

## Recent developments

# Human rights developments in the African Union during 2012 and 2013

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### Summary

*Positive developments in 2012 and 2013 included an increased impetus by the African Commission to reach decisions on petitions submitted to it and measures, such as hearings, to promote the implementation of its decisions. Concerns include the lack of publication of numerous decisions on individual cases and the lack of referral of cases from the Commission to the African Court in 2013. Despite the lack of referrals, the African Court now has a substantial docket and can focus on judicial work rather than the promotional work it has been focusing on over the last few years. The African Union political bodies continue to provide inadequate support, in particular to ensure sufficient staffing of the Commission and ensuring peer pressure in relation to the implementation of findings of the monitoring bodies. Projects such as expanding the mandate of the African Court to become a regional alternative to the International Criminal Court should be shelved until such time that a clear commitment to the existing institutions becomes evident.*

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## 1 Introduction

The regional African human rights system has witnessed significant developments since the adoption of the African Charter on Human and Peoples' Rights (African Charter) in 1981. This article reflects on the human rights developments within the African Union (AU) in 2012 and 2013. The focus is on the work of the African Commission on Human and Peoples' Rights (African Commission), the African Court on Human and Peoples' Rights (African Court) and the African Committee on the Rights and Welfare of the Child (African Children's Committee). The article also briefly considers the activities of the African Peer Review Mechanism (ARPM) and the African Union (AU) political organs in relation to human rights.

Highlights during the years in review include the entry into force in 2012 of the AU Convention for the Protection and Assistance of Internally-Displaced Persons in Africa (Kampala Convention) which provides a normative framework for the protection of internally-displaced persons (IDPs). The year 2012 also marked the 25th anniversary of the establishment of the main regional human rights monitoring body, the African Commission. The year 2013 marked the 10th anniversary of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) which, by the end of 2013 has been ratified by 36 AU member states. The year 2013 also marked the 50th anniversary of the establishment of the Organisation of African Unity (OAU), which was transformed into the AU in 2002.

## 2 African Commission on Human and Peoples' Rights

### 2.1 Composition

The AU Assembly in May 2013 elected Lawrence Mute as commissioner for a six-year term. Commissioner Mute has previously served as a commissioner of the Kenya National Commission on Human Rights. He replaces the former Chairperson of the Commission, Commissioner Dupe Atoki from Nigeria, who did not stand for re-election. At the same summit, the Assembly re-elected Yeung Kam John Yeung Sik Yuen (Mauritius), Soyata Maiga (Mali) and Lucy Asuagbor (Cameroon) for six-year terms.<sup>1</sup> The replacement of Commissioner Atoki with Commissioner Mute saw the number of women on the Commission decline from seven to six. However, the Commission retains a majority of women, unusual among similar bodies in other regions and at the United Nations (UN).<sup>2</sup>

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1 Assembly/AU/Dec.483.(XXI).

2 Eg, Inter-American Commission on Human Rights: 3 out of 7 commissioners <http://www.oas.org/en/iachr/mandate/composition.asp>; Human Rights Committee:

At the 54th ordinary session of the Commission in November 2013, the commissioners elected a new bureau (leadership) composed of Kayitesi Zainabo Sylvie (Rwanda) as Chairperson and Mohamed Béchir Khalfallah (Tunisia) as Vice-Chairperson.<sup>3</sup> Both will serve for renewable two-year terms in that capacity.<sup>4</sup> Prior to their election, Catherine Dupe Atoki and Kayitesi Zainabo Sylvie served as Chairperson and Vice-Chairperson respectively until the expiry of their terms in 2013.

## 2.2 Sessions

The African Commission holds two ordinary sessions each year and, when necessary, extraordinary sessions. It held the usual two ordinary sessions in 2012 and 2013. Due to the backlog of complaints and state reports, the Commission held two extraordinary sessions in 2012 and two in 2013. The Commission was in session for a total of 44 days in 2012 and 42 days in 2013.<sup>5</sup>

## 2.3 Resources

In its decisions on the African Commission's Activity Reports, the Executive Council has repeatedly called on the AU Commission to 'expedite recruitment for the Secretariat ... to enable the ACHPR effectively deliver on the mandate entrusted to it'.<sup>6</sup> The AU approved a staffing structure for the Secretariat in 2009. However, the AU Commission has still not expedited action for the recruitment of staff to the Commission's Secretariat.<sup>7</sup> While the financial allocation to the Commission in the AU budget has increased significantly in recent years,<sup>8</sup> such that the total budget for the Commission for 2013 was close to US \$8,5 million, the Commission has expressed concern that no funds for programme activities as allocated in the AU budget was released to the Commission in 2013.<sup>9</sup> The budget for 2014 was

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4 out of 18 members <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/Membership.aspx>; Committee against Torture: 2 out of 10 members <http://www.ohchr.org/EN/HRBodies/CAT/Pages/Membership.aspx>; UN Committee on the Rights of Persons with Disabilities: 7 out of 18 members <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Membership.aspx> (accessed 3 April 2014).

3 Final Communiqué of the 54th ordinary session of the African Commission on Human and Peoples' Rights, para 16.

4 F Viljoen *International human rights law in Africa* (2012) 290.

5 11th extraordinary session, Banjul, The Gambia, 21 February to 1 March 2012; 51st ordinary session, Banjul, The Gambia, 18 April to 2 May 2012; 12th extraordinary session, Algiers, Algeria, 30 July to 4 August 2012; 52nd ordinary session, Yamoussoukro, Côte d'Ivoire, 9-22 October 2012; 13th extraordinary session 18-25 February 2013; 53rd ordinary session, Banjul, The Gambia, 9-22 April 2013; 14th extraordinary session, Nairobi, Kenya, 20-24 July 2013; 54th ordinary session, Banjul, The Gambia, 22 October to 5 November 2013. See <http://www.achpr.org/sessions> (accessed 3 April 2014).

6 See eg Decision on the 34th Activity Report of the African Commission on Human and Peoples' Rights Doc EX.CL/796(XXIII) para 8.

7 35<sup>th</sup> Activity Report of the African Commission para 30.

8 M Killander & A Abebe 'Human rights developments in the African Union during 2010 and 2011' (2012) 12 *African Human Rights Law Journal* 201.

9 35<sup>th</sup> Activity Report of the African Commission para 31.

reduced to US \$4 million as an operational budget (from member states) and US \$1,5 million as programme budget (from partners).

## 2.4 State reporting

The consideration of state reports constitutes one of the key aspects of the African Commission's mandate. The African Charter and the African Women's Protocol oblige all states to submit reports to the Commission every two years on the steps taken to implement the provisions of these instruments.<sup>10</sup>

In 2012 the Commission considered and adopted concluding observations on the state reports of Angola, Sudan and Côte d'Ivoire,<sup>11</sup> and in 2013 on Cameroon, Gabon and Uganda. Consideration of the state reports of Liberia, Mozambique, Sahrawi Arab Democratic Republic (Western Sahara), Malawi, Sierra Leone and Uganda were pending as of the end of 2013. The reports submitted by four countries, Côte d'Ivoire, Liberia, Malawi and Sierra Leone were initial reports, thus bringing down the number of countries which have never submitted a report to the Commission to seven.<sup>12</sup> The only state report so far that covers implementation of the African Women's Protocol is the report of Malawi.<sup>13</sup>

## 2.5 Resolutions

In 2012 and 2013 the African Commission adopted country-specific resolutions dealing with the situation in Ethiopia, Mali, Nigeria, Senegal, South Sudan, Sudan and Swaziland. In the same period the Commission adopted numerous thematic resolutions. Some of the most important normative resolutions are discussed below.

In the Resolution on the Right to Adequate Housing and Protection from Forced Evictions,<sup>14</sup> the Commission called for an end to forced evictions, in particular evictions in the name of development. The Commission called on states to ensure that evictions were only used as a last resort and that remedies are available to challenge evictions.

10 Art 64 African Charter; art 27(1) African Women's Protocol.

11 <http://www.achpr.org/sessions/51st/info/communique51/> (accessed 3 April 2014).

12 Comoros, Djibouti, Equatorial Guinea, Eritrea, Guinea-Bissau, São Tomé and Príncipe and Somalia. The African Commission does not yet view South Sudan as being bound by the African Charter. 35th Activity Report of the African Commission on Human and Peoples' Rights para 17.

13 Art 26 of the African Women's Protocol obliges all state parties to 'indicate the legislative and other measures undertaken for the realisation of the rights' of women when submitting their periodic reports in accordance with art 62 of the African Charter. Although other state parties to the Protocol have failed to comply with this provision, Malawi in its 1995-2013 periodic report dedicated 45 pages to the Protocol. See Malawi (1995-2013) 'Report to the African Commission on Human and Peoples' Rights' [http://www.achpr.org/files/sessions/55th/state-reports/1-1995\\_2013/initial\\_report\\_combined\\_1995\\_2013\\_eng.pdf](http://www.achpr.org/files/sessions/55th/state-reports/1-1995_2013/initial_report_combined_1995_2013_eng.pdf) (accessed 1 April 2014).

14 Adopted at the 52nd ordinary session, October 2012.

The Commission further called on states to ensure security of tenure and that alternative housing that is provided in cases of evictions complies with international standards.

In the Resolution on the Right to Nationality,<sup>15</sup> the Commission expressed its deep concern at the arbitrary deprivation of nationality on discriminatory grounds. The Commission urged states to recognise, guarantee and facilitate the right to nationality of every person, especially the registration of births of all children on their territory.

In its Resolution on Illicit Capital Flight from Africa,<sup>16</sup> the Commission called on the Working Group on Economic, Social and Cultural Rights in Africa and the Working Group on Extractive Industries, Environment and Human Rights Violations in Africa to conduct an inquiry into the impact of illicit capital flight on human rights in Africa. African states were requested to examine their legislation to prevent illicit capital flow.

In promoting and protecting women's sexual and health rights, the Commission adopted the Resolution on Involuntary Sterilisation and the Protection of Human Rights in Access to HIV Services.<sup>17</sup> It noted that access to the enjoyment of sexual and reproductive health rights of women in Africa was limited due to harmful practices in addition to HIV-related stigma, discrimination and prejudices. It further expressed concern about the various reports of coerced or involuntary sterilisation of women living with HIV. Against this background, the Commission called on states to put in place mechanisms to ensure that women living with HIV are not subjected to pressure or undue inducement by health care providers in order to secure consent for sterilisation.

With the aim of promoting gender equality and improving women's political and socio-economic status, the Resolution on Women's Rights to Land and Productive Resources was adopted.<sup>18</sup> In this Resolution, the Commission expressed its concern on how women are still deprived of their right to own property and land, although most states have ratified the African Women's Protocol and other instruments on women's rights. The Commission urged states to repeal discriminatory laws and to abolish harmful social practices that have a negative impact on or limit women's access to the use and control of land.

In the Resolution on the Prevention of Attacks and Discrimination against Persons with Albinism,<sup>19</sup> the Commission expressed its deep concern about the social exclusion, discriminatory and systematic attacks against persons living with albinism. It emphasised the need

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15 Adopted at the 53rd ordinary session, April 2013.

16 As above.

17 Adopted at the 54th ordinary session, November 2013.

18 As above.

19 As above.

for states to provide special measures for the protection of these vulnerable individuals. The Commission charged states to institute effective mechanisms to eliminate all forms of discrimination and to increase public awareness to protect persons living with albinism. It further called for accountability through speedy prosecution of perpetrators and appropriate remedies for victims.

At its 54th ordinary session in November 2013, the Commission adopted a resolution calling on Kenya to implement the decision of the Commission in the *Endorois* case, adopted by the Commission in 2009. This followed the oral hearing on implementation held at the Commission's 53rd ordinary session in April 2013 and a workshop held by the Commission's working group on indigenous populations/communities in Nairobi in September 2013. The resolution was the result of Kenya's failure to submit a road-map for implementation as agreed at the oral hearing in April 2013.<sup>20</sup>

## 2.6 Missions

Commissioners, together with legal officers from the Secretariat, undertake promotional visits to a few countries each year. The aim of such missions is to promote the rights in the African Charter and other regional instruments by engaging governments and civil society as well as gathering information, in particular in relation to the thematic mandates of the commissioners participating in the visit.<sup>21</sup> Commissioners in 2012 and 2013 embarked on promotional missions to Mauritania,<sup>22</sup> Central African Republic,<sup>23</sup> Togo,<sup>24</sup> Lesotho,<sup>25</sup> Cameroon<sup>26</sup> and Chad.<sup>27</sup>

The AU political organs sometimes request the African Commission to undertake fact-finding missions. Thus, the Commission undertook a fact-finding mission to Algeria in September 2012, investigating the situation in the Sahrawi Arab Democratic Republic (SADR), as

20 Resolution Calling on the Republic of Kenya to Implement the *Endorois* Decision, adopted at the 54th ordinary session, November 2013.

21 See eg African Commission on Human and Peoples' Rights, Report of the Joint Human Rights Promotion Mission to the Republic of Chad, 11-19 March 2013, [http://www.achpr.org/files/sessions/54th/mission-reports/chad-promo-2014/misrep\\_promo\\_chad\\_2013\\_eng.pdf](http://www.achpr.org/files/sessions/54th/mission-reports/chad-promo-2014/misrep_promo_chad_2013_eng.pdf) (accessed 3 April 2014).

22 [http://www.achpr.org/states/mauritania/missions/promotion\\_mission-2012/](http://www.achpr.org/states/mauritania/missions/promotion_mission-2012/) (accessed 3 April 2014).

23 <http://www.achpr.org/states/central-african-republic/missions/promo-2012/> (accessed 3 April 2014).

24 <http://www.achpr.org/states/togo/missions/promo-2012/> (accessed 3 April 2014).

25 <http://www.achpr.org/states/lesotho/missions/promo-2012/> (accessed 3 April 2014).

26 <http://www.achpr.org/states/cameroon/missions/cameroon-promo-2012/> (accessed 3 April 2014).

27 <http://www.achpr.org/states/chad/missions/chad-promo-2014/> (accessed 3 April 2014).

requested by the AU Assembly in January 2012.<sup>28</sup> SADR, an AU member state also known as the Western Sahara, is occupied by Morocco. The delegation did not receive any response from the Moroccan authorities in relation to gaining access to the territory and therefore had to limit its visit to Algeria.

The AU Assembly in 2012 called on the African Commission to investigate the 'massive violations of human rights' committed against the Mali military and civilians in *Aguel'hoc* in January 2012.<sup>29</sup> A fact-finding mission was deployed by the Commission from 3 to 7 June 2013 and a report submitted to the Executive Council.<sup>30</sup>

## 2.7 Communications

### 2.7.1 10th extraordinary session, 12-16 December 2011<sup>31</sup>

The Commission in 2011 for the first time decided on the merits in a case concerning the violation of women's rights, Communication 323/06, *Egyptian Initiative for Personal Rights and Interights v Egypt*. The complaint was filed on behalf of four women who were sexually abused during a demonstration in Cairo regarding a referendum on the amendment of the Egyptian Constitution. The complainants claimed that the first victim's clothes were torn, documents seized and her private parts fondled.<sup>32</sup> The second, third and fourth victims, all journalists covering the protest, were beaten and sexually harassed by unidentified men and security officers.<sup>33</sup> They also alleged that, when the victims lodged their complaints, they received threats to withdraw the case.<sup>34</sup> Their complaints were rejected on the basis that the offenders could not be identified.<sup>35</sup> The Commission held that the physical, mental and sexual harm inflicted on the victims affected their physical and mental well-being in violation of the right to health.<sup>36</sup> The Commission ordered Egypt to conduct an investigation into the violation and to pay adequate compensation to each of the victims.<sup>37</sup>

28 Report of the fact-finding mission to the Sahrawi Arab Democratic Republic, 24-28 September 2012, [http://www.achpr.org/states/sahrawi-arab-democratic-republic/missions/promotion\\_mission-2012/](http://www.achpr.org/states/sahrawi-arab-democratic-republic/missions/promotion_mission-2012/) (accessed 3 April 2014).

29 For a discussion of the situation, see B Nkrumah & F Viljoen 'Lessons from ECOWAS for the implementation of article 4(h)' in D Kuwali & F Viljoen (eds) *Africa and the responsibility to protect: Article 4(h) of the African Union Constitutive Act* (2013) 261.

30 35th Activity Report para 32.

31 These cases are covered here as they had not been published at the time of the previous overview of the case law of the Commission. See Killander & Abebe (n 9 above) 199.

32 Para 6.

33 Para 11.

34 Para 20.

35 Paras 22 & 49.

36 Art 16 African Charter; para 259.

37 Para 275.

At its 10th extraordinary session, the Commission also decided Communication 277/2003, *Spilg & Others v Botswana*.<sup>38</sup> The complaint concerned the death penalty in Botswana, an issue which previously has been considered by the Commission in the *Bosch* case.<sup>39</sup> The complainants alleged that the victim was wrongfully sentenced to death by hanging for the murder of a police officer. Botswana argued that the communication was instituted by non-nationals and, for that reason, the Commission did not have jurisdiction. Botswana further averred that the imposition of the death penalty was reasonable if the crime is of the most serious nature and due process for safeguards is in place.<sup>40</sup> In responding to Botswana's first argument, the Commission held that limiting the authorship of communications to citizens is not in line with the African Charter.<sup>41</sup> On the merits, the Commission held that, while hanging as a method of execution could constitute a violation of the prohibition on cruel, inhuman or degrading punishment, it had not been shown to constitute such punishment in this case. However, not to inform relatives of the imminent execution constituted a violation of article 5 of the African Charter. The Commission urged Botswana to impose a moratorium on executions with a view to abolishing the death penalty.<sup>42</sup>

Communication 347/07, *Association Pro Derechos Humanos de Espana (APDHE) v Equatorial Guinea*, and Communication 372/09, *Interights v Ethiopia*, were declared inadmissible.

As of February 2014, these decisions had not been published by the Commission.

### 2.7.2 11th extraordinary session, 21 February to 1 March 2012

Communication 288/04, *Shumba v Zimbabwe*,<sup>43</sup> relates to the cruel, inhuman and degrading treatment of the complainant due to his political association. The Commission found a violation of article 5 of the African Charter and requested Zimbabwe to pay adequate compensation to the victim for the torture and trauma suffered while in detention.<sup>44</sup>

The Commission at this session also declared six communications inadmissible. Communication 278/2003, *Promoting Justice for Women and Children (PROJUST NGO) v Democratic Republic of Congo*, involved

38 [http://www.achpr.org/files/sessions/10th-eo/comunications/277\\_-\\_03/achpreos10\\_277\\_03\\_eng.pdf](http://www.achpr.org/files/sessions/10th-eo/comunications/277_-_03/achpreos10_277_03_eng.pdf) (accessed 3 April 2014).

39 *Interights & Others (on behalf of Bosch) v Botswana* (2003) AHRLR 55 (ACHPR 2003).

40 Para 138.

41 Para 84.

42 Para 206.

43 This case has not been published by the Commission on its website but is included in the African Human Rights case law analyser, <http://caselaw.ihnda.org/doc/288.04/> (accessed 3 March 2014).

44 Para 194.



six women who had been arrested in place of their husbands who were either deceased or had fled the country. The complainant alleged that the victims were tortured before being sent to the penitentiary while others were held there with their children.<sup>45</sup> The complainant submitted that local remedies had been exhausted since the decision of the Military Court which tried the victims could neither be appealed, nor set aside.<sup>46</sup> The Commission rejected this argument and indicated that the victims had the opportunity to refer the disputed ruling to the Supreme Court for redress. The communication was thus declared inadmissible.

Communication 351/2007, *Chari v Zimbabwe*, concerned the arrest and torture of a student during a peaceful demonstration. He maintained that, following constant harassment from government agents, he had fled to South Africa. He argued that since he escaped and is now resident in another country, domestic remedies could not be pursued and were therefore not available. The Commission rejected this argument on the grounds that it is not a legal requirement to be present in a country in order to access its domestic remedies.<sup>47</sup> The communication was therefore declared inadmissible.

The inadmissibility decisions on Communication 331/2006, *Kamanakao Association, Reteng and Minority Rights Group v Botswana*, 356/07, *The Gambia Task Force v The Gambia*, 340/07, *Zimbabwe Human Rights NGO Forum v Zimbabwe*, and 314/06, *Zimbabwe Lawyers for Human Rights and Human Rights Trusts of Southern Africa v Zimbabwe*, had as of February 2014 not been published by the African Commission. The same applies to Communication 380/09, *Global Conscience Initiative Cameroon v Cameroon*, which was struck from the list following withdrawal.

At the session, the Commission was seized of two new cases, one against the SADC member states (Communication 409/12) and one against Gabon (Communication 410/12). The case against the SADC member states relates to the suspension of the SADC Tribunal.<sup>48</sup> This case was declared admissible by the Commission at the 52nd ordinary session and decided on the merits at the 54th ordinary session, as discussed below.

At the session, the Commission also considered the implementation of its decision in *Good v Botswana*. After the decision was adopted, Botswana, through a diplomatic note, informed the Commission that 'it is not bound by the decision of the Commission'. The Commission called on the Executive Council to take 'appropriate action' against Botswana in its 32nd-33rd Activity Report. The Executive Council did not take any action against Botswana at the meeting at which it

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45 Para 3.

46 Para 39.

47 Para 78.

48 <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71656?oid=351130&sn=Detail&pid=71656> (accessed 3 April 2014).

adopted the Activity Report. However, in a more recent decision, it has made general calls on states to comply with the decision of the Commission.<sup>49</sup>

The Commission also decided to refer Communication 381/09, *Centre for Minority Rights Development (CEMIRIDE) and Minority Rights Group v Kenya*, to the African Court, basing the referral on non-compliance with provisional measures adopted by the Commission in 2009.<sup>50</sup>

### 2.7.3 51st ordinary session, 18 April to 2 May 2012

Communication 295/04, *Kazingachire & Others v Zimbabwe*, was filed by the Zimbabwe Human Rights NGO Forum on behalf of four victims. The complaint relates to allegations of wrongful killings and unfair compensation. The complainants argued that on 10 January 2001, a child who was a passenger in his father's car was mistakenly shot and killed by four policemen. The second victim, a motor mechanic, was wrongfully arrested and shot in the head at point blank range by police officers. The third victim, a student, while travelling by train, was assaulted and strangled to death by army officers due to his political affiliation. The complainants further submitted that the fourth victim was beaten to death by police officers during a student riot. The African Commission held that Zimbabwe's accountability system for excessive use of force by law enforcement officers was inadequate and violated the African Charter.<sup>51</sup> The Commission further held that Zimbabwe had failed to provide remedies and had thus violated articles 1 and 4 of the African Charter.<sup>52</sup> The Commission requested Zimbabwe to pay compensatory damages to the next of kin and legal heirs of the four deceased persons.

The Commission was seized of cases against Libya, Gabon, Angola and Swaziland and held oral hearings in cases against South Africa, Uganda, Sudan and Mauritania.

### 2.7.4 12th extraordinary session, 30 July to 4 August 2012

The inadmissibility decision with regard to Communication 337/2007, *Gumne & Others v Nigeria and Cameroon*, and the review decision in Communication 384/09, *Gumne & Others v Cameroon*, had as of February 2014 not been published by the Commission.

The Commission was seized of cases against Cameroon, Congo, Nigeria, Ethiopia and Sudan and discussed the implementation of its recommendations in the *Endorois* case.

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49 See EX.CL/Dec.804(XXIV).

50 See Application 006/2012, *African Commission v Kenya*.

51 Para 49.

52 Para 68.

### 2.7.5 52nd ordinary session, 9-22 October 2012

Communication 301/05, *Gabre-Selassie and IHRDA v Ethiopia*, was submitted on behalf of former officials of the Mengistu (Dergue) regime. The former officials alleged that they had been arbitrarily detained since 1991. Ethiopia was found to have violated the right to an impartial hearing, trial within a reasonable time and the presumption of innocence. The Commission accordingly ordered Ethiopia to pay adequate compensation to the victims.<sup>53</sup>

Communication 286/2004, *Noca v Democratic Republic of the Congo (DRC)*, dealt with the right to property. In 1974 the state adopted legislation which ceded undeveloped and abandoned properties to Congolese nationals. The complainant, an Italian national, entrusted his building to a state agency for management. The building was nonetheless declared abandoned and allocated to other persons. In its analysis, the Commission observed that the DRC had failed in its obligation to protect the rights of foreign nationals living within its borders.<sup>54</sup> It further indicated that the state could have exercised due diligence or goodwill by returning the property to the victim.<sup>55</sup> The Commission urged the DRC to reinstate the title deed of the building to the complainant or to pay him just compensation.<sup>56</sup>

Communication 285/2004, *Watumbulwa v Democratic Republic of the Congo*, and Communication 289/2004, *Koné & Another v Côte d'Ivoire*, were struck from the list due to a lack of interest on the part of the complainants. Four other communications, two against Sudan, one against Kenya and Sudan and one against Mozambique, were also struck from the list but had as of February 2014 not been published by the Commission.

The Commission was seized of cases against Cameroon, Egypt, Nigeria and Rwanda. The Commission referred Communication 411/12, *Gaddafi v Libya*, on which it had previously ordered provisional measures, to the African Court.

### 2.7.6 13th extraordinary session, 18-25 February 2013

The African Commission seized 11 communications.<sup>57</sup> The Commission decided not to be seized of Communication 422/12, *Sudan v South Sudan*. This was presumably because the Commission considered that South Sudan was not bound by the African Charter as

53 Para 240.

54 Para 137.

55 Para 140.

56 Para 207.

57 427/12, *SERAP v Nigeria*; 428/12, *Isaak v Eritrea*; 429/12, *The Ngambela of Barotseland & Others v Zambia*; 430/12, *Shumba & Others v Zimbabwe*; 431/12, *Kwayelo v Uganda*; 432/12, *Ngoge v Kenya*; 433/12, *Bialufu Ngandu Albert v Democratic Republic of the Congo*; 434/12, *Filimao Pedro Tivane v Mozambique*; 435/12, *Asemie v Lesotho*; 436/12, *Union Nationale v Gabon*; 437/12, *Ngoge v Kenya*; 438/12, *Peter Odiwuor Ngoge v Kenya*.

this country, which only gained independence in July 2011, had not at the time ratified it. However, it is questionable whether this in itself should prevent the Commission from being seized of the case, as a successor state is generally seen as being bound by the human rights commitments of the state to which it used to belong.<sup>58</sup> The Parliament of South Sudan voted to ratify the African Charter in October 2013, but the President has not yet assented.<sup>59</sup>

Two communications were declared admissible,<sup>60</sup> one inadmissible<sup>61</sup> and one decided on the merits.<sup>62</sup> The merits decision in Communication 270/03, *Access to Justice v Nigeria*, had as of February 2014 not been published. Communication 386/10, *Ibrahim v Sudan*, was declared inadmissible despite the Commission finding that the case had been considered by the Constitutional Court and other local remedies could not be exhausted.<sup>63</sup> The Commission declared the case inadmissible on the basis that it took the complainant 15 months to submit the case to the Commission after the ruling of the Constitutional Court. The Commission considered this to be an unreasonably long time in terms of article 56(6) of the African Charter.<sup>64</sup>

A case against Egypt was deferred pending the adoption of a new constitution.<sup>65</sup> Four cases were struck from the list due to a lack of diligent prosecution by the complainants.<sup>66</sup>

### 2.7.7 53rd ordinary session, 9-22 April 2013

During the session, the African Commission seized eight communications,<sup>67</sup> rejected the seizure of one,<sup>68</sup> conducted oral hearings on the merits of one case<sup>69</sup> and on the implementation of

58 MT Kamminga 'State succession in respect of human rights treaties' (1996) 7 *European Journal of International Law* 481-482.

59 'NGOs urge South Sudan to ratify African Charter' 15 April 2014, <http://talkof.sudan.com/ngos-urge-south-sudan-to-ratify-african-charter/> (accessed 29 April 2014). See also <http://www.radiomiraya.org/news-202/south-sudan/12299-parliament-ratifies-african-charter-on-rights-workers-bill.html#gsc.tab=0> (accessed 3 March 2014).

60 339/07, *Okiring and Aguiro v Uganda*; 387/2010, *Yamgnane v Togo*.

61 386/10, *Redress v Sudan*.

62 270/03, *Access to Justice v Nigeria*.

63 Para 67.

64 Para 77.

65 355/08, *Ezzat and Enayet v Egypt*.

66 290/04, *Open Society Justice Initiative v Cameroon*; 336/07, *Afrademop and Global Welfare v Cameroon*; 321/06, *Law Society of Zimbabwe v Zimbabwe*; 407/11, *Margayan and Sargsyan v Kenya*.

67 439/12, *Ngoge v Kenya*; 441/12, *Ngoge v Kenya*; 442/12, *Ngoge v Kenya*; 443/13, *Issa v Sudan*; 421/12, *Khadafi v Libya*; 447/13, *Oun v Libya*; 448/13, *Daou v Libya*; 449/13, *Khadafi v Libya*.

68 440/12, *Ngoge v Kenya*.

69 385/10, *ICJ-Kenya v Kenya*.

the *Endorois* case decided by the Commission in 2009.<sup>70</sup> Two cases were considered on the merits.<sup>71</sup> Communication 335/07, *Dabolorivhuwa Patriotic Front v South Africa*, concerned discrimination and a violation of the labour rights of the Vhavenda people.<sup>72</sup> The Commission held that article 2 of the African Charter permitted different treatment of people equally placed if such treatment is aimed at achieving a legitimate and an objective purpose.<sup>73</sup> For this reason, the Commission concurred with the state that the different treatment was based solely on a financial decision made by the complainants and not on grounds prohibited by the Charter.<sup>74</sup> The communication was therefore dismissed. The decision on Communication 302/05, *Mamboleo v Democratic Republic of Congo*, had as of February 2014 not been published by the Commission.

### 2.7.8 14th extraordinary session, 20-24 July 2013

The African Commission seized five communications,<sup>75</sup> declared six admissible<sup>76</sup> and one inadmissible,<sup>77</sup> and decided two communications on the merits.<sup>78</sup> These decisions had as of February 2014 not been published. It is noticeable that Communication 259/02, *Groupe de Travail sur les dossiers judiciaires stratégiques v DRC*, was submitted in 2002 and that it thus took more than a decade to reach a decision on the merits of the case.

The Commission rejected a request for the reconsideration of its decision on Communication 331/06, *Kamanakao Association and Others v Botswana*. The communication, submitted on behalf of minorities in Botswana, called for a review of the Commission's inadmissibility decision which was based on non-exhaustion of local remedies. The complainants argued that they did not approach the Court of Appeal since it was obvious that they were bound to fail based on a judgment of the same court. The Commission held that this did 'not constitute new evidence within the meaning adopted by the Commission'.<sup>79</sup> The Commission also considered a request for

70 *Centre for Minority Rights Development and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*.

71 302/05, *Mamboleo v Democratic Republic of Congo*; 335/07, *Dabolorivhuwa Patriotic Front v South Africa*.

72 Para 2.

73 Para 117.

74 Para 119.

75 444/13, *Masuku v Swaziland*; 445/13, *Human Rights Council & Others v Ethiopia*; 446/13, *Williams & Others v Zimbabwe*; 451/13-452/13, *Obi & Others v Nigeria*; 452/13, *Askouri and Nasr v Sudan*.

76 426/12, *Uwimana-Nkusi and Mukakibibi v Rwanda*; 419/12, *The indigenous peoples of the lower Omo v Ethiopia*; 389/10, *Mbiankeu v Cameroon*; 392/10, *Muhayeyezu v Rwanda*; 408/11, *Ushiye v DRC*; 370/09, *Social and Economic Rights Action Centre v Nigeria*.

77 413/12, *Mendes v Angola*.

78 259/02, *Groupe de Travail sur les dossiers judiciaires stratégiques v DRC*; 320/06, *Mamboundou v Gabon*.

79 Para 17.

review in Communication 375/09, *Echaria v Kenya*, which had been declared inadmissible in 2011 for failure of submission of the case to the Commission within a reasonable time of exhaustion of local remedies.

### 2.7.9 54th ordinary session, 22 October to 5 November 2013

The African Commission seized six communications,<sup>80</sup> decided not to be seized of one,<sup>81</sup> declared four communications admissible<sup>82</sup> and took four decisions on the merits.<sup>83</sup> None of the merits decisions had been published by the Commission as of February 2014. However, the complainant in the case dealing with the dissolution of the SADC Tribunal was after the session informed by the Commission Secretariat that the Commission had not found a violation since the African Charter only refers to national courts.<sup>84</sup>

Communication 280/03, *Phutuka v DRC*, was declared inadmissible after more than a decade on the Commission's roll. The Commission held an oral hearing on Communication 383/10, *Al-Assad v Djibouti*, and discussed follow-up on the implementation of the Commission's 2011 decision in Communication 323/06, *Egyptian Initiative for Personal Rights and Interights v Egypt*.<sup>85</sup>

## 3 African Court on Human and Peoples' Rights

### 3.1 Composition

The AU Assembly in July 2012 reappointed two judges for a six-year term, namely, Gerard Niyungeko from Burundi and El Hadji Guisse from Senegal. Ben Kioko from Kenya, formerly the AU legal counsel, was elected as a new appointment on the Court.<sup>86</sup> Mr Kimelabalou Aba from Togo was elected for a one and a half-year term in January 2013 to replace Justice Mulenga from Uganda who passed away in September 2012.<sup>87</sup> Justice Sophia Akuffo (Ghana) was elected

80 453/13 *Rasolovoahangy v Madagascar*; 454/13, *Ningo v Cameroon*; 455/13, *Mohamed v Ethiopia*; 456/13, *Uko v South Africa*; 458/13, *Ngoge v Kenya*; 459/13, *Hurman v Mauritius*.

81 457/13, *Mwandi v DRC*.

82 354/07, *Al-Shatir & Others v Egypt*; 398/11, *IHRDA and Congolese Human Rights Observatory v Congo*; 401/11, *Abdallah v Sudan*; 424/12, *Mahmoud and Abdel-Rahman v Egypt*.

83 274/03 & 282/03, *Interights & Others v DRC*; 328/06, *Front for the Liberation of the State of Cabinda v Angola*; 368/09, *Radi & Others v Sudan*; 409/12, *Temhani and Freeth v Zimbabwe & 13 Others*.

84 W Spies & B Freeth 'ACHPR unable to intervene over SADC Tribunal – AfriForum' <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/twitter.com/page71654?oid=559617&sn=Detail&pid=71654> (accessed 23 March 2014).

85 The African Commission's decision in the case is discussed above under the December 2011 session.

86 Assembly/AU/ /Dec.416-449(XIX) 40.

87 Decision on the election of one judge of the African Court on Human and Peoples' Rights, EX.CL/Dec.763(XXII).

President of the Court in 2012 and Justice Bernard Ngoepe (South Africa) replaced Justice Ougergouz (Algeria) as Vice-President after the latter resigned from this post in September 2012.<sup>88</sup>

### 3.2 Cases

Seven contentious cases were received in 2012 and five in 2013. Five were finalised in 2012, and four in 2013. Eight cases were pending at the end of 2013.<sup>89</sup> It is worth noting that most of the applications received by the African Court are brought against states which are not parties to the Protocol or have not deposited the declaration allowing individuals and non-governmental organisations (NGOs) to submit applications. It is questionable whether these cases should be determined judicially.

The Court declined jurisdiction in a case submitted against the AU. In *Femi Falana v African Union*, the applicant contended that he had made several attempts to have Nigeria deposit a declaration under article 34(6) to accept the competence of the Court to hear complaints brought by individuals and NGOs. The AU argued that the obligations of the state parties to the African Charter could not be inferred upon the AU. The Court, by a majority of seven to three votes, held that since the AU is not a party to the Protocol, it could not be subject to its obligations and the Court therefore lacked jurisdiction.<sup>90</sup>

Application 001/2013, *Mtingwi v Malawi*, concerned the wrongful and unfair termination of the employment of the applicant by the Malawi Revenue Authority (MRA). The applicant argued that, after the award of damages by the High Court, he realised that some items that were in the contract of employment were accidentally omitted during the preparation of exhibits submitted to the Court. The applicant further contended that the Supreme Court allowed the appeal of the MRA and dismissed the decision of the High Court which ruled in his favour. The African Court noted that it did not have an appellate jurisdiction to entertain complaints already decided by domestic or regional courts. The Court struck out the application for want of jurisdiction.<sup>91</sup>

The first merits judgment of the Court was handed down in June 2013.<sup>92</sup> The Court had joined two cases submitted against Tanzania dealing with the same issue, namely, whether the prohibition of independent candidates to contest elections violated the African

88 [http://www.fhr.org.za/latest\\_news/fhrs-preferred-candidate-justice-bernard-ngoep-e-both-vice-pr/](http://www.fhr.org.za/latest_news/fhrs-preferred-candidate-justice-bernard-ngoep-e-both-vice-pr/) (accessed 3 April 2014).

89 African Court on Human and Peoples' Rights 'Cases and decisions' <http://www.african-court.org/en/index.php/2012-03-04-06-06-00/all-cases-and-decisions> (accessed 3 April 2014).

90 001/2011, *Femi Falana v African Union*, judgment of 26 June 2012.

91 001/2013, *Mtingwi v Malawi*, judgment of 15 March 2013.

92 009 & 011/2011 *Tanganyika Law Society and The Legal and Human Rights Centre and Reverend Christopher Mtikila v Tanzania*, judgment of 4 June 2012.

Charter. The Court held that the denial of independent candidates to contest elections violated the right to political participation as set out in article 13 of the Charter.

It is questionable why it should have taken the Court a year to deliver judgment after oral hearings were held in the case in June 2012. In fact, article 28(1) of the Court Protocol provides that the Court should render judgment within 90 days of completing deliberations, but does not say anything about how long the Court may deliberate.

The Court made its first order for provisional measures in 2011 in a case submitted by the African Commission against Libya.<sup>93</sup> The substantive case was struck from the roll by the Court in 2013 as the Court did not receive the submissions it requested from the Commission.<sup>94</sup>

Another order for provisional measures was given by the Court in application 002/2013, *African Commission on Human and Peoples' Rights v Libya*. The case deals with the detention of Saif al Islam Gaddafi (son of late Libyan leader Muammar Gaddafi). The Court held that, in view of the failure of Libya to respond to the provisional measures of the African Commission and in light of the right to a fair trial, Libya should refrain from all investigations and judicial proceedings which could cause irreparable damage to the detainee.<sup>95</sup> After Libya refused to comply with the order of provisional measures, the Court requested the AU Assembly to call upon Libya to comply with the orders of the Court or take 'other measures as it deems appropriate'.<sup>96</sup> As of the end of 2013, the Court had not yet ruled on the admissibility and merits of the case.

The Court also ordered provisional measures in application 006/2012, *African Commission on Human and Peoples' Rights v Kenya*. The case deals with the eviction of an indigenous community from a forested area in Kenya and had been pending before the African Commission since 2009 when the Commission also issued provisional measures. The Court issued provisional measures in relation to transactions of land within the forest.<sup>97</sup> As at the end of 2013, the Court had not yet ruled on the admissibility and merits of the case.

The Court has issued provisional measures in one case submitted by an individual applicant under article 34(6). In application 004/2013, *Konaté v Burkina Faso*, the editor-in-chief of a newspaper was sentenced to one year imprisonment and a fine for libel. The Court

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93 See Killander & Abebe (n 9 above) 215.

94 004/2011, *African Commission on Human and Peoples' Rights v Libya*, order of 15 March 2013.

95 002/2013, *African Commission on Human and Peoples' Rights v Libya*, order of provisional measures, 15 March 2013, para 18.

96 [http://www.africancourt.org/en/images/documents/Reports/AFCHPR\\_Interim\\_Report\\_Non\\_compliance\\_by\\_a\\_State\\_-\\_Libya.pdf](http://www.africancourt.org/en/images/documents/Reports/AFCHPR_Interim_Report_Non_compliance_by_a_State_-_Libya.pdf) (accessed 10 March 2014) 3.

97 006/2012, *African Commission on Human and Peoples' Rights v Kenya*, order of provisional measures, 15 March 2013.



held, by majority, that to order Mr Konaté's immediate release would prejudice the merits of the case. The Court therefore only ordered provisional measures in relation to access to health care and medication as required.<sup>98</sup>

A request for an advisory opinion by the Socio-Economic Rights and Accountability Project (SERAP) was determined by the Court to fall outside the scope of the African Charter and struck off the list.<sup>99</sup> SERAP has resubmitted an application for an advisory opinion and one of the issues before the Court is whether an NGO has standing to request an advisory opinion from the Court. A request for an advisory opinion submitted by Mali in relation to the status of prisoners in Mali incarcerated following judgments by the International Criminal Tribunal for Rwanda was withdrawn by Mali and struck from the list.<sup>100</sup>

## 4 African Committee on the Rights and Welfare of the Child

### 4.1 Composition

The 11-member African Committee on the Rights and Welfare of the Child (African Children's Committee) serves as the monitoring body of the African Charter on the Rights and Welfare of the Child (African Children's Charter). Four new members were elected in May 2013 to serve for a five-year term: Sidikou Aissatou Alassane Moulaye (Niger); Suzanne Aho-Assouma (Togo); Joseph Ndayisenga (Burundi); and Azza Ashmawy (Egypt).

### 4.2 Sessions

The African Children's Committee dedicated its 19th ordinary session in March 2012 to harmful traditional practices affecting children and also discussed the situation of disabled children. At its 21st session, the Committee adopted its Work Plan for 2012-2013. In the Plan, the Committee indicated its intention to develop general comments based on thematic issues such as 'Children of Imprisoned Mothers'. At its 22nd session, the Committee adopted a joint working plan with the AU Peace and Security Council (PSC) aimed at promoting the rights of children during armed conflicts.<sup>101</sup> The plan was adopted pursuant to the Decision of the Executive Council at its 21st session,

98 Provisional measures order, 4 October 2013.

99 Request for advisory opinion 001/2012 by Socio-Economic Rights & Accountability Project, order of 15 March 2013.

100 Demande d'avis consultative 001/2011 par la République du Mali, ordonnance, 30 March 2012.

101 Draft Programme of Work, <http://acerwc.org/wp-content/uploads/2013/11/Program-of-Work-22nd-ACERWC-Session-2013-English.pdf> 2 (accessed 10 March 2014).

where the PSC and the Committee were requested to hold institutionalised consultations directed at adopting mechanisms and initiatives to promote and protect the rights of the child in armed conflict.<sup>102</sup>

### 4.3 State reports

The African Children's Committee is mandated by the African Children's Charter to examine state reports.<sup>103</sup> These reports have to be submitted initially two years after the entry into force of the Charter for the state, and thereafter every three years. The state report has to set out the degree to which the provisions of the Charter are being implemented. It also has to set out the constraints or challenges affecting the fulfilment of the obligation as preserved in the Charter. The Children's Committee considered its first set of state reports in 2008 and, as of the end of 2013, of the 47 states which have ratified the Children's Charter, only 22 had submitted their initial reports.<sup>104</sup> The initial reports of Cameroon, Niger and Senegal were considered at its 21st ordinary session.<sup>105</sup> The Committee has issued concluding observations on all state reports except Senegal and Sudan due to additional information to be submitted by these states.

### 4.4 Communications

The African Children's Charter mandates the African Children's Committee to receive and examine communications. Akin to the jurisprudence and case law of the African Commission, the Committee's guidelines allow not only victims but other interested persons to submit a communication on behalf of the victim(s). However, according to the Guidelines for Communication, the author should be able to demonstrate that he or she is acting in the best interests of the child.<sup>106</sup>

The Children's Committee adopted its first merits decision in March 2011 in a case brought against Kenya. The case dealt with the denial of Kenyan nationality to children of Nubian descent. The Commission found Kenya in multiple violations of the African Children's Charter.<sup>107</sup> The Committee gave Kenya six months within which to report on the implementation of the recommendations. A delegation of the Committee led by its Chairperson conducted a fact-finding

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102 K Ngankam 'Press statement of the 420th meeting of the PSC on the Rights and Welfare of the Child (ACERWC)' <http://acerwc.org/> (accessed 10 March 2014).

103 See art 43 of the African Children's Charter.

104 <http://acerwc.org/member-states/state-reports/initial-reports/> (accessed 10 March 2014).

105 EX.CL/744 (XXI).

106 See ch 2(1)(2) of the Guidelines for the Consideration of Communications provided for under art 44 of the African Charter on the Rights and Welfare of the Child, ACERWC/8/4.

107 Arts 6(2), (3) & (4); arts 3, 14(2), (b), (c) & (g) & 11(3) African Children's Charter.

mission to Kenya in February 2013 to assess the government's response to its recommendations.<sup>108</sup>

## 5 African Peer Review Mechanism

As of the end of 2013, 33 African states had signed up to the African Peer Review Mechanism (APRM), a voluntary process for self-reflection and independent assessment of various governance issues, including human rights. Niger joined in 2012 and Chad and Tunisia in 2013. At the end of 2013, 17 states had been reviewed,<sup>109</sup> though country review reports had not been published in relation to all the states which had undergone review. The culmination of the APRM process is the peer review before the APR Forum consisting of the committee of Participating Heads of State and Government (PHSG) or their representatives. This committee appoints a Panel of Eminent Persons to manage and steer the affairs of the process. The APRM process is based on a questionnaire which was finally revised in 2012 after a lengthy process. The country review report of Sierra Leone was discussed at the APR Forum in January 2012 and published later in that year. Tanzania and Zambia came before the APR Forum in January 2013.<sup>110</sup> The country review report of Tanzania was published later in the year,<sup>111</sup> while the country review report of Zambia had not been published by the end of 2013. The APR Forum also considers implementation reports with regard to states that have undergone reviews and adopted a National Programme of Action to address the issues identified through the process.

At the APR Forum in May 2013, the heads of state and government participating in the APRM process decided to elect the President of Liberia, Ellen Johnson Sirleaf, as new Chairperson of the Forum, replacing Hailemariam Desalegn, the Prime Minister of Ethiopia.

Not much has been done to implement the 2010 resolution adopted by the African Commission on closer collaboration between the Commission and the APRM process.<sup>112</sup> A former commissioner,

108 D Rachuonyo 'Nubians in Kenya: A people denied' <http://thinkafricapress.com/kenya/people-denied-nubians-kibera> (accessed 10 March 2014).

109 Algeria, Benin, Burkina Faso, Ethiopia, Ghana, Kenya, Lesotho, Mali, Mauritius, Nigeria, Rwanda, São Tomé and Príncipe, Sierra Leone, South Africa, Tanzania, Uganda and Zambia.

110 Communiqué issued at the end of the 18th summit of the Committee of Heads of State and Government participating in the African Peer Review Mechanism (APR Forum) [http://aprm-au.org/sites/default/files/18TH%20APR%20FORUM%20-%20COMMUNIQUE\\_1.pdf](http://aprm-au.org/sites/default/files/18TH%20APR%20FORUM%20-%20COMMUNIQUE_1.pdf) (accessed 10 March 2014).

111 African Peer Review Mechanism, The United Republic of Tanzania, country review report 17, January 2013, <http://aprmtoolkit.saiia.org.za/tanzania> (accessed 10 March 2014).

112 See Killander & Abebe (n 9 above).

Julienne Ondziel Gnelenga, was on the APRM Panel of Eminent Persons until her term expired in January 2014.<sup>113</sup>

## 6 African Union political organs

At the July 2012 summit, six new AU commissioners were elected. Aisha Abdullahi from Nigeria is the new Commissioner for Political Affairs, under which all the regional human rights bodies fall, except the African Children's Committee, which falls under the Department for Social Affairs. The new Commissioner for Social Affairs is Mustapha Kaloko from Sierra Leone.<sup>114</sup>

The dispute between AU member states and the International Criminal Court (ICC) intensified as one of the persons indicted in connection with the Kenyan post-election violence was elected President of Kenya. The cases of two sitting heads of state, President Kenyatta of Kenya and President al-Bashir of Sudan, are thus currently before the Court. At an extraordinary session in October 2013, the AU Assembly reiterated that the attempt by the ICC to prosecute sitting heads of state is detrimental as it has the potential of undermining peace, security and sovereignty in Africa. The Assembly during the session emphasised the need to fast-track the process of expanding the mandate of the African Court to handle international crimes.<sup>115</sup> The draft Protocol providing for such jurisdiction had not yet been adopted by the end of 2013.<sup>116</sup>

The draft Protocol establishes jurisdiction not only for genocide, crimes against humanity and war crimes, but also other crimes such as corruption and - most controversially among states - unconstitutional changes of government. In July 2012 the Executive Council requested the AU Commission, in collaboration with the AU Commission on International Law and the African Court, to come up with a definition of unconstitutional changes of government for the Protocol.<sup>117</sup> After receiving the report from the AU Commission, the Executive Council in January 2013 requested the African Commission in collaboration with the Peace and Security Council to look at the issue of legitimacy of popular uprisings in the context of unconstitutional changes of

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113 Communiqué issued at the end of the 20th summit of the Committee of Heads of State and Government participating in the African Peer Review Mechanism (APR Forum) para 29.

114 Decision on the election of the commissioners of the African Union, EX.CL/Dec.725XXI).

115 On the proposed Protocol, see J Biegon & M Killander 'Human rights developments in the African Union during 2009' (2010) 10 *African Human Rights Law Journal* 212 231; Killander & Abebe (n 9 above) 221.

116 See Exp/Min/IV/Rev.7.

117 Decision on the Protocol on amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Doc EX.CL/741(XXI)a, EX.CL/Dec 706(XXI).

government and to consider the 'structural and financial implications' of giving the African Court criminal jurisdiction.<sup>118</sup>

At the July 2012 session, the Executive Council approved an AU model national law on universal jurisdiction over international crimes and encouraged member states to 'strengthen their national legislations on the prosecution of those accused of international crimes'.<sup>119</sup>

## 7 Conclusion

The year 2012 marked the 25th anniversary of the African Commission. Since its inception, the Commission has made some positive contribution towards the realisation of human rights, although it is still confronted with serious challenges. Positive developments include the hearings on the implementation of decisions of the Commission and an increased number of decisions on communications. The submission of state reports by a number of states which have never submitted state reports before is a further positive development.

Concern must, however, be raised over the failure of the Commission to publish its decisions on communications in a timely manner. This is seemingly linked to the fact that the decisions are no longer included as attachments to the activity reports submitted by the Commission to the Executive Council.

The African Court is making slow progress but now has a substantive docket. Seven states have made a declaration allowing direct access for individuals and NGOs to the Court. At the end of 2013, cases against three of these states, Burkina Faso, Rwanda and Tanzania, were pending before the Court, while cases against Kenya and Libya submitted by the African Commission were also pending before the Court. A matter of concern is the non-submission of cases from the Commission to the Court since the decision to refer the *Gaddafi* case in October 2012.

Both the African Commission and African Court took initiatives in relation to follow-up on the implementation of their decisions. The Executive Council of the AU should heed these calls and highlight individual cases of non-compliance in its decisions and not only make a general call for compliance with the decisions of the human rights monitoring bodies. There is a need to intensify co-operation between the Commission and the Court, especially with regard to information sharing. For instance, a case submitted by the Commission to the Court was struck from the roll of the Court in 2013 due to non-receipt

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118 Decision on the Draft Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, EX.CL/Dec.766(XXII).

119 Decision on the African Union model national law on universal jurisdiction over international crimes, Doc EX.CL/731(XXI)c, EX.CL/Dec.708(XXI).

of information requested by the Court from the Commission. The failure of the Commission to properly engage with the Court may be linked to the perception of an overly arduous role of the Commission before the Court, where the original applicant before the Commission does not play any role in the proceedings before the Court.

The AU political organs continue to rhetorically support the human rights organs in their resolutions, but not much is done to exercise peer pressure on states that fail to live up to what they have committed to. The rift between the AU and the ICC is set to continue, but even if the draft protocol extending criminal jurisdiction to the African Court is eventually adopted, it is unlikely to be quickly ratified by member states. The limited resources available within the AU could better be used to strengthen the institutional framework that has already been established and which the AU member states have committed themselves to support.