

Human rights developments in the African Union during 2009

*Japhet Biegon**

Researcher and LLD candidate, Centre for Human Rights, University of Pretoria

*Magnus Killander***

Head of research, Centre for Human Rights, University of Pretoria

Summary

The year 2009 witnessed numerous human rights developments on the African continent. The African Union added a treaty on the protection of internally displaced persons to its already robust normative human rights framework. The African Commission reviewed and expanded its working groups, extended its reach to emerging issues, including climate change and the global financial crisis, and adopted reporting guidelines under the African Women's Protocol and a framework document on the abolition of the death penalty in Africa. For its part, the African Court handed down its first judgment, while the African Children's Committee further cemented its role in examining state reports under the African Children's Charter. This note provides an overview of these developments.

1 Introduction

The African Union (AU) – Africa's continental intergovernmental body – has entrenched the promotion and protection of human rights as an integral part of its mandate and agenda.¹ In 2009, the AU added a treaty on the protection of internally displaced persons to its already

* LLB (Hons) (Moi), PGDL (Kenya School of Law), LLM (Human Rights and Democratisation in Africa) (Pretoria); tehpajia@yahoo.com

** Jur Kand (Lund), EMA (Padua), LLD (Pretoria); magnus.killander@up.ac.za

¹ See E Baimu 'The African Union: Hope for better protection of human rights in Africa?' (2001) 1 *African Human Rights Law Journal* 299.

robust normative human rights framework.² Regional bodies operating under the auspices of the AU specifically charged with the functions of promoting and protecting human rights have also made significant strides in the discharge of their specific mandates. These bodies include the African Commission on Human and Peoples' Rights (African Commission), African Court on Human and Peoples' Rights (African Court) and the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee). The article reviews major developments within these bodies in the discharge of their specific mandates during 2009. It also briefly reviews developments within the AU's main organs which have relevance for human rights.

The developments highlighted in the article should not be seen in isolation from the human rights situation in Africa during 2009. In many parts of the continent, efforts to consolidate gains made over the years in the field of human rights and democratisation were enhanced. However, regression was recorded in several African countries where impunity and the resurgence of armed conflicts and unconstitutional regime changes prevailed.³ The realisation of socio-economic rights on the continent was also stalled by the global economic recession. Thus, an overall picture of the continent in 2009 shows a chequered landscape of gains and losses in the promotion and protection of human rights.

2 The African Commission on Human and Peoples' Rights

The African Commission lies at the heart of the AU's institutional framework for the promotion and protection of human rights. It is charged with the mandate of monitoring state compliance with the African Charter on Human and Peoples' Rights (African Charter),⁴ and its Protocol on the Rights of Women in Africa (African Women's Protocol).⁵ The Commission customarily holds two ordinary sessions per year, during which it performs a number of tasks in the execution of its mandate. The African Commission may also hold extraordinary sessions if and when circumstances demand. The individual commissioners who constitute the Commission are also expected to execute their specific mandates during the inter-session period. In 2009, the African Commission held

² For the main AU human rights instruments, see C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2007).

³ See Resolution on the general human rights situation in Africa, ACHPR/Res157(XLVI)09.

⁴ Art 45 African Charter.

⁵ Arts 26(1) & 32 African Women's Protocol.

two ordinary sessions⁶ and two extraordinary sessions.⁷ The fact that extraordinary sessions were held is a reflection of the recent increase in funding for the Commission by the AU. These sessions were convened with the primary aim of reducing the number of communications that were yet to be finalised by the Commission and to conclude its position on the issues of complementarity with the African Court.⁸

2.1 Election of new members and bureau

In 2009, the Chairperson of the African Commission, Sanji Mmasenono Monageng (from Botswana), was elected as a judge of the International Criminal Court (ICC) with effect from March 2009. Her term as commissioner was to expire in July. The term of Commissioner Nyanduga (from Tanzania) also came to an end in July. Two new members of the Commission were thus elected at the 15th ordinary session of the AU Executive Council held in Sirte, Libya, in June 2009. Mohamed Fayek (from Egypt) and Mohamed Bechir Khalfallah (from Tunisia) were elected as new members.⁹ The Executive Council also re-elected Zainabo Sylvie Kayitesi (from Rwanda) as a member of the Commission.¹⁰ The trio were sworn in as commissioners during the 46th ordinary session of the Commission held in November 2009 in Banjul, The Gambia.¹¹

With the election of Mr Fayek and Mr Khalfallah, both of whom have human rights non-governmental organisation (NGO) experience, the African Commission for the first time in a couple of years includes members from the North African region. The addition of Arab-speaking commissioners should be beneficial for the work of the Commission relating to the promotion and protection of human rights in this region of the continent.

The Commission now consists of six female and five male members; however, it seems that Commissioner Angela Melo (from Mozambique) has ceased to participate actively in the work of the Commission since

⁶ In May and November 2009, the African Commission held its 45th and 46th ordinary sessions, respectively, in Banjul, The Gambia.

⁷ In April and October 2009, the Commission held its 6th and 7th extraordinary sessions in Banjul, The Gambia, and Dakar, Senegal, respectively.

⁸ See 26th Activity Report of the African Commission, para 150; 27th Activity Report of the African Commission, para 219.

⁹ Decision on Election of Members of the African Commission on Human and Peoples' Rights, EX.CL/Dec.497(XV) Rev 1.

¹⁰ As above.

¹¹ 27th Activity Report, para 23.

April 2009, although her mandate expires only in 2013.¹² Rule 8(1) of the African Commission's interim Rules of Procedure provides:¹³

If, in the unanimous opinion of the other members of the Commission, a member has stopped discharging his or her duties for any reason other than a temporary absence, the Chairperson of the Commission shall inform the Chairperson of the African Union Commission, who shall declare the seat vacant.

The African Commission thus has some discretion as to how long an absence from the sessions of the Commission should be tolerated. The Commission declared in November 2006 that Commissioner Babana had stopped discharging his duties, with the result that the AU Executive Council appointed a new member in July 2007 for the two years that remained of his term. Commissioner Babana had been appointed by the AU Assembly in July 2003 and participated in the work of the Commission until the 37th ordinary session in May 2005. Following this precedent, the Commission should request the Chairperson of the AU Commission to declare the seat of Commissioner Melo vacant at the session in May 2010 should she fail to attend this session.

At the November session, a new bureau of the Commission was elected. Commissioners Reine Alapini-Gansou and Mumba Malila were respectively elected Chairperson and Vice-Chairperson of the Commission for a term of two years.¹⁴ Prior to the election of the new bureau, Commissioners Tom Nyanduga and Reine Alapini Gansou served as acting Chairperson and acting Vice-Chairperson as replacements for Commissioners Sanji Monageng and Angela Melo.

2.2 State reporting

The state reporting procedure is one of the two mechanisms (the other being the communications procedure) that the African Commission uses to monitor state compliance with the African Charter and the

¹² Commissioner Melo was re-elected to the Commission for a six-year period in July 2007. Her absence from the Commission is apparently linked to her appointment as Director of the Division of Philosophy and Human Rights of UNESCO in March 2009. She participated in the 6th extraordinary session of the Commission in Banjul, 30 March – 3 April 2009 but did not attend the 45th ordinary session in May, the 7th extraordinary session in October or the 46th ordinary session in November. She is not included in the list of members of the Commission published on the website of the Commission; see 'List and addresses of the commissioners of the African Commission on Human and Peoples' Rights' (updated January 2010), http://www.achpr.org/english/_info/members_achpr_en.html (accessed 16 March 2010), though the Commission took note of her absence from the November 2009 session; see 27th Activity Report of the African Commission, para 6.

¹³ This provision corresponds substantively with art 39(2) of the African Charter.

¹⁴ 27th Activity Report, para 24.

African Women's Protocol.¹⁵ The Commission's mandate to examine state reports draws from articles 62 and 26 of the African Charter and the African Women's Protocol respectively. It examines the reports in public during its ordinary sessions and issues concluding observations in respect of the reports it has examined. Since 1991, the Commission has examined a total of 77 reports, six of which were examined in 2009. During its 46th ordinary session, the Commission examined the reports of Mauritius, Uganda and Benin.¹⁶ It examined the reports of Botswana, Congo, and Ethiopia during its 47th ordinary session.¹⁷

Notably, by submitting and presenting its report during the Commission's 47th ordinary session, Botswana reduced the number of states that had never submitted a report to the Commission by one. Thus, as at the end of 2009, 12 states had not submitted any report to the Commission,¹⁸ while 26 other states were behind in the submission of reports.¹⁹ Evidently, states' non-compliance with their reporting obligations remains a major challenge to the Commission's state reporting mechanism. However, compared to previously, recent years have seen increased reporting under the African Charter, which may be attributed to the 'sensitisation conducted by commissioners whenever undertaking missions and interacting with the respective state parties'.²⁰ For instance, in reference to Botswana's submission of its initial report, Commissioner Nyanduga observed during the 46th session that he could testify that his interaction with the government of Botswana during the last six years had contributed to the submission of the Botswana state report.²¹

Apart from the consideration of state reports, a significant development in 2009 regarding the state reporting procedure was the formulation and adoption of state reporting guidelines under the African Women's Protocol. Partly for lack of reporting guidelines, no state has ever submitted a report in terms of article 26 of the Protocol. Thus, in August 2009, the African Commission, in conjunction with the Centre for Human Rights at the University of Pretoria, organised the Gender Expert Meeting on State Reporting on the Protocol on

¹⁵ See generally A Danielsen *The state reporting procedure under the African Charter* (1994); M Evans & R Murray 'The state reporting mechanism of the African Charter' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2006* (2008) 49.

¹⁶ 26th Activity Report of the African Commission, para 133.

¹⁷ 27th Activity Report, para 198.

¹⁸ Comoros, Côte d'Ivoire, Djibouti, Equatorial Guinea, Eritrea, Gabon, Guinea Bissau, Liberia, Malawi, São Tomé & Príncipe, Sierra Leone and Somalia. See 27th Activity Report, para 199.

¹⁹ 27th Activity Report, para 199.

²⁰ Speech by The Honourable Bahame Tom Mukirya Nyanduga, the Acting Chairperson of the African Commission, at the opening ceremony of the 46th ordinary session of the African Commission (on file with the authors).

²¹ As above.

the Rights of Women in Africa with the primary purpose of drafting reporting guidelines under the Protocol.²² The Meeting formulated draft guidelines for presentation to the Commission for adoption.²³ According to the final Communiqué of the 46th ordinary session, the draft guidelines were adopted by the African Commission during that session.²⁴ However, in reflection of its traditional slow pace of dissemination and publication of its activities, the Commission has not yet published the guidelines. Indeed, the 27th Activity Report of the Commission is silent regarding the adoption of the guidelines as part of the Commission's activities during the 46th session.

If the final version of the guidelines adopted by the Commission were to mirror the draft guidelines, state parties to the African Charter and the African Women's Protocol would be required to submit their state reports in two parts: Part A, dealing with the rights in the African Charter, and Part B, dealing with the rights in the Protocol. In reporting on how they have given effect to each of the Protocol rights, states would be required to do so in terms of a list of measures of implementation covering ten areas: legislation; administrative measures; institutions; policies and programmes; public education; any other measures; remedies; challenges experienced; accessibility; and disaggregated statistics. Moreover, states would be required to report on the Protocol rights under thematic clusters rather than on an article-by-article basis. The guidelines identify eight thematic clusters: equality/non-discrimination; the protection of women from violence; rights relating to marriage; health and reproductive rights; economic, social and cultural rights; the right to peace; the protection of women in armed conflicts; and the rights of especially protected women's groups. By and large, the draft guidelines are a great improvement in comparison with the Commission's reporting guidelines under the African Charter, which have been harshly criticised.²⁵

In 2009, the African Commission also published, for purposes of seeking comments from stakeholders, the Draft Principles and Guidelines on Economic, Social and Cultural Rights. Once adopted, the Principles and Guidelines will serve as 'additional guidelines for the submission

²² See J Biegón 'Towards the adoption of guidelines for state reporting under the African Union Protocol on Women's Rights: A review of the Pretoria Gender Expert Meeting, 6-7 August 2009' (2009) 9 *African Human Rights Law Journal* 615.

²³ The draft guidelines have been annexed to Biegón (n 22 above) 639-643.

²⁴ Final Communiqué of the 46th ordinary session of the African Commission, para 41.

²⁵ See G Mugwanya 'Examination of state reports by the African Commission: A critical appraisal' (2001) 1 *African Human Rights Law Journal* 110 111 (describing the 1989 Guidelines for National Periodic Reports as 'too detailed, lengthy and in some areas repetitive and unnecessarily complex'). See also K Quashigah 'The African Charter on Human and Peoples' Rights: Towards a more effective reporting mechanism' (2002) 2 *African Human Rights Law Journal* 261; F Viljoen 'State reporting under the African Charter on Human and Peoples' Rights: A boost from the South' (2000) 44 *Journal of African Law* 110 111.

of state party reports to the Commission'. The Draft Principles and Guidelines are detailed and bulky, running to a total of 74 pages. They easily fall prey to the criticism that has been levelled against previous guidelines of the African Commission which have been 'very elaborate, but also too lengthy and complicated, making compliance a matter of impossibility'.²⁶ It would have helped to minimise the existing confusion inherent in the African Commission's reporting guidelines under the African Charter, if guidelines akin to general comments available under the United Nations (UN) system were gradually adopted for each socio-economic right. If adopted in their present form, the Draft Guidelines and Principles will most likely add more confusion to the already complex maze of state reporting guidelines under the African Charter.

2.3 Resolutions

Resolutions adopted during the sessions of the African Commission are important instruments by which the Commission executes its mandate. It uses the resolutions in a number of ways: to elaborate Charter rights; to comment on the human rights situation on the continent and in individual countries; to define its relationship with external actors; and to regulate its internal operations. The Commission adopted a total of 21 resolutions in 2009.²⁷ Most of these resolutions were administrative in nature; mainly dealing with the appointment of special rapporteurs and members of working groups. Two resolutions addressed contemporary issues that impact on the enjoyment of human rights on the continent: climate change and the global financial crisis.²⁸ In the Resolution on Climate Change, the African Commission decided to carry out a study on the impact of climate change on human rights in Africa, while in the Resolution on the Impact of the Global Financial Crisis, it urged African states to, *inter alia*, continuously monitor the impact of the global financial crisis on vulnerable groups. In addition to resolutions, special rapporteurs issued press releases on specific incidents in member states.

The Resolution on the Deteriorating Human Rights Situation in the Republic of The Gambia, adopted during the Commission's 7th extraordinary session in October 2009, warrants specific discussion here. The Resolution was adopted following media reports that the Gambian President had threatened to 'kill anyone, especially human rights defenders and their supporters, whom he considered to be sabotaging

²⁶ F Viljoen *International human rights law in Africa* (2007) 372. See also Mugwanya (n 25 above) 279; Quashigah (n 25 above) 261.

²⁷ The Commission adopted three resolutions during its 45th ordinary session, three during its 7th extraordinary session and 15 during its 46th ordinary session.

²⁸ Resolution on Climate Change and Human Rights and the Need to Study its Impact in Africa, ACHPR/Res153(XLVI)09; Resolution on the Impact of the Ongoing Global Financial Crisis on the Enjoyment of Social and Economic Rights in Africa, ACHPR/Res159(XLVI)09.

or destabilising his government'. As a consequence, NGOs threatened to boycott the 46th session of the Commission which was due to be held in The Gambia in November 2009. In its Resolution, the Commission called on the AU to ensure that the Gambian President withdrew the threat and that if he could not, to provide the Commission with extra-budgetary resources to enable it to hold its 46th session either in Ethiopia or in any other member state of the AU. The Resolution also requested that the AU consider relocating the Secretariat of the Commission in the event that the human rights situation in The Gambia deteriorated.

The Resolution elicited strong but mixed reactions from the Gambian government. On the one hand, it reiterated its commitment to human rights and its willingness to host the African Commission and its sessions.²⁹ On the other hand, it made scathing attacks against the Commission and the African Centre for Democracy and Human Rights Studies, an NGO based in The Gambia, which was perceived to have been behind the adoption of the Resolution.³⁰ The Gambian government threatened to 'review its relationship with the African Centre' if the Resolution was maintained.³¹ It described the Resolution as 'obnoxious and based on ulterior motives' and questioned the reasons for its adoption 'in a meeting held outside The Gambia'.³² The stalemate, particularly as to where the 46th session would be held, was broken when high-level consultations between a delegation of the Gambian government, the Chairperson of the AU Commission and the Acting Chairperson of the African Commission were held in Kampala, Uganda, on 20 and 21 October 2009.³³ Following these consultations, the Gambian government affirmed its commitment to the African Charter, and the hosting of the 46th session of the Commission. It guaranteed the safe passage, free expression and participation of all participants who would attend the session.

2.4 Special mechanisms

The African Commission has, over the years, established special mechanisms in the form of special rapporteurs and working groups to deal with specific thematic human rights issues on the continent. There

²⁹ Letter from the Gambian Attorney-General and Minister of Justice to the African Commission, AG/C/144/Part 5/(44), 15 October 2009 (on file with the authors).

³⁰ Letter from the Gambian Office of the Secretary-General, President's Office, 28 October 2009, OP 209/400/01/Temp A/(22) (on file with the authors).

³¹ As above.

³² As above.

³³ See press release by Commissioner Tom Nyanduga, Acting Chairperson of the African Commission http://www.achpr.org/english/Press%20Release/pressrelease_gambia_46_session.pdf (accessed 27 February 2010).

are currently five special rapporteurs of the African Commission:³⁴ on prisons and conditions of detention; on the rights of women; on human rights defenders; on refugees, asylum seekers and internally displaced persons; and on freedom of expression. Save for the appointment, and in some cases reappointment, of individual members of the Commission as special rapporteurs on the above-mentioned five themes,³⁵ no substantive changes were made to the mechanism of special rapporteurs in 2009.

As of the end of 2008, the African Commission had established five working groups:³⁶ on indigenous populations and communities; on the Robben Island Guidelines; on the death penalty; on economic, social and cultural rights; and on specific issues relevant to the work of the Commission (mainly focusing on the revision of the Commission's Rules of Procedure). In addition to changes in the membership of these working groups,³⁷ there were four substantive developments in respect to working groups in 2009.

Firstly, during its 45th ordinary session, the African Commission transformed the Focal Point on the Rights of Older Persons to a Working Group on the Rights of Older Persons and People with Disabilities in Africa.³⁸ It is expected, *inter alia*, to draft a concept paper for consideration by the African Commission that will serve as the basis for the adoption of a Draft Protocol on Ageing and People with Disabilities.

³⁴ See generally R Murray 'The Special Rapporteurs in the African system' in Evans & Murray (n 15 above) 344.

³⁵ See Resolution on the Appointment of the Special Rapporteur on Prisons and Conditions of Detention in Africa, ACHPR/Res156(XLVI)09 (appointing Commissioner Catherine Dupe Atoki as the new Special Rapporteur on Prisons); Resolution on the Appointment of the Special Rapporteur on the Rights of Women in Africa, ACHPR/Res154(XLVI)09 (renewing the mandate of Commissioner Soyata Maiga as Special Rapporteur on the Rights of Women); Resolution on the Appointment of the Special Rapporteur on Human Rights Defenders in Africa, ACHPR/Res149(XLVI)09 (appointing Commissioner Mohamed Bechir Khalfallah as the new Special Rapporteur on Human Rights Defenders); Resolution on the Appointment of the Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons and Migrants in Africa, ACHPR/Res160(XLVI)09 (appointing Commissioner Mohamed Fayek as the new Special Rapporteur on Refugees); Resolution on the Reappointment of the Special Rapporteur on Freedom of Expression and Access to Information in Africa, ACHPR/Res161(XLVI)09 (renewing the mandate of Commissioner Pansy Tlakula as the Special Rapporteur on Freedom of Expression).

³⁶ See generally BTM Nyanduga 'Working groups of the African Commission and their role in the development of the African Charter on Human and Peoples' Rights' in Evans & Murray (n 15 above) 379.

³⁷ See Resolution on the Renewal of the Mandate of the Working Group on Indigenous Populations/Communities in Africa, ACHPR/Res155(XLVI); Resolution on the Renewal of the Mandate of the Chairperson and the Members of the Working Group on the Death Penalty, ACHPR/Res152(XLVI)09; Resolution on the Appointment and Composition of the Working Group on Specific Issues Relevant to the Work of the Commission.

³⁸ Resolution on the Transformation of the Focal Point on the Rights of Older Persons in Africa into a Working Group on the Rights of Older Persons and People with Disabilities in Africa, ACHPR/Res143(XXXV)09.

To treat the aged and the disabled together might seem arbitrary, but appears to be based on article 18(4) of the African Charter which provides: 'The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.'

Secondly, during the same session, the African Commission established the Advisory Committee on Budgetary and Staff Members. The Committee is tasked to work with the Secretariat of the Commission to identify activities from the Commission's Strategic Plan that should feature in its budget proposals; to prepare budget programmes of the Commission; to ensure proper execution of the programmes; and to implement the approved new structure of the Secretariat of the Commission. The Commission was for many years financially incapacitated and acutely understaffed, but it has also had difficulties in the preparation, presentation and execution of its budget. As such, the establishment of the Advisory Committee was long overdue. Indeed, the Committee could not have been established at a better time, considering that in 2008 the Commission, despite having received the highest budget allocation ever, failed to put the allocation to full use. As a consequence, the AU reduced the Commission's budget allocation for 2009 by almost half from US \$6 million for 2008 to US \$3,6 million for 2009.³⁹

Thirdly, the African Commission changed the name of the Robben Island Guidelines Follow-up Committee to the Committee for the Prevention of Torture and Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Committee for the Prevention of Torture in Africa) during its 46th ordinary session.⁴⁰ The change of the name was necessitated by the 'difficulty of national, regional and international stakeholders and partners in associating the name "Robben Island Guidelines Follow-Up Committee" with its torture prevention mandate'. It is thus anticipated that with the change of name, stakeholders will 'easily identify with the name of the Committee as a torture prevention mechanism'. While the change in name is welcomed, it tends to suggest that the Committee has a mandate akin to that of the UN Sub-Committee on the Prevention of Torture, established under the Optional Protocol to the Convention against Torture, or that of the European Committee for the Prevention of Torture, both of which operate a system of preventative visits to places of detention. Yet, contrary to the expectations that the change of name raises, the new Committee will have the same mandate as its predecessor, that is, to disseminate the Robben Island Guidelines, to work out strategies

³⁹ Decision on the budget for the African Union for the 2009 financial year, AU Executive Council, EX CL/Dec 454(XIV), January 2009.

⁴⁰ Resolution on the Change of Name of the 'Robben Island Guidelines Follow-Up Committee' to the 'Committee for the Prevention of Torture in Africa' and the Reappointment of the Chairperson and Members of the Committee, ACHPR/Res158(XLVI)09.

for their promotion, and to follow up on their implementation at the national level.⁴¹

Finally, the African Commission established a new Working Group on Extractive Industries, Environment and Human Rights Violations in Africa. This is in response to concerns of human rights violations and environmental destruction by extractive industries on the continent.⁴² The Working Group has an eight-fold mandate, which includes the examination of the impact of extractive industries in Africa and the formulation of recommendations on appropriate measures for the prevention and reparation of human and peoples' rights by these industries. The Working Group is also mandated not only to research violations of human and peoples' rights by non-state actors, but to also to inform the African Commission on the possible liability of non-state actors for these violations. It is vital to note that the liability of non-state actors is an issue of which there has been much debate without any consensus.⁴³ The African Commission has so far taken the position that the state is liable for violations occasioned by non-state actors.⁴⁴ The establishment of the Working Group on Extractive Industries, therefore, signifies that the Commission is inclined towards extending liability for human rights violations to non-state actors.

2.5 The death penalty in Africa

In 2009, the African Commission bolstered its campaign for the abolition of the death penalty on the continent.⁴⁵ In particular, as part of the work of the Working Group on the Death Penalty, the Commission organised the First Conference on the Question of the Death Penalty in

⁴¹ See Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa.

⁴² Resolution on the Establishment of a Working Group on Extractive Industries, Environment and Human Rights Violations in Africa, ACHPR/Res148 (XLVI).

⁴³ See generally P Alston (ed) *Non-state actors and human rights* (2005); A Clapham *Human rights in the private sphere* (1993).

⁴⁴ See *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

⁴⁵ While the African Charter impliedly permits the death penalty, the African Commission has been advocating for the abolition of the death penalty on the continent for a decade now. In 1999, the Commission adopted a resolution urging African states to 'consider a moratorium on executions' and to 'reflect on the possibility of abolishing the death penalty'. Similarly, in its decision in *Interights & Others (on behalf of Bosch) v Botswana* (2003) AHRLR 55 (ACHPR 2003), the Commission encouraged all states party to the African Charter to 'take all measures to refrain from exercising the death penalty'. This decision was followed in 2004 with the creation of the Working Group on the Death Penalty which was mandated to develop a strategic plan for the abolition of the death penalty. In 2008, the Commission reiterated its 1999 Resolution by urging states that still retain the death penalty to 'observe a moratorium on the execution of death sentences with a view to abolishing the death penalty'. On the death penalty in Africa, see L Chenwi *Towards the abolition of the death penalty in Africa: A human rights perspective* (2007); D van Zyl Smit 'The death penalty in Africa' (2004) 4 *Africa Human Rights Law Journal* 1.

Africa for Central, Eastern and Southern Africa. The conference brought together 50 participants representing states, AU organs, national human rights institutions, academic institutions and NGOs, with a view to debating issues concerning the death penalty and adopting a framework for its abolition.⁴⁶ At the conclusion of the conference, the participants adopted the Kigali Framework Document on the Abolition of the Death Penalty in Africa. The Framework Document sets out nine strategies to be employed in converting retentionist and *de facto* abolitionist states to abolitionist states. The strategies include conducting awareness campaigns and public debates on the death penalty and initiating public interest litigation to challenge the penalty. The document recommends the drafting of a Protocol to the African Charter on the Abolition of the Death Penalty in Africa to 'fill gaps in the African Charter on the inviolability and sanctity of human life'.

It is important to note here that in 2009, Burundi, Mali and Togo abolished the death penalty, in effect joining the ranks of abolitionist states in Africa.⁴⁷ Positive developments towards the abolitionist trend were also recorded in Kenya and Nigeria. In August 2009, the Kenyan President not only commuted 4 000 death row convicts to life imprisonment, but he also issued a directive that the relevance of the death penalty in the country's statute books be urgently reviewed.⁴⁸ However, in a move that threatened to reverse the gains made in Kenya towards becoming a *de jure* abolitionist state, the Kenyan police proposed the death penalty for persons found guilty of illegally possessing 'any automatic or semi-automatic self-loading military assault rifle of any other calibre'.⁴⁹ In Nigeria, the state of Lagos pardoned and released three death row prisoners, while the sentences of 37 other death row convicts were commuted.⁵⁰ Negative developments were recorded in Uganda, which proposed to introduce the death penalty for 'aggravated homosexuality'.⁵¹

2.6 Communications

The African Commission exercises its protective mandate through the communications procedure which serves to hold states accountable

⁴⁶ Concept note for a regional conference on the death penalty for Central, East and Southern Africa (on file with the authors).

⁴⁷ See Kigali Framework Document on the Abolition of the Death Penalty in Africa (on file with the authors) commending Burundi, Mali and Togo 'for being the latest countries to abolish the death penalty'.

⁴⁸ See 'Kibaki saves 4 000 prisoners from hangman's noose' <http://www.eastandard.net> (accessed 9 February 2010).

⁴⁹ See 'Owning AK-47 soon to be a hanging offence' <http://www.nation.co.ke/News/-/1056/669076/-/unii2d/-/index.html> (accessed 9 February 2010).

⁵⁰ See 'Pardons and commutations in Nigeria' <http://www.worldcoalition.org/modules/smartsection/item.php?itemid=360> (accessed 16 February 2010).

⁵¹ See 'Ugandan Anti-homosexuality Bill should not be adopted' http://www.chr.up.ac.za/press%20releases/Uganda-statement_1.pdf (accessed 10 March 2010).

for violations of the African Charter.⁵² It has used this procedure to progressively and generously interpret the African Charter, in effect yielding a rich jurisprudence. The decisions of the Commission following the consideration of communications are published upon the approval of the AU Assembly of Heads of State and Government.⁵³ In 2009, the Commission published nine decisions. Of these, two were decided in 2008 but only published in the 26th Activity Report in 2009: *Mouvement Ivoirien des Droits Humains (MIDH) v Côte d'Ivoire (I)*⁵⁴ and *Wetsh'okonda Koso and Others v Democratic Republic of the Congo*.⁵⁵ Of the decisions delivered by the Commission in 2009, three were on communications submitted against Zimbabwe, two against Sudan, two against Cameroon and one against Kenya. One of the communications had been submitted in 2000, two in 2003, two in 2004, and two in 2005, illustrating the long time the Commission takes before reaching a decision on cases submitted to it.

2.6.1 Decisions at the 6th extraordinary session, April 2009

In *Zimbabwe Lawyers for Human Rights and Another v Zimbabwe*,⁵⁶ the African Commission held that by preventing the publication of newspapers and seizing their equipment, the Zimbabwean government had violated the right to freedom of expression and property. By preventing the journalists to work, their right to income and livelihood and their right to work had been violated. In a related case, *Scanlen and Another v Zimbabwe*,⁵⁷ the Commission held that provisions in the Access to Information and Protection of Privacy Act, dealing with the compulsory accreditation of journalists and the criminalisation of the publication of 'falsehoods', violated the right to freedom of expression as set out in article 9(2) of the African Charter.

In *Zimbabwe Lawyers for Human Rights and Another (on behalf of Meldrum) v Zimbabwe*,⁵⁸ an American journalist, a long-term resident of Zimbabwe, published an article which caused the Zimbabwean authorities to deport him. In so doing, the authorities ignored the orders of the Zimbabwean courts. The African Commission held *inter alia* that the right to a deportation procedure 'in accordance with the law' (article 12(4)) and the independence of the judiciary (article 26) had been violated.

⁵² See F Viljoen 'Communications under the African Charter: Procedure and admissibility' in Evans & Murray (n 15 above) 76.

⁵³ Art 59 African Charter.

⁵⁴ (2008) AHRLR 62 (ACHPR 2008).

⁵⁵ (2008) AHRLR 93 (ACHPR 2008).

⁵⁶ Communication 284/2004, 26th Activity Report.

⁵⁷ Communication 297/2005, 26th Activity Report.

⁵⁸ Communication 294/2004, 26th Activity Report.

2.6.2 Decision at the 45th ordinary session, May 2009

In *Gunme and Others v Cameroon*,⁵⁹ the complainants alleged that the right to self-determination of Southern Cameroonians had been violated continuously since the 1961 plebiscite in which they were not given the opportunity to choose territorial independence. They contended that Southern Cameroonians had suffered marginalisation and discrimination, particularly in the education sector, in the political arena and in relation to access to basic infrastructure and justice. The complainants also alleged that Cameroon's membership in the *Organisation pour l'Harmonisation des Droits d'Affaires en Afrique* (OHADA), which adopts legislation in French only and which becomes directly applicable in Cameroon, constituted discrimination against English-speaking people of Cameroon. In its decision, the African Commission affirmed its earlier position as set out in *Katangese Peoples' Congress v Zaire*,⁶⁰ that the African Charter could not be invoked to threaten state sovereignty. Consequently, it did not find that the right to self-determination of Southern Cameroonians had been violated. However, the Commission found that the people of Southern Cameroon could legitimately claim to be a 'people' and they qualified to be regarded as such since they manifested numerous characteristics and affinities, which include a common history, linguistic tradition, territorial connection and political outlook. Therefore, while Southern Cameroonians could not secede, they were entitled to exercise their right to self-determination in a number of other ways.

2.6.3 Decisions at the 46th ordinary session, November 2009

In *Centre for Minority Rights Development (Kenya) and Another v Kenya*,⁶¹ the African Commission held in a 298-paragraph decision that members of the Endorois community, who had been evicted from their ancestral land, had had their rights to freedom of religion, property, cultural life, free disposal of natural resources, and development violated. The Commission declared the communication admissible based on the fact that the state had not contested admissibility. The Commission recommended that Kenya *inter alia* give back the Endorois ancestral land to the community, pay adequate compensation for loss suffered and pay royalties to the community for economic activities on their land. The Kenyan government was given three months to report back on their implementation of the Commission's recommendations. The decision is a significant contribution to jurisprudence on the rights of indigenous peoples. The decision is also significant as being the first decision in which the Commission has found a violation of the right to development in article 22 of the African Charter, the only international

⁵⁹ Communication 266/2003, 26th Activity Report.

⁶⁰ (2000) AHRLR 72 (ACHPR 1995).

⁶¹ Communication 276/2003, 27th Activity Report.

treaty that includes the right to development. In finding that the right to development had been violated, the Commission held that the government had not sufficiently consulted the community. The government had also failed to provide compensation or suitable alternative land for grazing.⁶²

In *Association of Victims of Post-Electoral Violence and Another v Cameroon*,⁶³ the claim was that compensation had not been paid to the victims of post-electoral violence in October 1992 in Bamenda, Cameroon, despite a committee responsible for compensation having been established in February 1993. The victims brought a case before the Administrative Chamber of the Supreme Court in 1998 which to date had not decided the matter. In April 2003 the case was brought before the African Commission. In December 2004 the Commission declared the case admissible as it considered the 'delays by the Administrative Chamber of the Supreme Court of Cameroon excessive'.⁶⁴ The Commission held that by 'failing to prevent the 1992 post-electoral violence even though there were early warning signs', the state had violated article 1 of the African Charter.⁶⁵ The Commission further found a violation of article 7 in relation to the right to have a cause heard within reasonable time and of article 4 (physical integrity) and article 14 (right to property). The Commission held that Cameroon should compensate the victims but, in line with its case law, left it to the state to determine the amount 'in accordance with applicable laws'.⁶⁶

*Doebbler v Sudan*⁶⁷ dealt with the termination of refugee status for thousands of Ethiopian refugees from Sudan in 1999. The communication was submitted in February 2000 and the African Commission declared it inadmissible due to a failure to exhaust local remedies in November 2003. In February 2004, the complainant requested the Commission to reconsider its decision. It decided to do so and invited the parties to submit new arguments on admissibility. In May 2006 the Commission declared the communication admissible since⁶⁸

it was not reasonable to expect refugees to seize the Sudanese Courts of their complaints, given their extreme vulnerability and state of deprivation, their fear of being deported and their lack of adequate means of legal representation.

In November 2009, nearly ten years after the submission of the communication, the Commission found that no provisions of the African Charter had been violated as it found no proof of forcible repatriation.

⁶² Para 298.

⁶³ Communication 272/03, 27th Activity Report.

⁶⁴ Para 65.

⁶⁵ Para 121. The Commission comes to this conclusion after an excessively long analysis of art 1; see paras 93-121.

⁶⁶ Para 138.

⁶⁷ Communication 235/00, 27th Activity Report.

⁶⁸ Para 116.

In *Darfur Relief and Documentation Centre v Sudan*,⁶⁹ it was claimed that the government of Sudan owed 33 Sudanese citizens compensation for their imprisonment in Iran from 1983 to 1990. The Sudanese citizens, who at the time were employed by a state-owned Iraqi oil company, were arrested by Iran during the Iran-Iraq war. After their release, Iraq agreed to compensate them. The payment had to be done through the Sudanese Ministry of Finance and Economic Planning and Iraq cancelled debt owed by Sudan equivalent to the sum agreed to be paid to the released workers. Part of the agreed compensation was paid in 1992, but the remainder has never been paid out. A case against the Ministry of Finance was pursued before the Sudanese courts between 2000 and 2003. The Commission declared the case inadmissible on the basis of non-exhaustion of local remedies as the complainant had failed to bring the case before the Sudanese Constitutional Court.⁷⁰ The Commission went on to find that the case had also not been submitted within a reasonable time as the complainant had waited two years and five months after the decision of the High Court (in 2003) to submit the case to the African Commission.

3 The African Court on Human and Peoples' Rights

The African Court is charged with the function of judicial enforcement of human rights on the continent. As a judicial body, the Court complements the quasi-judicial mandate of the African Commission. It is composed of 11 judges, who convene four times per year in ordinary sessions that last for about 15 days each. The Court has its seat in Arusha, Tanzania. In 2009, the African Court made initial steps towards being fully operational. It harmonised its rules of procedure with those of the African Commission and rendered its first judgment.

Members of the African Court and the African Commission held two joint meetings, on 14-17 July and 12-16 October 2009. At these meetings, the Commission and the Court agreed on revisions of the provisions in the African Commission's interim Rules of Procedure dealing with the relationship between the Commission and the Court. By the end of 2009, the Commission and Court had not yet published their respective final Rules of Procedure.

The Court handed down its first judgment on 15 December 2009, almost six years after the entry into force of the Protocol establishing the Court.⁷¹ The case was submitted by a Chadian national residing in Switzerland against Senegal with the aim of the Court suspending the proceedings instigated in Senegal against Hissène Habré, for crimes he committed while he was president of Chad. Senegal has not made a

⁶⁹ Communication 292/2004, 27th Activity Report.

⁷⁰ Para 73.

⁷¹ *Yogogombaye v Senegal*, Application 001/2008.

declaration under article 34(6) of the Protocol establishing the Court allowing for direct individual access to the Court. The case in question could therefore easily have been struck off the roll by the Court registry. Instead, the Court delivered a 13-page judgment to which Judge Ouguergouz appended a separate opinion.

Due to the slow processing of cases before the Commission, it might still be some time before a case is submitted by the African Commission to the African Court. Arguably, the Commission can only submit a case which claims that the violation took place after the state against which the complaint was submitted ratified the Court Protocol. The exception would be cases of continuous violations. Under the interim Rules of Procedure of the Commission, a state has six months from being informed about the decision to supply the Commission with information about how it has implemented the decision.⁷² If no response is received, the Commission shall send a reminder giving the state three months to respond.⁷³ If the Commission then decides that a state has not complied with its recommendations, it can proceed with bringing the case to the Court. It is worth noting that of the cases decided in 2009, in which the Commission found violations of the African Charter, only one was against a country that had ratified the Court Protocol, namely Kenya.

4 The African Committee of Experts on the Rights and Welfare of the Child

The African Children's Committee is Africa's continental body of experts charged with the function of monitoring the implementation of the African Charter on the Rights and Welfare of the Child (African Children's Charter).⁷⁴ It is composed of 11 members of 'high moral standing, integrity, impartiality and competence in matters of the rights and welfare of the child',⁷⁵ who meet twice a year to, *inter alia*, consider state reports and communications. In 2009, the Committee held its 13th and 14th ordinary sessions, both of which were held in Addis Ababa, Ethiopia.⁷⁶ The main activities of the Committee during these two sessions are discussed below.

⁷² Art 115(2).

⁷³ Art 115(4).

⁷⁴ (1990) OAU Doc CAB/LEG/24.9/49 (1990).

⁷⁵ Art 33(1) African Children's Charter.

⁷⁶ The Committee held its 13th session from 20 to 22 April 2009 and its 14th session from 16 to 19 November 2009.

4.1 State reporting

Every state party to the African Children's Charter is obliged to report to the African Children's Committee on the measures it has adopted to give effect to the provisions of the Children's Charter.⁷⁷ This obligation should be discharged within two years of the entry into force of the Charter in respect of a state party and, thereafter, every three years.⁷⁸ The Committee considered its first batch of state reports in 2008. In 2009, the Committee further cemented its role in monitoring compliance with the African Children's Committee through the state reporting procedure. The Committee held a pre-session for consideration of six state party reports during its 13th session.⁷⁹ The reports of Burkina Faso, Kenya, Mali, Niger, Rwanda and Tanzania were considered during the pre-session. Issues to be raised and questions to be posed to the respective states during the examination of the reports at the 14th session were formulated. As planned, the Committee examined the reports of the six states during the 14th session,⁸⁰ but failed to promptly adopt concluding observations after considering the reports.

4.2 Communications

The African Children's Committee is mandated to receive and consider communications alleging violations of the African Children's Charter.⁸¹ Since its inauguration in 2001, the Committee had received two communications. The Committee had by the end of 2009 not yet reached any final decision on any of these communications, despite the fact that it received the first communication way back in 2005. Such delay renders hollow the communications procedure of the African Children's Committee, and is an issue that should be addressed urgently for, with time, the Committee will most definitely receive more communications. Thus, during its 14th session, the Committee was implored by the NGO Forum to⁸²

[a]mend its guidelines for the consideration of [c]ommunications to include a timeframe of six weeks for the ACERWC to acknowledge receipt of a communication, to make a decision on admissibility and finally to give its decision on the merits of the [c]ommunication within a reasonable period of time to ensure that victims are not left without redress.

It would do well for the Commission to implement this recommendation because, as it has been rightly observed, '[t]he longer the consideration

⁷⁷ Art 43(1) African Children's Charter.

⁷⁸ As above.

⁷⁹ See J Sloth-Nielsen & B Mezmur 'Out of the starting blocks: The 12th and 13th sessions of the African Committee of Experts on the Rights and Welfare of the Child' (2009) 9 *African Human Rights Law Journal* 336.

⁸⁰ See Report of the 14th session of the African Children's Committee.

⁸¹ Art 44(1) African Children's Charter.

⁸² Report of the 14th session, para 31(iv).

of a communication takes, the more it allows the perpetuation of the violation of children's rights'.⁸³

5 African Union main organs

5.1 Standard setting

On 23 October 2009, Africa witnessed a landmark development in standard setting when a Special Summit of the AU convened in Kampala, Uganda,⁸⁴ and adopted the Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention). It is estimated that Africa is home to 11,6 million internally displaced persons (IDPs), representing 45 per cent of the world's population of IDPs.⁸⁵ The Convention therefore seeks to address the problem of internal displacement on the continent by 'eradicating the root causes, especially persistent and recurrent conflicts as well as addressing displacement caused by natural disasters'.⁸⁶ It establishes a legal framework for preventing internal displacement,⁸⁷ for protecting and assisting IDPs,⁸⁸ and for solidarity, co-operation and mutual support between states in combating internal displacement.⁸⁹ Moreover, the Convention sets out general duties of states,⁹⁰ non-state actors⁹¹ and the AU.⁹²

As the first ever regional treaty to address the plight of IDPs, the Kampala Convention is a 'landmark legal instrument in international human rights and humanitarian law'.⁹³ It sets a precedent that is worth being emulated at the international and regional levels. The impact of the Convention will, however, turn on a number of factors, including its rapid ratification by states and implementation at the national level.

⁸³ Sloth-Nielsen & Mezmur (n 79 above) 336 346.

⁸⁴ African Union Special Summit of Heads of State and Government on Refugees, Returnees, and Internally Displaced Persons in Africa, Kampala, Uganda, 22-23 October 2009.

⁸⁵ Internal Displacement Monitoring Centre (IDMC) *Internal displacement: Global overview of trends and developments in 2008* (2009) 9.

⁸⁶ Preamble, para 5 Kampala Convention.

⁸⁷ Art 4 Kampala Convention.

⁸⁸ Art 5 Kampala Convention.

⁸⁹ Art 5(2) Kampala Convention.

⁹⁰ Art 3 Kampala Convention.

⁹¹ Arts 6 & 7 Kampala Convention.

⁹² Art 8 Kampala Convention.

⁹³ 'Press Release' issued by the Special Rapporteur on Refugees, Asylum Seekers, Returnees and Internally Displaced Persons, http://www.achpr.org/english/Press%20Release/Kampala%20CONVENTION_IDPs.pdf (accessed 26 January 2010).

At the end of 2009, 25 African states had signed the Convention,⁹⁴ while none had ratified it. The Convention will come into force upon the ratification of 15 states.⁹⁵ The greater challenge, however, lies in preventing and eradicating violent conflicts in Africa which are the primary generators of IDPs on the continent.

In addition to the Kampala Convention, two other instruments with relevance to human rights in Africa, adopted by the AU in 2009, should be mentioned. In February 2009, the AU Assembly adopted the Statute of the African Union Commission on International Law which is set to play a leading role in the drafting of new treaties, including in the field of human rights.⁹⁶ The African Charter on Statistics was also adopted at the same session. The Charter will come into force upon the 15th ratification. So far, only Mauritius has ratified the Charter. Hopefully, the Charter will contribute to the development of more accurate statistics from African countries which in turn would be beneficial for monitoring compliance with human rights.

5.2 African Union Assembly

Seemingly as a result of the indictment of the Sudanese President al-Bashir by the ICC, the Assembly in February mandated the AU Commission, in consultation with the African Commission and the African Court, to examine the implications of giving the African Court competence to try international crimes.⁹⁷ By the end of 2009, no concrete proposals had been presented. Ways in which to finance an expansion of the African Court's mandate would need to be considered seriously. According to a decision of the AU Assembly in July 2006, the former Chadian president Hissène Habré is due to be prosecuted in Senegal on behalf of the AU. However, his trial has not begun due to a lack of money. The Assembly in July 2009 again called for contributions from member states for the trial and requested the government of Senegal and the AU Commission to consider convening a donors' conference.⁹⁸

It remains to be seen whether the suggestion to establish criminal jurisdiction for the African Court will remain on the AU agenda. If concrete proposals emerge, it will be important to ensure that such jurisdiction should not be used to shield African perpetrators against

⁹⁴ Burundi, Central African Republic, Côte d'Ivoire, Comoros, Republic of Congo, Djibouti, Democratic Republic of Congo, Ethiopia, Equatorial Guinea, Gabon, The Gambia, Ghana, Liberia, Mali, Namibia, Nigeria, Rwanda, Saharawi Arab Democratic Republic, Sierra Leone, Somalia, São Tomé and Príncipe, Togo, Uganda, Zambia and Zimbabwe.

⁹⁵ Art 17 Kampala Convention.

⁹⁶ The members of the Commission were appointed by the Assembly in July 2009. See Assembly/AU/Dec 249(XIII). Of the 11 members only one is a woman.

⁹⁷ Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction, Assembly/AU/Dec 213(XII) para 9.

⁹⁸ Decision on the *Hissène Habré* case, Assembly/AU/Dec 240(XII); Decision on the *Hissène Habré* case, Assembly/AU/Dec 246(XIII).

the jurisdiction of the ICC, but that the two courts should constructively complement each other.

6 Conclusion

The year 2009 witnessed numerous human rights developments on the African continent. The regional human rights treaty bodies bolstered their efforts towards discharging their specific mandates. The African Commission established a new working group on extractive industries, in addition to making significant changes to existing working groups. It also adopted a number of resolutions, including on emerging issues such as climate change and the global financial crisis. Moreover, the Commission adopted reporting guidelines under the African Women's Protocol and a framework document for the abolition of the death penalty in Africa. The African Court handed down its first judgment, while the African Children's Committee cemented its role in examining state reports under the African Children's Charter. For its part, the AU adopted a treaty for the protection and assistance of internally displaced persons, a move that is welcomed, although the focus should now shift to the ratification and implementation of the treaty.

However, despite the positive developments recorded in 2009, the protection and promotion of human rights continued to face challenges. The African Commission continued to suffer from a lack of capacity in relation to *inter alia* effectively handling individual communications. This problem has persisted despite the increased budget allocated to the Commission over the last couple of years. Similarly, the African Children's Committee continued to score poorly in executing its protective mandate through the communications procedure. Save for a single judgment it delivered, the African Court remained dormant for the larger part of 2009. Admittedly, the Court is not fully to blame for this situation as it is dependent on the African Commission to submit cases to it or alternatively on states submitting a declaration allowing for direct access to the Court. Thus, it is hoped that in 2010 the AU and the regional human rights bodies will harness their efforts towards tackling these challenges while simultaneously building on the gains that have been made so far in the promotion and protection of human rights on the African continent.