Chapter 3 REALISING HUMAN RIGHTS UNDER THE ORGANISATION OF AFRICAN UNITY

3.1 The OAU Charter and human rights

The Charter of the Organisation of African Unity ("OAU")[1] does not explicitly include human rights as part of the OAU's mandate. In this respect, it differs from the UN Charter.[2] The OAU was established as one of the "regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action", provided for in the UN Charter.[3] The OAU must promote international co-operation, having "due regard" to human rights set out in the Universal Declaration.[4] Of the five specialist commissions established under article 20 of the Charter,[5] none was devoted to human rights.

Some of the OAU's most marked successes had been in the field of human rights, but almost exclusively involving violations by non-African states or states that are not members of the OAU.[6] Emphasis fell on the rights to independence of colonised "peoples", the right of newly independent states to non-interference, and on the unity of African states. The OAU's human rights successes relate mainly to four areas:

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1 The Charter was adopted by a conference of Heads of States and Governments in Addis Ababa on 25 May 1963. The Charter was signed by 23 states. It is reprinted in (1964) 3 *ILM* at 1116.

2 Arts 1(3) and 55(c) of the UN Charter mentions the promotion and encouragement of human rights as one of the UN's overarching purposes. As far as the specific institutions are concerned, the General Assembly must assist "in the realisation of human rights and fundamental freedoms for all" (art 13(1)(b)) and ECOSOC may "make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all" (art 62(2)) and must set up commissions for the promotion of human rights (art 68).

3 Art 52(1) of the UN Charter.

4 Art 2(1)(e) of the OAU Charter. The Preamble also recognises the Universal Declaration and UN Charter as the foundation of peaceful and positive co-operation between states.

5 Established in terms of the Charter were the Economic and Social, the Educational and Cultural, and Sanitation and Nutrition Commissions. One on Transport and Communications, and one on Jurists were added in 1964 at the first ordinary session of the OAU. The last was designed as an instrument for legal research. (See M'Baye and Ndiaye in Vasak (ed) (1982) 583 at 593.) In any event, the Commission of Jurists was disbanded after only one year (see EL-Obaid and Appiagyei-Atua (1996) 41 *McGill Law Jnl* 819 at 827 (n 33)).

6 See Umozurike in Ginther (ed) (1983) at 122.

- The purpose of eradicating all traces of **colonialism** from Africa was identified as one of the political goals of the organisation. Decolonisation also implied the restoration of basic rights (such as the right to vote) that had been denied during colonialism. It also aimed at the removal of repressive regimes, most blatantly illustrated in the last days of Portuguese rule in Angola and Mozambique.

- **Self-determination** of African peoples enjoyed high priority, but again within the context of decolonisation.[7] In conformity with the 1964 resolution on respect for existing borders, the OAU rejected post-independence claims to self-determination in Biafra, Katanga, Southern Sudan, Shaba and Eritrea.[8] As far as the Western Sahara is concerned, the OAU admitted the Saharawi Arab Democratic Republic, causing Morocco's withdrawal from the organisation. However, the OAU did not recognise the Sahrawi people's right to self-determination.[9] Eritrea won its independence in 1991 despite the OAU's lack of support for the application of the principle of self-determination in its case.[10]

- A third human rights related area in which the OAU achieved a considerable measure of success is the collective effort to rid Africa of **apartheid** in South Africa.

- In the field of **refugees**, the OAU in 1969 adopted the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.[11]

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7 Denoted a "pigmentational self-determination" by Mazrui, quoted by Blay (1985) 29 *JAL* 147 at 157.

8 Blay (1985) 29 *JAL* 143 at 152 - 153. It should be noted that the 1994 Ethiopian Constitution has incorporated decentralisation by creating nine member states. "Nations, nationalities and peoples" within these states have the right to establish "their own States" (art 47(2) of the Constitution). At first glance this may seem to allow for the secession of groups (or "peoples") from the federal state. This is not the case, though: The new state "directly becomes a member of the Federal Democratic Republic of Ethiopia" (art 47(3)(e) of the Constitution) after complying with other requirements. For example, a two-thirds majority in the State Council and an ordinary majority in a referendum of the "nation, nationality or people" is required (art 47(3) of the Constitution). A multiplication of federal units within, rather than secession from the federal state, is envisaged.

9 Naldi (1982) 26 *JAL* 152.

10 See EL-Obaid and Appiagyei-Atua (1996) 4 *McGill Law Jnl* 819 at 844.

11 See par 3.5 below.

Human rights abuses by independent African states involving especially their own citizens were largely overlooked by the OAU.[12] A long list of human rights abusers provide testimony to that fact. In none of the following instances has the OAU publicly criticised the ruler:[13]

- Idi Amin and Milton Obote in Uganda[14]
- Bokassa in the Central African Republic[15]
- Marcias Nguema in Equatorial Guinea
- Mobutu Sese Seko in Zaïre
- el-Nimiery and al-Bashir in Sudan
- Barré in Somalia
- Mengistu Haile Miriam in Ethiopia
- General Acheampong of Ghana
- Generals Babangida and Sanni Abacha in Nigeria
- Kamuzu Banda in Malawi
- Paul Biya in Cameroon
- Daniel arap Moi in Kenya

The adoption of the African Charter on Human and Peoples' Rights[16] on 17 June 1981 has been a significant step towards greater concern for human rights in OAU member states. The Charter entered into force in 1986. The OAU subsequently exerted pressure by adopting resolutions urging

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12 Chanda (1989-92) 21 - 24 *Zambia Law Jnl* 1 at 17 described the OAU's record in this respect as "dismal".

13 See the list provided by Chanda (1989 - 92) 21 - 24 *Zambia Law Jnl* 1 at 16. See also Umozurike (1983) 77 *AJIL* 902 at 903 and Weisfelder in Welch and Meltzer (eds) (1984) at 90. Since this study concerns itself with human rights realisation in the supra-national, rather than in the national sphere, historical details about these human rights atrocities are not provided. Listing is always treacherous, and this list does not purport to be comprehensive. Citing these examples does not imply any form of exonoration of other violators of human rights on the continent.

14 See Republic of Uganda (1994).

15 See eg Lique (1993).

16 OAU Doc CAB/LEG/67/3/Rev 5, reprinted in eg (1981) 21 *ILM* 58.

states to ratify the Charter.[17] At the end of 1996, the Charter enjoyed near-universal ratification.[18] The OAU has adopted other resolutions of relevance, urging states to comply with the requirements of the Charter.[19] Unfortunately, the practice of the OAU has not changed sufficiently. The fact that human rights still do not enjoy significant attention is reflected most strikingly in the inadequate financial provision made towards the needs of the African Commission.

Having omitted human rights from the OAU Charter, the organisation continued to subscribe to a notion that violations occur primarily *between* states, and not *within* states. In this state-centred approach, human rights violations are addressed on the political and diplomatic level. For this reason, resolving disputes between states has since its inception been one of the OAU's priorities. Indeed, one of the four institutions provided for in the Charter is the Commission of Mediation, Conciliation and Arbitration ("CMCA").[20] The CMCA was founded to facilitate peaceful settlement of disputes between African states.[21] Just more than a year after the OAU had been founded, the Protocol of the Commission on Mediation, Conciliation and Arbitration was adopted.[22] In terms of the Protocol, the CMCA could only involve itself in conflicts between states. Gutto finds this preoccupation with inter-state disputes "quite in line with the general canons of international law as it then was".[23]

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17 See eg Resolution on the African Commission on Human and Peoples' Rights, 28th Ordinary Session of Assembly of Heads of States and Government of the OAU, 29 June - 1 July 1992, Dakar, Senegal, par D (also at Website http://heiwww.unige.ch/humanrts/africa/resafrchar28th.html).

18 See Table J below.

19 See eg the Resolution on the African Commission (adopted at the 28th session, in 1992), urging states parties to the Charter which have not submitted their initial reports to do so as soon as possible and requesting states to include human rights teaching in public education. At its 30th session (13 - 15 June 1994, Tunis, Tunisia), the Assembly adopted a resolution calling on states to take concrete measures towards the effective implementation of the Charter, calling on states to co-operate with the Special Rapporteur on extra-judicial executions, and urging all interested parties to ensure that the Commission is endowed with sufficient resources.

20 Art 7 of the OAU Charter.

21 See also art 3(4) of the OAU Charter, for the organisation's commitment to peaceful settlement of disputes by way of negotiation, mediation, conciliation or arbitration.

22 It was approved by the Assembly in Cairo, July 1964: Chanda (1989 - 92) 21 - 24 *Zambia Law Jnl* 1 at 9, Gutto (1996) 113 *SALJ* 314 at 317.

23 Gutto (1996) 113 *SALJ* 314 at 317.

The CMCA was a complete failure. Not once did a state approach it to settle a dispute.[24] The most obvious reason for this failure is that gross violations of human rights were usually not the product of disputes between states, but rather the product of repression or strife within the borders of a single state. However, inter-state conflict has also accounted for the deprivation of basic rights of numerous Africans.[25] This does not imply that no efforts were made to settle inter-African disputes. African states devised "more flexible *ad hoc* bodies of varying sizes".[26] Kunig described some of these efforts, indicating the prospect of success when heads of state were involved.[27]

Recognising the failure of the CMCA, the OAU Assembly of Heads of State and Government adopted the Cairo Declaration, which established the Mechanism for Conflict Prevention, Management and Resolution ("MCPMR") in 1993.[28] The primary objective of the MCPMR is to anticipate and prevent conflicts between African states. Realistically, the role of the Mechanism is seen as limited. It is restricted to "civilian and military missions of observation and monitoring of limited scope and duration",[29] and will not be directed at "resource-demanding peacekeeping operations".[30] The Central Organ is composed of the members elected annually to the Bureau of the Assembly. It is not clear to what extent the Mechanism is mandated to involve itself in internal conflicts. This is of paramount importance, as these conflicts have been both more numerous and more destructive of basic human dignity on the African continent than inter-state conflicts.[31] The

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24 Chanda (1989 - 92) 21 - 24 *Zambia Law Jnl* 1 at 15.

25 Gutto (1996) 11 *SALJ* 314 mentions the disputes between Uganda and Tanzania, Algeria and Morocco, Ethiopia and Somalia, Somalia and Kenya, Chad and Libya, Senegal and Guinea, Rwanda and Burundi, Ghana and Burkina Faso, Nigeria and Cameroon, and between Burkina Faso and Mali (at 317).

26 Chanda (1989 - 92) 21 - 24 *Zambia Law Jnl* 1 at 15.

27 Kunig (1984) at 30-31.

28 See the Declaration of the Assembly of Heads of State and Government on the Establishment Within the OAU of A Mechanism for Conflict Prevention, Management and Resolution, adopted in Cairo, at the 29th ordinary session of the Assembly, 28 - 30 June 1993: AHG/Decl. (XXIX) Rev 1 (also referred to as the "Cairo Declaration").

29 Par/Art 15 of the Declaration.

30 *Ibid.*

31 Classical examples are: the Biafran war in Nigeria, the Katangese secessionist movement in Congo, the conflict between northern and southern Sudan, the struggle between the Angolan government and UNITA, and the protracted war between RENAMO and the Mozambican government.

Cairo Declaration does not grant blanket approval of interference by the OAU in the domestic affairs of member states. On the contrary, it explicitly provides that it will "function on the basis of the consent and the co-operation of the parties to a conflict".[32]

Furthermore, it will be guided by the objectives of the OAU Charter, in particular those principles impeding scrutiny by external organs of internal affairs.[33] The only indication that pressure for internal inspection may overrule these considerations is found in the use of the word "guided" (as opposed to "will be bound") in paragraph 14. Gutto interprets the Mechanism as a breakthrough in that it provides a "clear basis for responding to both ... internal and external conflicts".[34] Support for this contention is found in the assertion that no "single factor has contributed more to the present socio-economic problems on the continent than the scourge of conflicts within and between our countries."[35]

The lack of a "clear basis" had not prevented the Central Organ from being seized with conflicts of an internal character in Rwanda, Burundi, Somalia, Liberia, Angola and Mozambique.[36] This is perhaps explained by the background which Wembou provided.[37] According to him, all the delegates present in Cairo (with the exception of the Sudanese delegation) agreed that there may be extraordinary circumstances in which the OAU will have to intervene even without first appealing to the international community.[38] Examples cited were Liberia and Somalia, where the extreme suffering and the total disregard for human rights were indicative of the disintegration of the state structure.[39]

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32 Par 14 of the Declaration.

33 In terms of par 14, non-interference in the internal affairs of member states, the respect of the sovereignty and territorial integrity of member states, and their inalienable right to independent existence.

34 (1996) 113 *SALJ* 314 at 315.

35 Par 9 of the Declaration.

36 See Gutto (1996) 113 *SALJ* 314 at 321.

37 Wembou (1993) 5 *RADIC* 725.

38 (1993) 5 *RADIC* 725 at 729.

39 *Ibid.*

The MCPMR is a promising development. It operates from the premise that human rights and security concerns are linked, and that human rights violations by states should be and can be prevented. The Mechanism shows resemblances to the European equivalent, the Organisation for Security and Co-operation in Europe ("OSCE"),[40] which may be enhanced in the future. It has the advantage that it fits more into traditional systems of international dispute settlement than into the human rights implementation model.[41]

3.2 The African Charter on Human and Peoples' Rights

3.2.1 Introduction

Of the three major regional human rights system in the world today, the African is the most recent. The European Convention, the basis of one system, was adopted in 1950. The other system, the Inter-American, was founded in 1948,[42] although the first human rights institution only dates from 1960. The last of the three was founded in 1981 when the Assembly of Heads of State and Government of the OAU adopted the African Charter.[43] After a simple majority of OAU member states had ratified the Charter, it took effect on 21 October 1986.[44] When the tenth anniversary of that date was celebrated, only two member states had not become party to the Charter.

At 51 members, the African system has the largest number of states parties of the three regional systems. While the novelty and geographical scope of the African Charter should be celebrated, they also reflect some of the deficiencies in the functioning of the Charter system.[45] Although near-universal acceptance strengthens the moral force of the Charter, it should not be overemphasised. For example, even after ratification of the Charter in 1995, Swaziland was still ruled by a 1973

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40 See ch 5.1 below.

41 See further on this aspect Brett (1996) 18 *HRQ* 668 at 679.

42 With the adoption of the Charter of the Organisation of American States (see ch 5.2 below).

43 For a historical background, see eg Kannyo in Welch and Meltzer (eds) (1984) 128.

44 The required majority was 26 states.

45 These deficiencies are, for example, the lack of a developed regional human rights jurisprudence, inefficiency in response to continental crises, and regional predominance of the Commission.

decree which outlawed opposition parties and trade unions in the Kingdom. Swazi trade unions organised strikes when the government refused to agree to demands for democratisation and the right to form trade unions.[46] The danger of focusing excessively on trans-continental ratification is that the perception may be created that human rights in Africa will be "realised" as soon as this goal has been attained. Ratification should not be used by repressive governments as a brush to white-wash human rights abuses or as a justification to serve as a smoke-screen to hide the reality of repression.

3.2.2 Substance clarified

The distinctive features and potential application of the African Charter have been the topic of an abundance of scholarly discussion inside and outside Africa.[47] Rather than repeating or summarising this discourse, I will look at the practice of the African Commission in giving some shape to the amorphous body of substantive provisions. The individual communications decided by the Commission on the merits of cases will be reviewed in another section of the study.[48] Here, the Commission's work in four other fields is reviewed:

- "**general comments**" about Charter provisions by adopting resolutions
- implications of **guidelines** for state reporting
- views expressed in the course of **examining state reports** presented in terms of article 62 of the Charter
- reference to the substance of a particular right in the Commission's **admissibility decisions**

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46 See Gebhardt "Union's Swazi Threat" (21- 27 February 1997) *Mail and Guardian* Bl.

47 See eg, rather randomly chosen, Eze (1984), Gittleman in Welch and Meltzer (eds) (1984) 152, Huaraka in Tom (1988) at 193 (discussing the collective concept of human rights, second and third generations of rights, especially the right to self-determination, duties and the right to life), Kunig in Kunig *et al* (1985), Mbaya (1984), M'Baye (1992), Mutua (1995) 35 *Virginia Jnl of Intl Law* 339, Ouguergouz (1993), Rembe (1985), Peter (1990) (in comparison with the Tanzanian Bill of Rights), Umozurike (1983), 77 *AJIL* 902, and Welch in El-Ayouty (ed) (1994) 53.

48 Par 3.3.3 below.

- Although the Charter is silent on the possibility of entering **reservations** upon ratification, two states parties have "clarified" their understanding of the substance of the Charter. These reservations are also discussed.

3.2.2.1 "General comments"[49]

One of the four main functions of the Commission is to "promote" human and peoples' rights.[50] Even if no provision was included to provide in particular for the competence to issue "general comments" about the ambit of rights, such competence could have been included in the broad term "promotion". This was not necessary, because the Charter makes reference to the competence to "formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights".[51] The more general mandate of *interpreting* the Charter provisions may only be exercised at the request of states, OAU institutions, and other African organisations or NGOs recognised by the OAU.[52] Although the Commission has not adopted "general comments" about country reports or the provisions of the Charter, one may derive such "comments" from its resolutions on a number of issues:

i Fair trial

The right to have one's case heard, article 7, has been criticised as being incomplete. The very crucial pre-trial phase of the criminal procedure is also insufficiently dealt with in article 6, which provides in general terms that "no one may be arbitrarily arrested or detained". However, the arrested person or detainee may be deprived of his or her freedom in terms of reasons and conditions "previously laid down by law".[53] In an attempt to "deepen the understanding of

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49 What follow are not general comments in the same sense as those issued by some of the UN treaty bodies. The Commission has not issued general comments as such, but has adopted resolutions on aspects contained in the Charter. I have extracted "general comments" from these resolutions.

50 Art 45(1) of the Charter.

51 Art 45(1)(b) of the Charter.

52 Art 45(3) of the Charter.

53 Article 6 of the Charter, comprising a "claw-back" clause.

substantive rights guaranteed by the Charter",[54] the Commission adopted a resolution on the "Right to Recourse Procedure and Fair Trial" at its 11th session. While the resolution restates aspects already contained in articles 6 and 7, as well as in article 3, the following had been added:

- The unequivocal point of departure is that the right to a fair trial is "essential for the protection of fundamental human rights and freedoms". This gives more importance to the right than was the case previously.

- The necessity of an effective remedy to redress violations of rights is underlined.

- As far as the pre-trial phase is concerned, the right not to be "arbitrarily" arrested or detained[55] is supplemented to include the right to be **informed promptly**, at the time of arrest, in a language he or she understands, of the **reason for the arrest and of any charges**; of the right to be **brought before a judicial officer promptly** after arrest or detention; and of the right to be **brought to trial within a reasonable time** or to be released.

- Article 7(1)(c) provides for the right to defence, including the right to be defended by counsel of one's choice. The Commission resolution clarifies that the right includes that the individual is entitled to "have adequate time and facilities" for the preparation of that defence, and should be allowed to "communicate in confidence with counsel of their choice". It further includes the right to examine, or have examined, the witnesses against him or her, and not to be prejudiced in obtaining witnesses on his or her behalf. The resolution also recommends that states parties provide the needy with legal aid.

- An aspect of a fair trial omitted from the Charter is the right to an interpreter. The resolution provides for "the free assistance of an interpreter" to persons unable to speak the language used in court.

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54 Fifth Activity Report (1991-1992) at 7.

55 As set out in art 6 of the African Charter.

ii Freedom of association

The exercise of the right to freely associate is made conditional on the requirement that one abides by "the law".[56] The danger that governments may limit the exercise of this right and claim to be within the ambit of the African Charter is to a large extent alleviated by the adoption of the Commission's resolution on the right to the freedom of association at its 11th session. This resolution calls on governments not to "enact provisions which would limit the exercise of this Freedom".[57] More ambiguously, the regulation of the exercise of this right "should be consistent with States' obligations under the African Charter". Presumably, the obligation referred to here is to ensure the enjoyment of the rights and freedoms guaranteed in the Charter.[58]

This was the first resolution adopted by the Commission to be referred in one of its own decisions on the merits of a communication.[59] In the case referred to, Nigeria was found to be in violation of article 10 of the Charter. One of the reasons for the finding was the action by the governing authorities in that country to "enact provisions which limit the exercise of this freedom" and "are against obligations under the Charter". This is an indication that the resolutions may serve as interpretative guides to the Charter.

iii Judicial independence

Another aspect of article 7, the right to be tried "by an impartial court or tribunal", was clarified by a resolution adopted at the Commission's 19th session. The resolution incorporated practical concerns, such as appointment, posting, resources, living and working conditions, security of tenure and threats to the security of judges and magistrates.[60]

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56 Art 10(1) of the African Charter.

57 Fifth Annual Activity Report at 28.

58 See in general arts 1 and 2 of the Charter.

59 Communication 101/93 (*Civil Liberties Organisation (in respect of the Nigerian Bar Association) v Nigeria).*

60 For a full text of the resolution, see par 3.4.4(a) below.

iv The right to vote in democratic elections

The Charter does not contain the right to vote, nor does it embody democratic concepts such as universal suffrage and credible, free and fair elections. The only relevant provision is article 13, which states that every citizen "shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law". This was the product of compromise in a political context where the one party system prevailed in numerous African states. Presumably, the requirement of "through freely chosen representatives" would have been satisfied by the existence of elections within a single party system, or from a list presented by the party in power.

A resolution adopted at the 19th session on "electoral process and participatory governance" introduces the concept of "elections". Noting with satisfaction the democratic elections in Benin, the Comoros and Sierra Leone as part of the "transition to democratic rule" in these countries, the Commission asserted that "elections are the only means by which people can elect democratically the Government of their choice in conformity with the African Charter".[61] This clearly qualifies the vague reference to "through freely chosen representatives" in article 13. The Commission further called on governments to take measures to ensure the credibility of electoral processes, emphasising the responsibility of states to provide in the material needs of electoral supervisory bodies.[62]

3.2.2.2 Implications of guidelines for state reporting

Over-elaborate as they are,[63] the guidelines for state reporting give an indication of how some rather elusive substantive Charter provisions are to be interpreted. For example, Scoble noted the complete silence of the Charter with regard to "trade unions".[64] If the right to form trade unions "are silently subsumed under freedom of association",[65] the claw-back clause embodied in article

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61 Ninth Annual Activity Report, Annex VII at 9.

62 On a view on the link between human rights and democracy in modern Africa, se Maluwa (1997) 9 *RADIC* 55.

63 See the criticism at par 3.3.4(b)(i) below.

64 Scoble in Welch and Meltzer (eds) (1984) 177 at 194.

65 *Ibid.*

10 could easily render the right illusory. Despite this dubious basis, the Commission introduced a heading "Trade Union Rights" in the guidelines for state reporting.[66] Reporting must refer to the right "to form and join Trade Unions", of "Trade Unions to Federate", and to "function freely". States also have to report on the *de iure* or *de facto* position governing the exercise of the right to strike.[67]

3.2.2.3 Views expressed during examination of state reports

Views expressed in the course of examining state reports are no more than asides, but they may be informative of the opinions held by individual commissioners. As could be expected, these views do not provide a uniform position taken by the Commission. For this reason, no attempt will be made to describe all the views that have been expressed during the examination of state reports.

One issue, capital punishment, is briefly discussed as an example.[68] Commissioner Beye has openly and explicitly identified himself as an abolitionist. At the Commission's 12th sesssion, he raised the issue of the abolition of the death penalty in relation to the country reports of the Gambia and Senegal. In both cases a very small number of executions had taken place over an extended period (one in 30 years in the Gambia, two in 32 years in Senegal).[69] In the latter instance Commissioner Beye emphasised that he is personally opposed to the death penalty. He made it clear that the

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66 In section II, "General guidelines regarding the form and contents of reports on economic and social rights".

67 Par II 16 of the reporting guidelines.

68 This is an issue of importance. Only three African states have ratified the Second Optional Protocol to the CCPR. By 1996, four African states have abolished the death penalty through statute. They are Cape Verde, Mauritius, Mozambique and Namibia (see (1996) 40 *JAL* 119, in which the adoption of a total ban on the death penalty in 1995, in Mauritius, is discussed). The Namibian Constitution of 1990 provides one of the clearest constitutional pronouncements worldwide against capital punishment: "The right to life shall be respected and protected. No law may prescribe death as a competent sentence. No Court or Tribunal shall have the power to impose a sentence of death upon any person. No executions shall take place in Namibia" (art 6). The Gambia had previously abolished capital punishment by statute, but the present military government reinstated it in 1995. In South Africa, the Constitutional Court declared capital punishment unconstitutional: see *S v Makwanyane* 1995 3 SA 391 (CC).

69 *Examination of State Reports* vol 3 (1995) at 32 and 79.

Charter is silent on the question and that the Commission has no recognised position on it.[70] The question put to the government representative in each case was why the death penalty is kept in place *de iure*, when it has *de facto* been abolished. A question put by commissioner Umozurike at the 16th session is also of relevance. He observed that Cape Verde was one of the few countries in Africa where capital punishment had been abolished. Remarking that there is "a discrepancy to the right to life",[71] he asked the representative whether the government would like to see this experience extended to the rest of Africa. Expressing an obviously personal opinion, the representative answered that the experience need not be "taken to sale", due to the "complexity" of the issue.[72]

3.2.2.4 Substance of right addressed in admissibility decision

Article 56 of the Charter, dealing with the requirements for admissibility, refers to "communications relating to human and peoples' rights". One of the requirements is that the communication should be "compatible ... with the ... Charter".[73] Part of the Commission's consideration in the admissibility phase is to ascertain whether a right, as contained in the Charter, is allegedly violated.

The Katanga secession case failed at this first hurdle.[74] The Katangese Peoples' Congress requested the Commission to declare the right of the Katangese "people" to complete sovereign independence, thus enabling them to secede from the state of Zaïre. Article 20(1) formed the basis of this claim. It provides that "all peoples" have the right to "self-determination".

The Commission found that the claim as such does not amount to an allegation that article 20 had been violated. It argued as follows:

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70 Examination of state reports vol 3 (1995) at 57: "La Commission n'a pas de position reconnue sur la peine de mort".

71 Public session, 25 October 1994.

72 *Ibid.*

73 Art 56(2).

74 Communication 75/92 (*Katangese Peoples' Congress v Zaïre*). One may also regard this as a decision on the *merits* of the case. The decision itself does not clarify the issue.

- It is the Commission's obligation to uphold the territorial integrity and sovereignty of all member states of the OAU and those party to the African Charter. This includes Zaïre.

- The term "peoples" is not defined in the Charter and the Commission refrained from giving a definition.

- Self-determination can be attained in a variety of ways. Possibilities include independence, but also federalism, confederalism, local government and unitarism.

- In principle, then, nationals of a state must exercise their right to self-determination by making use of one of the available alternatives, without undermining the territorial integrity and sovereignty of the state.

- Two possible grounds that may justify a variant of self-determination which would be incompatible with the territorial integrity and sovereignty of the state are hinted at by the Commission. One ground is "concrete evidence of violations of human rights to the point that the territorial integrity (of the state) should be called to question". The other is evidence that the group of people concerned are denied the right to participate in government, as guaranteed by the Charter.[75]

The implication of the finding is that the term "peoples" is given a state-centred content. All the nationals who happen to find themselves in a particular state have to express their "right to self-determination" within the boundaries of that state. The right to self-determination then essentially operates only as against colonial and other oppressors. However, a close reading of article 20 shows that article 20(1) contains a general statement about the right of self-determination of "all peoples". Article 20(2) deals specifically with the right of "colonized and oppressed peoples". The use of two different concepts (the one general, the one specific) implies that the right in article 20(1) is available to a broader group than just those forming a state in response to colonialism. It leaves open the possibility that the right to self-determination may also be applied to "peoples in

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75 Art 13(1).

the post-colonial context".[76] While the intention of the drafters possibly was quite different,[77] the Commission should not be trapped thereby. Also, one should note that the African Charter does not mention territorial integrity - one of the anchors of the OAU Charter. On this basis, an argument may be made that the Charter left the door open for specific claims to secession to be determined on their merits, and not to be discarded *en masse*.

Although the Commission declared the Katangese claim inadmissible, the decision implies that the right may be extended to groups within a state who are persecuted, whose rights are consistently violated and who are denied a meaningful say in government. Under the conditions mentioned these groups may qualify as "peoples" with a "right to self-determination". This right could include the right to secede from the state of which they are nationals. Ankumah advises that oppressed groups "within sovereign African states should be entitled to seek redress from the Commission".[78] In my view the balanced view of the Commission clearly provides for such a possibility. Partially, the problem with the Katangese communication was that it lacked a factual or evidentiary basis indicative of oppression or human rights abuses by the Zairian government directed at the Katangese people.

3.2.2.5 Reservations as "clarification" in respect of particular states

The Charter differs from multi-lateral treaties adopted under UN auspices in that it does not provide states with the possibility of entering reservations when they ratify the Charter. Notwithstanding, two states parties to the Charter (Egypt and Zambia) have entered declarations or reservations upon ratification.[79] The first reservation, from Zambia, is dated 10 January 1984.

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76 Blay (1985) 29 *JAL* 147 at 158. See also Blay (1985) 27 *JAL* 147 at 158 - 159, who shows that the Charter provision was adopted without amendment, despite the fact that the possibility of the relevant article being applied beyond the colonial context being raised during deliberations.

77 Ankumah (1996) at 165.

78 Ankumah (1996) at 165.

79 Information contained in letter faxed to me on 2 May 1997 by the acting head of the OAU legal division, Ben Kioko.

Various aspects are covered, of which only one qualifies as a "reservation".[80] This deals with article 13 of the Charter.[81] The reservations entered by Egypt are of a more fundamental nature. The rights to freedom of conscience, profession and religion,[82] as well as women's right to equal treatment[83] have to be "implemented in accordance with the Islamic law".

These reservations have to comply with the applicable international standards. The primary requirement is that the reservation may not be incompatible with the object and purpose of the relevant treaty.[84] What the Egyptian reservations have in fact accomplished is to extend the claw-back clauses already restricting most rights in the Charter, to other rights. Given the extent of restriction already allowed by the Charter, further inroads into the rights have to be minimised. In the light of these factors, it is unlikely that the Egyptian reservations are in accordance with international law.

3.3 The African Commission on Human and Peoples' Rights

3.3.1 Background, mandate and functioning

Eleven Commissioners, elected by the Assembly of Heads of state and Government, serve in a part-time capacity on the Commission.[85] They are nominated by states from amongst "African personalities of the highest reputation"[86] and known for their "competence in matters of human and

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80 Other aspects include the drawing of the lot by the Secretary-General, and placing an obligation on non-ratifying states to report on difficulties causing them to delay ratification.

81 Art 13(3) "should read" as follows: "Every individual shall have the right of access to any place, service or public property intended for use by the general public".

82 Art 8 of the Charter.

83 Art 18(3) of the Charter.

84 Art 19(c) of the 1969 Vienna Convention on the Law of Treaties, which entered into force in 1980.

85 On the composition and establishment of the Commission, see Part II, ch I of the Charter.

86 Reputation lies in the eye of the beholder, obviously. The governments opt for people who have held government positions. See Table F, in which it is reflected that only one commissioner (Ondziel) is totally

Footnotes continued on next page.

peoples' rights".[87] They serve in their personal capacities.[88] These members are elected for six-year terms, and may be re-elected indefinitely.[89] After the very first election, though, lots are drawn to decide which four members will have their terms terminated after two years, and which three at the end of four years.[90] No provision is made for geographic, legal or gender representativity in the composition of the Commission. This has led to the deplorable situation in which the Commission, at its 20th session, consisted of six members from West Africa, two each from North and Central Africa, one from East Africa and none from the whole of Southern Africa[91]. Commissioners are generally appointed at an advanced age and are often linked to government, even as diplomats serving their governments. Table C, setting out the profiles of the current Commissioners is presented to illustrate these remarks:[92]

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independent from the government. In general, too, respect in Africa is associated with age. It should be unremarkable that the average age of the present commissioners is 54.4 years.

87 Art 31 of the Charter.

88 Art 31(2) of the Charter.

89 Art 36 of the Charter. By the 21st session of the Commission four of the eleven had been serving the Commission consistently since its inception. The average number of years served by the present commissioners is 6.3.

90 See arts 36, 37 of the Charter.

91 See Table C.

92 Tables C, D and E have been compiled from data in the Commission's Annual Activity Reports, Final Communiqués and answers by commissioners to questions posed by Akumah (Oct - Dec 1996) *AFLAQ* 7.

TABLE C: PROFILE OF MEMBERS OF THE AFRICAN COMMISSION AS AT 31 MARCH 1997

COMMISSIONER	COUNTRY (region) (individual languages spoken)	AGE (at end of 1996)	PROFESSION (at end of 1996)	YEARS SERVED AS AT 1997 OAU SUMMIT
Amega	Togo (W. Africa) (francophone)	64	Retired (formerly Minister of Foreign Affairs and President of Supreme Court)	4
Ben Salem	Tunisia (N. Africa) (arabophone; speaks French and English)	40	Ambassador (to Senegal)	5
Beye	Mali (W. Africa) (francophone)	56	UN Special Representative to Angola (formerly Minister of Foreign Affairs)	10
Dankwa	Ghana (W. Africa) (anglophone)	51	Law Professor	4
Duarte-Martins	Cape Verde (W. Africa) (lusophone; speaks French)	43	Justice of Supreme Court	4
Kisanga	Tanzania (E. Africa) (anglophone)	63	Justice of Court of Appeal	10
Nguema	Gabon (C. Africa) (francophone)	59	Law Professor	10
Ndiaye	Senegal (W. Africa) (francophone)	58	President of Constitutional Court	10
Ondziel-Gnelenga	Congo (C. Africa) (francophone)	52	Lawyer	2
Rezzag-Bara	Algeria (N. Africa) (arabophone; speaks English and French)	48	President of National Human Rights Monitoring Group in Algeria	2
Umozurike	Nigeria (W. Africa) (anglophone)	64	Law professor; member of Nigerian Human Rights Commission	8

Table D provides a full list of people serving on the Commission in its first ten years of existence. It also appears that it is the rule, rather than the exception, for Commissioners to be re-elected after their first term. Four of the present Commissioners (Beye, Kisanga, Nguema and Ndiaye) have been serving the Commission without interruption since 1987. This factor has provided some continuity in the functioning of the Commission, but also epitomises a spirit of cautious conservatism which has inhibited innovation.

TABLE D: PERSONS WHO SERVED AS MEMBERS OF THE AFRICAN COMMISSION : 1987-1997

COMMISSIONER	COUNTRY	FIRST ELECTED (for term)	RE-ELECTED (for term)	NEXT ELIGIBLE FOR ELECTION (if incumbent)
Amega	Togo	1993 (6 years)		1999
Beye	Mali	1987 (2 years)	1989 (6 years) 1995 (6 years)	2001
Ben Salem	Tunisia	1992 (5 years - in place of Chipoya)		1997
Buhedma	Libya	1987 (6 years) [not re-elected in 1993]		
Chipoya	Zambia	1987 (4 years)	1991 (6 years) (died in 1992)	
Dankwa	Ghana	1993 (6 years)		1999
Duarte-Martins	Cape Verde	1993 (6 years)		1999
El Sheikh (Badawi)	Egypt	1987 (2 years)	1989 (6 years) [not re-elected in 1995]	
Gabou	Congo	1987 (6 years) [not re-elected in 1993]		
Ibingira	Uganda	1987 (4 years) [resigned in 1989]		
Janneh	Gambia	1989 (6 years) [not re-elected in 1995]		
Kisanga	Tanzania	1987 (4 years)	1991 (6 years)	1997
Mokama	Botswana	1987 (6 years) [not re-elected in 1993]		
Nguema	Gabon	1987 (2 years)	1989 (6 years) 1995 (6 years)	2001
Ndiaye	Senegal	1987 (6 years)	1993 (6 years)	1999
Ondziel-Gnelenga	Congo	1995 (6 years)		2001
Rezzag-Bara	Algeria	1995 (6 years)		2001
Semenga	Gambia	1987 (2 years) [not re-elected in 1989]		
Umozurike	Nigeria	1989 (5 years - in place of Ibingira)	1991 (6 years)	1997

The Commission's headquarters is located in Banjul, the Gambia, which also hosts its secretariat. The Commission meets twice per year, around April and November, for sessions of ten to fifteen days. A scheme setting out these sessions follows:

TABLE E: SESSIONS OF COMMISSION : 1987-1997

SESSION	PLACE	DATE	COMMISSIONERS ATTENDING	COMMISSIONERS ABSENT	STATE REPORT CONSIDERED
1st	Addis Ababa, Ethiopia	2 November 1987	Chair: Nguema Vice-Chair: El Sheikh (Badawi) Beye, Buhedma, Gabou, Ibingira, Semega, Kisanga, Mokama, Ndiaye	Chipoya (with apology)	
2nd	Dakar, Senegal	8 to 13 February 1988	Chair: Nguema Vice-Chair: El Sheikh (Badawi) Beye, Buhedma, Gabou, Chipoya, Semega, Kisanga, Mokama, Ndiaye	Ibingira (with apology)	
3rd	Libreville, Gabon	18 to 28 April 1988	Chair: Nguema Vice-Chair: El Sheikh (Badawi) Beye, Buhedma, Gabou, Chipoya, Semega, Kisanga, Mokama, Ndiaye	Ibingira	
4th	Cairo, Egypt	17 to 26 October 1988	Chair: Nguema Vice-Chair: El Sheikh (Badawi) Buhedma, Gabou, Chipoya, Ibingira, Kisanga, Mokama, Ndiaye, Semega	Beye (with apology)	
5th	Benghazi, Libya	3 to 14 April 1989	Chair: Nguema Vice-Chair: El Sheikh (Badawi) Beye, Buhedma, Chipoya, Gabou, Kisanga, Mokama, Ndiaye, Semega	Ibingira	
6th	Banjul, Gambia	23 October to 4 November 1989	Chair: Umozurike Vice-chair: Gabou Beye, Buhedma, Chipoya, El Sheikh (Badawi), Janneh, Kisanga, Mokama, Ndiaye, Nguema		
7th	Banjul, Gambia	18 to 28 April 1990	Chair: Umozurike Vice-chair: Gabou Buhedma, Chipoya, El Sheikh (Badawi), Janneh, Kisanga, Ndiaye, Nguema	Beye, Gabou, Mokama (all with apology)	
8th	Banjul, Gambia	8 to 21 October 1990	Chair: Umozurike Vice-chair: Gabou Beye, Buhedma, Chipoya, El Sheikh (Badawi), Janneh, Kisanga, Mokama, Ndiaye, Nguema		

9th	Lagos, Nigeria	18 to 25 March 1991	Chair: Umozurike Vice-chair: Gabou Beye, Buhedma, Chipoya, El Sheikh (Badawi), Janneh, Kisanga, Mokama, Ndiaye, Nguema		Libya Rwanda Tunisia
10th	Banjul, Gambia	8 to 15 October 1991	Chair: El Sheikh (Badawi) Vice-Chair: Chipoya Beye, Buhedma, Janneh, Kisanga, Mokama, Nguema, Umozurike	Ndiaye (with apology), Gabou	
11th	Tunis, Tunisia	2 to 9 March 1992	Chair: El Sheikh (Badawi) Vice-Chair: Janneh (Chipoya died) Beye, Buhedma, Kisanga, Mokama, Ndiaye, Nguema, Umozurike	Gabou	Egypt Tanzania
12th	Banjul, Gambia	12 to 21 October 1992	Chair: El Sheikh (Badawi) Vice-Chair: Janneh Ben Salem, Beye, Buhedma, Kisanga, Ndiaye, Nguema, Umozurike	Mokama (with apology), Gabou	Gambia Senegal Zimbabwe
13th	Banjul, Gambia	29 March to 7 April 1993	Chair: El Sheikh (Badawi) Vice-Chair: Janneh Ben Salem, Beye, Buhedma, Gabou, Kisanga, Mokama, Nguema, Umozurike	Ndiaye (with apology)	Nigeria Togo
14th	Addis Ababa, Ethiopia	1 to 10 December 1993	Chair: Nguema Vice-Chair: Ben Salem Amega, Dankwa, Duarte-Martins, El Sheikh (Badawi), Janneh, Kisanga, Ndiaye, Umozurike	Beye (with apology)	Ghana
15th	Banjul, Gambia	18 to 27 April 1994	Chair: Nguema Vice-Chair: Ben Salem Dankwa, Duarte-Martins, El Sheikh (Badawi), Janneh, Kisanga, Ndiaye, Umozurike	Amega and Beye (with apology)	
16th	Banjul, Gambia	25 October to 3 November 1994	Chair: Nguema Vice-Chair: Ben Salem Dankwa, Duarte-Martins, El Sheikh (Badawi), Janneh, Kisanga, Umozurike	Amega, Beye and Ndiaye (with apology)	Benin Cape Verde Gambia II
17th	Lomé, Togo	13 to 22 March 1995	Chair: Nguema Vice-Chair: Ben Salem Amega, Dankwa, Duarte-Martins, El Sheikh (Badawi), Janneh, Kisanga, Umozurike	Beye and Ndiaye (with apology)	
18th	Praia, Cape Verde	2 to 11 October 1995	Chair: Nguema Vice-Chair: Dankwa Amega, Ben Salem, Duarte-Martins, Kisanga, Ndiaye, Ondziel-Gnelenga, Rezzag-Bara, Umozurike	Beye (with apology)	Tunisia II
19th	Ougadou-gou,	26 March to 4 April 1996	Chair: Nguema Vice-Chair: Dankwa	Amega, Ben Salem, Beye (with apology)	Algeria Mozambique

	Burkina Faso		Duarte-Martins, Kisanga, Ndiaye, Ondziel-Gnelenga, Rezzag-Bara, Umozurike		
20th	Grand Bay, Mauritius	21 to 31 October 1996	Chair: Nguema Vice-Chair: Dankwa Amega, Ben Salem, Beye, Duarte-Martins, Kisanga, Ndiaye, Ondziel-Gnelenga, Rezzag-Bara, Umozurike		Mauritius
21st	Nouak-chott, Maurita-nia	15 to 24 April 1997	Chair: Nguema Vice-Chair: Dankwa Ben Salem, Ndiaye, Ondziel-Gnelenga, Rezzag-Bara, Umozurike	Amega, Beye, Duarte-Martins, Kisanga	Sudan Zimbabwe II + III
			EXTRAORDINARY SESSIONS		
SESSION	PLACE	DATE	COMMISSIONERS ATTENDING	COMMISSIONERS ABSENT	STATE REPORT CONSIDERED
1st	Banjul, Gambia	13 to 14 June 1989	Chair: Nguema Vice-Chair: El Sheikh (Badawi) Buhedma, Chipoya, Gabou, Kisanga, Ndiaye, Semenga	Beye, Mokama (with apology)	
2nd	Kampala, Uganda	18 to 19 December 1995	Chair: Nguema Vice-Chair: Dankwa Amega, Ben Salem, Kisanga, Ondziel-Gnelenga, Rezzag-Bara	Beye, Duarte-Martins, Ndiaye and Umozurike (with apology)	

Before focusing on the way in which the Commission has dealt with individual communications, the manner in which it has interpreted its mandate generally is scrutinised. In general the conclusion is that the Commission started off very cautiously, but gradually established itself as an institution of some importance. Its later initiatives stand in contrast to the initial approach, which is exemplified in the following excerpt from its First Annual Activity Report: "It felt that the magnitude and complex nature of the tasks it had to carry out demanded that it should stand on a solid foundation *so as to make slow but sure lasting progress*".[93] It is argued that the Commission gradually extended its role beyond the likely intention of the drafters by its activities in the following nine areas:

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93 At par 15 of the report, my emphasis.

3.3.1.1 Competence to deal with individual complaints

The Charter is very vague about the protective mandate of the Commission. Article 58 seems to suggest a very limited role for the Commission, in terms of which it may deal only with cases that reveal a series of serious or massive violations. The only thing the Commission is explicitly mandated to do, is to draw the attention of the OAU Assembly to these cases. The Assembly may then instruct the Commission to undertake an investigation and draw up a report. Article 58 "would appear to suggest that not only does the Commission have no jurisdiction in separate individual cases unless they are of an urgent nature, it also has no formal power to take the initiative itsef".[94] These constraints notwithstanding, from its 3rd session the Commission entertained individual complaints that were not revealing series of violations.[95] This approach ensured a much more significant role to the Commission than would have been the case if the restrictive wording of the Charter had been followed literally.

3.3.1.2 Competence to consider state reports

The Charter places states under an obligation to submit two-yearly reports on measures adopted to give effect to the Charter, but it is silent on the applicable organ that would have to consider these reports.[96] As Welch[97] pointed out, the drafters of the Charter must have been aware of the two models for the examination of state reports: either by a body of independent experts (such as the UN Human Rights Committee), or by government representatives (as is the case in the UN Human Rights Commission). I agree with his tentative conclusion that the matter was left "deliberately vague"[98] in the Charter so as not to jeopardise ratification. This means that, potentially, the Charter could have been interpreted to entail scrutiny of state reports by the Assembly of Heads of

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94 Murray (1997) 46 *ICLQ* 412 at 413.

95 See the Commission's Second Annual Activity Report, at IV, where the particulars of 38 communications received by the Commission are listed. This approach was mandated by the Rules of Procedure adopted at the Commission's 2nd ordinary session (see ch XVII of the original Rules of procedure).

96 Art 62 of the Charter.

97 (1995) at 153.

98 (1995) at 154.

State and Government, the Council of Ministers, by a sub-committee of any of these bodies, by the OAU secretariat, or by the African Commission.

However, at its 3rd session the Commission adopted a resolution, requesting the Assembly to entrust it with the task of examining submitted state reports.[99] This is hardly surprising, as the process of reporting would be meaningless without a reviewing procedure. The alternatives available to the Commission as reviewing body made little sense. This was also the basis of the Commission's decision, as it considered "that it is difficult to see which other organ of the OAU could accomplish this work", and that the Commission "is the only appropriate organ of the OAU capable not only of studying the said periodic reports, but also of making pertinent observations to State Parties".[100] At its subsequent ordinary session, the Assembly entrusted the Commission with the task of considering state reports.[101]

3.3.1.3 Admissibility requirements

The Charter sets a number of requirements to which communications should conform before the Commission may consider them.[102] Admissibility requirements are also stipulated in the European Convention and the American Convention.[103] The Charter is in essence a restatement of provisions of the other two systems, except for the addition of the requirement that communications may not be "written in disparaging or insulting language" against a state or its institutions.[104] The Commission has to date not used this potentially restricting formulation as an obstacle to inhibit

99 See First Annual Activity Report at 28.

100 First Activity Report Annex IX at 28.

101 See Second Activity Report at par 20.

102 Art 56 of the Charter.

103 See arts 26, 27 and 46 of the respective instruments.

104 Art 56(3) of the Charter.

access.[105] As far as the other prerequisites are concerned, the Commission has adopted an approach which circumvented the domestic remedies requirement in appropriate instances.[106]

3.3.1.4 Rigid secrecy watered down

Article 59 of the Charter has been cited by the Commission from the outset as an imperative to total secrecy about its most controversial role, that of protection. Article 59(1) states that "all measures taken within the provisions of the present chapter shall remain confidential until such time as the Assembly of Heads of State and Government shall decide otherwise". In an unfortunate interpretation, the Commission took "all measures taken" not to refer to specific steps taken against or recommendations made to offending states, but as the whole process of consideration of individual complaints. Consequently, only scant information was provided about protective functions in the annual reports.[107] The details of communications were "in accordance with article 59", "contained in a *confidential* annex".[108] The reference to article 59 is to the stipulation that the "measures" must remain confidential until the Assembly decides otherwise. Not surprisingly, the Assembly took no initiative to make this information public. In this stifled interpretation, the activities of the Commission remained obscured from public view and scrutiny, undermining not only the Commission's credibility, but also seriously impairing dissemination about the Charter and its role. It was not even known *whether* violations had been found in respect of *any* state whatsoever.[109] Secrecy cultivated the general impression that the Commission was callous about human rights violations, that it did very little and that the Charter meant nothing.

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105 The underlying philosophy of the article could have been the duty of respect owed to the state-as-father: see also art 29(1) of the Charter, which requires respect for parents at all times.

106 See discussion in par 3.3.2(c) below.

107 Such as the number of communications received, and the number of communications "followed up" (see eg the Sixth Annual Activity Report at par 28, 29).

108 Sixth Annual Activity Report at par 29 (my emphasis).

109 See eg the Third Annual Activity Report at par 16, 17: In response to mass media reports, the Commission issued an appeal "to these" countries to take immediate remedial measures. By not mentioning any of these countries by the name, this information is virtually worthless.

The Seventh Annual Activity Report is a stark departure from past practice on this issue. One is pleasantly taken by surprise to read the following: "In accordance with Article 59 of the African Charter, the details of (individual) communications are contained in Annex IX",[110] and to find a list of particulars about 52 communications. The omission of the single word "confidential" from the standard formulation caused a dramatic multiplication of information available about the activities of the Commission. The availability of the information has to a certain extent also exposed an inability to arrive at decisions, by the Commission's endless postponement of decisions. In only two of the 52 cases were violations of rights explicitly found. The option to keep activities secret becomes more understandable in the light of the fact that there really was nothing positive to report about: More than six years after the Commission started functioning, it had only found an explicit violation on two occasions.

The Commission has been much more open about its other activities. It has been commended for finding "defensible means for disseminating information about its work".[111] This includes the supply of minutes, press releases and communiqués. Especially the latter, issued soon after every session, became a valuable source of information about the activities of the Commission.[112] Its value was enhanced gradually by the increasing detail over the years. Unfortunately, the distribution of reports has been slow and inadequate, undermining other efforts at greater dissemination.

3.3.1.5 Findings made and remedies ordered

The Commission is not given a clear competence to order remedies for human rights violations. Fortunately, the Commission has opted for a wide interpretation of its mandate to "ensure the protection" of the rights under the Charter.[113] It has, for example, included the competence to order provisional measures in its Rules of procedure,[114] and made such an order in at least one case.[115]

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110 Par 36 of the report. No justification is presented for this departure from prior practice.

111 Dankwa (1990) 2 *ASICL Proc* 29 at 30.

112 See Rule 33 (old rules).

113 See art 45(2) of the Charter.

114 See discussion in par 3.3.7.3 below.

Although nowhere explicitly given the competence to order compensation, the Commission has done so in a case against Cameroon.[116] In recommending that decrees be nullified, it has gone further than the European Court in this respect.[117]

3.3.1.6 Appointment of Special Rapporteurs

A first step in this direction was taken at the Commission's 15th session. The newly-elected Vice chairman, Ben Salem, was appointed as Special Rapporteur for extra-judicial executions in Africa. At the same session, he was requested to address the situation in Rwanda as a matter of urgency.[118] But nothing happened between then and the 16th session, when the Commission requested the Special Rapporteur to present a draft on the terms of reference at the 17th session. Ultimately, the Commission adopted the mandate and budget estimates for this position only at its 18th session. In the absence of the Special Rapporteur at the 19th session, the Commission could not discuss any progress in the activities of the Special Rapporteur. This bureaucratic and formalistic approach amounted to extreme procrastination in the face of a situation that required immediate responses to minimise the violation of basic human rights and untold human suffering. One of the problems was the uncertainty about medical fees and insurance of the Commissioners when travelling on duty for the Commission.[119]

Realising the **personal** effort (in terms of time and energy) and **financial** implications required to accomplish the missions of Special Rapporteurs, the Commission adopted a different approach for the appointment of future Special Rapporteurs. It agreed in principle to appoint two further Special Rapporteurs (one on prison conditions in Africa and another on the rights of women), who would exercise their mandate under the supervision of a designated commissioner. The rapporteur

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115 Communication 83/92 (*Degli v Togo*), see par 3.3.3(a) above.

116 Communication 59/91 (*Mekongo v Cameroon*).

117 See par 3.3.3.1 below.

118 Final Communiqué of the 15th session, at par 20 and Annexures VI and VII to the Commission's Tenth Activity Report.

119 See Ninth Annual Activity Report at par 29. At the 20th session, the Commission considered this Special Rapporteur's report, and decided to extend his mission until his own mandate on the Commission expires.

would not be a commissioner, but someone selected by the Commission from the names submitted to it. Despite the preference expressed for this approach, the Commission decided to appoint Commissioner Dankwa as Special Rapporteur on prison conditions in Africa.[120] In the case of the rapporteur on the rights of women commissioners Dankwa and Duarte-Martins have been assigned as the commissioners responsible for overseeing the rapporteur's activities (when he or she is appointed). Another area in which the appointment of a Special Rapporteur was considered, is in relation to contemporary forms of slavery in Africa. This never materialised.[121] As far as financing the work of the rapporteurs is concerned, the Commission "decided to seek the support of NGOs and other institutions".[122]

The two appointed Special Rapporteurs reported at the 21st session.[123] The Commission encouraged Commissioner Ben Salem to continue with the investigative work, which aims at publicly identifying those responsible for extra-judicial executions. Commissioner Dankwa presented his first report on his visits to Zimbabwean prisons and his contact with the UN Special Rapporteur on Torture.[124] According to his report to the Commission, he plans to follow this first visit up with further country visits.[125]

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120 Final Communiqué of the 20th session at par 18.

121 Ankumah (1996) at 120.

122 Ninth Annual Activity Report at 7.

123 See final Communiqué of the 21st session.

124 The visit took place from 23 February to 3 March 1997, with the co-operation of the Zimbabwean government. Commissioner Dankwa consulted with a large number of interested parties and compiled a very comprehensive report (Annex VII to the Tenth Annual Activity Report).

125 In terms of his report (Annex VII to the Tenth Annual Activity Report), the following visits are foreseen: May - October 1997: Senegal or Mali; November 1997 - March 1998: Uganda or Mauritius; May - October 1998: Mozambique or São Tomé e Príncipe; November 1998 - January 1999: Tunisia or South Africa. While this long term planning must be welcomed, it also underscores the limited impact that these visits are likely to have in Africa as a whole.

3.3.1.7 Actions in relation to massive and serious violations

The Commission's actions in this regard have not been restricted to findings on communications presented to it.[126] It has adopted other courses of action to deal with massive and serious violations.

It has adopted numerous resolutions on situations where there was evidence of serious and massive violations. NGOs usually played an important role in ensuring the place of these issues on the agenda. Government abuses were condemned in Rwanda,[127] Sudan,[128] Nigeria,[129] The Gambia[130] and Burundi.[131]

It has held an extraordinary session in December 1995 to discuss the human rights situation in Nigeria and Burundi. The urgency of the situation necessitated that the Commission had to meet between its then recently completed session (in October 1995) and its next scheduled ordinary session (in April 1996). Representatives of the respective governments attended. Nigeria was requested to provide details in respect of these allegations in its next periodic report. As in many other respects, one of the reasons why this remains an isolated occurrence is the inadequate funding available to the Commission.

3.3.1.8 Interpretation of substantive provisions

At its 11th session the Commission elaborated upon the rather incomplete provisions of article 7 of the Charter.[132] Article 7 does not mention the important right to be informed of the reasons for

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126 This aspect is discussed in par 3.3.3(b) below.

127 See the resolution adopted at the 16th session in the Eighth Annual Activity Report.

128 See the resolution adopted at the 17th session in the Eighth Annual Activity Report.

129 See the resolutions adopted at the 16th and 17th sessions in the Eighth Annual Activity Report.

130 See the resolutions adopted at the 16th and 17th sessions in the Eighth Annual Activity Report.

131 See the resolution adopted at the 19th session.

132 See Heinz (1994) at 63. See also the finding in Communication 64/92 (*Achuthan (on behalf of Banda) v Malawi*), where the Commission observed that one of the reasons for this requirement is "that a government should have notice of a human rights violation in order to have the opportunity to remedy such violation, before being called before an international tribunal".

one's arrest and detention. The principle of *habeas corpus* is also not enshrined, allowing the legality of detention to be disputed in open court. Its elaboration corresponds with the general comments issued by other human rights treaty bodies.[133]

3.3.1.9 Missions to states parties

At its 19th session the Commission reiterated its decision to conduct missions to Burundi, Mauritania, Nigeria, Rwanda, Senegal and Sudan.[134] The aim of these missions is to "consider" with the states concerned communications against them that the Commission has already declared admissible. They are "missions of good offices" and are undertaken to contribute to reach amicable solutions in human rights related disputes and to bring "clarification to the Commission in its contribution to the search for an equitable solution through dialogue".[135]

Two or three commissioners were assigned to each of the states to undertake these missions. At that stage, the final dates of these missions still had to be confirmed. The missions to Senegal and Mauritania took place between the 19th and 20th sessions.[136] The delegations to Senegal[137] and Mauritania[138] presented reports at the 20th session, and recommendations were addressed to the two states.[139] The missions to Sudan[140] and Nigeria[141] took place between the 20th and 21st sessions.[142] The examination of the reports on the visits to Nigeria and Sudan was deferred to the 22nd session.

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133 See also par 3.2.2(a) above.

134 Ninth Annual Activity Report at par 20.

135 See the Annex VIII and IX, the reports of Senegal and Mauritania, contained in the Tenth Annual Activity Report

136 From 1 - 7 June and 19 - 27 June 1996 respectively.

137 Consisting of Commission Chairman Nguema and commissioner Duarte-Martins.

138 Consisting of Chairman Nguema, commissioners Ondziel-Gnelenga and Rezzag-Bara.

139 See the Final Communiqué of the 20th session at par 21.

140 Consisting of commissioners Dankwa, Kisanga and Rezzag-Bara.

141 Consisting of commissioners Dankwa and Amega.

142 From 1 - 7 December 1997 and 7 - 14 March 1997 respectively.

The report of the mission to **Senegal** dealt exclusively with the situation in the Casamance province of that country, following a communication received by the Commission in 1992 about clashes between the Senegalese army and Casamance rebels.[143] Having analysed the present conflict in a historical context, the delegation recommended a number of steps to bring about "constructive dialogue" between the Senegalese government and the Casamance separatists.

The mission to **Mauritania** was preceded by four communications, which related to the massacre of black Mauritanians by the government, torture of black Mauritanian prisoners, and the deportation and expulsion of black Mauritanians to Senegal and Mali. The Commission representatives investigated these allegations. In their concluding remarks the commissioners deplored "all the tragic events that have occurred in Mauritania and their consequences".[144] The mission went further and analysed some of the systematic patterns of human rights violations, such as slavery and its remnants,[145] as well as the inferior position of Mauritanian women.[146]

In the case of **Sudan**, the Commission delegation[147] was given the opportunity to meet senior government officials[148] and even to visit prisons.[149] The Commission found these interviews less than helpful, and criticised government officials and even members of civil society of engaging in official propaganda. Although the Commission praised the government for allowing the mission, it

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143 See the country report, Annex VIII to the Tenth Annual Activity Report.

144 Par VI of the report, Annex IX to the Tenth Annual Activity Report.

145 Despite the fact that slavery has been abolished formally in 1981 (Ordinance 81 - 234 of 9 November 1981), many "vestiges of slavery" are still prevailing in Mauritania (see par IV of the Commission report, Annex IX to the Tenth Annual Activity Report).

146 The Commission report found the promotion of women's rights to be "deficient". One example that confirms this is the fact that there was not a single female member of the National Assembly or Senate.

147 See Report of the Mission of Promotion and Protection of Human Rights in Sudan: 1 - 7 December 1996 (Report of the Secretariat). The delegation consisted of Commissioners Dankwa, Kisanga and Rezzag-Bara, who were accompanied by the legal advisor of the Commission (Essombé Edimo Joseph).

148 Ranging from the Minister of Justice, to spokespersons of the armed forces, the Attorney-General, the Chief of Police and the Director of Prisons.

149 In relation to allegations of "ghost" prisons, the mission "noted that the place specified was empty of any building" (*sic*). This rather ambiguous sentence seems to denote that the Commission had at least visited part of the prison.

formulated twelve recommendations as conclusions to its report. The hope is expressed that the recommendations "will be taken seriously, in the spirit of brotherhood in which they are offered". But without any mechanism to follow up these recommendations, the hope is unlikely to be fulfilled. It is unfortunate that the report was not discussed publicly during the same session in which Sudan submitted its country report. Whatever subsequently happens to the report, it stands as a serious indictment of the Sudanese government and went far beyond the government's expectation of a public relations exercise.

Three commissioners under the leadership of Commissioner Dankwa spent a week in **Nigeria**, travelling around the country and meeting with governmental officials and NGOs. A number of prominent NGOs failed to co-operate with the Commissioners. One of the reasons for their negative attitude was the inclusion of commissioner Amega in the three-member team. He had previously been a member of a UN fact-finding mission that gave its qualified support to the military regime's programme to convert itself into a civilian government.

Although there are promising signs that states are more willing to co-operate with the Commission, and that the Commission is more willing to undertake missions, details are still shrouded under a veil of secrecy. It is also regretted that reports of the missions to Sudan and Nigeria were not discussed. No further missions were proposed.

3.3.1.10 Role of NGOs

The African Charter does not provide for a role for NGOs in the Commission's functioning. In fact, the concept of a "NGO" is not mentioned at all in the Charter. Scoble explains that this silence resulted from the hostility of African governing élites towards "any social formation disrupting their conception of the natural identity of and interests of the individual and his society".[150]

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150 Scoble in Welch and Meltzer (eds) (1984) at 190.

When the Commission adopted its Rules of procedure at its second session, two rules were included to deal with "representation" of and "consultation" with NGOs. The Commission would establish a list of NGOs, who then could send authorised observers to participate in public sessions.[151] Direct consultation (or through a committee) between the Commission and NGOs was also envisaged.[152] From its third session, the Commission awarded observer status to NGOs.[153] By the end of the seventh session, nineteen NGOs received observer status. This number has increased steadily. However, no role is provided for NGO participation in the state reporting or individual complaints procedure. The increased importance of NGOs in the activities of the Commission is attributable mainly to efforts undertaken by the International Commission of Jurists. A first three-day workshop for African and international NGOs was organised before the Commission's session in October 1991.[154] This served as a start of better relations between the Commission and NGOs, the creation of a network for NGOs, and more publicity of the Commission's activities.

These pre-session workshops have become a regular and almost indispensable part of the Charter system. By the end of the Commission's 15th session (March 1994) 131 NGOs have been granted observer status with the Commission.[155] This number has grown to 183 by the end of the 19th session.[156] When the Commission granted similar status to another 15 NGOs at its 20th session, the number approached the 200 mark,[157] which was exceeded at the 21st session when another eight NGOs were granted observer status.[158]

Despite the initial omission of their role, the importance of NGOs has been acknowledged increasingly by the Commission in later years. For example, in 1996 Commissioner Umozurike

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151 Rule 76.

152 Rule 77.

153 The first three NGOs awarded this status were Amnesty International, International Commission of Jurists and African Association of International Law.

154 On the role of the International Commission of Jurists in Africa, see the exposition by Welch (1995) at 163 - 169.

155 Seventh Activity Report.

156 Ninth Annual Activity Report at par 23.

157 Final Communiqué of the 20th session at par 6.

158 Final Communiqué of the 21st session. The total number is now 206. (Or 205, see Tenth Annual Activity Report, at par IX.)

described the Commission's collaboration with NGOs as "indispensable" for its work, principally because NGOs are "nearer to the grassroots throughout the continent".[159] This does not represent a uniform view, as some Commissioners from time to time evince deeply harboured suspicion of NGOs and their role.

3.3.2 Individual complaints: the admissibility phase

3.3.2.1 Introduction

By the end of its 21st session the Commission had finalised and made public the results of 74 communications.[160] Of these 51 were declared inadmissible, 13 were admissible,[161] five resulted in friendly settlements[162] and five were withdrawn and closed without a finding being made.[163] The

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159 (1996) 6 *African Human Rights Newsletter* 8

160 The analysis here is based on the details of communications in the Seventh, Eighth, Ninth and Tenth Annual Activity Reports. In addition, more detailed particulars are provided in a non-official record of these communications, compiled by legal officers at the Commission and made available to me by Julia Harrington, who served at the Commission in that capacity.

161 See par 3.3.3 below.

162 Communication 11/88 (*Kalenga v Zambia*) (The author ceased to correspond with the Commission. The Commission emphasised that silence does not automatically mean withdrawal "because individuals are highly vulnerable to circumstances that might prevent them from continuing to prosecute a communication". By direct contract with the state the Commission satisfied itself that silence was the result of satisfaction, as the complainant had been released the previous year); Communication 16/88, 17/88, 18/88 (joined) (*Comité Culturel pour la Démocratie au Bénin, Badjogoume, El Hadj v Benin*) (The new government, in the Commission's view, sufficiently addressed injustices committed by the previous administration by repealing laws, releasing political prisoners and by introducing amnesty laws); Communication 44/90 (*Peoples' Democratic Organisation for Independence and Socialism v The Gambia*); Communication 67/91 (*Civil Liberties Organisation v Nigeria*) and Communication 97/93 (*Modise v Botswana*).

163 Communication 22/88 (*International PEN v Burkina Faso*), Communication 55/91 (*International PEN v Chad*), Communication 62/91 (*Committee for the Defence of Human Rights (in respect of Madike) v Nigeria*) (The Commission reiterated its concern for individuals "who are highly vulnerable to circumstances that might prevent them from continuing to prosecute a communication"), Communication 93/93 (*International PEN v Sudan*) (The decision by the Commission is couched as a finding of inadmissibility due to withdrawal), Communication 136/94 (*Curzon v Zimbabwe*).

Commission repeatedly reiterated that it will not interpret the silence of the author to automatically indicate withdrawal of the case.[164]

164 See eg Communication 67/91 (*Civil Liberties Organisation v Nigeria*).

TABLE F: FORTUNES OF COMMUNICATIONS SUBMITTED TO THE AFRICAN COMMISSION AS AT THE END OF THE 20TH SESSION[165]

COMMUNI-CATION	FINAL FINDING	REASON (IF INADMISSIBLE)	REMEDY (IF VIOLATION)	IN ACTIVITY REPORT	FINALISED AT SESSION	STATE INVOLVED (IF VIOLATION) (AND RESULT OF FRIENDLY SETTLEMENT)
1/88	Inadmissible	Other reason	-	7th	4th	-
2/88	Inadmissible	Non-state party	-	7th	4th	-
3/88	Inadmissible	Non-state party	-	7th	4th	-
4/88	Inadmissible	Non-state party	-	7th	4th	-
5/88	Inadmissible	Non-state party	-	7th	4th	-
6/88	Inadmissible	Non-state party	-	7th	4th	-
7/88	Inadmissible	Non-state party	-	7th	4th	-
8/88	Inadmissible	Non-state party	-	8th	4th	-
9/88	Inadmissible	Non-state party	-	7th	4th	-
10/88	Inadmissible	Non-state party	-	7th	4th	-
11/88	Friendly settlement	-	-	7th	7th	Zambia (victim released)
12/88	Inadmissible	Non-state party	-	7th	4th	-
13/88	Inadmissible	Other reason	-	7th	6th	-
14/88	Inadmissible	Non-state party	-	7th	4th	-
15/88	Inadmissible	Other reason	-	7th	6th	-
16/88 - 18/88 (joined)	Friendly settlement	-	-	8th	16th	Benin (victim released, detention laws amended)
19/88	Inadmissible	Non-state party	-	7th	6th	-

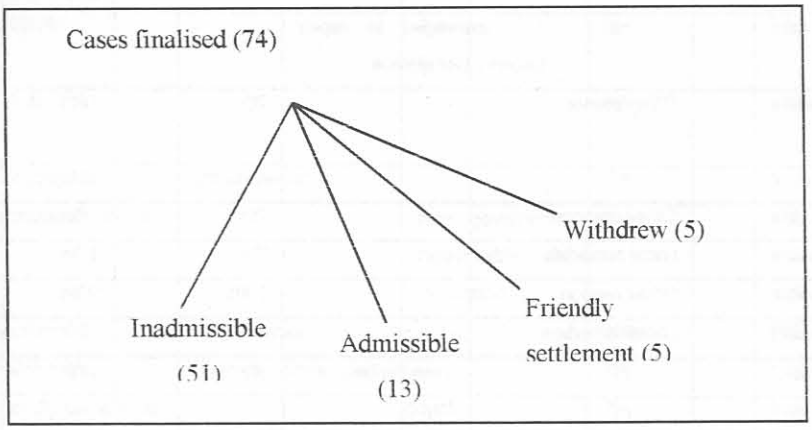
165 The table refers to "cases", rather than "communications". The total of 74 cases finalised comprises more than 74 communications. As appears from the table, in five finalised cases a number of communications were joined, usually because the subject matter was related.

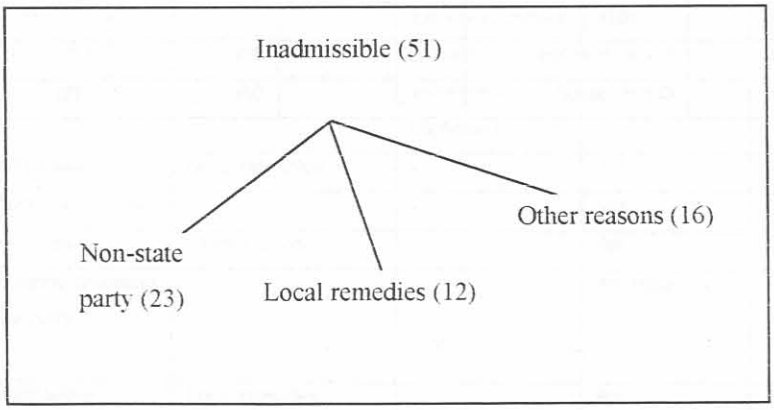
COMMUNI-CATION	FINAL FINDING	REASON (IF INADMISSIBLE)	REMEDY (IF VIOLATION)	IN ACTIVITY REPORT	FINALISED AT SESSION	STATE INVOLVED (IF VIOLATION) (AND RESULT OF FRIENDLY SETTLEMENT)
20/88	Inadmissible	Non-state party	-	7th	6th	-
21/88	Inadmissible	Non-state party	-	7th	6th	-
22/88 (withdrawn)	Closed	-	-	7th	15th	-
24 /89	Inadmissible	Non-state party	-	7th	5th	-
25/89; 47/90; 56/93; 100/93 (joined)	Massive violations	-	-	9th	18th	Zaïre
26/89	Inadmissible	Non-state party	-	7th	6th	-
27/89; 46/91; 49/91; 99/93 (joined)	Massive violations	-	-	10th	20th	
28/89	Inadmissible	Non-state party	-	7th	6th	-
29/89	Inadmissible	Non-state party	-	7th	6th	-
31/89	Inadmissible	Other reason	-	8th	17th	-
33/89	Inadmissible	Non-state party	-	7th	4th	-
35/89	Inadmissible	Other reason	-	7th	7th	-
37/89	Inadmissible	Non-state party	-	7th	5th	-
38/89	Inadmissible	Non-state party	-	7th	7th	-
39/89	Violation	-	-	10th	21st	Cameroon
41/90	Inadmissible	Non-state party	-	7th	5th	-
42/90	Inadmissible	Non-state party	-	7th	5th	-
43/90	Inadmissible	Other reason	-	7th	15th	-
44/90	Friendly settlement	-	-	10th	20th	The Gambia (Government's stated determination to review electoral law welcomed)
45/90	Inadmissible	Local remedies	-	7th	15th	-
53/90	Inadmissible	Local remedies	-	7th (also 8th)	17th	-
55/91 (withdrawn)	Closed	-	-	7th	14th	-
57/91	Inadmissible	Other reason	-	7th	13th	-

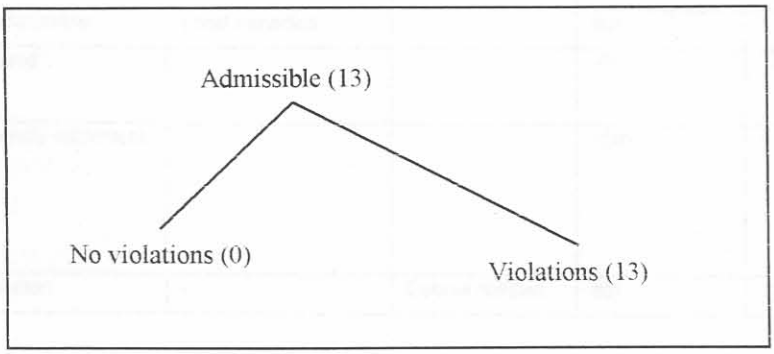
COMMUNI-CATION	FINAL FINDING	REASON (IF INADMISSIBLE)	REMEDY (IF VIOLATION)	IN ACTIVITY REPORT	FINALISED AT SESSION	STATE INVOLVED (IF VIOLATION) (AND RESULT OF FRIENDLY SETTLEMENT)
59/91	Violation	-	Reparation	8th	16th	Cameroon
60/91	Violation	-	Release recommended	8th	16th	Nigeria
62/91 (withdrawn)	Closed	-	-	8th	16th	-
63/92	Inadmissible	Other reason	-	7th	13th	-
64/92; 68/92; 78/92 (joined)	Massive violations	-	New government responsible for reparation	8th	16th	Malawi
65/92	Inadmissible	Other reason	-	10th	21st	-
66/92	Inadmissible	Local remedies	-	7th	14th	-
67/92	Friendly settlement	-	-	7th	14th	Nigeria (victims released)
69/92	Inadmissible	Other reason	-	7th	13th	-
70/92	Inadmissible	Other reason	-	9th	18th	-
71/92	Violation	-	Efforts to pursue friendly settlement continued	10th	20th	Zambia
72/92	Inadmissible	Local remedies	-	7th	12th	-
74/92	Massive violations	-	-	9th	18th	Chad
75/92	Inadmissible	Other reason	-	8th	16th	-
83/92; 88/93; 91/93 (joined)	Violations (massive violation?)	-	-	8th (also 7th)	17th	Togo (remedial steps by new government welcomed)
86/93	Inadmissible	Local remedies	-	8th	16th	-
87/93	Violations	-	Release recommended	8th	16th	Nigeria
90/93	Inadmissible	Local remedies	-	8th	16th	-
92/93	Inadmissible	Local remedies	-	8th	17th	-
93/93 (withdrawn)	Closed	-	-	7th	14th	-
97/93	Friendly settlement	-	-	10th	?	Botswana (Government urged to continue with efforts to reach friendly settlement)
101/93	Violation	-	Decree nullified	8th	17th	Nigeria

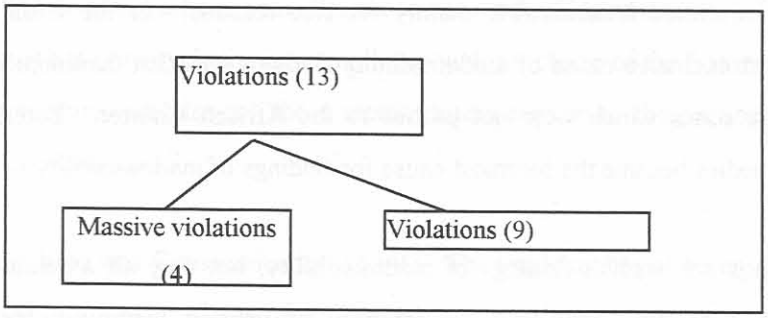
COMMUNI-CATION	FINAL FINDING	REASON (IF INADMISSIBLE)	REMEDY (IF VIOLATION)	IN ACTIVITY REPORT	FINALISED AT SESSION	STATE INVOLVED (IF VIOLATION) (AND RESULT OF FRIENDLY SETTLEMENT)
103/93	Violation	-	Government urged to repair prejudice	10th	20th	Ghana
104/94; 109 - 126/93 (joined)	Inadmissible	Other reason	-	7th	16th	-
106/93	Inadmissible	Other reason	-	7th	14th	-
107/93	Inadmissible	Local remedies	-	7th	17th	-
108/93	Inadmissible	Other reason	-	10th	20th	-
127/94	Inadmissible	Local remedies	-	8th	17th	-
129/74	Violations	-	Irregularities found	9th	17th	Nigeria
131/94	Inadmissible	Local remedies	-	7th	?	-
135/94	Inadmissible	Local remedies	-	9th	18th	-
136/94 (withdrawn)	Closed	-	-	8th	16th	-
138/94	Inadmissible	Local remedies	-	8th	17th	-
142/94	Inadmissible	Other reason	-	8th	17th	-

TABLE G: ANALYSIS OF COMMUNICATIONS SUBMITTED TO THE AFRICAN COMMISSION AS AT THE END OF THE 20TH SESSION









Communications were declared **inadmissible** mainly for two reasons. In the initial phase of development, the almost exclusive cause of inadmissibility findings was that communications had been submitted against states which were not parties to the African Charter. Later, the non-exhaustion of local remedies became the foremost cause for findings of inadmissibility.

Not all of these findings are explicit findings of inadmissibility, but they all amount to such a finding. The following decision falls into the category of implicit inadmissibility findings: Communication 63/92 (*Congress for the Second Republic of Malawi v Malawi*).The communication contained information about "the general political situation in Malawi".[166] The Commission's decision was that the "information is noted and no action is necessary, accordingly the matter is closed".[167]

The criteria in article 56 are intended as a sifting mechanism, to ensure that the Commission devotes its valuable time to the consideration of substantive violations which fall within the prescribed guidelines.[168] A decision on admissibility is only warranted if an eventual finding of the Commission is a possibility. Mere letters of information should not require any decision by the Commission. Only a very literalist interpretation of the word "communication" would result in even ordinary "communications", not constituting complaints, being considered for their admissibility. To ensure consistency, clarity and reliable statistical analysis, the Commission should make explicit its finding on admissibility throughout.

The grounds on which the Commission based its findings of inadmissibility are numerous. In the overwhelming majority of cases only one ground for the finding is given. Exceptions are Communication 104/93 (*Centre for the Independence of Judges and Lawyers v Algeria*) and Communication 43/90 (*Union des Scolaires Nigeriens - Union Generale des Etudiants Nigeriens au Benin v Niger*). In the former, four grounds for the Commission's finding of inadmissibility are listed: "Thus, in this case the author is not an alleged victim, nor is the communication submitted in the name of a specific victim, nor does the complainant allege grave and massive violations. The

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166 AHG/198 (XXX) 77.

167 *Ibid.*

168 See, on these requirements generally, Gye-Wado (1991) 3 *RADIC* 742.

information in the communication is insufficient to permit the Commission to take action". In the latter, reference is not only made to non-compliance with article 56 of the Charter and Rule 114 of the Rules of procedure, but also to "the 4 month deadline given to the parties at the Fourteenth Session of the Commission...".

The last case finalised was Communication 142/92. The total number of 68 cases finalised clearly falls short of this total (142). Some of the reasons are as follows: Some cases have not yet been finalised, or had been finalised after the Commission's 19th session. In any other instances cases were assigned registration numbers, but were subsequently not noted as communications by the Commission.

If the communications directed at non-states parties are considered "irreceivable", rather than "inadmissible", a total of 53 cases had been finalised by the Commission. The states parties against whom these communications were directed, are:[169]

Algeria	:	1
Benin	:	1
Botswana	:	2
Burkina Faso	:	1
Cameroon	:	5
Chad	:	2
Côte d'Ivoire	:	1
The Gambia	:	5
Ghana	:	2
Guinea	:	1
Kenya	:	2
Liberia	:	1
Madagascar	:	1
Malawi	:	2
Niger	:	1

169 The total adds up to 44, because one case is left out of consideration. This is Communication 104/94; 109-126/93 (joined), which was directed almost randomly at 18 different African states.

Nigeria	:	10
Rwanda	:	1
Sudan	:	1
Tanzania	:	2
Togo	:	2
Tunisia	:	1
Zaïre[170]	:	4
Zambia	:	2
Zimbabwe	:	1

At the time the 21st session took place, there were 52 member states of the OAU. By the 15th session 49 of these states had already ratified the Charter. The exceptions were Eritrea, Ethiopia and Swaziland.[171] Communications were directed at only 22 of the states parties to the Charter. No complaints were forthcoming against states in respect of which allegations of human rights abuses are not uncommon, such as Angola, CAR, Congo, Libya, Mauritania, Somalia and Sierra Leone.[172]

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170 The wave of democratisation caused a change of leaders, and a change of the name of Zaïre to the Democratic Republic of Congo in 1997. References to "Zaïre" are retained in this study.

171 Subsequently, the number of OAU states increased to 53 when South Africa became a member. The number of Charter ratifications increased to 51 at the end of 1996, with the ratification of South Africa and Swaziland.

172 In a contribution published in 1994 Bayefsky (in Henkin and Hargrove (1994) 229 at 292) identified State parties to the Optional Protocol of the CCPR worldwide that have never been subject to communications brought for violation of CCPR provisions. The African States cited are Algeria, Angola, Benin, Congo, Guinea, Niger, Seychelles and Somalia. The recurrence of the names of Angola, Congo and Somalia is significant. One obvious explanation would be a lack of dissemination of information about the Charter and the CCPR among the population and lawyers.

3.3.2.2 Communications directed at non-states parties[173]

The main ground on which the Commission decided not to consider communications is because the state complained against was not a state party.[174] This accounts for 23 of the 50 instances of inadmissibility. This especially occurred in the first few years. Three categories of communications fall into this category: Those against **African states** that were not party to the Charter at the time the communications were submitted (sixteen cases); those **against non-African states** (six cases - against Bahrain, Haiti, Indonesia, the USA and Yugoslavia) and those against **non-state entities** (one case against the OAU). The confusion is now something of the past, as the new rules of the Commission determine that no communications against a non-state party should be placed on the list of communications prepared by the Secretary of the Commission.[175]

One may assume that information about the Commission had not been disseminated to any meaningful extent when the Commission started operating. NGOs only became involved, and

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173 Some commentators (eg Ankumah (1996) at 56 - 60) prefers to regard the initial decisions on inadmissibility on this ground as "irreceivable". Although this is the way such complaints are handled *now* (subsequent to the amended Rules of procedure taking effect), the reported communications clearly refer to findings of "inadmissibility" and are here treated as such.

174 Communication 2/88 *(Ihebereme v USA)*; Communication 3/88 (*Centre for the Independence of Judges and Lawyers v Yugoslavia*); Communication 4/88 (*Coordinating Secretary of the Free Citizens Convention v Ghana*); Communication 5/88 (*Makoge v USA*); Communication 6/88 (*Kofi v Ghana*); Communication 7/88 (*Committee for the defence of Political Prisoners v Bahrain*); Communication 8/88 (*Buyingo v Uganda*); Communication 9/88 (*International Lawyers' Committee for Family Reunification v Ethiopia*); Communication 10/88 (*Abebe v Ethiopia*); Communication 12/88 (*El-Nekheily v OAU*); Communication 14/88 (*Sanussi v Ethiopia*); Communication 19/88 (*International PEN v Malawi, Ethiopia, Cameroon, Kenya*); Communication 20/88 (*Austrian Committee Against Torture v Morocco*); Communication 21/88 (*Centre Haitien des Libertés Publiques v Ethiopia*); Communication 24/89 (*Union National de Liberation de Cabinda v Angola*); Communication 26/89 (*Austrian Committee against Torture v Burundi*); Communication 28/89 (*Association Internationale des Juristes Democrates v Ethiopia*); Communication 29/89 (*Commission Française Justice et Paix v Ethiopia*); Communication 33/89 (*Ntaka v Lesotho*); Communication 37/90 (*Eugene v USA, Haiti*); Communication 38/90 (*Wesley Parish v Indonesia*); Communication 41/90 (*Houver v Morocco*); Communication 42/90 (*International PEN v Malawi*); Communication 51/91 (*Comité Bachelard v Morocco*).

175 Rule 102 (2) of the amended rules.

better acquainted, with the work of the Commission in later years. These factors partially account for the fact that the USA, Yugoslavia, Bahrain, Haiti and Indonesia appear as states against which communications were directed. The Commission has also relatively recently held that a communication is not admissible against a state if the state had not ratified the Charter at the time the communication was submitted.[176] This rule applies even when the state has subsequently, and before the Commission considers the communication, ratified the Charter. In *Njoka v Kenya* the Commission on 12 October 1993 decided that the communication is inadmissible, despite the fact that Kenya ratified the Charter on 23 January 1992. As the serialised registration number indicates, the communication was received during 1991. To order re-submission of a communication under such circumstances as the commission has done seems to be unduly formalistic and cumbersome on the individual. The communication was re-submitted.[177] At its 17th session, the Commission declared it inadmissible for "vagueness".

3.3.2.3 The Commission and the exhaustion of domestic remedies

The rationale behind the requirement that domestic or local remedies have to be exhausted before an individual may proceed with a complaint against a state in a supra-national forum has been formulated as follows: "The rule requiring the exhaustion of domestic remedies as a condition for the presentation of an international claim is founded upon the principle that the responsible state must first have an opportunity to redress by its own means within the framework of its own domestic legal system the wrong alleged to be done to the individual".[178] In the African context, this ensures that the Commission will not become a "court of first instance", a function that will clearly be beyond the capacity of the Commission.[179]

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176 Communication 142/94 (*Muthuthurin Njoka v Kenya*).

177 Communications 142/92 (*Njoka v Kenya*).

178 *Interhandel* case 1959 ICJ Reports 27.

179 See Communication 74/92 (*Commission Nationale des Droits de l'Homme et des Libertés v Chad*): "Requiring the exhaustion of local remedies also ensures that the African Commission does not become a tribunal of first instance, a function that is not in its mandate and which it clearly does not have the resources to fulfil".

Non-exhaustion of domestic remedies is the second most frequently cited ground for not considering the substance of communications directed to the Commission. This accounts for at least 13 of the 50 relevant instances.[180] This ground became the principal motivation for findings of inadmissibility in the last few years under review. From an analysis of the relative big number of cases dealing with the exhaustion of domestic remedies, the following interpretative map, as outlined by the Commission, may be drafted:

A local remedy has been defined as "any domestic legal action that may lead to the resolution of the complaints at the local or national level".[181] With this in mind, the constituent parts of article 56(5) of the Charter are now analysed:

i *Communications shall be considered if they are "sent **after exhausting** ..."*

Whether local remedies have been exhausted, is a factual question. The burden to present the court with a factual basis is that of the applicant or author. Without any information about attempts to exhaust local remedies the Commission cannot consider a communication. The applicant or author must provide some (*prima facie*) evidence of an attempt to exhaust remedies at the national level.[182] It is insufficient to argue that it is improbable that local remedies would be successful in the

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180 Communication 45/90 (*Civil Liberties Organisation v Nigeria)*; Communication 53/90 (*Capitao v Tanzania*); Communication 66/92 (*Lawyers Committee for Human Rights v Tanzania*); Communication 72/92 (*Aturu v Nigeria*); Communication 86/93 (*Ceesay v Gambia*); Communication 90/93 (*Haye v Gambia*); Communication 92/93 (*International PEN v Sudan*); Communication 97/93 (*Modise v Botswana*); Communication 107/93 (*Academic Staff of Nigerian Universities v Nigeria*); Communication 127/94 (*Dumbuya v Gambia*); Communication 131/94 (*Ousman Manjang v Gambia*); Communication 135/94 (*Kenya Human Rights Commission v Kenya*); Communication 138/94 (*International PEN (on behalf of Senn and Sangare) v Côte d'Ivoire*). (In Communication 97/93 the Commission decided to "write to the author stressing the need for exhaustion of local remedies". This decision may also be taken not to amount to a finding of inadmissibility, but as something constituting correspondence to the author that he may re-submit it).)

181 See Communication 101/93 (*Civil Liberties Organisation (in respect of Nigerian Bar Association) v Nigeria*).

182 Communications 86/93 (*Ceesay v The Gambia*) and 127/94 (*Dumbuya v The Gambia*).

absence of any attempt to avail oneself of them.[183] These requirements are illustrated well in *International PEN v Sudan*.[184] The complaint in that case related to wrongful arrest and detention. The complainant "had taken these cases up with the government but no response had been received". Also, the government had repeatedly denied that any illegal (incommunicado) detention occurred in the state. In finding the communication inadmissible, the Commission observed that it has not been shown that an attempt had been made to have recourse to national procedures.

Domestic remedies are not exhausted if a case pertaining to the complaint is still pending before the local courts,[185] or if a court is still "seized" with the matter.[186] In *Lawyers' Committee for Human Rights v Tanzania*[187] the Commission found that the fact that bail was granted to the complainant, indicated that "the domestic legal process is responsive and actively considering the case". Domestic remedies were therefore not exhausted. This decision followed after the complainant was first detained awaiting trial (bail being denied) for two years, then released and charges against him were "struck out by the court". He was apparently re-charged and granted bail.

ii "... local remedies ..."

A "local remedy" has been defined as "any domestic legal action that may lead to the resolution of the complaints at the local or national level".[188]

The Commission has consistently interpreted "local remedies" to mean "all local remedies".[189] "Local remedies" include an appeal out of time, if that exists.[190] In the ordinary course of events, local remedies are exhausted when leave to appeal is rejected in a national court.[191]

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183 Communication 1131/94 (*Manjang v The Gambia*).

184 Communication 92/93.

185 Communications 45/90 (*Civil Liberties Organisation v Nigeria*) and 135/94 (*Kenya Human Rights Commission v Kenya*).

186 Communication 107/93 (*Academic Staff of Nigerian Universities v Nigeria*).

187 Communication 66/92.

188 See Communication 101/93 (*Civil Liberties Organisation (in respect of the Nigerian Bar Association) v Nigeria*).

189 See eg Communications 66/92 (*Lawyers' Committee for Human Rights v Tanzania*) and 101/93 (*Civil Liberties Organisation (in respect of the Nigerian Bar Association) v Nigeria*).

190 Communication 90/93 (*Haye v The Gambia*).

iii "... , ***if any***, ..."

Remedies need only be exhausted if they are *available, possible and effective* in the domestic jurisdiction.

Five possible categories of cases in which remedies are either factually non-existent or deemed to be so, may be identified:

- If a decree or other measure has **ousted the jurisdiction of the courts**, making judicial recourse impossible, there are no local remedies which should be exhausted.[192] In other words, local remedies do not have to be exhausted when they are not available.

- If pursuing a remedy is **dependent on extra-judicial considerations**, such as a discretion or some extraordinary power granted to an executive state official, such "remedy" need not be exhausted before one may approach the Commission.[193]

- If the **nature of the relief is not possible in domestic courts**, that relief need not be sought in national courts.[194]

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191 *Ibid.*

192 A decree to the effect that no "person may commence ... an action or any legal proceeding whatsoever" relating to certain issues, was considered to "effectively remove all local remedies from national law" (Communication 101/93 (*Civil Liberties Organisation (in respect of the Nigerian Bar Association) v Nigeria).)*). See also Communication 129/94 (*Civil Liberties Organisation v Nigeria*): In the case of a decree ousting the jurisdiction of the courts and nullifying any domestic effect of the African Charter, the Commission found that "it is reasonable to presume that local remedies will not only be prolonged but are certain to yield no results".

193 An example is provided in Communication 60/91 (*Constitutional Rights Project v Nigeria*). In terms of the Robbery and Firearms Act the governor of a state could confirm or dismiss the decision of a specially established tribunal. The Commission found this "remedy" to be neither adequate nor effective. It had this to say: "The object of the remedy is to obtain a favour and not to vindicate a right. It would be improper to insist that the complainants seek remedies from sources which do not operate impartially and have no obligation to decide according to legal principles". See also 64/92 (*Achuthan (on behalf of Banda) v Malawi*) where the Commission found the communication admissible because the "available" remedy was at the complete discretion of the executive. In the light thereof, pursuing local remedies would be futile and to exhaust them would be ineffective.

- If a **situation of serious or massive violation of human rights** exists, domestic remedies need not be exhausted. In effect, the Commission took judicial notice of the fact that remedies are ineffectual in such cases. This may be due to the seriousness of the violations, or to the great number of individuals affected by the violations.[195] By their very nature, such situations either involve numerous rights of one victim being violated, or one or more rights of a number of victims being violated. The seriousness of the situation and the large number of victims involved make the exhaustion of remedies in the local jurisdiction impracticable and unrealistic. It is presumed that the state had ample notice of violations on such a vast scale prevailing within its territory, and took no steps to remedy these violations.[196]

- Where a complainant is **detained without trial**, they have no access to remedies, as no procedure has been instituted against them.[197]

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194 Communication 75/92 (*Katangese Peoples' Congress v Zaïre*) contained a claim for secession of the Katangese people from the main territorial unit of Zaïre. As it appeared to the Commission that no (judicial) remedies are available at the national level to "express the independence of the one area from the state", making the requirement of exhaustion of local remedies redundant. See also Communication 103/93 (*Abudakar v Ghana*), where the Commission observed that unavailable local remedies need not be exhausted. In that case the complainant was residing outside the state against which the complaint was directed. Considering the nature of the complaint "it would not be logical to ask the complainant to go back to Ghana in order to seek a remedy from national legal authorities".

195 "The Commission cannot hold the requirement of exhaustion of local remedies to apply literally in cases where it is impractical or undesirable for the complainant to seize the domestic courts in the case of each individual complaint. This is the case where there are thousands of individual victims. Due to the seriousness of the human rights situation as well as the great number of people involved, such remedies as might **theoretically exist** in the domestic courts are as a **practical matter unavailable**..." (Communication 64/92 *(Achuthan (on behalf of Banda) v Malawi*), emphasis added). See also Communications 74/92 (*Commission Nationale des Droits de l'Homme et des Libertés v Chad*) and 83/92 (*Degli (on behalf of Bikagni) v Togo*). In Communication 27/89, 46/91, 49/91, 99/93 (*Organisation Mondiale Contre la Torture and three others v Rwanda*) the Commission based its finding that local remedies need not be exhausted on the "varied scope of the violations alleged" and the "large number of violations involved".

196 See Communication 74/92 (*Commission Nationale des Droits de l'Homme et des Libertés v Chad*).

197 Communication 17/88, 18/88 (joined) (*Comité Culturel pour la Démocratie au Bénin et al v Benin*).

iv *"... unless it is obvious that this procedure is **unduly prolonged**."*

A delay of over two years in appeal procedures amounts to "undue" delay.[198] Appeals and a petition for executive clemency had been pending for twelve years in *Mekongo v Cameroon*.[199] The Commission considered the process of obtaining domestic redress to have been obviously unduly prolonged, and therefore not in need of exhaustion. If a case had been pending for three months when a related complaint was submitted to the Commission, the delay is insufficient to constitute undue delay.[200] Even if the President gave indications that any challenge would be ineffective, the complainant must still await the outcome of the local procedures.[201]

3.3.2.4 Other grounds for findings of inadmissibility

Other grounds for findings of inadmissibility put forward by the Commission are the following:

- The Commission did not receive a reply from the complainant (the information was needed to establish whether local remedies had been exhausted).[202]
- The Commission apparently did not receive a reply from the state complained against.[203]
- The communication was vague, incoherent or uncoordinated.[204]

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198 See Communication 66/92 (*Lawyers' Committee for Human Rights v Tanzania*), and the Commission's initial decision. The communication was later declared inadmissible on other grounds.

199 Communication 59/91.

200 See Communication 135/94 (*Kenya Human Rights Commission v Kenya*).

201 *Ibid.*

202 Communication 8/88 (*Buyingo v Uganda*).

203 Communication 43/90 (*Union des Scolaires Nigeriens - Union Generale des Etudiants Nigeriens au Benin v Niger*), in which the author(s) wrote to the Commission protesting against human rights violations allegedly committed by Niger. The Commission states as follows: "Considering that since the matter was referred to the Commission, no additional information has been received by the Secretariat, in spite of several reminders...". Even if this also relates to the state concerned, other factors pertaining to the communication contributed to the finding: "Considering that none of the conditions relating to form, time-limit or procedure laid down under Article 56 of the Charter and Rule 114 of the Rules of procedure has been complied with...".

- The matter had already been examined by the UN Human Rights Commission in terms of the 1503 procedure of ECOSOC.[205]
- The matter had already been referred to another international human rights body (the UN Human Rights Committee).[206]
- Insufficient information was provided on which the Commission could evaluate an allegation of violation.[207]
- The communication did not reveal the violation of any specific right in the Charter.[208]
- The conduct complained of did not constitute a *prima facie* violation of the Charter.[209]

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204 Communication 35/89 (*Ayele v Togo*), Communication 57/91 (*Bangav v Nigeria*) ("it is not clear what the complainant is trying to say").

205 Communication 69/92 (*Amnesty International v Tunisia*). This was in terms of Rule 114 (3)(f) of the Rules of procedure of the African Commission. However this rule has been amended at the Commissions 18th session. The rules now refer directly to art 56(7) of the Charter and therefore only to cases already settled (and not merely under consideration) by another international procedure.

206 Communication 15/88 (*Mpaka-Nsuku v Zaïre*). The practice among states parties to the European Convention is that they make declarations when accepting the CCPR Optional Protocol procedure. In terms thereof, the European Commission is given primacy, as states do not accept the Optional Protocol I procedure if a communication has already been considered by the European Commission. The only African state that has made a similar declaration is Uganda: It does not accept that complaints brought under the Optional Protocol if such a complaint has already been considered by another human right procedure or one form of international settlement. This gives consideration by the African Commission primacy above the Human Rights Commission.

207 Communication 31/89 (*Baes v Zaïre*). No specific dates and incidents were alleged in Communication 104/94 - 126/94 (*Center for the Independence of Judges and Lawyers v Algeria*) and Communication 65/92 (*Ligue Camerounaise des Droits de l'Homme v Cameroon*).

208 Communication 13/88 (*Hadjali Mohamad v Algeria*): "Considering that the communication does not state the complaint directed against the State concerned or the human rights violation suffered by the author of the communication or the procedures engendered (sic) by such violations..."; Communication 63/92 (*Congress for the Second Republic of Malawi v Malawi*) (complaint too general in nature); Communication 75/92 (*Katangese People's Congress v Zaïre*) (claim to self-determination of group within a state not covered by provisions of the Charter).

- A full contact address of the author was not given, compelling the Commission to declare it inadmissible.[210]
- The full identity of the author was not given.[211]
- The complainant used insulting language.[212]

3.3.2.5 Recommendation

The Commission's finding can only be properly analysed and evaluated if a substantial summary of the relevant facts are given. The facts given in later decisions are much more elaborate than the scant formation revealed initially. This trend should be encouraged and extended.

3.3.3 Individual complaints: decisions on merits

In the first ten years of the Charter's life (1986 - 1996) the Commission gave final decisions on the merits in 13 cases.[213] These are cases that did not involve friendly settlements. All of them ended in

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209 Communication 1/88 (*Korvah Liberia*), Communication 106/93 (*Vitine v Cameroon*), Communication 142/92 (*Njoka v Kenya.*)

210 Communication 57/91 (*Bariga v Nigeria*), Communication 70/92 (*Dioumessi, Kande, Koba v Guinea*) and Communication 108/93 (*Joana v Madagascar*). The finding on this ground in the latter case is not convincing. It seems very unlikely that "a prominent political figure" who had been a candidate for president could not be located with diligent effort.

211 Communication 70/92 (*Dioumessi, Kande, Kabe v Guinea*)

212 Communication 65/92 (*Ligue Camerounaise des Droits de l'Homme v Cameroon*).

213 These cases are Communications 25/89, 47/90, 56/91, 100/93 (joined) (*World Organisation Against Torture, Lawyers' Committee for Human Rights, Jehova Witnesses of Zaïre, Union Interafricaine des Droits de l'Homme et des Libertés v Zaïre*); Communication 27/89, 46/91, 49/91, 99/93 (joined) (*Organisation Mondiale Contre la Torture et al v Rwanda*)); Communication 39/90 (*Pagnoulle v Cameroon*)); Communication 59/91 (*Mekongo v Cameroon*); Communication 60/91 (*Constitutional Rights Project v Nigeria);* Communication 64/92, 68/92, 78/92 (joined) (*Achuthan (on behalf of Banda), Amnesty International (on behalf of Orton and Vera Chirwa), Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi*); Communication 71/92 (*Rencontre Africaine pour la Defense des Droits de l'Homme v*

Footnotes continued on next page.

an unequivocal finding that the government concerned had violated the Charter.[214] Findings of the existence of serious or massive human rights violations have been made in four cases. In all 13 cases the governments concerned were found in violation of its obligations under the Charter. The states found in violation are Nigeria (in four cases), Cameroon (in two cases), Chad, Ghana, Malawi, Rwanda, Togo, Zaïre and Zambia (one case each). Table H sets out the 13 finalised cases:

Zambia); Communication 74/92 (*Commission Nationale des Droits de l'Homme et des Libertés v Chad*); Communication 83/92, 88/93, 91/93 (joined) (*Degli (on behalf of Bikagni), Union Interafricaine des Droits de l'Homme, Commission Internationale de Juristes v Togo*); Communication 87/93 (*Constitutional Rights Project (on behalf of Lekwot and six others) v Nigeria*); Communication 101/93 (*Civil Liberties Organisation (in respect of the Nigerian Bar Association) v Nigeria*), Communication 103/93 (*Abudakar v Ghana*) and Communication 129/94 (*Civil Liberties Organisation v Nigeria*).

214 The details of these decisions have been published in the Commission's annual activity reports. At the time of writing, the Assembly had approved publication of the first nine reports. This covers the Commission's work up to (and including) its 19th session (March 1996). The discussion here is limited to these cases. The communication involving Togo is categorised as a final decision on the merits, although the Commission's finding was that it "welcomes the continued efforts of the government to remedy such violations". The finding follows a mission to Togo in February 1995. The outcome cannot be categorised as a "friendly settlement". It is clear that certain violations were found, and that the current government was held responsible. Two explanations for the "unconfrontational" drafting of the Commission's finding are offered here: The Commission did not want to negate or discourage the efforts of the new government in changing policies and addressing the defects of the past. Also, the sitting at which the decision was reached, was held in Lomé, Togo. This fact would have highlighted the need not to antagonise the government.

TABLE H: COMMUNICATIONS FINALLY DECIDED ON MERITS BY THE AFRICAN COMMISSION (AS AT THE END OF THE 21ST SESSION)

COMMUNI-CATION NUMBER	APPLICANT(S)	COUNTRY	RIGHTS VIOLATED	AT SES-SION	REMEDY	OBSERVATION
27/89; 46/91; 49/91; 99/93 (joined)	Organisation Mondiale Contre La Torture, ICJ and others	Rwanda	4,5,6,7,12(3) 12(4), 12(5)	20th	Urged government to adopt measures in conformity with decision	Serious or massive violations found at 20th session (art 58)
39/90	Pagnoulle	Cameroon	6, 7(1)(b), 7(1)(d), 15	21st	Recommended that victim be reinstated	
59/91	Mekongo	Cameroon	7(1)(a) 7(1)(d)	16th	Reparations, amount to be determined in legal system of Cameroon	
64/92; 68/92; 78/92	Achutan (on behalf of Banda); AI (on behalf of Orton and Vera Chirwa)	Malawi	4, 5, 6, 7(1)(a), 7(1)(c), 7(1)(d), 26	16th		At 14th session a series of serious and massive violations (art 58) was brought to Assembly's attention; which did not react; later considered by Commission as "ordinary" communication. Orton Chirwa died in prison.
60/91	Constitutional Rights Project	Nigeria	7(1)(a), 7(1)(c), 7(1)(d), 26	16th	Nigeria ordered to free complainants	Death penalty not executed
71/92	Rencontre Africaine pour la Defense des Droits de l'Homme	Zambia	2, 7(1)(a), 12(5)	20th	Efforts will be continued to reach amicable resolution	
83/92, 88/93, 91/93	Degli (on behalf of Bikagui), Union Interafricaine des Droits de l'Homme, International Commission of Jurists	Togo	4, 12(1)	17th		Delegation of Commission visited Togo; order welcomes efforts by the present government to remedy the violations (no explicit finding of violation)
87/93	Constitional Rights Project (in respect of	Nigeria	7(1)(a), 7(1)(c),	16th	Commission recommended that the	Were in fact freed

COMMUNI-CATION NUMBER	APPLICANT(S)	COUNTRY	RIGHTS VIOLATED	AT SES-SION	REMEDY	OBSERVATION
	Lekwot and 6 others)		7(1)(d), 26		complainants be freed	
101/93	Civil Liberties Organisation (in respect of Nigerian Bar Association)	Nigeria	6, 7, 10, 26	17th	Commission ordered that the relevant decree "should be annulled"	
103/93	Abudakar	Ghana	6, 7(1)(d)	20th	Government urged to take steps "to repair the prejudice suffered"	
129/94	Civil Liberties Organisation	Nigeria	7, 26	17th	Commission found that the act of the Nigerian government to nullify the effect of Charter "constitutes a serious irregularity"	
74/92	Commission Nationale des Droits de l'Homme	Chad	1, 4, 5, 6, 9	18th		Serious or massive violations found (art 58)
25/89; 47/90; 56/92; 100/93	World Organisation Against Torture; Lawyers Committee for Human Rights *et al.*	Zaïre	4, 5, 6, 7, 8, 16, 17	19th		Decision on serious or massive violations (art 58) taken at 19th session

3.3.3.1 Modus operandi *of Commission*

i *Procedure for consideration*

The main **aim of the communication procedure** before the Commission is, in the words of the Commission itself, "to initiate a positive dialogue, resulting in an amicable solution between the complainant and the state concerned".[215] To facilitate this **dialogue**, consideration of the merits of a case preferably takes place in the presence of both sides.[216] However, if the government does not

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215 See eg Communication 25/89, 47/90, 56/91, 100/93 (joined). See also Communication 27/89, 46/90, 49/90, 99/93: "The main goal of the communications procedure before the Commission is to initiate a positive dialogue, resulting in an amicable resolution between the complainant and the state concerned, which remedies the prejudice complained of".

216 *Ibid.*

heed notifications or respond to invitations to attend, the Commission considers the communication in the absence of a government representative.[217] This acknowledges that a prerequisite for any amicable solution is the good faith and willingness to participate in a dialogue on the part of both parties. The complaint may also be finalised in the absence of the complainant.

The Commission **decides the case on the factual basis presented to it**. A prerequisite for an amicable resolution of the conflict is the good faith of both sides involved, including the willingness to participate in a dialogue.[218] The communication must contain more than a mere allegation that a right has been infringed. Allegations of instances of torture without information about the specific acts do not enable the Commission to find a violation.[219] If the government did not respond to requests for information or for an explanation, a finding is made on the basis of the facts provided by the complainant alone. A blanket denial by the government is not deemed a sufficient factual basis for any finding.[220]

The lack of co-operation by a number of states and the desire for amicable settlements have prompted the Commission to **undertake missions to states** against which a final decision on the merits are pending. At its 16th session, the Commission decided to send a mission to Zaïre to investigate a number of communications received.[221] This visit never took place, because the government of Zaïre did not consent to the mission. Attempts to secure the state's consent resulted in excessive delay in the finalisation of these communications. The first of these joint communications is dated March 1989. A final decision was taken only in March 1996. An example of a mission which did take place is presented by the case against Togo. A final decision was reached at the 17th session (March 1995), after a mission had been undertaken to Togo in February 1995.

At its 19th session the Commission reaffirmed its decision to conduct missions to states in order to "consider" communications brought against these states which have already been declared

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217 *Ibid.*

218 See Communication 27/89, 46/90, 49/90, 99/93.

219 Communication 83/92, 88/93, 91/93, in respect of Communication 83/93.

220 The Commission's approach in respect of admissibility decisions is not as clear on this issue.

221 See Communication 25/89, 47/90, 56/91, 100/93 against Zaïre.

admissible by the Commission.[222] Six states were targeted, although no dates had been fixed by the end of the 19th session. These states are Burundi, Mauritania, Nigeria, Rwanda, Senegal and Sudan. As Welch observed, the record was "not encouraging".[223] Three factors undermined this course from the outset: the lack of consent from the states concerned to allow the visit to take place, inaction of the OAU Chair[224] and lack of Commission resources. Especially the visit to Nigeria in early March 1997 was an encouraging sign that the tide was turning. By then, missions to Senegal, Mauritania and Sudan had already taken place.[225]

These **missions underscore the consensus-seeking nature** of the Commissions approach to human rights violations. In the case of Mauritania, for example, the Commission received four communications prior to its visit to that country. No specific findings were made about these individual violations in the course of the Commission's report. Instead, the communications served as a basis to initiate an investigation into more systematic and pervasive violations by the government of Mauritania.

A degree of **tension** exists between the Commission's efforts to reach **amicable solutions** through mediation, and its findings based on a **quasi-judicial** (or, in some respects, even fully-fledged judicial) process. The "judicial" nature of these proceedings are underscored by the fact that

- parties represented before the Commission are afforded an opportunity to address the Commission verbally and by presenting memorials,[226] and
- the Commission issues a reasoned "judgment" motivating its finding.

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222 Ninth Annual Activity Report, par 20.

223 (1995) at 160.

224 See Welch (1995) at 160, for the protracted process to send missions to Sudan and Rwanda.

225 See Tenth Annual Activity Report.

226 See eg Communication 74/92, in which a representative of a French NGO, Ms Trusses-Naprous, reiterated the information in the original communication, both verbally and by way of brief. She also contended that the human rights position has not improved since the communication was lodged.

ii Issues of retrospectivity

Often, the Commission has been ineffective in the face of strong governmental resolve not to budge on the issue of human rights. Visits were for example not allowed. A communication could therefore take years to be brought to finality. In many instances the Commission only decided communications finally after the violating regime had been removed from office. The sad history of the Chirwas who were abducted from Zambia to Malawi in 1981 is a case in point. Their case was on the Commission's agenda since 5 March 1992, but was brought to finality only on 21 April 1994.[227] To Welch, "justice delayed was justice denied",[228] as Orton Chirwa died in prison before the Commission could dispose of the matter. The OAU Heads of State and Government did not respond to the Commission's finding of the existence of a series of massive violations, relayed to them in December 1993. Even at that stage, the progress to democracy was already under way.

The Charter does not have retroactive effect. It binds a state from the moment of formal adherence. Accordingly, the Commission held that it "cannot pronounce on the equity of court proceedings that took place before the African Charter entered into force".[229] The Charter does not render illegal what had previously been done legally.

However, a current, post-ratification violation may be informed by past events, allowing for some retrospective effect. An example is presented in the case of *Mekongo v Cameroon*,[230] where an appeal was lodged in Cameroon during 1982. The Commission found a violation of the right to be tried within a reasonable time. The time period involved had commenced before Cameroon ratified the Charter, but continued into the period after Cameroon's ratification.[231]

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227 See Communication 64/92, 68/92, 78/92 (joined) (*Achuthan (on behalf of Balanda), AI (on behalf of Orton and Vera Chirwa) v Malawi*).

228 Welch (1995) at 160.

229 See Communication 59/91 (*Mekongo v Cameroon*).

230 Communication 59/91.

231 See also Communication 97/93 (*Modise v Botswana*): "Although some of the events described in the communication took place before ratification, their effects continue to the present day. The current circumstances of the complainant is a result of a present policy decision taken by the Botswana government against him".

iii Redress and remedies

It is difficult to discern a consistent pattern from the Commission's findings concerning remedies to or corrections of situations in which it had found a violation.

When **executive decrees** (akin to legislation at least in form) had been found to violate the Charter, the Commission in one case held that the decree should be annulled,[232] in another that its effects constitute a "serious irregularity",[233] and in two other cases decided that the complainants should be freed, without referring to the effect of the violation on the decrees.[234] The first two cases were instances of "abstract review", in that there were no directly affected individuals already suffering from a violation. In the last two cases, individuals were detained, following the exercise of powers granted by the decrees. While it is only understandable that the focus will in such cases fall on the specific individuals concerned, the Commission should also avail itself of those opportunities to spell out that the decrees should be nullified. Emphasis should fall on the fact that not only its specific application to the facts at issue, but its existence as such, violates the Charter.

When a violation of the Charter through **executive action** (by members of security forces, for example) had been found, the Commission had not given clear directives.[235] In cases where a series of massive violations had been found, the Commission is restricted to bringing this to the attention of the Assembly of Heads of State and Government. In one case, it made a formal finding of violation after the Assembly had failed to respond.[236]

Only once was **compensation** ordered. An imprisoned complainant whose appeal had been delayed for more than twelve years was found to be entitled to reparations for the prejudice he

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232 Communication 101/93 (*Civil Liberties Organisation (in respect of the Nigerian Bar Association) v Nigeria*).

233 Communication 129/94 (*Civil Liberties Organisation v Nigeria*).

234 Communication 60/91 (*Constitutional Rights Project v Nigeria)* and Communication 87/93 *(Constitutional Rights Project (In respect of Lekwot and six others) v Nigeria*).

235 See Communication 64/92, 68/92, 78/92 (joined).

236 Communication 64/92, 68/92, 78/92 (joined) against Malawi.

suffered. The amount had to be determined by the domestic courts in accordance with the established legal principles of Cameroon.[237]

Provisional measures were ordered in *Degli v Togo*.[238] Unfortunately, the nature of these measures are not clear. The Commission's decision refers to "interim measures ... geared towards ensuring the security of Corporal ... to avoid any irreparable prejudice inflicted on the victim of the alleged violations". This is in accordance with the Rules of procedure which allows for provisional measures without implying a decision on the substance of the communication.[239] This case involved the human rights activist Ken Saro-Wiwa.[240] The interim measures were clearly not of a sufficiently specific nature, and were not complied with by the Nigerian government. At its session in October 1995 the Commission joined this case with others to be discussed with the Nigerian government during the Commission's intended visit to Nigeria. This mission only took place in 1997, long after Saro-Wiwa and eight others were convicted by a special military tribunal and executed (on 10 November 1995).

iv Follow-up

Only in **one instance** was a **clear** indication given as to follow-up of the Commission's finding. In the *Lekwot* case[241] the Commission at its 16th session found a violation of the Charter and recommended that the government should free the complainants. At its 17th session "the Commission decided to bring the file to Nigeria for a planned mission in order to make sure that the violations have been repaired".[242] This mission eventually took place in March 1997. The eventual outcome has not been published.

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237 See Communication 59/91 (*Mekongo v Cameroon*).

238 Communication 83/92.

239 See rule 109 of the original Rules of procedure, which was then in force.

240 See also Ankumah (1996) at 117 - 118.

241 Communication 87/93.

242 Eighth Annual Activity Report, Annex on Communications.

3.3.3.2 Series of serious and massive violations

In four cases the Commission made explicit findings of serious and massive violations of human rights. In terms of article 58 of the Charter, it could draw the attention of the Assembly to these facts. However, the Commission has not developed a consistent practice, either in making an explicit finding of serious or massive violations, or in drawing the attention of the Assembly thereto.[243]

The first case is the situation of "civil war" that pertained in Chad in the early 1990s.[244] The Commission based its finding of a series of serious and massive violations on the infringement of five rights in the Charter:

- The right to life, in that the state failed to prevent assassinations or to investigate them in order to solve them.
- The prohibition against torture was infringed.
- The state failed to provide security and stability in the country.
- Numerous people were arbitrarily arrested and detained, causing a violation of article 7.
- Freedom of expression was violated when journalists were harassed and attacked.

The second case relates to the situation in the former Zaïre. In the case above, against Chad, one institution brought a cumulative complaint, alleging massive violations. In this case, four different complaints, filed by numerous different NGOs, were joined by the Commission.[245] The complaints covered a long period - the first was submitted in 1989, the second in 1990, the third in 1991, and the last in 1993. They also apparently covered a wide geographical area. It was found that an

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243 See eg Communication 83/92; 88/93; 91/93 (joined) against Togo, in which reference is made to serious or massive violation in the admissibility finding, but not in the finding on the merits.

244 Communication 74/92 (*Commission Nationale des Droits de l'Homme et des Libertés v Chad*).

245 Communication 25/89, 47/90, 56/91, 100/93 (joined) (*Free Legal Assistance Group, Lawyers' Committee for Human Rights, Jehova's Witnesses of Zaïre, Union Interafricaine des Droits de l'Homme v Zaïre*).

extended list of rights (at least seven) had been violated. Treating these communications together as evidence of wide-spread abuse of human rights in Zaïre, the Commission, at its own initiative, concluded that a finding in terms of article 58 of the Charter was called for.

The third finding of massive violations related to complaints brought against Malawi. The cases of Aleke Banda (who had been in custody without charge "at the pleasure of the President" for over twelve years) and Vera and Orton Chirwa (who were abducted from Zambia, tried without legal representation, and detained in appalling prison conditions) led the Commission to this conclusion.[246] At its 14th session the Commission decided that the communications provided evidence of a series of massive violations of the Charter. Violations of articles 5, 6 and 7 were found. Interestingly, at its 16th session the Commission proceeded to consider the merits of the case and made a formal finding that the Charter had been violated.

The fourth case in which the Commission held that the facts constituted serious or massive violations of the African Charter related to events in Rwanda.[247] The Commission joined four communications, which made reference to the expulsion from Rwanda of Burundi nationals who had been refugees in Rwanda for many years, as well as the arbitrary arrest and extra-judicial executions of Rwandans, mostly of the Tutsi group. At its 20th session (October 1996) the Commission held that articles 4, 5, 6, 7, 12(4) and 12(5) had been violated and made a finding that the facts revealed serious or massive violations of the Charter. The Commission's finding was made after the situation had already changed dramatically.[248] This fact may explain the vague "remedy" according to which the Commission "urged" the government of Rwanda "to adopt measures in conformity with this decision".[249]

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246 Communication 64/92, 68/92, 78/92 (joined) (*Achuthan (on behalf of Banda) v Malawi*).

247 Communication 27/89, 46/90, 49/91, 99/93 (joined) (*Organisation Mondiale Contre la Torture and three others v Rwanda*).

248 The events in Rwanda occurred between 1989 and 1992.

249 *Ibid.*

3.3.3.3 *Violations*

The substantive provisions of the Charter which have been interpreted in the Commission's findings on the merits of communications are now discussed.[250] It will become clear that the decisions relate almost exclusively to civil and political rights of individuals, rather than to socio-economic or collective rights. The rights most frequently invoked are the right to a fair trial, to be free from arbitrary detention and arrest, and from cruel and inhuman punishment.

i Article 1

Article 1 stipulates the all-encompassing obligation of states parties to "recognise the rights, duties and freedoms enshrined in this Charter" and to "adopt legislative or other measures to give effect to them". Nigeria ratified the African Charter in 1983. In terms of the African Charter (Ratification and Enforcement Act) the Charter has the force of law in Nigerian domestic law. The Political Parties (Dissolution) Decree nullified any domestic effect of the Charter. A communication directed to the Commission complained that this decree violated the Charter.[251] The Commission found that the obligation under article 1 commences at ratification. It will only cease when ratification is withdrawn through a procedure acceptable in international law. This has not been done. This means that the Charter remains in force in Nigeria.

A state's duty to "undertake measures" implies that the state must also take pre-emptive steps to prevent human rights violations. Even if state agents are not the immediate and direct cause of a violation (for example an assassination), the state has a duty to intervene in order to prevent violations (such as the assassination of specific individuals) and to investigate the incidents.[252]

A question arising in this context is whether a change in government affects a state's obligations under the Charter. This question was bound to arise in African states as the wave of democratisation swiped repressive regimes out of office, replacing them with democratically-

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250 See also the discussion by Ankumah (1996) at 111 - 177.

251 Communication 129/94 (*Civil Liberties Organisation v Nigeria*).

252 See Communication 74/92 (*Commission Nationale des Droits de l'Homme et des Libertés v Chad*).

elected governments with a human rights consciousness and conscience. The Commission held that "international law stipulates that a government inherits the previous administration's responsibilities".[253] Therefore, the democratic government in Togo had to redress the violations caused by the previous regime.[254] Similarly, the new government in Malawi was held responsible for the reparation of human rights abuses committed by the previous government.[255] In accordance with principles of international law the change of government did not "extinguish" the claim before the Commission. The findings in the two cases differ: In the Chirwa couple case Malawi was found in violation of the Charter; in the Togolese case the Commission was satisfied "that the present administration has dealt with the issues satisfactorily".[256]

ii *Article 2*

The denial of rights to individuals on the basis of their nationality (in the particular case, Burundi nationals in Rwanda), or on the basis of their membership of a certain ethnic group (in the particular case, the Tutsi group) violates the guarantee of equality in article 2.[257]

iii *Article 4*

Article 4 guarantees respect for human life. Shootings by police officers are a clear violation of this article,[258] as is the shooting of peaceful demonstrators[259] and extra-judicial killings.[260]

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253 See Communication 83/92, 88/93, 91/93 (joined) against Togo.

254 *Ibid.*

255 The Chirwa couple case, Communication 64/92, 68/92, 78/92 (joined).

256 Eighth Annual Activity Report, Annex of Communications.

257 See Communication 27/89, 46/90, 49/90, 99/93 (joined) (*Organisation Mondiale Contre la Torture v Rwanda*).

258 See Communications 64/92, 68/92, 78/92 (joined) (*Achutan (on behalf of Banda), Amnesty International (on behalf of Orton and Vera Chirwa), Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi*).

259 See Communication 83/92, 88/93, 91/91 (joined) against Togo.

260 See Communication 27/89, 46/90, 49/90, 99/93 (joined).

iv *Article 5*

Article 5 outlaws all forms of "torture, cruel, inhuman or degrading punishment and treatment". Orton and Vera Chirwa were sentenced to death in Banda's Malawi. Their sentences were commuted to life imprisonment. Conditions of imprisonment were the subject of two communications submitted to the Commission on their behalf.[261] Various aspects of their imprisonment contravened this article. These were:

- conditions of overcrowding;
- acts of beating and torture;
- excessive solitary confinement; and
- shackling within a cell.

In its finding the Commission went further, incorporating a socio-economic dimension into the ambit of this right. The "extremely poor quality food" and "denial of access to adequate medical care" also led to contraventions of article 5. As in many other instances, the sparseness of the Commission's reasons and the brevity of the decision make it impossible to ascertain what the conditions were that gave rise to a finding of "extremely poor" and not "adequate". This lack of a factual basis diminishes the precedent-setting impact of the finding.

v *Article 6*

Article 6 grants the right to liberty and security of the person. Arbitrary arrest and detention constitute violations of article 6.[262]

vi *Article 7*

This article is applicable to any body that can hand down decisions which may lead to imprisonment, enabling that body to impact on the liberty and security of the person.[263] Such a

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261 Communications 64/92, 68/92, 78/92 (*Achutan (on behalf of Banda), Amnesty International (on behalf of Orton and Vera Chirwa), Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi*).

262 Communications 64/92, 68/92, 78/92 (joined) (*Achutan (on behalf of Banda), Amnesty International (on behalf of Orton and Vera Chirwa, Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi*).

body, even if it is called a "Body of Benchers", is analogous to a court and must satisfy the requirements of article 7.[264]

Article 7(1)(a) provides for "the right to appeal to competent national organs against acts of violating ... fundamental rights ...". The Nigerian Robbery and Firearms (Special Provisions) Act[265] determined that no "appeal shall lie from a decision of a tribunal constituted under this Act ...". The punishment decreed as a culmination of a carefully conducted criminal process would usually not, but may in some cases constitute an "act of violating ... fundamental rights", the Commission observed. However, a violation of article 7(1)(a) was based on the fact that the decree foreclosed any avenue of appeal to any of the "competent national organs" mentioned in article 7(1)(a).[266] A similar provision in the Civil Disturbances (Special Tribunal) Act was found in violation of article 7(1)(a).[267] The relevant section provided as follows: "The validity of any decision, sentence, judgment, ... or any order given or made, ... or anything whatsoever done under this Act shall not be inquired into in any court of law".[268] The Commission held that "to foreclose any avenue of appeal to competent national organs in criminal cases bearing such penalties clearly violates" article 7(1)(a).[269]

The ousting of the jurisdiction of the courts to adjudicate on the validity of decrees "constitutes an attack of incalculable proportions on Article 7", the Commission held.[270] It added: "An attack of this sort on the jurisdiction of the courts is especially invidious, because while it is a violation of human rights in itself, it permits other violations of rights to go unredressed".[271] A decree issued by the Nigerian authorities purported to nullify Nigeria's ratification of the Charter and recourse

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263 See the decision on Communication 101/93 *(Civil Liberties Organisation (in respect of the Nigerian Bar Association) v Nigeria*).

264 *Ibid.*

265 S 11(4) of the Act.

266 Communication 60/91 (*Constitutional Rights Project (in respect of Akamu, Adega and others) v Nigeria*).

267 Communication 87/93 (*Constitutional Rights Project (in respect of Lekwot and six others) v Nigeria*).

268 Part IV, s 8(1) of the Act.

269 Even the death penalty could be imposed by the Special Tribunal provided for in the Act.

270 See Communication 129/94 (*Civil Liberties Organisation v Nigeria*).

271 *Ibid.*

thereto in domestic courts.[272] Finding that the authorities could only undo Nigeria's ratification by withdrawing it, the Commission ruled that "Nigeria cannot negate the effects of its ratification of the Charter through domestic action". Nigeria remains under an obligation to guarantee all the rights in the Charter (see article 1), including article 7. Section 7(1)(a) refers to "fundamental rights as recognised ... by conventions ... in force". As the Charter is a "convention" which guarantees "fundamental rights" and is "in force", the right to appeal against acts which violate the Charter is included in its ambit.

Detention based on the suspicion that "an individual may cause problems" is a violation of the right to be presumed innocent in article 7(1)(b).[273]

The right to defence in the process of having one's case heard, including the right to be defended by counsel of one's choice, is articulated in article 7(1)(c) of the Charter. Harassment and intimidation of counsel, to the extent that they withdraw from a case, constitutes a violation of an accused person's right to counsel.[274] If counsel has withdrawn and the accused is not granted the opportunity to procure the services of other counsel, the right to be defended by counsel of one's choice (which is contained in article 7(1)(c)) has also been infringed.[275] The appearance of Orton and Vera Chirwa without counsel in a case in which the death penalty was imposed, constituted a violation of the same sub-article.[276]

Article 7(1)(d) guarantees the right to be tried by "an impartial court or tribunal". A violation of this guarantee was found in provisions of the Nigerian Robbery and Firearms (Special Provisions) Act.[277] In terms of the act certain offences are tried by special tribunals, each consisting of a judge, an officer from the Armed Forces and an officer from the Police Force. The Commission found a

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272 The Political Parties (Dissolution) Decree 114 of 1993.

273 See Communication 39/90 (*Pagnoulle v Cameroon*).

274 See Communication 87/93 (*Constitutional Rights Project (in respect of Lekwot and six others) v Nigeria*).

275 *Ibid.*

276 Communications 64/92, 68/92, 78/92 (*Achutan (on behalf of Banda), Amnesty International (on behalf of Orton and Vera Chirwa), Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi*).

277 S 8(1) of the Act. See Communication 60/91 (*Constitutional Rights Project (in respect of Akamu, Adega and others) v Nigeria*).

violation of article 7(1)(d), as an appearance of partiality has been created by the establishment of these tribunals. The perception of partiality was created because jurisdiction "has been transferred from the normal courts to a tribunal chiefly composed of persons belonging to the executive branch of government". This meant that the constitutionally cherished division of powers between the executive and the legislature had been eroded. Another factor that contributes towards an impression of impartiality is the fact that the members of the tribunal "do not necessarily possess any legal expertise". This implies that they may be seen to be influenced by extra-legal (such as overtly political) criteria. The Commission made it clear that the objective facts (that the members of the executive may also be lawyers and may in fact be favourably disposed towards individual rights) are not taken into account. Impartiality is gauged with reference to perceptions. Similarly, the Civil Disturbance (Special Tribunal) Act created a tribunal consisting of one judge and four members of the armed forces. Using the same arguments just cited, the Commission also found the relevant provisions[278] in violation of article 7(1)(d).[279]

Another Nigerian case that dealt with the impartiality of a tribunal concerned the creation of a new controlling body for the Nigerian Bar Association, called the "Body of Benchers". Of the 128 members of this body, 97 are government nominees. The Commission found a violation of article 7(1)(d).[280]

Article 7(1)(d) also stipulates the right to "be tried within a reasonable time". The complainant in *Mekongo v Cameroon*[281] instituted an appeal in 1982. After twelve years the appeal had not been heard. Finding a violation of article 7(1)(d), the Commission commented: "A judicial proceeding cannot be considered complete until all appeals have been heard. The twelve years that the complainant's appeals have been pending without result thus constitutes a violation of his right of appeal and his right to be tried within a reasonable time". In another case against Cameroon the Commission found that two years without any hearing or projected trial date constituted a violation

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278 Part II, s 2(2) of the Act.

279 See Communication 87/93 (*Constitutional Rights Project (in respect of Lekwot and six others) v Nigeria*)

280 Communication 101/93 (*Civil Liberties Organisation (in respect of the Nigerian Bar Association) v Nigeria*).

281 Communication 59/91.

of article 7(1)(d).[282] Indefinite detention without trial simultaneously breaches the right to appeal to a competent court,[283] and the right to be tried by a competent court within a reasonable time.[284]

The principle of legality (*nullum crimen sine lege*) is introduced in article 7(2). Noting the retroactive operation of the Nigerian Legal Practitioners' Decree (issued on 18 February 1993, but deemed to come into force on 31 July 1992), the Commission found a violation of article 7(2).[285] It added the following comment about article 7(2): "This statement should be read as a general prohibition on retroactivity. All other international human rights instruments contain a prohibition on the retroactive application of laws, for the reason that citizens must at all times be fully aware of the state of the law under which they are living. To impose laws retroactively seriously endangers the rights of citizens and makes a mockery of the principle of the rule of law."

vii Article 8

Article 8 guarantees "freedom of conscience" and "the profession and free practice of religion". This right contains a claw-back clause: The exercise of the right is made subject to restrictions serving the ends of "law and order". The harassment of Jehova's Witnesses was found in violation of this freedom.[286] The claw-back clause did not play a role, "since the government has presented no evidence that the practice of their religion in any way threatens law and order".

viii Article 10

Every individual, article 10 asserts, has the right to freely associate with others, "provided that he abides by the law". The inclusion of claw-back clauses in the Charter, such as the last phrase, has been criticised.

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282 Communication 39/90 (*Pagnoulle v Cameroon*).

283 Art 7(1)(a) of the Charter.

284 Art 7(1)(d) of the Charter, see Communications 64/92, 68/92, 78/92 against Malawi above.

285 Communication 101/93 (*Civil Liberties Organisation (in respect of the Nigerian Bar Association) v Nigeria*).

286 See Communications 25/89, 47/90, 56/91, 100/93 (joined) above.

The fear has been expressed that the term "law" would be interpreted widely to justify and excuse any action whatsoever taken by governments, as long as such action is couched in legislation or otherwise conforms with "law". Fortunately, the Commission has avoided a strictly and rigid positivistic approach in the interpretation of article 10. First, it adopted a resolution which provided that states must refrain from negating its obligations under the Charter (when adopting "laws" restricting freedom of association). Then, in Communication 101/93, it recalled its resolution in finding the Nigerian Legal Practitioners' Decree in violation of article 10.[287] In terms of the decree a new, government-controlled ruling body was created. The Commission observed that "interference with the self-governance of the Bar Association may limit or negate the reasons for which the lawyers desire in the first place to form an association".

ix Article 12

Article 12(1) provides as follows: "Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law". Actions by the security forces that caused individuals to flee the state of which they are nationals violate their freedom of residence.[288]

The expulsion of non-nationals may only take place "by virtue of a decision taken in accordance with the law".[289] The expulsion of Burundi refugees from Rwanda was found to violate this provision.[290] The Commission interpreted "in accordance with law" as including international law on this subject, which prohibits the expulsion of refugees who would be subjected to persecution in their country of nationality.[291]

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287 *Civil Liberties Organisation (in respect of the Nigerian Bar Association) v Nigeria.*

288 See Communication 83/92, 88/93, 91/93 against Togo.

289 Art 12(4) of the Charter.

290 See Communication 27/89, 46/90, 49/90, 99/93 (joined).

291 The Commission observed as follows: "This provision should be read as including a general protection of all those who are subject to persecution, that they may seek refuge in another state. Article 12(4) prohibits the arbitrary expulsion of such persons from the country of asylum."

The expulsion of Burundi nationals from Rwanda and West Africans from Zambia was also found to be in violation of the prohibition against mass expulsions aimed at national or ethnic groups.[292]

x *Article 15*

This article, which provides for the right to work under "equitable and satisfactory conditions", has socio-economic implications. An individual was denied reinstatement in his professional capacity as magistrate. He approached the Commission, arguing that the fact that he did not benefit from amnesty provisions violated his rights under the Charter. The Commission found that the government had violated article 15 "because it had prevented [the applicant] to work in his capacity of a magistrate even though others who have been condemned under similar conditions have been reinstated".[293]

xi *Article 16*

Article 16 contains an important socio-economic right, the right to health. In terms of the article every individual must be ensured the "best attainable state of physical and mental health". State parties must take the "necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick". The Commission gave a generous interpretation to this right, holding that it places the duty on governments "to provide basic services such as safe drinking water and electricity", besides the more obvious requirement to supply adequate medicine.[294]

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292 See art 12(5) of the Charter, and Communication 27/90, 44/90, 46/90, 39/99 (joined) (in respect of Rwanda), as well as Communication 71/92 *(Rencontre Africaine pour la Defense des Droits de l'Homme v Zambia*).

293 One may argue that the finding is actually based on the applicant's right to be treated equally to those similarly situated as himself.

294 Communication 25/89, 47/90, 56/91, 100/93 see above.

xii Article 17

The right to education is unequivocally guaranteed to every individual in article 17 of the Charter. This right is violated by the closure of universities and secondary schools.[295]

xiii Article 26

Article 26 places a duty on states parties "to guarantee the independence of the Courts" and to allow national institutions entrusted with the protection of human rights to be and to remain established. The Nigerian government enacted a clause ousting the jurisdiction of courts to entertain any question about the validity of decrees and edicts.[296] While the ouster clause was found in violation of article 7(1)(a), which guarantees an individual's right to be heard, the Commission also found a violation of article 26, which "speaks of the institutions which are essential to give meaning and content" to the right in article 7(1)(a).[297] Article 26 "clearly envisions the protection of the courts which have traditionally been the bastion of protection of the individual's rights against the abuses of State power".

3.3.4 State reporting

One of the obligations that states parties accept at ratification is to submit a two-yearly report on the legislative or other measures that they have taken with a view to giving effect to the provisions of the Charter.[298] The purpose of reporting to a treaty monitoring body is generally regarded as being twofold, here termed "introspection" and "inspection".

Reporting presents an opportunity for the state to undertake **introspection**. The African Charter, with its inclusion of socio-economic rights, the right to development and its emphasis of African culture, covers a broad range of human endeavour. Compiling information and drafting a report

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295 See Communication 25/89, 47/90, 56/91, 100/93 (joined) above.

296 See the Constitution (Suspension and Modification) Decree 1993, s 5.

297 Communication 129/94 (*Civil Liberties Organisation v Nigeria*).

298 Art 62 of the Charter.

would necessarily require a multi-disciplinary approach and the involvement of different government departments. The involvement of high-level officials will mean that reporting coincides with a process of thoughtful inter-departmental stock-taking and soul-searching. The presumption is further that departments will keep statistical records and provide comprehensive information. A good quality report will be evidence of serious introspection.

The presentation and consideration of the report by the monitoring body presents the international community with an opportunity for **inspection** of the state's compliance with its obligations under the treaty. If careful scrutiny of the report reveals non-compliance, it will expose the state party to international shame and embarrassment. But, ideally, it is more than that: It should also be seen as an opportunity presented to a government to "learn" from independent experts about ways of improving the human rights situation in its country. Seen from this angle, inspection need not only shame, but may also lead to legal reform in prompting for necessary legal change. On the whole, the reporting process should be treated as "an opportunity rather than a chore or formality".[299]

An analysis of reporting to the African Commission indicates that these purposes are not properly served in the African context.[300]

3.3.4.1 Introspection

i Infrequent reporting

The reporting obligation has led to little introspection. The first, obvious requirement is that the process of drafting a report has to be initiated. In the case of most states that had ratified the

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299 Alston (1991) at 14.

300 The analysis is based on the *Examination of State Reports* vols 1 - 5 (published by the Danish Centre for Human Rights), covering reports examined up to the 14th session. See also Danielsen (1994) and Gear (1992) 10 *NQHR* 29. Analysis of subsequent reports has been inhibited by the lack of published information. The only data generally accessible is the meagre particulars contained in annual activity reports and final communiqués. For further details, one has to rely on word of mouth or unofficial records. These factors explain why the analysis is tilted towards the first few years of the Commission's activities in this field.

Charter, no effort to report has been made whatsoever. By the 21st session of the Commission (more than ten years after the Charter took effect), the reports of only seventeen of the 51 states parties have been examined.[301] Four states had submitted a second report.[302] This means that 45 second reports were outstanding when the 20th session was completed.[303] No state had at that stage submitted a third, fourth or fifth report.[304]

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301 See Table I. Note that three submitted reports (those of Burkina Faso, Chad and the Seychelles) had at that stage not yet been considered by the Commission. The reports of two of the 51 states parties (South Africa and Swaziland) were not yet due at that stage, as these states had ratified the Charter less that two years previously.

302 Of these, the reports of Burkina Faso, Seychelles and Senegal have not been considered.

303 See Table I.

304 See, however, the second report of Zimbabwe, which was treated as a combination of a second and third report.

TABLE I: REPORTING UNDER ARTICLE 62 OF THE AFRICAN CHARTER AS AT 31 MARCH 1997

Country (date of ratification)	Reports as at 31 March 1997				
	1st	2nd	3rd	4th	5th
Algeria (ratified on 1 March 1987)	submitted ("sub") and considered ("cons") (19th Session) ("19th S")	due	due	due	-
Angola (2 March 1990)	due	due	due	-	-
Benin (20 January 1986)	sub and cons (16th S)	due	due	due	due
Botswana (17 July 1986)	due	due	due	due	due
Burkina Faso (6 July 1984)	sub (not yet cons)	due	due	due	due
Burundi (28 July 1989)	due	due	due	-	-
Cameroon (20 June 1989)	due	due	due	-	-
Cape Verde (2 June 1987)	sub and cons (16th S)	due	due	due	-
Central African Republic (26 April 1986)	due	due	due	due	due
Chad (9 October 1986)	sub (to be cons: 22nd S)	due	due	due	due
Comoros (1 June 1986)	due	due	due	due	due
Congo (9 December 1982)	due	due	due	due	due
Côte d'Ivoire (6 January 1992	due	due	-	-	-
Djibouti (11 November 1991)	due	due	-	-	-

Country (date of ratification)	Reports as at 31 March 1997				
	1st	2nd	3rd	4th	5th
Egypt (20 March 1984)	sub and cons (11th S)	due	due	due	due
Equatorial Guinea (7 April 1986)	due	due	due	due	due
Eritrea (not yet ratified)					
Ethiopia (not yet ratified)					
Gabon (20 February 1986)	due	due	due	due	due
Gambia (8 June 1983)	sub and cons (12th S)	sub and cons (16th S)	due	due	due
Ghana (24 January 1989)	sub and cons (14th S)	due	due	-	-
Guinea (16 February 1982)	due	due	due	due	due
Guinea-Bissau (4 December 1985)	due	due	due	due	due
Kenya (23 January 1992)	due	due	-	-	-
Lesotho (10 February 1992)	due	due	-	-	-
Liberia (4 August 1982)	due	due	-	-	-
Libya (19 July 1986)	sub and cons (9th S)	due	due	due	due
Madagascar (9 March 1992)	due	due	-	-	-
Malawi (17 November 1989)	due	due	due	-	-
Mali (21 December 1981)	due	due	due	due	due

Country (date of ratification)	Reports as at 31 March 1997				
	1st	2nd	3rd	4th	5th
Mauritania (14 June 1986)	due	due	due	due	due
Mauritius (19 June 1992)	sub and cons (20th S)	due	-	-	-
Mozambique (22 February 1989)	sub and cons (19th S)	due	due	-	-
Namibia (30 July 1992)	due	due	-	-	-
Niger (15 July 1986)	due	due	due	due	due
Nigeria (22 June 1983)	sub and cons (13th S)	due	due	due	due
Rwanda (15 July 1983)	sub and cons (9th S)	due	due	due	due
Sahrawi Arab Democratic Republic (2 May 1986)	due	due	due	due	due
São Tomé e Príncipe (23 May 1986)	due	due	due	due	due
Senegal (13 August 1982)	sub and cons (12th S)	sub (not yet cons)	due	due	due
Seychelles (13 April 1992)	sub (not yet cons)	due	-	-	-
Sierra Leone (21 September 1983)	due	due	due	due	due
Somalia (31 July 1985)	due	due	due	due	due
South Africa (9 July 1996)	-	-	-	-	-
Sudan (18 February 1986)	sub and cons (21st S)	due	due	due	due
Swaziland (15 September 1995)	-	-	-	-	-
Tanzania (18 February 1984)	sub and cons (11th S)	due	due	due	due

Country (date of ratification)	Reports as at 31 March 1997				
	1st	2nd	3rd	4th	5th
Togo (5 November 1982)	sub and cons (13th S)	due	due	due	due
Tunisia (16 March 1983)	sub and cons (9th S)	sub and cons (18th S)	due	due	due
Uganda (10 May 1986)	due	due	due	due	due
Zaïre (20 July 1987)	due	due	due	due	-
Zambia (19 January 1984)	due	due	due	due	due
Zimbabwe (30 May 1986)	sub and cons (12th S)	sub and cons (21st S))		due	due

The list of state reports considered by the Commission up to its 21st session is as follows:

9th session	Libya, Rwanda, Tunisia
10th session	none
11th session	Egypt, Tanzania
12th session	The Gambia, Senegal, Zimbabwe
13th session	Nigeria, Togo
14th session	Ghana
15th session	none
16th session	Benin, Cape Verde, Gambia II
17th session	none
18th session	Tunisia II
19th session	Algeria, Mozambique
20th session	Mauritius
21st session	Sudan, Zimbabwe (II and III combined)

Table I shows that the Commission has, since the first reports became due in October 1988, examined only 20 reports from 17 states.

An analysis of this data[305] reveals the role that commissioners can play to raise awareness and to coax inactive governments into compliance. Eleven of the twenty state reports were considered while a commissioner from that particular state was serving on the Commission.[306]

Reasons for this lack of compliance are a general need for political will on the part of states to co-operate with the Commission or to take their obligations seriously; the burden on states who ratified various international conventions in addition to the Charter;[307] and lack of co-ordinating efforts between state departments, such as the departments of foreign affairs and of justice.[308]

ii *Contents of reports insufficient*

When reports were in fact prepared, indications are that they were not the product of serious introspection, but rather the formalistic fulfilment of what was regarded as a bureaucratic obligation. This lack of self-criticism and evaluation is exemplified in the first "report" of Nigeria, that only consisted of a few brief remarks and a photo copy of table of contents of the partially suspended Constitution.[309] The reports of Senegal and Mauritius are exceptions, in that several ministries contributed to the report, and NGOs also made an input.[310] One of the main reasons for the bad quality of reports generally is the lack of timely planning and co-ordination at the level of government departments.

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305 See also Annexure D, reflecting terms of different commissioners.

306 They are Libya (Buhedma), Egypt (El Shiekh), Tanzania (Kisanga), Gambia (Janneh), Senegal (Ndiaye), Nigeria (Umozurike), Ghana (Dankwa), Cape Verde (Duarte), Gambia II (Janneh), Tunisia II (Ben Salem) and Algeria (Rezzag-Bara). See also the comments by Commissioner Rezzag-Bara, during an interview, about his personal role in ensuring that Algeria submitted its report, shortly after he became a commissioner ((1996) (Oct - Dec) *AFLAQ* at 45).

307 See interview with Chairman Nguema in (1996) (Oct - Dec) *AFLAQ* at 9.

308 Interview with Commissioner Kisanga ((1996) (Oct - Dec) *AFLAQ* at 29).

309 See Welch (1995) at 155. In fact, the whole "report" consists of six pages. The first three pages contains a "short brief of the Nigerian Judicial system as required" (in the words of the report). The next three pages is a photocopy of the index of the Constitution, ss 1 – 144.

310 *Examination of State Reports* vol 3 (1995) at 49.

Recently, the Commission has expressed its satisfaction with a number of reports.[311] The danger is, though, that the Commission may react positively to a rather imperfect report, just because it shines in comparison with totally inadequate precedents. It may also be blinded by the comparatively good quality of the report and lose sight of the inherently poor human rights record.[312]

3.3.4.2 Inspection

The procedure adopted by the Commission in considering those reports which are submitted, is as follows:[313]

- A member of the Commission is assigned beforehand as "Special Rapporteur".
- Questions are usually drafted by the Special Rapporteur and sent to the state some time before consideration of the report is due to take place.
- Proceedings at the examination start with the Chairman (or Special Rapporteur) explaining the purpose of the examination of state reports.
- Thereafter the state's representative introduces the report.
- This is followed by the observations and questions of the Special Rapporteur.
- Other members of the Commission then join in addressing more questions to the representative.

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311 See eg the "appreciation" for the Gambia's second report (Eighth Annual Activity Report at par 10), the "high quality" of the reports from Algeria and Mozambique presented at the 19th session (Ninth Annual Activity Report at par 12) and the "second and third" report of Zimbabwe examined at the 21st session (see the Final Communiqué of the 21st session).

312 See eg the reference to the fact that the Commission has commended Zimbabwe on "the good quality of the report" presented to the Commission's 21st session ((1997) (June - July) *African Topics* 12). By contrast, observers described the report presented by Sudan as a dismal failure.

313 This exposition is based on a perusal of the state reporting proceedings transcribed and contained in *Examination of State reports* vols 1 to 5.

- The representative is then granted an opportunity to prepare responses.
- After the representative has answered, the commission summarises the proceedings.

A number of factors which have seriously undermined the effectiveness of the system of inspection by the Commission, often reducing it to a meaningless exercise, are now discussed:

i *Guidelines for reporting*

In October 1988, at its 4th session, the Commission adopted guidelines for state reporting.[314] Rather than propelling the reporting system into motion, these guidelines became obstacles that retarded development. Some of these deficiencies are highlighted:

- An impressionistic view immediately reveals one of the core problems: The guidelines are **excessively detailed** and **unnecessarily complex**. The guidelines run for no less than 24 pages in the Commission publication in which they first appeared.[315] Consider that the substantive provisions of the Charter, reprinted in the same publication, take up only three and a half pages! For shear length, these guidelines surpass similar prescriptions issued by international human rights treaty bodies. This creates a perception that reporting is burdensome, and it has certainly been a factor inhibiting swift compliance. This must stand as a sorry example of unrealistic optimism, so easily deflated by harsh realities. Unnecessary complexity is also introduced by distinguishing between information required for "initial" and "periodic" reports.[316] Clarity was further confounded by a letter written by the then Chairman Nguema, which set the due date of the first reports at 21 October 1989, instead of 21 October 1988.[317]
- Secondly, various features of the reporting guidelines are **confusing**. The distinction between initial and periodic reports is not followed consistently.[318] The rights in the Charter are not

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314 The full text was attached to the Second Annual Activity Report, from 45.

315 Titled *African Commission on Human and Peoples' Rights DOCUMENTATION*. It also contains the first three activity reports, and was replaced by the *Review of the African Commission*.

316 See eg guideline IV par 6, on art 29 of the Charter.

317 See two letters attached as annexes to the Second Activity Report.

318 In some respect a distinction is drawn between information required in initial and periodic reports, in other instances not.

treated in any logical or coherent order. The Charter provisions are grouped together in subject fields, without any correlation to the structure of the Charter.

- Paradoxically, the guidelines are **too sparse in other respects**. When dealing with socio-economic rights, few details are given as to levels of realisation. The strictures created by claw-back clauses in respect of civil and political rights could have been mitigated by the guidelines.

- Another sign of **over-enthusiasm is the requirements for socio-economic reporting**, which requires elaborate statistical data.[319]

- The **guidance** sought in the guidelines used by treaty bodies established under international human rights instruments is **misguided**. On the subject of racial relations and women, guidelines adopted for the two applicable international instruments (CERD and CEDAW) are largely taken over uncritically. This has the effect of expecting reporting on issues not included in the Charter at all, and of neglecting issues of particular relevance in Africa. Elaborate as they are, the guidelines do not make mention of the practice of female circumcision, or of ethnic cleansing. This copying of existing guidelines has contributed to the fragmentary nature of the guidelines. It starts with "civil and political rights" (in I), then deals with racial discrimination (in V), the crime of apartheid (in VI) and lastly with discrimination against women (in VII).

States are, in any event, not complying with the guidelines. Even the recent Zimbabwean report, the subject of so much praise by the Commission, completely ignored these prescriptions. Instead, the report does the logical thing of following the sequence of the rights as they are set out in the Charter. One of the reasons for the negation of the guidelines may certainly be that they are not readily accessible to the drafters of state reports.

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319 See eg guideline II A par 32(j), for vagueness: "Statistical and other available data on the realization of the right to adequate food", and for difficulties to comply, II A par 37: "Statistical and other available data are requested on the realization of the right to health, in particular, statistics on infant mortality, number of doctors per inhabitant, number of hospitals and hospital beds, etc".

ii *Confusion about initial and periodic reports*

A comparison is drawn between the first session at which the Commission considered state report (the 9th session, March 1991) and the 14th session (December 1993).[320] At the **9th session**, there was a significant amount of confusion about the distinction between **initial and periodic reports**. Although general guidelines for reporting were issued, a letter was sent to the states which apparently requested states to "establish a general framework of legal life in their own countries".[321] In subsequent reports, a detailed analysis of compliance with the Charter would be presented.

Commissioner Mubanga-Chipoya echoed a previous decision that the Commission would only go into detailed periodic reports once the Commission is assured that the country satisfies "the groundwork".[322] In this approach a certain minimum requirement ("a system that would satisfy human rights")[323] had to be established before the Commission would consider whether the provisions of the Charter were in fact implemented in a specific country. Such a prerequisite would make sense as a precondition for ratification, but not in a system where ratification is unconditional. When a state ratifies the Charter, it becomes bound by its provisions. Every state should have to account publicly for any non-compliance, especially states performing poorly.

Commissioner Badawi, emphasising that the first examination of a state report is part of a process, disagreed with commissioner the late Mubanga-Chipoya following his decease, as well as the previous decision: "We cannot say - even if we have recommended that before - we cannot say that to Egypt, for example, ... do not go into the other Articles, or do not give us extras until you fulfil certain information in your first report and we are satisfied that these points are taken care of".[324]

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320 This choice is dictated by the availability of the transcript of proceedings by the Danish Centre for Human Rights (1995), which cover the 9th to the 14th sessions.

321 Commissioner Nguema, quoted in *Examination of State Reports* vol 1 (1995) 21.

322 Examination of state reports vol 1 (1995) 16.

323 Commissioner Mubanga-Chipoya, quoted in *Examination of State Reports* vol 1 (1995) 16.

324 *Examination of State Reports* vol 1 (1995) 17.

From the further deliberations no definite position appears to have been taken by the Commission. But it is quite clear from the content of all three the reports presented and the way in which commissioners addressed questions, that these reports were neither presented nor treated as "initial reports" in the sense suggested by commissioners Mubanga-Chipoya and Nguema. The inevitable conflation of the two types of reports is perhaps best illustrated by commissioner Nguema's reference later to the "initial periodic reports".[325]

It is suggested that the distinction sought to be drawn was not necessary, gave rise to confusion among states and commissioners, and caused considerable delay during the 9th session. At the consideration of Ghana's first report at the 14th session, these issues did not recur. Commissioner Nguema, then Chairman, called on Ghana to present their "periodic report".[326] Commissioners directed questions at various aspects of the Charter and their implementation in Ghana. However, this session illustrated the necessity of the information that the idea of an "initial" report was aiming to secure - a basic framework in which human rights protection should function. The report by Ghana was only six pages long. The Commission required a full text of the Constitution to engage in meaningful dialogue. It may be added that the Constitution had changed subsequent to the sending of the report. The fact that the report was considered without the Constitution may be attributed in part to the state party, to unclear guidelines by the Commission, and to inefficiency of the Secretariat.

iii *Waste of time on technical needle-picking and lack of decisive action*

Another issue raised but not conclusively decided during the 9th session was whether it is **obligatory that a state representative should be present** when the Commission considers a state's report. Commissioner Umozurike (at that time also Chairman) rightly pointed out that the Charter does not require the presence of a state's representative, but rather invites states to send a representative. Commissioner Badawi, referring to the "compelling logic" dictated by the "spirit and the sense of the exercise of discussing the report", expressed his opinion that the consideration of state reports "is a process which involves the presence of the state, establishing a dialogue with

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325 *Examination of State Reports* vol 1 (1995) 35.

326 *Examination of State Reports* vol 1 (1995) 15.

the state".[327] The latter practice was followed, as the Nigerian report was not considered in the absence of a representative at that session. This debate extended itself to later sessions. At the 13th session, for example, the report of Benin was on the agenda. For the fourth time, no government representative attended, despite being "called" by the Commission. This led to a continuation of the debate whether examination may continue in the absence of a state representative.[328]

A related issue is the Commission's **decision on the suitability of the representative**(s) to be sent by states parties. The consideration of the Zimbabwean report (at the 12th session) show how a lack of any guiding decision on this question has wasted time and led to confusion. Dissatisfied with the answers by the delegation, commissioner Nguema expressed the opinion that states should be represented by someone with technical legal expertise. Commissioner Beye differed, insisting that the Commission should not prescribe to states whom they should send as representatives. If the representative is unable to answer all the questions, the government could respond at a later occasion, he argued.[329] "Let us arm ourselves with some patience in awaiting that", he concluded.[330] Commissioner Umozurike underlined the fact that no decision on the issue had ever been taken.[331] The session was closed without the Commission further considering the question.

iv *Insufficient role for NGOs*

Governments do not readily provide a critical analysis of negative aspects pertaining to human rights protection in their countries. This fact necessitates that commissioners should have access to alternative sources of information. Non-governmental organisations are the most obvious potential

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327 *Examination of State Reports* vol 1 (1995) 31.

328 *Examination of State Reports* vol 4 (1995) at 10-19.

329 *Examination of State Reports* vol 3 (1995) at 112. He used the very vague term "la prochaine fois" ("the next time"), implying that the questions need to be answered only during the examination of the next country report.

330 *Examination of State Reports* vol 33 (1995) at 111-112. The motivation for his view is the fear that states may be persuaded not to comply with their obligations to report and to send representatives if the Commission becomes too prescriptive. Considering how little attention states had given to the reporting guidelines and their reporting obligations as such, this seems a bit like a storm in a teacup.

331 *Examination of State Reports* vol 3 (1995) at 112.

source of information against which the state report can be evaluated. Some information was provided about Tunisia, but apparently not when the reports of Rwanda and Libya were considered. From the 11th session the Commission started to refer publicly to documentation and other information presented to them by NGOs.[332] This is an area in which the Commission should have allowed for an explicit role for NGOs, not only in submitting "alternative" reports, but also in supplying information to the Commission, even during the process of examination.

v *Inadequacy and non-attendance of government representatives*[333]

Government representation has been problematic in two respects: The specific representatives were **sometimes not equipped** to deal with the relevant issues, and were **often absent** from the meeting scheduled to consider their country's report.

In its resolution authorising the publication of the Commission's Sixth Annual Report, the OAU Assembly recommended to states parties to **designate high ranking officials** "to act as focal points in the relation between the Commission and the States as such focal points would facilitate the follow-up on the Commission's recommendations and contact between states and the Commission".[334] Apart from the importance of an influential figure for effective follow-up, the ideal process of consideration itself consists of what is referred to by the Commission as "constructive dialogue". It is therefore dependent on two communicating partners who are able to enter into discussion about issues both of them are familiar with, and able to express opinions about. Clearly a synthesis of "influence" and "legal expertise" has to be sought.

Unfortunately, most frequently states designate either a high ranking (political) figure not sufficiently conversant with the legal issues, or a legal expert devoid of any potential impact in the higher echelons of government. An example of the first failing occurred when Libya sent its Ambassador to Addis Ababa to present Libya's report. Sometimes a happy medium is struck. As an example, it should be mentioned that the report of Mauritius was presented by their Minister of

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332 Welch (1995) at 156.

333 See par (iii) above.

334 Sixth Annual Activity Report at 8.

Justice.[335] Some progress may be noted between the presentation of the first report by Zimbabwe and its subsequent report. On the first occasion, the Commission expressed its dissatisfaction with the quality of responses. At the subsequent examination, more than four years later, the government representative impressed with her ability to answer directly, and her honesty in concessions made about blemishes on the Zimbabwean human rights record.

In many other instances **no representatives attended**, further delaying consideration of the reports. Three state reports (of Cape Verde, Nigeria and Togo)[336] were not examined at the 12th session, because no representatives attended. As a consequence of this, and further delay, the report of Cape Verde was considered only at the 16th session. Similarly, the representatives of Mauritius, Mozambique and the Seychelles were absent from the 17th session, where these country reports were to be considered.[337] The report from Mozambique was considered only at the 19th session, and that on Mauritius at the 20th session.

vi *Nature of dialogue, questions and responses*

The dialogue between the commissioners and state representatives has so far tended to be **subdued and correct**. The first two representatives to appear before the Commission at its 9th session were both ambassadors. They were handled with too much deference and respect, commissioner Nguema felt. He added: "I have the feeling that the sitting was rather too diplomatic - we hear the one party and then the other and then we rise. ... I thought we should engage in a dialogue, in other words we should not treat them as diplomats but rather as technicians of law that should be able on technical issues to elicit the responses".[338] This point is obviously interrelated with the former, as such dialogue depends on a high level of legal expertise as well as information about recent developments in the domestic legal system. An example of pertinent issues raised by a commissioner which were deflected by the government delegate is the following: In examining the Zimbabwean report, commissioner Buhedma raised concern about a constitutional amendment to

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335 At the 20th session.

336 *Examination of State Reports* vol 3 (1995) at 42.

337 Eight Annual Activity report at par 10.

338 *Examination of State Reports* vol 1 (1995) at 23.

nullify the effect of a Supreme Court judgment on the cruel treatment of convicts on death row.[339] In general terms, the representative contended that the government cannot be blamed, because "it is the issue of the legislature and it is a compromise sort of legislation".[340] The examination has gradually become more vigorous since the 11th session, but no level of consistency has been reached.[341]

The procedure which the Commission has adopted is also hardly conducive to true dialogue. A series of questions posed in quick succession by almost each of the eleven commissioners, followed by responses to some of these questions by an often bewildered representative hardly qualifies as a "dialogue". The process is more akin to a series of critical statements, followed by a statement in defence of the report. Better results would be attained if definite replies to specific questions are required. A question-answer format would probably be more time-consuming, but would leave little room for ignoring pertinent issues. In response to criticism that such a procedure would be judicial and confrontational in nature, one may reply that a frustrated dialogue is likely to end in cross-examination.

vii *Non-attendance of appointed rapporteurs*

At the 9th session two commissioners, who had to act as Special Rapporteurs, did not attend the sitting.[342] This gave rise to difficulties, because no substitute had been appointed, the state report had not been made available to all the commissioners before the session, and the state reports had not been translated into the working languages of the Commission. The task fell to commissioner Nguema, as a French speaker, to prepare two reports overnight. He raised an objection, stating that the reports would not be examined properly. He proposed that the reports be examined at the following session. The view of other commissioners, that the process could not be delayed any further, prevailed.

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339 *Examination of State Reports* vol 3 (1995) at 97.

340 *Examination of State Reports* vol 3 (1995) at 109.

341 Welch (1995) at 156.

342 Commissioner Ndiaye (the report of Tunisia) and commissioner Beye (Rwanda's report).

The Special Rapporteur appointed to introduce questions on Zimbabwe's first report was commissioner Mokama. He could not attend the 12th session, where the report was tabled. On very short notice, commissioner Kisanga had to take over.[343]

viii Secretarial problems

One of the most nagging problems at the level of the secretariat had been the **lack of translation** of state reports. Although states also bear responsibility, the problem had been exacerbated by the secretariat. The frustration of the commissioners was articulated by commissioner Beye, when he criticised the secretary for the failure to have the report of Zimbabwe translated into French. In response, the then secretary, Mutsinzi, explained that due to financial constraints no translator had been appointed at the secretariat. Commissioner Beye retorted that the report had been at the secretariat for more than six months and that a plan could have been made.[344] Small wonder, the amended Rules of procedure of the Commission require the secretary to "endeavor to translate all reports and other documents of the Commission into the working languages".[345] The inclusion of the phrase "endeavor" suggests cognisance of the seemingly insurmountable difficulties presented by reality. No French (or Arabic) translation of the Gambian and Zimbabwean reports were available at the 12th session.[346] No English translation of reports were available in the case of Togo.[347] The distribution of reports were insufficient at the 9th session.

An unhappy example of **secretarial inefficiency** is the handling of an "updated" report presented by Zimbabwe shortly before the commission's 12th session. As its report had been received six months previously, the delegation wanted, laudably, to present an updated version. The lack of co-operation to have this report copied and distributed to the commissioners and NGOs led the Zimbabwean ambassador to conclude that it was "most unfortunate that there seems to be a total lack of communication and management skills. We do hope something can be done pretty quickly,

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343 *Examination of State Reports* vol 3 (1995) at 112.

344 *Examination of State Reports* vol 3 (1995) at 112-114.

345 Rule 80 (amended).

346 *Examination of State Reports* vol 3 (1995) at eg 18, 29, 30, 34 and 87. Commissioner Beye apologised in advance for his inability to participate in the examination of the report presented by Zimbabwe.

347 At the 13th session, see *Examination of State Reports* vol 4 (1995) at 71.

because this is a shame on Africa and on the African race".[348] Information is often not provided in advance, or at all.

The uncertainty about the date of the Commission's sitting caused the representative of Nigeria to arrive without sufficient information at the 13th session. It is not entirely clear who or what caused the misunderstanding, but vice-chairman Janneh apologised on behalf of the Commission.[349]

ix Lack of follow-up

Follow-up is necessitated by the inability of delegates to answer some of the commissioners' questions. However, the Commission has devised no structured way of dealing with queries raised that were left unanswered or were unsatisfactorily answered. The Commission has to wait another two years (if reports are presented timely) or more before progress on certain issues may be gauged. Often government representatives make general and vague promises of answering questions in soon-to-be-presented further reports. The Gambian representative, at the 12th session, expressed the hope of answering the questions fully in the second report that would be submitted at the next session.[350]

Reporting by Zimbabwe provides more cause for optimism. At the 12th session the head of the Zimbabwean delegation remarked: "We would like to take these observations and questions with us, and hope to come back in the next session, ... and answer those observations in a proper manner in the right place".[351] When Zimbabwe's second and third reports were examined together at the 21st session, the Commission commended the government's efforts and described the report as a model.[352] The report in fact addressed many of the concerns raised at the previous occasion and thus provides an example of meaningful progress from one report to another.

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348 *Examination of State Reports* vol 3 (1995) at 88.

349 *Examination of State Reports* vol 4 (1995) at 29

350 *Examination of State Reports* vol 3 (1995) at 41.

351 *Examination of State Reports* vol 3 (1995) at 107.

352 See the report entitled "Zimbabwe's Second and Third Report in terms of Article 62 of the African Charter on Human and Peoples' Rights".

x *Time allocated insufficient*

Compared to other international monitoring bodies, the African Commission dispenses quite briskly with reports. Initially, reports were disposed of in approximately 45 minutes.[353] One of the important ways of establishing a meaningful dialogue between the UN Human Rights Committee and state representatives is the suspension of consideration of the report after questions were raised.[354] The government representative is usually afforded a day to prepare replies.

xi *Handling of due reports submitted*

It is rather obvious that the Commission will not be able to undo the backlog if all states were to present their overdue reports simultaneously. The practice has now already developed of treating a report as covering a four year period, rather than a two year period as required by the Charter.[355]

xii *Inadequate publicity*

The consideration by the UN Human Rights Committee of the Irish report in terms of the CCPR indicates under which circumstances publicity may become a powerful factor.[356] Merely requiring the state to disseminate the report in their countries will not have much effect. The national media has to be alerted to the fact that the state report will be considered. In the Irish case, the examination was extensively reported in the national press. One newspaper sent a correspondent, and other newspapers relied on NGOs for information. At least five different prime time radio interviews dealt with the report. National television did not, however, cover the proceedings.[357]

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353 Gaer (1992) 14 *NQHR* 29.

354 See O'Flaherty (1994) 16 *HRQ* 515 at 517.

355 See the Zimbabwean report, presented at the 21st session. Zimbabwe's second report was due on 21 October 1990, its third in 1992, its fourth in 1994, and its sixth in 1996. The report examined in Nouakchott (April 1997) was regarded as the "second and third periodic reports".

356 The information here is based on O'Flaherty (1994) 16 *HRQ* 515 at 537.

357 A broader issue may come into play here: the pre-existence of a relatively free press, which is lacking in many African states that are still not pluralist and open democracies.

xiii *Lack of general comments by Commission*

Initially the Human Rights Committee, considering reports under article 40 of the CCPR, did not adopt concluding views or general comments about state reports. In March 1992 the Human Rights Committee started to issue Agreed Final Comments at the conclusion of the consideration of every report. This comprises a "critique of the State Report and the responses of the state delegates to the scrutiny of the Committee".[358] It also contains recommendations for action by the state. The purpose of "General Comments" is "to make this experience available for the benefit of all State Parties in order to promote their further implementation of the Covenant; to draw their attention to insufficiencies disclosed by a large number of reports; to suggest improvements in the reporting procedure and to stimulate the activities of these States and international organisations in the promotion and protection of human rights".[359]

Apart from comments of a very general nature, usually in thanks and encouragement, the African Commission does not issue any comprehensive evaluation of the state reports. Comprehensive final comments could provide a basis around which publicity may be generated, and could serve as reference point in a process of follow-up.

xiv *Delay in examining reports*

At the 20th session, a number of reports had been received but had not yet been examined. One of the main reasons for delays in considering submitted reports is the non-attendance of government representatives.

3.3.4.3 Conclusion - an alternative

If the trends as identified continue, state reporting will be a waste of precious time and resources. Some possibilities for improvement of the process have explicitly, or by implication, been suggested in the critical comments above. Taking an optimistic outlook on the obligation of states

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358 O'Flaherty (1994) 16 *HRQ* 515 at 518.

359 Report of the HRC A/36/40 at 107.

to report: If all the reports that were due at the 21st session are submitted overnight, the Commission would have around 180 reports to examine.[360] Given the limited time available and the numerous problems experienced in examining an average of less than two reports per session, this represents an impossible backlog.

A concerted effort should be made to devise a method of securing the ideals of introspection and inspection. In this regard, the comparative experience of other regional systems may be informative. Neither of the two major regional human rights systems included examination of state reports in their founding instruments.

The **European Convention** provides for "petitions" (complaints) brought by individuals and states as the means of securing compliance. With the adoption of the European Social Charter in 1961, state reporting was introduced into the European system. These reports must be presented at two-yearly intervals and are examined by a committee of independent experts. A political body, the Committee of Ministers, may make recommendations to the state party.[361] The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, adopted in 1987, does not provide for either individual/state complaints or state reporting. A European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment is established. The committee itself, and not the states parties, draws up reports with recommendations to states parties. These reports are based on visits to prisons and other institutions or places where persons are held in deprivation of their liberty by a public authority. Provision is made for periodic visits and "visits as appear ... to be required in the circumstances".[362] These visits amount to on site-inspections, and even allow the committee to interview detainees in private.[363] To palliate the broad allowance for external supervision, reports are kept confidential.[364]

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360 See Table I above.

361 Part IV (arts 21-29) of the European Social Charter.

362 Art 7 of European Torture Convention.

363 Art 8(3) of the European Torture Convention.

364 Art 11 of the European Torture Convention.

The **Inter-American system** does not provide for reports by states. The Inter-American Commission is granted the very wide power to "prepare such studies or reports as it considers advisable in the performance of its duties".[365] Where the African Commission has to sit back and wait for states to come and show in which ways they have complied with and violated the African Charter, the Inter-American Commission has interpreted its powers broadly to give it a pro-active mission to investigate on its own initiative. These reports may be undertaken at the Commission's own initiative, or at the invitation of the particular state. Investigations may result in country reports without a visit to the state concerned if that state does not consent to such a visit.[366] If the state concerned consents to a visit, an on-site investigation is held.[367] This remains an "indirect channel of protection against abuse", although it has played a significant role in the 1970s and 1980s when military rule was prevalent in Latin America.[368]

The questioning of the institution of state reporting is not limited to the three regional human rights systems. State reporting, the main means of ensuring compliance with the CCPR, the CESCR, CEDAW, CRC and CERD, has been scrutinised critically. Welch placed state reporting in a broader perspective by referring to reporting under the Permanent Mandates Commission of the League of Nations and the ILO.[369] Tracing the history of state reporting, he concluded that a modest system of international supervision was (and will inevitably be) based on "this hardly-equal contest between international disclosure and national sovereignty".[370] Some commentators were more hopeful about the potential and realised impact of the reporting procedure.[371]

The appointment of **Special Rapporteurs** and **missions to countries** have been initiated by the African Commission. This is justified as an "appropriate method of investigation", which falls within its mandate.[372] Examples are the Special Rapporteur on extra-judicial executions in Africa

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365 Art 41(c) of the American Convention on Human Rights.

366 As in the cases of eg Cuba and Haiti, see Buergenthal (1995) at 188.

367 As in respect of the Dominican Republic, see Buergenthal (1995) at 188.

368 Vivanco in Kaysen *et al* (eds) (1994) 73 at 76.

369 See Welch (1995) at 143 - 147.

370 Welch (1995) at 143.

371 See eg O'Flaherty (1994) 16 *HRQ* 515.

372 Art 46 of the Charter.

and on prison conditions in Africa. It is suggested that the Commission should abandon the present format of considering country reports, replacing it with selected country studies and on-site investigations on the model of the Inter-American Commission, as well as investigations and reports by Special Rapporteurs.

Even if the African Commission converted state reporting into a process where it (and NGOs) had the initiative to undertake on-site investigations and draft reports, some questions of efficacy remain. These reports are still just a means to an end, the end of preventing human rights violations and of securing compliance with human rights norms. The end is to be attained, so goes the theory, because violator-states will be exposed, shamed into embarrassment and will endeavour to avoid such unmasking and discomfort in future. However, a recent analysis of government responses paints a much less optimistic picture. According to this study by Cohen, governments have mastered a **discourse of denial**.[373] Their responses vary from outright or official denial of the facts, and euphemistic reinterpretations of the facts, to justifications and rationalisations. Responses are often combined with a counteroffensive, questioning the integrity of the reporters. In the light of these devices to absorb potential embarrassment, Cohen asks how worthwhile the investment of resources "devoted to the circuit of claims and counterclaims" are.[374] These concerns are to an extent absorbed in the reporting procedure under the European Torture Convention, in its emphasis on confidentiality of findings, communication and consultation with the state party and recommendations to the state party "with a view to suggesting ... improvements in the protection of persons deprived of liberty".[375] Obviously, this *modus operandi* presupposes serious and sustained commitment by the state party. It is doubtful whether such a mechanism would improve realisation of rights in Africa in the short term.

The **missions to states parties** has also highlighted the Commission's potential role in taking the initiative, by deciding to visit a state to investigate certain problematic aspects pertaining to human rights protection and promotion. The visit to Sudan is a good example of a critical engagement by

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373 See Cohen (1996) 18 *HRQ* 517.

374 (1996) 18 *HRQ* 517 at 543.

375 Art 10(1) of the European Torture Convention.

the Commission. So far, this "alternative system of reporting" has suffered under a number of disadvantages:

- Adequate **financial resources** were lacking, causing delays and allowing brief visits only.[376]
- There was **no consistency** in procedure. Sometimes no report was compiled after the visit at all.
- The report is **not always coherent and clear**.[377]
- The **mandate** of the delegation is **not precise** and clarified.
- As in other areas of the Commission's work, there is a gaping **lack of publicity** and of meaningful **follow-up** strategies.

Although these missions have not been very successful, they indicate the direction of future developments in the reporting system. It is suggested that on-site investigations and subsequent reports will be a considerable improvement on the current stale and failed process of examining state reports. Even this possibility has its limitations. Ultimately, securing compliance with human rights treaties depends on an effective procedure for individual petition for human rights violations.

3.3.5 Promotional activities

Promotional functions of the Commission are more elaborately dealt with in the Charter than any of the Commission's other functions.[378] Many commentators and some of the commissioners have reiterated the importance of this function.[379] Especially in lesser developed countries conditions for human rights enforcement are not very favourable. One of the main causes for this state of affairs

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376 The mission to Sudan was made possible by the Raoul Wallenberg Institute, Sweden.

377 In the case of the report on Sudan, the English version reads as an obvious and direct translation from the French, making it sometimes difficult to follow.

378 Compare art 45(1)(a) of the Charter with other aspects of the mandate.

379 In particular, the Commission's First Annual Activity Report underlined the "particular importance of this essential mission" (at par 23).

is the low level of literacy and education of the majority of inhabitants. The Commission can therefore not be faulted for directing most of its initial efforts at promotion. At its fourth and fifth sessions, for example, the Commission adopted resolutions on the celebration of an African Day of Human Rights, on the establishment of domestic human rights committees, on the introduction of human rights in school curricula, and recommending radio and television broadcasts of the Charter in states parties.[380]

Realising the primacy of this part of its mandate, the Commission adopted a Programme of Action for 1992-1996 which deals almost exclusively with promotional activities.[381] This was based on a draft prepared by two consultants, Wolfgang Benedek and Adama Dieng. Five aspects of the promotional programme are contained in the Programme of Action, adopted at the Commission's 11th session. When the five-year term expired (it was adopted in March 1992 and was replaced by a new Programme of Action in October 1996, at the twentieth session), the successes and failures of realising this programme should be considered.[382]

- The priority of the Commission, in terms of the Programme, was to establish an **Information and Documentation Centre** ("IDOC"), and appoint a documentalist. In 1992, the Commission set up a Documentation Centre.[383] The salary of the documentalist was paid by the UN Centre for Human Rights. The term of the documentalist expired on 30 April 1995. By the 19th session (November 1996), the Documentation Centre was still closed because there was no staff member to run it. Financing was urgently required to recruit a documentation officer.[384]

- Secondly, the Commission was to **convene seminars, workshops and training courses** on various aspects relating to the African Charter. It is quite noticeable that the list of proposed

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380 See Second Annual Activity Report, Annexes VII, VIII and IX.

381 At its second session, the Commission already drew up a "Programme of Action" (see First Annual Activity Report Annex VIII).

382 For an overview of the Mauritius Plan of Action, see Oberleitner (1997) 15 *NQHR* 218 – 221.

383 See Eighth Annual Activity Report at par 27.

384 Ninth Annual Activity Report at par 27.

activities does not generally correspond with the list of activities that actually took place.[385] An example of a seminar on an important topic is the one on conditions of detention, which was co-organised by the Commission and "Penal Reform International" in September 1996. It took place in Kampala, Uganda. It should be noted that the African Charter does not specifically deal with the rights of prisoners. The Commission has, however, formulated minimum rules on the treatment of detainees. After the three-day seminar attended by 200 participants from 40 African states, the "Kampala Declaration" was adopted. It noted the overcrowding and insufficient basic conditions in African prisoners and recommended that the conditions of detention should not aggravate the suffering of a person already deprived of his or her liberty. It also called on states to introduce the minimum rules adopted by the UN and the African Commission into domestic legislation.[386]

- Each commissioner had to undertake **promotional activities**. The states parties were distributed among the commissioners, each being responsible for three to seven states, depending on the size of the state and other factors. According to the allocation as at January 1996, commissioner Kisanga was responsible for six states.[387] They were all more or less in the Eastern or "Horn" region. (The states are Ethiopia, Kenya, Tanzania, Somalia, Uganda and Zambia.) Commissioner Rezzag-Bara was less fortunate. The five countries assigned to him included states in Northern Africa, as well as the island states of the Comoros and Madagascar. Commissioner Blondin Beye, at that stage based in Angola as the UN Secretary-General's Special Representative, had to promote the Charter in states in West and Northern Africa. His promotional mandate excluded his country of origin (Mali) and his country of residence (Angola). The commissioner's pressing duties in Angola account for his absence at

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385 For example, contrast the list of nine seminars which the Commission decided to organise with the number which actually took place (see Ninth Annual Activity Report at par 18). In fact, in the preceding year only three seminars in which the Commission participated which it co-sponsored are mentioned in the report. Two of these are the regular NGO workshops organised by the International Commission of Jurists, which usually precede Commission sessions. These workshops can hardly be regarded as initiatives taken by the Commission.

386 See "Conditions of Detention in Africa: A Seminar" (1996) 3 *APT* (Association for the Prevention of Torture) *Journal* 11.

387 This information is contained in the Ninth Annual Activity Report, Annex VI.

Commission sessions,[388] and would no doubt have inhibited his promotional activities so far afield.

- When commissioners do manage to undertake promotional activities, they are very limited in nature. It usually consists of flying into a capital city, and delivering a prepared lecture or speech to an invited audience. While presenting a list of activities at the Commission meeting may create a good impression in the annual report, it remains a very superficial form of disseminating information and raising awareness.[389] Analysing the Ninth Activity Report, one is struck by the vagueness surrounding promotional activities. The Chairman, it states, attended "various" seminars and symposia. He also chaired the OAU mission to monitor elections in Benin. Other than the reference to Benin, no state is specifically mentioned. As for the other commissioners, some were involved in election monitoring in the Comoros and in Tanzania. No further mention is made of visits to or activities undertaken in relation to countries allocated to them. Three seminars "co-sponsored" by the Commission are listed.[390]

- In the fourth place, the Programme called for the **publication** of information about the Commission's activities. Specific mention was made of the Commission's Annual Activity Report, summary records, the Bulletin of the Commission (at least twice yearly) and the Review of the Commission (at least twice annually).

- Promotion depends on dissemination of information. Finally, then, the programme envisioned the **translation and distribution** of public documents of the Commission, which should include summary records and state reports submitted to the Commission. A recurring problem at the sessions in which state reports were examined was the lack of translated reports, especially into French and English. At the 15th session commissioner Badawi complained quite bitterly about the neglect of Arabic - not only in translation, but also in interpretation

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388 From the 14th to the 19th sessions, see Table E above.

389 In the Second Annual Activity Report, for example, 21 promotional activities are listed. Upon closer inspection one finds that only six of the eleven Commissioners were at all involved in any activity, and that the Chairman (Nguema) accounted, at least partially, for 15 of the listed activities. Some of the activities listed are also of dubious promotional value to the Charter, such as the "20th anniversary of the Zairian Bar organised" by Commissioner Gabou (Annex V of the report).

390 This analysis is based on information presented in the Ninth Activity Report.

during the sessions. These problems at the level of the Commission's functioning are indicative of the problems experienced in getting documents translated.

Although some commissioners have been very active in this field, the Commission has failed to implement the greater part of the Programme of Action and has failed to make any significant inroads to raise human rights awareness on the continent.[391] The **hosting of Commission sessions** by states have probably contributed much more to raise awareness about the Charter and the Commission's work in individual states. This should be encouraged, also in states where the Charter has enjoyed very limited exposure. There is no necessity in alternating commission sessions between Banjul and another state. NGOs should be involved much more in the process of conscientising the African masses. Growing awareness and participation by NGOs have been the by-product of a more effective and visible African Commission. This trend should be encouraged. If the commissioners are to retain a promotional function, it should be directed at African lawyers and judicial officials. Any discussion about promotion and information that takes place in the late twentieth century should primarily consider the potential presented by the mass media.

One of the main reasons for the many failures has been a **lack of funding**. Soon after the adoption of the Programme of Action, at its 13th session, the Commission decided to draw the attention of the OAU Assembly to the "very alarming situation ... in terms of logistics". This included a lack of staff, resources and services. Also, "no funds are allocated in the Commission's budget for promotional activities".[392] In its Ninth Activity Report the Commission had to state that due to "financial problems, facing the OAU, several projects of the Commission had to be suspended".[393] There is no mistaking the fact that financial resources are important, but there still is "room for improvement despite the lack of resources".[394]

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391 See Oberleitner (1997) 15 *NQHR* 218 at 219, who notes that this gives reason for concern, as the Mauritius Plan of Action is less specific and "ready-for-use" than its predecessor.

392 Sixth Annual Activity Report (1992-1993) at 7.

393 Ninth Annual Activity Report at 10.

394 Oberleitner (1997) 15 *NQHR* 218 at 219.

3.3.6 Other activities

Though related to their mandate to promote human and peoples' rights, the Commission's involvement in **overseeing democratic elections** in Africa has developed as a distinct function in the 1990s. Examples are found in the decisions adopted by the Commission at the following sessions:

- At its 11th session the Commission acceded to a request by the government of Mali to send an observer mission to monitor the presidential elections that were scheduled to be held in April 1992. The Commission appointed commissioner Ndiaye as leader of this mission.[395]

- At its 19th session the Commission adopted a resolution on electoral processes in Africa, reasserting its willingness "to place at the disposal of State Parties and other institutions its expertise and that of its members in observing elections".[396]

- At its 20th session the Commission responded favourably to an invitation extended by the OAU Secretary-General to monitor elections in the Gambia and Zambia.[397]

The Chairman of the Commission, Nguema, undertook a mission to observe elections in Madagascar.[398]

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395 Fifth Annual Activity Report (1991-1992) at 6.

396 Ninth Annual Activity Report, Annex VII at 9.

397 Final Communiqué of the 20th session at par 5.

398 See Tenth Annual Activity Report, par 16.

3.3.7 Rules of procedure[399]

3.3.7.1 Introduction

Article 42(2) of the Charter requires the Commission to formulate Rules of procedure to help it realise its main aims. This has been done with "commendable dispatch"[400] when the Commission adopted a set of rules and procedures at its second session (in February 1988).[401] The purpose of these Rules of procedures is to assist an institution to perform its functions consistently and effectively. Criticism has been levelled at various aspects of these rules. Already in 1992 amendment of the rules was mentioned.[402] Commissioner Dankwa was appointed to prepare an amended text of the Rules of procedure. Eventually in 1995, at its 18th session, the Commission adopted amended Rules of procedure.[403]

3.3.7.2 Criticism

Dankwa highlighted a number of inelegancies in the drafting of the rules. In his view this sometimes made them unintelligible, in some respects created a lack of consistency causing ambiguities, and in others it suggests imprecision and untidiness.[404]

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399 Although the Rules of procedure are integrated into other aspects which have been and will be discussed under other headings, they are treated under a separate heading here. This emphasises their importance and the necessity of further reform of the Commission's rules, especially in the light of the future establishment of an African Court on Human Rights. On the Commission's Rules of procedure after their amendment, see also Ankumah (1996) at 43 - 50.

400 Dankwa (1990) 2 *ASICL Proc* 29.

401 Contained as annexure to the First Annual Activity Report.

402 It was an item on the Agenda of the Commission's 13th session. From then, it featured continuously on the Commission's agenda (see 6th to 9th Annual Activity Reports).

403 See ACHPR/RP/XIX, adopted on 6 October 1995.

404 See Dankwa (1990) 2 *ASICL Proc* 29 at 33-34 (eg new formulations for rules 62(3), 65, 68 and 70).

More fundamentally, he identified two instances where Charter provisions were extended by the rules. The rigidity of the confidentiality requirements suggested by article 59(c) of the Charter has been softened by Rules 33 and 40. Also, the uncircumscribed discretion of the Secretary-General to appoint the Commission's Secretary[405] has been limited by Rule 22(2). It provides that the Secretary-General must, at least, consult the Commission Chairman before making that appointment. Dankwa further recommended a substantive change of article 42(5) of the Charter by adopting as part of the rules a requirement that the Secretary-General may attend meetings of the Commission at its invitation.[406]

Odinkalu, writing a bit later, levelled a more fundamental critique, directed at eight aspects of the rules:[407]

- He recommended that the Oath of Office should be made as a "solemn commitment", rather than an "oath".[408]
- He further advised that an order of preference of commissioners should be incorporated.[409]
- As far as voting on and deciding cases are concerned, Odinkalu recommended that commissioners should not be allowed to abstain from voting on complaints before them, and that dissenting opinions should be allowed explicitly.[410]
- Many of the functions entrusted to the OAU Secretary-General should be re-assigned to the Commission's Secretary.[411]
- He recommended that non-state entities (individuals and NGOs) should be allowed to present oral argument when the Commission decides on communications.[412]

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405 See art 41 of the Charter.

406 Dankwa (1990) 2 *ASICL Proc* 29 at 31-32.

407 In 1993, see (1993) 15 *HRQ* 533.

408 Odinkalu (1993) 15 *HRQ* 533 at 534.

409 Odinkalu (1993) 15 *HRQ* 533 at 535

410 At 535-537.

411 Odinkalu (1993) 15 *HRQ* 533 at 538-540.

412 Odinkalu (1993) 15 *HRQ* 533 at 541.

- The rules should permit the Commission to undertake on-site investigations, especially in cases of emergencies. The Commission should not be obliged to await a communication before taking provisional measures, as suggested by Rule 109.[413]

- Consequences of non-compliance by states of time limits to supply information should be stipulated clearly.[414]

- He lastly recommended more transparency. The rules should, for example, provide that the author of a communication must be informed of the final opinion of the Commission; they should enable an accredited *amicus curiae* to appear before the Commission, and more information should be made available to the public.[415]

3.3.7.3 Comparison

In October 1995 the Commission adopted a revised set of Rules of procedure. The potential for difference between the revised rules and the original version thereof (of February 1988) presents a yard stick for assessing the progress of the Commission in the interpretation of its mandate. The question also arises whether the lapse of just about eight years is reflected in a shift in focus or other significant amendments to the Rules of procedure.

i Style and construction

Improvement in style and sentence construction appear from the later version, making it more reader-friendly. The mass of information in Rule 44 (original version), containing six rather lengthy sentences, was compressed into a single paragraph. By sub-dividing the information into three paragraphs, Rule 44 in the 1995 text is much easier to read and understand. Some parts of the rules have been redrafted to express their meaning more clearly and concisely.[416]

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413 Odinkalu (1993) 15 *HRQ* 533 at 542.

414 Odinkalu (1993) 15 *HRQ* 533 at 543-544.

415 Odinkalu (1993) 15 *HRQ* 533 at 544-548.

416 For example, compare Rule 62(3) (original text) with Rule 62 (3) (amended text).

ii Gender-sensitivity

Semantic changes in the 1995 version purport to make the rules gender-sensitive. In Rule 23, for example, the Secretary of the Commission is referred to as "he/she" or "him/her".[417] In numerous other rules, only the male pronoun is still being used.[418] This shows inconsistency and lack of precision in drafting. Although the continued use of the term "Chairman"[419] is motivated by its use in the Charter itself,[420] the rules could certainly have helped to establish a different practice.

iii A coherent role for the Secretary

A similar lack of precision is noticed with reference to the substitution of "Secretary" for "Secretary-General" in the amended rules. Many functions better suited to or actually performed by the Commission's Secretary were initially made the responsibility of the OAU Secretary-General. By conceptualising the role of the Secretary more clearly, the amended rules make much more sense. So, not longer the OAU Secretary-General, but the Secretary of the Commission now:

- informs members of the Commission when sessions start,[421]
- distributes a provisional agenda and relevant materials before each session,[422]
- informs the Commission of the non-submission of state reports[423] and performs other functions in relation to state reports,[424]
- requests and distributes information about communications received,[425] and

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417 See also Rule 44.

418 See eg Rules 224, 22(2), 47, 56(4).

419 See eg Rule 4.

420 Arts 39, 42 and 59 of the Charter.

421 Rule 5 (original and amended).

422 Rule 7(2) (original and amended).

423 Rule 84(1) (original and amended).

424 Rule 86(1) (original and amended).

425 Rule 103 and 104 (original and amended).

- importantly, individual communications are submitted to the Secretary.[426]

In some instances the role of the Secretary-General is retained. The Commission is seized when an inter-state Communication is communicated to its Chairman, to the other states and to the Secretary-General (and not the Secretary).[427] The Secretary-General appoints the Secretary and provides the Commission with staff.[428] The Secretary-General also remains entrusted with the functions of taking "all the necessary steps for the meetings of the Commission".[429] This last function represents a serious inconsistency and should rather have been assigned to the Secretary, who is *de facto* in charge of protocol arrangements for sessions.

iv *No hierarchy*

Procedural clarification was provided by regulating the position when neither the Chairman nor the Vice-Chairman attends a session. The amended rules state that members shall, in such a situation, elect an acting Chairman.[430] In my opinion it is fortunate that the amendment does not follow Odinkalu's recommendation to assign status to Commission members.[431] This would have led to the creation of a stratified hierarchy and could have encouraged a formalistic approach.

v *Erosion of confidentiality*

The secretive nature of the activities of the Commission has been the object of some amendment. This is illustrated in the shift of focus in Rule 32. The two versions merit being quoted fully: "The sittings of the Commission ... shall be private and shall be held *in camera*" became "The sittings of the Commission ... shall be held in public unless the Commission decides otherwise or it appears from the relevant provisions of the Charter that the meeting shall be held in private". End-

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426 Rule 1 (original) and 102 (amended).

427 See new Rules 88(1), 92 and 93.

428 Rule 22 (amended)

429 See new Rule 22(4).

430 See Rule 19 (2) (amended).

431 See (1993) 15 *HRQ* 533 at 535.

of-session Communiqués could in the past only be issued though the Secretary-General.[432] Under the new rules, the Commission itself is given this responsibility.[433] A clear distinction is drawn between public and private sessions. The secretary is now obliged to keep a permanent register of all individual communications "which shall be made public".[434] The fact that "organisations or persons capable of enlightening the Commission"[435] may participate in its deliberations is also an indication of the erosion of the confidentiality principle. Comment and observation made by the Commission are now explicitly recognised as "public documents".[436]

vi *Effect of non-compliance with time requirements*

Concerning its admissibility decisions, the period allowed to states for responding was originally left open.[437] In the amended version of the rules, a cut-off point of **three months** is set. If no response is sent within three months of notification, the Commission must decide the question without the state's response.[438] As for decisions on the merits, the 1988 rules determined that the state should respond within **four months**. [439] This period is shortened to **three months** in the 1995 amendments.[440] The practice developed by the Commission to act on the evidence before it[441] is codified in the new rules.[442]

vii *Role of individuals in deliberations of Commission*

The procedure for the consideration of communications refers only to written submissions. In practice, though, the Commission has allowed both states and individuals to present oral argument

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432 Rule 33 (original).

433 Rule 33 (amended).

434 Rule 103 (1) (amended).

435 Rule 72 (amended).

436 Rule 86 (1) (amended). Compare Rule 86 (1) (original).

437 The Commission could "fix a time limit" (rule 115(1)).

438 Rule 117 (4) (amended).

439 Rule 117 (2) (original).

440 Rule 119 (2) (amended).

441 See discussion in par 3.3.3(a) above.

442 Rule 119(4): "State parties from whom explanations are sought within specified times shall be informed that if they fail to comply with these times the Commission will act on the evidence before it".

on the merits. Amended Rules 71 and 72 allow for this possibility. The first provides that the Commission may invite any state, and the second, any organisation or person, to participate in its deliberations. States are invited if an issue to be discussed is of "particular interest" to that state.[443] Organisations or persons will be invited if they are "capable of enlightening" the Commission.[444]

viii *Provisional measures*

In terms of its 1988 Rules of procedure, the Commission could have informed a state of provisional measures to be taken to "avoid irreparable damage".[445] This could, however, only be done once a communication had been received, and by the Commission at its sessions. Under the amended rules the Chairman may now, when the Commission is not in session, take "any necessary action on behalf of the Commission".[446] This should be done in consultation with other members, and the Chairman must report back to the next session.[447] The new rules provides a golden opportunity to take provisional measures in cases of emergency.

ix *Special Rapporteurs introduced*

The first Special Rapporteur was appointed by the Commission at its 15th session. This role is formally introduced into the amended rules.[448]

x *Commissioners' promotional role stressed*

The new Rule 87 stresses the promotional function of commissioners, requiring each of them to file a written report on these functions at each session. This is in line with evolved Commission practice.

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443 Rule 71(1) (amended).

444 Rule 72 (amended).

445 Rule 109 (original).

446 Rule 111(3) (amended).

447 *Ibid.*

448 Rule 120(3) (amended).

3.3.7.4 Evaluation

All the instances mentioned above represent progress towards a more effective Commission and one that can better realise supra-national human rights protection. However, it could certainly have gone further:

- It could have been redrafted in much clearer and more simplified language, increasing readability, understandability and accessibility.
- It could have been consistently gender-sensitive.
- It could have been consistent in ascribing functions to the Secretary of the Commission.
- It could have spelled out that individual complainants or their representatives may present new argument at Commission deliberations.
- It should have made it clear that basic information about communications considered can be contained in end-of-session communiqués and reports. More information can still be made available to the public.

In some respects the rules merely "catch up" with amended practice. Even before the rules had been amended, individuals were represented at Commission deliberations, and a Special Rapporteur was appointed.

While most of Dankwa's recommendations were incorporated, a number of Odinkalu's were rejected. Some are mentioned here:

- The oath of office remains as it was.[449]
- Members are still allowed to abstain during voting,[450] and no provision is made for dissenting opinions.

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449 Rule 16 (amended).

450 Rule 62(2) (amended).

- As for provisional measures, the general rule still is that the Commission acts on communications, and not to a situation as such.[451]

- The author of a communication is informed about the outcome of the admissibility decision, but not of the outcome of the consideration of the merits.[452]

3.4 Domestic application

3.4.1. Status of international law generally

Using architectural imagery as metaphor, the co-existence of international human rights norms and internal laws may be portrayed as a two-storied building. This corresponds with the distinction between international ("external") ratification (or accession) (at the "elevated" level) and constitutional ("internal") ratification (or accession) (at "ground" level). As a political act, "external" ratification is a decision impacting on international relations. Some internal action is needed to ensure that the effect of ratification is felt at ground level. Once externally ratified, two important, and related questions arise when one considers the relationship between international and domestic law:

- Are the international law norms in principle **incorporated into domestic law**, that is - may these provisions be invoked in local courts, or are they restricted to the upper floor?

- If so, what is the **hierarchy of norms**, that is - if international law and domestic law conflict, which system has precedence? As far as local law is concerned, a distinction may also have to be drawn between the Constitution, and other legislation and executive directives and actions.

In answering these two questions, a distinction is drawn between the position pertaining to **customary international law** and to **treaties**.

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451 Rule 111(1) (amended).

A further distinction is dictated by colonial legacies, as reflected in the different theories of international law followed by states in Africa. As far as **Commonwealth Africa** is concerned, the discussion is informed by the British system. The French Constitution informs much of **civil law Africa**. The two main theories as to the relation between international and domestic law are the monist and dualist (or pluralist)[453] theories. According to the monist view "international law and state law are concomitant aspects of the one system - law in general".[454] The dualist theory regards international and domestic law as being intrinsically different in character. In this view international law and domestic law are two "entirely distinct legal systems".[455]

The focus here is on the reformed African constitutions of the 1990s. These constitutions predominantly adhere to constitutionalism, liberal pluralism and democratic governance. This context provides a much more promising environment for the meaningful implementation of supra-national norms than autocratic, single-party and military regimes of the recent African past. Together with the "Soviet block", a number of African countries earmarked international law as imperialism.[456] This statement exemplified African reluctance to having their internal laws held to international scrutiny.[457]

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452 Rule 118(1), 119(1) and 120(1) (amended).

453 "Dualist" theory is regarded as a misnomer by some, because the domestic system is usually not a single system to be juxtaposed to international law, but rather a plurality of systems co-existing domestically.

454 Starke (1989) at 71 - 72. This is also referred to as the doctrine of incorporation, in terms of which international law becomes "incorporated" into national law without any further legislative intervention.

455 Starke (1989) at 72. This is also referred to as the doctrine of transformation, in terms of which "inferior" international law has to be "transformed" to become part of national law.

456 See eg Stein (1994) 84 *AJIL* 427 at 432-433.

457 Some of the older constitutions, such as the 1969 Kenyan Constitution, the 1979 Nigerian Constitution and the 1984 Tanzanian Constitution, do not provide an explicit role to international law.

3.4.2 Status of customary international human rights law in Africa

3.4.2.1 Incorporation

i Commonwealth Africa

"Customary law" has been instrumental in the fomenting of the English common law. In line with the approach in local law, English law has accepted customary international law as part of the developing local law. Customary international law is therefore considered to be part of domestic law in the common law tradition and will be applied by domestic courts. In Africa, a provision in the 1995 **Malawi** Constitution reflects this approach: "Customary international law ... shall have continued application".[458] According to Maluwa the implication of this article is "that where a particular international human rights norm is regarded as having matured into a rule of customary international law, such a rule must be applied by the domestic courts as part of the municipal law of the country".[459] Another example is presented by the final **South African** Constitution, which provides that customary international law binds the Republic.[460]

i Civil law Africa

Customary international law is not a notion frequently used in the constitutions of civil law states. It is more common to find general propositions such as the following from the Constitution of **Guinea**: "The Republic conforms to the rules of international law".[461] Although a formulation like this is imprecise, it is accepted that it entails incorporation of customary international law into internal law.[462] Similarly, the **Cape Verde** Constitution provides that "international law shall be an

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458 Art 211(3).

459 (1995) 3 *AYBIL* 53 at 70. He expressed some concern about the inclusion of the word "continued", as it could suggest that only those rules already in existence at a fixed time would, from then onwards, "continue" to apply.

460 Art 232 of Act 108 of 1996.

461 Art 31 of the 1958 Constitution.

462 Gonidec (1996) 8 *RADIC* 789 at 793.

integral part of the Cape Verde judicial system, as long as it is in force in the international legal system".[463]

3.4.2.2 Hierarchy of norms

i Commonwealth Africa

In English law, courts will not apply customary international law if it is contrary to British statutes, making **domestic law the higher normative system**. In some African constitutions a similar hierarchy is spelled out. In the 1995 **Malawi** Constitution customary international law applies "unless inconsistent with this Constitution or any Act of Parliament",[464] clearly indicating that customary international law is lower in the hierarchy of legal norms that may be applied. However, the presumption of statutory interpretation that the legislature does not intend to infringe upon international law may soften the position. For example, in the case of uncertainty whether a conflict between customary international law and the Constitution exists, "an attempt should be made to reconcile the two before declaring the customary rule invalid".[465] In terms of the **South African** Constitution, customary international law is law of the Republic unless it is inconsistent with the Constitution or an act of Parliament.[466]

ii Civil law Africa

In most Civil law constitutions which give international law precedence above internal law. Constitutional reference to "international law" is generally regarded as including customary international law. As custom and customary international law play a less pronounced role in civil law systems, the status of customary international law is not regulated with any specificity in most civil law constitutions.

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463 Art 11(1) of the 1992 Constitution.

464 Art 211(3).

465 Maluwa (1995) 3 *AYBIL* 53 at 70.

466 S 232 of Act 108 of 1996.

3.4.3 Domestic status of treaties, in particular the African Charter

The absence of a supra-national judicial organ to give final judgments on the rights and duties in the African Charter does not affect the competence of domestic courts in the various ratifying states to apply the Charter. One may actually argue that the very absence of an African Human Rights Court accentuates the responsibility of the existing African judiciary to "interpret and apply, where appropriate, the relevant principles in domestic law so as to comply with the commitments of African governments in ratifying the Charter".[467]

The question arises to what extent the African Charter is applied in different ratifying states. This leads to the further question about the status of the African Charter in the domestic or national legal constitutional framework. In the absence of any specific reference to the Charter, the status of international treaty law in the particular jurisdiction will determine the status of the African Charter.[468]

3.4.3.1 Incorporation

i Preambular incorporation

In the majority of Francophone states the preamble of the domestic Constitution proclaims a lofty commitment to human rights in various international human rights documents, including the African Charter. The Constitutions of Burkina Faso, CAR, Chad, Guinea, Mali, Mauritania, Niger, Togo and Zaïre fall into this category. The African Charter is never cited in isolation, but usually in conjunction with the Universal Declaration of Human Rights. Sometimes the preamble

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467 D'Sa in *Developing Human Rights Jurisprudence* vol 2 (1989) 101 at 116.

468 Not surprisingly, the Charter itself leaves room for both dualist and monist theories. In terms of art 1 of the Charter states parties undertake to "adopt legislative or other measures to give effect" to the rights in the Charter. The adoption of legislation would be required if a state adheres to the dualist theory, and "other measures" (such as court judgments or administrative actions) would be required to give effect to the Charter in a state which follows a monist theory (see Lindholt (1997) at 85 - 86).

refers to the CCPR and CESCR. It is striking that all these states had been part of the French sphere of influence and have constitutions to some extent modelled on the French example.

Four states have retained reference in their preamble to the Declaration of the Rights of Man and Citizen of 1789. They are Chad, Côte d'Ivoire, Gabon and Senegal. In all four instances the Universal Declaration is also mentioned. In two of the constitutions, those of Chad and Gabon, the African Charter is added as guiding source and inspiration. Debene poses the question why these independent African states would keep alive this remnant of their colonial past.[469] Reference to the 1789 Declaration is in all cases supplemented by reference to the Universal Declaration, indicating that first generation rights (as set out in the 1789 instrument) are not discarded, but are supplemented by the second generation rights of the Universal Declaration. Reference to the African Charter complements these two categories, with its incorporation also of solidarity ("third generation") rights. Viewed in this way, the 1789 Declaration is a building block in an evolving process. But not all ex-French colonies retained this reference in their current constitutions. On the contrary, some have quite deliberately rid themselves of this signifier of a colonial past. The first state to become independent from France in Africa, Guinea, discarded the reference after its population voted against becoming a member of the French "Communauté" in the referendum of 28 September 1958.

Debene provides two possible answers to the question why certain states would have retained the colonial baggage. In the case of Chad (and of the 1989 Constitution of Niger)[470] he finds the value of the 1789 Declaration in its originating history. It was drawn up by revolutionaries who wanted to change the world, and wanted to restrict excesses and corruption by the authorities, and not by representatives of states already established.[471] The Declaration and its history became a battle cry for some in the democratic revolution in Africa which started in 1989 (incidentally, two hundred years after the declaration). The reason why Côte d'Ivoire, Gabon and Senegal have kept on proclaiming their adherence to the declaration since independence, may be diametrically opposed.

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469 (1990) *Revue Juridique Africaine* 46.

470 But this reference was not included in the Constitution approved by referendum on 26 December 1992.

471 To quote him directly : "ayant été elaborée par des hommes en lutte, par des revolutionnaires, ...et non ... par les représentants étatiques des pouvoires en place..." (at 59).

In all three of these states an enduring commitment to "la francophonie" or "la francité" is identifiable. On a political level, preference for closer liaison with France was expressed by decisions to retain links with France, and by representation in the French Parliament.[472] Underlying the cultural substructure are reasons of a socio-economic nature, Debene argues.[473] Even if it was not explicitly stated in the Declaration, values of free enterprise and freedom of choice in the economic arena underlined its elaboration. Côte d'Ivoire has been a free-market, capitalist society all along; later Gabon also adopted this model. In the 1970s Senegal, under President Abdou Diouf, adopted a similar economic policy. It is therefore arguable that not only cultural, but also economic attachment to the French model are reflected in the continued reference to the Declaration of 1789.

What does it mean if the 1789 Declaration, or African Charter, is invoked in the Preamble?[474] As far as Francophone Africa is concerned, the answer is tied closely to constitutional developments in France. Despite the Declaration, and the inclusion of fundamental rights in the preamble to the 1958 Constitution, the *Conseil Constitutionnel* did not at first engage in judicial review on the basis of the violation of human rights. The *Conseil* declared a law unconstitutional for the first time in 1971. Only then was the principle settled that "constitutional review involves taking into consideration the 'fundamental rights' inherited from 1789 and strengthened in 1946".[475] This elevated the preambular status of human rights in the 1958 Constitution to enforceable guarantees and should serve as a valuable precedent to Francophone African countries that also have only preambular reference to human rights.[476]

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472 The example of Felix Houphouet-Boigny, and Leopold Senghor.

473 At 61.

474 On the status of fundamental rights declared in a preamble, see *Re Akoto* 1961 GLR 523 (in Ghana, the Court found that it imposes a moral obligation on the President) and *Société United Docks v Government of Mauritius* [1985] LRC (Const) 801 (where the preamble was regarded as an "enacting section" and was given effect in Mauritius).

475 Maus in Smith (ed) (1995) 142. See also Bell (1992) at 273-274.

476 This seemingly influenced the 1996 Constitution of Cameroon: The preamble commits the people to the affirmation of human rights, as set out in the Universal Declaration, the UN Charter and the African Charter. Art 65 of the Constitution determines that the preamble forms an integral part of the Constitution.

ii *Immediate incorporation*

According to French constitutional law,[477] once a treaty has been "externally" ratified and has been published, it becomes part of internal law.[478] In other words, no legislative action is needed to lower the second storey norms to the ground floor. This approach is explicitly followed in a number of African constitutions.[479]

In some of the states with a French-based constitutional history, the lofty affirmation in the preamble is supplemented by directly incorporating the Charter (or international treaties generally) into the legal system. The **Madagascar** Constitution adopts the African Charter (and the CCPR, the CSECR and the Convention on the Rights of the Child) in the preamble, and proclaims them to be an "integral part" of its law.[480] The preamble of the Constitution of **Benin** reaffirms a commitment to the principles of participatory democracy and human rights as defined in the UN Charter, the Universal Declaration and the African Charter. But it continues, in the preamble, to add that those provisions "make up an integral part of this present Constitution and of Benin law and have a value superior to the internal law".[481] A commitment to the rights and duties in the African Charter is also explicitly proclaimed by the Constitution of **Burundi.** Article 10 of the Constitution concretises the Charter by providing that it "shall be an integral part of this

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477 Art 53 of the 1958 Constitution of France reads as follows: "[T]reaties ...may only be approved or ratified by a *loi*. They only take effect after they are ratified or approved". Art 55 determines that duly ratified or approved treaties have a higher authority than *lois*. Art 54 provides for a mechanism to determine whether there is a conflict between any part of a treaty and the Constitution. If a conflict exists, authorisation to ratify or approve the treaty may only be given after a revision of the Constitution has been undertaken. After an amendment in 1990, the question whether such a conflict exists may also be referred to the *Conseil Constitutionnel* by 60 members of the National Assembly or 60 members of the Senate (see Maus in Smith (ed) (1995) at 113).

478 This is also referred to as the "monist" theory, see par 3.4.1 above.

479 See eg art 120 of the constitution of Niger (treaties ratified have superior authority to that of legislation once ratified), and similar provisions in art 74 of the 1992 Constitution of Burundi and art 45 the 1996 Constitution of Cameroon.

480 Preamble of the 1992 Constitution.

481 Of the 1990 Benin Constitution.

Constitution". This is also the case with Congo, where the principles proclaimed in the Charter are declared to be an integral part of the Constitution.[482]

This model may seem ideal, but it presents a very real problem: General incorporation of norms has to be followed by the **enactment of internal measures** to make the provisions of the treaty applicable, unless the provisions are "self-executing".[483] African states have not made the required enactments, restricting human rights treaties to declarations without effect, and contributing to the largely "ideological" nature of African international law.[484]

Other states with a civil law background also conform to this model. After external ratification, treaties "shall be in force in the **Cape Verde** judicial system".[485]

Some countries with a "mixed"[486] legal tradition, such as Namibia, also provide that international law "shall form part of the law of Namibia".[487]

iii Incorporation required

In Commonwealth Africa treaties do not become part of domestic law merely by virtue of their ratification. The explanation for this lies in the British constitutional context. Ratification of a treaty in which the state becomes bound on the international level ("external ratification") is a prerogative of the Crown. But it still has to be incorporated into the domestic legal system. This is in line with the system of Parliamentary sovereignty, which has been developed as a cherished bulwark against the exercise of executive prerogatives. In terms of the long-standing principle of checks and balances, and of the more recent symbolical functions of the Crown, such "external" ratification does not automatically bind internal courts: "If ... the provisions of a treaty made by

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482 Preamble of 1992 Congo Constitution.

483 See Gonidec (1996) 8 *RADIC* 789 at 794.

484 Gonidec (1993) 3 *RADIC* 243.

485 Art 11(2) of the 1992 Constitution.

486 Similar to South African law, Namibian law may be regarded as a mixture of a civil-law based system (Roman-Dutch) and English law.

487 S 144 of the 1991 Namibian Constitution.

the Crown were to become operative within Great Britain automatically and without any specified act of incorporation, this might lead to the result that the Crown would alter the British municipal law or otherwise take some important step without consulting Parliament or obtaining Parliament's approval".[488] So, for example, British courts cannot directly apply provisions of the European Convention.

In a number of African states international law (or treaties such as the African Charter) does not become part of domestic law, unless explicitly incorporated by an act of Parliament. The Constitutions of Malawi, South Africa and Zimbabwe fall into this category. The **Malawi** Constitution of 1995 provides that agreements ratified by Parliament "shall form part of the law of the Republic if so provided for in the Act of Parliament ratifying the agreement".[489] While this formulation leaves some uncertainty about the process of international ratification, it seems clear that the municipal law cannot be altered without "the democratic participation of the legislature".[490]

According to the final Constitution of **South Africa** international agreements bind the Republic only after they have been approved by the National Assembly and the National Council of Provinces.[491] This requirement pertains to "external" ratification. A treaty only "becomes law" after it has further been enacted into national legislation. "Self-executing" provisions become law once "external" ratification has been approved by Parliament. In other words, for a convention to become applicable, an enabling domestic law has to be promulgated, unless its provisions are "self-executing". In **Zimbabwe**, the Constitution contains the general rule that no international treaty or agreement forms part of the law of Zimbabwe unless incorporated into domestic law by an act of Parliament.[492]

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488 Shearer *Starke's International Law* (1994) at 70.

489 S 211(1) of the Constitution of the Republic of Malawi.

490 Maluwa (1995) 3 *AYBIL* 53 at 74.

491 S 231 of Act 108 of 1996.

492 S 111B(1)(b) of the Constitution, as amended by Act 4 of 1993 (see (1993) 3 *Bulletin of Zimbabwean Law* at 26-27).

Under the Constitutions of **Burundi** and **Togo** the content of treaties determine whether legislation is required to effect ratification. Treaties dealing with, amongst others, the status of persons, have to be "ratified only by virtue of a law".[493]

iv *Concept of self-execution introduced*

American jurisprudence has introduced different terminology, which may sometimes lead to conceptual confusion. Courts distinguish between "self-executing" and "non self-executing" treaties. Treaties in the first category do not require legislation to make them operational, while those in the second do. In terms of the 1996 **South African** Constitution, external ratification of human rights treaties has to be followed by the approval of the National Assembly and Council of Provinces.[494] In addition, if the provision is not "self-executing", it has to be enacted into national legislation before it becomes law.[495] If the provision is self-executing and it is not inconsistent with the Constitution or other act of Parliament, it becomes part of national law upon Parliament's approval of the external ratification.[496]

v *Mandate to apply international case-law and instruments as interpretative tools*

Many constitutions provide explicitly for the use of international law in the process of interpreting the local Constitution. Examples are found in the Constitutions of South Africa, Namibia and the Seychelles. The final South African Constitution reaffirms that, in interpreting the Bill of Rights, courts "must consider international law", and "may consider foreign law".[497] The Malawian Constitution still echoes the South African interim Constitution, where it provides that courts "shall, where applicable, have regard to current norms of public international and comparable foreign case-law".[498] The Constitution of the Seychelles is very detailed in its provision of aspects which courts may take judicial notice of in interpreting the Chapter of rights. It refers to

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493 Art 171 of the 1992 Constitution of Burundi and art 138 of the 1992 Constitution of Togo.

494 Sec 231(2) of the 1996 Constitution.

495 Sec 231(4) of the 1996 Constitution.

496 Sec 231(4) of the 1996 Constitution.

497 S 39(1) of the final South African Constitution.

498 S 11(2) of the 1994 Constitution.

international instruments, reports and views adopted by treaty bodies, as well as decisions of regional and international institutions administering human rights provisions.[499]

vi Legislative naturalisation of treaty provisions

The surest way of giving effect to treaty provisions is to naturalise them by making them part of local laws. This makes arguments about monist and dualist theories redundant. This makes international law accessible and gives it a national colour. Questions about the enforceability of treaties then become questions common to the legal system as a whole. Both the neo-Nigerian Bills of Rights, and the Bills of Rights adopted in the 1990s, have incorporated many generally accepted human rights. This has the effect that many rights which are contained in the African Charter, are also included in African constitutions. For example, the right not to be treated inhumanely and cruelly is enshrined not only in the Charter,[500] but in most African constitutions.[501]

3.4.3.2 Hierarchy of norms

i International law (African Charter) superior to national law

In most Francophone constitutional regimes in Africa a clear distinction is drawn between the status of international law in relation to the Constitution (on the one hand), and in relation to other laws (on the other). **International law may be superior** to both the Constitution and other laws, or only to other laws and not the Constitution. In the latter case, potential conflict with the Constitution must be pre-empted and resolved before ratification is confirmed. The **Central African Republic** is an example of a country in which the Constitution has superiority over

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499 Art 48 of the 1993 Constitution.

500 Art 5 of the Charter.

501 See eg art 18 of the 1990 Constitution of Benin, s 7 of the 1966 Botswana Constitution, art 2 of the 1991 Constitution of Burkina Faso, art 20 of the 1992 Constitution of Burundi, art 26(2) of the 1972 Constitution of Cape Verde, art 3 of the 1994 Constitution of the CAR, art 11 of the 1993 Constitution of Chad and 16 of the 1992 Constitution of Congo (which represents a survey of countries starting with letters "a" to "c" only!).

international treaties, while international law has superior authority over all other laws.[502] If there is a conflict between the Constitution and a provision of a treaty, Parliament may approve ratification only once the Constitution has been revised to bring it into line with the provision. The question whether a conflict exists is determined by the Constitutional Court. Determination of such an issue is required if the President of the Republic, the President of the National Assembly, or a third of the members of the National Assembly seizes the Constitutional Court.

The **Beninois** Constitution reaffirms its attachment to the African Charter and states that its provisions "have a value superior to the internal law".[503] But authorisation to ratify a treaty may also occur only after revision of the Constitution. This approach is modelled on the French Constitution of 1958.[504]

In another civil law country, **Cape Verde**, a similar distinction is made. International law takes precedence "over all laws and regulations below the constitutional level".[505]

Other Francophone African states proclaim the superiority of international law in more general terms, without drawing a distinction between the relative status of the Constitution and other laws. In **Tunisia**, treaties "duly ratified" have an authority superior to laws in general.[506] The Constitutions of **Chad**, **Congo**, **Mali** and **Zaïre** introduce the principle of reciprocity, in formulations such as: "Treaties ... have, as soon as they are published, a higher authority than that of law; provided that each treaty ... is approved by the other party".[507] This also reflects the French constitutional approach.[508]

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502 Art 68 of the 1995 Constitution.

503 Preamble of 1990 Constitution.

504 Art 54.

505 Art 11(4) of the Cape Verde Constitution of 1992.

506 Art 32 of the 1959 Constitution

507 Art 106 of the 1995 Constitution of Chad, art 176 of the 1992 Constitution of Congo, art 116 of the 1992 Constitution of Mali and art 109 of the 1978 Constitution of Zaïre.

508 Art 55 of the 1958 Constitution.

ii National law superior to international law (African Charter)

The **South African** Constitution presents an example of the superior status of domestic law, not only in the form of the domestic constitution, but also other local legislation. "Self-executing" treaty provisions become part of national law once Parliament has assented to the executive's decision to ratify a human rights treaty only if these provision are *consistent with the Constitution and any other act of Parliament.*[509] These provisions are tempered by the duty placed on courts to "prefer any reasonable interpretation ... that is consistent with international law" over any alternative interpretation that is inconsistent with international law, when interpreting legislation.[510]

In terms of the **Namibian** Constitution international law applies, unless "otherwise provided by this Constitution or Act of Parliament".[511] The superiority of the Constitution is in a sense predictable, as the whole Constitution in these two countries is premised on the notion of the "supremacy of the Constitution".[512]

3.4.4 Judicial independence

3.4.4.1 Charter provisions

A prerequisite for any meaningful application of the Charter in any country is an independent and functioning judiciary in that country. This fact is acknowledged by the Charter itself: Article 7 guarantees the right to "an appeal to competent national organs against acts of violating" of human and peoples' rights. Article 26 places a duty on states parties to guarantee "the independence of

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509 Sec 231(4) of the 1996 Constitution.

510 Art 233 of Act 108 of 1996.

511 S 144 of the 1991 Constitution. See also *Kauesa v Minister of Home Affairs* 1995 1 SA 51 (NmHC) at 86J – 87A: "The specific provisions of the Constitution of Namibia, where specific and unequivocal, override provisions of international agreements which have become part of Namibian law. In [such] cases the provisions of the international agreements must *at least* be given considerable weight in interpreting and defining the scope of the provisions contained in the Namibian Constitution" (emphasis in original).

512 See s 2 of the final South African Constitution and art 1(6) of the Namibian Constitution of 1990.

the Courts" and to establish and approve "appropriate national institutions" to promote and protect the Charter rights. The Commission has elaborated on the criteria of "independence", "competence" and "appropriateness". At its 19th session, the Commission adopted a resolution on the "respect and the strengthening of the independence of the judiciary".[513] This resolution emphasises the interconnectedness of human rights, justice, social equilibrium and economic development. The Commission called on African countries to:

- "repeal all their legislation which is inconsistent with the principle of respect of the independence of the Judiciary, especially with regard to the appointment and posting of judges;
- provide, with the assistance of the international community, the Judiciary with sufficient resources in order to enable the legal system (to) fulfil its function;
- provide judges with decent living and working conditions to enable them (to) maintain their independence and realise their full potential;
- incorporate in their legal systems universal principles establishing the independence of the Judiciary, especially with regard to security of tenure; and to
- refrain from taking any action which may threaten directly or indirectly the independence and the security of judges and magistrates."

3.4.4.2 Domestic provisions on judicial independence[514]

Independence of the judiciary, and its opposite (political manipulation of the judiciary) depend on the procedure used to **appoint** judges, the security of tenure inherent in their **terms of appointment**, the ease with which they may be **removed for office**, and less visible or more **subtle forms of interference**. An analysis of these four aspects in domestic legislation of some African states follows:

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513 Ninth Annual Activity Report, Annex VII at 5.

514 See, in general, Ankumah (1991) 3 *RADIC* at 581-588.

i *Procedure for the appointment of judges*

The executive (usually in the form of the President) has the main role in the appointment of judges under most African constitutions. But the extent of checks and balances on the exercise of his powers differs from constitution to constitution.

The decision to appoint the **Chief Justice** is usually within the sole and **unfettered discretion** of the President.[515] In some instances the President's discretion is **circumscribed**. In Cape Verde, the President appoint the President of the Supreme Court of Justice from among the members of the Court, *after consultation with* the Superior Council of Magistrates.[516] In Ghana, the President appoints the Chief Justice acting *in consultation with* the Council of State and *with the approval of Parliament.*[517] In Uganda, the President has the power to appoint all judges, acting "on the advice of" the Judicial Service Commission ("JSC"), but also "with the approval of Parliament".[518] In Zambia all judges are appointed by the President "subject to ratification by the National Assembly".[519] It should be kept in mind that the consent required by the legislature in states dominated by one party is illusory. In some countries the negligible role of Parliament is acknowledged. In Zimbabwe, for instance, the President appoints a Chief Justice, acting on the advice of the Prime Minister. The Prime Minister, in turn, has to consult the JSC. If the proposed appointment differs with the recommendation of the JSC, "Parliament shall *be informed* before the appointment is made".[520]

As far as **other judges** are concerned, appointments are sometimes made jointly by the legislature, the executive and the judiciary or judicial commission.[521] In some other instances, judges are

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515 See eg s 61(1) of the Kenya Constitution: "The Chief Justice shall be appointed by the President".

516 Art 235(1) of the 1992 Constitution (my emphasis).

517 S 144 of the 1992 Constitution (my emphasis).

518 S 142(1) of the 1995 Constitution (my emphasis).

519 S 93 of the 1991 Constitution.

520 S 84(1) of the 1980 Constitution (my emphasis).

521 See eg the situation in Cape Verde (art 230 of Constitution Loi i/IV/1992): The Supreme Court of Justice consists of five judges. One is appointed by the President (executive), one is elected by a two-thirds majority in the National Assembly (legislative), and the other three are designated by the Superior Council of Magistrates (judicially). Other examples correspond with the French system. The constitutional Court in

Footnotes continued on next page.

appointed by the executive, on advice of a judicial or quasi-judicial Commission.[522] This draws attention to the composition of the membership of the particular commission, in order to determine the independence which inheres in the decision to appoint.[523]

ii *Terms of appointment*

Ankumah states that almost "all African constitutions guarantee security of tenure".[524] With reference to examples from Uganda[525] and Botswana,[526] she concludes that the practice has been different. Formal guarantees do exist, though. Constitutional Court judges are appointed for a

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CAR consists of three judges named by the President (executive), three named by the National Assembly (legislative), and three elected by their peers (judiciary) (art 71 of the 1995 CAR Constitution).

522 See eg s 61(2) of the Constitution of Kenya: "The puisne judges shall be appointed by the President acting in accordance with the advice of the JSC" and s 123 of the 1993 Seychelles Constitution: "The President appoints the President and judges of the Court of Appeal" from candidates proposed by the Constitutional Appointments Authority".

523 The independence of the body is mostly compromised by executive dominance of its composition: S 68(1) of the Kenya Constitution: Chief Justice, Attorney-General, two judges designated by the President, chairman of Public Service Commission (the five members are all executive appointees); s 153 of the 1992 Ghana Constitution: 18 Members, four are judicial officers nominated by their peers, two represent the Ghana Bar Association, and the Editor of the Ghana Law Reports are independent (a total of seven), while the President appoints four non-lawyers. In terms of art 246(1) of the Cape Verde Constitution: President of Supreme Court of Justice, Superior Judicial Inspector, two citizens appointed by President of country, three citizens elected by National Assembly, two career judges elected by their peers (only four of the nine members can be said to be executive appointees). The President can also dominate the composition of the JSC in Uganda: The President appoints four of the seven members (s 146(2) of the 1995 Constitution). The Attorney-General also serves as *ex office* member (s 146(3)). The Constitutional Appointments Authority of the Seychelles consists only of three members. The President again has ultimate control. He/she appoints one member, as does the Leader of the Opposition. These two members then have to agree on a third member. If the required Consensus is not reached, they submit a list of two or three names to the President, who appoints the third member (art 140 of the 1993 Seychelles Constitution).

524 Ankumah (1991) 3 *RADIC* 5 at 586.

525 The non-renewal of the contracts of judges Udoma and Allen are also cited (at 586). In terms of s 142(3) of the 1995 Constitution judges act for a fixed period of appointment. If no period is fixed, a judge's term may be revoked by the President (acting on the advice of the JSC).

526 The contract appointment of Chief Justice Hayfron was not renewed (at 586).

non-renewable term of nine years in many ex-French colonies,[527] and for a non-renewable term of twelve years in South Africa.[528] Until recently, Ugandan Chief Justices have not had security of tenure.[529] In practice, every regime appointed its own Chief Justice. In one case the very regime that had appointed the Chief Justice was also responsible for his execution.[530]

iii Removal from office

Two related questions arise: "*By whom* may a judge be removed ?" and "*On which grounds* may a judge be removed?". Ideally an independent review body alone should have the final say in the **dismissal of a judge**.[531] It could be in the form of the Court on which the judge sits. It may also be an *ad hoc* tribunal consisting of judges of the same Court.[532] Some countries use a judicial inquiry. The President may appoint an *ad hoc* tribunal to investigate and to make recommendations,[533] or it may be done by a permanent body, such as the Judicial Service Commission.[534] Other states require Parliament to make a recommendation to the President. The **grounds** for dismissal are usually limited to specified grounds such as incapacity,[535] gross

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527 See eg art 71 of 1995 Constitution of Chad.

528 Art 176(1) of the 1996 Constitution.

529 See Republic of Uganda (1994) at 151.

530 *Ibid.* Chief Justice Kiwanuka was abducted from his chambers and murdered in 1972 by the regime of Idi Amin, who had also appointed him.

531 Art 20 of the UN Basic Principles on the Independence of the Judiciary.

532 See eg art 71 of the CAR Constitution: The members of the Constitutional Court may only be investigated or arrested with the authorisation of the Court itself.

533 See s 144(4)(b) of the 1995 Uganda Constitution: In the case of a judge's proposed dismissal, the President must appoint a tribunal consisting of three present of retired judges of the Supreme Court or of "a court of similar jurisdiction". See also s 98 of the 1991 Zambian Constitution: The president may remove a judge only if so advised by a tribunal consisting of three members "who held or have held high judicial office",and who are appointed by the President). Such a tribunal was appointed in January 1997 by President Chiluba. The panel consisted of two supreme Court judges, judge Kapembwa (also chairman of the Zambian Anti-Corruption Commission), and judge Gardner. The third member is a non-Zambian, judge Onyolo of the Malawi Supreme Court (Kunda "Chiluba Suspends Top Judge" (24-30 January 1997) *Mail and Guardian* 15). See also s 87 of the Zimbabwe Constitution.

534 See eg s 84 of the Namibian Constitution.

535 See s 84(2) of the Namibian Constitution.

misconduct,[536] inability to perform functions arising from physical or mental infirmity,[537] incompetence,[538] and misbehaviour.[539] In Chad, magistrates are "irremovable".[540]

It should be noted that the Kenyan decisions in *Kuria* and *Mbacha*[541] were decided in an era when judicial independence was not guaranteed in that country. An amendment to the Constitution in 1988 caused High Court judges to hold tenure "at the pleasure of the President", leaving judicial tenure totally unshielded from "the political whims of government".[542] In 1990 the position was changed, creating a tribunal charged with the discipline of judges.[543] However, the central role of the President remained, as he could appoint the tribunal and make recommendations to it about the removal of judges. This made the new procedure "immediately suspect due to the direct influence exercised by the executive".[544]

iv *Other forms of interference*

Less subtle ways of interfering with the independence of the judiciary are also possible. A well-documented example is the campaign against judge O'Linn of the Namibian High Court, while he was trying a treason case.[545] Leaders of the majority party, SWAPO, insulted and scandalised the judge, branding him as colonial, racist and disloyal. The Minister of Justice issued a statement

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536 *Ibid.*

537 See s 144(2) of the 1995 Uganda Constitution.

538 *Ibid.*

539 See s 98(2) of the 1991 Zambian Constitution. The open-endedness of a term such as this leaves room for the executive to intimidate judicial officers when no real likelihood of dismissal is present. In January 1997 Zambian President Chiluba suspended High Court judge Chanda and appointed a tribunal to probe his conduct (Kunda "Chiluba Suspends Top Judge" (24-30 January 1997) *Mail and Guardian* 15). This followed the judge's critical stance against the government's human rights record.

540 Art 98 of 1995 Constitution.

541 See par 3.4.4(c) below.

542 Kuria and Vazaues (1991) 35 *JAL* 142 at 146.

543 *Ibid.* See s 62 of the Kenyan Constitution.

544 Kuria and Vazauez (1991) 35 *JAL* 142 at 147.

545 See the case report of O'Linn J's *mero motu* consideration of his own recusal *S v Heita* 1992 3 SA 785 (NmH);1992 NR 403 (HC).

reiterating that the independence of the judiciary was sacrosanct. He added that fair comment (in the form of dissenting opinions on terms of imprisonment imposed) should be tolerated as long as it does not amount to undue political influence on judges. The constitutional guarantees and official government stance is clearly at variance with what in fact transpired.

A more subtle method adopted is the appointment of judges in acting capacity only. Judges will be prone to tow the government line if the extension of their terms is continuously assessed. President Chiluba used a rather transparent mechanism when he doubled the salaries of supreme Court judges while they were hearing a challenge against his re-election.[546] Given this indirect pressure and the suspension of one of the judges before the case was heard, it is not surprising that the Court rejected the application that the President be subjected to a DNA test to prove his nationality, and, consequently, his eligibility to be President.[547]

3.4.4.3 Judicial restraint, executive-mindedness and judicial activism

With reference to a rag-bag of experiences in six African states, Africa's mixed record in dealing with the tensions and possibilities in respect of the judicial role is now illuminated. These states are the Gambia, Kenya, Madagascar, Malawi, Tanzania and Zimbabwe.

i The Gambia

A military coup took place in the Gambia in 1994. In November 1994 Momodou Dibba was arrested and held incommunicado.[548] His wife brought an application for his release and for an order granting him bail. The state argued and the Supreme Court found that the Economic Crimes Decree 16 ousted the jurisdiction of courts to hear the matter. Overturning the decision, the Gambian Court of Appeal remarked that the Supreme Court has original jurisdiction to hear any application. Justice Chomba, President of the Court, added: "It may also make any order, issue

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546 Kunda "Chiluba tips justice scales in his favour" (13 -19 June 1997) *Mail and Guardian* 6.

547 See "President Chiluba off the hook in paternity test" (25 - 31 July 1997) *Mail and Guardian* 13.

548 This account is based on the report by Jawo "Appeal Court Reverses Supreme Court Ruling" 23 May 1994 *Daily Observer* (Banjul, The Gambia) 1.

any writ or give any directives for the purpose of enforcing the entrenched rights and freedoms included in sections 13 to 27 of the Constitution." [549]

ii Kenya

Some Kenyan cases exemplify a judicial tendency to abdicate from adjudicating on constitutional claims altogether. In opting for technical and formalistic reasoning, some Kenyan judges have sought to avoid judging the substance of claims brought under the Kenyan Bill of Rights. An excessively positivistic jurisprudential approach clearly facilitates such reasoning, as it presents itself as value-neutral adjudication and a mechanical search for the correct applicable "rule".

This is illustrated by two High Court decisions of the late 1980s, *Kuria v Attorney General* [550] and *Mbacha v Attorney General*.[551] The substantive issue involved in the first of these two cases was whether the right to free movement had been infringed by the government's refusal to return the applicant's passport. He was due to travel to the United States to receive a human rights award. The constitutional application was brought under section 84 of the Kenyan Constitution. Section 84(1) provides that a person who alleges a violation of a provision of the Bill of Rights may apply to the High Court for redress. The operation of the sub-section is made subject to section 84(6), which allows the Chief Justice to make Rules of procedure in relation to such applications. Sitting as a single High Court judge, Chief Justice Miller ruled that section 84 was "inoperative", as no rules had been promulgated under section 84(6). This is clearly wrong, as the wording of the sub-section ("may") is facultative rather than imperative or conditional. Apart from being an incorrect interpretation, the implication is preposterous: "With a stroke of the pen the Chief Justice decided that he held Kenyans to ransom and henceforth whether or not they enforced their fundamental rights was dependent on him".[552] There was indeed no impediment on the Chief Justice to issue such rules there and then, had he cared to.

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549 *Ibid.*

550 High Court of Kenya at Nairobi, Miscellaneous Civil Application No 550 of 1988 (See (1989) 33 *Nairobi Law Monthly*).

551 High Court of Kenya at Nairobi, Miscellaneous Civil Application No 3-6 of 1989 (See (1989) 38 *Nairobi Law Monthly*).

552 M'Inoti (1991) 34 *Nairobi Law Monthly* 17 at 23.

The second case concerned the detention without bail of three men charged with creating a disturbance, arising from a press release signed by them. In the statement, a by-election was alleged to have been rigged. Application was made to the High Court, seeking (*inter alia*) a declaration that the applicant's conduct was justified by their right to free speech.[553] Justice Dugdale, following the decision in *Kuria*, held section 84 to be "inoperative" and dismissed the application. For two reasons the judgment is highly extraordinary. Firstly, judgment was read from a pre-typed ruling without the Court having heard any of the parties. Secondly, and probably resulting from the first: The Court seemed to have overlooked the fact that the application was not only brought under section 84, but also under section 60, which grants "unlimited original jurisdiction in all civil and criminal matters" to the High Court. By dismissing the application in its entirety, the Court has taken "the final step in abdicating from judicial power to enforce the Bill of Rights".[554]

Both cases are extraordinary in their disregard for precedent. Only a few years earlier, the then acting Chief Justice Madan faced a similar preliminary objection in *Odinga v Attorney General*.[555] Referring to authority of the Privy Council, he held that when no rules had been issued pursuant to section 84(6), the Court can be approached through any of the existing procedures.[556] Although it did not overturn the two High Court decisions referred to above, the later judgment by the Court of Appeal in *Kihoro v Attorney General*[557] showed an acceptance to find the government in violation of the Constitution. The highest Court for the first time awarded damages for the breach of constitutional rights.[558]

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553 See eg Vazquez (1990) 20 *Nairobi Law Monthly* 7 at 12.

554 M'Inoti (1991) 34 *Nairobi Law Monthly* 17 at 23

555 Miscellaneous Civil Application No 104 of 1986

556 See Gathii (1994) *Univ of Nairobi Law Jnl* 140 at 141.

557 Civil Appeal No 151 of 1988 (Judgment delivered 17 March 1993). The case was brought under section 84(2) of the Constitution.

558 Gathii (1994) *Univ of Nairobi Law Jnl* 140 at 149.

iii *Madagascar*

In similar vein, recent developments in Madagascar may be mentioned. In terms of the Madagascar Constitution[559] a majority of the National Assembly may request the Constitutional Court to declare that the president of the state be impeached. In 1996 such a resolution was adopted by the National Assembly. The Constitutional Court formally impeached the president on 4 September 1996.[560] This marks a clear acceptance of the Constitutional Court's role in the political life of the nation. The Court based its finding on violations of the Constitution. The incumbent, having become president on 27 March 1993, did not fulfil his constitutional obligation to establish a second chamber (the senate).[561] He also obstructed the legislative process, by not rectifying some fifteen laws within the fifteen days following their adoption by the National Assembly.[562]

iv *Malawi*

An application seeking the release of a detainee was brought before ex-patriate Malawian Chief Justice Skinner in 1977.[563] In terms of the relevant statute, Law (Miscellaneous Provisions) Act[564] the High Court may "whenever its thinks fit, direct that any person ... improperly detained in .... custody .... be set at liberty". Despite this clear provision, the Court denied the application. Its finding was based on English law authority to the effect that it is not the function of a court to act as a court of appeal from a discretionary order for detention made under an act of Parliament.[565] The relevant Malawian statute permitted detention when an official had reasonable grounds to believe that the person's activities were a threat to public security.[566]

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559 S 50.

560 See Bohmer "La Constitution, Plus Efficace que les Putchs" (1996) 226 *Jeune Afrique Economique* 12.

561 *Ibid.*

562 In an advanced democracy such as the USA the procedure was used twice: in 1968, in the case of President Johnson, and in 1974, when president Nixon was removed from office.

563 *Njilu v Republic* 8 MLR 347.

564 S 16(6).

565 *R v Home Secretary, ep Lees* (1941) 1 KB 72.

566 Public Security Regulations (Laws of Malawi Cap (4:02)).

v Tanzania

The Tanzanian courts have a mixed record. One High Court Judge, Mwalusanya J, stands out as an activist.[567] As a result of one of the boldest steps taken by him, he was seriously reprimanded by the Court of Appeal.[568] Section 4 of the Legal Aid (Criminal Proceedings) Act 21 of 1969 provides that an advocate who had appeared in a criminal case is to be remunerated between shs 120 and shs 500 in each case. After completing a case, a certain advocate (Butambala) addressed the "usual letter" to the judge, requesting payment. Mwalusanya J, outraged at the paltry sum prescribed, indicated that he intended construing the section "as modified so as to bring it into conformity with the provisions of the Bill of Right" to read that an advocate shall be "entitled to be remunerated according to the quantity and quality of the work done".[569] A hearing was fixed, at which theAttorney-General and Butambala were represented. The judge found as he indicated earlier, and ordered payment of shs 10 000 to Butambala.

An appeal against this judgment was allowed. The Court of Appeal found that the judge raised an issue at his own initiative, without a constitutional complaint being lodged by anyone. The Court (per Makame JA) expressed a reluctance to make findings of unconstitutionality where institutional or administrative avenues could be followed, stating: "We need hardly say that our Constitution is a serious and solemn document. *We think that invoking it and knocking down laws or portions of them should be reserved for appropriate and really momentous occasions. Things which can easily be taken up by administrative initiative are best pursued in that manner.* If we may be permitted to borrow and extend the term "Ambulance Lawyers" in currency in certain jurisdictions, it is not desirable to reach a situation where we have "ambulance Courts" which go round looking for situations where we can invalidate statutes. We say this deliberately and by design, and we do not think this is conservative in the negative same. We think it is responsible and responsive to the needs of our Society. There is, or should be, plenty of room for judges and magistrates to make

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567 See Coldham (1991) 35 JAL 205, who refers to his important role in the interpretation and the enforcement of the Tanzanian Bill of Rights and describes a "series of bold and controversial judgments" handed down by him.

568 See *Attorney-General v Batambala*, Criminal Appeal 37 of 1991, Court of Appeal of Tanzania at Mwanza, 14 June 1991 (unreported).

569 Quoted in *Attorney-General v Butamasala* above at 1-2 (as typed).

positive and constructive inputs which can influence legislation in the right direction. The old practice where judges and magistrates used to construct such opinions for consideration by their own higher authorities or conferences should continue to be encouraged".[570] In an *obiter dictum*, the Court remarked that the fees provided for under Section 4 "may be grossly inadequate and out of date". It concluded with this ambiguous statement: "We think something positive must be done, unless the public philosophy is that the service advocates render under the law are intended to be taken to be akin to the classical dock briefs of some jurisdictions".[571]

Similarly, the Court of Appeal reversed the judgment by Mwalusanya J in *R v Mbushuu*.[572] Agreeing with the court *a quo* that the death penalty constitutes a *prima face* violation of constitutional rights, the Court held that the inroad is justified in terms of section 30(2) of the Constitution, which stipulates that basic human rights should not lead to the invalidation of laws that ensure "the rights and freedoms of others or the public interest".

However, on other occasions the Court of Appeal did not allow section 30(2) to be used as an instrument to condone human rights violations. The question in *Pumbun v Attorney-General*[573] was whether the requirement that one had to obtain the government's consent to sue it, was constitutional. Violations of the right to have disputes determined by a court[574] and the right to equality[575] were found. In its application of section 30(2) the Court referred with approval to Mwalusanya J's judgment in *Ng'omango v Mwanga*.[576] The Court found no justification in treating individuals on a footing unequal to the State, merely because the State is responsible for the wider interests of society.

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570 *Attorney-General v Butamsala* above at 6-7 (as typed), my emphasis.

571 At 11 (as typed).

572 [1994] 2 LRC 355.

573 Civil Appeal 32 of 1992, Court of Appeal of Tanzania at Arusha, 23 July 1993 (unreported). The judgment was delivered by Kisanga JA, member of the Africa Commission.

574 Art 13.

575 Art 6.

576 Civil case 22 of 1992, High Court at Dodoma (unreported).

vi Zimbabwe

The activist attitude of the judiciary in Zimbabwe adopted in the late 1980s contrasts with some previous precedents.[577] The 1989 decision in *Smith v Mutasa NO*[578] has been described as the "high watermark" in the development of constitutionalism in Zimbabwe.[579] Parliament adopted a resolution that deprived the "Rhodesian" Prime Minister Ian Smith of his salary. The Supreme Court found that this deprivation violated his constitutional right to property.[580] Given the racist remarks Smith had reportedly made and the swell of popular support in favour of the deprivation, the Court's judgment was very bold. Madhuku recounted that the Speaker of the Parliament followed up the decision with a statement to the effect that Parliament will disregard the decision.[581] In an unprecedented move, the five judges involved in the finding issued a public statement. In the statement they stressed that the duty to interpret the Constitution is that of the courts, and even Parliament has to comply with such findings.[582] Eventually, Smith's salary was paid to him.[583]

In *Catholic Commission for Justice and Peace in Zimbabwe v A-G, Zimbabwe*[584] the Zimbabwe Supreme Court altered the death penalty of the applicants, who had been detained on death row, to life imprisonment. This finding was based on section 15 of the Constitution, which outlaws inhuman and degrading punishment. A delay in execution and conditions of detention on death row were held to be unconstitutional. This decision was given on 24 June 1993. Subsequent to that decision, similarly situated applicants approached the Court for a similar declaratory order.[585] The applicants in this subsequent case were sentenced to death in November 1988. After the relevant court papers were filed, but before the appeal was heard, the Constitution of Zimbabwe Amendment (No 13) Act 1993 was adopted (as "the Legislature's remarkably quick response to

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577 See eg Roux (1996) 8 *RADIC* 755 at 763, discussing the case of *Hewlett v Minister of Finance* 1982 1 SA 490 (ZSC).

578 1989 3 ZLR 183.

579 Madhuku (1996) 8 *RADIC* 932 at 933.

580 Guaranteed under s 16 of the Zimbabwe Constitution.

581 (1996) 8 *RADIC* 932.

582 Statement quoted by Madhuku (1996) 8 RADIC 932 at 933.

583 (1996) 8 *RADIC* 932 at 934.

584 1993 4 SA 239 (ZS).

585 *Nkomo v Attorney-General, Zimbabwe* 1994 3 SA 34 (ZS).

the Supreme Court decision"[586] in the *Catholic Commission* case) and took force on 5 November 1993. In terms of this amendment, delay in the execution of a death sentence is not a contravention of article 15 of the Constitution.[587]

A preliminary issue raised by the state was that of *locus standi*: The contention by the state was that the applicants had already petitioned the President for mercy. This petition was however not yet debated or determined by cabinet. Put differently, the requirement that remedies had to be exhausted, was not met. The Court rejected this argument, finding no reason why it should not exercise its role of protecting the rights of individuals. The Court had the following to say about the amendment: " ... it cannot be said that the effect of subsection 5 is, by necessary implication, expressed to be back-dated to destroy the vital fundamental right to obtain the substitution of a sentence of life imprisonment for that of death ...".[588]

The legislature did not respond to the Supreme Court only in this one instance. The judgment in *S v A Juvenile*,[589] which outlawed juvenile corporal punishment, prompted the Constitution of Zimbabwe Amendment (no 11) Act 30 of 1990, which amended section 15 of the Constitution so as to permit corporal punishment to be imposed on male juvenile offenders.[590] The amendment also reacted to the *obiter dicta* regarding corporal punishment in schools[591], by clarifying that moderate

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586 (1993) 3 *Bulletin of Zimbabwean Law* 27.

587 The amendment went further by inserting subs 15(6), which states that contraventions of s 15(1) will not entitle a person to a stay, alteration or remission of sentence (see (1993) 3 *Bulletin of Zimbabwean Law* 27).

588 Per Gubbay CJ, at 41J-42A, Muchechetere J dissenting.

589 1990 4 SA 151 (Z). It should be added, though, that the government commuted the death sentences of all those prisoners whose cases had been finalised before the date of the decision in the *Catholic Commission* case to life imprisonment (Gubbay (1997) 19 *HRQ* 227 at 242). To a certain extent, at least, the Zimbabwean state report submitted to the Commission and examined at its 21st session is correct where is states that the "Executive did not challenge the Supreme Court order, thus accepting the independence of the judiciary in Zimbabwe" (at 61 of report, as typed). Subsequent legislative changes have reversed this decision. Given the executive domination of the legislature, this ultimately amounts to executive interference, though at a much more subtle level.

590 See (1991) 1 *Bulletin of Zimbabwean Law* 19. See also Hatchard ((1991) 35 *JAL* 198), who describes the amendment as a constitutional and penological disaster (at 202).

591 At 161E-I, per Dumbutshena CJ.

corporal punishment may be imposed on children by their parents or by persons *in loco parentis*.[592] In other cases, the legislature acted pre-emptively. For example, the question of the constitutionality of hanging as method of executing the death penalty was raised in *S v Chitiza*. The case was not brought to finality, but the legislature intervened by (re)affirming the constitutionality of hanging as method of execution, by including section 5 in the Constitution of Zimbabwe Amendment (no 11) Act 30 of 1990.[593]

Another example is presented by the circumstances surrounding *S v Gatsi*.[594] In that case, counsel unsuccessfully argued that the delegation of legislative authority to the President in terms of specific legislation was unconstitutionally wide. In terms of the Constitution of Zimbabwe Amendment (no 12) Act 4 of 1993 it is stipulated that Parliament may delegate its legislative powers, presumably to ensure that similar arguments are discouraged in future.[595]

The Supreme Court did not hesitate to censure governmental non-compliance with its finding in *Rattigan v Chief Immigration Officer*.[596] In that case it was held that the freedom of movement of married Zimbabwean women is infringed if their alien husbands are refused permanent residence in Zimbabwe. This decision notwithstanding, the immigration officials still refused residence permits to non-Zimbabwean husbands married to Zimbabwean wives. The following observation was made in *Salem v Chief Immigration Officer*[597] about the disdainful disregard of the Court's judgment by the immigration officer: "Such an attitude by a government official is deserving of censure. It enjoins this Court, so as to ensure that such rights are given effect to, *to issue directives* to the Chief Immigration Officer, *rather than adopt the preferred expedient of merely declaring their existence under the Constitution*".[598] Again, the legislature intervened to reverse and overrule the decisions in *Rattigan* and *Salem*.[599]

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592 (1991) 1 *Bulletin of Zimbabwean Law* 19.

593 See (1991) 1 *Bulletin of Zimbabwean Law* 19.

594 1994 1 ZLR 7 (H), described in (1993) 3 *Bulletin of Zimbabwean Law* 27.

595 *Ibid.*

596 [1994] 1 LRC 343 (Zimbabwe)

597 [1994] 1 LRC 354 (Zimbabwe)

598 At 356g, my emphasis.

599 By the Constitution Amendment (no 14) Act, which amended s 22 (see Gubbay (1997) 19 *HRQ* 227 at 243).

Lest a picture of incessant confrontation is drawn, it should be noted that the legislature has implemented at least some of the Supreme Court judgments. An example is the enactment of the Criminal Laws Amendment Act 2 of 1992. It removed from the statute book punishment with sparse diet and solitary confinement, following a decision to this effect in *S v Masitere*.[600] The implications of numerous other decisions have also been left intact.[601]

3.4.5 Application of the African Charter by domestic courts

What follows is not a comprehensive survey of the application of the Charter by domestic courts. The exposition (sometimes very brief) is based on information gathered from various sources. It covers sixteen countries, extends across sub-regions and includes the major legal systems of the continent.

3.4.5.1 Algeria

Commissioner Rezzag-Bara, from Algeria, noted that the Charter has been incorporated into Algerian law, but that he knew of no cases that have come before the Algerian courts on the basis of the African Charter.[602]

3.4.5.2 Benin

Following the adoption of a democratic constitution in 1990,[603] a Constitutional Court was established in Benin in 1991.[604] Soon thereafter, on 22 May 1991, a trade union leader seized the

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600 1990 2 ZLR 289 (SC), and see (1992) 2 *Bulletin of Zimbabwean Law* 16.

601 See the discussion by Gubbay ((1997) 19 *HRQ* 277), who concludes that "the Declaration of Rights in the Constitution of Zimbabwe has greatly enhanced the rights and freedoms of every person in Zimbabwe" (at 231).

602 Interview in (1996) (Oct - Dec) *AFLAQ* at 45.

603 The Constitution of 11 December.

court.[605] He claimed that legislation of 26 September 1988 contravened articles 17 and 22 of the Beninois Constitution, as well as article 7(1) of the African Charter. In its very brief decision (of less than two typed pages), citing article 4(1) (a) to (c) of the African Charter, the Court found that the "Loi" conformed with the Constitution.

In a subsequent case, one Madame Bagri invoked the right to work, as guaranteed in both the Beninois Constitution and the African Charter,[606] before the Constitutional Court.[607] The Court, remarking that the complaint related to the application of rules of the "Statuts de la Fonction Publique", found that the actions taken to dismiss Mme Bagri were not unconstitutional.

The first cases in which the Constitutional Court declared government action unconstitutional, date from 1994.[608] In one case a decree by the Minister of the Interior, Security and Territorial Administration had to be scrutinised for constitutional consistency.[609] The decree declared that only one developmental association shall be registered per administrative entity. Associations that had previously existed and whose applications for registration had been refused, had to cease all activities and be liquidated.[610] In making this decree, the Court observed, the Minister had encroached upon the domain reserved to the law in terms of the Beninois Constitution and article 10 of the African Charter.[611] Article 10 of the Charter declares that "every individual shall have the right to free association provided that he abides by the law".

Commentators have speculated about the interpretation of the term "provided that he abides by the law". Some have criticised the Charter as draconian, as they regarded every legal response by a government as "law". Others have suggested that "law" should and could be interpreted

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604 Pursuant to Loi 91-009 of 4 March 1991, "Loi Organique sur la Cour Constitutionnelle".

605 Decision 002/ of 26 June 1991.

606 Specifically article 13 (2), which guarantees equal access to the public service.

607 Decision DDC-03-93.

608 Based on a personal perusal of the Court's records in Cotonou, Benin, during April 1995.

609 Decision DCC 16-94 of 27 May 1994.

610 Decree 260/ MISAT/ DC/ DAI/ SAAP of 22 November 1993.

611 The minister "a empiété sur le domain reservé a la loi par articles 25 et 98 de la Constitution et 10 de la Charte Africaine des Droits de l'Homme et des Peuples".

restrictively, requiring an essential minimum moral content before government fiat becomes elevated to law. It is quite clear that the latter approach was adopted by President of the Court Elisabeth Pognon and her five male colleagues. The mere fact that a minister has issued a decree does not mean that the right to freely associate in article 110 of the Charter becomes impossible to invoke. According to the Beninois Constitutional Court there is "a domain reserved to law", upon which an executive may not encroach. The implications of the decision should not be overstated. It was an executive law making activity that came under scrutiny, not an ordinary law of a law making body, such as Parliament. The meaning of "law" in French constitutionalism must also be taken into account. The decision says that "loi" should be distinguished from a "arrêté".

In another case decided by the Beninois Constitutional Court in 1994, the Court heard an application to have certain appointments to the Communications Authority declared unconstitutional.[612] Interfering to a very limited extent with the executive decree, the Court referred to the African Charter as an integral part of the Constitution of 11 December 1990.[613] Article 10 of the African Charter was cited as an interpretative tool, providing confirmation of the freedom to associate set out in article 25 of the Beninois Constitution.

In 1993 four cases were heard by the Constitutional Court. In none of these reference is made to the African Charter. One finding of partial inconsistency with the Constitution was handed down. Of the 14 cases adjudicated in 1994, by way of contrast, seven contain some reference to the African Charter.[614] Findings of unconstitutionality were made in six of these instances. From this one may not only deduce a tendency towards greater judicial activism, but also a clear commitment to regional human rights realisation.

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612 Decision DCC 10-94 of 9 May 1994.

613 "partie intègrante".

614 Cases DDC 05-94 (art 13(2) of the African Charter), DDC 06-95 (art 13(2)), DDC 09-94 (art 13(2)), DDC 10-94 (art 10), DDC 11-94 (art 7), DDC 16-94 (art 10) and DDC 18-94 (art 13(2)). Based on a perusal of records in the Constitutional Court Library, Cotounou, Benin, during 1995.

3.4.5.3 *Botswana*[615]

The question whether discrimination based on sex was unconstitutional arose in the case *Attorney-General of Botswana v Unity Dow*.[616] The lower court relied on international human rights treaties ratified by Botswana to inform its conclusion that the omission of the word "sex" from the list of prohibited grounds in the Botswana Constitution does not imply that discrimination based on sex is constitutionally tolerable. One of these instruments was the African Charter. In article 2 the Charter guarantees the enjoyment of the rights recognised therein without distinction on the basis of, amongst other factors, sex. At the Court of Appeal, the appellant raised an objection against the lower court's reliance on these international instruments. Amissah JP rejected these objections. However, the international norms were applied not as "enforceable rights", but as "an aid to the construction of an enactment" such as a "difficult provision of the Constitution".[617] In relation to the African Charter, Amissah JP made the following observations: "Botswana is a signatory to this Charter. Indeed it would appear that Botswana is one of the credible prime movers behind the promotion and supervision of the Charter".[618] The judge conceded that the Charter is not binding law "as legislation passed by its Parliament", but that domestic legislation should be interpreted so as not "to conflict with Botswana's obligations under the Charter".[619]

The facts of the case concerned the constitutionality of provisions in the Citizenship Act of 1982, in terms of which children had to adopt the nationality of their fathers. This meant that if a female Botswana citizen married a non-Botswana citizen, their children would not have Botswana nationality. It was assumed that women would "follow their husbands".[620] It was argued that this provision amounted to discrimination against women and was in conflict with article 15 of the Botswana Constitution.[621] However, the state contended that article 15 was not applicable, as it did

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615 See in general the discussion by Lindholt (1997) ch 6 and 7.

616 [1992] LRC (Const) 623.

617 *Ibid.*

618 At 656d-e.

619 At 656h-i.

620 On the investigation of the Botswana Law Reform Commission and its conclusions, see Lindholt (1997) at 199.

621 Art 15 prohibits laws which are discriminatory "either in itsef or in its effect" (art 15(1)).

not refer to "sex" or "gender" as explicit grounds for non-discrimination. Basing itself on international law obligations of the state, including article 2 of the African Charter, a majority of the Botswana Court of Appeal found a violation of the Botswana Constitution.[622]

As a direct consequence of this decision,[623] the Botswana Parliament amended the Citizenship Act, so that the relevant section now provides that a person "shall be a citizen of Botswana ... if, at the time of his birth, his father *or mother* was a citizen of Botswana.[624] The Court of Appeal continued its progressive improvement of women's rights when it delared unconstitutional regulations which forced female students to leave college when becoming pregnant.[625] This sequence of events stands as testimony to the undeniable effect of global and regional human rights norms in a domestic legal system.

3.4.5.4 Cape Verde

For all its laudable incorporation of the Charter and the fact that it enjoys direct applicability in Cape Verde, no cases invoking the Charter as such could be cited by commissioner Duarte when questioned about the subject.[626]

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622 Art 2 of the Charter includes "sex" as one of the grounds on which the guarantees of the Charter may not be denied to any individual. The other grounds are "race, ethnic group, language, religion, political or any other opinion, national and social origin, fortune, birth or other status". The list in the Botswana Constitution is restricted to "race, tribe, place of origin, political opinions, colour or creed" (art 15(3)).

623 Although the amendment came several years after the *Unity Dow* judgment, it is clear from the memorandum accompanying the amendment that it was adopted in reaction to the judgment (Memorandum on Citizenship (Amendment) Bill no 9 1995, which quotes the *Dow* case). See Lindholt (1997) at 200. For a background of pressure on the government, see also Quansah (1995) 39 *JAL* 97 at 102.

624 Emphasis added.

625 *Student Representative Council, Molepolole College of Education v Attorney General of Botswana*, Civil Appeal 13 of 1994, judgment delivered on 31 January 1995, unreported. For a case discussion, see Quansah (1995) 39 *JAL* 97. See also Lindholt (1997) at 209.

626 Answer to a question during interview, see (1996) (Oct - Dec) *AFLAQ* at 14.

3.4.5.5 Congo

Commissioner Ondziel-Gnelenga, herself a lawyer appearing in cases in her home country, Congo, sketched the following bleak picture: "Personally, I have invoked in some cases, certain provisions of the Charter, but this has only served as additional information to the cases in question. The judges and magistrates have not taken into account these provisions when making decisions or formulating opinions".[627]

3.4.5.6 Ghana

In an article published in 1991, the Ghanaian represented on the African Commission, professor Dankwa, made a plea for the incorporation of international human rights treaties into domestic law in Ghana.[628] He lamented the fact that none of the nine international treaties ratified by Ghana had been made part of local law. This had the effect that the provisions of these instruments could not be asserted in Ghanaian courts. He proceeded to indicate the practical implications of one of these instruments, the African Charter. He argued that PNDC Law 4 (the Preventative Custody Law, 1982) and PNDC Law 91 (*Habeas Corpus* (Amendment) Law, 1984) cannot stand in the face of article 6 of the African Charter.[629] Furthermore, he expressed his doubts whether PNDC Law 211 (The Newspaper Licensing Law) "can stand by virtue of the combined effect of Articles 9 and 7(1) of the same Charter".[630] This decree provides that anyone intent on publishing a newspaper in Ghana must first obtain a license, which may be withdrawn at the discretion of the PNDC Secretary for Information. The legislation does not provide for review of or appeal against this decision.

The Ghana Public Order Decree 1972 came under scrutiny in *New Patriotic Party v Inspector-General of Police, Accra.*[631] The measures of this Decree included giving the Minister of the

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627 Interview in (1996) (Oct - Dec) *AFLAQ* at 34.

628 Dankwa (1991) 3 *ASICL Proc* 57.

629 *Ibid.*

630 Dankwa (1991) 3 *ASICL Proc* 57 at 63.

631 (1993)1 NLPR 73, suit 3/93, 30 November 1993.

Interior the power to prohibit the holding of public meetings or processions for a specific period in a specified area,[632] and a requirement that any meeting to celebrate a traditional custom shall be subject to prior permission.[633] The Supreme Court of Ghana found section 7 to be in violation not only of the Ghanaian Constitution,[634] but also of the African Charter.[635] The Chief Justice (Archer) added the following remarks to the leading judgment of Hayfron-Benjamin J: "Ghana is a signatory to this African Charter and Member States of the Organisation of African Unity and parties to the Charter are expected to recognise the rights, duties and freedoms enshrined in the charter and to undertake to adopt legislative and other measures to give effect to the rights and duties. I do not think the fact that Ghana has not passed specific legislation to give effect to the Charter, the Charter cannot be relied upon. On the contrary, Article 21 of our Constitution has recognised the right to assembly mentioned in Article 11 of the African Charter".[636] This does not necessarily form a pattern. In another decision handed down on the same day, *New Patriotic Party v Ghana Broadcasting Corporation*,[637] pertaining to the right to information, no reference is made to the African Charter.[638]

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632 S 7.

633 S 8.

634 S 21, which guarantees freedom of assembly including freedom to take part in processions and demonstrations.

635 S 11, dealing with freedom of assembly.

636 At 82.

637 Writ 1/93, Supreme Court, judgment of 30 November 1993, per Archer CJ, Francois J, Sekyi J, Aitkins J, Wirebu J, Bamford-Addo J and Hayfron-Benjamin J.

638 The Ghanaian Court referred to the fact that the Constitution demands that a broad and liberal spirit of a democratic and pluralist society should prevail in the country (at 11 of typed judgment). Art 21(1)(f) of their Constitution provides that all persons have the right to information, subject to such qualifications as are necessary in a democratic society. The Court chose to seek the spirit referred to in Ghana law, rather than in art 9(1) or 9(2) of the Charter. Art 9(1) of the Charter grants an unqualified right to receive information. Art 9(2) has a claw-back clause: Everyone may express their opinions "within the law". It is perhaps understandable that the Court did not seek to find the embodiment of a democratic and pluralist spirit in these two provisions of the Charter.

Dankwa finds reason for optimism about the increased role of the Charter in the fact that a high-ranking government official, the Attorney-General, referred to a provision of the Charter during a case.[639]

3.4.5.7 Malawi

Through a process of negotiations, a new constitution was adopted in Malawi in 1994, and signed into law by the President in 1995. Not long before this, under the previous constitutional dispensation, the rare occasion of the African Charter being invoked, presented itself to the Malawi Supreme Court of Appeal. Malawi had already ratified the African Charter on 17 November 1989.[640]

In this case, *Chafukwa Chichana v The Republic*, the appellant was sentenced after a conviction for the importation and possession of seditious materials.[641] It was argued that certain of the appellant's fundamental rights, enshrined in the Universal Declaration, had been violated by the State. The Court agreed, holding that the content of the Universal Declaration had been incorporated into Malawian law by virtue of the 1966 Constitution.[642]

Counsel for the applicant further argued that the applicant's rights were also protected under the African Charter, to which Malawi was a party. No specific legislation had been passed to incorporate the Charter into domestic law. Banda CJ rejected this contention: "This Charter, in our view, must be placed on a different plane from the UN Universal Declaration of Human Rights. Whereas the latter is part of the law of Malawi the African Charter is not. Malawi may well be a signatory to the Charter but until Malawi takes legislative measures to adopt it, the Charter is not

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639 Observation made during interview, see (1996) (Oct - Dec) *AFLAQ* at 11.

640 On the potential effects of the Charter on Malawi law, see Lindholt (1997) ch 6 and ch 7.

641 Discussed by Maluwa (1995) 3 *AYBIL* 53 at 65-69.

642 The 1966 Constitution, then in force, provided in s 2(1)(iii) that the "Government and the people of Malawi shall continue to recognise the sanctity of the personal liberties enshrined in the United Nations' Universal Declaration of Human Rights...".

part of the municipal law of Malawi and we doubt whether in the absence of any local statute incorporating its provisions the Charter would be enforceable in our Courts".[643]

Tiyanjana Maluwa agrees with this conclusion. He points out that the Court did not in any depth address the relevance of international law in protecting and interpreting human rights domestically. He suggests a different line of argument, not based on the constitutional incorporation of the Universal Declaration into Malawian law, but on it having become binding customary international law. In so far as the rights in the African Charter resemble the Universal Declaration (as binding customary international law), they may be applied by municipal courts. As Maluwa concedes, this argument remains premised and dependent on the status of the Universal Declaration - not the African Charter.[644] It appears as if a similar conclusion would have been reached under the provisions of the 1995 Constitution.[645]

3.4.5.8 Namibia

Namibia ratified the Charter on 30 July 1990, not long after its independence on 21 March 1990. The Namibian High Court in *Kauesa v Minister of Home Affairs*[646] referred to various articles of the African Charter.[647] Quoting articles 143[648] and 144[649] of the Namibian Constitution, the Court made the following general statement: "The Namibian government has, as far as can be established, formally recognised the African Charter in accordance with art 143 read with art 63(2)(d) of the Namibian Constitution. The provisions of the Charter have therefore become

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643 Cited by Maluwa (1995) 3 *AYBIL* 53 at 68.

644 See (1995) 3 *AYBIL* 53 at 68-69.

645 See s 211(1) of the 1994 Constitution.

646 1995 1 SA 51 (NmHC); [1994] 2 LRC 263 (Namibia, HC).

647 Noting that the provision for non-discrimination in the African Charter does not allow for any exception (at 86D; 302 I).

648 "All existing international agreements binding on Namibia shall remain in force, unless and until the National Assembly, acting under article 63(2)(d) hereof, otherwise decide".

649 "Unless otherwise provided by this Constitution or act of parliament, the general rules of public international law and international agreements binding on Namibia under this Constitution shall form part of the law of Namibia".

binding on Namibia and form part of the law of Namibia in accordance with art 143, read with art 144 of the Namibian Constitution".[650] On this basis the Court rejected arguments that certain hate speech provisions and a regulation criminalising unfavourable comment about the armed forces were unconstitutional.[651]

3.4.5.9 Nigeria

It is ironic, but perhaps predictable, that the clearest illustration of the potential effect of the African Charter in domestic law is found in a military regime at a time of severe repression.[652] The country is Nigeria, and the time is the period following the nullification of the results of the elections held on 12 June 1993.[653]

Nigeria ratified the African Charter on 22 June 1983. It subsequently incorporated its content into domestic law by way of the African Charter on Human and Peoples' Right (Ratification and Enforcement) Decree, which now forms chapter 10 of volume 1 of The Laws of the Federation of Nigeria.

During the previous military regime some judges took tentative steps to ameliorate the eroding impact of military rule on fundamental rights. Eleven youths were convicted and sentenced to death by an "armed robbery tribunal" in 1988. The fundamental issue to be decided by Longe J in *Garba v Lagos State Attorney-General*[654] was whether the jurisdiction of the High Court of Lagos

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650 At 86 G - H; 303 d. In its decision reversing the court *a quo's* finding the Namibian Supreme Court did not make reference to the African Charter: *Kauesa v Minister of Home Affairs* 1996 4 SA 965 (NmSC).

651 S 11(1)(b) of the Racial Discrimination Prohobition Amendment Act and Reg 58(32) made in terms of the Police Act (RSA) 7 of 1958.

652 This fact is also reflected in the proliferation of "non-official" human rights case reports, such as those in the *Jnl of Human Rights Law and Practice.*

653 The Nigerian courts were also approached on bases other than the African Charter. In some judgments, judges showed a willingness to stand up to executive conduct, such as judge Akinsanya in *Abiola v National Electoral Commission* (1993) 1 NLPR 42, in which the High Court of Lagos State ruled that the previous president Babangida lacked the authority to annul the elections and instate an interim government.

654 Suit ID/599M/91, judgment of 31 October 1991; see Falana (1994) at 7 (of typed manuscript).

State was ousted by section 10 (3) of the Robbery and Firearms (Special Provisions) Decree 5 of 1984, which reads as follows: "The question whether any provision of Chapter VI of the Constitution of the Federal Republic of Nigeria 1979 has been, is being or would be contravened by anything done in pursuance of this Decree shall not be inquired into in ... any Court of Law". As the applicants relied on the right to life contained in that chapter of the Constitution, the respondent argued that the Court lacked jurisdiction to hear the matter. In deciding that it had jurisdiction, the Court referred to the African Charter: "The African Charter on Human and Peoples' Rights, of which Nigeria is a signatory is now made into our law by African Charter Act 1983, cited by the learned counsel for the applicants. Even if its aspect in our Constitution is suspended or ousted by any provision of our local law, the international aspect of it cannot unilaterally be abrogated."

This approach was not adopted consistently by all Nigerian judges. In *Wanab Akanmu v Attorney-General of Lagos State*[655] the Court rejected the applicants' request for an order restraining the government from carrying out their execution pending the determination of a communication directed to the African Commission. In this instance, the Court held that Decree 5, quoted in the preceding paragraph, precluded it from considering the application. The Court rejected the contention that the African Charter was part of and enforceable in Nigerian law, remarking as follows: "As for the African Charter on Human Right (sic), this cannot override the Laws of the Land. ... The applicants are Nigerians residing in Nigeria. They were charged in Nigeria for Armed Robbery and were convicted and sentenced to death by a Competent Tribunal on the Law of the Land".[656]

In 1993 the following facts came before the High Court of Lagos State in *The Registered Trustees of the Constitutional Rights Project v President of Nigeria*:[657] Six persons had been convicted and sentenced to death by a "Disturbance Tribunal", which was set up pursuant to the Civil Disturbances (Special Tribunal) Decree 2 of 1987. The state wanted to proceed with their execution. An application had at that stage already been lodged on their behalf with the

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655 Suit M/568/91, judgment of 31 January 1992, High Court of Lagos State, unreported.

656 Quoted in Lester in *Developing Human Rights Jurisprudence* vol 4 (1992) 136 at 152.

657 Civil suit M/102/92, judgment of 5 May 1992, unreported.

Commission.[658] In that application the contention was that the applicants had not received a fair trial, as required by the African Charter. The application before the domestic court was directed at restraining the government from carrying out the applicants' execution pending the final determination of the communication by the Commission. When the Commission finally decided the case (in October 1994, at its 16th session), it found that articles 7 and 26 of the Charter had been violated and recommended that the complainants should be freed.[659] This must stand as one of the clearest examples of how the Charter (and the Commission) has materially affected the destiny of Africans, in that the death sentences have not been enforced.[660]

In the High Court of Lagos the respondents argued that the jurisdiction of the Court to hear the application was excluded by virtue of certain decrees. Section 8 (1) of the Civil Disturbances (Special Tribunal) Decree 2 of 1987 provides: "The validity of any decision, sentence, judgment, conformation, direction, notice or order given or made as the case may be or any other thing whatsoever done under this Act shall not be inquired into in any court of law". For the avoidance of doubt Decree 55 of 1992 was also invoked in their argument. Section 3 (1) of that decree determines that no "civil proceedings shall lie or be instituted in any court or tribunal for or on account of or in respect of any act, matter or thing done or purported to be done under or pursuant to this Decree by or on behalf of the Military Government". The respondent argued that the African Charter by being incorporated into domestic law, lost its status as international law. The Court (per Onalaja J) held that the Human and Peoples' Rights (Ratification and Enforcement) Act [661]is also a "decree" for the purposes of Decree 55 of 1992, but "it is a Decree with a difference being a Decree to enable effect to be given in the Federal Republic of Nigeria to the African Charter".[662] The African Charter is a treaty which has been ratified by the Nigerian government.

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658 See Communication 87/93 (*Constitutional Rights Project (in respect of Lekwot and six others) v Nigeria*) and the discussion in par 3.3.3 above.

659 See Communication 87/93 (*Constitutional Rights Project (in respect of Lekwot and others) v Nigeria*).

660 At its 17th session the Commission decided to bring the file to Nigeria for a planned mission "in order to make sure that the violations have been repaired". This mission took place from 7 to 14 Match 1997, but the mission report has not been submitted yet (see Tenth Annual Activity Report at paras 21, 22).

661 Cap 10 of the laws of the Federation of Nigeria 1990.

662 At 40 of the typed judgment.

Since the government is still a member of the OAU, chapter 10 of the federal laws is binding on the government. Assuming that the Human and Peoples' Rights (Ratification and Enforcement) Act is an ordinary decree, the Court is presented with a conflict between it and the ouster clauses. With reference to existing case-law, the Court applied the principle that international law obligations "prevail over the rules of domestic law when they are incompatible with the latter".[663] In the light thereof, the Court found that its jurisdiction was preserved by the African Charter, as provisions of the Charter override the ouster clauses.

The judge introduced his judgment with a statement on the significance of the decision: "This is a case of great constitutional landmark and significance not only for Nigeria but also for member states of OAU as it touches the interpretation of African Charter due to paucity of cases that involved the said charter. This case opens a novel point with its uniqueness in the approach for the enforcement of the African Charter ... with the guide to the courts of member states where there is conflict between the municipal or domestic law of the member state and the said charter... ."[664] This illustrates the leading role of the Nigerian judiciary in making the Charter guarantees effective.

In *Akinnola v General Babangida*[665] the same Court (per Hunponu-Wusu J) went a step further. The applicant in this case sought an order declaring the Newspaper Decree 43 of 1993 to be in violation of the 1979 Nigerian Constitution and contrary to the African Charter. In terms of the Newspaper Decree newspapers had to comply with new registration guidelines. The applicant argued that these guidelines infringed the applicant's freedom of expression, as guaranteed in both the 1979 Constitution and the African Charter.

Again the state party raised jurisdiction as a preliminary objection, arguing that enactments in the Constitution Suspension and Modification Act (similar to those in the *Constitutional Rights Project case supra*) ousted the jurisdiction of the courts. The Court relied on the judgment previously given by Onalaja J, extending it to apply to cases brought under the Nigerian

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663 At 44 of the typed judgment.

664 At 1 of the typed judgment.

665 Judgment reprinted in (1994) 4 *Jnl of Human Rights Law and Practice* 250.

Constitution and the African Charter in the domestic courts: "Since the Courts have held that the African Charter is like an enactment of the Federal Government like a decree, it follows that if there is a conflict between an enactment ousting the jurisdiction of the Court and another which does not, the Court should lean more on the one that preserves the jurisdiction of the Court." The judge also referred to the proceedings of the Judicial Colloquium held in Bangalore in 1988, in which Chief Justice Helfen of Pakistan said: "The International human rights norms are in fact part of the constitutional expression of liberties guaranteed at the national level. The domestic Courts can assume the task of expanding these liberties".

Counsel for the state in *Nemi v The State*[666] argued that there was a lacuna in Nigerian law for the enforcement of the rights in the Charter. A particular enforcement procedure was enacted in the 1979 Constitution[667] to provide for a process of enforcing fundamental rights guaranteed in that Constitution. Similar provision was not made in the African Charter or the Ratification and Enforcement Act. Rejecting this argument, Bello CJ continued: "Since the Charter has become part of our domestic law, the enforcement of its provisions like all our other laws fall within the judicial powers of the courts as provided by the Constitution and all other laws relating thereto".[668]

Another case in which reference was made to the African Charter was *Agbakoba v Director State Security Services*.[669] The passport of the applicant in this case was impounded by a state security official without any reasons being given. The High Court held that a passport was the property of the government and could be withdrawn at any time. Allowing an appeal against the judgment, the Court of Appeal found that the seizure of the passport constituted a violation of the right to freedom of movement. The Court observed that the right (particularly the right not to be refused entry to or exit from one's country) was recognised in the African Charter.

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666 [1994] 1 LRC 376 (Nigeria, SC)

667 S 42 of the 1979 Constitution.

668 At 385 c-d.

669 1994 6 NWLR 475; see also [1996]1 CHRD 89.

In two cases dealing with the occupation and closure of newspaper premises the government was found to have violated the Constitution.[670] Although the findings were not based on the African Charter, both applications made reference to the violation of rights protected in the Charter. Commissioner Umozurike, when interviewed about the domestic invocation of the Charter, referred to the "latest case *Fawehnmi v Attorney-General*" in which it was held "in an important *ratio decidendi* that the African Charter has priority over any decree by government and cannot be excluded from application by decree".[671]

3.4.5.10 Senegal

When questioned about the Charter's domestic application in Senegal, commissioner Ndiaye referred in vague terms to "a decision stating that the African Charter and international treaties have direct applicability in the courts of Senegal".[672]

3.4.5.11 South Africa

In the second judgment delivered by the South African Constitutional Court, it declared capital punishment unconstitutional.[673] In his leading judgment, Chaskalson P made foot-noted reference to the African Charter, emphasising that it prohibits the arbitrary deprivation of life.[674] O'Regan J referred to the same provision of the Charter, contrasting it with the open-ended formulation of the interim Constitution, which protected life as such.[675]

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670 *Punch Nigeria Ltd v Attorney-General* (1996) 1 CHRD 46 and *Concord Press of Nigeria Ltd v Attorney-General* (1996) 1 CHRD 47.

671 Interview reported in (1996) (Oct - Dec) *AFLAQ* at 47.

672 See (1996) (Oct - Dec) *AFLAQ* at 39.

673 *S v Makwanyane* 1995 3 SA 391 (CC).

674 At par 36, n 52.

675 At par 324, n 221.

Langa J went a step further in *S v Williams* when he delivered the Court's judgment declaring juvenile whipping unconstitutional.[676] Article 5 of the African Charter helped him substantiate the assertion that section 11(2) of the interim Constitution corresponds with most international human rights instruments.[677] However, the judge seemed to have gone beyond referring to the Charter as an interpretative tool when he mentioned that Mozambique had abolished corporal punishment in 1989 "in accordance with the country's obligations under the African Charter…".[678]

A critical issue to be decided in *Ferreira v Levin NO*[679] was how the right to freedom in the interim Constitution had to be interpreted.[680] Relying on, amongst others, the philosophers Berlin and Kant, as well as Canadian, American and German case-law, Ackermann J opted for a broad interpretation of the right. Chaskalson P, with whom the majority agreed, adopted a narrow interpretation. Support for an interpretation limiting "freedom and security of the person" to a context relating to detention or other physical constraints was found in public international law, including the African Charter.[681] In another case, involving possession of indecent material, Mokgoro J found the African Charter clear in its provision for the right to receive information prior to transmitting it.[682]

A judge of the former Supreme Court, McLaren J, in dealing with the interpretation of the right to dignity in the interim Constitution,[683] referred to a text book which makes reference in this context to the African Charter.[684]

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676 1995 3 SA 632 (CC).

677 At par 21, n 24.

678 At par 40, n 58.

679 1996 1 SA 984 (CC).

680 S 11(1).

681 At par 170.

682 See *Case v Minister of Safety and Security* 1996 3 SA 617 (CC) at par 29, n 41, referring to art 9 of the African Charter.

683 S 10.

684 The text is Cachalia *et al Fundamental Rights in the New Constitution* (at 33-34). See also *Potgieter v Kilian* 1996 2 SA 276 (N) at 314 D-E. See further the reference to the African Charter in *Shabalala v Attorney-General, Transvaal* 1995 (SA 608 (T), where Cloete J declined to look at any foreign or international law (at 642 J).

The relative minimal impact of the African Charter may be explained by the fact that South Africa was a non-state party until July 1996 when she acceded to the African Charter.[685] This event did not enjoy extensive media coverage. Very few South Africans would have realised that this had taken place. The minimal impact of the African Charter in South Africa since South African ratification remains disappointing. This is particularly striking in the *Certification of the Constitution of the Republic of South Africa* case,[686] where regular reference is made to other constitutions and international instruments. The African Charter is mentioned twice: once as part of some background on developments in international human rights,[687] and once to support the proposition that a right to intellectual property is rarely recognised in regional human rights conventions.[688]

In other cases, extensive reference to international law is contrasted with silence about the African Charter, its provisions and potential scope and application.[689] The Charter may have been an interpretative tool, or more, in at least some of these decisions.

3.4.5.12 Tanzania

Judicial activism and Mwalusanya J are synonymous in Tanzania. His name reappears in the Tanzanian cases in which the African Charter were referred to in case-law.[690]

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685 See eg *AZAPO v President of RSA* 1996 4 SA 671 (CC), which dealt with a constitutional challenge to the amnesty provisions in the Promotion of National Unity and Reconciliation Act, 34 of 1995.

686 See eg 1996 3 SACLR 17 (CC).

687 Par 50, n 46 of the judgment.

688 Par 75, n 67 of the judgment.

689 See eg *Brink v Kitshoff* 1996 1 SACLR 69 (CC), *Dispute Concerning Constitutionality of Certain Provisions of Gauteng Scool Education Bill* 1996 2 SACLR 117 (CC) and *AZAPO v President of RSA* 1996 4 SA 671 (CC).

690 An individual judge **can** sometimes make a difference. Mwalusanya J is the force behind a turning tide. In Australia, Murphy J started making sustained suggestions that the Australian Constitution embodies a range of "implied freedoms". See Blackshield *et al Australian Constitutional Law and Theory* (1996).

Equality of the sexes was the issue in *Ephrahim v Pastory,*[691] a decision of the Tanzanian High Court. A woman inherited clan land from her father. In old age, the woman decided to sell the land. The willing buyer happened to be someone not belonging to the clan. A male clan member filed a suit to declare the sale void, as females do not have the power to sell clan land. The relevant codification of customary law (of the Haya group) indeed provides that clan land shall not be sold by female members of the clan. In terms of an amendment to the Tanzanian Constitution, a Bill of Rights was introduced.[692] In terms thereof a court must construe existing law "as may be necessary to bring it into conformity with" the provisions of the Bill of Rights.[693] Article 13(4) of the Bill of Rights prohibits discrimination against women. In interpreting article 13(4), the Court referred to similar provisions in the Universal Declaration of Human Rights and the CCPR, and to the fact that Tanzania ratified the Convention on the Elimination of All Forms of Discrimination against Women. Mwalusanya J continued: "That is not all. Tanzania has also ratified the African Charter on Human and Peoples' Rights which in art 18(3) prohibits discrimination based on account of sex ... The principles enunciated in the above-named documents are a standard below which any civilised nation will be ashamed to fall. It is clear ... that the customary law under discussion flies in the face of our Bill of Rights as well as the international conventions to which we are signatories".[694] As a result, he found the Haya customary rule to be inconsistent with the Bill of Rights and ordered that the Constitution should prevail.[695]

In *DPP v Pete*[696] the highest Tanzanian Court, the Court of Appeal, heard an appeal against a judgment of Mwalusanya J.[697] Sub-sections 148(4) and 148(5) of the Criminal Procedure Act 1985 were declared unconstitutional by him in the lower court. The first sub-section provided that bail had to be denied if the Director of Public Prosecutions issued a certificate to the effect that the release of a detained person would be prejudicial to the safety of the Republic. The second made it

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691 [1990] LRC (Const) 757.

692 By means of the Constitution (Consequential, Transitional and Temporal Provisions) Act (16 of 1984), which took effect in March 1988.

693 S 5(1) of Act 16 of 1984.

694 At 763 a - c.

695 At 770 c.

696 [1991] LRC (Const) 553.

697 For a case comment, see Coldham (1991) 35 *JAL* 205.

impossible for courts to grant bail in respect of certain categories of offences, including offences for which possessing a firearm was an element. In the course of interpreting the Bill of Rights, the Court found support for its interpretation in the African Charter: "Tanzania signed the Charter on 31 May 1982 and ratified it on 18 February 1984. Since our Bill of Rights and Duties was introduced into the Constitution under the Fifth Amendment in February 1985, that is, slightly over three years after Tanzania signed the Charter, and about a year after ratification, account must be taken of the Charter in interpreting our Bill of Rights and Duties".[698] The court referred to the Preamble of the Charter and concluded: "It seems evident in our view that the Bill of Rights and Duties embodied in our Constitution is consistent with the concepts underlying the African Charter on Human and Peoples' Rights as stated in the Preamble to the Charter".[699] The Court consequently affirmed the decision of the lower court, holding that provisions of the Criminal Procedure Act violated the individual's right to personal freedom.[700]

3.4.5.13 Togo

According to commissioner Amega, the provisions of the Togolese Constitution correspond with the provisions of the Charter. He was not aware of any cases in which the Charter had been invoked by the Togolese courts.[701]

3.4.5.14 Tunisia

Interviewed in 1996, commissioner Ben Salem could not refer to any cases in which courts in Tunisia had relied on or referred to the Charter.[702]

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698 Per Nyalali CJ, Makame and Ramadhani JJA, at 565 g.

699 At 566 b.

700 At 568 e - f. The violation could also not be "saved" under s 30 or 31 in the Bill of Rights, because the provision was overbroad (at 572).

701 See (1996) (Oct - Dec) *AFLAQ* at 42.

702 Interview contained in (1996) (Oct - Dec) *AFLAQ* at 37.

3.4.5.15 Zambia

Counsel in *Longwe v Intercontinental Hotels*[703] referred to international human rights documents, including the African Charter. The Zambian High Court (per Musumali J) made some remarks about the effect of international treaties ratified by Zambia: "It is my considered view that ratification of such documents by a nation state without reservations is a clear testimony to the willingness by that state to be bound by the provisions of such a document. Since there is that willingness, if an issue comes before this Court which would not be covered by local legislation but would be covered by such international document, I would take judicial notice of that treaty or convention in my resolution of the dispute".[704] The African Charter was cited explicitly as a treaty with such effect.[705]

3.4.5.16 Zimbabwe

Zimbabwe ratified the Charter on 30 May 1986. One finds scant reference to the African Charter in the relatively extensive human rights jurisprudence that has burgeoned in the ten years thereafter. In two cases which dealt with corporal punishment, extensive reliance was placed on international authority.[706] While the European Convention was quoted and numerous cases decided by the European Commission and Court were referred to, there is not a single reference to the African Charter in these two cases.

The African Charter was quoted as one of a number of international instruments that contain a right to freedom of movement and travel, supporting the High Court's judgment in *Chirwa v Registrar-General.*[707] In a case concerning the refusal of a licence to operate a mobile cellular telephone service, the Supreme Court ruled that such a refusal violated the applicant's freedom of

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703 [1993] 4 LRC (Const) 221.

704 At 233 c - d.

705 At 233 c.

706 *S v Ncube* 1988 2 SA 702 (ZS) (see the reference also to US courts at eg 718) and *S v A Juvenile* 1990 4 SA 151 (ZS).

707 1993 (1) ZLR 1 (H).

expression.[708] This was guaranteed as a right in the Zimbabwean Constitution. This right is an indispensable condition for a free and democratic society, the court held, referring to its inclusion in a number of international human rights instruments. One of these references is to article 9 of the African Charter.[709]

3.4.5.17 Conclusions

- The first observation is an obvious one: The **extent to which the African Charter** has been **invoked** in a particular country **correlates with the status that the Charter** (as part of international law) enjoys in the domestic legal system.

- Clearly, the above list is not exhaustive of all judicial reliance on or interpretation of the African Charter by courts on the continent. But the survey strongly suggests that the cases in which the Charter was mentioned in domestic courts, are **few**. The survey may not be comprehensive, but provides as complete a picture as could be assembled.

- When the Charter could not be invoked as an enforceable right, it was sometimes used as **interpretative guide**. In many cases where this could be done, it was not. Particularly in the corporal punishment cases decided by Southern African courts (Namibia, South Africa and Zimbabwe), the European rather than the African system was referred to. One obvious explanation for this preference is the fact that the abstract norm of "cruel, inhuman and degrading punishment" had been given concrete content in the European jurisprudence.[710] In one instance the African Charter had not been ratified when the case was instituted or decided.[711] Using the Charter as interpretative guide is the most likely first step in extending the

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708 *Retrofit v Telecommunications Corporation* 1996 (1) SA 847 (ZS).

709 At 856 G-H.

710 See eg the remarks by Gubbay, the present Chief Justice of Zimbabwe: "... we have looked to precedential judicial decisions emanating from those jurisdictions whose reputation for human rights is highly regarded and, of course, the opinions of the European Court of Human Rights" ((1997) 19 *HRQ* 277 at 253).

711 This justifies the omission in the Namibian case *Ex parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State* 1991 3 SA 76 (Nm S).

sphere of influence of the Charter. In this respect the Commission adopted a resolution at its 19th session, urging judges and magistrates in African states to "play a greater role in incorporating the Charter and future jurisprudence of the Commission" in their judgments.[712]

- Another reason why African courts have not relied explicitly on the Charter, even as an interpretative guide, is that local courts primarily interpret and apply local law. In many instances, the **provisions of the Charter have been incorporated into domestic law**. If these systems overlap, judicial application of national law is simultaneously also (albeit implicitly) application of the Charter. Although this may not be stated explicitly, the Charter has effectively been applied under such circumstances.

- A **growing awareness of the African Charter** has been experienced in the 1990s. This has in some instances followed the creation of new domestic institutions or the enforcement of constitutional rights, as exemplified by the case-law emanating from Benin.

- There is also some evidence of a **cumulative or domino effect**. Once a single case has been decided on the basis of the African Charter, others follow, as in the case of Nigeria.

- In some instances **one judge** remained a lone voice for some time, showing what a difference it would have made if more followed his example. Mwalusanya J of the Tanzanian High Court epitomises the singular resolve of one judge to convert the guarantees of the Bill of Rights into reality.

- The **interrelationship** between the domestic institutions and the Commission has to be kept in mind. If a domestic court can interpret and apply the Charter, the Charter itself is part of the domestic remedies to be exhausted. In such instances, the Commission acts as a "court of appeal" against the decision by the domestic court. But if the domestic courts do not have that competence, the Commission must provide an initial decision based on the African Charter. In time, it should be instructive to note the degree of difference or correlation in the application and interpretation of the Charter by national courts and the supra-national body.

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712 Ninth Annual Activity Report Annex VII at 6.

- The frequency and innovative use of the Charter by the local judiciary is closely linked to the arguments forwarded by **legal counsel**.[713] For this reason, not only judges, but lawyers more generally, should be exposed to training programmes about the Charter. In this, NGOs and law societies in the different countries will have to play an active role.[714]

3.5 The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa

3.5.1 Background

The Heads of State and Government of the OAU in September 1969 adopted the OAU Convention Governing the Specific Problems of Refugees in Africa.[715] Both the historic framework and the convention title indicate that this regional instrument should be viewed in conjunction with and supplementary to the international convention that had been in existence since 1951.[716] As was highlighted elsewhere, Africans had good cause to regard the UN Convention Relating to the Status of Refugees as "Eurocentric".[717] The 1967 Protocol opened the initial instrument to include all persons that complied with the definition of "refugee", thereby allaying some of the African concerns. African states started facing refugee problems since the early 1960s. Before the 1967 Protocol extended the 1951 Convention, efforts were underway to conclude a distinctly African

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713 See eg the remarks by Onalaja J in *The Registered Trustees of the Constitutional Rights Project v The President of Nigeria* above, at 46 - 47 of the typed judgment: "Let me put on record that the ingenuity in the quintessence manner and dexterity of the learned counsel for the applicant/respondent has shed a new light and horizon on African Charter on Human and Peoples' Rights in African jurisprudence (sic). It has reflected the law and lawyer in the words of Dean Roscoe Pound as social engineers".

714 See also the Commission's recommendation at its 19th session in which it urged bodies in civil society "to initiate specialised and comprehensive training for judicial officers, lawyers at national and sub-regional level" (Ninth Annual Activity Report Annex VII at 7).

715 UN Treaty Series vol 1001 at 45, adopted on 10 September 1969 and entered into force on 20 June 1974.

716 And amended thereafter, see ch 2.6 above.

717 See ch 2.6 above.

instrument. After 1967, efforts became directed at a regional supplement to the UN Convention. Thus, the OAU Convention recognises the 1951 Convention (as modified by the 1967 Protocol) as "the basis and universal instrument relating to the status of refugees".[718] The OAU Convention goes further, by adapting the universal norms and standards to deal with the challenges facing Africa.

The OAU Convention entered into force on 20 June 1974.[719] By the end of March 1997 it had been ratified by 43 OAU member states.[720] Those states that had not ratified were the Comoros, Côte d'Ivoire, Eritrea, Djibouti, Madagascar, Mauritius, Namibia, Sahrawi Arab Democratic Republic, São Tomé e Príncipe and Somalia. Of these, three are island states. Of these ten non-ratifying states, all but three (Comoros, Eritrea and Mauritius) have at least ratified the UN instruments.[721] This means that three states have adopted the international refugee regime, without supplementing it with its African complement. They are Cape Verde, Libya and Swaziland. It also means that the more universal instrument has been accepted by more states in Africa than the regional supplement. Three states (Botswana, Kenya and South Africa) ratified the OAU Convention after 1990, indicating that the instrument retains its relevance in Africa today.

3.5.2 Comparison with the UN Refugee Convention

In an attempt to understand why an "African supplement"[722] to existing international refugee law was added, one should draw a distinction between the two systems. In this way one may ascertain how this African contribution differs from its global equivalent.

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718 See Preamble of OAU Convention, par 9. See also art VIII(2): "The present Convention shall be the effective regional complement in Africa of the 1951 United Nations Convention".

719 See Patel and Watters (1994) at 245.

720 See Table J below.

721 See Table B above.

722 The OAU Refugee Convention recognises the UN Conversion and Protocol as "the basic and universal instrument" on the topic (Preamble).

3.5.2.1 Definition of refugee

The OAU Refugee Convention largely restates the exact wording of the UN Convention, but the term "refugee" is broadened. The global instrument allows for a "well-founded fear of being prosecuted" as the only basic requirement for refugee status. The OAU Refugee Convention extends the term to include anyone who is compelled to flee a country of residence "owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin on nationality".[723] This extension was necessitated by the restrictive nature of the initial approach to refugees. "Fear of persecution" concentrated on the ideas a person holds, and not on the socio-political context itself. This has led Oloka-Onyango to conclude that "the overall ideology of those grounds ... are rooted in the philosophy that accords primacy of place to political and civil rights over economic, social, and cultural rights".[724] The broadened definition allows for many more factors to be invoked in seeking refugee status. These factors include serious natural disasters (such as famine, which has become prevalent in Africa) and need not affect the country as a whole.

The UN Convention's definition assumes individual screening of persons in order to establish whether they have a "well-founded" fear of persecution. Such a system is obviously only manageable when persons flee as individuals or in small groups. When questions about refugee status arise, not in isolated cases, but from mass migrations, the application of such a test becomes impossible. Exactly the latter type of situation prevailed and still prevails in Africa. This necessitated an approach in which cumulative and objective factors could be determinative of refugee status. Such factors are "events seriously disrupting public order" and "foreign domination".[725]

Neither the international nor the African instrument provides for internally displaced persons.

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723 Art I (2).

724 (1996) 24 *Denver Jnl of Intl Law and Policy* 349 at 364.

725 See art 1(2) of the OAU Convention.

3.5.2.2 *Disqualification as refugee*

The grounds in the OAU Convention on which refugees lose their status as refugees ("cessation of status"), or persons who are disqualified from qualifying as refugees at all ("exclusion from status"), are again derived from the UN document. But also in this regard the OAU Refugee Conventions adds to the list. The widened scope created by the broader definition of "refugee status" is narrowed down by virtue of these additional grounds for exclusion and cessation of refugee status. Three additional categories are included in the OAU document:

- *Anyone guilty of acts contrary to the purpose and principles of the OAU.* This ground arises from the Convention's status as an instrument embedded within a particular structure, that of the OAU. Similarly, the 1951 Convention refers to acts contrary to the purpose and principles of the UN. By retaining the latter ground, the OAU Refugee Convention underlines its supplementary nature. Kimminich expressed the opinion that as long as the soul of the OAU remains within the ambit of that of the UN, the OAU Convention will remain a regional realisation of the UN Convention.[726]

- *Anyone who has seriously infringed the purposes and objectives of the OAU Refugee Convention.* Although this requirement does not appear commonly in human rights treaties, it is understandable.

- *Anyone who has committed a serious non-political crime outside his country of refuge after his admission to that country of refuge.* It is a peculiar provision. If a refugee commits a serious non-political crime inside the country of refuge after his admission to that country, he does not lose the protection of the Convention. Why should he or she lose this protection if the crime is committed outside the host country?

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726 (1970) *Verfassung und Recht in Übersee* 443 at 453.

3.5.2.3 *Asylum*

The OAU Refugee Convention is explicit about the obligation of states to grant asylum to refugees.[727] In contrast, the UN Convention is silent on this issue. However, the duty on states is "to use their best endeavours ... to receive all refugees".[728] The way in which this duty was phrased led Weis to conclude that the requirement is recommendatory, rather than binding.[729] Also, because these endeavours must be "consistent with their laws and constitutions", states need merely comply with internal laws, whatever their content. This provision may be viewed as a precursor to the inclusion of "claw-back" clauses in the African Charter.

3.5.2.4 *Duty of refugee in host state*

The OAU Convention determines that a refugee has to conform with the law in the state of refuge. He or she must also "abstain from any subversive activities against any Member State of the OAU".[730] In this regard, states have the obligation to prohibit refugees from attacking other OAU member states through acts of armed aggression or the use of mass media. Although the basis of the prohibition of the use of force and of disseminating propaganda for war has its roots in international law, the OAU Refugee Convention is unique in placing a duty on the host state to ensure compliance.

3.5.2.5 *Duty on country of origin*

An interesting innovation in the OAU Convention is the duty which is placed on the country of origin in relation to returning refugees. States must grant full rights and privileges to returning nationals, and must refrain from any sanctions or punishment against them.[731]

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727 Art II (2).

728 Art II (1).

729 (1970) 3 *Revue des Droits de l'Homme* 449 at 457.

730 Art III (1).

731 See Weis (1970) 3 *Revue des Droits de l'Homme* 449 at 463.

3.5.2.6 Conclusion

The OAU Convention has rightly been declared a progressive contribution to international refugee law. It presents a clear example of how a regional instrument can supplement an international regime by addressing problems specific to that region. Not only has Africa continued to experience refugee problems, but the restrictive definition of "refugee" has also made the application of the UN Convention difficult in regions other than Africa. For example, mass migrations due to political violence and instability highlighted the inadequacy of the Convention definition in Latin America. Protection was granted by the Inter-American Commission to "persons who have fled their country because their lives, safety, or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disrupted public order".[732] This broadened definition incorporates much of the African instrument, but does not grant refugee status merely because persons had to leave their country due to disturbed public order. In the Latin American context applicants have to show that, in addition, their personal security has been "threatened by generalized violence".

3.5.3 The Convention and reality

Shortly after the adoption of the OAU Convention, Weis lauded its substantive provisions, but warned that "much will depend on the implementation of the Convention's provisions".[733] Incorporation of the Convention standards into domestic legislation is the most obvious way in which these norms would be realised in individual countries. Such incorporation is essential, and can make a significant difference. This has been illustrated by Maluwa in relation to the position of refugees fleeing from Mozambique into Malawi.[734] In Malawi, ratification of the three supra-national instruments dealing with refugees in 1987 was followed by the adoption of the Malawi

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732 Annual report of Inter-American Commission 1984 - 1985. This definition was subsequently affirmed by the General Assembly of the OAS. See Arboleda (1991) 3 *IJRefLaw* 185.

733 Weis (1970) 3 *Revue des Droits de l'Homme* 449 at 464.

734 (1993) 53 *ZäoRV* 88.

Refugee Act in April 1989. The new legislation adopted the broader definition of the OAU Convention, and guaranteed compliance with the principle of *non-refoulement*.[735]

But legislative and constitutional enactments remain formal guarantees. The fact of their guarantee need not necessarily correspond with the reality of their observance. For this reason, some observations are made about the application of refugee law in concrete situations.

3.5.3.1 Refugee status

Before anyone may be accorded protection under the OAU Refugee Convention, he or she must qualify as a "refugee". Problems arose because states refused to accord refugee status to people fleeing to their countries, who should under article 1 of the Convention have been considered to be "refugees". On some occasions, these states were not party to any of the refugee conventions. South Africa and Côte d'Ivoire[736] are examples. South Africa rejected refugees from war-torn Mozambique, even resorting to the construction of an electrified fence in its efforts to exclude them.[737] People fleeing the conditions were treated as illegal immigrants and were forcibly returned. Clearly, the principle of *non-refoulement* was not applied. Murray argued that these people qualified as refugees even under the UN Convention.[738] Such an interpretation would in her view be "clearly within the spirit of the Convention" as those caught in a "cross-fire" would "face persecution whatever they do".[739]

The practice of the South African government in relation to Mozambique (in the 1980s) may be contrasted with its treatment of people fleeing Angola in the 1970s. Those fleeing violence in the north of what was then South-West Africa were also classified as aliens, but the principle of *non-*

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735 Maluwa (1993) 53 *ZäoRV* 88 at 105, 109 - 110.

736 Côte d'Ivoire signed the OAU Refugee Convention in 1969, but never ratified it. *The African Exodus* report does not take this factor into account sufficiently (at 51).

737 Lawyers Committee for Human Rights *African Exodus* (1995) at 44: The official death toll from the fence exceeded the total number of facilities from the Berlin Wall in its 28-year existence.

738 (1986) 2 *SAJHR* 154.

739 (1986) 2 *SAJHR* 154 at 162.

refoulement was applied.[740] Humanitarian assistance was also granted to assist them. It has been suggested that the difference in treatment in the two instances may be ascribed to the race of those involved ("Angolans" of Portuguese origin; black Mozambicans) and to the fact that those fleeing from Angola had a "homeland" to which they could be deported.

Since the end of 1995 Côte d'Ivoire placed restrictions on the recognition of refugees from Liberia.[741] In 1989 Mauritania expelled a large number of its black citizens to Senegal. Senegal has been in violation of its obligations under the OAU Convention[742] in not recognising the almost 100 000[743] persons as refugees.

3.5.3.2 Protection of refugees

States must provide a secure environment in which refugees may live a peaceful and normal life.[744] At least in the case of two states parties to the OAU Refugee Convention (Kenya and Zimbabwe) instances of state neglect of this duty have been documented.[745] Some of the rights guaranteed under the Convention and other international human rights instruments have been infringed by host-states. Examples are violation of freedom of expression (for example, in Zambia and Zimbabwe in relation to ANC "dissidents"),[746] detention (in Sudan),[747] and denial of basic socio-economic rights (in Malawi)[748]

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740 See Faris (1976) 2 *SAYIL* 176.

741 *African Exodus* (1995) at 49.

742 It ratified the convention in 1971. See the definition in art 1.

743 *African Exodus* (1995) at 54.

744 See eg Preamble of OAU Refugee Convention.

745 See *African Exodus* (1995) at 64-71; 78-80.

746 See *African Exodus* (1995) at 95-96.

747 *African Exodus* (1995) at 100.

748 *African Exodus* (1995) at 104-106.

3.5.3.3 *Non-refoulement*

The OAU Refugee Convention clearly states that no refugee may be returned or expelled, compelling him or her to return to the country of origin.[749] However, serious incidents of refoulement occurred between Kenya and Tanzania in the 1980s,[750] and Nigeria expelled refugees from Chad in 1991 and 1992. All four these states involved had ratified the OAU Convention. The Nigerian authorities arrested Chadian refugees and deported them. On arrival, many were summarily executed for alleged involvement in anti-government guerrilla activities. These actions are shocking violations of Nigeria's obligations under the OAU Refugee Convention and the African Charter, both of which had been incorporated into Nigerian domestic law.[751]

3.6 *The African Charter on the Rights and Welfare of the Child*

The African Charter does not provide extensively for children's rights. In fact, children are only referred to on one occasion, as an afterthought, in the context of women's rights: "The State shall ensure ... the protection of the woman and the child as stipulated in international declarations and conventions".[752] These "conventions" today certainly include the Convention on the Rights of the Child,[753] therefore incorporating it into the Charter.[754] In addition, children would, as "individuals", qualify for all the rights appropriate to their position. So, for example, would an arrested child qualify for the right of an individual to "have his case heard",[755] and not to be "arbitrarily deprived

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749 See arts II (3) and V (1).

750 *African Exodus* (1995) at 83.

751 See Civil Liberties Organization (1992) *The Status of Refugee Rights in Nigeria*.

752 Art 18(3) of the African Charter.

753 The CRC was adopted in 1989, and entered into force on 2 September 1990.

754 Does this mean that even those states parties to the African Charter which have not ratified the CRC are bound by all its provisions? A similar question arises in relation to CEDAW. This issue is discussed under par 3.8 below, and the arguments are applicable in the context of children's rights as well. An important difference is that the CRC was elaborated and adopted *after* the African Charter, while CEDAW was adopted just before the African Charter. As the CRC has now been ratified by almost all African states, this issue is largely of theoretical interest only.

755 Art 7(1) of the African Charter.

of his life".[756] At least one right granted to all "individuals", the right to education,[757] is likely to be of more benefit to children than to other members of society.

Motivation for a separate African Charter on the Rights and Welfare of the Child ("the African Children's Charter") was spelled out by Muthoga. According to him, this idea "originated from a desire to address certain peculiarly African problems".[758] To some extent the African initiative was born out of frustration with the UN process. The failures of the UN drafting process, which culminated in the adoption of the CRC in 1989, are regarded as threefold:

- Africans were underrepresented during the drafting process of the CRC.[759]
- Potentially divisive and emotive issues were omitted in the search for consensus between states from diverse backgrounds.
- Specific provisions on aspects peculiar to Africa became the victims of the overriding aim to reach a compromise, and were not sufficiently addressed in the UN instrument.

Wako emphasised the value of regional arrangements *as such* as a motivation for an African equivalent to the CRC. He referred to resolutions of the General Assembly in this regard, and concluded that "each region, with its unique culture, traditions and history, is best placed to handle and resolve its own human rights situation".[760] As an illustration, he referred to the more "sophisticated" rights in Europe (such as the right of children conceived through artificial insemination to know their origin) that need not occupy Africans.[761]

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756 Art 4 of the African Charter.

757 Art 17 of the African Charter.

758 (1992).

759 See Barsh (1989) 58 *Nordic Jnl of Intl Law* 24, describing Africa's minimal participation in the open-ended working groups leading to the adoption of the CRC. Only Algeria, Morocco, Senegal, and to some extent Egypt, participated meaningfully.

760 (1988) at 7.

761 *Ibid.*

The first vocal opposition to the UN process (at that stage aimed against the draft UN Convention) was aired in May 1988, at a ANPACAN[762]/ UNICEF conference on "Children in Situations of Armed Conflicts in Africa". One of the objectives of the workshop was "to consider the degree of comprehensiveness of the UN Draft Convention and whether it is necessary to supplement it with an African Charter".[763] Some of the peculiarities of the African situation omitted from the Convention were identified as the following:[764]

- The situation of children living under apartheid was not addressed.
- Disadvantages influencing the female child were not sufficiently considered.
- Practices which are prevalent in African society, such as female genital mutilation and circumcision, were not mentioned explicitly.
- Problems of internal displacement arising from internal conflicts received scant attention.
- Socio-economic conditions such as illiteracy and low levels of sanitary conditions, "with all their threats to survival",[765] posed specific problems in Africa.
- "The community's inability to engage in meaningful participation in the planning and managing of basic programmes for children was not taken into account.[766]
- The African conception of the community's responsibilities and duties had been neglected.
- In Africa, the use of children as soldiers and a compulsory minimum age for military service is of great importance.
- The position of children in prison and that of expectant mothers had not been regulated.

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762 African Network for the Protection Against Child Abuse and Neglect.

763 Muhindi (mimeo) at 7. The conference also considered strategies for the implementation of the UN Convention.

764 These grounds have been forwarded by Muthoga (1992) and Wako (1988).

765 Muhindi (undated mimeo) at 8.

766 Muthoga (1992) at 4

- The CRC negates the role of the family (also in its extended sense) in the upbringing of the child and in matters of adoption and fostering.

Pursuant to this meeting, a working group of African experts was set up by the OAU, in collaboration with the two organisations that had organised the workshop. This group, of which Lee Muthoga was the chair, produced a draft charter. The draft followed the usual route of

- draft by government experts;
- scrutiny by the Secretary-General;
- consideration by the Council of Ministers; and then
- adoption at the Assembly of Heads of States and Governments.[767]

The African Charter on the Rights and Welfare of the Child was adopted by the Assembly on 11 July 1990.[768] It is quite remarkable that the African states could reach agreement on its contents in such a short period. Africa has clearly taken the lead in becoming the first region to give the global instrument regional application. Unfortunately, some seven years thereafter, the Charter is not yet in force, as only six of the required fifteen states[769] have ratified it so far.[770] Why have *African* states not ratified the *African* instrument, while they ratified the one adopted on a global scale? One possibility is the notion that that the African equivalent was essentially only a copy of the UN instrument.[771] However, this possibility is dispelled by a comparison between the African Children's Charter and its UN equivalent:[772]

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767 On this process, also see Veerman (1992) at 271 - 273.

768 OAU Doc CAB/LEG/TSG/Rev 1. See text in (1991) 3 *RADIC* 173 and (1992) 18 *Commonwealth Law Bulletin* 1112.

769 See art 47(3) of the African Children's Charter.

770 See Table K below.

771 According to Veerman (19) the Sudanese delegate at a preparatory meeting held in April 1990 "was struck by the lack of specificity in the document and wanted guidance as to how it differed from the United Nations Convention" (at 272).

772 On this comparison, also see Arts (1992) 5 *RADIC* 1139.

- The **primacy of the provisions of the Charter over African cultural practices** is clearly established.[773] States are required to take specific measures to "abolish customs and practices harmful to the welfare, normal growth and development" of children.[774] Relevant cultural practices specified are those prejudicial to the health or life of a child, those discriminating between children on the basis of, amongst others, sex, and those related to child marriages.[775] A number of cultural practices still prevailing in Africa are harmful to the welfare, normal growth and development of the child. Examples are female genital mutilation, dietary taboos, prohibiting certain children or categories of children from eating certain foods, and, in a very extreme form, the killing of twins or triplets. These practices are not mentioned by name, but will certainly be covered by this prohibition. This aspect should be read with the guideline that the best interests of the child "shall be the primary consideration",[776] and not merely "a primary consideration", as required by CRC.[777]

- As in the "mother" charter, the African Charter on Human and Peoples' Rights, certain **rights are also qualified** by "claw-back" clauses in the African Children's Charter. The rights affected relate to free expression of views,[778] freedom of association,[779] and of thought and religion.[780] These formulations echo the African Charter in that the rights are made subject to "such restrictions as are prescribed by law".[781] This stands in contrast to the corresponding provisions in the CRC, which may only be limited if it is necessary to do so in order to protect, for example, health, morals, public order, public safety or the rights of other individuals.[782]

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773 "Any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency be null and void" (Art 1(3) of the African Children's Charter). Contrast this with art 24(3) of the CRC, which calls for the abolition of cultural practices of a more restricted scope (those "prejudicial to the health of children").

774 Art 21(1).

775 Art 21.

776 Art 4(1) of the African Children's Charter.

777 Art 3(1) of CRC.

778 Art 7 of the African Children's Charter.

779 Art 8 of the African Children's Charter.

780 Art 9 of the African Children's Charter.

781 Art 7 of the Children's Charter.

782 Arts 13(2), 14(3) and 15(2) of the CRC.

- The qualification of rights and freedoms generally emphasises the **supervisory role of the parents** in relation to their children. Parental guidance in the exercise of the right to freedom of thought and religion under the CRC must be "consistent with" the evolving capacities of the child, but in terms of the African Children's Charter only "due regard" to the evolving capacities and best interest of the child is required.[783]

- The protection of **children in armed conflict** is broadened under the African Children's Charter. The CRC allows children between fifteen and eighteen to be used in *direct* hostilities.[784] Under the African Children's Charter, no person under the age of eighteen years is allowed to take part directly in hostilities.[785] The CRC also permits the recruitment of youths between fifteen and eighteen years old,[786] even though states are advised to "endeavour to give priority to those who are oldest".[787] African states that ratified the African Children's Charter must refrain from recruiting any person under the age of eighteen.[788] In both these documents states are obliged to take measures to ensure the protection of children affected by armed conflict.[789] In the African context protection is explicitly extended to "internal armed conflict, tension or strife".[790]

- The consequence of defining "child" as everyone under eighteen years old, and prohibiting child marriages,[791] is that **marriages of girls (under 18) will not be allowed**.[792] Marriages

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783 Art 14 of the CRC; art 9 of African Children's Charter. See also Arts (1992) 5 *RADIC* 139 at 147 - 148.

784 Art 38(2) of the CRC.

785 Art 22(2) of the African Children's Charter.

786 Art 38(3) of the CRC.

787 *Ibid.*

788 Art 22(2) of the African Children's Charter.

789 Art 38(4) of the CRC; art 22(3) of the African Children's Charter.

790 Art 22(3) of the African Children's Charter.

791 Art 21(2) of the African Children's Charter.

792 The requirement that states must "specify the minimum age of marriage" (art 21(2)) should not be interpreted as allowing for a lower age of marriage. A different interpretation may also be attached to this ambiguous provision, but should be avoided.

must also be registered.[793] The exception allowed under the CRC "unless majority is attained earlier",[794] is not included in the African document.

- The protection of the **child-refugee** in the two documents is similarly worded. However, the scope of the African Children's Charter is broader, as it makes the relevant provisions applicable to a much larger group by recognising "internally displaced" children as refugees.[795] The displacement need also not be of a political nature. The causes of internal dislocation may be of a political and military nature, but also include any "breakdown of economic and social order".[796] The last phrase in the article, "howsoever caused", shows that the list is in fact open-ended. No such extension of the scope of protection is found in the CRC.[797] This is very significant in the African context, as a very high percentage of African refugees are children.

- One article of the African Children's Charter is reserved for the special needs of children living under **apartheid** and of children living in states subject to military destabilisation by the apartheid regime.[798] Nothing similar is found in the CRC.

- The African Children's Charter also reiterates the emphasis on **duties** in the African Charter. Duties that fall to the parents include the duty to "ensure that domestic discipline is administered in moderation".[799] The primary duty of the child is towards his or her family and society. The list of duties set out in the African Charter is repeated in slightly adapted form.[800] Only states parties have duties in the CRC framework. States are to "respect the responsibilities, rights, and duties of parents".[801]

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793 See art 21(2) of the African Children's Charter.

794 Art 1 of the CRC.

795 Art 23(4) of the African Children's Charter.

796 *Ibid.*

797 See art 22 of the CRC.

798 Art 26 of the African Children's Charter, which illustrates the danger of over-specificity in a human rights instrument. An instrument should be sufficiently vague to remain relevant for decades or even centuries.

799 Art 20(1)(c) of the African Children's Charter.

800 Compare art 29 of the African Charter with art 31 of the African Children's Charter.

801 Art 5 of the CRC.

- Compared with the CRC, the African Children's Charter makes more detailed provision for **dissemination of information** on the rights of the African child.[802]
- **Implementation** is much stronger in the African Children's Charter. The UN instrument creates a Committee on the Rights of the Child ("CRC Committee") and empowers this committee only to examine state reports. The African Committee of Experts on the Rights and Welfare of the Child ("African Committee") has a similar function,[803] but may also receive and consider communications from "any person, group or NGO".[804] Although these communications are to be treated "in confidence"[805] and only lead to a biannual report to the OAU Assembly,[806] this represents a significant advance on potential enforcement of children's rights. The African Committee is also granted the potentially wide-ranging and powerful mandate to "resort to any appropriate method of investigation".[807] In all these respects, the African Committee resembles the African Commission much more than the CRC Committee.
- Receiving less attention in the African Children's Charter than in the CRC, is the rights of children to benefit from **social security** and to an adequate standard of living.[808]

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802 See art 42(a) of the African Children's Charter, for the activist role envisaged for the African Committee.

803 The frequency of reporting under the African regional instrument is as follows: initially, within two years after ratification; thereafter, every three years. The term for periodic reports under the CRC is five years. When the African Children's Charter turns into force, these requirements will lead to multiple reports, submitted to two monitoring bodies. This need not be viewed in a negative light. The two reports should be co-ordinated, and information used for the one may to an extent serve as a basis for the other. Still, the view expressed by Van Bueren ((1991) 8 *International Children's Rights Monitor* 20 at 22) that shorter reporting periods lessen "the risk of losing momentum". Consider what dual ratification will require from a state: A state that has ratified both instruments simultaneously, will have to submit a periodic report after three years (under the African Children's Charter), then after five (under CRC), then again after a year (the next report under the regional Charter), then within two years (again under CRC), the next year yet again (under the African Children's Charter), and so on.

804 Art 44(1) of the African Children's Charter.

805 Art 44(2) of the African Children's Charter.

806 Art 45(2) of the African Children's Charter.

807 Art 45(1) of the African Children's Charter.

808 Arts 26 and 27 of the CRC.

- Also omitted in the CRC, but regulated in its regional equivalent, is the treatment by penal law of **expectant mothers** and **child abduction and trafficking in children**.[809] These are aspects of the position of children that have been foregrounded in the African context.

This analysis shows that the African Children's Charter deals with various aspects identified at the outset as *lacunae* in the global instrument. Some of these, such as the provisions on apartheid and prohibition on negative cultural practices, clearly give the Charter a specifically "African" flavour. This is also, albeit sometimes to a lesser degree, true of the provisions relating to the prohibition of child marriages, the prohibition on child-soldiers involved in direct hostilities, the granting of refugee protection to internally displaced persons and the prevention of child abduction and trafficking in children. Although these provisions relate to social problems experienced globally, they are more pronounced in Africa and are regional-specific aspects in the regional equivalent of the CRC.

Two characteristics which are generally regarded as giving the African Charter its "African" character are the inclusion of "duties" and of "collective or 'peoples' rights". One of these main focal points in the "mother" Charter, the emphasis on "peoples' rights", is not respected in the African Children's Charter. The rights of the child pertain to children individually. While this may be conceptually sound, it still is surprising that this essential "African" characteristic of the African Charter has been discarded. One explanation could be that the concept of collective rights has not found favour with the later drafters. Another would be that the Charter lacks an essential African characteristic.[810]

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809 See arts 29 and 30 of the African Children's Charter respectively. See, in the South African context, President Mandelas's decision soon after taking office to release female prisoners with young children, and the subsequent constitutional challenge by male prisoners: See *Kruger v Minister of Correctional Services* 1995 2 SA 803 (T) and *Hugo v President of RSA* 1966 6 BCLR 876 (D) and *President of RSA v Hugo* 1997 6 BCLR 708 (CC).

810 Yet another interpretation is that extending collective rights such as the right to self-determination or to a satisfactory environment would not have made sense in this context. Children's rights are, in any event, treated as communal (see eg the emphasis on the family in art 18 and the duties of the child towards the family and society in art 31).

However, the other overriding "African" feature of the African Charter, "duties" placed on individuals, is reiterated. This may create contradictions and tensions in the African Children's Charter. Children are protected against discriminatory cultural practices, but must also "respect his parents and elders *at all times*".[811] This responsibility of obedience has been criticised by Van Bueren, who finds it "too unquestioning and general".[812] But one need not adopt a confrontational approach to the interpretation of the Charter. If a holistic approach is adopted, the duty of obedience may be reconciled with, for example, the prohibition of harmful cultural practices. The duty of obedience placed on the child must be viewed within the context of the Charter as a whole. The prohibition of certain practices forms part of the framework of the Charter. The duties are to be given content to harmonise it with the framework already established, and not to confront the very setting within which it exists.

What the Charter indeed unequivocally succeeds with is to set a higher threshold and give better protection to children in Africa than the UN instrument has done. This appears clearest in the definition of "child", and its impact on armed conflict and child marriages. More effective implementation is made possible by **allowing for individual complaints** about violations of the African Children's Charter. These positive features are, paradoxically, both the Charter's outstanding accomplishment and biggest draw-back. Under the Charter the fullest possible realisation of children's various rights can be secured. But it seems rather unlikely that governments will easily accept these responsibilities by ratifying the Charter. In marked contrast to the UN equivalent, which 52 African states have ratified, so far only six states have ratified the African version. The reason for the insufficient ratification rate is not that the Charter lacks an "African" content, or was a wasteful exercise, in that it made no new positive contribution. The explanation rather lies in the reluctance of African states to accept the higher levels of protection

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811 Art 31(a) of the African Children's Charter, my emphasis.

812 (1991) 8 *International Children's Rights Monitor* 20 at 22. She adds: "To educate children that where family members or elders are abusing, neglecting or exploiting them, they remain obliged to respect the abuser is patently ridiculous". Not that she directs blanket criticism against all "responsibilities". The duty to work for the cohesion of the family "can provide children with a sense of value".

accorded to children, and the supervision of a treaty body which may be approached by individual complainants.[813]

3.7 The OAU and the environment

In recent times, the influence of the environment on the well-being of individuals has been highlighted. Although the protection of the environment is primarily dependant on non-legal factors (such as government policy, local and international economic forces, demographics and natural elements), international treaties may also play a part by creating or stimulating an appropriate (legal) framework to improve environmental protection. The African Charter devotes one article to the "right to a general satisfactory environment" favourable to the development of "all peoples".[814] The adoption of this provision was preceded and followed by two treaties which deal more specifically with the environment. These treaties are now discussed briefly. Moreover, in the later Treaty establishing the African Economic Community ("AEC"), specific provision is also made for the environment and the ban on import of hazardous waste into Africa and across African borders.[815]

3.7.1 The African Convention on the Conservation of Nature and Natural Resources

An African instrument on the environment, the African Convention on the Conservation of Nature and Natural Resources, was adopted in 1968 in Algiers by the OAU Heads of State and

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813 Two approaches seem possible: One may either be critical of the effort, as it clearly went beyond what African states were prepared to accept, and therefore runs the risk of becoming a dead letter. But one may also take an optimistic stance and argue that the Charter sets an ideal, and that civil society must pressurise governments to ratify. As soon as the Charter is ratified by fifteen states, it could become a shining example of a group of African states who set the tone of a new era of human rights protection in Africa.

814 Art 24 of the Charter.

815 Arts 58 and 59 of the Abuja Treaty.

Government.[816] It entered into force on 16 June 1969. This convention concerns itself primarily with wildlife, but also extends to many other aspects, such as the use of resources like soil and water. It has been described (in 1985) as the "most comprehensive multilateral treaty for the conservation of nature yet negotiated",[817] in which environmental concerns and development are linked.[818] As is the case with other treaties on the environment, no administrative structure is created to ensure implementation. As a result, the provisions have largely remained neglected.[819] Still, the Convention "has stimulated useful conservation measures in some countries and remains the framework on which a substantial body of national legislation is based".[820] By 1985, 28 states have become party to the Convention. A further 14 had at that stage signed the treaty, without ratifying it.[821] By 31 March 1997, the number of ratifications had only risen by one.[822] This indicates that this Convention has lost some of its initial impact.

3.7.2 The Bamako Convention

The Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa was adopted on 30 January 1991 by a conference of Ministers of the Environment from 51 African states who were also all members of the OAU.[823] This followed on the heels of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, adopted under UN supervision on 22 March 1989.[824] Given the high degree of specialisation and uniformity due to standardised technical terminology, it should hardly be surprising that the regional treaty borrows extensively from its international predecessor. Not only the sequence of issues dealt with, but also

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816 OAU doc CAB/LEG/24.1, adopted on 15 September 1968.

817 Lyster (1985) at 115.

818 See eg art VII of the Convention.

819 *Ibid.*

820 *Ibid.*

821 For a list of these states, see Lyster (1985) at 115.

822 Only Gabon became a party since 1985, in 1988

823 See text in (1993) 1 *AYBIL* 268 - 293.

824 See text in (1989) 28 *ILM* 656.

the wording of articles correspond very closely in the two instruments.[825] The Bamako Convention has one article more, dealing with its registration with the UN, once it has become operational. The other 29 articles of the respective documents deal with the same subject matter, mostly using the same formulations. But it would have been even more surprising if the African treaty completely mirrored the Basel Convention. What would the *raison d'être* of the Bamako Convention then be?[826]

- As its title suggests, the Bamako document deals specifically with the importing of hazardous waste *into Africa* and its movement across African borders. It places a total ban on the import of waste into the continent, and regulates waste movement within Africa itself. The Basel Convention, in contrast, contains no ban. It is regulatory, in that it permits and regulates all transboundary movement of hazardous waste.[827]

- The scope of the Bamako document is more extensive, as it broadens the definition of "hazardous waste".[828] The inclusion of artificially created radioactive waste in the list of controlled waste streams is of particular relevance.[829]

Other minor changes may be observed. For instance, the Basel Convention requires twenty ratifications before its entry into force; the Bamako Convention requires ten ratifications.[830] The former entered into force on 5 May 1992.[831] By 31 December 1992 only three African states had ratified the Basel Convention: Mauritius, Nigeria and Senegal.[832] On the same date, of the three only Mauritius had also ratified the Bamako Convention. Except Mauritius, another two African

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825 Both envisage implementation primarily through national institutions, with trans-national institutions in the form of a Secretariat and Conference (see arts 5, 15 and 16 of the Bamako Convention).

826 See in general Ouguergouz (1993) 1 *AYBIL* 195.

827 See Cheyne (1994) 6 *RADIC* 493 at 499.

828 See Ouguergouz (1993) 1 *AYBIL* 195 at 201.

829 See Annex I. This aspect has probably inhibited ratification by a country like South Africa.

830 Art 25 of both conventions.

831 See Ouguergouz (1993) 1 *AYBIL* 195 at 196.

832 *Ibid.*

countries (Tunisia and Zimbabwe) had by then ratified the regional instrument. The Bamako Convention will turn into force on 22 April 1998.[833]

833 Based on information provided by Tiyanjana Maluwa, in his capacity as head of the legal division of the OAU. The Bamako Convention envisaged its entry into force on the ninetieth day after the deposit of the tenth instrument of ratification by the signatory states. This was interpreted to mean that it was only the ratification of the original signatories to the treaty which would count in computing the ten ratifications and not those ratifications by states which acceded to the treaty only after its adoption. This happened on 21 January 1998, when the tenth original signatory state (Benin) deposited its instrument of ratification. No Secretariat has as yet been established, mainly due to a lack of funds (according to officials of the South African Department of Foreign Affairs).

A chart giving the status of ratification of these two instruments is now provided:[834]

TABLE J: AFRICAN HUMAN RIGHTS INSTRUMENTS ON THE ENVIRONMENT AS AT 31 MARCH 1997

OAU member states	The African Convention on the Conservation of Nature and Natural Resources (entered into force on 16 June 1969)		Bamako Convention (not yet in force)	
Country	**Signed**	**Ratified**	**Signed**	**Ratified**
Algeria	15/09/68	05/02/83		
Angola				
Benin	15/09/68		30/01/91	
Botswana	15/09/68			
Burkina Faso	15/09/68	16/08/69	30/01/91	
Burundi	15/09/68			
Cameroon	15/09/68	18/07/77	01/03/91	11/07/94
Cape Verde				
Central African Republic	15/09/68	16/03/70	30/01/91	
Chad	15/09/68		27/01/91	
Comoros				
Congo	15/09/68	04/04/81		
Côte d'Ivoire	15/09/68	15/01/69	30/01/91	13/07/94
Djibouti		11/04/78	20/12/91	
Egypt	15/09/68	06/03/72	30/01/91	
Equatorial Guinea				

834 See CAB/LEG/24.1 and CAB/LEG/170. The Bamako Convention comes into force 90 days after the date of deposit of the tenth instrument of ratification. This will be on 22 April 1998, being the ninetieth day after ratification by the tenth of the original signatories to the Convention. It is not clear to me why this restrictive interpretation was adopted. If all acceding states were included in the computation process, rather than only the original signatories, the Convention would have entered into force much earlier, already in 1994, following the ratification by Côte d'Ivoire on 13 July 1994.

OAU member states	The African Convention on the Conservation of Nature and Natural Resources (entered into force on 16 June 1969)		Bamako Convention (not yet in force)	
Country	**Signed**	**Ratified**	**Signed**	**Ratified**
Eritrea				
Ethiopia	15/09/68			
Gabon	15/09/68	09/05/88		
Gambia	15/09/68			
Ghana	15/09/68	17/05/69		
Guinea	15/09/68		30/01/91	
Guinea-Bissau			01/03/91	
Kenya	15/09/68	12/05/69		
Lesotho	15/09/68		01/06/91	
Liberia	15/09/68	21/09/78		
Libya	15/09/68		30/01/91	02/11/92
Madagascar	15/09/68	03/09/71		
Malawi		06/03/73		
Mali	15/09/68	03/06/74	30/01/91	06/06/91
Mauritania	15/09/68			
Mauritius	15/09/68			29/10/92
Mozambique		28/02/81		
Namibia				
Niger	15/09/68	10/01/70	30/01/91	
Nigeria	15/09/68	02/04/74		
Rwanda	15/09/68	19/11/79	26/08/91	
Sahrawi Arab Democratic Rep				
São Tomé e Príncipe				
Senegal	15/09/68	03/02/72	30/01/91	16/02/94
Seychelles		31/08/77		
Sierra Leone	15/09/68			
Somalia	15/09/68		01/06/91	
South Africa				
Sudan	15/09/68	09/10/73		21/09/93
Swaziland	15/09/68	25/03/69	29/06/92	
Tanzania	15/09/68	07/09/74	26/11/91	15/02/93
Togo	15/09/68	24/10/79	30/01/91	06/05/96

OAU member states	The African Convention on the Conservation of Nature and Natural Resources (entered into force on 16 June 1969)		Bamako Convention (not yet in force)	
Country	Signed	Ratified	Signed	Ratified
Tunisia	15/09/68	21/12/76	20/05/91	06/04/92
Uganda	15/09/68	15/11/77		
Zaïre	15/09/68	29/05/76		15/09/94
Zambia	15/09/68	29/03/72		
Zimbabwe				10/07/92

3.8 The OAU and women's rights

3.8.1 From private to public

African public life has been dominated by men. The negotiations resulting in the OAU Charter and the African Charter were characterised by the absence of any meaningful contribution by women. Indeed, **all** the decisions of the Assembly of Heads of State and Government since the OAU was founded in 1963 until 1996, had been taken by men. The first female head of state, former senator Ruth Perry, was appointed Head of the Council of State of Liberia by an ECOWAS summit in August 1996.[835] The new African trend to appoint Vice-Presidents allowed President Jammeh of the Gambia to appoint a woman, Isatou Saidy, as his deputy.[836]

Few women have also been elevated to the role of judge in African states. The 1990s saw a gradual change in this trend. Examples of some of the increasing number of women now holding

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835 "Iron Lady may be Angel of Peace" (1996) Nov/Dec *Africa Today* 42-43. See also Wells "Lady at the Top" (Jan - March 1997) at 32: She has given new content to the position of head of state, by eg converting part of her home into a feeding centre for displaced people.

836 See (June-July 1997) *African Topics* 33. One may not but feel some scepticism, as such a step is aimed at securing the female vote.

high judicial office are Justice Lady Effie Owuor (High Court judge in Kenya), Justice Anastasia Msosa (Malawi's only High Court judge, who previously was Chairperson of the Electoral Commission) and Justices O'Regan and Mokgoro (on the South African Constitutional Court).

The African Commission on Human and Peoples' Rights has not been free from similar criticisms. It was founded as an all-male institution. Only in December 1993, when Mrs Duarte-Martins took her seat at the Commission's 14th session, was this stronghold broken. At the 18th session, the number of women doubled, when newly-elected commissioner Ondziel-Gnelenga took her seat. A female presence is essential for seriously addressing the situation of women in Africa. The male perspective inherent in the following statement reminds one of that fact: "It is almost embarrassing for me to have to question the Gambian delegate, not just because she is a woman, but because of the debt we owe to Gambia".[837] In a later interview, the first woman commissioner was asked how she had been received by her male colleagues. Her response underlies the role of stigmatisation: "In principle I have been treated as an equal. But people are used to seeing a woman in different roles. Sometimes some unexpected comments have been made."[838]

Any African legal instrument is bound to confront, in one way or another, the African split personality. African society remains poised between tradition and modernity.[839] It is a modern tree with ancient roots, forming a single organic whole. In traditional Africa, the role of women was predominately restricted to the private sphere of the family. Women were, and still are, regarded as fulfilling functions (childbearing, child care, sustaining a family) which by necessity subordinate them to men. These sentiments are prevailing in much of Africa today. In many respects, though, the role of women has changed, leading to greater acceptance of their role in public life and their equality as partners in the family sphere.

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837 Examination of state reports vol. 3 (1995) at 24 (Commissioner Umozurike, prefacing his remarks about the examination of the Gambian state report).

838 Interview reported in (1996) (Oct - Dec) *AFLAQ* at 15.

839 See, generally, Ouguergouz (1993) at eg 84 – 91.

3.8.2 Provisions on women in the African Charter

The African Charter is not blind to this duality. On the one hand, traditional values inherited from ancient African civilisations are incorporated.[840] These values find their counter-weight in the duty of states not to discriminate, in any form, on the basis of a person's sex.[841] Male dominance and female subordination (bordering on disregard) is suggested by the language of the Charter. Male pronouns[842] and words such as "chairman" are used throughout the document. However, any fear that the rights in the Charter are in fact reserved for men only, are immediately dispelled. These rights, we are assured, are the entitlements of all individuals, irrespective of their sex.[843] Article 3 reinforces the approach of ensuring equality, by providing for equality before the law. In this discourse, women are no different from men: The rights of the one sex applies to the other. So, the right to dignity may be invoked by women pertaining to cultural practices that ridicule their status, the right not to be treated inhumanely may be invoked to criminalise female circumcision, and so forth.

However, the Charter also moves outside the equality rhetoric. It singles out women for special treatment and specific measures. This is done in article 18, where women and children are categorised together as groups deserving of "protection". This is followed, in the next sub-article, by the provision that the aged and disabled "shall *also* have the right to special measures of protection".[844] One may easily form the impression that women are viewed only within the family context, and are deserving of special protective measures, in the same sense as children, the aged and disabled are.

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840 See the Preamble: All human rights in the Charter are inspired by "virtues of their historical tradition and values of African civilization". Also refer to the duty (in art 29(1)) to preserve the harmonious development of the family and the emphasis of respect in the family environment.

841 Again, in the Preamble: States proclaim that they are conscious of their duty to dismantle all forms of discrimination, "particularly those based on ... sex...". Art 2 converts this into a legal obligation on states: Every individual shall be entitled to the rights in the Charter without distinction of sex, among others.

842 See eg art 9(2) ("his opinions"); art 12(1) ("provided he abides by the law") and art 17(2) ("his community").

843 Art 2.

844 Art 18(4) (my emphasis).

The special measures that should be directed at protecting women (and at ensuring the elimination of discrimination against them)[845] are not delineated. They are to be found in "international declarations and conventions"[846] on the elimination of discrimination against and the protection of women. Immediately, the major international human rights instrument on women's rights, CEDAW, comes to mind. This is a comprehensive codification of various rights, and deals with aspects as diverse as voting, nationality, gender stereotyping, cultural practices and ownership.

One has to keep in mind that CEDAW has been passed two years prior to the adoption of the Charter. This fact is only "obliquely apparent"[847] from the wording of the Charter. Oloka-Onyango and Tamale[848] have argued that the drafters of the African Charter were "only minimally influenced by CEDAW's provisions",[849] because there is only one article in the Charter dealing with women's rights. The authors are also critical of the wording of that article, which only incorporates CEDAW "by inference and not by name".[850] They find evidence of the lack of African leaders' enthusiasm for CEDAW in the fact that they did not initiate a regional duplication. In this, they argue, the response was markedly different from those following the adoption of the Universal Declaration, the 1966 covenants and the international conventions on refugees and children. Of these only the last, the case of children, provides a clear contrast. A regional children's treaty was in fact elaborated after the African Charter, with its incorporation of international human rights protection as regards both women and children,[851] had entered into force.

Langley acknowledges, but is less critical of the incorporation by reference.[852] If all the conventions referred to had explicitly been included in the Charter, it would have been "overly complicated".[853]

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845 See art 18(3).

846 *Ibid.*

847 Oloka-Onyango (1996) 24 *Denver Jnl of Int1 Law and Policy* 349 at 372.

848 (1995) 17 *HRQ* 691.

849 At 719.

850 *Ibid.*

851 Art 18(3) of the African Charter.

852 (1987) 7 *Boston College Third World Law Jnl* 215.

On the other hand, had only some of these rights been incorporated specifically, it would have created the impression that other rights have in fact been excluded.[854]

3.8.3 Are all states parties to the Charter bound by CEDAW?

Does this imply that all states parties to the African Charter have, by virtue of article 18(3), become bound to implement all the provisions of CEDAW? To answer this question, a distinction has to be drawn between those states parties which have ratified CEDAW, and those which have not ratified it.

As for the **states that have ratified CEDAW**: The provision in the African Charter serves to reiterate their obligations under CEDAW. It reminds the state and the individuals of the supplement to the Charter contained in the international instrument. In a sense it is an unnecessary duplication. This duality would also imply that reporting on the realisation of rights in CEDAW must be presented to both the African Commission and the Committee on the Rights of Women.

As for the second group of states, those that **have not formally undertaken the CEDAW obligations**: It is submitted that these states also become bound to observe the provisions of CEDAW, on the following grounds:

- Article 18(3) of the African Charter refers to the elimination of discrimination and protection of the rights of women "as stipulated in international declarations and conventions". No mention is made of any requirement of ratification of the applicable conventions. In this respect, the provisions in article 18(3) should be contrasted with those in article 60. Article 60 refers to international law on human and peoples' rights from which the Commission may "draw inspiration". Particular mention is made of UN instruments "of which the parties to the present Charter are members". Prior ratification enters into discussion on article 60, but not on article 18(3).

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853 At 220.

854 *Ibid.*

- CEDAW was adopted by the UN in 1979, and entered into force on 3 September 1981. As the adoption of the African Charter (on 21 October 1981) post-dates the adoption of CEDAW, it must be presumed that reference to "international conventions" include CEDAW. In any event, the Charter only took effect in 1986, when CEDAW was already well established and ratified by numerous African states.

- This argument also finds support in article 1 of the Charter. This article requires states to recognise, without qualification, the rights, duties and freedoms enshrined in the Charter. In its guidelines for reporting the Commission devoted a very comprehensive part to reporting on women's rights, in which the guidelines of the Committee of Women's Rights were largely mirrored. All states parties to the Charter are, in terms of these guidelines, required to report on obligations set out in CEDAW, and not explicitly in the Charter.

- If only some (and not all) states parties to the Charter are obliged to implement CEDAW, it will lead to a duality in the system of human rights protection under the African Charter. Some women in Africa will have recourse to protection which is far more extensive than that afforded to other women.

- If this interpretation is not followed, article 18(3) would mean that only states parties to CEDAW are bound by the applicable "international convention". But these states are already bound to observe CEDAW by virtue of their ratification thereof. Article 18(3) would be rendered meaningless if it only affects those states that have, in any case, already undertaken the obligations.

3.8.4 Proposals for reform

Even if it is accepted that all states parties to the Charter have these obligations to ensure the rights set out in CEDAW, reality is different. To women who suffer from human rights violations around Africa, it does not signify whether states are *de iure* bound by CEDAW or not. A general perception exists that the Charter does not suffice to protect women or to guarantee their equality. From this frustration was born the campaign for the elaboration of a specific document on the rights of the African woman.

This issue has been on the agenda for quite some time now. At the 6th NGO Workshop, a study on the issue of women's rights was requested. Two commissioners, Duarte-Martins and Dankwa, were subsequently, at the Commissions 17th session, entrusted with the task to "initiate work on an additional protocol on the rights of Women".[855] At its 19th session the Commission decided to appoint a Special Rapporteur on the rights of women at its 20th session. It was also decided that the rapporteur would work under commissioners Duarte-Martins and Dankwa.[856] This did not materialise: The Commission only "reiterated its commitment to elaborate the additional protocol on the rights of African women and to appoint a Special Rapporteur".[857] It decided to consider proposals in this regard "at its forthcoming session".[858] Before the 21st session, a draft Protocol was prepared by a group of experts.[859] The basis of this draft was a document prepared by commissioner Dankwa, with the collaboration of commissioners Duarte and Ondziel-Gnelenga. According to the final communiqué the Draft Protocol "was discussed" at the Commission's session.

Today, wide agreement exists about the need to highlight the necessity that women's rights should be taken seriously by states that have ratified the Charter and by other African states. There is consensus on the fact that women's rights should be codified. Disagreement prevails about the exact form which this should take. Four options have been advanced:

- an amendment of the Charter;
- a Protocol, optional or additional to the Charter;
- an independent African Women's Rights Charter; and

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855 See Final Communiqué, 17th session, ACHPR/COM.FIN/XVII/Rev. 3 at par 30.

856 Ninth Annual Activity Report at 7.

857 See Final Communiqué, 20th session at par 3.3.1(f) 19.

858 *Ibid.*

859 Final Communiqué of 21st session.

- interpretative declarations by the Commission.[860]

The arguments for and against each of these courses of action are now considered:

- An important argument in favour of the first two options is that both models build onto an existing system and may, as such, be quicker to be drafted and more likely to be accepted by states.[861] By merely amending the Charter, the danger that a superfluous instrument will be created, is excluded. A major disadvantage of both these possibilities is that the problematic aspects and flaws of the Charter (such as the emphasis on the family and its weak implementation) will also apply to the Protocol.[862] A serious disadvantage of an optional (or additional) protocol is that such an option can create a dual system (with the possibility of some states opting out).

- Kibwana supports the adoption of a distinct African Women's Charter.[863] The main argument he forwards is that such an instrument would not be parasitic on the Charter, as a new Charter can loosen itself from it. This means that it can be a far-reaching document, and that it can provide for meaningful implementation. He mentions two major disadvantages: It may take a long time to agree on its content and to have it adopted. In addition, given that CEDAW already exists, such a charter will not be entirely new. In my view, especially the last factor should be accorded sufficient weight in one's consideration of the issue. Experience regarding the African Charter on the Rights and Welfare of the Child has shown that elaborating a regional equivalent of an accepted international instrument may lead to unnecessary duplication. It has also indicated the reluctance of states to ratify an instrument with effective

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860 Most commissioners seem to favour some form of protocol on women's rights. Of those expressing their views on the issue in (1996) (Oct - Dec) *AFLAQ*, Amega (at 43), Dankwa (at 12) and Kisanga (at 32) to varying degrees question the need or necessity of supplementing the Charter with another instrument. Discussing improvements to the Charter, a meeting of governmental experts in Cape Town proposed that a protocol to the Charter on the rights of women should be elaborated. Alternatively, they agreed, a separate instrument on the rights of women should be formulated (See OAU/LEG/EXP/HPR/RPT/ (I) Rev 1 at 3).

861 See Kibwana (1995) 5 *Review of the African Commission* 1 at 11-12. See the contrary view of Benedek (1995) 5 *Review of the African Commission* 21 at 31.

862 See eg Kibwana (1995) 5 *Review of the African Commission* 1 at 12 and Benedek (1995) 5 *Review of the African Commission* 21 at 31.

863 See arguments in (1995) 5 *Review of the African Commission* 1 at 11-12.

enforcement procedures. Another affirmation of rights will not bring states closer to taking even their existing obligations seriously. Wasted energy and false expectations may be the only end-results of these efforts.

- This leaves the last option, which Benedek favours.[864] He concedes that it might be necessary, in the longer term, to include rights into the Charter which have not been contained in it (and by CEDAW, one should add). As an immediate step, though, it makes more sense for the Commission to issue an interpretative declaration (or "general comment")[865] about women's rights under the Charter. This will have immediate effect. It could be done in terms of the Commission's quasi-judicial mandate,[866] or at the request of a state party, the OAU, or an African organisation recognised by the OAU.[867] The last category should include NGOs with observer status at the Commission. Such a clear statement about the rights of women may serve as a rallying cry in attempts to improve the position of women under the Charter. This course is less dramatic than the first two, but will certainly be effected with the least delay. Given that many of the rights in the Charter may be invoked by women who suffer human rights violations, NGOs should focus on bringing concrete cases to the Commission. A single finding in a real case might have more worth than many words, declarations and declamations.

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864 See his position in (1995) 5 *Review of the African Commission* 21 at 32.

865 In a sense, the guidelines for state reporting are already "interpretations" of the substantive provisions on women. See the discussion at par 3.3.4.2i above.

866 In terms of art 45(1)(b).

867 In terms of art 45(3).

TABLE K: AFRICAN HUMAN RIGHTS TREATIES AS AT 31 MARCH 1997

	African Charter on Human and Peoples' Rights (entered into force 21 October 1986)[868]		OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (entered into force 20 June 1974)[869]		African Charter on the Rights and Welfare of the Child (not yet entered into force)[870]	
Country	**Signed**	**Ratified**	**Signed**	**Ratified**	**Signed**	**Ratified**
Algeria	10/04/86	01/03/87	10/09/69	25/05/74		
Angola		02/03/90		30/04/81		
Benin		20/01/86	10/09/69	26/02/73	27/02/92	
Botswana		17/07/86	10/09/69	04/05/95		
Burkina Faso	05/03/84	06/07/84	10/09/69	19/03/74	27/02/92	08/06/92
Burundi		28/07/89	10/09/69	31/10/75		
Cameroon	23/07/87	20/06/89	10/09/69	07/09/75	16/09/92	
Cape Verde	31/03/86	02/06/87		16/02/89	27/02/92	20/07/93
Central African Republic		26/04/86	10/09/69	23/07/70		
Chad	29/05/86	09/10/86	10/09/69	12/08/81		
Comoros		01/06/86				
Congo	27/11/81	09/12/82	10/09/69	16/01/71	28/02/92	
Côte d'Ivoire		06/01/92	10/09/69			
Djibouti	20/12/91	11/11/91			28/02/92	
Egypt	16/11/81	20/03/84		12/06/80		
Equatorial Guinea	18/08/86	07/04/86	10/09/69	08/09/80		
Eritrea						
Ethiopia			10/09/69	15/10/73		
Gabon	26/02/82	20/02/86		21/03/86	27/02/92	
Gambia	11/02/83	08/06/83	10/09/69	12/11/80		
Ghana		24/01/89	10/09/69	19/06/75		

868 See CAB/LEG/67.1

869 See CAB/LEG/24.3

870 See CAB/LEG/24.9

	African Charter on Human and Peoples' Rights (entered into force 21 October 1986)[868]		OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (entered into force 20 June 1974)[869]		African Charter on the Rights and Welfare of the Child (not yet entered into force)[870]	
Country	**Signed**	**Ratified**	**Signed**	**Ratified**	**Signed**	**Ratified**
Guinea	09/12/81	16/02/82	10/09/69	18/10/72		
Guinea-Bissau		04/12/85		27/06/89		
Kenya		23/01/92	10/09/69	23/06/92		
Lesotho	07/03/84	10/02/92		18/11/88		
Liberia	31/01/83	04/08/82	10/09/69	01/10/71		
Libya	30/05/85	19/07/86		25/04/81		
Madagascar		09/03/92	10/09/69			
Malawi	23/02/90	17/11/89		04/11/87		
Mali	13/11/81	21/12/81	10/09/69	10/10/81		
Mauritania	25/02/82	14/06/86	10/09/69	22/07/72		
Mauritius	27/02/92	19/06/92	10/09/69		07/11/91	14/02/92
Mozambique		22/02/89		22/02/89		
Namibia		30/07/92				
Niger	09/07/86	15/07/86	10/09/69	16/09/71		
Nigeria	31/08/82	22/06/83	10/09/69	23/05/86		
Rwanda	11/11/81	15/07/83	10/09/69	19/11/79	02/10/91	
Sahrawi Arab Democratic Rep	10/04/86	02/05/86			23/10/92	
São Tomé and Príncipe		23/05/86				
Senegal	23/09/81	13/08/82	10/09/69	01/04/71	18/05/92	
Seychelles		13/04/92		11/09/80	27/02/92	13/02/92
Sierra Leone	27/08/81	21/09/83		28/12/87	14/04/92	
Somalia	26/02/82	31/07/85	10/09/69		01/06/91	
South Africa	09/07/96	09/07/96		15/12/95		
Sudan	03/09/82	18/02/86	10/09/69	24/12/72		
Swaziland		15/09/95	10/09/69	16/01/89	29/06/92	
Tanzania	31/05/82	18/02/84	10/09/69	10/01/75		
Togo	26/02/82	05/11/82	10/09/69	10/04/70	27/02/92	
Tunisia		16/03/83	10/09/69	17/11/89	16/06/95	
Uganda	18/08/86	10/05/86	10/09/69	24/07/87	26/02/92	17/08/94
Zaïre	23/07/87	20/07/87	10/09/69	14/02/73		

	African Charter on Human and Peoples' Rights (entered into force 21 October 1986)[868]		OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (entered into force 20 June 1974)[869]		African Charter on the Rights and Welfare of the Child (not yet entered into force)[870]	
Country	**Signed**	**Ratified**	**Signed**	**Ratified**	**Signed**	**Ratified**
Zambia	17/01/83	19/01/84	10/09/69	30/07/73	28/02/92	
Zimbabwe	20/02/86	30/05/86		28/09/85		19/01/95