

The African Regional Human Rights System*

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1. Introduction

While the term "human rights" is of relative recent currency on the continent, people have been struggling for freedom, dignity, equality and social justice for centuries in Africa. In Africa, as is the case elsewhere, that which is now called human rights finds its foundations in the struggle to assert these core values of human existence.¹

Today, the term human rights is used widely in the African context. The written constitutions of every country in Africa recognise the concept; the inter-governmental organisation of African states, the African Union, regards the realisation of human rights as one of its objectives and principles; and the record of ratification of the human rights treaties of the United Nations by African countries is on a par with practices around the world.² There is wide acceptance that the security and development of Africa—as in the world at large—will have to be based on human rights.

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¹ For an exposition of the approach that human rights and legitimate struggle are two sides of the same coin, see C. HEYNS: "A 'struggle approach' to human rights" in A. SOETEMAN (ed.): *Pluralism and Law*, 2001, p. 171.

² For a collection of the primary material dealing with human rights law in Africa on the United Nations, regional, sub-regional and domestic levels of all the countries of Africa, see C. HEYNS (ed.): *Human Rights Law in Africa*, 2004. See also C. HEYNS (ed.): *Compendium of key human rights documents of the African Union*, 2005.

Not surprisingly, given the history of exploitation of Africa, the struggle roots of the concept of human rights are clearly visible in the human rights documents of the continent. The African Charter on Human and Peoples' Rights also reflects in many ways a reaction to the continental experience of slavery and colonialism, for example by recognising a "peoples" right to self-determination. The excesses of some post-independence leaders are reflected in the fact that a significant number of African constitutions explicitly recognise a direct right, located in the people, to protect constitutional and human rights norms, if need be through political struggle, should they be violated.³ The Constitutive Act of the African Union uniquely provides for a right of humanitarian intervention in member states by the Union, in cases of grave human rights violations.⁴

As is well known, the struggle for human rights on the African continent is far from over or complete. The continent is plagued by widespread violations of human rights, often on a massive scale. The process to establish effective institutional structures, that will help to consolidate and protect the hard earned gains of the freedom struggles of the past, has become a struggle in its own right. No doubt, the most important task in this regard is to establish legal systems on the national level that protect human rights. At the same time regional and global attempts to change the human rights practices of the continent, and to create safety nets for those cases not effectively dealt with on the national level, are assuming increased importance.

This contribution first introduces the main legal instruments relevant to the continental protection of human rights in Africa, then discusses the norms recognised (individual and peoples' rights and duties, etc) and thereafter turns to the regional institutional structures set up to achieve the implementation of the norms. This institutional overview focuses primarily on four important pillars of the African human rights system: the organs of the African Union, the African Commission on Human and Peoples' Rights, the yet to be established African Court on Human and Peoples' Rights and the newly established African Peer Review Mechanism.

2. The African Union and Human Rights

2.1. Background

The African regional system has been developed under the auspices of the Organization of African Unity ("OAU"),⁵ established in 1963, which was transformed

³ The explicit recognition of a right of resistance to protect constitutional and human rights norms is present in the Constitutions of Benin (1990) (Art. 66); Burkina Faso (1997) (Art. 167); Cape Verde (1992) (Art. 19); Chad (1996) (Preamble); Congo (2001) (Art. 13); The Gambia (1996) (Art. 6); Ghana (1992) (Art. 3); Mozambique (Art. 80); and Togo (1992) (Art. 150).

⁴ Article 4(h) of the Constitutive Act.

⁵ The Charter of the OAU is reprinted in *Human Rights Law in Africa* 111. The Preamble stated adherence to the principles of the Universal Declaration of Human Rights. See also Art. II(1)(e). The Charter of the OAU was nevertheless a human rights document in the sense that it was aimed at the abolition of colonialism and apartheid. On the OAU see G.J. NALU: *The Organization of African Unity: An Analysis of its Role*, 1999, p. 109.

in 2001 into the African Union ("AU").⁶ All the states of Africa are members of the AU, except Morocco which withdrew in 1984 when the OAU recognised Western Sahara bringing the membership to 53. While the Charter of the OAU of 1963 made only passing reference to the concept of human rights, the Constitutive Act of the AU of 2000 (entered into force 2001) has now placed human rights squarely on the agenda of the new regional body.⁷

2.2. *The Constitutive Act*

The Constitutive Act of the AU, in its Preamble, refers to the African struggles for independence and human dignity "by our peoples" and the determination of the Heads of State and Government "to promote and protect human and peoples' rights". Article 3 sets out the "Objectives" of the AU as follows: "the objectives of the Union shall be to ... (e) encourage international cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights;" and to "... (h) promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments ...".

Article 4 deals with "Principles", and provides that:

The Union shall function in accordance with the following principles: ... (g) non-interference by any Member State in the internal affairs of another; (h) the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity; (i) peaceful co-existence of member states and their right to live in peace and security; (j) the right of member states to request intervention from the Union in order to restore peace and security; (l) promotion of gender equality; (m) respect for democratic principles, human rights, the rule of law and good governance; (n) promotion of social justice to ensure balanced economic development; (o) respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities; (p) condemnation and rejection of unconstitutional changes of governments.

There are no entry requirements in terms of their human rights records and practices for states to join the African Union (as is the case for example with the Council of Europe), and all the members of the OAU became members of the AU without scrutiny of their human rights records. There is, however, at least a theo-

⁶ Constitutive Act of the African Union CAB/LEG/23.15, entered into force 26 May 2001. For an overview of the AU see C. HEVINS, E. BAIMU & M. KILLANDER: "The African Union" 46 *German Yearbook of International Law*, 2003, p. 252. On the transformation from OAU to AU from a human rights perspective see R. MURRAY: *Human Rights in Africa*, 2004.

⁷ For a discussion, see E. BAIMU: "The African Union: Hope for better protection of human rights in Africa?" 1 *African Human Rights Law Journal*, 2001, p. 299. The Constitutive Act is reprinted on p. 315 of the same volume. See also B. MANSBY: "The African Union, NEPAD, and Human Rights: The Missing Agenda", 26 *Human Rights Quarterly*, 2004, p. 983.

retical chance that violations of AU human rights standards may lead to suspension from the AU; certainly lesser forms of sanctions are possible.

According to Art. 23(2)

... any Member State that fails to comply with the decisions and policies of the Union may be subjected to ... sanctions, such as the denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly.

Art. 30 provides: "Governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union."

The African Union has seen the establishment of a number of new institutions, many with relevance for the implementation of human rights, which will be discussed below.

2.3. African human rights instruments

The central document of the African regional human rights system, the African Charter on Human and Peoples' Rights ("African Charter"),⁸ was opened for signature in 1981 and entered into force in 1986. It has been ratified by all 53 member states of the OAU/AU.⁹ The sole supervisory body of the African Charter currently in existence is the African Commission on Human and Peoples' Rights ("African Commission"). The African Commission was constituted and met for the first time in 1987. The Commission has adopted its own Rules of Procedure (amended in 1995).¹⁰ The work of the African Commission will be discussed later in this article.

The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights ("African Human Rights Court Protocol")¹¹ was adopted in 1998 and entered into force in January 2004, but as of February 2006 the Court had not yet been established. The African Charter has further been supplemented by the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted in 2003, which entered into force in November 2005.¹²

In addition to these instruments the African regional human rights system is comprised of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969¹³ which entered into force in 1974 (45 ratifications); and the

⁸ OAU Doc OAU/CABLEG/67/3/Rev.5. Reprinted in *Human Rights Law in Africa* 134.

⁹ See status of ratification of AU treaties, available on www.africa-union.org. Ratification status given for the treaties mentioned in this article is as of February 2006. For the three reservations to the African Charter, see *Human Rights Law in Africa* 108. The last state to ratify was Eritrea, in 1999.

¹⁰ ACHPR/RP/XIX. Reprinted in *Human Rights Law in Africa* 540.

¹¹ OAU/LEG/MIN/AFCHPR/PROT (I) Rev. 2. Reprinted in *Human Rights Law in Africa* 170.

¹² The Protocol is discussed further below. As of February 2006 the Protocol had been ratified by 17 states.

¹³ OAU Doc CABLEG/24.3. Reprinted in *Human Rights Law in Africa* 122. See G. OKOTH-ODBO: "Thirty years on: A legal review of the 1969 OAU Refugee Convention" *African Yearbook of International Law* 8, 2000, p. 3.

African Charter on the Rights and Welfare of the Child ("African Children's Charter") of 1990,¹⁴ which came into force in 1999 (38 ratifications). A special monitoring body for the African Children's Charter, the African Committee on the Rights and Welfare of the Child, discussed further below, held its first meeting in 2002.¹⁵

The relatively unknown Cultural Charter for Africa of 1976 came into force in 1990.¹⁶ Another treaty with relevance for human rights is the Convention on Preventing and Combating Corruption adopted in 2003.¹⁷ This convention has as of February 2006 not entered into force. The Convention for the Elimination of Mercenarism in Africa was adopted in 1977 and entered into force in 1985.¹⁸ The OAU Convention on the Prevention and Combating of Terrorism of 1999 entered into force in 2002.¹⁹ There are also two African regional treaties dealing with the environment.²⁰

3. The norms recognised in the African Charter on Human and Peoples' Rights

As alluded to earlier, the 1963 OAU Charter did not recognise the realisation of human rights as such as one of the objectives of that body. It would only be in 1979 that a meeting of experts was gathered by the OAU in Dakar, Senegal, to prepare a preliminary draft of an African human rights charter.²¹ This culminated in the Draft African Charter on Human and Peoples' Rights, finalised in Banjul, The Gambia, in 1981 (resulting in the name "Banjul Charter", which is sometimes used for the African Charter). The African Charter was formally adopted by the OAU in Kenya later that year.²²

¹⁴ OAU Doc CAB/LEG/153/Rev 2. Reprinted in *Human Rights Law in Africa* 143.

¹⁵ See A. LLOYD: "The first meeting of the African Committee of Experts on the Rights and Welfare of the Child" 2 *African Human Rights Law Journal*, 2002, p. 320. See also A. LLOYD: "Report of the second ordinary session of the African Committee of Experts on the Rights and Welfare of the Child" 3 *African Human Rights Law Journal*, 2003, p. 329; A. LLOYD: "The Third Ordinary Session of the African Committee of Experts on the Rights and Welfare of the Child", 4 *African Human Rights Law Journal*, 2004, p. 139.

¹⁶ Reprinted in *Human Rights Law in Africa* 125.

¹⁷ See K. OLANIVAN: "The African Union Convention on Preventing and Combating Corruption: A critical appraisal", 4 *African Human Rights Law Journal*, 2004, p. 74.

¹⁸ Reprinted in *Human Rights Law in Africa* 132.

¹⁹ Reprinted in *Human Rights Law in Africa* 175. A Protocol to this Convention was adopted in 2004.

²⁰ The African Convention on the Conservation of Nature and Natural Resources (1968/69), reprinted in *Human Rights Law in Africa* 116, revised version adopted 2003, not yet in force, reprinted in C. HEYNS (ed.): *Compendium of key human rights documents of the African Union*, 2005, and the [Bamako] Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (1991/98), reprinted in *Human Rights Law in Africa* 153. See M. VAN DER LINDE: "A review of the African Convention on Nature and Natural Resources", 2 *African Human Rights Law Journal*, 2002, p. 33.

²¹ The meeting was convened in terms of a decision of the Assembly of Heads of State and Government of the OAU, AHG/Dec 115 (XVI) Rev 1 1979, reprinted in C. HEYNS (ed) *Human Rights Law in Africa* 1999, 2002, p. 127.

²² For the documents leading up to the adoption of the African Charter, see *Human Rights Law in Africa* 1999, pp. 65-105.

A number of reasons have been advanced why the OAU changed its approach and gave the concept of human rights the prominence offered by the Charter during the late 1970s and the early 1980s. These include the increased emphasis on human rights internationally at the time (as in the foreign policy of President Carter of the United States of America), the use to which the concept of human rights was put in international bodies such as the UN and the OAU to condemn the apartheid practices in South Africa, and abhorrence at the human rights violations that had taken part in some member state in particular Uganda, Central Africa and Equatorial Guinea.²³

The African Charter recognises a wide range of internationally accepted human rights norms, but also has some unique features.²⁴ The Charter recognises not only civil and political rights, but also economic, social and cultural rights, not only individual but also peoples' rights, not only rights but also duties, and it has a singular system for the restrictions on rights. The Charter also contains provisions concerning interpretation which are very generous towards international law.

3.1. *Civil and political rights*

The civil and political rights recognised in the African Charter are in many ways similar to those recognised in other international instruments, and these rights have in practical terms received most of the attention of the African Commission.²⁵

The Charter recognises the following civil and political rights: The prohibition of discrimination (Art. 2); equality (Art. 3); bodily integrity and the right to life (Art. 4); dignity and prohibition of torture and inhuman treatment (Art. 5); liberty and security (Art. 6); fair trial (Art. 7); freedom of conscience (Art. 8); information and freedom of expression (Art. 9); freedom of association (Art. 10); assembly (Art. 11); freedom of movement (Art. 12); political participation (Art. 13); property (Art. 14); and independence of the courts (Art. 26).

A number of possible shortcomings in respect of civil and political rights in the African Charter could be noted. There is for example no explicit reference in the Charter to a right to privacy; the right against forced labour is not mentioned by name; and the fair trial rights²⁶ and the right of political participation²⁷ are given scant

²³ See U.O. UMOZURIKE: *The African Charter on Human and Peoples' Rights*, 1997, pp. 27-28.

²⁴ In his welcoming address in 1979 to the Meeting of African Experts preparing the Draft African Charter in Dakar, Senegal, Leopold Senghor, President of Senegal, referred to the example set by international human rights instruments, and said: "As Africans, we shall neither copy, nor strive for originality, for the sake of originality ... [Y]ou must keep constantly in mind our values of civilisation and the real needs of Africa." Reprinted in *Human Rights Law in Africa 1999*, 78 at 79.

²⁵ For a full discussion, see C. HEVNS: "Civil and political rights in the African Charter" in M. EVANS & R. MURRAY (eds.): *The African Charter on Human and Peoples' Rights*, 2002, p. 137.

²⁶ There is, for example, no explicit reference to the right to a public hearing, the right to interpretation, the right against self-incrimination and the right against double jeopardy. However, the Commission has interpreted the Charter protection to encompass some of these rights.

²⁷ While Art. 13(1) the Charter recognises the right "of every citizen to participate freely in the government of his country", it does not stipulate that this should be done through regular, free and fair elections, based on universal suffrage.

protection when measured against international standards. However, the Commission has in resolutions and in cases before it interpreted the Charter protection to encompass some of the rights or aspects of rights not explicitly included in the Charter.

An overview of some Commission decisions in respect of individual communications provides a sample of the Commission's approach:

- In a number of cases the Commission has held that there is a positive duty on state parties to protect those in their jurisdictions against violations by non-state actors. In a case concerning Mauritania, the Commission found that, although slavery had officially been abolished in that country, this was not effectively enforced by the government.²⁸ In a case involving Chad, the Commission likewise held that the state's failure to protect people under its jurisdiction during a civil war against attacks by unidentified militants, not proven to be government agents, constituted a violation of the right to life.²⁹
- The imposition of *Shari'a* law on non-Muslims in Sudan has been held to violate freedom of religion.³⁰
- In *Media Rights Agenda and Others v Nigeria*³¹ the Commission ruled against the Abacha government's clampdown on freedom of expression, and determined that politicians should be provided less protection from free expression than other people. As with many of the seemingly more bold decisions of the Commission, this decision was unfortunately handed down only after the Abacha regime had fallen. Nevertheless, a positive precedent was set.
- The suspension of national elections was held to violate the right to political participation in *Constitutional Rights Project and Another v Nigeria*.³²
- The Commission has held that decrees ousting the jurisdiction of courts to examine the validity of such decrees, violate the fair trial provision of the Charter,³³ and also that the creation of special tribunals, dominated by members of the executive, violated the same right.³⁴
- The Commission has held that an execution after an unfair trial is a violation of the right to life,³⁵ but that the death penalty in itself does not violate the African Charter.³⁶

²⁸ *Malawi African Association and Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000).

²⁹ *Commission Nationale des Droits de l'Homme et des Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995). See also *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

³⁰ *Amnesty International and Others v Sudan* (2000) AHRLR 297 (ACHPR 1999).

³¹ (2000) AHRLR 200 (ACHPR 1998).

³² (2000) AHRLR 191 (ACHPR 1998).

³³ *Civil Liberties Organisation v Nigeria* (2000) AHRLR 188 (ACHPR 1995).

³⁴ *Constitutional Rights Project (in respect of Akamu and Others) v Nigeria* (2000) AHRLR 180 (ACHPR 1995). The appearance of impartiality is enough to constitute a violation (para 12).

³⁵ *Forum of Conscience v Sierra Leone* (2000) AHRLR 293 (ACHPR 2000).

³⁶ *Interights and Others (on behalf of Bosch) v Botswana*, communication 240/2001, 17th Annual Activity Report.

— A constitutional amendment providing that anyone who wanted to stand for office in the presidential election in Zambia would have to prove that both parents were Zambians by birth or descent was found to be in violation of the Charter in *Legal Resources Foundation v Zambia*.³⁷

3.2. Socio-economic rights

A unique feature of the Charter is the inclusion of socio-economic rights in a regional human rights treaty, alongside the civil and political rights mentioned above.³⁸ The inclusion of socio-economic rights in the Charter is significant, in that it emphasises the indivisibility of human rights and the importance of developmental issues, which are obviously important matters in the African context.

At the same time, the fact that only a modest number of socio-economic rights are explicitly included in the Charter, should be noted. The Charter only recognises "a right to work under equitable and satisfactory conditions" (Art. 15), a right to health (Art. 16) and a right to education (Art. 17). Some prominent socio-economic rights are not mentioned by name, such as the right to food, water, social security and housing.³⁹

The socio-economic rights in the Charter have received scant attention from the Commission, but in one case the Commission has dealt extensively with the issue, and has in effect held that some internationally recognised socio-economic rights which are not explicitly recognised in the Charter should be regarded as being implicitly included.

The so-called *SERAC v Nigeria*⁴⁰ decision dealt with the destruction of part of Ogoniland by Shell, acting in collaboration with the government of Nigeria. The Commission held that the presence of an implicit right to "housing or shelter" in the Charter has to be deduced from the explicit provisions on health, property and family life in the Charter.⁴¹ Similarly, a right to food has to be read into the right to dignity and other rights.⁴² It was accepted, without argument or reasoning, that the Ogoni's constituted a "people".

³⁷ (2001) AHRLR 84 (ACHPR 2001).

³⁸ For a discussion, see C. ODINKALU: "Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights" in EVANS & MURRAY (n 23 above) 178.

³⁹ It is also somewhat surprising that the socio-economic rights that are recognised, are not explicitly made subject to the usual internal qualifiers that apply in respect of such rights in most international instruments—such as the provision that the state is only required to ensure progressive realisation, subject to available resources, etc. This is made more problematic by the absence of a general limitation clause in the Charter, as discussed below. A selected few socio-economic rights, stated in near absolute terms, are recognised, while other obvious candidates for inclusion are not present. The Protocol on the Rights of Women, adopted in 2003 and discussed further below, qualifies the provision of socio-economic rights by providing that the government should take appropriate measures with regard to most socio-economic rights. However, it provides for an unqualified right to adequate housing (article 16).

⁴⁰ *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*, n 29 above.

⁴¹ Para 60.

⁴² Para 65.

The approach of the Commission of filling in the gaps in the Charter as was done in the *SERAC* case could be seen as a creative and bold move on the part of the Commission, but it could also be argued that a too wide divergence between the Commission's interpretation of the Charter and the Charter itself could compromise legal certainty.⁴³

3.3. Women's rights

The way in which the Charter deals with gender issues has been a bone of contention. Article 18(3) provides as follows:

The state shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.

This lumping together of women and children, in an article which deals primarily with the family, re-enforces outdated stereotypes about the proper place and role of women in society and has been partially responsible for the drive to adopt the Protocol to the African Charter on the Rights of Women in Africa.⁴⁴ The Protocol was adopted by the AU Assembly in 2003 and received the required 15 ratifications on 26 October 2005 thereby entering into force on 25 November 2005.

The Protocol on the Rights of Women is detailed with 24 substantive articles, some dealing with specific issues affecting women, while other deal with rights that should apply equally to men and women, some of which are not included in the African Charter. The rights in the Protocol include elimination of discrimination against women (Art. 2); right to dignity (Art. 3); right to life, integrity and security of person (Art. 4); elimination of harmful practices (Art. 5); marriage (Art. 6); separation, divorce and annulment of marriage (Art. 7); access to justice and equal protection of the law (Art. 8); political participation (Art. 9); peace (Art. 10); protection of women in armed conflict (Art. 11); education (Art. 12); economic and social welfare rights (Art. 13); health and reproductive rights (Art. 14); food security (Art. 15); adequate housing (Art. 16); positive cultural context (Art. 17); healthy and sustainable environment (Art. 18); right to sustainable development (Art. 19); widow's rights (Art. 20); inheritance (Art. 21); special protection of elderly women (Art. 22); women with disabilities (Art. 23); and women in distress (Art. 24).

The African Commission (and after its establishment also the African Court) is responsible for monitoring the implementation of the Charter and as a result also for the Protocol, thereby avoiding the duplication that exists with regard to children's

⁴³ C. HEYNS: "The African regional human rights system: In need of reform?", 1 *African Human Rights Law Journal*, 2001, p. 155.

⁴⁴ M. NSEIRWA: "A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women", 1 *African Human Rights Law Journal*, 2001, p. 40. See also J. ODI: "Reclaiming women's social and economic rights in Africa - The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa" *ESR Review* vol 5 no 4. A further important development for women's rights was the adoption by the AU Heads of State and Government of a "Solemn Declaration on Gender Equality in Africa" in July 2004.

issues, where as mentioned above a separate Committee on the Rights and Welfare of the Child has been established.

3.4. Peoples' rights

In its protection of peoples' rights the Charter goes further than any other international instrument.⁴⁵

All "peoples", according to the Charter, have a right to be equal (Art. 19); to existence and self-determination (Art. 20); to freely dispose of their wealth and natural resources (Art. 21); to economic, social and cultural development (Art. 22); to peace and security (Art. 23); and to a satisfactory environment (Art. 24). Clearly part of the motivation for the recognition of "peoples' rights" lies in the fact that entire "peoples" have been colonised and otherwise exploited in the history of Africa.

The concept of "peoples" has been referred to in some of the cases before the Commission, including the following:

- In a case concerning Katangese secessionists in the former Zaire,⁴⁶ a complaint was brought on the basis that the Katangese people had a right, as a people, to self-determination in the form of independence. The Commission ruled that there was no evidence that a Charter provision had been violated, because widespread human rights violations or a lack of political participation by the Katangese people had not been proven. This could be understood to suggest that if these conditions were met, secession by such a "people" could be a permissible option. On the other hand the Commission was careful to emphasize that self-determination can also take forms other than secession, such as self-government, local government, federalism, or confederalism.⁴⁷
- In a case concerning the 1994 *coup d'état* against the democratically elected government of The Gambia, the Commission held that this violated the right to self-determination of the people of The Gambia as a whole.⁴⁸ The same conclusion was reached when the Abacha government in Nigeria annulled internationally recognised free and fair elections.⁴⁹
- In the abovementioned *SERAC* case the Commission held that the right to a satisfactory environment in Article 24 requires the state "to take reasonable ... measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources."⁵⁰ Significantly, here the rights of peoples are also used outside the context of self-determination.

⁴⁵ See R. MURRAY and S. WHEATLEY: "Groups and the African Charter on Human and Peoples' Rights", 25 *Human Rights Quarterly*, 2003, p. 213.

⁴⁶ *Katangese Peoples' Congress v Zaire* (2000) AHRLR 71 (ACHPR 1995).

⁴⁷ As above, para 4.

⁴⁸ *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000).

⁴⁹ *Constitutional Rights Project and Another v Nigeria* (2000) AHRLR 191 (ACHPR 1998) para 52.

⁵⁰ N 40 above, para 52.

3.5. *Limitations, derogation and duties*

The way in which the African Charter deals with restrictions on all rights, including civil and political rights, presents a significant obstacle. The African Charter does not contain a general limitation clause (although, as is noted below, Article 27(2) is starting to play this role). This means that there are no general guidelines spelled out in the Charter on how its rights should be limited—no clear “limits on the limitations”, so to speak—. A well-defined system of limitations is important. A society in which rights cannot be limited will be ungovernable, but it is essential that appropriate human rights norms be set for the limitations.

A number of the articles of the Charter setting out specific civil and political rights do contain limiting provisions applicable to those particular rights. Some of these internal limitations clearly spell out the procedural and substantive norms with which limitations should comply,⁵¹ while others only describe the substantive requirements which limitations must meet.⁵²

A last category of these internal limitation clauses merely poses the apparently procedural requirement that limitations should be done “within the law”. An example of this category of internal limitations is Article 9(2), which provides as follows: “Every individual shall have the right to express and disseminate his opinions within the law.” This kind of limitation is generally known as a “claw-back clause”. They seem to recognise the right in question only to the extent that such a right is not infringed upon by national law.

If that was the correct interpretation, the claw-back clauses would obviously undermine the whole idea of international supervision of domestic law and practices and render the Charter meaningless in respect of the rights involved. Domestic law will in those cases have to be measured according to domestic standards; a senseless exercise. What is given with the one hand is seemingly taken away with the other.

As has been noted above, however, the Charter has a very expansive approach in respect of interpretation. In terms of Articles 60 and 61, the Commission has to draw inspiration from international human rights law in interpreting the provisions of the Charter. The Commission has used these provisions very liberally in a number of instances to bring the Charter in line with international practices, and the claw-back clauses are no exception.

In the context of the claw-back clauses, the African Commission has held that provisions in articles that allow rights to be limited “in accordance with law”, should be understood to require such limitations to be done in terms of domestic legal provisions, which comply with international human rights standards.⁵³

⁵¹ For example, Art. 11 recognises the right of freedom of assembly, subject to the following proviso: “The exercise of this right shall be subject only to necessary restrictions provided for by law, in particular those enacted in the interests of national security, the safety, health, ethics and rights and freedoms of others.”

⁵² Art. 8 provides that the freedom of conscience and religion may only be limited in the interest of “law and order”.

⁵³ The Commission has held, eg, in *Media Rights Agenda and Others v Nigeria*, n 31 above, para 66: “To allow national law to have precedent over the international law of the Charter would defeat the purpose of the rights and freedoms enshrined in the Charter. International human rights standards must always prevail over contradicting national law.”

Through this interpretation, the Commission has gone a long way towards curing one of the most troublesome inherent deficiencies in the Charter. However, it remains unfortunate that the Charter, to those who have not had the benefit of exposure to the approach of the Commission, will continue to appear to condone infringements of human rights norms as long as it is done through domestic law.

The African Charter does not contain a provision either allowing or disallowing derogation from its provisions during a state of emergency. This has led the Commission to the conclusion that derogation is not possible.⁵⁴ This could mean that in real emergencies the Charter will be ignored, and will not exercise a restraining influence.

The Charter recognises, in addition to rights, also duties.⁵⁵ For example, individuals have duties towards their family and society,⁵⁶ and state parties have the duty to promote the Charter.⁵⁷

Perhaps the most significant provision under the heading "Duties" is Article 27(2), which reads as follows: "The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest." This provision has now in effect been given the status by the African Commission of a general limitation clause. According to the Commission: "The only legitimate reasons for limitations of the rights and freedoms of the African Charter are found in Article 27(2) ...".⁵⁸

The Commission's use of Article 27(2) as a general limitation clause seems to confirm the view that the concept of "duties" should not be understood as a sinister way of saying rights should first be earned, or that meeting certain obligations is a precondition for enjoying human rights. Rather, it implies that the exercise of human rights, which people have simply because they are human beings⁵⁹ may be limited by the duties which they also have. Rights precede duties, and the recognition of certain duties is merely another way of signifying the kind of limitations that may be placed on rights.

4. Norms recognised in other treaties

4.1. OAU Convention Governing Specific Aspects of Refugee Problems in Africa

The definition of refugee in Article 1 of the OAU Refugee Convention is broader than in the UN Refugee Convention. In addition to "well founded fear of being

⁵⁴ *Commission Nationale des Droits de l'Homme et des Libertés v Chad*, n 29 above, para 21.

⁵⁵ See M. MUTUA: "The Banjul Charter and the African cultural fingerprint", 35 *Virginia Journal of International Law*, 1995, p. 339.

⁵⁶ Arts. 27, 28 & 29.

⁵⁷ Art. 25. See also Art. 26.

⁵⁸ See *Media Rights Agenda and Others v Nigeria*, n 31 above, para 68. See also *Constitutional Rights Project and Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999), para 41.

⁵⁹ "[I]nherent in a human being", in the words of Art. 5 of the Charter, in respect of dignity.

persecuted for reasons of race, religion, nationality, membership of a particular group or political opinion"⁶⁰ the OAU Convention also stipulates that anyone who is compelled to leave his country because of "external aggression, occupation, foreign domination or events seriously disturbing public order" shall be considered a refugee. The OAU Convention does not provide for any supervisory system but the African Commission has considered a number of communications dealing with refugees.⁶¹

4.2. *African Charter on the Rights and Welfare of the Child*

The African Children's Charter, adopted in 1990, in many respects has similar provisions to the UN Convention on the Rights of the Child (CRC), adopted less than a year prior to the African instrument. In some respects the African Children's Charter goes further than the CRC. No person under 18 years should be recruited or take part in direct hostilities.⁶² The CRC sets the age-limit at 15 years, though a Protocol adopted in 2000 raises it to 18 years. The African Children's Charter goes further than the CRC also in other aspects, for example in prohibiting child marriages.⁶³ The implementation of the African Children's Charter lies with the African Committee of Experts on the Rights and Welfare of the Child, discussed further below.

4.3. *AU Convention on Preventing and Combating Corruption*

Corruption depletes the resources necessary for a state to be able to fulfil its human rights obligations. This is recognised in the AU Convention on Preventing and Combating Corruption which provides as one of the objectives of the Convention to "[p]romote socio-economic development by removing obstacles to the enjoyment of economic, social and cultural rights as well as civil and political rights."⁶⁴ The Convention also provides for rights linked to the fight against corruption such as access to information.⁶⁵ The Convention provides for an Advisory Board on Corruption as a follow up mechanism.⁶⁶

⁶⁰ OAU Convention Art. 1(1), UN Refugee Convention Art. 1(a)(2) read with the Protocol relating to the status of refugees (1967) Art. 1(2). For a discussion see Lawyers for Human Rights *African exodus*, 1995.

⁶¹ See eg *Organisation Mondiale Contre la Torture and Others v Rwanda* (2000) AHRLR 282 (ACHPR 1996) and *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia* (2000) AHRLR 321 (ACHPR 1996).

⁶² Art. 22(2).

⁶³ Art. 21(2). See F. VILOJA: "Introduction to the African Commission" in *Human Rights Law in Africa* 491. See also D.M. CHIRWA: "The merits and demerits of the African Charter on the Rights and Welfare of the Child" 10 *International Journal of Children's Rights*, 2002, p. 157.

⁶⁴ AU Convention on Preventing and Combating Corruption, Art. 2(4).

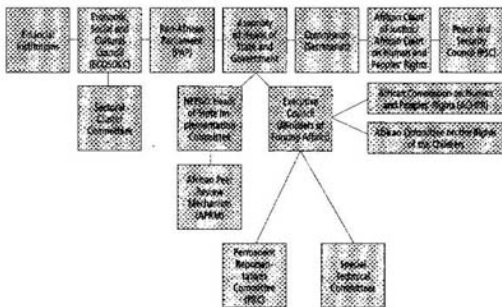
⁶⁵ As above, Art. 9.

⁶⁶ As above, Art. 22.

5. Organs established for the enforcement of Human Rights

The establishment of the African Union has seen an unprecedented institutional proliferation of bodies with a human rights mandate.⁶⁷ Schematically, the continental bodies with a human rights function may be set out as follows:

Organigram: African Union



Source: C. HEYNS (ed.): *Compendium of key human rights documents of the African Union*, 2005, p. 92.

5.1. The role of the main organs of the AU in protecting human rights

The African Union has the following main organs: the Assembly of Heads of State and Government, the Executive Council, the Permanent Representative Committee, the Pan-African Parliament, the African Court of Justice, the AU Commission, Specialised Technical Committees, the Economic, Social and Cultural Council, financial institutions and the Peace and Security Council.⁶⁸

The Pan-African Parliament shall "ensure the full participation of African peoples in the development and economic integration of the continent."⁶⁹ The Parlia-

⁶⁷ A. LLOYD & R. MURRAY: "Institutions with responsibility for human rights protection under the African Union", 48 *Journal of African Law*, 2004, p. 155

⁶⁸ AU Constitutive Act Art. 5. The PSC is not included as a main organ of the AU in the original Constitutive Act, but will be so under amendments that have not yet entered into force. For a discussion see Heyns and others, n 6 above, 252.

⁶⁹ AU Constitutive Act Art. 17(1). The functions of the Parliament is set out in the Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament,

ment has as one of its objectives to "promote the principles of human rights and democracy in Africa".⁷⁰ The Parliament held its first session in 2004. Each state party to the Protocol establishing the Parliament sends five national parliamentarians to the Parliament that meets twice a year in Midrand, South Africa. Currently its powers are purely consultative and advisory.⁷¹

The Economic, Social and Cultural Council (ECOSOCC) is "an advisory organ composed of different social and professional groups".⁷² Its purpose is to provide a role for civil society in the AU. ECOSOCC has as one of its objectives to "promote and defend a culture of good governance, democratic principles and institutions, popular participation, human rights and freedoms as well as social justice."⁷³ The statutes of ECOSOCC were adopted by the AU Assembly in July 2004 and the Council held its first meeting in Addis Ababa in March 2005.⁷⁴

The African Court of Justice, one of the main organs of the AU, has not yet been established as the Protocol setting up the court had only received eight of 15 ratifications required to enter into force by November 2005. The Court of Justice will be further discussed below in relation to the African Court on Human and Peoples' Rights.

The attempts to develop mechanisms to deal with conflict in Africa are also of importance in trying to prevent massive human rights violations.⁷⁵ The Protocol on the Peace and Security Council (PSC), adopted in 2002, entered into force in 2003. The PSC is composed of 15 members. The criteria for membership include "respect for constitutional governance ... as well as the rule of law and human rights ..."⁷⁶.

adopted by the OAU Assembly in March 2001 and entered into force in 2003. Reprinted in *Human Rights Law in Africa* 212. See K.D. MAGUIERAS & G.J. NALDI: "The Pan-African Parliament of the African Union: An overview", 3 *African Human Rights Law Journal*, 2003, p. 222 and T. DEMEKE: "The new Pan-African Parliament: Prospects and challenges in view of the experience of the European Parliament", 4 *African Human Rights Law Journal*, 2004, p. 53.

⁷⁰ Protocol on the Pan-African Parliament Art. 3(2).

⁷¹ It is clear that the Parliament has yet to find its feet, but among the activities with relevance for human rights are its fact-finding mission to Darfur, which produced a report to the April 2005 session of the Parliament and its decision at the same session to send missions to Côte d'Ivoire and the Democratic Republic of Congo. The Parliament will also play a role in the African Peer Review process. See Recommendations on the New Partnership for Africa's Development and the African Peer Review Mechanism, adopted at second ordinary session of the Pan-African Parliament, 16 September - 1 October 2004, PAP-Rec 002/04. http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/pap3rdres.pdf (accessed 26 September 2005).

⁷² AU Constitutive Act Art. 22(1).

⁷³ ECOSOCC Statutes Art. 2(5).

⁷⁴ <http://www.africa-union.org/organs/ecosocc/home.htm>. ECOSOCC has a membership of 150 organisations, constituting the General Assembly, and a 18-member Standing Committee. To facilitate policy input into the other AU organs the Council has ten sectoral cluster committees, roughly corresponding to the departments of the AU Commission (Political affairs; peace and security; infrastructure and energy, social affairs and health; human resources, science and technology; trade and industry; rural economy and agriculture; economic affairs; women and gender; and cross-cutting issues. Human rights are considered under political affairs.)

⁷⁵ See Declaration on the Establishment of a Mechanism for Conflict Prevention, Management and Resolution, AHG/DECL. 3 (XXIX). The Central Organ of this Mechanism was included as an organ of the AU at the 37th OAU Assembly in 2001, AHG/Dec. 160 (XXXVII). According to Art. 22 of the Protocol Relating to the Establishment of Peace and Security Council of Africa, ASS/AUMDec. 2(1), this Council will replace the earlier Mechanism.

⁷⁶ PSC Protocol Art. 5(2)(g).

Article 4 of the PSC Protocol provides that the Council shall be guided by the AU Constitutive Act, the UN Charter and the Universal Declaration of Human Rights. The Protocol further provides as one of the objectives of the Council to

promote and encourage democratic practices, good governance and the rule of law, protect human rights and fundamental freedoms, respect for the sanctity of human life and international humanitarian law, as part of efforts for preventing conflicts.⁷⁷

Article 19 of the Protocol provides that:

the Peace and Security Council shall seek close cooperation with the African Commission on Human and Peoples' Rights in all matters relevant to its objectives and mandate. The Commission on Human and Peoples' Rights shall bring to the attention of the Peace and Security Council any information relevant to the objectives and mandates of the Peace and Security Council.

From its Annual Activity Reports it appears that the Commission has not made use of this provision, though it has made reference to PSC resolutions in its own country specific resolutions.⁷⁸

The development programme of the AU, the New Partnership for Africa's Development (NEPAD), links human rights to development and provides for the African Peer Review Mechanism, (APRM), discussed below.

5.2. *The African Commission on Human and Peoples' Rights*

As was mentioned earlier, the African Charter, as adopted in 1981, provided only for the creation of a Commission and not a Court on Human Rights, in contrast with the other two regional systems in the world—in Europe and in the Americas, which, at the time, had both—.⁷⁹ The Commission is not formally an organ of the AU, as it was created by a separate treaty.

5.2.1. THE COMMISSIONERS

The African Commission consists of 11 commissioners, who serve in their individual capacities.⁸⁰ The Commission meets twice a year in regular sessions for a period of up to two weeks. They are nominated by state parties to the Charter and elected by the Assembly.⁸¹ The Secretariat of the Commission is based in Banjul, The

⁷⁷ PSC Protocol Art. 3(f).

⁷⁸ See eg Resolution on Côte d'Ivoire and Resolution on Darfur (2004), 17th Annual Activity Report of the African Commission on Human and Peoples' Rights.

⁷⁹ With the entry into force of Protocol 11 to the European Convention on Human Rights in November 1998 the European Commission on Human Rights was abolished.

⁸⁰ Art. 31.

⁸¹ Art. 33.

Gambia. The Commission alternates its meetings between Banjul and other African capitals. The Commission has a protective as well as a promotional mandate.⁸²

Although the Charter provides that the Commissioners should be independent there have been many instances where the independence of individual Commissioners has been questioned. The fact that many Commissioners have been serving civil servants or ambassadors has received criticism. For example, a Commissioner from Mauritania elected in 2003 became a minister in his home country shortly thereafter. An important step was, however, taken when the AU requested nominations to fill the post of four Commissioners in 2005. In a *note verbale* to the member countries in April 2005 the AU Commission provided guidelines that excluded senior civil servants and diplomatic representatives.⁸³ The four new Commissioners elected at the July 2005 summit all hold positions which are independent from government.⁸⁴

The main mechanisms employed by the Commission to fulfil its task of supervising compliance with Charter norms by state parties are the following:

5.2.2. THE COMPLAINTS PROCEDURE

Both states and individuals may bring complaints to the African Commission alleging violations of the African Charter by state parties.

The procedure by which one state brings a complaint about an alleged human rights violation by another state is not often used.⁸⁵ Currently one such case is pending before the Commission, between the Democratic Republic of Congo and three neighbouring countries.⁸⁶

The so-called individual communication or complaints procedure is not clearly provided for in the African Charter. One reading of the Charter is that communications could be considered only where "serious or massive violations" are at stake, which then triggers the rather futile Article 58 procedure, described below. However, the African Commission has accepted from the start that it has the power to deal with complaints about any human rights violations under the Charter even if "serious or massive" violations are not at stake, provided the admissibility criteria are met.⁸⁷

⁸² Art. 45(1) & (2). See V. DANKWA: "The promotional role of the African Commission on Human and Peoples' Rights" in EVANS and MURRAY (n 23 above) 335.

⁸³ BC/OLC/66/Vol. XVIII

⁸⁴ The four members elected were Ms Peine Alapini-Gansou lawyer and NGO activist in Benin; Mr Musa Ngary Bitaye, president of the Bar Association of The Gambia; Ms Faith Pansy Tiakula, Chief Electoral Officer, Independent Electoral Commission of South Africa; and Mr Mumba Malila, chairperson of the Zambian Human Rights Commission.

⁸⁵ Provided for in Arts. 47-54.

⁸⁶ Communication 227/99, *Democratic Republic of the Congo v Burundi, Rwanda and Uganda*. In a case brought by a Burundian organisation against a number of neighbouring states it was held by the Commission that the complainant was in essence representing the state. However, the communication was considered under the individual communication procedure as the organisation's standing to bring the complaint was not challenged by the responding governments. Communication 157/96, *Association Pour la Sauvegarde de la Paix au Burundi v Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia*, 17th Annual Activity Report of the African Commission.

⁸⁷ Following directly after the provisions on inter-state communications, Art. 55 provides for "other communications". The Commission has proceeded from the assumption that this refers to individual communications. See *Jawara v The Gambia*, n 48 above, para 42.

The Charter is silent on the question who can bring such complaints, but the Commission practice is that complaints from individuals as well as NGOs are accepted. From the case law of the Commission it is clear that the complainant does not need to be a victim or a family member of a victim.⁸⁸ The Commission in the *SERAC* case expressed its thanks to

the two human rights NGOs which brought the matter under its purview ... This a demonstration of the usefulness to the Commission and individuals of *actio popularis*, which is wisely allowed under the African Charter.⁸⁹

The individual complaints procedure is used much more frequently than the inter-state mechanism of the African Charter, although not as frequently as one would have expected on a continent with the kind of human rights problems that Africa has.⁹⁰ This could to some extent be attributed to a lack of awareness about the system, but even where there is awareness, there is often not much faith that the system can make a difference.

According to a recent study on the compliance of states with the findings of the Commission there has been full state compliance in six of the 44 cases where the Commission found state parties in violation of the African Charter. The study finds that there has been non-compliance in 13 cases, partial compliance in 14 cases, seven cases of situational compliance (through change of government) and unclear compliance in four cases.⁹¹ Viljoen and Louw finds that

in the analysis of cases of full and clear non-compliance, it appears that the most important factors are political, rather than legal. The nature of the case, the elaborateness of reasoning or the type of remedy required seems to have little bearing on the likelihood of adherence by states. The only factor of relevance that relates to the treaty body itself is follow-up activities undertaken by the Commission.⁹²

As with other complaints systems, the African Charter poses certain admissibility criteria before the Commission may entertain complaints.⁹³ These criteria include the requirement of exhausting local remedies. The Commission may be approached only once the matter has been pursued in the highest court in the country in question, without success, or a reasonable prospect of success.

The Commission has stated that for a case not to be admissible local remedies must be available, effective, sufficient and not unduly prolonged.⁹⁴ In *Purohit and*

⁸⁸ *Malawi African Association and Others v Mauritania*, n 28 above, para 78.

⁸⁹ N 29 above, para 49.

⁹⁰ The Commission has received around 300 individual communications since its inception in 1987, many of them submitted by NGOs.

⁹¹ F. VILJOEN & L. LOUW: "An assessment of state compliance with the recommendations issued by the African Commission on Human and Peoples' Rights between 1993 and 2003" (forthcoming, on file with authors).

⁹² As above.

⁹³ Art. 56. For a discussion, see F. VILJOEN: "Admissibility under the African Charter" in EWMS & MURRAY (n 25 above) 61.

⁹⁴ *Jawara v The Gambia*, n 48 above.

Moore v the Gambia,⁹⁵ a case dealing with detention in a mental health institution, the Commission gave a potentially far-reaching decision on the exhaustion of local remedies when it held that:

the category of people being represented in the present communication are likely to be people picked up from the streets or people from poor backgrounds and as such it cannot be said that the remedies available in terms of the Constitution are realistic remedies for them in the absence of legal aid services.⁹⁶

The Charter also has a requirement that the communications are "not written in disparaging or insulting language directed against the state concerned and its institutions or to the Organization of African Unity".⁹⁷

When a complaint is lodged, the state in question is asked to respond to the allegations against it. If the state does not respond, the Commission proceeds on the basis of the facts as provided by the complainant.⁹⁸ If the decision of the Commission is that there has indeed been a violation or violations of the Charter, the Commission sometimes also makes recommendations that continuing violations should stop (eg prisoners be released);⁹⁹ or specific laws be changed¹⁰⁰, but often the recommendations are rather vague, and the state party is merely urged to "take all necessary steps to comply with its obligations under the Charter."¹⁰¹ Sometimes there is no provision at all as to remedies,¹⁰² while in other cases the remedies provided are elaborate.¹⁰³ Recently the Commission required some states to report on measures taken to comply with the recommendations in their state reports to the Commission.¹⁰⁴

Article 58 provides that "special cases which reveal the existence of serious or massive violations of human and peoples' rights" must be referred by the Commission to the Assembly, which "may then request the Commission to undertake an in-depth study of these cases". Where the Commission has followed this route, the

⁹⁵ *Purohit and Moore v The Gambia*, communication 241/2001, 16th Annual Activity Report of the African Commission on Human and Peoples' Rights.

⁹⁶ As above, para 37.

⁹⁷ Art. 56(3). The Commission has only used this provision in one case, see *Ligue Camerounaise des Droits de l'Homme v Cameroon* (2000) AHRLR 61 (ACHPR 1997).

⁹⁸ See, for example, *Commission Nationale des Droits de l'Homme et des Libertés v Chad*, n 29 above, para 25. See also R. MURRAY: "Evidence and fact-finding by the African Commission" in EVANS and MURRAY (n 25 above) 100.

⁹⁹ See eg *Constitutional Rights Project (in respect of Akamu and Others) v Nigeria*, n 34 above; *Constitutional Rights Project (in respect of Lekwot and Others) v Nigeria* (2000) AHRLR 183 (ACHPR 1995); *Constitutional Rights Project and Another v Nigeria*, n 49 above; *Constitutional Rights Project v Nigeria I* (2000) AHRLR 241 (ACHPR 1999); *Centre for Free Speech v Nigeria* (2000) AHRLR 250 (ACHPR 1999).

¹⁰⁰ See eg *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998); *Avocats Sans Frontières (on behalf of Bwampamyé) v Burundi*; (2000) AHRLR 48 (ACHPR 2000).

¹⁰¹ *Constitutional Rights Project and Others v Nigeria*, n 58 above.

¹⁰² *Huri-Laws V Nigeria* (2000) AHRLR 273 (ACHPR 2000).

¹⁰³ See eg *Malawi African Association and Others v Mauritania*, n 28 above; *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*, n 29 above.

¹⁰⁴ See eg *Legal Resources Foundation v Zambia*, n 37 above.

Assembly has failed to respond, but the Commission has nevertheless made findings that such massive violations have occurred. Today, the Commission does not seem to refer cases anymore to the Assembly in terms of Article 58.¹⁰⁵

The Charter does not contain a provision in terms of which the Commission has the power to take provisional or interim measures requesting state parties to abstain from causing irreparable harm.¹⁰⁶ However, the Rules of Procedure of the Commission grants the Commission the power to do so. The Commission has used these provisional or interim measures in a number of cases. One such case concerned Ken Saro-Wiwa and other Ogoni activists, who had been sentenced to death by a special tribunal, set up by the military government in Nigeria.¹⁰⁷ In that particular case, the interim measures requesting the Nigerian government not to execute them were ignored. The execution of Saro-Wiwa and the others caused a worldwide outcry. The Commission said in its decision that it had tried to assist Nigeria to meet its obligations under the Charter by means of the interim measures, and the execution in the face of the interim measures consequently violated Article 1.¹⁰⁸

5.2.3. CONSIDERATION OF STATE REPORTS

Each state party is required to submit a report every two years on its efforts to comply with the African Charter.¹⁰⁹ Although it is not provided for in the African Charter that the reports should be submitted specifically to the African Commission, the Commission recommended to the Assembly that the Commission be given the mandate to consider the reports. The Assembly has endorsed this recommendation.¹¹⁰ NGOs are allowed to submit shadow or alternative reports, but the impact of this avenue is diminished by the lack of access of NGOs to the state reports to which they are supposed to respond. The reports are considered by the Commission in public sessions. Reporting by state parties should be done in accordance with guidelines adopted by the Commission. Currently there are two sets of guidelines; one, adopted in 1988¹¹¹ is long and complex and one, adopted in 1998¹¹² which is overly brief.¹¹³ The relationship between these guidelines is unclear and it should be

¹⁰⁵ It seems that the Commission will be able to refer such cases to the PSC (Art. 19 of the PSC Protocol, see above).

¹⁰⁶ Rule 111. For a discussion, see G.J. NALDI: "Interim measures of protection in the African system for the protection of human and peoples' rights", 2 *African Human Rights Law Journal*, 2002, p. 1.

¹⁰⁷ *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*, n 102 above.

¹⁰⁸ However, in a recent decision the Commission held that Article 1 could only be violated if "the State does not enact the necessary legislative enactment". *Interights and Others (on behalf of Bosch) v Botswana*, n 36 above, para 51. In that case non-compliance with interim measures was not held to have constituted a violation of Art. 1.

¹⁰⁹ Art. 62. For a discussion, see M. EVANS and others "The reporting mechanism of the African Charter on Human and Peoples' Rights" in EVANS & MURRAY (n 25 above) 36 and GW Mugwanya "Examination of state reports by the African Commission: A critical appraisal", 1 *African Human Rights Law Journal*, 2001, p. 268.

¹¹⁰ See AHG/Res 176 (XXIV) 1988, reprinted in *Human Rights Law in Africa 1999* 128.

¹¹¹ Reprinted in *Human Rights Law in Africa* 507.

¹¹² Reprinted in *Human Rights Law in Africa* 569.

¹¹³ Evans and others, 45.

a priority of the Commission to clarify the situation as regards guidelines on state reporting.¹¹⁴

Reporting under the Charter, as in other systems, is aimed at facilitating both introspection and inspection. "Introspection" refers to the process when the state, in writing its report, measures itself against the norms of the Charter. "Inspection" refers to the process when the Commission measures the performance of the state in question against the Charter. The objective is to facilitate a "constructive dialogue" between the Commission and the states.

Reporting has been very tardy, and 18 of the 53 state parties to the African Charter have never submitted any report. In 2001 the Commission started to issue concluding observations in respect of reports considered. Their usefulness is diminished by the fact that neither the state reports nor the concluding observations are published by the Commission.

5.2.4. SPECIAL RAPORTEURS AND WORKING GROUPS

The Commission has appointed a number of special rapporteurs, with varying degrees of success. There is no obvious legal basis for the appointment of the special rapporteurs in the Charter; it has been described as another innovation of the Commission.¹¹⁵ The special rapporteurs are all members of the Commission.

There has been widespread criticism of the lack of effective action on the part of the Special Rapporteur on Summary, Arbitrary and Extrajudicial Executions, while the same is true of at least the first incumbent of the position of Special Rapporteur on the Conditions of Women in Africa. In contrast, the Special Rapporteur on Prisons and Conditions of Detention in Africa has set the standards for years to come.

The Commission has recently appointed special rapporteurs on freedom of expression; refugees and internally displaced persons; and human rights defenders. The Commission has also established a committee to monitor the implementation of the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines). In addition a Working Group on Indigenous People or Communities and a Working Group on Economic, Social and Cultural Rights have been established. Some of the members of these working groups are not members of the Commission.

¹¹⁴ The Commission's Working Group on Economic, Social and Cultural Rights has in its mandate to "elaborate a draft revised guidelines pertaining to economic, social and cultural rights, for State reporting". Resolution On Economic, Social And Cultural Rights In Africa, ACHPR/Res.73(XXXVI)04, adopted by the African Commission on Human and Peoples' Rights, December 2004.

¹¹⁵ It has been argued that the legal justification is to be found in Article 46, which allows for "any appropriate method of investigation". For a discussion, see J. HARRINGTON: "Special rapporteurs of the African Commission on Human and Peoples' Rights" 1 *African Human Rights Law Journal*, 2001, p. 247 and M. EVANS & R. MURRAY: "The special rapporteurs in the African system" in EVANS & MURRAY (n 25 above) 280. For the mandates of the special rapporteurs, see www.achpr.org.

5.2.5. ON-SITE VISITS

The Commission has since 1995 conducted a number of on-site visits.¹¹⁶ These involve a range of activities, from fact finding to good offices and general promotional visits.¹¹⁷ Many mission reports have never been published.

5.2.6. RESOLUTIONS

The Commission has adopted resolutions on a number of human rights issues in Africa. In addition to country-specific and other more *ad hoc* resolutions, they have adopted resolutions on topics such as the following: fair trial; freedom of association; human and peoples' rights education; humanitarian law; contemporary forms of slavery; anti-personnel mines; prisons in Africa; the independence of the judiciary; the electoral process and participatory governance; the International Criminal Court; the death penalty; torture; HIV/AIDS; and freedom of expression.¹¹⁸

5.2.7. RELATIONSHIP WITH NGOS

NGOs have a special relationship with the Commission.¹¹⁹ Large numbers have registered for observer status.¹²⁰ NGOs are often instrumental in bringing cases to the Commission; they sometimes submit shadow reports; propose agenda items at the outset of Commission sessions; and provide logistical and other support to the Commission, for example by placing interns at the Commission and providing support to the special rapporteurs and missions of the Commission. NGOs often organise special NGO workshops just prior to Commission sessions, and participate actively in the public sessions of the Commission. NGOs also collaborate with the Commission in developing normative resolutions and new protocols to the African Charter.

5.2.8. INTERACTION WITH AU POLITICAL BODIES

The Annual Activity Reports of the Commission, which reflect the decisions, resolutions, and other acts of the Commission, are submitted each year for permission to publish to the meetings of the Assembly of Heads of State and Government

¹¹⁶ Countries that members of the Commission has conducted promotional or fact-finding missions to include: Burkina Faso (2001), Chad (2000), Congo (2004), Côte d'Ivoire (2001, 2003), Democratic Republic of Congo (2004), Djibouti (2000, 2002), Libya (2002), Mauritania (1996), Mozambique (2000), Niger (2002), Nigeria (1997, 2005), Senegal (1996, 2002), Seychelles (2001), Sierra Leone (2000, 2004), South Africa (2001), Sudan (1996, 2002), Togo (1995), Zambia (2001) and Zimbabwe (2002).

¹¹⁷ See R. MURRAY: "Evidence and fact-finding by the African Commission" in EVANS & MURRAY (n 25 above) 100.

¹¹⁸ For the text of the resolutions see *Human Rights Law in Africa* and www.achpr.org.

¹¹⁹ See A. MOTALA: "Non-governmental organisations in the African system" in EVANS & MURRAY (n 25 above) 246 and CE Welch: *Protecting Human Rights in Africa: Strategies and Roles of Non-governmental Organisations* (1995).

¹²⁰ See the resolution reprinted in *Human Rights Law in Africa* 572. National human rights institutions may also register for observer/affiliate status. See the resolution reprinted in *Human Rights Law in Africa* 574.

("Assembly") of the OAU/AU that have traditionally taken place in June or July of the following year. The Assembly has now delegated the authority to discuss the Activity Report to the Executive Council.¹²¹ However, it is still formally adopted by the Assembly as this is required by the Charter.¹²² The AU has recently started to have summits twice a year and it remains to be seen whether the African Commission will submit a report to each summit.

In practice the Assembly has served as a rubber stamp for the publication of the report by the Commission containing its decisions, but the principle that the very people in charge of the institutions whose human rights practices are at stake—the Heads of State—should take the final decision on publicity undermines the legitimacy of the system. When the 17th Annual Activity Report was considered by the Executive Council at the AU summit in July 2004, Zimbabwe complained that it had not had the opportunity to respond to allegations contained in the report concerning a fact-finding mission undertaken by the Commission to Zimbabwe. The Council suspended the publication of the report and its publication was only finally authorised at the summit in January 2005.

5.2.9. INFORMATION ON THE COMMISSION

The decisions of the Commission are published in the *African Human Rights Law Reports* (AHLRL).¹²³ A small but growing number of secondary publications on the work of the Commission have appeared.¹²⁴ Information on the work of the Commission is available on a number of websites.¹²⁵ It is unclear why the Commission makes little use of its own web site which should be the main resource on information on the work of the Commission. In December 2005 the Commission published the 18th Annual Activity Report, adopted by the AU Assembly in July 2005 on its web site. However, the 17th Annual Activity Report, adopted by the AU Assembly in January 2005 had as of February 2006 not been published on the web site.

5.3. *The African Court on Human and Peoples' Rights*

Several reasons have been advanced why only a Commission, and not a Court, was provided for in the African Charter in 1981 as the body responsible for monitoring compliance of state parties with the Charter. On the one hand there is perhaps

¹²¹ Decision on the 16th Annual Activity Report of the African Commission on Human and Peoples' Rights, Doc. Assembly/AU/7 (II), July 2003, para 5.

¹²² African Charter on Human and Peoples' Rights Art. 59(3).

¹²³ The first volume, covering the period 1987-2000 was published in 2004.

¹²⁴ Among the most prominent are E. ANKUMAH: *The African Commission on Human and Peoples' Rights: Practice and Procedures*, 1996; U.O. UMOZURIKE: *The African Charter on Human and Peoples' Rights*, EVANS & MURRAY (eds), n 25 above; and F. OUGUERGOUZ: *The African Charter on Human and Peoples' Rights: a comprehensive agenda for human rights*, 2003. For a detailed overview, see F. VILOREN: "Introduction to the African Commission and the regional human rights system" in *Human Rights Law in Africa* 385. Developments in the system are covered on a regular basis in the *African Human Rights Law Journal*, since 2001.

¹²⁵ www.achpr.org; www.africa-union.org; www.chr.up.ac.za.

the more idealistic explanation that the traditional way of solving disputes in Africa is through mediation and conciliation, not through the adversarial, "win or lose" mechanism of a court. On the other hand there is the view that the member states of the OAU were jealous of their newly founded sovereignty.¹²⁶

The notion of a human rights court for Africa would be taken up by the OAU 13 years after the adoption of the African Charter when, in 1994, the Assembly adopted a resolution requesting the Secretary-General of the OAU to convene a Meeting of Experts to consider the establishment of an African Court on Human and Peoples' Rights.¹²⁷

Ostensibly, the concept of human rights was accepted widely enough in Africa in the early 1990s for the decision to be taken to give more "teeth" to the African human rights system, in the form of a Court. This came in the wake of the different waves of democratisation on the national level, epitomised by the watershed elections in Benin in 1991, and the advent of democracy in South Africa in 1994. Worldwide, of course, the idea of human rights also gained prominence after the end of the cold war.

The Protocol on the African Court on Human and Peoples' Rights was adopted in Addis Ababa, Ethiopia, in 1998.¹²⁸ The Protocol entered into force in January 2004 and by February 2006 had received 22 ratifications.

The AU Assembly decided at its summit in July 2004 that the African Human Rights Court should merge with the African Court of Justice. The protocol establishing the latter court had been adopted by the Assembly in July 2003,¹²⁹ without any reference to a merger with the human rights court. The Protocol on the African Court of Justice had as of February 2006 not received the required 15 ratifications to enter into force. A draft merger protocol has been circulated¹³⁰ and at the AU summit in July 2005 the Assembly decided that:

...
2. ... a draft legal instrument relating to the establishment of the merged court comprising the Human Rights Court and the Court of Justice should be completed for consideration by the next ordinary sessions of the Executive Council and the Assembly ...

¹²⁶ J. HARRINGTON: "The African Court on Human and Peoples' Rights" in EVANS & MURRAY (eds.), n 23 above, 306. For commentary on the envisaged Court, see also G.J. NALDI & K. MAGUIRAS: "Reinforcing the African system of human rights: The Protocol on the Establishment of a Regional Court of Human and Peoples' Rights", 16 *Netherlands Quarterly of Human Rights*, 1998, p. 431; N.J. UBOMBANA: "Towards the African Court on Human and Peoples' Rights: Better late than never" 3 *Yale Human Rights and Development Law Journal*, 2000, p. 45; M. MUTUA: "The African Human Rights Court: A two-legged stool?" 21 *Human Rights Quarterly*, 1999, p. 350; "The African Court on Human and Peoples' Rights" in EVANS & MURRAY (n 23 above) 305; and F. VIJODIK: "A Human Rights Court for Africa, and Africans", 30 *Brooklyn Journal of International Law*, 2004, p. 1.

¹²⁷ AHG/Res 230 (XXX) 1994. Reprinted in *Human Rights Law in Africa* 1999 139.

¹²⁸ The documents leading up to the adoption of the African Human Rights Court Protocol are reprinted in *Human Rights Law in Africa* 1999 233-296. The Protocol is reprinted in *Human Rights Law in Africa*, 2004, p. 170.

¹²⁹ Protocol of the Court of Justice of the African Union, adopted by the AU Assembly of Heads of State and Government, Maputo, July 2003.

¹³⁰ AMNESTY INTERNATIONAL: "African Union: The establishment of an independent and effective African Court on Human and Peoples' Rights must be a top priority", IOR 30/02/2005, 28 January 2005.

3. ALSO DECIDES that all necessary measures for the functioning of the Human Rights Court be taken, including particularly the election of the judges, the determination of the budget and the operationalization of the Registry;

4. FURTHER DECIDES that the Seat of the merged court shall be at a place to be decided upon by the Member States of the Eastern Region, which shall also serve as the seat of the Human Rights Court pending the merger.¹³¹

Once the African Human Rights Court is in place, it will "complement" the protective mandate of the Commission under the Charter.¹³² Under the 1998 Protocol the Court will consist of 11 judges, serving in their individual capacities,¹³³ nominated by state parties to the Protocol,¹³⁴ and elected by the Assembly. Only the president will be full-time.¹³⁵ The judges were elected by the Assembly in January 2006.¹³⁶ The seat of the Court is still to be determined,¹³⁷ but as is clear from the above resolution it will be in the Eastern Region.

The Protocol provides that the judges will be appointed in their individual capacities,¹³⁸ and their independence is guaranteed.¹³⁹ Special provision is made that "[t]he position of judge of the Court is incompatible with any activity that might interfere with the independence or impartiality of such a judge ...".¹⁴⁰ Judges will not be allowed to sit in a case if that judge is a national of a state which is a party to the case.¹⁴¹

In respect of the Court's findings, the Protocol determines that "[i]f the Court finds that there has been a violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation."¹⁴² The Court is explicitly granted the powers to adopt provisional measures.¹⁴³

By ratifying the Protocol, states accept that the Commission and the states involved will be in a position to take a case that has appeared before them to the African Human Rights Court, to obtain a legally binding decision.¹⁴⁴ Individuals and those who act on their behalf will be able to take cases to the Court only in respect of those states that have made an additional declaration specifically authorising them to do so. In such instances the case will have to be taken "directly" to the Court, presumably

¹³¹ Decision on the merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union, Assembly/AU/dec.83 (v).

¹³² Art. 2 of the African Human Rights Court Protocol.

¹³³ Art. 11.

¹³⁴ Art. 12.

¹³⁵ Art. 15(4).

¹³⁶ Assembly/AU/Dec.100(VI).

¹³⁷ Art. 25.

¹³⁸ Art. 11.

¹³⁹ Art. 17.

¹⁴⁰ Art. 18. This is significant because one of the criticisms against the Commission has been that a number of Commissioners have been closely associated with the Executive in their countries.

¹⁴¹ Art. 22.

¹⁴² Art. 27(1).

¹⁴³ Art. 27(2).

¹⁴⁴ Art. 5(1).

bypassing the Commission or, if the Commission was approached first, the case can be taken to the Court without requiring the authorisation of the Commission.¹⁴⁵

Article 3(1) reads as follows:

The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the states concerned.

The phrase "any other relevant human rights instrument ratified by the states concerned", according to most commentators, means that adjudication in respect of even UN and sub-regional human rights instruments will fall within the jurisdiction of the African Human Rights Court, provided that such treaties have been ratified by the states concerned.¹⁴⁶

It is submitted that nothing is wrong with the African Human Rights Court interpreting the Charter in view of international standards.¹⁴⁷ Advisory opinions¹⁴⁸ could also deal with other treaties.¹⁴⁹ However, if contentious cases could be brought to the African Human Rights Court on the ground that for example UN treaties have been violated, with no reference to the African Charter, this could lead to conflicting decisions in the different systems.¹⁵⁰

The jurisdiction of the African Human Rights Court to give advisory opinions was mentioned above. In addition to member states and AU organs any "African organization recognized by the [AU]" can request an advisory opinion from the Court.¹⁵¹ Advisory jurisdiction has proved useful in the Inter-American human rights system and could potentially play a similar role in the African system.

¹⁴⁵ Art. 5(3), read with Art. 34(6). Only Burkina Faso has so far made such a declaration, and it will be surprising if many states follow soon. Where a state has not made the additional declaration, the access of the individual to the Court will be as it is under the inter-American system—the individual does not have the power to seize the Court himself or herself—. Where the additional declaration has been made, the situation of the individual resembles the current European system, where there is no Commission and the Court is accessed directly. For criticism, see Heyns, n 41 above.

¹⁴⁶ See Naldi & Magliveras (n 128 above) 435; Udombana (n 128 above) 90; and Mutua (n 128 above) 354.

¹⁴⁷ It should be noted, however, that technically Arts. 60 and 61 of the African Charter only provide that this should be done by the African Commission.

¹⁴⁸ A.P. VAN DER MEI: "The advisory jurisdiction of the African Court on Human and Peoples' Rights", 5 *African Human Rights Law Journal*, 2005, p. 27.

¹⁴⁹ The American Convention on Human Rights provides in Art. 64(1) that the Inter-American Court can give "interpretation of this Convention or of other treaties concerning the protection of human rights in the American states". The Inter-American Court has interpreted "other treaties" to include "[a]ny provision dealing with the protection of human rights set forth in any international treaty applicable in the American States ...". See Advisory Opinion OC-1/82 of 24 September 1982, Series A No 1, para 52, quoted in van der Mei, n 151 above, 38.

¹⁵⁰ At the same time it should be recognised that the potential of conflicting decisions will arise in practice only in cases of "direct" access to the Court, where the Commission is bypassed, because in other cases one of the admissibility criteria before the Commission will be compatibility with the Charter. It is submitted that the word "relevant" in the phrase "relevant human rights instrument" should be understood to restrict the contentious jurisdiction of the Court beyond the Charter and the Protocol only to those instances where the instrument in question has explicitly provided for the jurisdiction of the Court. See Heyns, n 41 above, 166-167.

¹⁵¹ African Human Rights Court Protocol Art. 4.

5.4. African Committee on the Rights and Welfare of the Child

The African Children's Charter adopted in 1990 entered into force in November 1999. The 11 members of the African Committee on the Rights and Welfare of the Child, provided for under the Charter, were elected in July 2001. The Committee held its first meeting in 2002. The Committee has adopted its Rules of Procedures and Guidelines for State Reports. States shall report to the Committee within two years from the entry into force of the convention for the state party concerned and thereafter every three years.¹⁵² Apart from state reporting the African Children's Charter, uniquely among international instruments for the protection of the rights of children, also provides for a communication procedure. The Committee has recently received one communication but it remains unclear how the Committee will handle this.¹⁵³

The Committee does not have its own secretariat, and is serviced by the Department for Social Affairs. The AU is in the process of recruiting a Secretary to the Committee. The Committee suffers from a serious lack of resources and the question could be asked whether the Committee should not be merged with the African Commission.¹⁵⁴

5.5. The African Peer Review Mechanism

In July 2002 in Durban the OAU/AU Assembly of Heads of State and Government adopted the Declaration on Democracy, Political, Economic and Corporate Governance (Governance Declaration).¹⁵⁵ The Governance Declaration provided for the establishment of an African Peer Review Mechanism (APRM) "to promote adherence to and fulfillment of the commitments" in the Declaration.¹⁵⁶ The initiative grew out of the New Partnership for Africa's Development (NEPAD), adopted by the AU in 2001 as the development framework for the Union.

The Governance Declaration in section 10 provides as follows:

In the light of Africa's recent history, respect for human rights has to be accorded an importance and urgency all of its own. One of the tests by which the quality of a democracy is judged is the protection it provides for each individual citizen and for the vulnerable and disadvantaged groups. Ethnic minorities, women and children have borne the brunt of the conflicts rag-

¹⁵² Art. 43. It is unclear how many state parties have actually submitted state reports. However, the Committee has adopted its procedures for considering state reports and has indicated that it will start considering state reports at its meetings. Report of the African Committee on the Rights and Welfare of the Child, EX.CL/200 (VII), report presented to the meeting of the AU Executive Council, 28 June - 2 July 2005, 1.

¹⁵³ As above, 11.

¹⁵⁴ This would be in line with the current initiative to merge the UN human rights treaty bodies. See Plan of action submitted by the United Nations High Commissioner for Human Rights, A/59/2005/Add.3, para 99.

¹⁵⁵ AHG/235(XXXVIII) Annex I.

¹⁵⁶ As above, para 28.

ing on the continent today. We undertake to do more to advance the cause of human rights in Africa generally and, specifically, to end the moral shame exemplified by the plight of women, children, the disabled and ethnic minorities in conflict situations in Africa.

Under the heading "Democracy and Good Political Governance", section 13 provides:

In support of democracy and the democratic process, We will: ensure that our respective national constitutions reflect the democratic ethos and provide for demonstrably accountable governance; promote political representation, thus providing for all citizens to participate in the political process in a free and fair political environment; enforce strict adherence to the position of the African Union (AU) on unconstitutional changes of government and other decisions of our continental organization aimed at promoting democracy, good governance, peace and security; strengthen and, where necessary, establish an appropriate electoral administration and oversight bodies, in our respective countries and provide the necessary resources and capacity to conduct elections which are free, fair and credible; reassess and where necessary strengthen the AU and sub-regional election monitoring mechanisms and procedures; and heighten public awareness of the African Charter on Human and Peoples' Rights, especially in our educational institutions.

At the Durban summit the Assembly also adopted a document specifically dealing with the APRM process, the so-called APRM Base Document:

The process will entail periodic reviews of the policies and practices of participating states to ascertain progress being made towards achieving mutual agreed goals and compliance with agreed political, economic and corporate governance values, codes and standards as outlined in the Declaration on Democracy, Political, Economic and Corporate Governance.¹⁵⁷

The APRM process consists of a self-evaluation by the country that has signed up to being reviewed and a review by an international review team. It is in this respect similar to the state reporting under the African Charter. However, there are also clear differences such as country visits by the APRM review team and the political stage, when the leader of the country discusses the outcome of the review with his peers in other participating countries.

The highest decision making body in the APRM is the APR Forum consisting of the Heads of State and Government of the participating states. A panel of eminent persons with seven members oversees the review process and a member of this panel is chosen to lead the review team on its country mission.

The international review process consists of five stages.¹⁵⁸ First a background study is carried out by the secretariat assisted by consultants. This stage also includes a support mission to the country that will be reviewed. In the second stage a review team led by one of the eminent persons visits the country for discussions with all

¹⁵⁷ The New Partnership for Africa's Development (NEPAD). The African Peer Review Mechanism (APRM), AHG/235(XXXV/III) Annex II (APRM base document), para 15.

¹⁵⁸ As above, paras 18-25.

stakeholders, after which the team prepare its report (third stage). A number of partner institutions and independent consultants assist in the process. The fourth stage consists of the submission of the report to the APRM Forum and the discussion among the peers. The last stage is the publication of the report and further discussion in other AU institutions such as the Pan-African Parliament.

The APRM deals with political, economic and corporate governance and socio-economic development. Initially, there was some debate as to the inclusion of political governance aspects, including human rights, but as pointed out by Cilliers: "Without making political governance the core focus of NEPAD, the Partnership is unlikely to make an impact on the continent."¹⁵⁹

The APRM is voluntary and as of February 2006 26 out of 53 AU member states have signed the Memorandum of Understanding (MOU)¹⁶⁰ that forms the legal basis for the review. In paragraph 24 of the MOU the signatory state agrees to "take such steps as may be necessary for the implementation of the recommendations adopted at the completion of the review process ...". The MOU does not deal with the substantive undertakings of the signatories, but instead refers to the Governance Declaration. The Governance Declaration makes reference to standards that have already been accepted by the participating states in other declarations and treaties, including global and regional human rights instruments. The Governance Declaration comprises not only 28 paragraphs and covers all the areas that are being reviewed, i.e. political, economic and corporate governance as well as socio-economic development. Further documents have been developed with regard to standards and indicators, including a questionnaire to help participating states complete their self-assessments.

Many observers have emphasised the necessity for civil society to engage the APRM if the mechanism is to make any difference on the ground.¹⁶¹ The possibilities for such engagement varies greatly between participating countries, as do the approaches to the independence of the national process from government interference.

The APRM integrates the political level of the AU/NEPAD in a way that other parts of the African human rights system have not done.¹⁶² The situation could to some extent be compared to the role, by many perceived as successful, of the Committee of Ministers of the Council of Europe with regard to the European Conven-

¹⁵⁹ J. CILLIERS: "Peace and Security through Good Governance: A guide to the NEPAD African Peer Review Mechanism" ISS Occasional Paper 70, April 2003.

¹⁶⁰ Memorandum of Understanding on the African Peer Review Mechanism, adopted by the 6th summit of the NEPAD Heads of State and Government Implementation Committee, 9 March 2003, Abuja, Nigeria, NEPAD/HSGIC/03-2003/APRM/MOU. See also Communiqué on the 4th Summit of the Committee of Participating Heads of State and Government of the African Peer Review Mechanism (APR Forum), 22 January 2006, Khartoum, Sudan, <http://www.nepad.org/2005/files/aprm/communiqueKhartoum2006.pdf> (accessed 3 March 2006).

¹⁶¹ See eg A. KULE: "NEPAD's APRM: A progress report" in *South African Yearbook of International Affairs* 2003/2004.

¹⁶² The main African human rights body, the African Commission on Human and Peoples' Rights submits its Annual Activity Report to the Executive Council of the AU which submits it to the Assembly for adoption. Though the report in 2003 aroused a certain amount of debate, this was not for trying to implement suggestions in the report but rather to shield Zimbabwe from criticism.

tion on Human Rights and the European Social Charter. However, as shown by the activities of the political bodies of the United Nations involved with human rights, the direct involvement of other states in the protection of rights is not without its problems.¹⁶³

As in other parts of the world African leaders have not shown a great interest in criticising their peers. Hence there are reasons to be sceptical about whether "peer pressure" will be employed in the process. However, to solely focus on the pressure exercised at this level would be to underestimate the process as a whole. The APRM Base Document provides for sanctions as a last resort if peer pressure is not enough to convince governments with a lack of political will to rectify identified shortcomings.¹⁶⁴

There has not been much cooperation between the APRM and the African Commission, which is unfortunate. A look at the composition of the missions to Ghana and Rwanda, the first two states to be subject to the APRM process, also makes it clear that the focus is more on economic than political governance.

6. Conclusion

It is not difficult to criticise the African regional human rights system, and many have done so. Some have argued that given the fact that the African Charter was adopted 25 years ago and the African Commission has been in operation for 20 years, the track record of the Commission is less than impressive. The Commission has been poorly managed by its Secretariat for many years. The Commission suffers from a lack of resources, but questions have been asked about the way in which available resources have been managed.

The perceived lack of impartiality of some Commissioners has been a constant bone of contention, as has been the lack of political will in the OAU/AU on a political level to ensure the effectiveness of the Charter system.

The Charter itself has its own internal limitations and thus has required extensive creative interpretation by the Commission. For example, the main mandates of the Commission—receiving individual communications and state reports—are not clearly recognised in the Charter. Some of the internationally accepted rights are recognised only in a cursory form in the Charter.

Moving beyond the Charter system, the need to have established a separate system for the protection of children's rights (complete with a complaints and reporting mechanism) has been questioned. There is a danger of a proliferation of mechanisms, each one depleting the scarce resources even further, instead of establishing one or two truly effective mechanisms before more are created.

¹⁶³ In his address to the UN Commission on Human Rights on 7 April 2005 UN Secretary General Kofi Annan stated that the work of the Commission had "been undermined by the politicization of its sessions and the selectivity of its work". He proposed the adoption of a permanent Human Rights Council which should "have an explicitly defined function as a chamber of peer review, and its main task should be to evaluate all States' fulfilment of all their human rights obligations...". "Secretary General elaborates on reform of human rights structures in address to Commission on Human Rights" United Nations press release, 7 April 2005, www.ohchr.org.

¹⁶⁴ APRM base document, n 154 above, para 24.

Some commentators have also focused on the potential weaknesses of the APRM, which relies on Heads of State—who often don't have much interest in promoting a system of finger-pointing about human rights violations—to police each other.

There is undeniably some truth in these criticisms, and much room for improvement. At the same time the merits of the African regional human rights system also need to be recognised.

The fact that Africa has a regional human rights system in the first place—only one of three regions to have that—provides an entry point for international human rights to play a role which would otherwise not have existed. The arguments about a possible “African exception” to the concept of human rights—the idea that human rights is a foreign concept with little applicability to the African situation—are considerably weaker than they would otherwise have been. The regional human rights system provides the possibility of imminent critique through a mechanism created by African states themselves, which cannot be shrugged off as easily as critique expressed by far-away capitals.

The current make-up of the African regional system in terms of the norms recognised and the enforcement mechanisms followed—largely the result of recent changes to the system—are probably well suited to the African environment. The fact that the norms recognised also reflect socio-economic rights, duties and people's rights does not detract from the recognition of civil and political rights, and the rights of individuals, in the system. Their addition ensures that norms that play a strong role on the continent are also reflected. It should be noted in this regard that the jurisprudence of the African Commission so far by and large reflects internationally accepted standards, and constitutes a valuable point of reference also for national courts.

A wider range of enforcement mechanisms than that which is used elsewhere is followed in Africa. While the European regional human rights system places a strong emphasis on the judicial enforcement of individual civil and political rights through the European Court of Human Rights, the African system operates on a number of levels simultaneously. While the African Human Rights Court (under whatever name that may be used) will provide for a component of judicial suspension, the APRM on the other side of the spectrum has a more political character. This is complimented by the quasi-judicial mechanism of the African Commission, which occupies a place somewhere between the other two mechanisms.

On a continent as diverse as Africa, with its multi-layered landscape of human rights issues, employing an enforcement mechanism with such diverse components seems to be a wise approach. Each component of the collective mechanism plays a different and equally important role. Courts can address individual cases in a strong and decisive manner, but they have a more limited role to play in respect of mobilising a political consensus or dealing with widespread human rights violations. A commission on human rights, which can consider state reports and conduct on site visits, can play an important role in identifying human rights issues that need to be addressed in a systematic way and in working towards negotiated solutions which courts cannot always do. To the extent that such a commission functions and is perceived as an independent body, it can to some extent play a role which those placed inside the confines of power politics will have difficulty in playing.

At the same time there is also a role for human rights supervision in the political processes of the continent. A mechanism such as the APRM, although it has limitations because of its political nature, can also precisely for that reason have an impact on aspects of political life which the other mechanisms cannot reach. Standing alone the APRM would probably not have made much of a difference, but as part of a broader network of mechanisms aimed at the protection of human rights the APRM has the potential to play a significant role—and the same probably applies also to the Court and the Commission—.

The issue of political will remains, and it cannot be denied that much remains to be done to turn the potential offered by the available systems and mechanisms into reality. At the same time, the new institutional focus of the African Union on human rights, as reflected in its Constitutive Act, and in the mandates of its organs provides a starting point. Increasingly individuals are encountered within the system in governments and in civil society in Africa who take this orientation seriously. Clearly, it is on their input that the full implementation of an effective African regional human rights system will depend. Much will depend in this regard on the increased realisation of human rights on the domestic level—an international human rights system cannot survive without a critical mass of building-blocks of state parties that take human rights seriously internally at home—.

7. Postscript: comparative regional Human Rights Systems

The fairly extensive body of material (primary and secondary) on the African regional system which now exists, allows comparison of the experience in Africa with that in the regional systems of the Americas and Europe, and the development of a new field of study, focusing on the different aspects of the phenomenon of regional human rights systems. Engaging in this task in any detail falls beyond the scope of this study—instead some explanatory remarks will merely be made—.¹⁶⁵

Some of the issues that will come into play in such a study are how to compare the effectiveness of the different systems and, proceeding from that, to establish why some systems are less or more effective than others. Are regional human rights systems appropriate for all regions? Is it feasible to establish a regional system eg for Asia,¹⁶⁶ or for the Arab-speaking world?¹⁶⁷ Where does regional protection of human rights fit in compared with the global (UN) system on the one hand and the

¹⁶⁵ Some of the ideas advanced here draw on L.R. HELFER and A. SLAUGHTER: "Towards a theory of effective supranational adjudication", 107 *Yale Law Journal*, 1997, p. 275. See also H. KOH: "Why do nations obey international law?", 106 *Yale Law Journal*, 1997, p. 2599, D. CASSEL: "Does international human rights law make a difference?", 2 *Chicago Journal of International Law*, 2001, p. 121 and E. NEUMAYER: "Do international human rights treaties improve respect for human rights?", 49 *Journal of Conflict Resolution*, 2005, p. 1.

¹⁶⁶ V. MUNTARBHORN: "Asia, human rights and the new millennium: Time for a regional human rights charter?", 8 *Transnational Law and Contemporary Problems*, 1998, p. 407, S.R. HARRIS: "Asian human rights: Forming a regional covenant", 17 *Asian-Pacific Law and Policy Journal*, 2000, p. 1

¹⁶⁷ M. RISHMANN: "The revised Arab Charter on Human Rights: A step forward?", 5 *Human Rights Law Review*, 2005, p. 361.

domestic protection of human rights on the other? What role does civil society have in influencing these systems? What is the relationship between the human rights and the other functions of the parent regional bodies (such as the AU)?

To start answering these questions, a more thorough comparison of the different regional systems in the world today than is currently available would have to be made. To a large extent, existing comparisons take the features of the different regional systems and juxtapose them, seen in isolation and divorced from their context.¹⁶⁸ Such comparisons are quick to point out that the case load of the European system is, for example, much higher than that of the African system, that the facilities of the one system are superior to the other, etc. This is a starting point, but analysis will have to move beyond these superficial comparisons, and also bring into the picture the fact that the challenges faced by the respective systems differ in fundamental respects, and this should in turn affect how they are to be assessed.

For example, it is often said that many of the problems faced by the European system—in particular before the enlargement of the membership after the end of the cold war—were “luxury” problems, compared to the gross and systematic human rights violations often witnessed in Africa and the Americas. In Europe, the finer points of fair trial procedure or freedom of expression are often at stake, involving governments with a strong commitment to human rights. On the other side of the spectrum, human rights violations in Africa have often taken the form of massive violations, in states where the basic mechanisms for the protection of human rights are not in place on the domestic level. A comprehensive assessment of the relative effectiveness of a regional human rights system should take the different contexts into account and ask the question how do the systems compare in terms of meeting the often very different challenges they are confronted with.

Based on an initial overview, it seems that considerations such as the following may play a role in terms of the impact of the different regional systems, and are worth investigating further:

Focusing on the role played by the state parties, the following issues may come into play:

- Are there effective domestic systems for the protection of human rights in place in the countries that form part of the regional human rights system? These seem to be the building blocks of any functioning regional system.
- Do states parties have the political will to be subjected to human rights scrutiny? This is reflected among other things in the extent to which they make acceptance of human rights treaties subject to debilitating reservations, and whether they are willing to comply with formal treaty requirements (eg submitting state reports where required, engaging with individual complaints, and implementation of recommendations). It also impacts on the question whether they are prepared to support the creation of a strong regional human rights system through the role they play in the parent regional body (see below).

¹⁶⁸ See for example C. HEYNS, D. PADILLA & L. ZWIAR: “A schematic comparison of regional human rights systems: An update”, *5 African Human Rights Law Journal*, 2005, p. 308.

- What is the balance in the region between the countries where there is a strong commitment to human rights, and the countries where there is not? Do the majority of the states have a poor or a good domestic human rights record and at what point is a critical mass reached on either side?

On the regional level, a number of considerations could affect the impact of the system:

- Does the human rights system form part of a range of activities of the regional parent body which, taken as a whole, is to the clear benefit of the states concerned? If human rights protection is one part of a broader mandate which includes for example diplomatic, environmental and trade activities, it may have a stronger chance of success. The more attractive the net benefits of membership of the regional body are, the more likely states may be to accept effective human rights supervision as part of the package. In Europe the human rights criteria for membership of the European Union with all the associated financial benefits have led to reforms in many candidate countries.
- Is the human rights component of the activities of the regional human rights body well resourced, in terms of financial as well as human resources (both the number of people involved but also their ability in this field).
- Do the member states follow an approach of appointing independent and capable experts to be members of supervisory bodies?
- Do the members of the supervisory bodies maintain the highest standards of independence and impartiality, and do they develop a jurisprudence which is compelling and persuasive on principled grounds?
- Is there sufficient correspondence or "norm resonance" between the values of the societies in question, and the values recognised in the regional systems? For example, if the concept of the group is important among the people of the region, some emphasis on peoples' rights and duties could be important in ensuring the legitimacy and as a result the spontaneous acceptance of the systems.
- Is there resonance between the traditional ways of resolving disputes in the region and the methods followed by the supervisory bodies. For example, as was alluded to above in Europe the traditional emphasis on judicial processes could support the central role of the European Court of Human Rights in that system, while the emphasis on non-judicial methods of resolving disputes in Africa could require a more mixed system of supervision, eg not only by a court, but also by a quasi-judicial commission and also by institutions with a strong political component such as the APRM.
- Is there effective publicity for the work of the regional human rights bodies? This appears to be essential in a system based on peer and public pressure.
- Do trade and other links exist between the states involved? Without such links states seem to have little leverage over each other, to implement peer pressure.
- Are the mechanisms in place focused and well coordinated to ensure maximum efficiency in the use of resources? At first glance there seems to be an unnecessary proliferation of systems in the African region.

- Is civil society active in the field of human rights? This applies to NGOs but also other institutions such as universities.
- Is a certain level of homogeneity required for a regional system to be effective?

The issues raised above serve merely to introduce the idea that a comparative study of regional systems in the world today is now a feasible and necessary endeavour, given the availability of information on the African and other regional human rights systems. Comprehensive and ongoing studies of comparative regional human rights systems are bound to open up avenues for the improvement of the existing systems, and will support informed decision-making on the question whether similar systems should be established in other parts of the world.

Regional human rights studies will also serve to integrate into the understanding worldwide of the concept of human rights the experience gained in Africa over the last 20 years in a situation where the concept of human rights is often strongly challenged, but where it arguably also can make its strongest contribution.