction over all cases and all legal disputes submitted to it in accordance with the present Statute which relate to:

- a) the interpretation and application of the Constitutive Act;
- b) the interpretation, application or validity of other Union Treaties and all subsidiary legal instruments adopted within the framework of the Union or Organisation of African Unity;
- c) the interpretation and application of the African Charter, the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, or any other legal instrument relating to human rights, ratified by the States Parties concerned;
- d) any question of international law;
- e) all acts, decisions, regulations and directives of the organs of the Union;
- f) all matters specifically provided for in any other agreements that States Parties may conclude among themselves, or with the Union and which confer jurisdiction on the Court;
- g) the existence of any fact which, if established, would constitute a breach of an obligation owed to a State Party or to the Union;
- h) the nature or extent of the reparation to be made for the breach of an international obligation.

By all accounts, this is a very broad mandate. A unique feature is the inclusion of "All acts, decisions, regulations and directives of the organs of the Union". Another singular facet is the inclusion of "agreements State Parties may conclude among themselves" – as long as they confer jurisdiction on the Court. Bilateral agreements between states parties may probably now be amenable to the Court's jurisdiction. With regard to "or any other legal instrument relating to human rights ratified by the States Parties concerned", the intention is to reach out to those treaties not specifically mentioned in the Statute and to treaties and instruments yet to be adopted.

The Protocol on the Statute of the African Court of Justice and Human Rights

Who can bring cases to the Court? This is set out exhaustively in Articles 29 and 30 of the Statute. States parties to the Protocol, of course, as natural litigants in

international law, have been recognised as being eligible to bring cases to the Court. Others are the Assembly, staff members of the Union, the Pan-African Parliament, and other organs of the African Union. Article 30, in addition to entitling states parties to the Protocol, broadens the eligibility to submit cases to include the following:

- The African Commission on Human and Peoples' Rights
- The African Committee of Experts on the Rights of the Child
- African Intergovernmental Organisations accredited to the Union or its organs
- African national human rights institutions, and
- Individuals or relevant NGOs accredited to the AU or to its organs, subject to the provisions of Article 8 of the Protocol.

Innovations include conferring eligibility on the African Committee of Experts on the Rights of the Child, African national human rights institutions, and individuals. This has expanded the scope of persons and institutions that are eligible to submit cases from those formerly provided for in Article 5 of the Protocol to the African Court on Human and Peoples' Rights.

But the right, pursuant to Article 30(e), of individuals and accredited NGOs to submit cases is limited to compliance with Article 8 of the Statute. Article 8(f) provides as follows:

Any Member State may, at the time of signature or when depositing its instrument of ratification or accession, or at any time thereafter, make a declaration accepting the competence of the Court to receive cases under Article 30 (f) involving a State which has not made such a declaration.

This is similar to the Article 35(6) declaration in the replaced Protocol, relevant parts of which provided the following:

At the time of ratification of this Protocol ... the State shall make a declaration accepting the competence of the Court to receive cases under Article 5 (3) of this Protocol

Article 5(3) of the replaced Protocol granted NGOs with observer status eligibility to bring cases to the Court directly, thereby bypassing the African Commission. It was at the state party's discretion to accept – by way of a declaration – that the Court was possessed of jurisdiction to entertain cases from individuals or NGOs accredited to the AU or to its organs.

Several innovations have penetrated the Statute with regard to procedure. Article 34 provides some guidance in terms of how to institute proceedings before the Human Rights Section. In particular, it is instructed that proceedings are to be brought by way of written application to the Registrar. Article 34 also directs that, if possible, the case should indicate the right or rights alleged to have been violated, as well as the specific provision and instrument the allegation seeks to invoke. Thus, there is a shift towards more formal procedures in comparison with the African Commission; quite frankly, however, unless a continental fund is created to provide for mandatory Africa-wide legal aid, this will turn away illiterate and indigent litigants. Article 52(2) provides for “free legal aid for a person presenting an individual communication”; nonetheless, this may just not be adequate, given that it is limited to being “required in the public interest” and to further conditions to be provided in the Rules of Procedure. If one considers that the majority of Africans who happen to be victims of human rights abuses are chronically poor, the Statute is indulging in academic polemics.

Article 35 provides for the application of provisional measures. However, experience has shown that states parties to the African Charter routinely ignored the provisional measures invoked by the African Commission.¹⁴ The important question here is how such measures will work under the new Court’s supervision, when they clearly did not work under the Commission’s. Merely providing for such measures, therefore, is not enough.

Article 36 introduces some interesting concepts with regard to representation of parties before the Court. In particular, it provides that –

[t]he African Commission, the African Committee of Experts ... [and] African National Human Rights Institutions **shall be represented by any person they choose for that purpose.** [Emphasis added]

This opens the door for the African Commission and other bodies to hire legal counsel or law professors, or to be represented by their own staff members.

¹⁴ See e.g. Communication No.’s 137/94, 139/94, 154/96 and 161/97 *International Pen, Constitutional Rights Project, Interights and Civil Liberties Organisation (On behalf of Ken Saro Wiwa Jnr) v Nigeria*, 12th Annual Activity Report: 1998–1999. In this communication, Nigeria blissfully ignored the call by the Commission to not execute Ken Saro Wiwa as his complaint was still pending before it. Many other states parties have ignored the provisional measures the Commission invoked to prevent rendering the process before it became academic.

Given the fact that the African Commission, for example, has no experience in international litigation, this is a practical solution to the dilemma the Commission faced when the African Court on Human and Peoples' Rights become operational. Thus, besides individuals themselves, relevant NGOs, agents and other representatives of parties before the Court, their counsel or advocates, etc., are entitled to appear before the Court.

With respect to judgements, the Statute provides that decisions are to be taken by a majority of Judges, with a casting vote by the Presiding Judge in the event of "an equality of votes".¹⁵ This provision is made in addition to the right provided to Judges in Article 44 to have dissenting opinions. Other conditions, such as the duty on the Court to render judgement within 90 days of having completed deliberations, the requirement that Judges are to state the reasons on which their judgements are based, and the obligation to notify the parties of the judgement in the case, are a rendition of the 1998 Ouagadougou Protocol. However, there is one particular innovation, namely that Article 43(6) mandates the Executive Council, which is also to be notified of the judgement, "to monitor its execution on behalf of the Assembly". This is a direct response to the frustrations over unimplemented African Commission recommendations or decisions. Article 43(6) is a mutatis mutandis extract of its equivalent in the European Convention on Human Rights.¹⁶

Article 46 provides that "[t]he decision of the Court shall be binding on the parties", and that such decision is final. Furthermore, in an innovative way, the Statute provides that –¹⁷

[t]he parties shall comply with the judgement made by the Court in any dispute to which they are parties within the time stipulated by the Court and shall guarantee its execution.

Paragraphs 4 and 5 enjoin the Court to report to the Assembly any party that fails to comply with the judgement, and the Assembly is mandated to punish the defaulting party – including by the imposition of sanctions provided in Article 23(2) of the Constitutive Act.

¹⁵ Article 42 of the Statute.

¹⁶ Ovey & White (2002:420–436).

¹⁷ Article 46(3) of the Statute.

There is also provision for advisory opinion, which the Court may render upon request. This, however, is limited as to who may request it. A request for an advisory opinion may be submitted by –¹⁸

... the Assembly, the Pan-African Parliament, the Executive Council, the Peace and Security Council, the Economic, Social and Cultural Council (ECOSOC), Financial Institutions or any other organ of the Union as may be authorised by the Assembly.

The request is also not permitted to relate to a matter that is pending before the Court.

Finally, Article 57 provides for an “Annual Activity Report” which the Court is obliged to render to the AU Assembly each year. This might appear to be formal process, but it can be a powerful weapon of compliance. Through the Report, the Assembly will get to know the work of the Court; but, more importantly, states parties found to have violated international law and human rights will be exposed – and hopefully shamed – along with any states parties found to have defaulted in implementing the decisions of the Court. Article 57 can be construed as a ‘shaming clause’ meant to bring shame on guilty parties, but also to praise those that are not found to have run foul of the law.

The African Commission on Human and Peoples’ Rights

Introduction

The African Commission on Human and Peoples’ Rights (*African Commission*) was established in terms of Article 30 of the African Charter on Human and Peoples’ Rights. The African Charter came into force in October 1986. Relevant parts of Article 30 provide as follows:

The African Commission ... shall be established **within** the African Union to promote human and peoples’ rights and ensure their protection in Africa. [Original emphasis]

As explained below, the Secretariat of the African Commission complained that the vague status of the Commission was cause for concern.¹⁹ While other

¹⁸ Article 53 of the Statute.

¹⁹ E-mail from the Secretariat, African Commission on Human and Peoples’ Rights, Banjul, The Gambia, 30 January 2009.

African courts and the African Commission on Human and Peoples' Rights

AU organs are provided for in the Constitutive Act, the African Commission is not. Consequently, the Commission has no proper status in the structures and institutions of the AU at Addis Ababa. Nevertheless, the table below shows the current Commissioners, their countries of origin, and the countries to which they have been allocated in order to promote the Charter:

Name of Commissioner	Country of origin	Country covered in respect of promoting the Charter
Alapini-Gansou , Ms Reine	Benin	Cameroon, the Democratic Republic of Congo, Mali, Senegal, Togo, and Tunisia
Atoki , Ms Catherine Dupe	Nigeria	Djibouti, Egypt, Ethiopia, Somalia and Sudan
Bitaye , Mr Musa Ngary	Gambia	Ghana, Nigeria, Sierra Leone and Zimbabwe
Kayitesi , Ms Zainabo Sylvie	Rwanda	Algeria, Burkina Faso, Burundi, Côte d'Ivoire and Mauritania
Maïga , Mr Soyata	Mali	Central African Republic, Republic of Congo, Gabon, Guinea, Libya and Niger
Malila , Mr Mumba	Zambia	Kenya, Malawi, Tanzania and Uganda
Melo , Dr Angela	Mozambique	Angola, Cape Verde, Equatorial Guinea, Guinea, Guinea Bissau, and São Tomé and Príncipe
Monageng , Hon. Judge Sanji M	Botswana	Lesotho, Liberia, Mauritius and Mozambique
Mukirya Nyanduga , Mr Bahame Tom	Tanzania	Botswana, Eritrea, Rwanda, the Seychelles and South Africa
Tlakula , Ms Pansy	South Africa	The Gambia, Namibia, Swaziland and Zambia
Yeung Sik Yuen , Chief Justice Yeung Kam John	Mauritius	Benin, Chad, the Comoros, Madagascar, and the Saharan Arab Democratic Republic

Article 45 of the African Charter spells out the African Commission's mandate as follows:

The functions of the Commission shall be:

1. To promote Human and Peoples' Rights; and in particular:
 - (a) to collect documents, undertake studies and research; on African problems in the field of human and peoples' rights, organize 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 legislations;
 - (c) co-operate 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 AU or an African organization recognized by the AU.
4. Perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government.

The past 20 years have been hectic for the African Commission in its attempts to discharge this rather bloated mandate. In particular, the Commission has been trying to promote the human and peoples' rights provided for in Article 45(1) above through a variety of activities, more especially by organising seminars, symposia, conferences, and the dissemination of information, as well as by encouraging national and local institutions concerned with human and peoples' rights to persevere in their efforts. But it has not been easy. First, the whole idea of promoting human rights is new to Africa. Second, there is no money; everyone knows that African institutions survive on shoestring budgets. It is far worse at the AU. Therefore, it is understandable that the African Commission claims not to have been able to deliver on its mandate to promote the Charter because it was not funded. However, the Commission also bears part of the blame for its poor performance. Most Commissioners are there to promote their personal interests: very few are there to promote rights. Proof of this is in how they are appointed or 'elected' into the Commission, particularly how they are identified as eligible by their governments. Most of them are identified as personal friends of government officials, if they are not themselves employed in government. Even when they know they are not qualified – going by the Charter – because

they come from government, they stay in the Commission anyway. A person with such a background, as most current Commissioners have, cannot promote the Charter excitedly or wholeheartedly because there are other considerations which are more important that s/he has to take into account when discharging Charter functions. A case in point is the former Chairperson of the Commission, who walked straight from that post to become Minister of Human Rights in her home country. How can this be if this person was 'independent', as the Charter would have liked, during her tenure both as Commissioner and later as Chairperson? There are and have been ambassadors, attorney-generals, government legal officers, electoral officers, officers from national human rights institutions in states parties, etc., on the Commission. Even those that are not recruited directly from government usually have close ties with senior politicians and government officials in order to have been identified as potential Commissioners. Therefore, demanding the implementation of such an exacting mandate by persons who are there for interests other than those of the African Commission is being unfair – to say the least.

The African Commission has also given its views and recommendations to states parties on how best they can abide by their obligations under the Charter.²⁰ Similarly, the Commission seeks to protect human and peoples' rights, particularly through decisions or recommendations in the course of processing mostly individual communications. Nonetheless, there have hardly been any requests for the Commission to interpret the provisions of the Charter except by way of communications, and then only by individuals or NGOs and not the bodies contemplated in Article 45(3). The OAU Assembly of Heads of State and Government, mandated the Commission to assume jurisdiction over the state-party reporting procedure after the latter made a request during their Third Ordinary Session held in Libreville, Gabon, in April 1988.²¹

Implementation of the above mandate over the years has proven to be a major challenge to the African Commission. One of these challenges, as indicated, is the perennial lack of funding. The other is the glaring lack of the necessary will

²⁰ These have normally taken the form of 'resolutions' adopted by the Commission, which address specific and general issues related to human and peoples' rights; observations made in the course of examining state party reports, even though the Commission on its website does not keep 'concluding observations' on state initial/periodic reports to the African Commission, which, however, it lists on the page but without actually providing for it.

²¹ Documentation, African Commission on Human and Peoples' Rights, Banjul, The Gambia, Vol. 1 (1991) of the Review.

on the part of all stakeholders, more especially states parties, to push the human rights agenda. The inability of the Commission in spite of these other constraints to deliver on its mandate is another. However, the Secretariat has indicated that the situation was now changing. A case in point was the latest increase in the Commission budget.²² For the past 20 years, the African Commission had been receiving less than US\$1 million annually.²³ However, in 2008, through the efforts of the current Secretariat, it received US\$6 million from the AU. As the Commission observed, “even if we only received half of it this year [2009], it is much more than what we were receiving just two years back”.²⁴

Article 41 has further bearing on this issue:

The Secretary-General ... shall also provide the staff and services necessary for the effective discharge of the duties of the Commission. The Organisation of African Unity shall bear the costs of the staff and services.

However, as explained by the Secretariat, to date this has not been implemented by the AU. It is therefore encouraging that there has been a change of heart by AU authorities at Addis Ababa regarding the provision of necessary funding to the African Commission. Of course, human rights work is not just about money: it is about being strategic on how to conduct human rights-related work. However, money is important when it comes to spreading the word to millions of people around the continent who are deprived of their human rights.

The Secretariat also revealed as a positive development the recent decision by the AU to adopt a new structure for the African Commission, “which will result

²² E-mail, African Commission Secretariat, Banjul, The Gambia, 13 March 2009.

²³ See e.g. Report of the African Commission on Human and Peoples' Rights, Executive Council, Eleventh Ordinary Session, 25 June 2007, Accra, Ghana, EXCL/364 (X). The report states the following: “During the 2006 financial year, the Commission was allocated One million one hundred and forty-two thousand four hundred and thirty six United States Dollars (USD 1,142,436)”. In the 2007 financial year, there was a 5% increase compared to the 2006 budget. “... Out of this amount, only Forty-seven thousand United States Dollars (USD 47,000) has been allocated to programmes, including promotion and protection missions of the Commission. This amount is enough to cover only four missions in any year. No allocation is made for research, training/capacity building, special mechanisms, activities, projects, seminars and conferences ... This amount does not cover a third of the cost of the promotion missions for Commissioners and special mechanisms earmarked for a year ... The work of the Commission thus continues to be severely compromised due to inadequate funding ...”.

²⁴ (ibid.).

in a substantial increase in the number of staff".²⁵ This is important because, over the past two decades, the Secretariat has operated on a skeleton structure, thereby effectively preventing it from fully servicing the Commission in respect of discharging its mandate.²⁶ The AU is clearly not being serious when it assigns 23 individuals the responsibility of overseeing human rights work in 53 different countries boasting over 800 million people.

A much more realistic staff structure with the capacity to discharge the business of the Secretariat and service the Commission at optimum capacity is presented in the diagram on the following page.²⁷

The suggested Business of the Secretariat Model would call for an expanded Secretariat – which, for years, the AU has been unwilling to agree to. Nonetheless, the AU did finally agree to a relatively expanded 'Maputo structure', consisting of a total of 36 staff, including the new posts of Deputy Secretary, Researchers, Resource Mobilisation Officer, and Planner, among others. But given Africa's vast needs in the field of human and peoples' rights, this will amount to a drop in the ocean.

The Secretariat also claimed credit for the establishment of the African Court of Human and Peoples' Rights.²⁸ But with the founding of the African Court of Justice and Human Rights, the former has been replaced.

With regard to some of the developments that tend to affect the work of the Commission, the Secretariat alluded to the fact that the African Commission was not clearly defined within the AU.²⁹ They bemoaned as a negative element

²⁵ E-mail, African Commission Secretariat, Banjul, The Gambia, 13 March 2009.

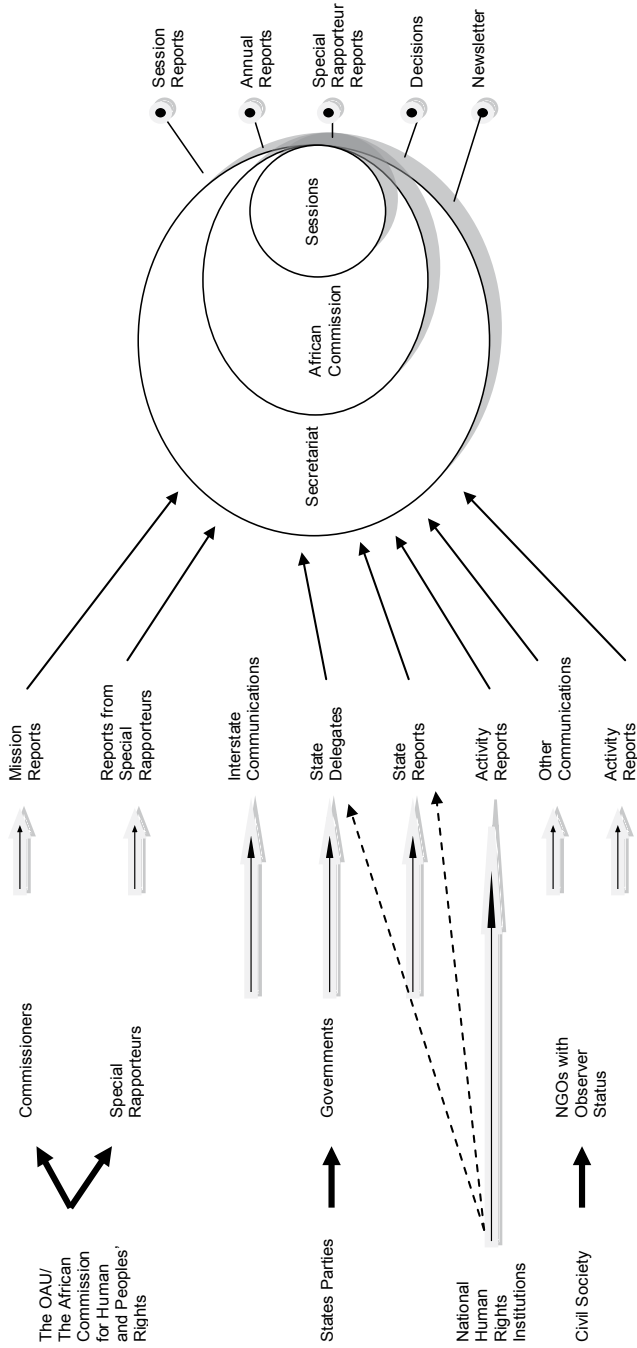
²⁶ As at May 2007, the staff situation at the African Commission Secretariat comprised a total of 23 members, including the post of Executive Secretary vacant at the time. The 23 staff members included 9 legal officers assigned to different offices, 1 documentation officer, 1 receptionist, 1 cleaner, and a number of translators, computer technicians, clerks, drivers, security guards, etc.

²⁷ E-mail (ibid.).

²⁸ In a discussion on 22 June 2003 in Pretoria, South Africa, with one of the Commissioners, who has since retired. The fall-out happened at the 2002 (October) Session of the African Commission held in Pretoria. See also Communication: *DRC v Burundi, Rwanda and Uganda*.

²⁹ When the idea of a Charter was being mooted at the OAU Summit held at Monrovia, Liberia, way back in July 1979, and in the days that followed, few people believed the African

**The business of the Secretariat
of the African Commission for Human and Peoples' Rights**



that the Commission was not mentioned in the AU's Constitutive Act. The Secretariat explained that, until 2008, the African Commission had been placed administratively under the Political Department. This refers to the Commission not being included among the Article 5 Organs in the AU Constitutive Act. A particularly negative aspect was that the Commission did not have its own budget line, but fell under that of the Political Department. The latter Department had to authorise the Commission's expenditures, therefore, i.e. expenditures of its missions, which impacted negatively on the Commission's effectiveness. Furthermore, the Secretariat mentioned that its own status was not very clear in the Charter. For example, it was not immediately apparent whether the Secretariat should receive instructions from the Commission only, or from the AU Commission as well. For the time being, the Secretariat explained, "everything was controlled from Addis Ababa". A case in point was that the Commission did not take part in staff recruitment. This, especially the recruitment of the Secretary, had been a great bone of contention between the Commission and the AU, but more specifically between the Commission and the Executive Secretary.

State party reporting obligation

State party reporting is a complete failure in the African human rights system.³⁰ Many states are in arrears, with several reports due; and when they report, they do so inconsistently and often without due regard to quality. The Commission has compounded this by declaring an amnesty on any state that reports once, 'forgiving' it its past arrears – however many they may be. Besides this not being

leaders meant well and were serious about it. In September that year, the UN organised a symposium – again at Monrovia – to which UN representatives and representatives from regional systems in the Americas and Europe were invited. The idea was to gain insight into the experiences with these three systems. One thing that came out quite clearly was the need to protect the body that would develop out of the process from interference by the OAU and any other states parties. That was when it was suggested that the African Commission would have to be established outside of the OAU Charter: in this way it would be shielded from the political influence that would inevitably follow if it were set up under the auspices of the Charter. To date, therefore, the African Commission stands separately and autonomously from other organs of the AU, precisely in order to protect its independence.

³⁰ The Status on Submission of State Initial/Periodic Reports to the African Commission (March 2008 update). It shows a very high defaulting record, with more than ten states parties not having submitted a single report more than 20 years after the Charter came into force and the reporting obligation became due. See www.achpr.org/english/_info/statereport_considered_en.html; last accessed 18 April 2009.

sanctioned by Article 62, which is specific about when and how states are to report, it discourages those few states that want to comply.

Poor quality reporting has come to characterise the reporting procedure in the sense that guidelines on the preparation of state reports are rarely taken into account. The Commission has also not fully grasped the purpose of the reporting obligation. There are no follow-up mechanisms, comments or observations, as there are in the UN System, to assist states in appreciating where they went wrong and to offer pointers on how to improve in subsequent reports.

Promotion and protection

Owing to a variety of factors, the Commission's mandate to promote the African Charter has not really been implemented – let alone implemented satisfactorily. As indicated above, Article 45 imposes the overarching duty on the Commission to promote the Charter. This huge responsibility effectively means undertaking sustained research in human rights, and then disseminating the research findings to the general public through lectures, workshops, conferences, etc.

In response, the Commission has come up with several instruments and mechanisms with which to implement this part of its mandate. In the table of current Commissioners presented earlier in the paper, the third column shows which countries have been allocated to each Commissioner. It is that incumbent's duty to promote the Charter as well as the work of the Commission itself.

Firstly, due to inadequate funding, however, most of the Commissioners have hardly visited the countries allocated to them for their promotional work. Secondly, in instances where a country or two have been visited, the same constraint – a lack of funding – has meant the official concerned will spend one week at the most to conduct all the promotional work for the entire country. This is reflected in the reports some of the Commissioners have compiled. However, apart from reporting to their peers at sessions about what they accomplished during intersession periods, the majority of Commissioners have not compiled comprehensive reports on their promotion missions. Thirdly, the method Commissioners often use ensures a limited outcome of the promotional mission embarked upon. Because Commissioners are hosted by governments, who arrange the mission and provide all facilities to facilitate it, ownership of the programme is solely in the hands of the host state – which seriously compromises

the Commissioner's work. Fourthly, the fact that the 11 Commissioners are part-time officials with full-time jobs to earn their living, they cannot possibly be expected to cover the entire continent of 53 countries. Obviously, this makes it impossible to even imagine they can implement a fifth of their promotional mandate in their tenure. Therefore, the promotional mandate lacks concrete deliverables of which the Commission can be proud.

Rapporteurs

Based on Article 46 of the Charter, which entitles the Commission to “resort to any appropriate method of investigation”, it has tried to be proactive and come up with innovative methods such as appointing rapporteurs with specific mandates to investigate and, in the course of doing so, promote human rights. This has resulted in several mechanisms, including those on the following:

- The right to life and protection from extrajudicial killings
- The rights of prisoners in Africa
- The rights of women in Africa
- Press freedom and the right to information
- Human rights defenders, and
- Refugees and internally displaced persons.

The objective is for the Commissioner concerned, especially during inter-session periods, to go out and investigate his/her mandate in the specific area covered by the mechanism, and to deliver a report to the Commission, which may prompt action to be taken after due consideration of the report findings. There have been positive results in some of the work done by Rapporteurs and Commissioners, more especially those funded by external bodies: as with the rest of the Commission, the main constraint here, too, has been funding. The Rights of Prisoners in Africa as well as the Rights of Women mandates are among those that have attracted funding from outside, resulting in projects being implemented in these fields. In fact, there has sometimes been so much money poured into these mechanisms supported by outside bodies that it has created tension among Commissioners as to how such funding is used. However, those that are not so lucky in respect of attracting outside funding have found their work constrained.

But again, the mechanisms have not achieved much. The first problem is an internal one. Due to the selfishness of some of the Commissioners in previous

years, special procedures were allocated to Commissioners. In the present circumstances, only Commissioners can be Rapporteurs. Even though, as part-time officials with full-time employment elsewhere, Commissioners often complain of a lack of time to attend to Commission work, they nevertheless insist on undertaking the Rapporteur work themselves – mostly due to the monetary benefits this entails. A Commissioner who is lucky enough to land on a lucrative mechanism whose funding is constant is likely to benefit monetarily from undertaking the work of the mechanism and, hence, prefers to keep the mechanism in-house. Outsourcing it to outside experts, such as in the UN Human Rights system,³¹ of course, should result in more positive results than is presently the case at the African system. Part-time Commissioners with so much on their plate practically have no time to conduct the kind of intensive investigations an expert in the field would to produce a quality report.

Also, the lack of a proper focus on the aims and objectives due from the mechanism has led to poor implementation.³² Some of the Rapporteurs simply have no idea what it is the mechanism aims to achieve. For example, one of the Rapporteurs for the Prison Conditions in Africa decided to visit prisons in Europe instead of in Africa; this understandably provoked criticism from her fellow Commissioners during her report-back. Similarly, the Rapporteur on Women's Rights in Africa had such a bloated mandate that she was unable to specific issues to investigate: women's rights are a broad subject. Another case in point is the Rapporteur on Refugees and Internally Displaced Persons, who was caught up in a diplomatic fracas in Zimbabwe when – without a proper mandate either from his colleagues in the African Commission or the host state – rushed to Zimbabwe on a directive from the AU to join a UN Mission investigating the government's programme ("*Murambatsvina*") of demolishing the houses of suspected political opponents, which resulted in widespread displacements. Officials in Zimbabwe's Foreign Ministry expressed ignorance of the Rapporteur's visit and, as a result, the Zimbabwe Government did not clear him as required in the rules governing visits by Rapporteurs or foreign officials. Consequently, he was left stranded in his hotel for days until he decided to return – without having met one official.

³¹ In the UN, Independent Procedures are outsourced to experts outside the treaty bodies, such as the Special Representative on Business and Human Rights, and the Rapporteur on Education. These are independent experts mostly from academia, legal practice, etc.

³² See a handful of the reports submitted from some of the Commissioners that have tried to do something at least; available at www.achpr.org; last accessed 18 April 2009.

The Rapporteur mechanism is currently under review. The Working Group on Specific Issues Relevant to the Work of the Commission alluded to this review in their report.³³ It is hoped that the review will be comprehensive, open to the public, and meant to strengthen the mechanism which, if properly focused, could drive the Commission forward in its efforts to promote human rights effectively in accord with its mandate.

Communication

The procedure

Besides promotion, the other cornerstone of the African Commission's mandate as set out in Article 45 of the Charter is protection. Based on the protection mandate, anyone (not just citizens) within the territory of a state party to the Charter may bring a complaint to the attention of the African Commission where s/he may allege violation of one or more of his or her rights set out in the Charter. Due to the broad nature of the range and class of rights the Charter guarantees, it is not easy to find a complaint of an alleged violation of a right that is *not* guaranteed in the Charter. Indeed, a few rights like privacy and personality are missing from the Charter; but on the whole, the Charter is one of the most comprehensive instruments as far as catering for all categories of human and collective rights is concerned. Nonetheless, the Secretariat has dismissed certain complaints – even without sending them to Commissioners for determination as to whether they establish a *prima facie* case for these complaints to be accepted for investigation, e.g. where the state complained of is not a state party to the Charter.

Individuals and NGOs based in or outside Africa are entitled to submit complaints to the African Commission and, over the years, many have done so. Complaints tend to increase against a state party depending on the political situation in the country. For example, during the era of military rule in Nigeria, it monopolised the communication procedure; more recently it was Zimbabwe that took the lead. Although there has not been a complaint by a legal person like a corporate entity, this is not totally unlikely. The Charter guarantees rights like property which inhere in both natural and legal persons.

³³ For a full discussion on this particular Working Group, see below.

As indicated, the duty to protect the rights and freedoms guaranteed in the Charter is one of the Commission's principal functions. The protection mandate plays a greater part of the Commission's work. This mostly is due more to the circumstances than out of desire of the Commission in that, owing to awareness by NGOs, several victims approached the Commission for protection when the Commission opened its doors to the general public.

The Charter provides for two types of communications. In the first instance, states parties to the Charter are entitled to submit complaints against other states parties. This is provided for in Articles 48–49. In a broad sense, the state brings the complaint in a representative sense on behalf not of its own citizens per se, but of another country's citizens or residents. In practice, states parties have refrained from resorting to this procedure; they fear that, if it uses the procedure against state A, it may be creating a bad precedent for the procedure to be used against itself. States are shy to take on other states – and even more so in human rights issues: each state has some skeletons in the closet. Therefore, there is not much jurisprudence in the Commission in terms of the interstate complaint procedure as it is generally known to justify further comment.

Secondly, the Commission is empowered to receive and consider what in Article 55 are colloquially known as 'other communications'. Here, individual victims of human rights violations or organisations on their behalf are entitled to submit complaints containing allegations of violations of one or more rights guaranteed in the Charter. Though the procedure set out in Rules 102–120 of the Rules of Procedure state that these so-called 'other communications' will be processed in written form, some communications were initially submitted to the African Commission Secretariat by telephone. The general procedure, however, is to submit communications by means of a letter, e-mail, fax, etc. However, it is perfectly in keeping with procedure for the author of a communication to abandon it, in which case the Commission will discontinue any related proceedings.

Conditions governing admissibility of communications

Once a communication has been received and seized, the Secretariat is obliged to bring the development to the attention of the state party concerned.³⁴ But one of the Secretariat's problems has been getting states informed of a complaint

³⁴ Article 57 of the Charter.

lodged against them. Most respondent states usually claim that they did not receive the notification. Of course, some of them take advantage of the poor bureaucracy at the Secretariat to claim they were never informed, but there are others that genuinely do not get the information for the reason stated.

From the reactions by most states parties on the subject of communications, ensuring states take note of the allegations being made against them has been an immense problem.³⁵ States would plead ignorance of any information that may have been sent to them by the Secretariat with regard to complaints against them. Sometimes, States do this in order to buy time to prepare a response, which adds to the delays experienced in the processing of communications. This is one of the main sources of delays in processing communications. States are known to have 'slept' on the requests and pleaded not to have been approached, even where they may have been. It is a common tactic in the African Commission for the state subject of a communication to buy time by claiming it was not informed at all or at least not on time.

However, once the state has responded, the communication in question will be measured against the criteria governing the admissibility of communications. Article 56 of the Charter stipulates the admissibility criteria to be applied to individual communications. There is a list of conditions required to be exhausted by the victim, including –

- disclosing the identity of the communication's author – even where s/he may wish to request anonymity
- that the communication be compatible with OAU/AU instruments
- that the communication should not be written in insulting or disparaging language
- that the communication not be based exclusively on news disseminated through the media
- that the communication be sent to the Commission within a reasonable period after exhausting local remedies, and
- that the communication should not deal with matters that have been settled in accordance with the principles of the Charter, UN instruments, and provisions of the present point.

³⁵ Most states either do not bother to respond to the Secretariat's letters seeking information as to the allegations levelled against them. When the request is sent a second time, they often ask for more information – claiming they did not get the first request.

According to the Commission, all seven conditions have to be met, otherwise the communication will be closed.³⁶ This means, for instance, that a communication which is brought, received and seized and which meets all the conditions except that it was “based exclusively on news disseminated through the news media”, it will be declared inadmissible on this account alone.

Of the seven conditions, the most important is the local remedies rule. Consequently, there is plenty of jurisprudence in which the Commission has repeatedly pronounced itself on the nature and scope of the local remedies rule. This happened, for instance, in the *John Modise* case, where on a submission by Botswana that the complainant had not yet exhausted local remedies, the Commission observed that “[t]he communication has a long history before the Commission”. The Commission declared the communication admissible at its 17th Ordinary Session on the grounds that “local remedies were unduly prolonged and the legal process wilfully obstructed by the government through repeated deportations of the complainant”.³⁷ But rather inconsistently, the Commission declared Motale Sakwe’s complaint inadmissible.³⁸ This is a person who, together with his elderly mother, had gone through a heart-rending experience at the hands of Cameroon police. Sakwe had complained that he and his mother had been abducted by police and, without charge, held in illegal and prolonged detention where the two of them were subjected to torture. But the Commission, despite all this, dismissed the complaint on the grounds that it had not heard from the parties on the question of exhaustion of local remedies. This is extremely distressing. The Commission could easily have approached the Government of Cameroon to confirm this, had it wanted to. Besides, it ought to have been clear to the Commission from the information in the public domain that there were no local remedies in Cameroon. Every NGO that has worked in Cameroon could testify on behalf of Sakwe as to a lack of local remedies in that country in respect of the brutalities for which the police force is so notorious. Instead, the Commission chose to take a passive approach and disappointingly threw the complaint out due to its own failure to establish simple facts around the case.

Nevertheless, the decision on whether local remedies have been exhausted – and, therefore, on the admissibility of the communication – is taken only after the state has been given an opportunity to consider the complaint and respond to

³⁶ Information Sheet No. 3, www.achpr.org; last accessed 20 March 2009.

³⁷ 97/93 *John K Modise v Botswana*, 14th Annual Activity Report: 2000–2001.

³⁸ 230/99 *Motale Zacharia Sakwe v Cameroon*, 14th Annual Activity Report: 2000–2001.

the issue. Based on international law, the burden of proving that local remedies have been exhausted is a question for the state party³⁹ or respondent, and not – as would be expected – for the complainant who brings the case. The reason for this is very simple. An ordinary person may and often does not know what remedies there are in law for him/her in respect of the complaint in question. The state, which also has the necessary resources, is the one which can determine remedies that the law may provide and how to exhaust them. It is important to stress the fact that the Commission has previously stipulated that remedies should be available, effective, sufficient, and not unduly prolonged.⁴⁰ In particular, they must be judicial – and not administrative or discretionary remedies. Therefore, relief from a national human rights institution has not been held to constitute an effective remedy.

If the state does not respond within three months as to where it stands on the issue of admissibility, particularly as regards the exhaustion of local remedies, but also on the other six Article 56 conditions, it is normally given another three months – making it a total of six in which to respond. If it fails to do so within that six-month period, it is deemed to have forfeited its entitlement to respond and, therefore, could be said to have breached the Charter regarding its duty to

³⁹ *Communication No. 71/92 Recontre Africaine pour la Defense des Droits de l'Homme (RADDHO) v Zambia*, 10th Annual Activity Report: 1996–1997. In this communication, the Commission held that “[w]hen the Zambian government argues that the communication must be declared inadmissible because the local remedies have not been exhausted, the government then has the burden of demonstrating the existence of such remedies”.

⁴⁰ *147/95 Sir Dawda K Jawara v The Gambia*, 13th Annual Activity Report: 1999–2000. In this Communication, the Commission clarified the rationale of the local remedies rule, which it said was “to ensure that before proceedings are brought before an international body, the state concerned must have had the opportunity to remedy the matter through its own system”. This prevents the Commission from acting as a court of first instance rather than a body of last resort. Three major criteria could be deduced from the practice of the Commission in determining this rule, namely, the remedy needs to be available, effective, sufficient, and not unduly prolonged. The remedy is considered *available* if the petitioner can pursue it without impediment; it is deemed *effective* if it offers a prospect of success; and it is found *sufficient* if it is capable of redressing the complaint (*RADDHO v Zambia*, *ibid.*). The Communication set the tone that “[t]he rule requiring the exhaustion of local remedies as a condition of an international claim is founded upon, amongst other principles, the contention that the respondent state must first have an opportunity to redress by its own means within the framework of its own domestic legal system, the wrong alleged to have been done to the state”. It went on to say “[t]his does not mean, however, that complainants are required to exhaust local remedy which is found to be, as a practical matter, unavailable or ineffective”.

cooperate. Consequently, the Commission would go ahead and decide the issue. This it normally does by ratifying the position canvassed by the complainant on the issue, although it can also conduct its own investigation and come up with an independent decision.⁴¹ However, this is not automatic, as the Commission is free to seek other sources to rebut or prove the victim's assertions. For example, Article 46 entitles the Commission to "resort to any appropriate method of investigation ..." to enable it to get a better picture or means to decide the matter. Similarly, the complainant will be afforded opportunity to respond to the state's observations on admissibility, and is entitled to the same six months' response time due to the state.

Once the communication has been declared admissible, the parties are informed of the outcome. They would also be informed of the session and date due for determination of the communication on merit. The problem, however, is that the Commission does not decide the communication on its merit during the same session in which it addresses the issue of admissibility. Another date is set for the merit stage – and often after a long time lapse.

However, the decision on merit precedes the same consultation as in admissibility, including three months to the state party to respond to the allegations, only this time on the merit issue; again, the response time allowance is liable to extension by another three months if the state does not answer within the first three. Often, as in international human rights procedure, states choose not to add to what they may already have said in support of their cases at the admissibility stage. Although the admissibility and merit issues are different, states often simply reiterate their positions submitted on admissibility stage when called upon to address the Commission as to the merits of the complainant's case. Specifically with regard to the cited e-mail, long lapses of time are allowed after final

⁴¹ An example in which the state did not bother to respond to the Commission's correspondence is Communication No. 159/96 *Union Inter Africaine des de l'Homme, Fédération Internationale des Ligues des Droits de l'Homme, Recontre Africaine pour la Defense des Droits de l'Homme, Organisation Nationale des Droits de l'Homme au Senegal and Association Malienne des Droits de l'Homme v Angola*, 11th Annual Activity Report: 1997–1998. According to the complainants, between April and September 1996, the Angolan Government rounded up and expelled West African nationals on its territory. These illegal expulsions were preceded by acts of brutality committed against Gambian, Malian, Mauritian, Senegalese and other nationals. The complainants maintained that the Angolan State had violated the provisions of Articles 2, 7(1)(a), and 12(4) and (5) of the African Charter on Human and Peoples' Rights.

submissions by parties before the Commission decides the communication or makes its recommendations. The internal procedure is that the Commissioner serving as the Rapporteur, who was assigned the communication after it was seized, is the one who will prepare the decision or recommendation; the other Commissioners will consider in plenary or by means of e-mail. If they are agreeable, they will approve the decision or recommendation.

Individual Commissioners have on several occasions effectively held the system to ransom by delaying the preparation of decisions or recommendations. There is no system to control Commissioners in respect of a cut-off point by which they must have rendered the decision. Rather, it is left up to NGOs to lobby the Commission and the Secretariat to prepare a decision – which is not right. Delayed decisions have been a major source of frustration by most people – but particularly victims who have interacted with the African human rights system.

Amicable resolution

Though it is not strongly emphasised, the amicable resolution of disputes is an important feature of the African system of human rights. In fact, this was a feature of the African system during the early stages of the gestation of the African Charter before protection came to the fore. The original intention of the drafters of the Charter was to provide a mechanism where disputes would be resolved amicably and not through the rigid dispute settlement procedure by means of adjudication.

Resort to amicable settlement technically starts to run once a communication has been declared admissible. It has not often happened, but the Commission offers its good offices for the parties who need it to try to achieve a friendly settlement of the matter, but this depends on the willingness of parties to do so without resorting to adjudication. If the parties are willing to try the amicable way, the Commission usually appoints one of the Commissioners to facilitate the discussions and possible resolution of the matter. This will often either be the Commissioner who has been handling the case up to that point, the one responsible for promotional activities in the state concerned, or even a group of Commissioners. There is no developed procedure for amicable settlement in the Commission, which is why nothing is fixed in advance as to who among the Commissioners will be expected to assist parties to settle the matter amicably.

If a friendly settlement is struck, the terms are presented to the Commission at its next session. The Commission acts as a kind of underwriter to the settlement and, once it is adopted by the Commission, the communication comes to an end. The above procedure, however, was not followed in *John Modise v Botswana*,⁴² where the Commission simply resolved to close the file on learning that the Botswana head of State had granted the complainant nationality without thorough investigation to determine whether this was the joint effort of the parties concerned. In fact, it was a unilateral decision by the State in order to frustrate the proceedings in the Commission and try to get the case back under its jurisdiction. Consequently, the Commission was forced to reopen the file when the complainant, through his representatives, rejected the finding that the parties had agreed to settle the matter amicably.

Working Groups

One of the mechanisms the African Commission uses to implement its mandate is the system of Working Groups. A number of Working Groups have been established over the years, including Working Groups on Indigenous Populations/Communities; Economic, Social and Cultural Rights; the Death Penalty; and Specific Issues Relevant to the Work of the Commission on Human and Peoples' Rights.

While some of the Working Groups are still new and, therefore, have yet to find their feet in the system, the Working Group of Experts on Indigenous Populations/Communities has mobilised representatives of indigenous groups in Africa and, together with local and foreign experts, has come up with a comprehensive report setting out the indigenous peoples' human rights situation, and the local and international regime and jurisprudence governing these people, besides grappling with the vexing issue of the criteria for identifying indigenous peoples. During its 30th Ordinary Session held in November 2003, the African Commission adopted the Working Group's report as well as its recommendations. One of the recommendations was a call to establish a focal point on indigenous issues within the Commission. It was also recommended that the Commission establish a forum which brought together indigenous participants, experts and other human rights activists regularly in the context of the sessions of the

⁴² Cited in footnote No. 37 above.

African Commission to consider developments in the field of the human rights of indigenous populations/communities in Africa.⁴³

Equally important among these Commission entities is the Working Group on Specific Issues Relevant to the Work of the Commission on Human and Peoples' Rights.⁴⁴ The latter Working Group was established by the Commission during its 37th Ordinary Session in April/May 2005 in Banjul, The Gambia.⁴⁵

In its mandate, the Working Group on Specific Issues focuses on very important features of the African Commission. Among others, the Group is tasked with the following mandate:

- The review of the Rules of Procedure of the African Commission on Human and Peoples' Rights. In its review of the Rules, the Group was instructed to ensure that the specific issues below were included:
 - The relationship between the African Commission Bureau and the Secretariat
 - The relationship between the African Commission and its partners
 - The relationship between the African Commission and the various organs and institutions of the African Union
- The mechanism and procedure for following up on decisions and recommendations of the African Commission
- The structure of different African Commission reports
- The modalities for the establishment of a Voluntary Fund for Human Rights in Africa; and
- The follow-up on the implementation of the Retreat of the African Commission in Addis Ababa of September 2003, the evaluation report on the work of the African Commission, and the Uppsala Consultation of June 2004.

⁴³ African Commission's Working Group of Experts on Indigenous Populations/Communities (2004).

⁴⁴ This Group was found necessary in order to review the way in which the Commission conducted its business, especially in light of the coming into operation of the Court, but also as a general issue to make the Commission more efficient. One of the Commission's concerns has been the power of the AU to appoint the Commission's Secretary and all other Commission staff, without consulting the Commission itself. Commissioners have been demanding a role in this process, but to no avail. The Working Group on Specific Issues is one of the ways to encourage a dialogue on some of these issues between the Commission and the AU, the Commission and the Secretariat, etc.

⁴⁵ African Commission on Human and Peoples' Rights, Res.77 (XXXV11) 05; Session chaired by Dr Angela Melo, currently Vice-Chairperson of the African Commission.

This Working Group is distinct in one particular respect: its open reliance on outside expertise. Besides the Chairperson and another Commissioner, members were drawn from external expertise.⁴⁶ This has created questions from the AU on the Commission's working methods if it appears to be obliged to rely totally on private persons to do its work.

Nevertheless, to execute its work, the Working Group used information extracted from a wealth of sources, including –

- the September 2003 Addis Ababa brainstorming report
- the 2004 report of the Uppsala consultation on the African Commission
- the May 2006 report of the Banjul brainstorming session, and
- the May 2007 brainstorming session held in Maseru, Lesotho, between the African Commission and members of the Permanent Representatives Committee.

The first meeting expanded on the items set out in the mandate. These additional items included a number of other issues relating to –

- the functions and composition of the Commission Bureau and its Secretariat
- the communications submitted to the Commission in accordance with Article 55 of the African Charter
- communications submitted in accordance with Article 47 of the African Charter
- state reporting
- missions
- the speech of the Chairperson before the Executive Council
- the issue of incompatibility
- the integrity and independence of the African Commission
- the establishment of a Voluntary Fund for Human Rights in Africa, and
- potential donors.

Most of these items found themselves in the final draft of the Interim Rules of Procedure which are currently awaiting harmonisation with the Interim Rules of

⁴⁶ Up until November 2007, the Working Group consisted of Commissioner Angela Melo, Commissioner Faith Pansy Tlakula, Mr Ibrahim Kane (Interights), Mr K Maxwell (Open Society Justice Initiative, Nigeria), Mr Alpha Fall (Institut pour les Droits Humains et le Développement en Afrique, IDHDA), and Ms Julia Harrington (Open Society Justice Initiative, New York). After its 42nd Session in Congo-Brazzaville, the Commission elected Commissioner Silvie Zainabo Kayitesi as a new member.

Procedure of the African Court on Human and Peoples' Rights. Though this Court has since been replaced, the Rules were made with it in mind. It seems, however, that there was not much consultation with stakeholders towards the Interim Rules of Procedure. Though the AU Commission Departments – especially the Department of Political Affairs, which oversees the docket on human rights, and the AU's Permanent Representative Committee – were consulted, the process nevertheless was not subjected to public comment until after the Interim Rules had already been adopted. This deprived the Commission of an opportunity to benefit from the public beyond the four organisations that had been selected to join the Working Group. This is compounded by the fact that the procedure used to include the organisations remains unclear. The Secretariat has posted the Interim Rules on the African Commission website and is soliciting comments from the public. But it would appear that it is rather too late to get the cooperation of the public as many believe whatever input they make at this stage cannot change much of what is already in the Interim document.

Conclusion

The advent of the African Union represents an era of significant change. Human rights that played no role during the 40 years of existence of the OAU are finally on the agenda of the African Union. Similarly, most African States are slowly warming up to international justice in the conduct of their internal affairs. Clearly, change is in the air in Africa. On realising that, important as it is, the African Commission on Human and Peoples' Rights is not efficient and effective, a new architecture with far-reaching consequences on individual liberty, peace and justice in Africa is under construction. The chapter has tried to document some of this architecture.

However, because most of what has been discussed in the paper is still developing, it is important to come back to the work again, particularly after the new single Court is in place and victims have started using it this time to document the principles in the light of experiences. The scrapping of both the African Court of Human and Peoples' Rights and the African Court of Justice, as well as their replacement by the single African Court of Justice and Human Rights, may need to be put in context after the latter becomes operational.

The African Commission has recently released its Interim Rules of Procedure, which it hoped to harmonise with the Interim Rules of the African Court of

Human and Peoples' Rights, also released almost simultaneously. However, the two bodies may have to hold on until after the new single Court is in place. As indicated in the chapter, things move rather too quickly in Africa. The Interim Rules of Procedure of both the two bodies now are effectively history. It is expected, however, that the change that is coming will ultimately benefit the African architecture of human rights and, in the final analysis, the individual victim of human rights violation.

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