

THE FIGHT FOR HUMAN RIGHTS IN AFRICA PERSPECTIVES ON THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

Edited by Michael Wodzicki



Canadian International
Development Agency

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développement international



Droits et Démocratie
Rights & Democracy

Centre international des droits de la personne et du développement démocratique
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ACRONYMS

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
AHG	Assembly of Heads of State and Government of the African Union
AU	African Union
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CIDA	Canadian International Development Agency
ECHR	European Convention on Human Rights
ICCPR	International Covenant on Civil and Political Rights
NEPAD	New Partnership for Africa's Development
NGO	Non governmental organization
OAS	Organization of American States
OUA	Organization for African Unity
SOWAR	Solidarity for African Women's Rights
UN	United Nations

FOREWORD

2008 is the 60th anniversary of the Universal Declaration on Human Rights. In the decades that followed the adoption of the Declaration, human rights norms and institutions have expanded and deepened around the world. Included amongst these is the African Commission on Human and Peoples' Rights (the African Commission), which in 2007 celebrated its 20th anniversary.

The African Commission is Africa's key regional institution charged with the promotion and protection of human rights. Over time, as the African Commission has slowly but surely expanded its reach in Africa, and consequently the space to fight for human rights, human rights actors on and outside the continent have taken notice; Rights & Democracy is one such actor. Rights & Democracy is a pioneer Canadian institution that supports human rights and democratic development around the world, and celebrates its 20th anniversary in 2008.

For the last 15 years, the African Commission and Rights & Democracy have cooperated at opportune moments. In 2005, the African Commission and Rights & Democracy entered into a partnership which for the first time saw Canadian lawyers posted to the African Commission's Secretariat in Banjul, The Gambia, for 2 years. Working with and learning from their colleagues at the Secretariat, these Canadians were able to make important contributions to the fulfilment of the Commission's mandate. Drawing on their experiences, these Canadians describe in the chapters of this volume the African Commission's mandate and opportunities for human rights promotion and protection in Africa.

The growing commitment of African states to Africa's human rights system is in part evidenced by the fact that some of the opportunities described and analyzed in this volume's chapters are already becoming reality. Indeed, changes in the African human rights system are occurring faster than we can write about them.

As this goes to press, it is expected that at the Eleventh Assembly of the African Union from 30 June to 1 July 2008 in Sharm El-Sheikh, Egypt, Africa's Heads of State will adopt a single legal instrument merging the Court of Justice of the African Union and the African Court on Human and Peoples' Rights. This historic decision reflects the tireless efforts of African Union officials, African Union member states, and civil society activists from across the continent to continue reinforcing Africa's human rights mechanisms. The next step is for all African Union member states to ratify and sign the protocol recognizing the jurisdiction of the new African Court of Justice and Human Rights – which we call on them to do as soon as possible and without reservation.

We hope that stories in this publication contribute to the positive momentum currently driving the African human rights system, and serve to educate, inform, and motivate human rights practitioners in Africa and around the world.

Sanji Mmasenono Monageng
*Chairperson of the African
Commission on Human
and Peoples' Rights*

Rémy Beauregard
*President of Rights &
Democracy*

INTRODUCTION

Michael Wodzicki

The statement “human rights in Africa” does not often leave a positive impression. News from Africa invariably describes gross human rights violations, accompanied by graphic images of destitution and despair. The reality of genocide in Darfur, mass rape in eastern Congo, or stolen elections in Egypt, Kenya or Nigeria dominate headlines at the expense of the ongoing struggle of African institutions for human rights. Front and centre among these institutions is the African Commission for Human and Peoples’ Rights (the African Commission), the key regional body responsible for the protection and promotion of human rights in Africa.

Drawing on the African Charter for Human and Peoples’ Rights (the African Charter) and buttressed by the vigorous support of civil society organizations, the African Commission not only gives a voice to the victims of abuses, but has been increasingly effective in encouraging African states to live up to their human rights obligations. With the establishment of a new African Court for Human and Peoples’ Rights (the African Court) and a drastic increase in the African Commission’s resources in early 2008, opportunities to strengthen the fight for human rights in Africa now exist.

The objective of this publication is to describe the strengths and challenges of Africa’s regional human rights system. In 2005, with the support of the Canadian International Development Agency (CIDA), three Canadian lawyers were given the opportunity to work at the African Commission’s Secretariat in Banjul, Gambia. For two years, they learned from their colleagues and contributed to the African Commission’s efforts. This publication

brings together their experiences and highlights the strengths and opportunities of a regional system too often ignored or criticized from afar. Their reflections are not uncritical; clearly the system has its weaknesses and challenges. However, working on a daily basis on these issues has given these Canadians a perspective that is seldom heard or shared. This publication endeavours to share those perspectives.

THE AFRICAN HUMAN RIGHTS SYSTEM

The origins of the African human rights system can be traced back to 1963 and the creation of the Organization for African Unity (OAU). The OAU founders were motivated on the one hand by a pan-African desire to unite the continent and on the other hand, a desire to protect their hard-won independence; they therefore created a political, anti-colonial, and anti-apartheid organization.¹ One could argue that two human rights based principles inspired the OAU, namely those of self-determination and anti-racism.² However, any human rights principles at the OAU almost always lost out to the organization's overriding principle of non-intervention in state affairs, as well as its focus on the economic development of its newly independent members.³

Nonetheless, by the late 1970s, mounting pressure changed this situation. As early as 1961, a cadre of dedicated African and international jurists were the first to officially launch the idea of an African human rights commission.⁴ Through the 1960s and 1970s, these jurists began advocating for an African human rights charter. Their efforts were reinforced by civil society organizations, different church-based groups and the media, who were putting pressure on the OAU by exposing some of the most blatant human

1 OAU Charter, 1963, Preamble, paragraph 7. Available at www.africa-union.org/root/au/Documents/Treaties/text/OAU_Charter_1963.pdf.

2 See chapter 1 of Rachel Murray, *Human Rights in Africa*, Cambridge UP: United Kingdom, 2004.

3 Op. cit. 1, Preamble, paragraph 7; Article 3(1)(2)(3).

4 International Commission of Jurists, *Human and Peoples' Rights in Africa and the African Charter*, Report of a Conference held in Nairobi from December 2 to 4, 1985, Geneva, Switzerland.

rights abuses in Africa. Civil society has in fact played a key role throughout the development of the African human rights system, a theme that resonates through this book's chapters.

In 1979, the United Nations sponsored a seminar in Liberia on regional human rights commissions that already existed in other parts of the world, but with special reference to Africa. Over the next two years, a group of experts fleshed out these principles, which finally found their fullest African expression in 1981 with the adoption of the African Charter on Human and Peoples' Rights. When it came into force five years later, the OAU created the African Commission, which was established in Banjul, Gambia in 1987. Chapter 2 and 3 of this publication describe the African Charter and the African Commission in more detail.

Over the next fifteen years, the OAU showed some willingness to make such commitments and took steps towards their implementation. In 1998, the Protocol on the African Court on Human and Peoples' Rights (the African Court) was adopted and came into force in 2004. In 1999, OAU foreign ministers adopted the Grand Bay Declaration at the first ever OAU "Human Rights in Africa" conference, which linked human rights and democracy explicitly and integrated human rights into the OAU and, later on, the African Union (AU).⁵

In a departure from the OAU regime, in 2000, African leaders used the constitutive act of the AU—the successor to the OAU—to express their determination "to promote and protect human and peoples' rights..."⁶ Drawing on human rights commitments made at the aforementioned conference in Kampala, AU leaders committed themselves to implementing the principles found in the African Charter. At the heart of these efforts is the African Commission. It is responsible for supervising the implementation of the African Charter in all member states; actual implementation of the African Charter rests with the African Court.

The African Commission provides citizens and states with a regional complaints mechanism to pursue violations of the African

5 Available at www.africanreview.org/docs/rights/grandBay.pdf.

6 The Act is available at www.africa-union.org/root/au/AboutAU/Constitutive_Act_en.htm.

Charter and other recognized human rights protocols. The African Court is, in theory, the implementing organ of human rights for the AU. It has the mandate to pass judgment on human rights cases brought before it; how the African Court does so, in particular as it relates to the African Commission, remains to be determined, and is discussed in more detail in chapters 1 and 2.

The African Commission has also developed several special mechanisms, which it uses to address specific human rights themes on the continent. For instance, Special Rapporteurs have been named for prisons, women's rights, freedom of expression, protection of human rights defenders, extra-judicial execution, torture, and refugees. Chapters 3 and 4 of this publication describe the strengths, opportunities, and challenges faced by two of these mechanisms: women's rights and freedom of expression.

INTERNATIONAL STAKEHOLDERS—RIGHTS & DEMOCRACY

The role of international stakeholders in supporting the African Commission's mandate has been important throughout its history. Support has been provided by international donors, government agencies, non-governmental organizations, and academic institutions. The types of support provided has ranged from supporting staff positions at the Secretariat, providing resources for the African Commission to conduct promotional activities, and supporting the efforts of the Special Rapporteurs and other special mechanisms.

Such support has not been without controversy.⁷ As noted in a recent audit of the AU, the independence of Africa's regional human rights system has been questioned by some, given the significant role of external actors in supporting the system. Nevertheless, the same report notes that the African Commission would not have been able to fulfil its mandate without support from outside actors.⁸ Thus, external actors and the African Commission have con-

7 African Union, *Audit of the African Union: Towards a People-Centred Political and Socio-Economic Integration and Transformation of Africa*, African Union: Addis Ababa, 2007, paragraph 240. Op. cit. 3, p. 56.

8 Op. cit. 7, paragraph 239.

sistently needed to strike a balance between ensuring the respect by African states of their human rights obligations as described in the Charter while respecting the full independence of the African Commission. One such external actor is Canada's International Centre for Human Rights and Democratic Development, or Rights & Democracy.

Rights & Democracy is an independent institution created by an Act of Canada's Parliament in 1988.⁹ It first opened its doors in 1990. It has an international mandate to promote, advocate and defend the democratic and human rights set out in the International Bill of Human Rights. In cooperation with civil society organizations and governments, Rights & Democracy initiates and supports programmes to strengthen laws and institutions to ensure the respect for international, regional, and national human rights norms.

There are clear convergences between the roles of an independent Canadian institution created to support human rights and an independent human rights commission in Africa. As a Canadian institution, Rights & Democracy benefits from working in two of Africa's five official languages (English and French), as well as being familiar with common and civil law traditions. As a result, Rights & Democracy has been able to make contributions to the protocol establishing the African Court as well as the recently adopted African Charter on Democracy, Elections, and Governance.¹⁰

In this sense, it was natural for Rights & Democracy and the African Commission to establish contact in the early 1990s and to begin building a relationship based on mutual respect and trust. Both institutions approached partnership slowly, as a means towards building on each institution's strengths while attempting to implement the African Charter.

Early on, Rights & Democracy provided resources to the African Commission to support recently appointed Special Rapporteurs, in particular the Special Rapporteur on the Rights of Women in Africa. In 2004, Rights & Democracy sent a Canadian intern to

9 Available at <http://laws.justice.gc.ca/en/l-17.3/text.html>

10 The African Charter on Democracy, Elections and Governance is available at www.africa-union.org/root/au/Documents/Treaties/text/Charter%20on%20Democracy.pdf.

the Secretariat, to support the work of the Special Rapporteur on the Rights of Women in Africa. In 2005, in response to a call for proposals from CIDA, Rights & Democracy and the African Commission jointly submitted a proposal calling for the posting of four Canadian lawyers to the Secretariat for a period of two years. The proposal was supported by two Canadian academic institutions, the Centre for Human Rights and Legal Pluralism at McGill University and the Centre for International Relations at Université de Montréal; a final year law student at the former authored Chapter 3 in this publication. With CIDA's support, four Canadians arrived in Banjul in February 2006.

This idea of posting Canadian lawyers to the African Commission was the result of unique circumstances and needs at the African Commission. CIDA had resources to support the work of Canadian human rights experts abroad; due to financial constraints, the African Commission was faced with a dearth of legal expertise. Rights & Democracy interviewed candidates and the African Commission had the final say on who was selected. The four Canadians were to be supervised by the legal officers in the Secretariat, while being assigned to support specific Special Rapporteurs.

Rights & Democracy and the African Commission recognized the inherent challenges of integrating four Canadians into the Secretariat and furthermore, ensuring the usefulness of their work over the long run. The integration of the Canadians took place slowly; one left in the summer of 2006 to pursue other opportunities, while the remaining three served the full two years of their posting. These three have contributed chapters to this work and their biographies can be found at the end of the publication.

CONCLUSION

Since the adoption of the African Charter in 1981, Africa's institutional and normative human rights system has expanded and strengthened. Throughout its history, however, practical realities have greatly hampered the ability of the African Commission and, more broadly, the African human rights system to fulfil this man-

date. The two main challenges have traditionally been a lack of political will and a lack of resources. Despite rhetoric promoting human rights and the ratification of the African Charter by all AU member states, many have not submitted their mandatory reports to the African Commission, nor do many grant the African Commission authorization to undertake missions in their countries.¹¹ A related challenge has been the consistent lack of financial resources allocated to the African Commission by the AU.¹² This has been a problem faced by the institution since its inception; a problem to which the AU now seems to have responded.¹³

In early 2008, the African Commission defended its budget for the first time in front of AU member state ambassadors in Addis Ababa. Soon thereafter, a draft report emerged from the meeting, recommending a 600 percent increase in the African Commission's budget, noting that it was time to deliver on AU promises to provide the African Commission with the resources it needs to fulfil its mandate.¹⁴ The proposed budget for the African Court was even larger than for the African Commission.

If these recommendations are accepted, they will reflect a new reality in Africa of how the African human rights system can respond to human rights violations on the continent. Responding effectively to these violations will in part depend on how the African Commission can build on the systems' strengths while learning from its achievements. It is our hope that this publication will make a useful contribution in this regard.

11 Op. cit. 7, paragraph 237. On the case of promotional visits, some were taken in late 2007 and early 2008, perhaps demonstrating a change in this regard.

12 Op. cit. 2, p. 55.

13 See the available Activity Reports of the ACHPR at www.achpr.org/english/_info/index_activity_en.html.

14 African Union, *Draft Report of the Fifteenth Ordinary Session of the Permanent Representatives' Committee*, Addis Ababa, Ethiopia, PRC/Draft/Rapt/Rpt(XV), p.4, paragraph 16(c). Report made available to the author.

Chapter 1

THE AFRICAN SYSTEM OF HUMAN RIGHTS: INSTITUTIONAL MECHANISMS AND THEIR INTERCONNECTIONS

Ndiaga Loum

More than 20 years after the adoption of the Charter of Human and Peoples' Rights, the time has come to take stock. This is not an exhaustive review, but rather a critical analysis of the African human rights promotion and protection system, from its infancy to the present day.

This analysis will evaluate the effectiveness of the system, from the qualitative content of the Charter to the powers and limitations of the African Commission to guarantee respect for human rights, as set out by the Charter. Based on the lessons learned from this evaluation, we will address the question of the recent creation of the African Court on Human and Peoples' Rights. Will it serve as a complementary mechanism for strengthening the protection system already in place? Or will it simply be one more institution created by states with a penchant for creating institutions, but little interest in providing real support to make them work?

THE CONTENT OF THE CHARTER

The Charter sets out two main types of rights: the rights of peoples and the rights of individuals.

The Rights of Individuals

These rights conform to international norms and should not be problematic. However, my concern is that certain fundamental individual freedoms will be treated as “poor cousins” on the pretext that they cannot be defended in the same way, given the context of powerful age-old traditions that prevent their effective exercise. This is the case for freedom of expression in relation to religion, as evidenced by the experience of Senegalese journalists in the context of the “brotherhoods.”¹ However, other issues, such as sexual freedom in the form of homosexuality, for example, are more difficult to address through the prism of the universality of human rights; here, individual freedoms must navigate a sea of collective passions. Each time the issue is raised before an African human rights body such as the African Commission, there is a real struggle to achieve a calm debate that would make it possible to establish common legal ground.

The Rights of Peoples

Articles 19 to 24 guarantee rights such as the rights of peoples to equality and prohibit the domination of one people by another; the right to existence and self-determination; the right to sovereignty over their wealth and natural resources; the right to economic, social and cultural development; and the right to a satisfactory environment favourable to their development.

1 Islam in Senegal is defined by powerful local connotations, and is subdivided into several religious brotherhoods, the most influential of which are the Mourides and the Tijjaniyya. The relationship between the brotherhoods and the media is often conflictual, and tends to limit journalistic freedom. See Ndiaga Loum, *Les médias et l'État au Sénégal: l'impossible autonomie*, éditions L'Harmattan, Paris, 2003.

The category of “peoples’ rights” has been contested by certain “purists” within the legal profession who have failed to understand the importance of the concept of “people.” Others have argued that “people” must be defined in order to understand its inclusion in the African Charter, believing that it refers to different ethnic groups that live together within a state, referred to variously as “ethnic groups,” “tribes,” “clans,” or “societies.”² The concept of “people” appears to be ambiguous under the Charter. Sometimes “people” refers to a group of individuals benefiting from universal suffrage within a given state, the citizens, the electoral body (articles 13 and 20 in the Charter³). The term also refers to “population,” which includes nationals and foreigners (articles 2, 12, and 21 of the Charter⁴); in other words, as “state” people.⁵ Oddly, it is also interpreted that “peoples’ rights” is merely a mathematical calculation, that is, simply a question of adding up the different rights of all of the individuals within a given state.

I argue, however, that this interpretation is rooted in a failure to understand two realities: firstly, a failure to understand the context in which the Charter was developed, that is, in a key period in the history of African nations, most of which, 20 years after independence, were still striving for greater autonomy. The greatest political expression of this desire was their participation in the non-aligned movement at the end of the 1960s; secondly, a failure to understand the political nature of the message the authors of the Charter were trying to convey, namely, that in the historical context, the Charter’s vocation could not be strictly legal (see its Preamble). At the time the Charter was written, South Africa, one of the most important countries in Africa from a strategic point of view, was still under racist colonial domination. This domination excluded the black majority from decision-making. The authors of the African Charter wished to remind the world that human rights were

2 E. Nchama, *Développement et droits de l’Homme en Afrique*, PUBLISUD, 1991, p. 140.

3 P.F. Gonidec and J. Owona, “Les droits de l’homme : la Charte africaine des droits de l’homme et des peuples,” in *Encyclopédie juridique de l’Afrique*, Vol. 2, p. 370.

4 D. Segui, *L’apport de la Charte africaine des droits de l’homme et des peuples au droit international de l’homme*, in RADIC, Special Issue, 1991, p. 706.

5 Ibid.

also the rights of the black peoples of South Africa to freedom from apartheid. The Charter forcefully highlighted the right of peoples to self-determination, and the jurisprudence of the African Commission has never stopped interpreting these terms as meaning the rights of different peoples within a state. In one of its reports, it stated, "the rights of all peoples of Rwanda."⁶ In order to provide an interpretation of these rights and avoid any confusion, the African Commission had to affirm on several occasions that peoples enjoy the right to self-determination as they do all the rights guaranteed by the Charter, but that the exercise of these rights must not violate the territorial integrity of existing independent states. By stating this, the Commission wished to avoid a perverse or abusive use of the right to self-determination by a secessionist group to justify, for example, secession from an independent state. Any contradictory interpretation by the Commission would constitute a blank cheque for the plethora of secessionist movements in Africa to exploit the permeability of Africa's fragile borders, inherited from the colonial era, in order to launch attacks against a country from the safety of a neighbouring country.

THE AFRICAN COMMISSION: THE FIRST MECHANISM FOR MONITORING THE APPLICATION OF THE CHARTER

The African Charter established the African Commission on Human and Peoples' Rights. Its mandate is to promote and protect the rights guaranteed under the Charter. The Commission is composed of 11 members elected by the Conference of Heads of State and Government of the African Union (AU). Once elected, these members serve as individuals. Article 36 of the Charter stipulates that the members of the Commission are elected for six years and may be re-elected. The Commission is assisted in its functions by a Secretary and a staff appointed by the Secretary General of the AU. The Commission's Secretariat is located in Banjul, Gambia. If rights

6 Resolution on the situation in Rwanda, *Seventh Annual Activity Report of the African Commission on Human and Peoples' Rights, 1993-94*, ACHPR/APT/7, Annex XII, Para. 2.

promotion is its primary function, rights protection is its “Achilles heel.”

The Missions Assigned to the African Commission by the African Charter

Article 45 of the Charter sets forth the African Commission’s functions, as follows:

- a) Collect documents, conduct 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 human rights organizations, give its views or make recommendations to governments;
- b) Formulate and lay down principles and rules aimed at solving legal problems related to the enjoyment of human and peoples’ rights and fundamental freedoms upon which African governments may base their legislation;
- c) Cooperate with other African and international institutions interested in the promotion and protection of human rights;
- d) Ensure the protection of human and peoples’ rights under the conditions set out by the present Charter;
- e) Interpret all of 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;
- f) Perform any other tasks which may be entrusted to it by the Conference of Heads of State and Government.

Note that there is no mention in the statements of the Commission’s power to sanction, a jurisdiction that has been amputated from its key functions. Despite this, if the unstated objective of the authors of the Charter was to make it more of a political organ that would correspond to the African culture of non-litigious conflict resolution, it is clear that the African Commission has been given a heavy load. Carrying out its mandate not only requires the political will of states to collaborate, but sufficient funding from the African Union to ensure that the principles laid out will not be empty ideals.

The Jurisdictions Assigned to the African Commission by the Charter

The African Commission has long found itself in a paradoxical situation: the scope of the missions with which it has been entrusted contrasts with the absence of a genuine power to sanction. It can observe rights violations, issue reports to the African Union and make recommendations to states, but it cannot guarantee an effective follow-up of its decisions and, ultimately, must turn for this to the Conference of Heads of State and Government. This absence of power to sanction or to compel disarms the jurisdictional function of this body so poorly known by African populations.

Moreover, the 11 commissioners of the Commission are not permanent and must often work at great distances. Given that they have to combine their function as commissioner with their professional responsibilities in their respective countries, they have relatively little time, given the scope of their tasks. The Commission's activities are further hindered by its financial and material difficulties.

The Secretariat of the Commission, the very linchpin of the institution, is located in Gambia and has to contend with a slow Internet connection, a poorly-equipped documentation centre, and an almost laughable number of jurists (three permanent jurists, with others on short-term contract whose renewal is dependent on funds from international NGOs)—all of which does not provide an environment conducive to fulfillment of its formidable mandate. And yet, the Secretariat is responsible for receiving individual complaints as well as those from NGOs, classifying them and ensuring follow up with the complainants and defendants, writing draft decisions, summarizing state reports, formulating requests for visits to states, registering applications for observer status from NGOs or affiliated status from national human rights institutions, writing final reports for the Conference of Heads of State and Government and preparing the ordinary sessions of the Commission organized every six months. Given the vast scope of its task and the paltry sums at its disposal, it is nothing short of a miracle that the Commission still exists.

The African Commission is aware of its limitations but is nevertheless trying to make a difference by playing a mediation and

reconciliation role. Practical experience shows that despite all of the difficulties it encounters, the Commission has ruled on a truly impressive number of cases of human rights violations in Africa. In addition, the quality of the legal argumentation behind some of its decisions has helped to clarify the debate around doctrine and jurisprudence in unprecedented legal situations, with the opposing parties often having diametrically opposed interpretations of the same law under the Charter or another ratified international legal instrument.

Moreover, it should be stressed that the Commission offers a rare opportunity for NGOs to democratically express themselves (close to 400 have observer status). During the public sessions of the Commission's biannual, NGOs interact directly with state representatives on human rights situations in African states. In fact, NGOs hold their forum on human rights in Africa on the eve of each ordinary session of the Commission. The resolutions voted on during the NGO forums are then brought to the attention of the Commission, which can amend and adopt them.

The Commission's quasi "complicit" relationship with NGOs has been a great source of contention for certain African states. They question its independence and accuse it of serving as a mouthpiece for human rights activists, who they accuse of serving as the surrogates of Western powers that fund them in order to attack uncooperative states. However, this accusation is exaggerated, even unfounded, if we look at the internal functioning of most of the members of the Commission. Our practical experience with the Commission has clearly shown that the members of the Commission are concerned about its independence, which legitimizes their functions as commissioners and could, at the same time, expose them to accusations of being too soft by victims and their spokespersons, namely, NGOs. The fact that criticism is levelled at it by both sides paradoxically helps to establish its credibility, and its impartiality vis-à-vis both NGOs and states.

The Commission also employs specific mechanisms such as Special Rapporteurs (women's rights, freedom of expression, prisons and detention conditions, the situation of human rights defenders, refugees and displaced persons), and working groups

(indigenous and aboriginal populations, death penalty), which allow it to build its intervention capacities in emergency situations. This openness ensures the support of certain international partners (such as Pretoria's Centre for Human Rights, the Danish Institute for Human Rights, Rights & Democracy, Frontline, Interights) which, in addition to providing financial and material support, also offer the Commission qualified personnel on a temporary basis, thereby contributing to its human resources capacity.

While the Commission's work has led to the denunciation, condemnation and possibly even the reduction of human rights violations in Africa, the African human rights protection system suffers from the absence of a jurisdictional mechanism with the power to sanction and compel states, and to offer reparations to victims of rights violations, following a fair trial. In all likelihood, this gap has now been bridged with the creation of the African Court on Human and Peoples' Rights.

COMPLEMENTARY MECHANISM: THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

This Court is the fruit of a long process, as will be discussed later. The creation of a court was a source of serious debate at the time of the development of the Charter. Opponents argued that Africans preferred a less adversarial form of conflict resolution, which corresponded more to the role of the Commission than to the litigious procedures of a jurisdictional body like a court. In the words of Judge Kéba M'Baye, one of the "founding fathers" of the Charter, "We can use justice to solve conflicts in a friendly manner, but we are rarely in conflict in the litigious sense of the term."⁷

Since then, a lot of water has flowed under the bridge and some of those early detractors have changed their minds about the Court. Among them was Judge Kéba M'Baye, who, a few years later, said this about the African human rights protection system: "Of course,

7 K. M'Baye, "Rapport introductif sur la Charte africaine des droits de l'homme et des peuples," International Commission of Jurists (Ed.), *Droits de l'homme et des peuples en Afrique et la Charte africaine*. Geneva, 1986, pp. 28-29.

we must recognize that it is far from perfect. In particular, it lacks a human rights court. But this is not an omission (...). However, the time has come to reopen this discussion."⁸ In 1998, that is precisely what happened when the Conference of Heads of State of the African Union met in Ouagadougou, Burkina Faso, and retained the principle of reforming the mechanism of the Charter by introducing a Court. The additional protocol creating a court entered into effect on January 25, 2004 following its ratification by 15 African states.

The Court's stated objective is to bridge the gaps in the Commission. The Court should be seen as a complementary rather than competing mechanism to the Commission. What are the jurisdictions of this Court? Does it have specific jurisdictions that will set it apart from the Commission? Is there a risk of overlapping and conflicts of interpretation between them?

The Jurisdictions of the African Court on Human and Peoples' Rights

Under Article 5, Paragraph 3 of the Additional Protocol to the Charter on the creation of the Court, the Court can receive communications from individuals or from non-governmental organizations having observer status with the Commission, on condition that the state in question has previously recognized the Court's jurisdiction to receive such communications, in accordance with Article 34 Paragraph 6 of the Protocol. What is to be made of this clause that is *a priori* open but *a posteriori* limited? The Court is supposed to contribute to strengthening human rights protection in Africa by offering victims the possibility of reparation for rights violations following due process and a ruling rendered by an independent and impartial justice. Undeniably, this would be a satisfactory outcome. However, how can these victims hope for reparation when they are not allowed to appeal directly before the Court? On the positive side, the Protocol allows for that possibility. On the negative side, however, very few African states would be inclined to offer their "own victims" the possibility of taking the stand in an in-

8 K. M'Baye, *Les droits de l'homme en Afrique*, Paris, Pedone, 1992, p. 266.

ternational jurisdiction. And yet this is what this new and unique institution is supposed to offer. The Protocol is clear on this: the possibility for victims and NGOs to appeal to the Court is subject to the authorization of the states, under Article 34, Paragraph 6. It is no surprise that to date only two states, Burkina Faso and Mali, have recognized this jurisdiction for victims and NGOs. But there is room for hope, since the African Commission can, *suo moto*, decide to refer a case to the African Court. This makes the Commission a kind of interface between the Court and individuals.

Among the Court's jurisdictions, it has the power to interpret, that is, to play a consultative role. Under Article 4 of the Protocol, the Court can, at the request of a state or an organization recognized by the AU, render a verdict on all legal questions regarding the interpretation of Charter provisions. It should be noted that this jurisdiction extends to all other African human rights instruments, as well as all human rights treaties or conventions ratified by the concerned states. Of course, opinions rendered by the African Court (like those rendered by the European and Inter-American courts) are not binding on states. The states are free to respect or disregard them. This in no way diminishes their importance, since they are interpretations which, given the legitimacy of the body that issues them, enjoy a presumption of quality and will carry weight in legal arguments on human rights issues.

Moreover, the Court and the African Commission share a consultative role. From this perspective, these institutions have competing jurisdictions. Article 45, Paragraph 3 of the Charter attributes to the African Commission a consultative role, as does Article 4 of the Protocol with regard to the Court. Could this eventually put the Court and the Commission on opposing sides, if they gave differing interpretations of a particular provision?

The Coexistence of the Court and the Commission within the African Human Rights Protection System

How can we ensure the peaceful coexistence of these two institutional mechanisms? What measures can be put in place to ensure effective collaboration between the Court and the Commission?

How can we ensure that the members will perceive these mechanisms as complementary rather than competing? Concretely, how can the Commission share with the Court the benefits of its 20 years of experience in the field of human rights litigation? These are important questions, since the creation of the Court will certainly have concrete repercussions on the activities of the Commission. The coexistence of these two institutions requires a detailed clarification of their respective functions. While the mandate of the African Commission is set out in detail in Article 45 of the African Charter, Article 2 of the Protocol on the relationship between the Commission and the Court does not set out any specific provision for the particular functions of each mechanism. It states, in general, that, “the Court shall, bearing in mind the provisions of this Protocol, complement the protective mandate of the African Commission on Human and Peoples’ Rights.”

From Article 2, it can be deduced that the function of the Court is limited to the provisions of the Charter relating to protection, which means that, far from replacing the Commission, the Court strengthens the protection mandate of this mechanism. The Commission maintains the mandate of human rights protection and promotion conferred upon it by the Charter, but now has the possibility of submitting matters to the Court. The Court and the Commission share the protection mandate. It is still possible that the activities of the Commission and the Court will overlap, given that Article 45.3 confers on the Commission the power of interpreting any provision of the Charter at the request of a state party, an AU institution or an African organization recognized by the AU. However, while the Commission’s mandate to interpret is limited to the African Charter, Article 3 of the Protocol extends the Court’s jurisdiction to interpret and apply the Charter, the Protocol and any other instrument relevant to human rights and ratified by the state concerned. This begs the question: if there is ever a disagreement between the Commission and the Court on the interpretation of a given rule, how will it be resolved?⁹

9 See the document published by Amnesty International, *Credibility in Question: proposals for improving the efficiency and effectiveness of the African Commission on Human and Peoples’ Rights* (IOR 63/02/98).

On a closer reading of the texts, it would appear that any interpretation by the Commission could be brought to the attention of the Court. This would seem to imply that the Court has a key role in interpreting the provisions of the Charter, as well as other relevant human rights instruments. Will the Commission necessarily be bound by the authority of the Court's interpretation? This could generate some reticence by the Commission if it feels that the Court is "stealing its limelight" after so many years of experience on these issues.

The concern here is to avoid sterile debates on the legitimacy of each body which, in turn, could generate conflicts over jurisdiction. It is essential that the African Union bring these two complementary institutional mechanisms together into a formal framework in order to work out, together, the limits of their respective, beyond that, the regulatory framework of their collaboration. It will not be fruitful for each body to first write up their own internal regulations before formally meeting under the auspices of the AU. This will simply plunge the whole process into "legalism" in which the content of both sets of internal regulations are compared in order to determine a framework for collaboration between the Court and the Commission.¹⁰

On a final note, there is no basis for claiming that the existence of the Court renders the Commission *de facto* obsolete. The Commission should be able to fulfil (assuming there is a partial rewriting of its founding texts) a role similar to the one played by the Inter-American Commission in the inter-American human rights system, serving to filter the cases presented, as a last resort, to the Court. If, one day, the elimination of the Commission is put on the table, one possible solution would be to merge it with the Court, thus turning it into an Office of the Prosecutor, along the lines of the *ad hoc* international criminal courts.¹¹

10 As this publication went to press, the Court had already adopted its rules of procedure. The Commission is scheduled to adopt its rules of procedure at its 5th Extraordinary Session in July 2008 after which the Commission and Court intend to meet in order to harmonize their respective rules.

11 See N. Loum, *Le Tribunal pénal international de La Haye : une exigence humanitaire ?* Mémoire de DEA de sciences politiques, Université Montesquieu Bordeaux IV, 1997.

Chapter 2

THE AFRICAN HUMAN RIGHTS SYSTEM: COMPARISON, CONTEXT, AND OPPORTUNITIES FOR FUTURE GROWTH

Sybil Sakle Thompson

Africa's human rights system has long been dismissed by jurists and activists for its inability to properly protect those in its charge. In comparative analysis, while the superiority of the European and inter-American human rights systems is assumed without question, the African system is almost inevitably found wanting (Murray 2006). Of all the world's regional human rights protection systems, the African system has the shortest pedigree, and was until recently both chronically under-funded and lacking the support of the states responsible for its operation.

The perception that the mandate of the African human rights system remains unfulfilled, however, is contradicted by the positive steps that have been taken since the drafting of the continent's first comprehensive human rights convention. This chapter briefly surveys the development of Africa's human rights system, drawing comparisons where appropriate with its European and inter-American counterparts. The early role played by the Organization of African Unity (OAU) in protecting human rights in

Africa, through the drafting of the African (Banjul) Charter on Human and Peoples' Rights,¹ is discussed in Part 1. Part 2 considers the role of the African Commission on Human and Peoples' Rights in promoting and protecting human rights in Africa. Part 3 addresses the creation of the African Court for Human and Peoples' Rights, and Part 4 highlights the African Union's stated commitment to the principles of human rights and good governance through its provision for an African Court of Justice. The chapter closes with some remarks on possible future avenues for the growth of systematic human rights protection in Africa.

THE ORGANIZATION OF AFRICAN UNITY (OAU) AND THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS (AFRICAN CHARTER)

The Charter of the Organization of African Unity, signed at Addis Ababa on May 25, 1963, represented the collective will of 32 newly independent African countries to encourage inter-state cooperation "in response to the aspirations of [African] peoples for brotherhood and solidarity, in a larger unity transcending ethnic and national differences".² The Preamble to the OAU Charter speaks of the organization's commitment to both the Charter of the United Nations³ and the Universal Declaration of Human Rights.⁴ The OAU's purposes (OAU Charter Article II (e)) re-state the organization's commitment to the principles embodied in both documents (D'Sa 1985, p. 72).

However, between the OAU's founding and into the late 1970s, large-scale human rights violations were perpetrated by the govern-

1 June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (entered into force October 26, 1986), see www.africa-union.org/root/au/Documents/Treaties/Text/Banjul%20Charter.pdf > [African Charter].

2 479 U.N.T.S. 39 (entered into force Sept. 13, 1963), Preamble, see www.africa-union.org/root/au/Documents/Treaties/text/OAU_Charter_1963.pdf > [OAU Charter].

3 June 26, 1945, 59 U.S. Stat. 1031, T.S. 993 (entered into force October 24, 1945, amended 1965, 1968, and 1973).

4 U.N.G.A. Res. 217(III), U.N. GAOR, 3rd Sess., Supp. No. 13, at 71, U.N. Doc. A/810 (1948) (adopted by vote 48-0, with eight abstentions) [Universal Declaration of Human Rights-UDHR].

ments of African states primarily against their own peoples, both in peacetime and in conflict situations. Africa's poor human rights protection record during this period can be attributed to numerous factors: successful consolidations of power by repressive rulers; the perpetuation of Cold War proxy conflicts; and civil strife rooted in the ethno-religious pluralism that remains characteristic of many African countries (Ojo and Sesay 1986, p. 91). During this period the organization's states "[condemned] the racist practices of South Africa while at the same time overlooking the human rights atrocities within their own frontiers," raising fears that African states would continue to invoke the OAU Charter's "non-interference" clause (Article III (2)) as justification for failing "to publicly condemn breaches of human rights in their fellow countries... [giving] rise to allegations of a 'double standard'" (D'Sa 1985, p. 73).

In 1979, the OAU Assembly of Heads of State and Governments ("the OAU Assembly") passed a resolution calling for the establishment of a committee to draft a human rights covenant that would address the unique needs of African countries and peoples in the post-colonial era. The committee's first draft of the African Charter on Human and Peoples' Rights was granted the unanimous approval of the OAU Assembly in Nairobi on June 27, 1981.

Comparison of the African Charter on Human and Peoples' Rights (ACHPR) to the European Convention on Human Rights (ECHR) and the American Convention on Human Rights (ACHR): Unique Features of the African Charter

The African Charter adapts international human rights law to "Africa's colonial history, philosophy of law, and conception of man." (Obinna Okere 1984, p. 141). The African Charter is the fixed expression of the need of then newly independent African states for responses to African human rights problems, problems whose most appropriate solutions differed from solutions employed in Europe and the Americas.

The African Charter refers to African customs and practices as sources of law both in its preamble and in its operative text (D'Sa 1985, pp. 73-74). The marginalization of indigenous African

sociological perspectives and customary practices during the colonial period prompted OAU member states to legitimize cultural differences that distinguish African states from American and European countries, not only as sources for the interpretation of human rights previously codified in international instruments like the International Covenant on Civil and Political Rights,⁵ but as legitimate sources to invoke in interpreting human rights for Africans in the African context. To that end,

[t]he catalogue of rights that the African Charter guarantees differs from its European and inter-American counterparts in several important respects. The Charter proclaims not only rights but also duties, and it guarantees both individual and peoples' rights. In addition to civil and political rights, the African Charter sets out a series of economic and social rights. ... African historical traditions and customs are also reflected in some provisions of the Charter, particularly those dealing with duties of individuals and family matters. (Buergethal 2006, p. 798).

The African Charter is also distinguished from the American Convention on Human Rights⁶ by its refusal to grant standing to individual petitions. Under Article 44 of the ACHR, petitions may be filed by individuals (Ojo and Sesay 1986, p. 97). Articles 34 and 56(4) of the European Convention for the Protection of Human Rights and Fundamental Freedoms⁷ require signatory states to make separate declarations to grant individuals standing before the organization's human rights bodies.⁸ The African Charter makes no specific provision for individual complaints beyond Articles 55 through 59 inclusively, which refer to "Other Communications."

5 U.N.G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force March 23, 1976), available at www1.umn.edu/humanrts/instrtree/b3ccpr.htm [ICCP].

6 O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978, reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V/II.82 Doc. 6 rev.1, p. 25 (1992)) [ACHR].

7 (E.T.S. 5), 213 U.N.T.S. 222 (entered into force September 3, 1953, as amended by Protocol No. 11 (E.T.S. No. 155) which entered into force on November 1, 1998), online: www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf > [ECHR].

8 The entry into force of Protocol 11 to the ECHR amended that Convention to give individuals compulsory standing before the European Court of Human Rights (see Mohamed 1999, p. 206; and Eno 2002, p. 230).

This is troubling, because the African Charter “permits... state parties to impose more extensive restrictions and limitations on the exercise of the rights it proclaims than the European and inter-American human rights instruments” (Buergethal 2006, p. 798). Many of the civil and political rights given in the African Charter contain “clawback clauses”⁹ that allow signatory states “to justify limitations on individual rights and freedoms by reference to domestic laws, which may be restrictive” (D’Sa 1985, p. 76; see also Welch 1992, p. 46). None of the African Charter’s clawback clauses stipulate any further conditions under which a state’s clawback on individuals’ rights must also be justified. This is unlike the ECHR, which employs a derogation mechanism similar to that contained in article 4 of the ICCPR.

As stated above, the African Charter also distinguishes between collective rights (enumerated in Chapter I of the Charter) and duties owed by individuals (Obinna Okere 1984, pp. 145, 148). These “duties,” or responsibilities, are said to flow from individuals’ membership in groups, and include obligations to discrete categories of beneficiaries: one’s family, society, the state, other legally recognized groups, and the international community (Article 27). The specific duties owed these beneficiaries complement the individual’s general responsibility for “maintain[ing] relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance” (Article 28). These stipulations have variously been understood as “a code of good conduct for all citizens of African countries” (D’Sa 1985, p. 77) and as a formulation that recognizes that individual human rights are best enjoyed when distributed to group members in collective form (Kiwauka 1988, p. 85).

It is important to remember, however, that despite the African Charter’s distinctive cultural orientation, culture itself is not an unproblematic source of rights in the African Charter. The collective

9 Clawback clauses are found in African Charter Articles 6 (liberty and security of the person and freedom from arbitrary arrest), 8 (freedom of conscience and religion), 9.2 (freedom of expression and the right to disseminate one’s opinion), 10.1 (freedom of association), 11 (freedom of assembly), 12.1 (freedom of movement and residence within one’s state) and 12.2 (the right to leave any country and to return to one’s own country), 13 (freedom to participate in the government of one’s own country), and 14 (right to property).

(peoples') rights present in the African Charter exist in constant tension with the right to self-determination (D'Sa 1985, p. 78). The African Charter does not define what constitutes a "people" for the purposes of self-determination. Some commentators suggested shortly after the African Charter's drafting that the right to self-determination contained therein should be interpreted as one that groups within states could avail themselves of, given the existence of racist and oppressive post-colonial regimes at the time of the African Charter's signing (Addo 1998, pp. 185-186).

In practice, the OAU Charter's commitment to the "safeguard[ing] and [consolidation] of ... the sovereignty and territorial integrity"¹⁰ of member states was frequently invoked to undermine the legitimacy of secessionist interpretations of the African Charter's right to self-determination by groups within states. For the most part, after African countries achieved independence, self-determination was no longer formally recognized as part of the African Charter's bundle of collective rights. Instead, the rights of discrete groups within states were subsequently construed as "minority rights" (Kiwanuka 1988, p. 90; see also Addo 1988, p. 184).

THE AFRICAN COMMISSION FOR HUMAN AND PEOPLES' RIGHTS (ACHPR)

Promotion of Human Rights under the Charter

The unique provisions of the African Charter outlined above can only be understood in the context created by the case history of the African Commission for Human and Peoples' Rights ("the African Commission"). Established by Articles 30 to 46, inclusively, of the African Charter, the African Commission is a quasi-judicial body responsible for *promoting* and *protecting* the human rights guaranteed by the African Charter. It began functioning in late 1987, well before it formally adopted its Rules of Procedure in February 1988 (Odinkalu 1993, p. 533; see also Welch 1992, pp. 49-54).

10 OAU Charter, *supra* note 2, in Preamble.

Like the ECHR and the ACHR,¹¹ the African Charter creates both an inter-state complaints mechanism (articles 47 to 54), and, as mentioned in Part 1.1, above, a non-state petition mechanism subject to the approval of African Charter signatory states. The requirement that non-state petitions identify complainants, exhaust all local remedies, and refrain from disparaging the states they concern (article 56) impose onerous obligations on non-state claimants. Even petitions that conform to these requirements in all respects may nonetheless be deemed inadmissible if they do not win the support of a simple majority of the eleven Commissioners (Ojo and Sesay 1986, p. 97).

However, the Commission has successfully used Article 55 of the African Charter to accept cases from non-state petitioners (Heyns 2004, p. 694; Helfer 1999, p. 355). This is critical for four reasons. First, the majority of the Commission's petitions come from non-state actors. Second, the Commission has also used its authority under Articles 60 and 61 of the African Charter to draw inspiration from international human rights law in *interpreting* African Charter provisions. For instance, the Commission has clarified that states that refer to domestic law to justify invoking the internal limits of the African Charter's clawback clauses must act in accordance with international human rights law (Eno 2002, p. 689).¹² This has prevented states from using clawback provisions to stop the Commission from accepting petitions from wronged parties, allowing both NGOs and individuals to participate more fully in the Commission's activities than they otherwise might. Third, this practice effectively renders inoperative Article 52 of the African Charter, under which the focus of the Commission's dispute resolution efforts is given as achieving "an amicable solution' between... states, not between the aggrieved individual and the state" (Ojo and Sesay 1986, p. 96).

11 Article 24 of the ECHR, *supra* note 7, allows for inter-state complaints immediately upon ratification of the treaty by European Union member states. Article 45 of the ACHR, *supra* note 6, by contrast, allows inter-state complaints "only if this has been recognized by both parties concerned, namely, the applicant state and the respondent state." See Obinna Okere 1984, p. 156.

12 African Commission on Human and Peoples' Rights, Communications 105/93, 128/94, 130/94, and 152/96, *Media Rights Agenda & Others v. Nigeria*, 12th Annual Activity Report (1998-99).

Finally, accepting non-state complaints has enabled the Commission to evolve a robust case history that demonstrates its extremely innovative approach to the African Charter over time. This approach has shifted the focus of disputes brought under the African Charter from relatively petty concerns about the admissibility of complaints, to concerns about the obligations of states towards individuals and groups. This shift is evident from the Commission's case history on self-determination,¹³ civil and political rights,¹⁴ and social and economic rights.¹⁵ As one commentator notes, "the potential of this mechanism has not nearly been exhausted" (Heyns 2004, p. 694).

Challenges to Protection of Charter Rights

Despite having pioneered the innovative approach to non-state petitions described above, the Commission has been roundly criticized as ineffectual. The Commission has employed the full scope of its promotional capabilities; however its *protective* capabilities remain grossly inadequate to the magnitude of the continent's need (Chapter 1 of this publication describes some of these needs in greater detail). This is in part because key provisions in the African Charter limit the scope of protective action granted to the Commission by the OAU Assembly (now the African Union Assembly; see Part 4, below). For instance, the Commission cannot initiate on-site investigations under its own authority. It may only

13 African Commission on Human and Peoples' Rights, Communication 75/92, *Congrès du Peuple Katangais v. Zaïre*, 8th Annual Activity Report (1994-95); Communications 147/95 & 149/95, *Sir Dawda K. Jawara v. The Gambia*, 13th Annual Activity Report (1999).

14 African Commission on Human and Peoples' Rights, Communication 60/91, *Constitutional Rights Project (Akamu) v. Nigeria*, 8th Annual Activity Report (1994-95); Communication 74/92, *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, 9th Annual Activity Report (1995-96); Communications 105/93, 128/94, 130/94, and 152/96, *Media Rights Agenda & Others v. Nigeria*, 12th Annual Activity Report (1998-99); Communication 102/93, *Constitutional Rights Project & Another v. Nigeria*, 12th Annual Activity Report (1998-99); Communications 54/91, 61/91, 98/93, 164-196/97, & 210/98, *Malawi African Association & Others v. Mauritania*, 13th Annual Activity Report (1999); and Communications 48/90, 50/91, 52/91, & 89/93155/96, *Amnesty International v. Sudan*, 13th Annual Activity Report (1999).

15 African Commission on Human and Peoples' Rights, Communication 155/96, *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*, Annex V, 15th Annual Activity Report (2001-2).

draw states' attention to widespread human rights violations, and is obliged to wait for the Assembly's Chairman to request an in-depth study before it may investigate emergency situations (Article 58). Further, Commission reports on specific issues cannot be made public without the prior approval of the Assembly (Article 59). Finally, amicable resolution of disputes between states having failed, the Commission must wait for three months before it may prepare a written report to the Assembly (Article 52). The Assembly thus has the potential to unduly influence the Commission's work, to the extent of negating its protective capacity.

THE AFRICAN COURT FOR HUMAN AND PEOPLES' RIGHTS

In short, the African system has been restricted to "settlement of cases involving human rights violations, through the *instrumentality* of the Commission" (Obinna Okere 1984, p. 156) *because* the Commission's recommendations are not binding (Article 53). This is not particularly shocking: recommendations of the European Commission on Human Rights are also non-binding (Murray 2002, p. 198). However, the European and American systems had, by the time the African Charter was operative, already "advanced beyond diplomatic settlement to the ultimate stage of judicial arbitration of human rights violations" (Obinna Okere 1984, p. 156).

With this in mind, the OAU adopted the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights at Ouagadougou on June 10, 1998.¹⁶ Under Article 2 of the 1998 Protocol, the role of the African Court on Human and Peoples' Rights ("the African Human Rights Court") is complementary to the protective role of the African Commission. While this subject is explored in greater detail in Chapter 1 of this publication, three key points of comparison to the European and American experiences are made here.

16 OAU Doc. OAU/LEG/MIN/AFCHPR/PROT.1 rev.2 (1997) (entered into force January 25, 2004), available at www.africa-union.org/root/au/Documents/Treaties/Text/africancourt-humanrights.pdf> [1998 Protocol].

First, under Article 4 of the 1998 Protocol, the African Human Rights Court's advisory jurisdiction is entirely discretionary. The African Human Rights Court can "give advisory opinions 'on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission'" (Eno 2002, p. 231). The advisory capacities of the European Court on Human Rights and the Inter-American Court on Human Rights are, by contrast, limited to providing opinions requested by the Committee of Ministers and OAS member states and organs, respectively (Eno 2002, p. 232).

Second, unlike its European and American counterparts, the African Court can adjudicate disputes not only under regional human rights instruments, but under international ones as well. "This is particularly important and encouraging because a person whose rights are not adequately protected in the African Charter can easily hold the state concerned accountable by invoking another treaty to which that state is a party either at [the] UN level or sub-regional level" (Eno 2002, p. 227). Of course, this will only be possible where states party to the African Charter have signed other human rights treaties, and where states formally allow individual petitions to organs responsible for the administration of such international treaties.

Third, under Article 5.3 of the 1998 Protocol, "[t]he Court may entitle relevant non governmental organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34.6 of [the] Protocol." This requires states to make a formal declaration giving the African Human Rights Court jurisdiction to hear non-state petitions filed against them. Not only is this an improvement on the African Charter's failure to refer to NGOs at all, it improves on both the European and American Courts of human rights, neither of whose statutes grant NGOs standing to initiate complaints (Mohamed 1999, p. 201; also see Eno 2002, p. 230). This novel provision in the 1998 Protocol is of the utmost significance, because NGOs have traditionally played a vital role in helping the African Commission fulfil its promotional and protective mandates.

Article 6.3 of the 1998 Protocol also allows the African Court to transfer cases to the Commission (Eno 2002, p. 228). While the limited protective capacity of the Commission has already been noted, the fact that NGOs, in addition to being “relevant,” must also have observer status at the Commission to bring cases before the African Human Rights Court (1998 Protocol, article 5.3), means that the Commission will play an important role both as a clearinghouse for NGOs seeking to bring cases before the African Human Rights Court themselves, and also in filtering meritorious cases from the Commission to the African Human Rights Court for further review.

THE AFRICAN UNION (AU)

With little fanfare and even less scrutiny from the international community, 27 African countries signed the Constitutive Act of the African Union at Lome on July 11, 2000.¹⁷ The Constitutive Act replaces both the OAU Charter and the Treaty Establishing the African Economic Community,¹⁸ its immediate predecessors (Article 33), but borrows many of its provisions directly from the Abuja Treaty.

The African Union (AU) deliberately distinguishes itself from the OAU by placing human rights and good governance at the heart of its objectives.¹⁹ In particular, Article 30 of the Constitutive Act allows the AU to suspend member states whose governments come to power through unconstitutional means (Maluwa 2003, p. 165). The sanctions contained in the Constitutive Act’s provisions can only be realized through the exercise of political will by states in the form of concrete action to protect human rights, raising hopes that African states are preparing to “[confront] the ... urgent challenges

17 OAU Doc. CAB/LEG/23.15 (entered into force May 26, 2001), available at www.africa-union.org/root/au/AboutAU/Constitutive_Act_en.htm > [Constitutive Act].

18 June 3, 1991, O.A.U. Doc. AHG/Res. 205 (XXVII) (entered into force May 12, 1994), available at www.africa-union.org/root/au/Documents/Treaties/Text/AEC_Treaty_1991.pdf > [Abuja Treaty] www.uneca.org/itca/ariportal/abuja.htm.

19 Abuja Treaty, supra note 18, at Articles 3(h) and (g).

of strengthening democracy, collective security, and human rights in Africa" (Maluwa 2003, p. 158). It is therefore surprising that the Constitutive Act, while mentioning the African Charter and "other relevant human rights instruments" (Article 3(h)), mentions neither the African Commission nor the African Human Rights Court, the two institutions created under the statutes of its predecessor to promote and protect human rights in Africa.

The Constitutive Act's failure to reference these institutions does not leave the organization without a judicial body, as the possibility of the creation of an African Court of Justice is given in Article 18 (Udombana 2002, p. 1243). Such a court was created by the AU's adoption of the Constitutive Act's Protocol of the Court of Justice of the African Union at Maputo on July 11, 2003.²⁰ The African Court of Justice was originally conceived of in the Abuja Treaty (which defined it in Article 7.1(e) as an organ of the African Economic Community). In addition to identifying the African Court of Justice's functions (Article 18) and organization (Article 20), the Abuja Treaty stipulates that the Court's decisions will be "binding on member states and organs of the Community" (Article 19). Article 87 of the Abuja Treaty gives the African Court of Justice jurisdiction over inter-state dispute-resolution where states are unable to amicably resolve disputes themselves (Packer and Rukare, p. 376).

The 2003 Protocol, however, makes no mention of human rights. This, in combination with the Constitutive Act's silence concerning the Commission and the African Human Rights Court, and current provisions for an African Court of Justice, has created some confusion among African states. Their resultant unwillingness to ratify the 2003 Protocol raises concerns about the future ability of individuals whose human rights have been violated to access justice (Murray 2002, p. 206). Legal commentators also fear that jurisdictional overlap between the two Courts could potentially "[thwart],

20 *Decision on the Draft Protocol of the Court of Justice of the African Union*, Assembly/AU/Dec.25 (II), Assembly of the African Union, 2nd Ordinary Session, O.A.U. Doc.EX/CL/59 (III), at 25, available at www.africa-union.org/root/au/Documents/Treaties/Text/Protocol%20to%20the%20African%20Court%20of%20Justice%20-%20Maputo.pdf [2003 Protocol]. The 2003 Protocol has not yet received the 15 ratifications required for it to enter into force.

rather than [develop], human rights jurisprudence,” because of the potential for “conflicting interpretations [of] the provisions of relevant human rights instruments invoked before each Court” (Udombana 2002, pp. 1247-8).

One suggestion is that the functional relationship of the African Human Rights Court and the future African Court of Justice emulate the complementary relationship of the European Court of Human Rights and the European Court of Justice. However, the success of this approach in Europe is enabled by the fact that “EU law has primacy over national law, and so states are required to comply directly with European Convention provisions where the ECJ has used them as interpreting EU law” (Murray 2002, p. 207). Although the first 11 judges have been elected to the African Court of Justice,²¹ the Court has yet to receive a case or issue a judgment, and so it remains to be seen whether AU member states, long committed to the principles of state sovereignty and non-interference, will easily comply with its judgments. An alternative approach would be to further develop the African Human Rights Court as part of the establishment of the African Court of Justice, with a view to eventually making the Human Rights Court a specialized chamber of the Court of Justice.

A third way seems to have been adopted by the AU Assembly of Heads of state and Government, at its 7th Ordinary Session at Banjul (July 1 and 2, 2006). The AU Assembly endorsed the Executive Council’s recommendation that the AU’s Ministers of Justice convene to consider the Draft Protocol on the Statute of the future African Court of Justice and Human Rights, drafted by Mohamed Bedjaoui, the former President of the International Court of Justice and Algeria’s Minister of Foreign Affairs, with a view to making recommendations to the Executive Council by January 2007.²²

21 *Decision on the Election of Judges of the African Court on Human and Peoples’ Rights*, Assembly/AU/Dec.100 (VI), Assembly of the African Union, 6th Ordinary Session, OAU Doc. EX.CL/241 (VIII) (January 23-24, 2006), at 12, available at www.africa-union.org/root/au/Documents/Decisions/hog/AU6th_ord_KHARTOUM_Jan2006.pdf.

22 *Decision On The Draft Single Instrument on the Merger of the African Court On Human And Peoples’ Rights and the Court of Justice of the African Union*, Assembly/AU/Dec.118 (VII), Assembly of the African Union, 7th Ordinary Session, O.A.U. Doc.EX.CL/253 (IX), at 11, available at www.africa-union.org/root/au/Conferences/Past/2006/July/summit/doc/Decisions_and_Declarations/Assembly-AU-Dec.pdf.

CONCLUSION

While the framework for the operation of the forthcoming integrated court will be addressed in the pending Protocol to the AU's Constitutive Act, the African human rights system has already laid the foundation for the systematic promotion, protection, and enforcement of human rights law throughout the continent. With its receptivity to NGO submissions, its capacity to address complaints under the African Charter and other international human rights treaties, the African Human Rights Court is poised to make great inroads into human rights protection in Africa.

The AU's latest judicial project raises the tantalizing possibility that the enforcement of human rights law throughout Africa could become more than a mere flight of fancy. The African Court of Justice's 2003 Protocol stipulates at Article 37 that the court's judgments are binding. If this provision is retained in the final protocol that establishes the Statute of the African Court of Justice and Human Rights, the latter Court's judgments in respect of human rights could also be of binding effect, once the Court is established and operational.

The creation of the African Court of Justice and Human Rights is an unparalleled opportunity for African states to capitalize on the start made in human rights protection on the continent by NGOs and the African Commission, by increasing the strength of legal protections available to African individuals and peoples. The future will reveal whether African states are ready to exercise the political will needed to invest the promise of substantive human rights protection for Africa with life.

By March 2008, the African Union Commission completed consideration of the merger of the two courts and adopted a document entitled "the Single Legal Document on the African Court of Justice and Human Rights." This was to be tabled before the Executive Council and eventually the Heads of state for adoption at the African Union Summit in Egypt in June/July 2008.

Chapter 3

WOMEN'S RIGHTS IN THE AFRICAN SYSTEM: PROGRESS AND CHALLENGES

Valérie Couillard

WOMEN'S RIGHTS IN AFRICA ARE HUMAN RIGHTS

Advocating women's rights in Africa often elicits the following reaction: "Women's rights! What about men's rights?" As if women's rights were a pipe dream ... What's more, it is argued that women and men cannot be considered equal or on the same footing, because in reality the two sexes are different and have different roles that cannot be compared.

This chapter explains the reasons it was deemed necessary in Africa to report the problems women experience and to create genuine legal protection for them. It describes the developments in women's rights in the African regional system, in particular those pertaining to the advent of a comprehensive and innovative instrument, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa¹ (the Protocol). It also highlights the special implementation mechanism for women's rights created by the African Commission on Human and Peoples' Rights (the Commission) and its activities with civil society. Lastly,

1 The Protocol is available at www.africa-union.org.

this chapter addresses the question of the implementation of rights guaranteed under the Protocol by presenting the realities of legal pluralism and the lack of knowledge of the African human rights protection system. This text is not an exhaustive exploration of the nature, causes and consequences of violence against women. It does, however, seek to demonstrate the importance of highlighting the remarkable legal progress made thus far and proposes means for addressing existing problems.

DEVELOPMENT IN WOMEN'S RIGHTS IN THE AFRICAN SYSTEM

The Protocol on Women's Rights in Africa: An Innovative Instrument

The African Charter on Human and People's Rights (the African Charter), adopted in 1981² by the member states of the Organization of African Unity (OAU³), commits the states Parties to guarantee all persons—including women—the rights stipulated therein. However, it remains silent on the specific problems experienced by women.⁴ The almost unanimous ratification in Africa of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW⁵), as well as the main international human rights protection covenants⁶ has not been sufficient in providing concrete and adequate protection against violations specifically experienced

2 The African Charter came into effect in 1986 and is available at www.africa-union.org.

3 The Organization of African Unity (OAU) was established by charter in 1963 and later became the African Union (AU) in 2002. The Constitutive Act of the African Union and the Charter of the OAU are available at www.africa-union.org.

4 Women's rights are not specifically recognized under the Charter. There is a general protection in the Preamble and Articles 2 and 3 that guarantee the equality of all and affirm the principle of non-discrimination on the basis of sex. Only Article 18.3 provides protection for the elimination of all forms of discrimination against women.

5 United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW/CEDEF) 1979, 1249 UNTS 13.

6 Universal Declaration of Human Rights 1948, (UDHR) UN GA Res.217 A (III) 1948 Articles 2 and 7; International Covenant on Civil and Political Rights 1966 (ICCPR) 999 UNTS 171 Articles 2.1, 3, and 26; International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) 993 UNTS 3 Articles 2.2 and 3. Also, the Kigali Declaration following the first African Union Ministerial Conference on Human Rights in Africa, adopted on May 8, 2003, stipulates in Paragraph 16 the need to pursue the drafting process of the Protocol on the Rights of Women and calls on member states to take necessary measures towards its adoption, signature and ratification. MIN/CONF/HRA/Decl. 1(I).

by women. To bridge this legal gap, the Protocol on the Rights of Women was adopted in 2003, in Maputo, by the Assembly of the Heads of State and Government of the African Union. It came into effect, for the countries that ratified it, on November 25, 2005.⁷ Developed in response to numerous and persistent violations suffered by women on the continent, it guarantees a range of rights and was an innovative human rights instrument for its time.

In 1994 and 1995, a working group composed primarily of civil society activists was created within the framework of the activities of the African Commission and was mandated to develop a draft Protocol.⁸ It became one of the major motors for change, pushing also for the creation, in 1998, of a women's rights protection mechanism within the African Commission.⁹ Through the concerted actions of civil society with organs of the African Union, women's rights are taking shape in the Protocol. In fact, several awareness campaigns for the signature and ratification of the Protocol are underway in each of the African countries.¹⁰ The presence and vibrancy of women's civil society in Africa during the process leading up to the adoption of the Protocol are what have made it so detailed and exhaustive.¹¹

The Protocol constitutes an innovative legal instrument. Its most significant legal developments include, first, a definition of violence against women that is modeled on the definition adopted by CEDAW, with the addition of the concept of economic violence.

7 That is, 30 days following the submission of the instruments of ratification by the fifteenth state party that accedes to the Protocol, in compliance with Article 29 of the Protocol. An update of the signatures and ratifications is available at www.africa-union.org.

8 The major civil society players involved in the drafting process of the Protocol on the Rights of Women include the International Commission of Jurists, Women in Law and Development in Africa (WILDAF/ FEDDAF), and the African Centre for Democracy and Human Rights Studies.

9 Resolution on the appointment of a Special Rapporteur on the Rights of Women in Africa, ACHPR/ Res.38 (XXV) 99. This 1999 resolution was adopted retroactively to 1998, the years during which Julienne Ondziel Gnelenga held this position. She was replaced by Angela Melo in 2001, followed by Soyata Maïga in 2007. The legal basis for creating a mandate of Special Rapporteur by the Commission is contained in Articles 45 and 66 of the African Charter.

10 For example, the ever-growing SOWAR coalition (Solidarity for African Women's Rights), which included 29 member organizations in January 2008, played a leading role in the campaign for the ratification of the Protocol. One of the coalition's last initiatives involved fighting violence against women in Kenya. A press release is available at www.preventgbvafrica.org/Downloads.

11 The Protocol contains 32 Articles of which 25 stipulate specific categories of the protected rights.

A second innovation is an explicit description of the commitments of states, providing a guide for governments in terms of the measures that must be taken to ensure the full enjoyment of rights. For instance, the elimination of discrimination against women goes hand-in-hand with procedures for the harmonization of laws, the participation of women and their integration into decision-making positions, public education and the strategic dissemination of information in order to change sociocultural paradigms and models. Furthermore, the Protocol is the first human rights legal instrument to expressly stipulate the right to sexual and reproductive health. This instrument gives women the right to control their fertility, decide the spacing between births, protect themselves against sexually transmitted infections, be informed, and have access to family planning and health services and, in some circumstances, medicalized abortion.¹² These aspects of the Protocol make it a normative tool that extends beyond the protection guaranteed to women under the other human rights instruments that preceded it.

Moreover, the Protocol serves to offset the overriding importance the African Charter places on the respect of cultural values, since certain customs perpetuate violence against women. While customs and traditions must be promoted, they must be positive, that is, they must not result in human rights violations. The role of culture and its potential conflict with individual rights are played out differently within African and Western human rights protection systems. In Europe, for example, fundamental individual rights supersede cultural rights.¹³ On the African continent, people have a stronger sense of belonging to groups defined by cultural practices. Individual and group rights are therefore amalgamated.¹⁴

12 The circumstances listed in Article 14 of the Protocol are sexual assault, rape, incest and where the pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.

13 To illustrate this phenomenon, we can refer to the classification of rights into generations, which inspired the development of the international human rights system, and which was supported, in particular, by jurist Karel Vasak. According to this concept, there is a first generation of civil and political rights, a second generation of economic, social and cultural rights, and a third generation of environmental, cultural and development rights.

14 For a comparative reading of the Western and African human rights protection systems, see, among others: Michel Alliot, *La coutume dans les droits originellement africains*, available at www.dhdi.free.fr/; Jacques Vanderlinden *Les droits africains entre positivisme et pluralisme*, in *Académie*

From this perspective, the Protocol strikes a balance between the cultural rights of peoples and the rights of African women. The overriding importance of traditional values in the Charter conflicts with the guarantees set out in the Protocol.

Indeed, the Protocol challenges head on the customary practices that overshadow African women's rights. First, it advocates the elimination of harmful practices and explicitly prohibits female genital mutilation. The Protocol also addresses marriage, separation and inheritance rights. For example, marriages must be registered and women have the right to retain their nationality. Monogamy is encouraged and in the case of polygamist conjugal relations, the rights set out under the Protocol must be applied. In marriage and in the case of separation or divorce, men and women are equal. Furthermore, women have the right to administer their husband's property in case of death. Girls are also given the same right as boys to their parents' property.

The Protocol also addresses cultural practices that affect widows. Under its provisions, marriage requires consent and any harmful practices that affect widows are prohibited. These include the practice of levirate, which requires women to marry a relative of her deceased spouse, and sororate, where a widower can marry the sister of his deceased spouse. Widows also have the right to an equal share of the property of the deceased spouse and can remain in the matrimonial house.

The Protocol also addresses women's economic, social and cultural rights, access to justice, participation in the political process as well as promoting and maintaining peace. It offers special protections to women in armed conflicts, to elderly women, women in distress and women with disabilities. Lastly, the Protocol is an instrument of its time that places women at the heart of current legal concepts such as the right to sustainable development, the right to food security and the right to a healthy environment.

The adoption of the Protocol constitutes a major legal advance and its entry into force testifies to the recognition of women's rights

by African states. In fact, very few states expressed reservations during its ratification.¹⁵ In practice, however, several obstacles stand in the way of the full enjoyment of the rights guaranteed under this instrument. It was swiftly ratified by the first 15 or so countries, and then began to lose momentum. Activist groups are currently looking for strategies to accelerate the process in their respective countries.¹⁶ Over the last few years, the African Commission has made sweeping efforts, particularly by way of a special mechanism, to ensure the application of the system for the protection of women's rights.

The African Commission and Its Special Mechanism for Women's Rights Protection

In the last 15 years or so, the African Commission has produced several documents for the promotion and protection of women's rights. Over the years, there has been an increase in the number of gender-related decisions. During this growing movement toward the full enjoyment of women's rights in Africa, the Commission's activities have been bolstered by civil society players, financial partners and scientists.

Between 1993 and 2007, the African Commission adopted 18 resolutions on gender-related issues. Five of the resolutions adopted between 2004 and 2007 deal specifically and solely with women. They respectively address the situation of women and children in Africa; implementation of the Protocol; sexual violence in the Democratic Republic of Congo; health-related rights and control of reproductive functions; and reparation for victims of sexual

15 Gambia had reservations about female genital mutilation, marriage, separation and divorce, and rights to reproductive health. These reservations were later lifted in May 2006. Mauritius refused to raise the legal age of marriage to 18 and to encourage monogamy in order to avoid conflict with existing laws. This was also the case for the choice of contraception methods, since a legislative reform on contraception was underway in the state of Mauritius at the time of the ratification of the Protocol. South Africa declared, with respect to marriage and the nationality of children, that national legislation already offered more extensive protection.

16 This is the case, particularly in Niger, where a bill for the ratification of the Protocol made its way to Parliament and was ultimately rejected in 2006.

violence in conflict situations.¹⁷ By the end of 2007, no decisions regarding communications citing provisions of the Protocol had been rendered by the Commission. Complaints currently under review are still based solely on provisions under the Charter, where the responding state has not ratified the Protocol. Nevertheless, urgent appeals have been made by the Special Rapporteur, particularly with regard to sexual violence in the Democratic Republic of Congo.¹⁸ Since 1999, the Commission's mechanism has also completed promotion missions to Liberia, Burundi, Rwanda, Chad, Côte d'Ivoire, Nigeria, Angola, Djibouti, Sudan, São Tome and Príncipe, and Cape Verde. Lastly, the African Commission has also gradually integrated gender-related issues into its practices during the review of the periodic reports of states which is held during its public sessions; its member states are asked to examine the principles of equality and non-discrimination, political representation and policy regarding the legal framework and *de facto* situation of women.¹⁹

A few key initiatives undertaken between 2005 and 2008 underscore the partnership with civil society in promoting women's rights. The Special Rapporteur on the Rights of Women in Africa was invited to take part in several events, including an international conference on abortion practised in safe and legalized conditions.²⁰ The Special Rapporteur also promoted reproductive rights during a day-long event organized in conjunction with the 41st Ordinary Session of the Commission, in Accra, Ghana.²¹ Lastly, civil society players have also encouraged the partnership between regional and international human rights protection mechanisms. In

17 A list of the resolutions regarding women's rights that have been adopted by the Commission is available at www.achpr.org/english/_info/women_C_res.html.

18 An urgent appeal is a practice in which a Special Rapporteur writes to a head of state when faced with a serious human rights situation.

19 The obligation of states to present periodic reports on a biennial basis is stipulated in Article 62 of the Charter and Article 26 of the Protocol.

20 This conference was held in London, England, on October 23 and 24, 2007. Available at www.globalsafeabortion.org. The participation of the Rapporteur was made possible by IPAS Africa.

21 This day of awareness and discussion about reproductive rights and access to land for women living with HIV/AIDS, organized by the African Commission, was made possible with the assistance of the Center for Reproductive Rights (New York), IPAS (Accra) and the Centre on Housing Rights and Eviction (CHORE) (Accra).

January 2008, the Special Rapporteur on the Rights of Women in Africa of the African Commission joined the UN Special Rapporteur on Violence against Women, its Causes and Consequences, during a roundtable on the issue of sexual violence in the Democratic Republic of Congo.²²

Generally, initiatives involving the special mechanism seek to ensure the implementation of women's human rights by raising public awareness and disseminating information on the African Commission, its instruments and its mechanisms. These actions also reach African governments that benefit from learning more about the human rights protection system within the African Union. In keeping with this, in April 2007, the African Commission held a forum on the rights of Gambian women in Banjul, the headquarters of its Secretariat. This three-day forum led to the education of rural Gambian women's organizations about the Protocol as well as rights protection mechanisms. The event also created solid ties between the Women's Bureau responsible for gender-related issues within the Gambian government (Women's Bureau) and the Commission. Located in the same city as the Commission, the Women's Bureau in the Republic of Gambia had nevertheless had very few dealings with the Commission prior to this event. The Gambian government's involvement in the forum's activities led to significant collaboration with the Commission, particularly in terms of drafting a bill for the domestication²³ of the Protocol, ratified in 2005.

Moreover, civil society organizations offer research support to the women's rights protection mechanism. Some university bodies collaborated with the Special Rapporteur in the context of a comparative study on gender led by the African Commission. Through

22 The main objective of the meeting of the two Special Rapporteurs was to coordinate efforts in the fight against sexual violence in this region. It followed the adoption of the Mission Report of the United Nations Rapporteur for the DRC and the activities were intended to respond to the problem of multiplicity of civil society campaigns on this issue. A website was created at www.rdcviolencesexuelle.org. It provides a list of initiatives and existing campaigns. The participation of the two Rapporteurs was made possible by Rights & Democracy.

23 The domestication of an instrument of international law and its harmonization with national legislation are two different processes that occur according to the legal tradition of the country. The example of the domestication process in Gambia is provided in the second part of this chapter.

this research, comparative data was gathered on the application of the Protocol in the countries that ratified it. Research was also conducted on the presence of principles of equality between the sexes and non-discrimination against women in the constitutions of the member countries of the African Union.²⁴ Civil society in collaboration with the Special Rapporteur also conducted a study on applicable laws related to marital rape in conjugal situations.²⁵ Based on the data collected, the Special Rapporteur submitted reports to the Commission and called for action to improve the situation of women's rights.

The African Commission is thus exploring various strategies for the implementation of women's rights. At the same time, several other instruments related to women are emerging within the African system. The most important legislative developments include the African Platform for Action and the Dakar Declaration, 1994, on the importance of eliminating gender-based discrimination and violence,²⁶ the 1997 SADC Declaration on Gender and Development and its addendum,²⁷ the Constitutive Act of the African Union which recognizes the full participation of women as equal partners,²⁸ decisions and resolutions of the New Partnership for Africa's Development (NEPAD),²⁹ the 2004 Solemn Declaration on Gender Equality in Africa,³⁰ the 2006 Maputo Plan of Action on the

24 The studies are on the application of the Protocol in the countries where it has been ratified and on the principles of equality and non-discrimination in African constitutions. They were conducted by students at the University of Pretoria, South Africa, in collaboration with the Centre for Human Rights at the University of Pretoria.

25 This study was conducted by a research group from the University of Alberta, Canada. In some countries, criminal laws offer a defence that can be invoked by a husband accused of raping his wife. According to this legal reasoning, rape is impossible in the context of marriage, which means that even if the wife does not consent to sexual relations, she is deemed to have consented by the simple fact that she is married to her spouse. The Special Rapporteur is calling for an amendment to legislation in states where this provision exists.

26 Adopted by the Fifth African Regional Conference on Women, held in Dakar from November 16 to 23, 1994, available at www.famafrique.org/femmes2000/dkrpfa1.html.

27 Southern African Development Community (SADC) Gender and Development Declaration 1997, (1999) SADC Gender Monitor 1 33; and its addendum on the prevention and eradication of violence against women and children. (1999) 1 SADC Gender Monitor 37.

28 Constitutive Act of the African Union, Article 4.I, available at www.africa-union.org

29 See the documents adopted at www.nepad.org/2005/fr/progressreport.php.

30 Adopted at the Conference of the Heads of State and Government of Member States of the African Union in Addis Ababa, Ethiopia, in July 2004, Assembly/AU/Decl.12(III). Available at www.afrimap.

Operationalization of the Continental Sexual and Reproductive Health and Rights Policy Framework in Africa,³¹ and the Pact on Security, Stability and Development for the Great Lake Region.³²

It is also important to note some of the remarkable achievements with respect to the situation of women in Africa, such as the political representation of women and their presence in decision-making positions. Two good examples are the election in Liberia, in November 2005, of Ellen Johnson-Sirleaf, the first female President of an African country, and parliamentary parity in Rwanda.³³ Another achievement worth mentioning is the nomination in 2007 of several women as commissioners to the African Commission on Human and Peoples' Rights, raising the total to seven women out of eleven commissioners, including the Chairperson and the Vice-Chairperson.

THE CHALLENGES OF LEGAL PLURALISM AND LACK OF RIGHTS AWARENESS

Despite the progress in Africa's women's rights protection system in recent years, certain obstacles stand in the way of the full enjoyment of rights set out in the legal instruments for the protection of women's rights in Africa. To begin with, the proliferation of legal tools in recent years puts the governments of African countries in a complex situation as they face the laborious process of harmonizing laws. Furthermore, too few women are aware of their rights, the African Commission and the African protection system in general.

[org/english/images/treaty/AU_DeclSol_egaliteDec04_FR.pdf](http://www.africa-union.org/english/images/treaty/AU_DeclSol_egaliteDec04_FR.pdf)

31 Special Session of the African Union Conference of Ministers of Health, in Maputo, Mozambique, from September 18 to 22, 2006, Sp/Min/CAMH/5(I). "Maputo Plan of Action on the Operationalization of the Continental Sexual and Reproductive Health and Rights Policy Framework in Africa 2007-2010." Available online at www.africa-union.org/; Report of the Special Session of the African Union Ministers of Health, September 18 to 20, 2006, Maputo, Mozambique, Sp/EXP/CAMH/Rpt(I).

32 See www.internal-displacement.org.

33 In Rwanda, the law requires that 30% of the seats in Parliament be reserved for women. In 2006, 49% of members of parliament were women (the highest percentage in the world), and 36% of government ministers were women.

Pluralism and Harmonization of Laws

When a state ratifies the Protocol, it must fulfil its international obligations under the Vienna Convention on the Law of Treaties which stipulates how this instrument must be effectively implemented.³⁴ This process differs according to the legal tradition that governs the country in question. In a common law country, the Protocol must be domesticated, that is to say, a law must be adopted so that it becomes part of the national legislation and so that its content can be invoked in the courts. In countries that follow civil law, the act of ratifying an international treaty generally incorporates it into national legislation. Notwithstanding the legal tradition of the country that has ratified a regional or international legal instrument, it must harmonize its national legislation with the content of the instrument.³⁵ This is where problems arise. Often, the implementation of the Protocol on the Rights of Women in Africa is thwarted by the coexistence of various national legislative systems.

In several African countries, the law does not emanate exclusively from the state, it is also dictated by religion, customs or other legitimate independent legal structures within particular groups. In West Africa, for example, Muslim religious law sometimes contradicts the state's codified law which is rooted in the colonial era. Several countries in West Africa have ratified the Protocol and are now in the process of implementing it. However, a widow can still have her inheritance rights interpreted in a radically different way by the various legal entities. Similarly, customary marriage does not enjoy the legal protection provided under the codified national law if it has not been registered according to the formalities of the state; that is, recorded in a register of civil status. In the case of

34 Vienna Convention on the Law of Treaties, Vienna, May 23, 1969. Entered into force on January 27, 1980. United Nations, Treaty Series, vol. 1155, p. 331, available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

35 Domestication and harmonization are two distinct concepts: domestication is a process by which a law is adopted following ratification of an instrument so that it can be incorporated into domestic law. In countries with a civil law tradition, ratified international instruments are automatically integrated into domestic law. This is not the case in countries with a common law tradition. Harmonization is another process according to which national laws are reformed in order to comply with ratified international instruments.

separation, divorce and sometimes repudiation, a woman who has entered solely into a customary marriage is therefore more likely to find herself in a prejudicial situation. Customary religious law, with its own legal framework, will result in different decisions that may even blatantly contradict the decisions rendered by legal institutions that apply the state's codified law. In practice, major challenges in harmonizing laws and pluralist legal mechanisms must be overcome in order for women's rights stipulated under the Protocol to be fully enjoyed.

Knowledge of Rights and Visibility of the African Commission

Since its creation, the Commission has deliberated on very few complaints regarding women's rights. Despite the fact that it entered into effect in 2005, not a single communication citing a provision in the Protocol has yet been presented before the Commission. Yet, it is a known fact that there are many serious violations of women's rights across the continent. High illiteracy rates in many countries and the fact that the Commission's legal instruments are not accessible in African languages explain the inadequate dissemination of information regarding rights. Thus, there is a need to increase the visibility of the African Commission's activities and to make the fruit of its work accessible.

In Gambia, the headquarters of the Secretariat of the African Commission on Human and Peoples' Rights since 1987, too few women know their rights. During a forum on the rights of Gambian women, organized by the Commission in 2007, it was apparent that almost none of the women participants were aware of the Protocol or the Commission. Moreover, preparatory work for the forum revealed that the national Women's Bureau did not know about the Commission. The forum therefore served, on the one hand, to inform rural women's organizations about the very existence of the Commission, its special mechanism for women's rights and rights guaranteed them under the Protocol; on the other hand, it allowed the Women's Bureau within the Gambian government to take advantage of the legal expertise of the Commission's Secretariat in order to validate the drafting of a bill for the domes-

tication of the Protocol. Due to Gambia's common law tradition, simple ratification in 2005 did not provide the legal effect needed for its application at the national level. Nevertheless, the progress Gambia has made makes it one of the most advanced countries in implementing the rights of women in Africa.

In this context, where the full enjoyment of human rights in Africa depends largely on knowledge of the African protection system, importance must be given to education and awareness not only of the public, but also of governments within the African Union. The promotion of human rights protection instruments and documents adopted by the Commission are an integral part of this process. However, the results of the Commission's work are difficult to access. Over the last 20 years, the Commission has issued an impressive number of quasi-legal decisions and background papers on the situation of human rights in Africa. But all too often, the reports adopted fall by the wayside due to inefficient archiving. The documents issued by the Commission are difficult to find and the players involved in ensuring the full enjoyment of rights must refer to a myriad of secondary sources. The actions of African governments, activists and populations are directly hampered by this situation. Knowledge of human rights and the activities of the African human rights protection system depend on proper organization of the documentation produced by the African Commission.

Prospects for the Future

The advent of the Protocol is a major advance for women's rights in Africa, but efforts to breathe life into its provisions are lagging, primarily under the weight of the process of harmonizing laws and the lack of knowledge of human rights on the continent. With the creation of the African Court, the Commission is currently redefining its identity.³⁶ In fact, it has undertaken a reform of its Rules of Procedure.³⁷ In order to harness the winds of change and transform the architecture of the African system, the Commission must know

36 On this subject, see the chapters by Ndiaga Loum and Sybil Sakle Thompson.

37 The Commission held a fourth Extraordinary Session in Banjul, Gambia, from February 17 to 24, 2008 which it devoted to revising its Rules of Procedures.

which sails to deploy. In terms of the three mandates of protection, promotion and interpretation as defined under the Charter, both institutions will work hand-in-hand on protection and interpretation initiatives, while the Commission will intensify its efforts in terms of promotion.

At a crucial time when the African Union has just attributed a sizeable budget to its activities, the Commission must be creative and avant-garde, as it was in its efforts to introduce the Protocol. The Commission must prove its assistance to governments in harmonizing national legislation with regional human rights protection instruments and its public education efforts. In addition, it can take full advantage of new communication technologies, pursue collaborative ties forged with civil society partners, and ensure a sustainable and visible documentation base.

Chapter 4

THE PROMOTION AND PROTECTION OF FREEDOM OF EXPRESSION IN AFRICA: WHAT ROLE FOR THE REGIONAL SPECIAL MECHANISM?

Kim Turcotte

“Let the whole world go to hell—if I have good reasons of closing down any newspaper offices I will do so.”¹

Freedom of expression is a fundamental human right guaranteed by numerous international and regional instruments and national constitutions. The majority of African governments have now ratified international and regional treaties in which they pledge to uphold freedom of expression. While there have been some improvements over the last few years in Africa, the above quote is rather revealing, as it comes from the Head of State of the very country that hosts the Secretariat of the African Commission on Human and Peoples’ Rights (the African Commission). It is not

1 Dr. Yahya Jammeh, President of The Republic of The Gambia, after his re-election on September 22, 2006, when asked about reports by international media watchdogs alleging widespread abuse against journalists in Gambia, report available at www.irinnews.org/report.aspx?ReportId=61178: *Commonwealth cries foul as Jammeh wins landslide victory.*

surprising then that cases of arbitrary arrests and disappearances of media practitioners, closure of media outlets and adoption of legislation that falls short of recognized standards are still all too common in the region.

Following a brief overview of the main applicable international and regional standards, this chapter describes how the African system for the promotion and protection of human and peoples' rights has addressed the situation of the right to freedom of expression in Africa. Particular attention is given to the work of the Special Rapporteur on Freedom of Expression and Access to Information in Africa, established by the African Commission in December 2004. The chapter finally explores the relationship between elections, freedom of expression and access to information, demonstrating how this issue has become central to the mandate of the Special Rapporteur.

LEGAL FRAMEWORK

Freedom of expression and information is guaranteed by the Universal Declaration of Human Rights (Article 19), the International Covenant on Civil and Political Rights (Article 19), the European Convention on Human Rights (Articles 9 and 10), the American Convention on Human Rights (Article 13), the African Charter on Human and Peoples' Rights (Article 9), as well as other international and regional instruments and national constitutions.

Freedom of expression and information as enshrined in Article 9 of the African Charter is a fundamental individual human right, a cornerstone of democracy and a means of ensuring the enjoyment of other rights guaranteed by the Charter. However, in reality, the African Charter actually provides the weakest formulation of freedom of expression of any major international human rights instruments. Article 9 of the African Charter reads: "(1) Every individual shall have the right to receive information;

(2) Every individual shall have the right to express and disseminate his opinions *within the law* (emphasis added).²

The African Charter's protection of freedom of expression hence differs from the protection afforded by other treaties in that it does not explicitly protect the freedom to hold opinions without interference or the right to impart information or to receive opinions and ideas. Moreover, the protection afforded to the right under the African Charter has been watered down by the so-called clawback clause—also discussed in Chapter 2—inserted within the same Article.

The phrase “within the law” opens the door, at least theoretically, to its reinterpretation by some states in a manner that unreasonably restricts freedom of expression.³ By contrast, most international human rights conventions contain specific derogation clauses under which certain rights are declared non-derogable under all circumstances while precise conditions and legal requirements for permissible derogation are laid out for others, leaving little room for arbitrariness.⁴

This cautious wording in the African Charter can be explained by the timing and circumstances that characterized its drafting.⁵ Admittedly though, with the necessary political will, a vague or weakly-worded treaty can be developed or interpreted broadly over time, with a view to rectifying omissions emanating from the drafting process. Unfortunately, in the years following the adoption of the African Charter, such political will to interpret the wording of Article 9 broadly did not appear to be present. Particular attention

2 African Commission on Human and Peoples' Rights, African Charter of Human and Peoples' Rights, art. 9: available at www.achpr.org/english/_info/charter_en.html

3 Welch J., Claude E. 1998. The African Charter and Freedom of Expression in Africa. 4 *Buff. Hum. Rts. L. Rev.* 103, 113, citing: Gittleman, Richard, 1984. The Banjul Charter on Human and People's Rights: A Legal Analysis. In *Human Rights and Development in Africa* 152, 158-62 (Claude E. Welch, Jr. & Ronald I. Meltzer eds.).

4 In Art. 19.3, the ICCPR speaks of “certain restrictions,” adding “but these shall only be such as are provided by law and are necessary: (a) For the respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or public health or morals.” See also, the American Convention on Human Rights, Nov. 22, 1969, Art. 27, 1144 U.N.T.S. 123, O.A.S.T.S. No. 36 (1970) (entered into force July 18, 1978), governing when states may permissibly suspend the guarantees of the Convention.

5 See Welch *supra* note 2 pp. 114-115.

to the situation of the right to freedom of expression and efforts to strengthen its protection on the continent would only come several years later, in large measure due to the involvement of civil society organizations, notably non-governmental organizations (NGOs).

FREEDOM OF EXPRESSION AND THE AFRICAN COMMISSION

In view of the limited protection afforded to freedom of expression in the African Charter and the rather marginal role played by the African Commission in the years following its creation in protecting the right, there was an obvious need to strengthen it. As was the case for other rights entrenched in the African Charter, NGOs have played a central role in enhancing the protection of the right to freedom of expression in the regional system. The "Article 19: Global Campaign for Free Expression" as well as other NGOs concerned with freedom of expression have consistently advocated for the inclusion on the African Commission's agenda of a permanent item on freedom of expression and for the establishment of a special mechanism on the subject.

Over time, the African Commission addressed the right to freedom of expression through a variety of ways, for instance: recommendations made in the context of individual communications (i.e., complaints), through resolutions and declarations, by promoting dialogue with member states during consideration of state reports, and during promotional and fact-finding missions undertaken by Commissioners. Following the eventual recognition by the African Commission and its partners of a lack of continental strategies for the effective protection of the right to freedom of expression, and faced with an increasing number of reports alleging violations of the right received by the Secretariat, the African Commission eventually addressed the issue more systematically.

Specifically, progress was made at its 26th Ordinary Session, when the African Commission decided to hold a seminar on "Freedom of Expression and the African Charter." Organized in collaboration with ARTICLE 19 in South Africa from November 22 to 25, 2000, the seminar brought together representatives of states party

to the African Charter, national human rights institutions, NGOs and the media. Participants examined the nature and content of the right to freedom of expression under Article 9 of the African Charter, reviewed its practical observance on the continent and made recommendations on strategies for enforcement with particular reference to the role of the African Commission.

A series of similar meetings followed, ultimately leading to the adoption by the African Commission at its 32nd Ordinary Session in October 2002 of the Declaration of Principles on Freedom of Expression in Africa (the Declaration). The Declaration is a result of combined efforts by many stakeholders working on freedom of expression, reemphasizing that a vibrant civil society has a crucial role to play in Africa's regional human rights system.

The Declaration sets out important benchmarks and elaborates on the precise meaning and scope of the guarantees of freedom of expression laid down under Article 9 of the African Charter. In the Declaration, the continent has one of the most progressive documents on freedom of expression, albeit a non-binding one. This has compromised its effectiveness. Its adoption did not end the persecution of journalists, enactment of anti-media laws and other violations of the right to freedom of expression.

At its 33rd Ordinary Session, a Focal Person was appointed by the African Commission to oversee activities relating to the implementation of the Declaration. The Focal Person held a series of consultative meetings with various stakeholders, which would pave the way for the African Commission to appoint one of its members as Special Rapporteur on Freedom of Expression in Africa in 2004.

At its 40th Ordinary Session in November 2006, the African Commission adopted a resolution on the situation of freedom of expression in Africa in which, expressing its concerns over the current situation of the right to freedom of expression on the continent, the African Commission called on member states to "take all necessary measures in order to uphold their obligations under the African Charter" and to "extend their full collaboration with the mandate of the Special Rapporteur on Freedom of Expression in Africa, in order to strengthen the right to freedom of expression on

the African continent and work towards the effective implementation of the principles enshrined in the Declaration."⁶

Seeking to make the right to freedom of expression effectively binding on African states, civil society organizations recently adopted a resolution for the adoption of an additional protocol to the African Charter on freedom of expression.⁷ The process is ongoing and has been strongly supported by the Special Rapporteur on Freedom of Expression and Access to Information in Africa.

SPECIAL RAPPORTEUR ON FREEDOM OF EXPRESSION AND ACCESS TO INFORMATION IN AFRICA

The African Commission initially appointed the Special Rapporteur on Freedom of Expression in Africa at its 36th Ordinary Session in December 2004. Commissioner Pansy Tlakula was appointed as Special Rapporteur at the 38th Ordinary Session in December 2005 for two years and was re-appointed at the 42nd Ordinary Session in November 2007, when her mandate was expanded to include access to information.⁸

The history of the mandate is similar to that of other special mechanisms of the African Commission. Frans Viljoen explains that "[B]y establishing its first and second Special Rapporteurs, the African Commission went beyond its explicitly defined mandate, as the African Charter does not provide for the establishment of the position of Special Rapporteur. The legal basis for the establishment of the position of Special Rapporteur lies in Article 45.1(a) of the African Charter, which states the following: 'The function of

6 Resolution on the Situation of Freedom of Expression in Africa, adopted in Banjul, The Gambia, November 29, 2006, available at www.achpr.org/english/_info/free_exp_res2.html.

7 See www.pambazuka.org/action/alerts/images/uploads/COMMUNIQUE_Free_Expression.doc. The Resolution was adopted at a civil society conference on strengthening freedom of expression in Africa, held in Accra, Ghana, on June 25-26, 2007; the conference was one of several media and civil society activities organized ahead of the 9th ordinary session of the Council of the African Union.

8 See ACHPR/Res.122 (XXXII) 07: Resolution on the Expansion of the Mandate and Reappointment of the Special Rapporteur on Freedom of Expression and Access to Information in Africa, adopted in Brazzaville, The Republic of Congo, November 28, 2007. The amendment of the title of the Special Rapporteur was made in a bid to confirm that the right to access to information was indeed part of her mandate from the very beginning and had been treated as such.

the Commission shall be to promote human and peoples' rights and in particular to ... undertake studies and researches on African problems in the field of human and peoples' rights."⁹

Unlike UN Special Rapporteurs, who are independent experts, African Commission Special Rapporteurs are Commissioners appointed with a specific mandate, in some cases without a particular expertise in the areas in which they work.¹⁰ This has fuelled criticism and recommendations have been made to appoint independent experts, although there does not seem to be a trend in this direction. That said, the independence of the different Special Mechanisms from the African Commission itself greatly depends on the mandate-holder and his/her interpretation of the mandate. Commissioner Tlakula has been able to conduct her mandate "independently" from her role as Commissioner, striking a good balance between her views as Special Rapporteur and what could be referred to as the "views of the Commission" on certain subject matters that would still appear to be rather sensitive. In brief, the Special Rapporteur does enjoy a certain level of independence but will obviously exercise political judgment and carefully avoid taking any action which could jeopardize her close relationship with and role within the African Commission.

The Special Rapporteur's terms of reference are directly derived from the resolution establishing her mandate, as can be seen in her so-called Plan of Action, included in her activity report presented to the 40th Ordinary Session.¹¹ In a nutshell, her role is to monitor the situation of freedom of expression and access to information in Africa and report to the African Commission accordingly. This involves monitoring violations of the right to freedom of expression, recommending to the African Commission measures to address the violations and assisting AU member states to review their national media laws and policies with a view to complying

9 Viljoen, Frans. 2005. *The Special Rapporteur on Prisons and Conditions of Detention in Africa: Achievements and Possibilities*, HRQ 27 125-171, The Johns Hopkins University Press, p. 130.

10 Beyani, Chaloka. 2007. *Recent Developments in the African Human Rights System 2004-2006*, 7 Hum. Rts. L. Rev. 582, p. 588.

11 Activity Report of the Special Rapporteur on Freedom of Expression in Africa presented at the 40th Ordinary Session of the African Commission in Banjul, Gambia, in November 2006. Report available at www.achpr.org/english/_info/free_exp_inter.html.

with freedom of expression standards in general and the Declaration in particular.

When deciding on the appropriate course of action, the Special Rapporteur must take into account several concerns, including whether there is a pending communication on the same situation before the African Commission. She must clearly identify the objective of her action and determine whether a particular situation would be better addressed by way of public statement, for instance. The Special Rapporteur can also undertake fact-finding missions, although the current Rapporteur has of yet not undertaken any, notably due to a lack of funds.

Part of her mandate is also to take action on behalf of alleged victims of violations of the right to freedom of expression, including by sending "Urgent Appeals" to member states asking for clarifications on reports forwarded to her from reliable sources. As one seasoned observer notes:

Urgent appeals functions outside the rigors of legal formalism, depending on a more informal and quicker process. Lawyers need not be involved, local remedies need not be exhausted, information is submitted not by the victim but by an anonymous source and there usually is less delay. Similar to the formal communications procedure, its scope is however rather restrictive, focusing on individuals.¹²

Submitting Urgent Appeals is challenging, given difficulties in corroborating reports or a lack of resources to follow up on accusations. Nevertheless, there have been some positive outcomes. Indeed, while none of the Appeals sent by the Special Rapporteur have received any formal response, they have triggered reactions from government officials. This is especially the case during Ordinary Sessions, after the presentation of the Special Rapporteur's activity reports, which summarize such appeals, and underlines the lack of response from certain states. While this has led to welcome dialogue between the Special Rapporteur and state representatives,

12 See Viljoen, *supra* note 8, p. 162.

it is very rare that promises of providing the Special Rapporteur with written replies are met in practice.¹³

The Special Rapporteur's achievements so far includes raising public awareness of her mandate, which highlights, by the same token, the situation of the right to freedom of expression and access to information in Africa. She has also strengthened her network of NGOs and media stakeholders collaborating with her mandate, claiming her place as "regional focal point" in the African system for the promotion and protection of the right to freedom of expression.

The Special Rapporteur has also strengthened her relationship with her UN counterpart, with whom she has discussed possible joint activities, and with her other regional counterparts, with whom she has, for instance, issued joint public statements.

One of the mandate's greatest achievement to date lies in the recognition of the intrinsic link between elections, freedom of expression and access to information and the importance that these issues take within her mandate, as well as their gradual inclusion on the agenda of the African Commission, which will be addressed in the next section of this chapter.

THE SPECIAL RAPPORTEUR AND THE QUESTION OF ELECTIONS IN AFRICA

Dr. Ndulo recalls that "Democracy involves three central rights: the right to take part in government, the right to vote and to be elected, and the right to equal access to public service" and that "Good governance furthers the protection of human rights at both the international and national levels."¹⁴ The development of democracy requires the availability and access of a wide range of

13 On a related topic, the lack of demonstrable impact of the work of the Special Rapporteur in Gambia is particularly disappointing. Given that the Secretariat is based in Banjul, one would assume that access to information and government officials would be easier. Theoretically, this would enable continuous dialogue with the government, sustained follow up and implementation.

14 Ndulo, Muna. 1998-1999. *The Democratization Process and Structural Adjustment in Africa. Symposium: Globalization and Governance: The prospects for Democracy Part III: Globalization and Empire*, 10 Ind. J. Global Legal Stud. 315, at p. 334-335.

news and information sources emanating from a plurality of service providers. Unfortunately, the media is still being harassed in Africa, and journalists are often arbitrarily arrested and detained in many African states.

There could be no independent and fair elections without a free media. The right to information is central to seeking accountability of officials and also in exposing otherwise hidden issues to the public in order to encourage democratic debate. Legislation enabling the public and media access to information held by governments and public institutions are therefore essential. There is also a need for countries to review their media laws and practices in order to foster equal and free access by all parties and candidates to the media during elections. Without the free flow of news, information and opinion, the population cannot be adequately informed and cannot therefore exercise its democratic rights. Through the media, citizens are better able to make informed choices before, during and after elections. Free media is simply critical to the survival of democracy in Africa.

Drawing on international covenants and declarations, Article 13 of the African Charter provides that: (1) Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law; (2) Every citizen shall have the right of equal access to the public service of his country; and (3) Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

The importance of the right to freedom of expression has also been mentioned in other instruments relevant to the electoral process in Africa. For instance, by adopting the African Union Declaration on the Principles Governing Democratic Elections in Africa in 2002, member states committed themselves to safeguarding the human and civil liberties of all citizens, including the freedom of movement, assembly, association, expression, and campaigning as well as access to the media on the part of all stakeholders during electoral processes.¹⁵ Member states have also reaffirmed several

15 Assembly of the Heads of Government of the African Union (AHG) /Decl.1 (XXXVIII), 2002, at par. III.

rights and obligations under which democratic elections shall be conducted.¹⁶

Another important development is the adoption of the African Charter on Democracy, Elections and Governance by the Eighth Ordinary Session of The Assembly of Heads of State and Government of the African Union (AHG), in Addis Ababa, Ethiopia on January 30, 2007.¹⁷ This Charter emphasizes the significance of good governance, popular participation, the rule of law and human rights and aims to enhance the relevant Declarations and Decisions of the OAU/AU, including the above-mentioned Declaration on Principles Governing Democratic Elections in Africa.

In view of the above, the current Special Rapporteur has clearly indicated an interest in pursuing her mandate to protect and promote freedom of expression in Africa, in particular, its link to free and fair elections. This interest in part draws on her full-time job as the Chief Electoral Officer of the Independent Electoral Commission of South Africa. It is clear that her expertise in the electoral process has helped her to appreciate the need to develop strategies to bring different stakeholders together and consolidate the existing standards relevant to this important process. Following her re-appointment and based on the work she did during her previous term, she has identified three major and highly interrelated issues on which she plans to focus for the duration of her new term as Special Rapporteur: the relationship between elections, freedom of expression and access to information; the need to enact access to information legislation; and the issue of broadcasting reforms.

16 AHG/Decl.1 (XXXVIII), 2002, at par. IV. The New Partnership for Africa's Development (NEPAD) further includes a *Declaration on Democracy, Political, Economic and Corporate Governance*, AHG/235(XXXVIII) Annex I, which commits African governments, among other things, to promoting and protecting democracy and human rights in their respective countries and regions, by developing clear standards of accountability, transparency and participative governance at the national and sub-national levels.

17 The text of the Charter is available at www.africa-union.org/root/au/Documents/Treaties/text/Charter%20on%20Democracy.pdf. As of January 29, 2008, the Charter had been signed by 17 states but had not yet been ratified (www.africa-union.org/root/au/Documents/Treaties/list/Charter_on_Democracy_and_Governance.pdf). In her Activity Report presented to the 42nd Ordinary Session of the African Commission, the Special Rapporteur welcomed the adoption of this Charter on Democracy, noting that there had been no ratification yet and that the Charter needed 15 ratifications to enter into force.

To this end, the Special Rapporteur co-hosted a workshop on "Elections, Freedom of Expression and Information in the Southern African Development Community (SADC)" with the Electoral Commissions Forum of SADC Countries in Luanda, Angola, on August 20 and 21, 2007.¹⁸ The theme was a reflection of the imperative to explore how electoral commissions interface with media stakeholders in the conducting of elections in the SADC region. A total of 28 participants representing media stakeholders and 29 delegates representing electoral commissions from SADC countries attended the workshop. The topics discussed included media coverage of elections, freedom of expression and elections, electoral conflict management, access to information and elections as well as the relationship between media practitioners and political parties.

The workshop emphasized some very important points, including the fact that the relationship between elections, freedom of expression and access to information raises a myriad of complex questions. This further underlines the need for involvement of all stakeholders and that, while freedom of expression is indeed a fundamental human right, it also entails certain responsibilities.¹⁹ Media outlets play an important role, especially in election periods, and therefore must be aware of their duties and follow a strict code of conduct during elections. The very central role played by the media in delivering free and fair elections was reemphasized, as was the fact that political parties cannot do without the media, hence the need for an on-going partnership among all stakeholders.²⁰

Building on this first and successful sub-regional meeting, the Special Rapporteur intends to organize similar workshops in the other regions of the continent, which would ultimately culminate in a continental conference on the topic. In the long run, the aim is

18 The Electoral Commissions Forum of SADC Countries (ECF) is an autonomous body of Electoral Commissions of SADC countries. It was launched in July 1998 with the main aim of encouraging cooperation and support on electoral issues among member countries. More information is available at www.sadc-ecf.org/.

19 Maphanyane, Modise. 2007. *Political Parties and Media in Elections*. Paper presented at the Regional Workshop held during the 9th Annual general conference of the Electoral Commissions Forum of SADC Countries, August 20-21, in Luanda, Angola.

20 Musavengana, Takawira. 2007. *Media and Political Parties: The Achilles Heel of an Enduring Democracy*. Paper presented at the Regional Workshop held during the 9th Annual general conference of the Electoral Commissions Forum of SADC Countries, August 20-21, in Luanda, Angola.

to consolidate existing regional norms that address the freedom of expression, free media, and elections.

Two recent examples reinforce the need to seriously tackle these relationships, namely, the recent elections in Kenya and Zimbabwe. The media in Kenya was harshly criticized for its role in the election in December 2007, in particular for exercising a form of self-censorship.²¹ The first and now second round of elections in Zimbabwe, which are still going on as this chapter goes to press, also provide clear ground for further analysis in this regard.²²

CONCLUSION

This chapter has traced the creation and entrenchment of a specific human right in the African regional human rights system, namely the right to freedom of expression. Despite hesitant beginnings, what emerges is a right that has progressively been better defined and expanded to include other elements, and as a result, is better protected. The key role of NGOs, the African Commission, and the regional Special Rapporteur were highlighted. While freedom of expression is not yet a reality for many individuals in Africa, the African human rights system as a whole is being strengthened through the committed actions of such individuals, organizations, and institutions.

As always, the two main challenges in implementing this system's standards are political will and resources. States need to demonstrate their commitment to some of the Declarations cited previously. Furthermore, as argued in other chapters of this publication, African states must also be willing to submit themselves

21 See for example, *Kenyan media under pressure: The Nairobi Round Table Recommendations*, published by International Media Support, February 12, 2008. Available at www.gurtong.org/ResourceCenter/documents/Reports/kenya-rec-s-media.pdf and *How far to go? Kenya's media caught in the turmoil of a failed election*. Available at www.article19.org/pdfs/publications/kenya-how-far-to-go.pdf.

22 The African Commission, meeting at its 42nd Ordinary Session, in Brazzaville, Republic of Congo, adopted a *Resolution on freedom of expression and the upcoming elections in Zimbabwe*, reaffirming the importance of freedom of expression, encouraging the state to create conditions conducive to free, fair and credible elections and ensure that contesting parties and candidates for elections are given equitable access to state-controlled media.

to the jurisdiction of Africa's newest regional human rights institution, the African Court. With respect to resources, while the African Commission has recently received an increase in its core funding from the African Union, the Special Rapporteur on Freedom of Expression currently does not have a full-time jurist at the African Commission assigned to this mandate. The same holds true for most of the special mechanisms at the African Commission. Under such conditions, it is difficult for the Rapporteur and her colleagues to play leadership roles in their mandates, and in her case, promoting and protecting freedom of expression and access to information in Africa.

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REFERENCES

- ADDO, MICHAEL K. 1988. Political Self Determination within the Context of the African Charter on Human and Peoples' Rights. *Journal of African Law* 32(2): 182-193.
- AIDOO, AKWASI. 1993. Africa: Democracy without Human Rights? *Human Rights Quarterly* 15(4): 703-715.
- AMNESTY INTERNATIONAL, *Credibility in Question: proposals for improving the efficiency and effectiveness of the African Commission on Human and Peoples' Rights* (IOR 63/02/98).
- ANKUMAH, E.A. (1997), *La Commission africaine des droits de l'homme et des peuples. Pratiques et procédures*, London, Société africaine de droit international et comparé.
- BUERGENTHAL, THOMAS. 2006. The Evolving International Human Rights System. *American Journal of International Law* 100: 783-807.
- D'SA, ROSE M. 1985. Human and Peoples' Rights: Distinctive Features of the African Charter. *Journal of African Law* 29(1): 72-81.
- DONNELLY, JACK. 1986. International Human Rights: A Regime Analysis. *International Organization* 40(3): 599-642.
- ENO, ROBERT WUNDEH. 2002. The jurisdiction of the African Court on Human and Peoples' Rights. *African Human Rights Law Journal* 2: 223-233
- ENONCHONG, NELSON. 2002. The African Charter on Human and Peoples' Rights: Effective Remedies in Domestic Law? *Journal of African Law* 46(2): 197-215.

- HELPER, LAURENCE R. 1999. Forum Shopping for Human Rights. *University of Pennsylvania Law Review* 148(2): 285-400.
- HEYNS, CHRISTOF. 2004. The African regional human rights system: The African Charter. *Penn State Law Review* 108: 679-702.
- KIWANUKA, RICHARD N. 1988. The Meaning of 'People' in the African Charter on Human and Peoples' Rights. *The American Journal of International Law* 82(1): 80-101.
- LOUM, N. 1997. *Le Tribunal pénal international ad hoc de la Haye : une exigence humanitaire ?* Mémoire de DEA de sciences politiques, Université Montesquieu Bordeaux IV.
- MAHMUD, SAKAH SAIDU. 1993. The State and Human Rights in Africa in the 1990s: Perspectives and Prospects. *Human Rights Quarterly* 15(3): 485-498.
- MAKAU, WA MUTWA. 1993. The African Human Rights System in a Comparative Perspective, *Review of the African Commission on Human and Peoples Rights*, Vol. 3.
- MALUWA, TIYANJANA. 2003. The Constitutive Act of the African Union and Institution-Building in Postcolonial Africa. *Leiden Journal of International Law* 16: 157-170.
- M'BAYE, K. 1986. *Rapport introductif sur la Charte africaine des droits de l'homme et des peuples*, International Commission of Jurists (ed.), *Droits de l'homme et des peuples en Afrique et la Charte africaine*, Geneva.
- M'BAYE, K. 1992. *Les droits de l'homme en Afrique*, Paris, Pedone.
- MOHAMED, ABDELSALAM A. 1999. Individual and NGO Participation in Human Rights Litigation before the African Court of Human and Peoples' Rights: Lessons from the European and Inter-American Courts of Human Rights. *Journal of African Law* 43(2): 201-213.
- MUBIALA, M. 1997. Contribution à l'étude comparative des mécanismes régionaux africain, américain et européen de protection des droits de l'homme, *Revue africaine de droit international comparé*, Vol. 9.
- MURRAY, RACHEL. 2002. A comparison between the African and European Courts of Human Rights. *African Human Rights Law Journal* 2: 195-222.

- MURRAY, RACHEL. 2006. International Human Rights: Neglect of Perspectives from African Institutions. *International and Comparative Law Quarterly* 55: 193-204.
- NCHAMA, E. 1991. *Développement et droits de l'homme en Afrique*, PUBLISUD.
- OBINNA OKERE, B. 1984. The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems. *Human Rights Quarterly* 6(2): 141-159.
- ODINKALU, ANSELM CHIDI. 1993. Proposals for Review of the Rules of Procedure of the African Commission of Human and Peoples' Rights. *Human Rights Quarterly* 15(3): 533-548.
- OJO, OLUSOLA AND AMADU SESAY. 1986. The O.A.U. and Human Rights: Prospects for the 1980s and Beyond. *Human Rights Quarterly* 8(1): 89-103.
- OUGUERGOUZ, F. 1980. *La Commission africaine des droits de l'homme et des peuples : présentation et bilan d'activités, (1988-1989)*, A.F.D.I, Vol. 35.
- PACKER, CORINNE A.A. AND DONALD RUKARE. 2002. The New African Union and Its Constitutive Act. *The American Journal of International Law* 96(2): 365-379.
- PITYANA, NYAMEKO BARNEY. 2004. Reflections on the African Court on Human and Peoples' Rights. *African Human Rights Law Journal* 4(1): 121-129.
- SEGUI, D. 1991. *L'apport de la Charte africaine des droits de l'homme et des peuples au droit international de l'homme*, in RADIC, Special Issue.
- UDOMBANA, NSONGURUA J. 2002. Can The Leopard Change Its Spots? The African Union Treaty And Human Rights. *American University International Law Review* 17: 1177-1261.
- UDOMBANA, NSONGURUA J. 2003. So Far, so Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights. *The American Journal of International Law* 97(1): 1-37.
- VILJOEN, FRANS AND LIRETTE LOUW. 2007. State Compliance with the Recommendations of the African Commission on Human

- and Peoples' Rights, 1994-2004. *The American Journal of International Law* 101(1): 1-34.
- VILJOEN, FRANS. 1999. Application of the African Charter on Human and Peoples' Rights by Domestic Courts in Africa. *Journal of African Law* 43(1): 1-17.
- VILJOEN, FRANS. 2000. State Reporting under the African Charter on Human and Peoples' Rights: A Boost from the South. *Journal of African Law* 44(1): 110-118.
- WELCH, JR., CLAUDE E. 1992. The African Commission on Human and Peoples' Rights: A Five-Year Report and Assessment. *Human Rights Quarterly* 14(1): 43-61.
- WISEBERG, LAURIE S. 1994. The African Commission on Human and Peoples' Rights. *Issue: A Journal of Opinion* 22(2): 34-41.