Communications before the African Commission on Human and Peoples' Rights 1988–2002

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1 INTRODUCTION

This article gives an overview of the work of the African Commission on Human and Peoples' Rights with regard to individual communications from its first decision in 1988 until the end of 2002.[1]

The African Commission on Human and Peoples' Rights (Commission) was established in 1987 after the entry into force, the previous year, of the African Charter on Human and Peoples' Rights (Charter). The Commission received its first individual complaint in 1987 but did not take a decision on it until October 1988.[2] By the end of 2002 the Commission had taken around 100 decisions on communications submitted to it under the individual communications procedure over the previous 15 years.

Case references in this article are to the *African Human Rights Law Reports* (AHRLR) which in addition to the decisions of the Commission also publishes views adopted by the UN human rights treaty bodies with regard to African countries and domestic judgments from across the African continent.[3]

2 STATISTICAL OVERVIEW

The first decisions of the Commission were published in the 7th Annual Activity Report in 1994. Some of these decisions are not dated but cover the period 1988–1994. 23 of the communications were declared inadmissible on the ground that they were directed against states not party to the

1 For a detailed overview of the work of the Commission see Viljoen F 'The African Commission on Human and Peoples' Rights' in Heyns (ed) *Human rights law in Africa* (2004) 385. See also Heyns C and Killander M 'The African human rights system' in Gomez Isa K and De Feyter K (eds) *International protection of human rights at the dawn of twenty-first century*, University of Deusto-EIUC, Bilbao, forthcoming.

2 *Korvah v Liberia* (2000) AHRLR 140 (ACHPR 1988).

3 The first volume of the AHRLR contains all the decisions of the Commission from its inception until the end of 2000. Two further volumes have so far been published, 2001 and 2002. The AHRLR is published by Juta. For more information see the website of the Centre for Human Rights, University of Pretoria, www.chr.up.ac.za.

Charter.[4] Of the remaining 29 decisions five were referrals of the case for decision at a later session and one confirmed interim measures. Two files were closed because of withdrawal of the communications and two due to amicable settlement. One case was closed because the prisoner had been released and another because a prisoner had been granted bail. In a case 'on the general political situation in Malawi' the information was noted and the matter closed.[5] The Commission declared 14 communications inadmissible on other grounds and two were decided on the merits, one finding serious or massive violations and the other finding a violation of articles 4, 5 and 7 of the Charter. In both cases the Commission decided to call the attention of the OAU Assembly to the situation as provided for under article 58 of the Charter.

The Commission took 26 decisions on individual communications in 1995. One case was closed after withdrawal and 17 declared inadmissible. Out of eight decisions, on the merits, violations were found in seven cases and of these, two cases refer to serious or massive violations, though no explicit reference to article 58 was made. In 1996 the Commission decided five cases. The Commission found violations in three of these cases, of which serious or massive violations in one. One case was declared inadmissible and an amicable settlement reached in the remaining case. In 1997 the Commission decided seven cases, finding violations in two and no violation in two out of four decisions on the merits. Three cases were declared inadmissible. The Commission only took three decisions on individual cases in 1998, finding Nigeria in violation of the Charter in all of them. Out of 11 cases decided in 1999 two were declared inadmissible and violations found in nine. In 2000 the Commission decided 16 cases. It closed one case after an amicable settlement, declared six cases inadmissible and found violations in nine cases. In 2001 the Commission found violations in all four cases it decided. In 2002 two cases were declared inadmissible and one case was closed after withdrawal of the communication by the complainant.

Out of a total of 98 cases[6] considered by the Commission up to the end of 2002, 48 were declared inadmissible, four closed after the withdrawal of

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4 14 complaints were declared inadmissible on this ground against states that have later become parties to the Charter: Angola, Burundi, Ethiopia (6), Ghana (2), Lesotho and Malawi. One complaint was submitted jointly against Cameroon, Ethiopia, Kenya and Malawi. Complaints were also declared inadmissible that had been submitted against states that are not members of the OAU, now AU, which is a requisite for ratifying the Charter (art 63): Bahrain, Indonesia, Morocco (3), USA (2), Yugoslavia and the OAU. One complaint was submitted jointly against the USA and Haiti. See Institute for Human Rights and Development *Compilation of decisions on communications of the African Commission on Human and Peoples' Rights 1994-2001* (2002). See also Viljoen (fn 1 above) 441.

5 For statistical purposes I consider the last three cases as declared inadmissible.

6 The cases against non-state parties are not included. Also not included are the six procedural decisions included in the 7th Annual Activity Report since these cases were later declared inadmissible or a decision taken on the merits. Many cases have been joined, thereby partly explaining the discrepancy between the roughly 250 cases registered by the Commission and the number of cases considered by the Commission.

the complaint and four closed after an amicable settlement was reached. The Commission took a decision on the merits in 42 cases, finding violations in 39 of these. By the end of 2002 the Commission had decided communications submitted against 34 states parties to the Charter. The Commission had found 17 states in violation of the Charter.[7]

The decisions from 1994 are only one or two paragraphs long, making it difficult to draw a conclusion as to why the Commission came to its conclusion. The Commission's decisions have become more elaborate over the years so that the average length of a decision in 2000 was 43 paragraphs, with the longest decision being 150 paragraphs.[8] Still many decisions, also from later years, show a lack in legal reasoning.

Figure 1. Statistical overview of decisions taken by the Commission on individual communications

Year	Number of cases	Inadmissible	Amicable	Withdrawn	Violation	No violation
1994	23	17	2	2	2	
1995	26	17		1	7	1
1996	5	1	1		3	
1997	7	3			2	2
1998	3				3	
1999	11	2			9	
2000	16	6	1		9	
2001	4				4	
2002	3	2		1		
Total	98	48	4	4	39	3

Figure 2. Number of violations found by the African Commission by Charter article 1988–2002

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	20	21	23	24	26
3	9	5	12	19	24	32	3	12	9	3	11	4	7	1	6	1	6	2	1	1	1	9

Art 1 (legislative or other measures); art 2 (non-discrimination); art 3 (equality before the law); art 4 (life); art 5 (dignity); art 6 (personal liberty and security); art 7 (fair trial); art 8 (conscience); art 9 (expression); art 10

7 Angola, Botswana, Burkina Faso, Burundi, Cameroon, Chad, DRC (formerly Zaire), the Gambia, Ghana, Kenya, Malawi, Mauritania, Nigeria, Rwanda, Sierra Leone, Sudan, Zambia.

8 *Malawi African Association and Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000).

(association); art 11 (assembly); art 12 (movement); art 13 (political participation); art 14 (property); art 15 (work); art 16 (health); art 17 (education); art 18 (family); art 19 (equality of peoples); art 20 (self-determination); art 21 (disposal of wealth and natural resources); art 22 (development); art 23 (peace and security); art 24 (environment); art 25 (human rights education) and art 26 (judicial independence). The table only includes articles under which the Commission found one or more violations from 1988 to 2002.

3 GENERAL PRINCIPLES AND PROCEDURE

3.1 *Locus standi*

A decision by the Commission in 1995 against Algeria indicates that communications can be brought by the victim, in the name of an alleged victim or by anyone if alleging grave and massive violations.[9] The lack of a victim requirement in the case of grave or massive violations was confirmed in a case against Mauritania in which it was held that 'it may be impossible to give a complete list of names of all the victims'. The Commission noted that article 56(1) of the Charter only requires the indication of 'the names of those submitting and not those of all the victims of the alleged violations'.[10] Most complaints have been submitted by NGOs, most of the times on behalf of victims, but in some cases as an *actio popularis* in cases of grave or massive violations. In *SERAC and Another v Nigeria* the Commission thanked the two human rights NGOs that brought the matter under its purview. This is a demonstration of the usefulness to the Commission and individuals of *actio popularis*, which is wisely allowed under the African Charter.[11]

3.2 Admissibility

Article 56 of the African Charter provides for seven criteria which a complaint must fulfil in order to be considered.[12] The first criterion is that the complaint must indicate the author, which as mentioned above does not have to be the victim. The second criterion is that the complaint must be compatible with the Charter. This criterion has been used by the Commission to declare inadmissible cases which do not show a *prima facie* violation of the Charter. The third criterion is that a communication should not be written in disparaging or insulting language. This ground to declare a communication has only been used once, in a communication against Cameroon decided by the Commission in 1997.[13] The fourth criterion is

9 *Centre for the Independence of Judges and Lawyers v Algeria* (2000) AHRLR 16 (ACHPR 1995) par 6.

10 *Malawi African Association and Others v Mauritania* (fn 8 above) par 79.

11 *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) par 49.

12 Viljoen F 'Admissibility under the African Charter' in Evans and Murray (eds) *The African Charter on Human and Peoples' Rights – The system in practice, 1986–2000* (2002) 61.

13 *Ligue Camerounaise des Droits de l'Homme v Cameroon* (2000) AHRLR 61 (ACHPR 1997).

that the complaint must not be based exclusively on reports in the mass media. In a case against the Gambia in which the government argued that the communication should be declared inadmissible on this ground the Commission held:

> While it would be dangerous to rely exclusively on news disseminated from the mass media, it would be equally damaging if the Commission were to reject a communication because some aspects of it are based on news disseminated through the mass media.[14]

The majority of the communications that have been declared inadmissible have been declared such on the basis of article 56(5) dealing with the exhaustion of local remedies.[15]

The rule on exhaustion of local remedies is however not absolute. Remedies must be available, effective, sufficient and not unduly prolonged.[16] In a number of cases where the jurisdiction of the courts have been ousted the Commission has found that local remedies are not available.[17] The onus is on the government to prove that remedies are available.[18] A complainant is not required to exhaust remedies that are discretionary or in the hands of impartial bodies that do not apply legal principles.[19] The requirement of exhaustion of local remedies has been held by the Commission not to be applicable in cases of massive violations.[20]

The approach of the Commission with regard to exhaustion of local remedies when the complainant is in exile has varied depending on the type of violation alleged. In *Abubakar v Ghana* the complainant lived in exile after having been detained without charge in Ghana for seven years. After his escape the authorities tried to get information about his whereabouts through his relatives and searches of his house. The Commission held that '[c]onsidering the nature of the complaint it would not be logical to ask the complainant to go back to Ghana in order to seek a remedy from the national legal authorities'.[21] In *Jawara v The Gambia* the Commission held that

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14 *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000) par 24.

15 For a detailed overview of the requirement of exhaustion of local remedies see Onoria H 'The African Commission on Human and Peoples' Rights and the exhaustion of local remedies under the African Charter' (2003) 3 *African Human Rights Law Journal* 1.

16 *Jawara v The Gambia* (fn 14 above); *Modise v Botswana* (2000) AHRLR 30 (ACHPR 2000).

17 See *eg Constitutional Rights Project (in respect of Akamu and Others) v Nigeria* (2000) AHRLR 180 (ACHPR 1995).

18 *Rencontre Africain pour la Défense des Droits de l'Homme v Zambia* (2000) AHRLR 321 (ACHPR 1996)

19 *Constitutional Rights Project (in respect of Lekwot and Others) v Nigeria* (2000) AHRLR 183 (ACHPR 1995); *Avocats Sans Frontières (on behalf of Bwampamye) v Burundi* (2000) AHRLR 48 (ACHPR 2000).

20 *Free Legal Assistance Group and Others v Zaire* (2000) AHRLR 74 (ACHPR 1995); *Organisation Mondiale Contre la Torture and Others v Rwanda* (2000) AHRLR 297 (ACHPR 1996); *Amnesty International v Sudan* (2000) AHRLR 297 (ACHPR 1999); *Malawi African Association and Others v Mauritania* (fn 8 above); *Union Interafricaine des Droits de l'Homme and Others v Angola* (2000) AHRLR 18 (ACHPR 1997).

21 *Abubakar v Ghana* (2000) AHRLR 124 (ACHPR 1996) par 6. See also similar reasoning in *Rights International v Nigeria* (2000) AHRLR 254 (ACHPR 1999) and *Otko v Kenya* (2000) AHRLR 135 (ACHPR 2000).

> [t]he complainant in this case had been overthrown by the military, he was tried *in absentia*, former ministers and members of parliament of his government have been detained and there was terror and fear for lives in the country. It would be an affront to common sense and logic to require the complainant to return to his country to exhaust local remedies.[22]

In a case alleging illegal deportation the Commission, however, held that 'the victim does not need to be physically in a country to avail himself of available domestic remedies'.[23]

The Commission has not made any determination as to what constitutes 'reasonable time' with regard to the sixth criterion, namely that a communication should be submitted within reasonable time of exhaustion of local remedies. The seventh criterion is that a communication that has been settled by another international body is not considered by the Commission. The Commission has declared a communication inadmissible on the ground that it has been submitted to the Human Rights Committee.[24] In a case against Egypt in 1997 the Commission held that

> the decision of the United Nations Sub-Commission [on the Prevention of Discrimination and Protection of Minorities] not to take any action and therefore not pronounce on the communication submitted by the complainant does not boil down to a decision on the merits of the case and does not in any way indicate that the matter has been settled as envisaged under article 56(7) of the African Charter . . .[25]

3.3 Interim/provisional measures

There is no provision in the African Charter providing for the adoption of interim measures by the Commission. However, rule 111 of the Commission's Rules of Procedure (1995) provides that 'the Commission may inform the state party concerned of its views on the appropriateness of taking provisional measures to avoid irreparable damage being caused to the victim of the alleged violation'.

The Commission had used interim measures on six occasions by the end of 2002. The earliest decision on interim measures was taken at the 14th session of the Commission in 1993 in a communication against Togo. In the 7th Annual Activity Report (1993–1994) the Commission confirmed the interim measures 'geared towards ensuring the security of Corporal Nikabou Bikagni to avoid any irreparable prejudice inflicted on the victim of the alleged violations'.[26] In two decisions on interim measures the Commission requested a stay of execution of the death penalty.[27] In *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria* the Nigerian

22 *Jawara v The Gambia* (fn 14 above) par 36.
23 *Legal Defence Centre v The Gambia* (2000) AHRLR 2000) par 17.
24 *Mpaka-Nsusu v Zaire* (2000) AHRLR 71 (ACHPR 1994). See also *Amnesty International v Tunisia* (2000) AHRLR 319 (ACHPR 1994).
25 *Njoku v Egypt* (2000) AHRLR 83 (ACHPR 1997).
26 *Degli (on behalf of Bikagni) v Togo* (2000) AHRLR 315 (ACHPR 1994) par 6.
27 *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998); *Avocats Sans Frontières (on behalf of Bwampamye) v Burundi* (fn 19 above).

military regime ignored the pleas by the Commission and others not to execute Ken Saro-Wiwa and other Ogoni leaders. The Commission found that in ignoring its interim measures Nigeria had violated article 1 of the African Charter.[28]

3.4 Amicable settlement

It is often said that one of the main features of the African human rights system is its focus on reaching amicable settlements, rather than finding violations. It is therefore interesting to note that only four of the 98 cases considered by the Commission until the end of 2002 have been discontinued as a result of an amicable settlement.[29]

3.5 Evidence

Unfortunately accused states have rarely responded to the requests of the Commission to present their views on the complaint that have been submitted against them. The Commission has held that a fact uncontested by the government shall be considered as established.[30] This has been the ground for finding the state responsible in the majority of the cases where the Commission found a violation of the Charter.

The Commission has held that it should not judge facts contested in the domestic courts but only the compliance of the state with the Charter.[31]

3.6 State responsibility

A state party's responsibility goes further than violations committed by its own agents. In a case against Chad in 1995 the Commission held that '[e]ven where it cannot be proved that violations were committed by government agents, the government has the responsibility to secure the safety and the liberty of its citizens, and to conduct investigations'.[32] In the *SERAC* case the Commission held that

> [g]overnments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement, but also by protecting them from damaging acts that may be perpetrated by private parties.[33]

28 Fn 27 above, par 122.

29 *Kalenga v Zambia* (2000) AHRLR 321 (ACHPR 1994); *Civil Liberties Organisation v Nigeria* (2000) AHRLR 179 (ACHPR 1994); *Peoples' Democratic Organisation for Independence and Socialism v The Gambia* (2000) AHRLR 104 (ACHPR 1996); *Association pour la Défense des Droits de l'Homme et des Libertés v Djibouti* (2000) AHRLR 80 (ACHPR 2000).

30 See eg *Free Legal Assistance Group and Others v Zaire* (fn 20 above).

31 *Njoku v Egypt* (fn 25 above); *Amnesty International v Zambia* (2000) AHRLR 325 (ACHPR 1999).

32 *Commission Nationale des Droits de l'Homme et des Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995) par 22. See also *Amnesty International v Sudan* (fn 20 above); *Malawi African Association and Others v Mauritania* (fn 8 above); *Mouvement Burkinabé des Droits de l'Homme et des Peuples v Burkina Faso* (2001) AHRLR 51 (ACHPR 2001); *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (fn 11 above).

33 *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (fn 11 above) par 57.

In a case against Togo the Commission, in 1995, held that the 'acts were committed under a previous administration. The Commission is satisfied that the present administration has dealt with the issues satisfactorily.'[34] However, in another decision the same year the Commission held that the state was responsible for previous violations, a view that has since then been reiterated in a number of cases:

> [A] new government inherits the responsibility for the previous government's international obligations, including the responsibility for the previous government's mismanagement. The change of government in Malawi does not extinguish the present claim before the Commission.[35]

3.7 Limitations of rights

Most of the provision of the Charter has claw-back clauses whereby a state, with a literal reading of the Charter, could use its domestic law to limit the right. Such a reading would make the Charter meaningless, in that, most rights provided for in the Charter could be removed by national legislation. Fortunately the Commission has held that any limitations must be consistent with the Charter[36] and has further held that any limitation on a right recognised in the Charter must be proportionate, necessary and acceptable in a democratic society and not render a right illusory.[37] Limitations must be done through laws of general application.[38] The onus is on the state to prove that limitations are justified.[39]

3.8 Interpretation

According to the Charter the African Commission 'shall draw inspiration from international law on human and peoples' rights'[40] including case law.[41] The Commission has made reference to a number of international instruments: the Universal Declaration of Human Rights,[42] the International Covenant on Economic and Social Rights,[43] International Covenant on Civil and Political Rights,[44] the Vienna Convention on the Law of Treaties,[45]

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34 *Degli and Others v Togo* (2000) AHRLR 317 (ACHPR 1995) par 5.
35 *Achuthan and Another (on behalf of Banda and Others) v Malawi* (2000) AHRLR 144 (ACHPR 1995) par 12. See also *Amnesty International v Sudan* (fn 20 above); *Media Rights Agenda v Nigeria* (2000) AHRLR 262 (ACHPR 2000); *Huri-Laws v Nigeria* (2000) AHRLR 273 (ACHPR 2000).
36 *Constitutional Rights Project and Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999); *Malawi African Association and Others v Mauritania* (fn 8 above); *Media Rights Agenda v Nigeria* (fn 35 above).
37 *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998).
38 *Constitutional Rights Project and Another v Nigeria* (2000) AHRLR 191 (ACHPR 1998).
39 *Media Rights Agenda and Others v Nigeria* (fn 37 above).
40 African Charter, art 60.
41 African Charter, art 61.
42 *Malawi African Associations and Others v Mauritania* (fn 8 above).
43 *Malawi African Associations and Others v Mauritania* (fn 8 above); *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (fn 11 above).
44 *Media Rights Agenda v Nigeria* (fn 35 above); *Civil Liberties Organisation and Others v Nigeria* (2001) AHRLR 75 (ACHPR 2001).
45 *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001).

Vienna Declaration and Programme of Action of the World Conference on Human Rights,[46] the UN Basic Principles of the Independence of the Judiciary,[47] the UN Declaration on the Protection of all Persons against Forced Disappearances,[48] UN Fundamental Principles on the Independence of the Judiciary,[49] UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty,[50] the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment[51] and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.[52]

In addition to its own resolutions the Commission has also sought guidance from General Comments of the UN Committee on Economic, Social and Cultural Rights[53] and the UN Human Rights Committee[54] and from case law of the UN Human Rights Committee,[55] the European Commission of Human Rights,[56] the European Court of Human Rights,[57] the Inter-American Commission of Human Rights[58] and the Inter-American Court of Human Rights.[59]

The Commission has also interpreted the Charter in a number of different resolutions. In its decisions the Commission has made reference to its Resolution on the Right to Recourse and Fair Trial (1992), Resolution on the Freedom of Association (1992), Resolution on the Military (1994) and Resolution on the Right to Fair Trial and Legal Assistance in Africa (1999).

4 SUBSTANTIVE RIGHTS

4.1 Non-discrimination and equal protection of the law

The Commission has found discrimination on the grounds of ethnicity, origin or nationality in five cases and one case each of discrimination on

46 *Legal Resources Foundation v Zambia* (fn 45 above).
47 *Civil Liberties Organisation (in respect of Bar Association) v Nigeria* (2000) AHRLR 186 (ACHPR 1995); *Centre for Free Speech v Nigeria* (2000) AHRLR 250 (ACHPR 1999); *Media Rights Agenda v Nigeria* (fn 35 above).
48 *Mouvement Burkinabè des Droits de l'Homme et des Peuples v Burkina Faso* (2001) AHRLR 51 (ACHPR 2001).
49 *Mouvement Burkinabè des Droits de l'Homme et des Peuples v Burkina Faso* (fn 48 above).
50 *Civil Liberties Organisation and Others v Nigeria* (fn 44 above).
51 *Media Rights Agenda v Nigeria* (fn 35 above); *Huri-Laws v Nigeria* (fn 35 above); *Otto v Kenya* (fn 21 above).
52 *Malawi African Association and Others v Mauritania* (fn 8 above).
53 *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (fn 11 above).
54 *Media Rights Agenda v Nigeria* (fn 35 above); *Civil Liberties Organisation and Others v Nigeria* (fn 44 above); *Legal Resource Foundation v Zambia* (fn 45 above).
55 *Civil Liberties Organisation and Others v Nigeria* (fn 44 above).
56 *Huri-Laws v Nigeria* (fn 35 above); *Civil Liberties Organisation and Others v Nigeria* (fn 44 above).
57 *Huri-Laws v Nigeria* (fn 35 above); *Legal Resource Foundation v Zambia* (fn 45 above); *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (fn 11 above).
58 *Civil Liberties Organisation and Others v Nigeria* (fn 44 above); *Legal Resource Foundation v Zambia* (fn 45 above).
59 *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (fn 11 above).

the grounds of political opinion and religion. Discrimination on the grounds of sexual orientation was complained of in a case against Zimbabwe, but this case was withdrawn.[60]

The Commission has found a violation of article 3 (equal protection of the law) in a case where rampant arrests forced the victim to go into hiding.[61] The Commission has, in a number of cases, held that laws made to apply specifically to one individual or legal entity are discriminating.

4.2 Right to life

The Commission has found a violation of article 4 (the right to life) in a number of cases where extrajudicial executions have taken place. Where a complainant has been hiding in fear of his life following death threats the Commission has found a violation of the right to life.[62]

The African Charter does not prohibit the death penalty. However, in a case dealing with the execution of Ken Saro-Wiwa and other Ogoni leaders the Commission held that '[g]iven that the trial which ordered the executions itself violate article 7, any subsequent implementation of the sentences renders the resulting deprivation of life arbitrary and in violation of article 4'.[63]

4.3 Right to dignity

Article 5 of the Charter provides for the right to dignity including the prohibition of slavery and torture, cruel, inhuman or degrading treatment and punishment. In a case against Sudan the Commission set out measures that should be taken to combat torture:

> The Commission appreciates the fact that the government has brought some officials to trial for torture, but the scale of the government's measures is not commensurate with the magnitude of the abuses. Punishment of torturers is important, but so also are preventive measures such as halting of *incommunicado* detention, effective remedies under a transparent, independent and efficient legal system, and ongoing investigations into allegations of torture.[64]

In a case against Mauritania the Commission failed to find evidence of slavery but condemned practices analogous to slavery.

4.4 Personal liberty and security

The Commission has found a violation of the right to personal liberty and security (article 6) in 24 cases, most of these dealing with arbitrary arrest and detention. The Commission has also found violations of the right to personal liberty and security in cases where there has been no legal

60 *Courson v Zimbabwe* (2000) AHRLR 335 (ACHPR 1995).
61 *Aminu v Nigeria* (2000) AHRLR 258 (ACHPR 2000).
62 *Aminu v Nigeria* (fn 61 above).
63 *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria* (fn 27 above) par 103. See also *Forum of Conscience v Sierra Leone* (2000) AHRLR 293 (ACHPR 2000).
64 *Amnesty International and Others v Sudan* (fn 20 above) par 56.

remedies to challenge detention (*habeas corpus*),[65] where a detainee has been held *incommunicado* and in cases of forced disappearances. In a case against Nigeria a retroactive decree providing for imprisonment was held to violate article 6.

4.5 Fair trial and independence of courts

The Commission has found a violation of the right to a fair trial (article 7 of the Charter) in 32 of the 39 cases in which it has found a violation of the Charter. In nine of these cases the Commission also found a violation of article 26 that deals with the independence of courts.

Many cases have dealt with the ousting of the jurisdiction of the courts. In a case against the Gambia the Commission held that:

> The rights and freedoms of individuals enshrined in the Charter can only be fully realised if governments provide structures which enable them to seek redress if they are violated. By ousting the competence of the ordinary courts to handle human rights cases, and ignoring court judgments, the Gambian military government demonstrated clearly that the courts were not independent.[66]

In a number of cases courts controlled by the executive have been held to violate the Charter. During the military dictatorship in Nigeria the government created three-member tribunals consisting of one judge, one military officer and one police officer. The Commission held: 'Regardless of the character of the individual members of such tribunals, its composition alone creates the appearance, if not the actual lack, of impartiality. It thus violates article 7(1)(d).'[67]

The Commission has found violations of the right to appeal and the right to defence in a number of cases. The Commission has in interpreting these rights made use of its resolutions and other international standards. The Commission has held that the failure of a state to provide an accused with a counsel of his choice 'may expose the accused to a situation where he will not be able to give full instructions to his counsel for lack of confidence'.[68] Even in legal aid cases 'the accused should be able to choose from a list the preferred independent counsel not acting under the instructions of government but responsible only to the accused'.[69]

In a case against Nigeria it was held that

> during the trial leading representatives of government pronounced MOSOP and the accused guilty of the crimes at various press conferences and before the United Nations. As the allegations have not been contradicted, the Commission finds a violation of the right to be presumed innocent, article 7(1)(b).[70]

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65 *Constitutional Rights Project and Another v Nigeria* (fn 38 above).
66 *Jawara v The Gambia* (fn 14 above) par 74.
67 *Constitutional Rights Project (in respect of Akamu and Others) v Nigeria* (fn 17 above) par 12.
68 *Civil Liberties Organisation and Others v Nigeria* (fn 44 above) par 28.
69 *Civil Liberties Organisation and Others v Nigeria* (fn 44 above) par 29.
70 *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria* (fn 27 above).

The Commission has dealt with the requirement of trial within reasonable time in a few cases. Two years in custody without charge[71] and seven years without trial[72] has been held by the Commission to violate the right to trial within reasonable time. The Commission has held that in a civil case a delay of over two years in hearing a case dealing with the complainant's 'ability to work in his profession' constituted a violation of the right to trial within reasonable time.[73]

A number of fair trial rights that are not explicit in the Charter have been interpreted by the Commission as being implicitly recognised. The Commission has thus interpreted the Charter to include a right for a detainee to be brought promptly before a judge,[74] to provide for a right to public trial,[75] and to be given reasons for arrest.[76]

4.6 Freedom of conscience/religion

The Commission has found a violation of article 8 (freedom of conscience/religion) in a case of harassment of Jehovah's Witnesses in Zaire[77] and with regard to the application of Sharia law to non-muslims in Sudan.[78] Deportation for political reasons has been held to constitute a violation of article 8.[79]

4.7 Freedom of expression

The Commission has found a violation of article 9 (freedom of expression) in 12 cases. Most of these cases have dealt with persecution of opposition members, NGO activists and journalists.

Criticism against leaders should only be limited by law of defamation and public figures must expect to face a higher degree of criticism than others and not resort to persecution of those criticising them.[80]

4.8 Right to association and assembly

The Commission has found violations of the right to association in article 10 of the Charter in cases of persecution based on political opinion and banning of political parties. The Commission also found a violation of the right to association in a case where government representatives were in the majority in the Bar Association of Nigeria.

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71 *Constitutional Rights Project v Nigeria* (II) (2000) AHRLR 248 (ACHPR 1999).
72 *Abubakar v Ghana* (fn 21 above).
73 *Pagnoulle (on behalf of Mazou) v Cameroon* (2000) AHRLR 57 (ACHPR 1997) par 19.
74 *Huri-Laws v Nigeria* (fn 35 above).
75 *Media Rights Agenda v Nigeria* (fn 35 above).
76 *Rights International v Nigeria* (fn 21 above); *Media Rights Agenda v Nigeria* (fn 35 above); *Huri-Laws v Nigeria* (fn 35 above).
77 *Free Legal Assistance Group and Others v Zaire* (fn 20 above).
78 *Amnesty International and Others v Sudan* (fn 20 above).
79 *Amnesty International v Zambia* (fn 31 above).
80 *Media Rights Agenda and Others v Nigeria* (fn 37 above).

4.9 Freedom of movement

The right to movement in article 12 includes a right to leave or return to one's home country. The Commission has also found violations with regard to article 12 in cases dealing with mass expulsion[81] and when no reasons were given for deportation.[82]

4.10 Right to political participation

Political participation is recognised as a right in article 13 of the Charter. The Commission has found violations against this article in relation to a ban on participation in political activity,[83] the prohibition of naturalised citizens to run for president.[84] After the Nigerian government annulled elections that international observers had declared free and fair the Commission held:

> To participate freely in government entails, among other things, the right to vote for the representative of one's choice. An inevitable corollary of this right is that the results of the free expression of the will of the voters are respected; otherwise, the right to vote freely is meaningless. In the light of this, the annulment of the election results, which reflected the free choice of the voter, is in violation of article 13(1).[85]

4.11 Economic and social rights

The African Charter recognises some economic and social rights such as the rights to property, work, health and education. In the *SERAC* case the Commission held that the right to shelter and food are implicit rights in the Charter. The right to shelter was held to follow from the combined effect of the right to property, health and the protection accorded to the family,[86] while the right to food was seen to be 'inseparably linked to the dignity of human beings'.[87] The *SERAC* case dealt with violations of the rights of the Ogoni people in connection with oil exploration in the Niger delta in Nigeria.[88]

Apart from *SERAC* the Commission has decided few cases dealing with economic and social rights. A case against Zaire decided in 1995 found a

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81 *Organisation Mondial Contre la Torture and Others v Rwanda* (fn 20 above); *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia* (fn 18 above); *Union Interafricaine des Droits de l'Homme and Others v Angola* (fn 20 above).

82 *Amnesty International v Zambia* (fn 31 above).

83 *Jawara v The Gambia* (fn 14 above).

84 *Modise v Botswana* (fn 16 above); *Legal Resources Foundation v Zambia* (fn 45 above).

85 *Constitutional Rights Project and Another v Nigeria* (fn 38 above).

86 *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (fn 11 above) par 60.

87 *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (fn 11 above) par 65.

88 For a commentary on this case see van der Linde M & Louw L 'Considering the interpretation and implementation of article 24 of the African Charter on Human and Peoples' Rights in light of the SERAC communication' (2003) 3 *African Human Rights Law Journal* 167.

violation of the right to education in relation to closure of schools and universities and that the failure of the government to provide basic services such as safe drinking water and electricity violated the right to health.[89] A case against Angola decided in 1997 made mention of the effect on the rights to property, work and education as a result of mass expulsion and held that the separation of families and the right to property had been violated.[90]

The Commission has found a violation of the right to health in a number of cases where detainees have been denied medical care.

The right to work has not often been invoked before the Commission. In 1997 the Commission held that by preventing the complainant 'from working in his capacity of a magistrate even though others who had been condemned under similar conditions have been reinstated' constituted a violation of the right to work.[91]

In a case against Mauritania the government was accused of having violated the linguistic rights of the black population. The Commission held that language enables a man 'to take active part in the community and in its activities. To deprive a man of such participation amounts to depriving him of his identity.'[92] However, the Commission held that there was not sufficient evidence to find a violation.

4.12 Peoples' rights

The right to self-determination is recognised in article 20 of the Charter. In *Katangese Peoples' Congress v Zaire* the complainant asked the Commission to recognise the right to self-determination of Katanga. The Commission held:

> In the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in government as guaranteed by article 13(1) of the African Charter, the Commission holds the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire.[93]

In a case against the military dictatorship in Nigeria the Commission held that government by force is not compatible with the rights of peoples to freely determine their political future.[94]

Article 21 of the Charter provides that 'all peoples shall freely dispose of their wealth and natural resources'. In the *SERAC* case the Commission stated that

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89 *Free Legal Assistance Group and Others v Zaire* (fn 20 above).
90 *Union Interafricaine des Droits de l'Homme and Others v Angola* (fn 20 above).
91 *Ligue Camerounaise des Droits de l'Homme v Cameroon* (fn 13 above) par 29.
92 *Malawi African Association and Others v Mauritania* (fn 8 above) par 137.
93 *Katangese Peoples' Congress v Zaire* (2000) AHRLR 72 (ACHPR 1995) par 6.
94 *Media Rights Agenda and Others v Nigeria* (fn 37 above); see also *Constitutional Rights Project and Another v Nigeria* (fn 38 above) and *Jawara v The Gambia* (fn 14 above).

> [t]he origins of this provision may be traced to colonialism, during which the human and material resources of Africa were largely exploited for the benefit of outside powers, creating tragedy for Africans themselves, depriving them of their birthright and alienating them from the land . . . The drafts of the Charter obviously wanted to remind African governments of the continent's painful legacy and restore cooperative economic development to its traditional place at the heart of African society.[95]

In holding the Nigerian government responsible for the destruction of Ogoniland the Commission held that

> the government of Nigeria facilitated the destruction of the Ogoniland. Contrary to its Charter obligations . . . the Nigerian government has given the green light to private actors, and the oil companies in particular, to devastatingly affect the well-being of the Ogonis. By any measure of standards its practice falls short of the minimum conduct expected of governments, and therefore, is in violation of article 21 of the African Charter.[96]

The Charter includes in article 23 a peoples' right to 'peace and security'. In a case against Mauritania the Commission held that '[t]he unprovoked attacks on villages constitute a denial of the right to live in peace and security'.[97]

Article 24 provides for a right to a satisfactory environment. In the *SERAC* case the Commission held that this right

> requires the state to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.[98]

5 REMEDIES

The only remedy provided for in the Charter is that the Commission call the attention of the Assembly of Heads of State and Government to the situation in cases of a series of serious or massive violations (art 58(1)). As mentioned above the Commission only made use of this provision a few times and has apparently ceased to make use of this provision of the Charter. Instead the Commission has started to make provision for other remedies in some of its decisions.

In *Embga Mekongo v Cameroon* the Commission found that the author

> had in fact suffered damages. Being unable to determine the amount of damages, the Commission recommends that the quantum should be determined under the laws of Cameroon.[99]

This is one of the few decisions in which the Commission has explicitly recommended the state to compensate the victim.[100] Often the Commission

95 *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (fn 11 above) par 56.

96 *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (fn 11 above) par 58.

97 *Malawi African Association and Others v Mauritania* (fn 8 above) par 140.

98 *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (fn 11 above) par 52.

99 *Embga Mekongo v Cameroon* (2000) AHRLR 56 (ACHPR 1995) par 2.

100 *Modise v Botswana* (fn 16 above); *Civil Liberties Organisation and Others v Nigeria* (fn 44 above); *Malawi African Association and Others v Mauritania* (fn 8 above).

has provided for vague remedies such as that the government should 'adopt measures in conformity with this decision'.[101] At other times the Commission has simply requested the state party to bring its legislation into conformity with the Charter.[102]

In two cases against Nigeria the Commission recommended 'that the government of Nigeria should free the complainants' and decided to verify their release at a planned mission to Nigeria.[103] The Commission also appealed for the release of detainees in *Constitutional Rights Project and Another v Nigeria*[104] in which it also appealed to the government 'to preserve the traditional functions of the courts by not curtailing their jurisdiction'. In *Civil Liberties Organisation v Nigeria*[105] the Commission appealed to the government to permit 'a civil retrial with full access to lawyers of their choice; and to improve their conditions of detention'.

In a case against Burkina Faso the Commission recommended that

> the Republic of Burkina Faso draws all the legal consequences of this decision, in particular by identifying and taking to court those responsible for the human rights violations cited above; accelerating the judicial process of the cases pending before the courts and compensating the victims of the human rights violations stated in the complaint.[106]

Follow-up of its decisions has not been high on the agenda of the Commission. In *Legal Resources Foundation v Zambia* the Commission requested Zambia to report in its next state report on what measures it had taken to comply with the decision.

In a case against Egypt in which the Commission found that there had been no violation the Commission decided to mandate one of its members to 'pursue his good offices with the Egyptian government with a view to obtaining clemency for Mr Ngozi Njoku on purely humanitarian grounds'.[107]

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101 *Organisation Mondiale Contre la Torture and Others v Rwanda* (fn 20 above).

102 *Avocats Sans Frontières (on behalf of Bwampamye) v Burundi* (fn 19 above); *Jawara v The Gambia* (fn 14 above); *Media Rights Agenda and Others v Nigeria* (fn 37 above); *Constitutional Rights Project and Another v Nigeria* (fn 38 above); *Media Rights Agenda v Nigeria* (fn 35 above). In *Civil Liberties Organisation (in respect of Bar Association) v Nigeria* (fn 47 above) the Commission held that decrees violating the Charter should be annulled.

103 *Constitutional Rights Project (in respect of Akamu and Others) v Nigeria* (fn 17 above); *Constitutional Rights Project (in respect of Lekwot and Others) v Nigeria* (fn 19 above).

104 Fn 38 above. The Commission also urged the government to release prisoners in *Constitutional Rights Project v Nigeria* (I) (2000) AHRLR 241 (ACHPR 1999) and *Centre for Free Speech v Nigeria* (fn 47 above). In *Constitutional Rights Project v Nigeria* (II) (fn 71 above) the Commission urged the government to charge the detainees or release them.

105 (2000) AHRLR 243 (ACHPR 1999) par 29.

106 *Mouvement Burkinabé des Droits de l'Homme et des Peuples v Burkina Faso* (fn 48 above) par 50. Detailed remedies was also provided for in *Malawi African Association and Others v Mauritania* (fn 8 above) and *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (fn 11 above).

107 *Njoku v Egypt* (fn 25 above) par 63.

6 CONCLUSION

The record so far of the individual complaints procedure before the Africa Commission has been disappointing. In addition to limited knowledge about the system among civil society organisations and individuals in Africa one of the main contributing factors to the lack of use of the system seems to be the lack of implementation by member states of the findings of the Commission.[108]

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108 On the lack of implementation of the decisions by the Commission see Louw L *An analysis of state compliance with the recommendations of the African Commission on Human and Peoples' Rights* (LLD thesis, 2005, University of Pretoria).