

Recent developments

Human rights developments in the African Union during 2016

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Summary

During the year 2016 several significant normative developments were recorded in the African human rights system. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa was adopted but is yet to be ratified by any member state. The African Court delivered three merit decisions dealing with the right to fair trial and the right to political participation: a judgment on reparations; one ruling on jurisdiction; and one ruling on a review application. Despite this positive outlook, Rwanda's withdrawal of its article 34(6) declaration allowing direct access by individuals and NGOs posed a real challenge to the Court's legitimacy in cases with sensitive political implications. Both the African Commission and African Children's Committee made progress on the examination of state reports. As far as communications are concerned, the African Commission delivered seven merit decisions, while the African Children's Committee delivered two decisions on the merits and one ruling on admissibility. The African Children's Committee's decision on the age of childhood in Malawi, which was reached through an amicable settlement, led to constitutional amendments increasing the

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age of adulthood from 16 to 18 years. Finally, the trial and conviction of former Chadian dictator, Hissène Habré, by the Extraordinary African Chambers served as a breath of fresh air in the fight against impunity for human rights violations in Africa.

Key words: *African Union; African Commission on Human and Peoples' Rights; African Court on Human and Peoples' Rights; African Committee of Experts on the Rights and Welfare of the Child; Extraordinary African Chambers*

1 Introduction

The article highlights important developments in the African human rights system in the course of 2016. It considers normative developments within the African Union (AU) and jurisprudential developments within the judicial, quasi-judicial and hybrid organs of the AU. In particular, the article reviews the work of the African Commission of Human and Peoples' Rights (African Commission); the African Court on Human and Peoples' Rights (African Court); the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee); and the Extraordinary African Chambers.

2 African Union political organs and normative developments

The single most important normative development in the African human rights system in the year under review was the adoption by the AU Assembly on 31 January 2016 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa (Older Persons Protocol). This Protocol defines 'older persons' as individuals aged 60 years and above,¹ and obliges state parties to²

ensure that the 1991 United Nations Principles of Independence, Dignity, Self-Fulfilment, Participation and Care of Older Persons are included in their national laws and are legally binding as the basis for ensuring their rights.

Among its substantive provisions, the Protocol prohibits all forms of discrimination against older persons,³ including discrimination in the area of employment,⁴ and obliges state parties to ensure the development of new legislation and/or the review of old legislation to ensure that older persons receive equal treatment and protection⁵ and

1 Art 1 Older Persons Protocol.

2 Art 2(2).

3 Art 3.

4 Art 6(1).

5 Art 4(1).

are provided with legal assistance to protect their rights.⁶ State parties are further obliged to ensure that legislation recognises the rights of older persons to make decisions concerning their own wellbeing;⁷ to 'be provided with legal and social assistance in order to make decisions that are in their best interests and wellbeing';⁸ and that 'the rights of older persons to express opinions and participate in social and political life' are protected.⁹ Also covered are their rights to pension and social protection;¹⁰ prohibition of and protection from harmful traditional practices;¹¹ the rights of older women to protection from 'violence, sexual abuse and discrimination based on gender';¹² abuses related to property; land rights;¹³ and inheritance.¹⁴ Other provisions include financial support to older persons who take care of vulnerable children;¹⁵ the protection of older persons with disabilities;¹⁶ protection during armed conflict and disasters;¹⁷ access to healthcare¹⁸ and education, including information technology skills;¹⁹ participation in recreational activities;²⁰ and access to infrastructure.²¹

State parties undertake to indicate in their periodic reports to the African Commission measures they have taken to implement the provisions of the Protocol.²² The African Commission is also mandated with the interpretation and enforcement of the Protocol and may refer any matters regarding the interpretation and enforcement of the Protocol to the African Court.²³ In appropriate instances – where the state party concerned has made a declaration accepting the direct jurisdiction of the African Court in terms of the Protocol establishing the Court – the Court has the mandate to hear disputes arising out of the application or implementation of the Older Persons Protocol.²⁴ The Older Persons Protocol enters into force 30 days after receipt of the 15th ratification. No state has yet signed or ratified the Protocol. The Older Persons Protocol presents an important avenue for the promotion and protection of the rights of older persons on the

6 Art 4(2).

7 Art 5(1).

8 Art 5(2).

9 Art 5(3).

10 Art 7.

11 Art 8.

12 Art 9(1).

13 Art 9(2).

14 Art 9(3).

15 Art 12.

16 Art 13.

17 Art 14.

18 Art 15.

19 Art 16.

20 Art 17.

21 Art 18.

22 Art 22(1).

23 Arts 22(2) & (3).

24 Art 22(4).

continent. However, its impact ultimately depends on how quickly states will ratify and diligently implement it.

Another important development regarding the AU political organs was the recommendation by the AU Executive Council in July 2016 to the AU Assembly to amend article 5(1) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights to include the African Children's Committee in the list of entities entitled to refer cases to the African Court.²⁵ This follows the advisory opinion of the African Court that the African Children's Committee cannot refer contentious cases submitted to it to the African Court because of the textual omission of the Committee from the African Court Protocol.²⁶ However, at the end of 2016 this amendment process had not yet been completed.

3 African Commission on Human and Peoples' Rights

3.1 Sessions

The African Commission held four sessions in 2016: the 19th extraordinary session (16-25 February); the 58th ordinary session (6-20 April); the 20th extraordinary session (9-18 June); and the 59th ordinary session (21 October- 4 November). These sessions were held at the seat of the African Commission in Banjul, The Gambia, or in the territory of any state party that invited the Commission.²⁷

3.2 State reporting

At the 19th extraordinary session held in February, the African Commission adopted Concluding Observations on the reports of Sierra Leone and Kenya,²⁸ while the Commission considered the periodic reports of Mali, Namibia and South Africa at its April session. The periodic reports of Mauritius and Côte d'Ivoire were considered at

25 Executive Council 'Decision on the Report of the African Committee of Experts on the Rights and Welfare of the Child' Doc EX.CL/977(XXIX) para 8, https://iss.africa.org/pscreport/uploads/31275-ex_cl_dec_919_-_925_and_928_-_938_xxix_e.pdf (accessed 7 April 2017). For a further discussion, see F Viljoen 'Understanding and overcoming challenges in accessing the African Court on Human and Peoples' Rights' (on file with author).

26 Advisory Opinion 2/2013, The African Committee of Experts on the Rights and Welfare of the Child on the Standing of the African Committee of Experts on the Rights and Welfare of the Child before the African Court and Human and Peoples' Rights (5 December 2014).

27 Rule 28 of the Rules of Procedure of the African Commission on Human and Peoples' Rights (2010).

28 Final Communiqué of the 19th extraordinary session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia, 16-25 February 2016 para 18.

the November session.²⁹ The Commission published the status of reporting as at 2016, which revealed that fewer than half the member states have been reporting regularly. Only 19 states (Algeria, Burkina Faso, Côte d'Ivoire, Djibouti, Ethiopia, Kenya, Liberia, Mali, Malawi, Mauritius, Mozambique, Namibia, Niger, Nigeria, Sahrawi Arab Democratic Republic, Senegal, Sierra Leone, South Africa and Uganda) have up-to-date reports; two states (Gabon and Sudan) have one report overdue; seven states (Angola, Burundi, Cameroon, Democratic Republic of the Congo, Libya, Rwanda and Togo) have two reports overdue; five states (Benin, Botswana, Congo, Madagascar and Tanzania) have three reports overdue; 14 states (Cape Verde, Central African Republic, Chad, Egypt, The Gambia, Ghana, Guinea, Lesotho, Mauritania, Seychelles, Swaziland, Tunisia, Zambia and Zimbabwe) are in arrears in respect of more than three reports; while six states (Comoros, Eritrea, Guinea-Bissau, Equatorial Guinea, São Tomé and Príncipe and Somalia) have never submitted a report.³⁰ The statistics reveal that, generally, the reporting status of state parties to the African Charter is not impressive.

At the February extraordinary session, the African Commission adopted Concluding Observations on the reports of Sierra Leone. At its June session, the Commission considered and adopted Concluding Observations on periodic reports presented at its 57th and 58th ordinary sessions by Algeria, South Africa and Namibia,³¹ while at the November session it adopted the Concluding Observations on the periodic report of Mali.³² The Concluding Observations of the June and November sessions were not available to the public at the time of writing. However, in its Concluding Observations and recommendations to the combined reports of Sierra Leone, the Commission commended the government for ratifying on 3 July 2015 the Protocol to the African Charter on the Rights of Women in Africa (African Women's Protocol) and noted the moratorium on the death penalty as no death sentence has been carried out since 1998. It identified as a source of concern the fact that Sierra Leone is yet to domesticate the African Charter within its legal system and the lack of information on issues such as the prohibition of torture and cruel, inhuman and degrading treatment; the right to liberty and security of the person; conditions in prisons and detention centres; and economic, social and cultural rights.³³ The Commission called upon

29 Final Communiqué of the 59th ordinary session of the African Commission on Human and Peoples' Rights, 21 October-4 November 2016, Banjul, The Gambia (November Communiqué) para 25.

30 40th Activity Report of the African Commission on Human and Peoples' Rights, submitted in accordance with art 54 of the African Charter on Human and Peoples' Rights, December 2015-April 2016, para 14.

31 Final Communiqué of the 20th extraordinary session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia, 9-18 June 2016.

32 November Communiqué (n 29 above) para 27.

33 Concluding Observations and Recommendations on the Initial and Combined Periodic Report of the Republic of Sierra Leone on the Implementation of the

the government to address these issues in its next report and urged it to ensure that the next report includes the legislative, policy, institutional and programmatic measures that have been taken to implement the African Women's Protocol.

3.3 Resolutions, guidelines and General Comments

The African Commission adopted 37 resolutions in 2016. These resolutions can be divided into four categories: resolutions relating to the human rights situation in specific states; resolutions relating to general human rights themes; resolutions dealing with the functioning of the Commission; and resolutions dealing with working groups. Some resolutions fall outside this categorisation, such as the resolution on the criteria for granting and maintaining observer status to non-governmental organisations (NGOs) working on human and peoples' rights in Africa and a resolution on the collaboration between the Commission and partners on promoting the revised United Nations (UN) Standard Minimum Rules for the Treatment of Prisoners.

As far as the resolution on the criteria for the granting and maintaining of observer status of NGOs is concerned, it will be recalled that the Executive Council in 2015 requested the Commission to review its criteria for the granting and maintaining of observer status to NGOs (observer status criteria), following the granting of observer status to the Coalition of African Lesbians (CAL).³⁴ The Executive Council specifically requested the withdrawal of the observer status granted to CAL, and to take into consideration 'fundamental African values' in the review of the criteria for granting observer status.³⁵ The Commission acknowledges that the adoption of the new resolution on the observer status criteria flows from the request by the Executive Council.³⁶ However, the new observer status criteria are almost identical to the previous ones, with minor differences such as the substitution of the OAU Charter with the AU Constitutive Act and the inclusion of the African Women's Protocol as part of the values to which the activities and objectives of an NGO seeking observer status must conform.³⁷ There is no provision expressly requiring that 'fundamental African values' should be taken into account when granting observer status to NGOs as requested by the Executive Council. What is curious, though, is the substitution of

African Charter on Human and Peoples' Rights, adopted at the 19th extraordinary session of the African Commission on Human and Peoples' Rights held in Banjul, The Gambia, from 16-25 February 2016.

34 M Killander 'Human rights developments in the African Union during 2015' (2016) 16 *African Human Rights Law Journal* 532-537; see also Executive Council Decisions ExCL/887(XXVII) and ExCL/Dec.902 (XXVIII) Rev1.

35 As above.

36 African Commission 'Resolution on the Criteria for the Granting and Maintaining of Observer Status to Non-Governmental Organisations working on Human and Peoples' Rights in Africa', adopted at 59th ordinary session held from 21 October-4 November 2017 in Banjul, The Gambia, preambular paras 8 & 9.

37 African Commission (n 36 above) para 2(a).

the African Charter with the 'Preamble of the African Charter'.³⁸ Whilst it may reasonably be speculated that the Commission may deliberately have done this as a way of complying with the Executive Council request, since the Preamble of the African Charter provides that 'historical tradition and the values of African civilisation' should 'inspire and characterise ... the concept of human and peoples' rights',³⁹ it is trite that reference to the African Charter includes its Preamble. Reference to the African Charter as in the previous criteria would thus have sufficed for this purpose. The new observer status criteria, therefore, do not achieve anything different from the previous ones.

Regarding the resolutions dealing with specific states, the African Commission adopted resolutions on the human rights situation in Congo, Sahrawi Arab Democratic Republic, Gabon, Ethiopia, Burundi, The Gambia and Nigeria (the human rights situation of the abducted Chibok girls and others abducted). In its resolution on The Gambia, the Commission condemned the use of force against protestors and members of the opposition, restrictions on the right to freedom of expression and access to the internet by the government. The Commission called on the government to stop the use of force against its population, to ensure free, fair and peaceful elections and to pardon persons incarcerated for opposing reforms of the Election Amendment Act. Arguably, as revealed later by the brief political instability and repression that resulted from the opposition's victory in the elections, this resolution constitutes an early warning on the situation in The Gambia.

Resolutions dealing with a general human rights theme focus on the proposal for the extension of the deadline for the study of transitional justice in Africa; climate change and human rights; the right to dignity and freedom from torture or ill-treatment of persons with psychological disabilities in Africa; the fight against impunity; the situation of human rights defenders in Africa; the right to education; human rights issues affecting the African youth; elections; human rights in conflict situations; the situation of migrants; indigenous populations/communities; internally-displaced persons; woman human rights defenders; freedom of information and expression on the internet; policing and assemblies; and extractive industries in Africa.

With regard to resolutions dealing with the functioning of the African Commission, the Commission adopted a resolution on the establishment of a Resolutions Committee. This resolution is important to the functioning of the Commission in that the Resolutions Committee has been charged with ensuring the proper publication and popularisation of all adopted resolutions through

38 As above.

39 African Charter, preambular para 5.

appropriate means, including by a compilation and analysis of all resolutions of the Commission.⁴⁰

Resolutions focusing on working groups relate to the modification of the mandate of the working group on specific issues relevant to the work of the Commission; the appointment of expert members of the working group on indigenous populations or communities; the appointment of a new expert member of the working group on the rights of older persons and persons with disabilities; the appointment of an expert member of the working group on indigenous populations or communities; and the appointment of an expert member of the working group on economic, social and cultural rights. These working groups perform the important function of enhancing the promotional mandate of the Commission in specific human rights fields.⁴¹ Hence their appointment is strong testimony to the commitment of the Commission to the investigation, research into and intervention on pertinent issues relating to human rights in Africa.

3.4 Communications

The African Commission considered 31 communications during its 19th extraordinary session, while 11 communications were considered at the 58th ordinary session. Out of the 31 communications considered at the 19th session, the Commission delivered seven decisions on the merits. These are Communication 355/07, *Ezzat & Enayet v Egypt*; Communication 385/10, *ICJ v Kenya*; Communication 392/10, *Me Theogene Muhayeyezu v Rwanda*; Communication 408/11, *Jose Alidor Kabambi v DRC*; Communication 423/12, *Mack Kit v Cameroon*; Communication 428/12, *Dawit Issak v Eritea*; and Communication 433/12, *Ngandu v DRC*. None of these decisions was publicly available at the time of writing.

The African Commission granted one review application (Communication 383/10, *Al-Asad v Djibouti*), while oral hearings were scheduled for two communications (Communication 370/09, *Social and Economic Rights Action Centre v Nigeria*; and Communication 376/09, *Acleo Kalinga (represented by REDRESS, OMCT and IRCT) v Uganda*). The Commission scheduled two communications (Communication 459/13, *Dev Hurnam v Mauritius* and Communication 434/12, *Filimao Pedro Tivane (represented by Dr Simeao Cuamba) v Mozambique*) for referral to the African Court while one communication (Communication 425/12, *Abiodun Saburu (represented by Legal Defence Assistance Project) v Nigeria*) was struck out for want of diligent prosecution. The Commission granted provisional measures in four communications (Communication 586/15, *Dr Osama Yassin (represented by European Alliance for Human Rights) v The Arab Republic*

40 Resolution 338: Resolution on the Establishment of a Resolutions Committee – ACHPR/Res 338(LVIII) 2016, adopted at the meeting of the African Commission in its 58th ordinary session held in Banjul, The Gambia, from 6-20 April 2016.

41 F Viljoen *International human rights law in Africa* (2012) 377.

of Egypt; Communication 591/15, *El Sayed Mossad v The Arab Republic of Egypt*; Communication 600/16, *Patrick Gabaakanye (represented by Dingake Law Partners, DITSHWANELO and REPRIEVE) v Botswana*; and Communication 602/16, *Lofty Ibrahim Ismail Khalil & 3 Others v Arab Republic of Egypt*). At the time of writing, rulings on provisional measures were not publicly available for commentary.

Of the 11 communications considered at the 58th session, provisional measures were given in respect of four communications (Communication 610/16, *Abdul Rahman Osama (represented by European Alliance for Human Rights & 2 Others) v The Arab Republic of Egypt*; Communication 609/16, *Prince Seraki Mampuru (on behalf of Bapedi Mamone Community under the leadership of Kgosi Mampuru III) v the Republic of South Africa*; Communication 611/16, *Omar Hegazy's (represented by the Organisation of European Alliance & 2 Others) v The Arab Republic of Egypt*; and Communication 612/16, *Ahmed Mohammed Aly Subaie v The Arab Republic of Egypt*). No ruling on any of the four communications is publicly available for commentary. No decision was given on merit at the 58th ordinary session.

4 African Court on Human and Peoples' Rights

4.1 Composition

The term of office of four of the judges of the court – Augustino Ramadhani (Tanzania, President); Elsie Thompson (Nigeria, Vice-President); Fatsah Ouguergouz (Algeria); and Duncan Tambala (Malawi) – ended on 5 September 2016. Two new judges – Ntyam Ondo Mengue (Cameroon) and Marie Thérèse Mukamulisa (Rwanda) – were elected at the 27th ordinary session of the AU Assembly⁴² and sworn in at the 42nd ordinary session of the Court. It is worth noting that even though there were four vacancies available, the Assembly decided to postpone the election of the two additional judges to the January 2017 session to ensure that only 'female candidates from the northern and southern regions of the AU were nominated for election'.⁴³ This was to ensure that there was both gender and regional balance on the Court in accordance with articles 12(2) and 14(2) and (3) of the Court's Protocol and Executive Council Decision EXCL/907 (XXVIII).⁴⁴

A new bureau of the Court was also elected at the 42nd ordinary session to replace the retiring judges with Justice Sylvian Ore (Côte

42 African Union Assembly 'Decision on the appointment of four (4) judges of the African Court on Human and Peoples' Rights', Doc EXCL/990(XXIX) para 2.

43 AU Assembly (n 42 above) para 3.

44 As above. Executive Council Decision EXCL/907 (XXVIII) Rev1 deals with the 'modalities on implementation of criteria for equitable geographical and gender representation in the African Union organs', which require that each of the five regions of the AU shall have at least two representatives on the African Court, and at least one judge from each region must be a woman.

d'Ivoire) elected as the Court's new President and Justice Ben Kioko (Kenya) as Vice-President for a two-year term.

4.2 Sessions

The African Court held four ordinary sessions in 2016. These were the 40th, 41st, 42nd and 43rd ordinary sessions of the Court which were held from 19 February to 18 March, 16 May to 3 June, 5-15 September and 31 October to 18 November respectively. The sessions were all held at the seat of the Court in Arusha, Tanzania.

4.3 Ratifications and withdrawals

Chad deposited the instrument of ratification of the Court Protocol on 8 February 2016, bringing the total number of ratifications to 30, while Benin on the same day deposited its article 34(6) declaration allowing direct access to the Court by individuals and NGOs, increasing the number of declarations to eight.⁴⁵ However, in a rather unfortunate turn of events, Rwanda withdrew its article 34(6) declaration citing, principally, the fact that the Court had allowed access by persons convicted by national courts of serious crimes (genocide).⁴⁶ While member states should reasonably be able to withdraw their declarations, as subsequently held by the Court,⁴⁷ what is disturbing about Rwanda's withdrawal is the reason given as justification. Rwanda's justification assumes that there are categories of persons who should not be able to have access to the Court because of crimes they are alleged to have committed. This kind of reasoning is not only wrong as it is discriminatory, but also fundamentally goes against the very mandate of the Court, which is to ensure access to justice in the protection of human rights irrespective of the designation of the person(s) seizing its jurisdiction. Rwanda's withdrawal and subsequent refusal to participate in further proceedings also undermine efforts to strengthen African institutions to ensure accountability for human rights violations and cast further doubt on the seriousness of African states to ensure the effectiveness of African human rights institutions. Rwanda's actions further set a bad precedent for member states to withdraw their declaration whenever they disagree with the Court on any matter. This has the potential to weaken the Court and may possibly lead to self-censure by the Court in order not to get involved in confrontations with

45 African Union 'List of countries which have signed, ratified/acceded to the Protocol to the African Charter on Human and Peoples' Rights on the establishment of the African Court of Human and Peoples' Rights' http://en.african-court.org/images/Basic%20Documents/Ratification_and_Deposit_of_the_Declaration_final-jan_2017.pdf (accessed 17 March 2017).

46 Centre for Human Rights 'Report: Rwanda's withdrawal of its acceptance of direct individual access to the African Human Rights Court' <http://www.chr.up.ac.za/index.php/centre-news-a-events-2016/1604-report-rwandas-withdrawal-of-its-acceptance-of-direct-individual-access-to-the-african-human-rights-court.html> (accessed 28 March 2017).

47 See *Ingabire Victoire Umuhoza v Republic of Rwanda* – Appl 003/2014.

member states. This should also be a cause for introspection for advocates calling for the *en bloc* withdrawal of African states from the ICC with a view towards the establishment of criminal chamber of the African Court.

4.4 Hearings and decisions

At the 40th ordinary session, the African Court held two public hearings for the cases of *Action pour la Protection des Droits de l'Homme APDH v Republic of Côte d'Ivoire* – Appl 001/2014 and *Ingabire Victoire Umuhoza v Republic of Rwanda* – Appl 003/2014 – and delivered judgment in the case of *Wilfred Onyango Nganyi & 9 Others v United Republic of Tanzania* – App 006/2013. The Court delivered four judgments at its 41st ordinary session⁴⁸ and one each at the 42nd⁴⁹ and 43rd⁵⁰ ordinary sessions. These cases are discussed below.

In *Wilfred Onyango Nganyi & Others*, the applicants, all citizens of Kenya, brought the case against Tanzania alleging that their right to be tried within a reasonable time and to be provided with legal aid had been violated contrary to article 7 of the African Charter. The case flowed from a criminal case against the applicants, which had been pending before the national courts since 2006. The respondent state objected to the admissibility of the case, among others on the ground that the failure of the applicants to cite the specific provisions of the African Charter alleged to have been violated made the application incompatible with the Constitutive Act of the African Union and, therefore, inadmissible. The Court held that it was not necessary for the applicants to cite specific provisions of the African Charter alleged to have been violated. What was important was that human rights provided for in the African Charter were alleged to have been violated even if no specific provisions were cited. On the merits, the Court found the respondent state in violation of the right to be tried within a reasonable time as the criminal case against the applicants had been pending for almost a decade. The Court also held that the respondent state was under an obligation to provide the applicants with legal aid when the judicial authorities realised they had no legal representation, even if this was not requested. The failure to provide the applicants with legal aid, therefore, amounted to a violation of the right to a fair trial provided for by article 7 of the Charter.

Frank David Omary & Others concerned an application for review of the judgment of the Court (the initial judgment) rendered on 28 March 2014, pursuant to article 28(3) of the Court's Protocol and

48 *Frank David Omary & Others v United Republic of Tanzania* – Appl 001/2012, *African Commission on Human and Peoples' Rights v Libya* – Appl 002/2013, *Lohe Issa Konate v Burkina Faso* – Appl 004/2013, & *Mohamed Abubakari v United Republic of Tanzania* – Appl 007/2013.

49 *Ingabire* (n 47 above).

50 *Actions Pour la Protection des Droits de L'homme (APDH) v Republic of Côte d'Ivoire* – Appl 001/2014.

Rule 67(1) of the Rules of Court. The applicants, former employees of the East African Community (EAC), had seized the Court in January 2012 alleging that the respondent had failed to pay the entirety of their pension and terminal allowance as contained in a Mediation Agreement of 1984. The applicants alleged that this conduct of the respondent violated various provisions of the Universal Declaration of Human Rights (Universal Declaration), namely, article 7 on non-discrimination; article 8 on the right to an effective remedy; article 23 on the right to work and fair remuneration; article 25 on the right to an adequate standard of living; and article 30 on the obligation to refrain from acting in breach of the rights contained in the Universal Declaration. The applicants also alleged that they had been subjected to police brutality in violation of the Declaration. In the initial judgment, the Court unanimously ruled the application inadmissible for non-exhaustion of local remedies and held that the matter had not been unduly prolonged.⁵¹ The applicants submitted documents they claimed to be new evidence of the undue prolongation of their case and the exhaustion of local remedies. The Court found that the documents submitted had previously been submitted and considered in the initial application and, therefore, did not qualify as new evidence.⁵² The Court further held that in terms of article 28(3) of the Court's Protocol and Rule 67(1) of the Rules of Court, a review application was admissible only if there was the 'discovery of evidence which was not within the knowledge of the party at the time the judgment was delivered' and is 'filed within six months after the party acquired knowledge of the evidence so discovered'.⁵³ These requirements are cumulative and the absence of one requirement renders the application inadmissible.⁵⁴ The application consequently was dismissed.

African Commission on Human and Peoples' Rights v Libya concerned an application filed on behalf of Saif Al Islam Kadhafi, the son of the former leader of Libya, who was being held in detention in a secret location in Libya. Mr Kadhafi had not been charged with any offence nor brought before court, but was denied access to his lawyer and family. His detention had been extended several times in his absence without him being represented by his lawyer. The African Commission alleged that the treatment of Mr Kadhafi was in violation of the right to liberty and security of the person and the right to a fair trial contrary to articles 6 and 7 of the African Charter respectively. Before the Court could deliver judgment, it received reports that the Azize Court of Tripoli had sentenced Mr Kadhafi to death. The African Court issued a second provisional order requesting the respondent state to take all necessary measures to preserve the life of Mr Kadhafi and to refrain from any acts that could cause him irreparable harm. On the

51 Para 37.

52 Paras 45 & 46.

53 Para 33.

54 Para 52.

merits, the Court held that even in the face of the security problems faced by the respondent state, it still had the obligation to guarantee the right to personal liberty and a fair trial in terms of articles 6 and 7 of the African Charter respectively. This case is particularly important as it was the first time the Court has delivered a judgment on merits in a case referred to it by the African Commission.

Lohe Issa Konate v Burkina Faso concerned the determination of reparations due by the respondent state, which had been found to be in violation of the right of the applicant to freedom of speech through the use of criminal defamation law to sentence the applicant to one year's imprisonment contrary to article 9 of the African Charter. The applicant requested that the criminal conviction be expunged in addition to compensation for loss of work and equipment. The respondent state did not raise any objections to expunging the criminal conviction and, therefore, this was endorsed by the Court. The Court, however, held that it had no jurisdiction to set aside the fines imposed on the applicant as it was not an appellate court. This was a rather strange conclusion given the fact that the Court had previously held in *Alex Thomaz v United Republic of Tanzania* and *Abubakari Mohamed v United Republic of Tanzania* that in terms of article 27(1) of the African Court Protocol it has the power to release an applicant from prison under special circumstance (even though the Court did not in these cases order the release of the applicants). Therefore, it is peculiar that the Court deems itself capable of ordering the release from prison of a convicted applicant in some cases but is incapable of setting aside a fine in this case. Regarding the award of compensation, the Court held that it would award compensation on the basis of equity even where the applicant did not have documentary proof of the amount claimed. The Court, therefore, awarded the applicant compensation for, among others, loss of income, moral damage and medical expenses. The respondent state was also ordered to review the fines imposed on the applicant downwards to comply with the requirements of necessity and proportionality.

In *Mohamed Abubakari v United Republic of Tanzania* the applicant had been sentenced to 30 years' imprisonment for armed robbery. The applicant alleged that his right to a fair trial had been violated by, among others, the failure by the respondent state to investigate his allegations of a conflict of interest on the part of the prosecutor, and the failure by the respondent state to inform him of his right to a lawyer and to provide him with legal aid throughout the proceedings before the national courts. The respondent state raised objections on several grounds to the jurisdiction of the Court and the admissibility of the case, including on the ground that re-examining the evidence on which the applicant had been convicted would amount to the African Court serving as an appellate court to the domestic courts contrary to the Court's Protocol. Another ground of objection to the admissibility of the case was that the applicant had failed to cite any specific provisions of the African Charter alleged to have been violated and,

therefore, the application was incompatible with the Constitutive Act of the AU. Regarding the challenge to its jurisdiction, the Court held that it was not precluded from examining whether 'procedures before national courts are consistent with the international standards established by the [African] Charter or other applicable human rights instruments'. The Court also held that it was not fatal if the applicant failed to cite the specific provisions of the African Charter alleged to have been violated. What was important was that the applicant alleged violations of rights enshrined in the African Charter. On the merits, the Court held that allegations relating to the conflict of interest on the part of the prosecutor should have been taken seriously by the respondent state as it had the potential to impact on the applicant's right to a fair trial. The failure on the part of the respondent to investigate the allegation of bias on the part of the prosecutor, therefore, amounted to a violation of the applicant's right to a fair trial under article 7 of the African Charter. The Court also held that the failure by the respondent state to provide legal aid to the applicant, who was facing serious criminal charges, amounted to a violation of his right to a fair trial under article 7 of the African Charter. However, the Court refused the applicant's request to be released from prison, holding that it would only do so under 'special and compelling circumstances', without elaborating on the nature of the 'special and compelling circumstances' which may persuade it to order such a remedy. The Court should elaborate on this in subsequent cases in order to guide applicants and their representatives on how to craft the remedies they seek from the Court. It is worth noting that in separate dissenting opinions, Justices Elsie Thompson and Rafea Ben Achour disagreed with the decision of the majority to refuse the order to release the applicant. According to these dissenting opinions, the circumstances of this case satisfied the 'special and compelling circumstances' requirement, namely, the Court agreed that the applicant's conviction had been marred by irregularities and, therefore, amounted to a violation of the right to a fair trial; the applicant had already spent more than 18 years in prison; and the Court had ordered that the case should not be reopened before the national courts as this would lead to further injustice. Consequently, there could be no better 'reparatory' order that would be proper to remedy the violations suffered by the applicant in this case than an order for his release from prison.

Ingabire Victoire Umuhoza v Republic of Rwanda concerned the jurisdiction of the African Court to continue hearing a case given that the respondent state had submitted a notice of withdrawal of its declaration in terms of article 34(6) of the Court Protocol allowing direct access to the Court by individuals and NGOs. The case was filed with the Court on 3 October 2014, while the notice of withdrawal was deposited with the AU Commission on 29 February 2016. The respondent argued, among others, that it was only the AU Commission that could decide on its withdrawal and not the Court, and requested the Court to suspend proceedings. The applicant, on

the other hand, argued that in the absence of any provisions regarding withdrawal in the Court Protocol, the Court should apply article 56 of the Vienna Convention on the Law of Treaties (VCLT) in interpreting the Protocol. The applicant further argued that the respondent state had an obligation under the VCLT to comply with the Court Protocol in good faith under the principle of *pacta sunt servanda* and could only withdraw upon following the proper procedure, which must include a cooling-off period. The applicant further argued that based on the principle of non-retroactivity, the respondent's withdrawal, even if valid, would have no effect on pending cases. The Court held that in terms of articles 3(1) and (2) of the Court Protocol it has jurisdiction to entertain all disputes relating to the Court Protocol, including the issue of withdrawal of the article 34(6) declaration. On the validity of the withdrawal, the Court held that even though the Court Protocol was subject to the VCLT, the declaration being a unilateral act, the VCLT was not directly applicable but could be applied by analogy. The Court also held that even though the respondent was entitled to withdraw its declaration, this could not be done arbitrarily as it conferred rights on 'third parties, the enjoyment of which require legal certainty'. Withdrawal should, therefore, be preceded by a minimum of one year prior notice to ensure 'judicial security by preventing abrupt suspension of rights which impacts on ... individuals and groups'. The withdrawal, therefore, only takes effect on 1 March 2017, one year after the notice. The Court further held that the notice of withdrawal had no effect on cases already pending before the Court.

In *Actions Pour la Protection des Droits de L'homme (APDH) v Republic of Côte d'Ivoire*, the applicant alleged that Law 2014-335 amending Law 2001-634 of 2001 regulating the composition, organisation and functioning of the Independent Electoral Commission (IEC) was not in conformity with the African Charter on Democracy, Governance and Elections (African Democracy Charter) and the ECOWAS Protocol on Democracy and Good Governance (ECOWAS Democracy Protocol). The applicant's allegations related to the presence of a personal representative of the President, a personal representative of the president of the National Assembly, representation of, among others, the minister in charge of Territorial Administration and the Minister of Economy and Finance in the IEC, creating unequal treatment in the form of over-representation in the favour of the President. According to the applicant, this was in violation of an obligation of the respondent state to establish an independent and impartial electoral body as well as the right to equality before the law and equal protection of the law contrary to articles 3 and 13(1) & (2) of the African Charter, 10(3) and 17(1) of the African Democracy Charter, 3 of the ECOWAS Democracy Protocol, 1 of the Universal Declaration and 26 of the International Covenant on Civil and Political Rights (ICCPR). The Court first had to decide whether the African Democracy Charter and ECOWAS Democracy Protocol were human rights instruments in terms of article 3 of the Court Protocol, which it

concluded in the affirmative. On the merits, the Court held that the international instruments cited by the applicant did not prescribe any precise characteristics of an independent and impartial electoral body. An electoral body would, however, be deemed independent if 'it has administrative and financial autonomy; and offers sufficient guarantees of its members' independence and impartiality'. In this case, the imbalance in representation in favour of the ruling coalition amounted to a violation of its obligation to establish an independent and impartial electoral management body as provided for under article 17 of the African Democracy Charter and article 3 of the ECOWAS Democracy Protocol, which affects the right of every citizen to freely participate in the public affairs of his country in terms of article 13 of the African Charter. The Court also held that the impugned law violated the right to equal protection as the imbalance in representation within the IEC placed some candidates at an advantage over others. The respondent state was ordered to amend its electoral laws to comply with the relevant international instruments.

5 African Committee of Experts on the Rights and Welfare of the Child

5.1 Composition

In 2016, Mr Mohamed Ould Ahmedoudit H'Meyada from Mauritania was elected to the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) as a replacement for Prof Julia Sloth-Nielsen who served a five-year term which expired in January 2016. Prof Sloth-Nielsen has been very influential in conducting several Children's Committee projects, such as the General Comment on article 6 of the African Charter which deals with birth registration, name and nationality.⁵⁵ Although in this case a female was replaced by a male, the Committee still retains a majority of women. The Committee is now composed of six women and five men.

5.2 Sessions

The African Children's Committee holds an ordinary session twice a year. At the ordinary sessions, state parties' reports, complementary reports by civil society organisations (CSOs), communications, requests for investigation and other requests submitted to the Committee are examined. Some activities during these sessions are

55 AU Executive Council elects a new member of the African Children's Committee <http://www.acerwc.org/au-executive-council-elects-a-new-member-of-the-acerwc/> (accessed 27 February 2017).

open while others are restricted.⁵⁶ The Committee held two sessions in 2016: the 27th ordinary session (2-6 May 2016); and the 28th ordinary session (21 October-1 November 2016). The 27th ordinary session was held at the headquarters of the AU Commission in Addis Ababa, Ethiopia, while the 28th ordinary session along with the 12th pre-session was held jointly with the 59th ordinary session of the African Commission in Banjul, The Gambia.

5.3 State reporting

At its 28th ordinary session, the African Children's Committee considered the state reports from Eritrea, Cameroon, Ghana and Sierra Leone. The Concluding Observations of the Committee in respect of these states were not available at the time of writing.

5.4 Communications

The Children's Committee handed down a decision in *Institute for Human Rights and Development in Africa (IHRDA) v The Republic of Malawi*,⁵⁷ and heard arguments in the case of *Minority Rights Group International and SOS-Esclaves on behalf of Said Ould Salem and Yarg Ould Salem v The Republic of Mauritania*⁵⁸ at the 28th ordinary session, and a ruling on one communication (*African Centre of Justice and Peace Studies (ACJPS) and People's Legal Aid Centre (PLACE) v The Government of Republic of Sudan*).⁵⁹

Institute for Human Rights and Development in Africa (IHRDA) v The Republic of Malawi was a communication in relation to the provision of section 23 of the Malawian Constitution which defines a child as any person under the age of 16 years. The complainant submitted that the provision contravened article 2 of the African Children's Charter, which defines a child as a person below the age of 18 years of age. The complainant also alleged that the provision was incompatible with article 1 (obligations of state parties) and article 3 (non-discrimination) of the Children's Charter as it excluded Malawian children between the ages of 16 and 18 years from the protection accorded to them under the African Children's Charter.

However, the case was not heard as to its substance as parties had submitted a request for an amicable settlement. The request for amicable settlement was granted by the Committee in line with section 13 of the Revised Communication Guidelines, which permits the parties to a communication to resort in settling their dispute amicably any time before the Committee decides on the merits of the communication. After having deliberated on the details of the terms and conditions of the amicable settlement agreement, the Committee

56 African Committee of Experts on the Rights and Welfare of the Child <http://www.acerwc.org/session-reports/> (accessed 27 February 2017).

57 Communication 004/Com/001/2014 (accessed 27 February 2017).

58 Communication 007/Com/003/2015.

59 Communication 005/Com/001/2015.

decided to adopt the amicable settlement while it continued to be seized of the communication. Malawi has since amended its Constitution to increase the age of childhood to 18 years.⁶⁰ However, while an amicable settlement is indeed a recognised mechanism in the African Children's Charter, its weakness is evident. For instance, it has prevented an authoritative analysis and novel jurisprudence which would have emboldened advocacy for change in other states that have retained a similar provision in their legislative framework.

Minority Rights Group International and SOS-Esclaves on behalf of Said Ould Salem and Yarg Ould Salem v the Republic of Mauritania was brought on behalf of two victims of slavery. The complainants alleged that the government of Mauritania had failed to effectively enforce its 2007 law which purportedly criminalises slavery, and that those convicted under the law did not receive sentences commensurate to the gravity of their actions. In addition, where lenient sentences had been given by its courts, the government of Mauritania had failed to ensure they appeal against the unduly lenient sentences. Hence, the complainants submitted that these failures constituted a violation by Mauritania of article 1 (obligations of state parties); article 3 (non-discrimination); article 4 (best interests of the child); article 5 (survival and development); article 11 (education); article 12 (leisure, recreation and cultural activities); article 15 (protection from economic exploitation); article 16 (protection against child abuse and torture); article 21 (protection against harmful social and cultural practices); and article 29 (prevention of sale, trafficking and abduction of children) of the African Children's Charter. Submissions addressing both admissibility and merits were lodged with the Children's Committee in December 2015. The Committee heard oral presentations by the parties at its 28th ordinary session and decided to undertake an on-site investigation in Mauritania early in 2017.⁶¹

In *African Centre of Justice and Peace Studies (ACJPS) and People's Legal Aid Centre (PLACE) v The Government of Republic of Sudan*, the complainants challenged a decision made by Sudan revoking a young Sudanese woman's citizenship rights. The woman, born to a Sudanese mother and South Sudanese father, was not allowed to obtain a Sudanese national identity card merely because her father's last name indicated that he was from South Sudan. In arriving at a ruling that the matter was admissible, the African Children's Committee noted that the requirement of exhaustion of local remedies in section IX(1)(E) of the Revised Guidelines for the consideration of communications did not apply to this case as there are no remedies to be exhausted at the national level. The Committee also held that the fact that the person involved had attained majority did not exclude

60 'Parliament amends child age to 18 years' <http://www.times.mw/parliament-amends-child-age-to-18-years/> (accessed 25 February 2017).

61 African Children's Committee '28th Session of the African Committee of Experts on the Rights And Welfare of the Child (ACERWC) 21 October-1 November 2016, Banjul, The Gambia: Draft report', ACERWC/ RPT(XXVIII) 20.

the competence of the Committee to receive a communication on violations that had occurred while the complainant was still a child. In terms of article 1(4)(A) of the Revised Guidelines for the consideration of communications, the Committee's jurisdiction is determined by the child's age at the time of the alleged violation which, in this case, was 17 years and 10 months. On this basis, the Committee concluded that the communication submitted by the authors had fulfilled all the admissibility conditions laid down in the Committee's Revised Guidelines on Consideration of Communications and declared it admissible.⁶²

5.5 General Comments and key discussions

The African Children's Committee considered the draft joint General Comment by the African Commission and the Committee on child marriage at both the 27th and 28th ordinary sessions.⁶³ The draft was presented by the Centre for Human Rights of the University of Pretoria, pursuant to article 6(b) of the African Women's Protocol which provides as follows:

States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that (a) no marriage shall take place without the free and full consent of both parties; (b) the minimum age of marriage for women shall be 18 years.

Article 21(2) of the African Children's Charter further provides:

Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.

During the 28th session the Committee held a joint session with the African Commission at which two members each from the Committee and the Commission were assigned to work with the consultant towards the finalisation of the General Comment.⁶⁴ The formulation of a General Comment on child marriage is laudable and cannot come at a more auspicious period in Africa as, sadly, it remains a problem in most states in Africa.⁶⁵ This has been highlighted in the Concluding Observations of the Children's Committee on countries

62 Admissibility Ruling Communication 005/Com/001/2015; Decision on Admissibility 003/2016, December 2016.

63 African Children's Committee '27th Session of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) 2-6 May 2016, Addis-Ababa, Ethiopia: Report', ACERWC/RPT (XXVII) 14-15; African Children's Committee (n 61 above) 19.

64 African Children's Committee (n 61 above) 19.

65 'Ending child marriage in Africa. A brief by Girls Not Brides' <http://www.girlsnotbrides.org/wp-content/uploads/2015/02/Child-marriage-in-Africa-A-brief-by-Girls-Not-Brides.pdf> (accessed 25 February 2017).

including South Africa⁶⁶ and Nigeria,⁶⁷ and it has been the focus of a resolution by the African Commission.⁶⁸

The African Children's Committee also considered and granted the application for observer status from *Terre des Hommes*, Holland, at the 27th session, having found that it met the requirements as stated in the Guidelines. This signifies that in line with the tradition of other intergovernmental bodies, an organisation need not originate from Africa to obtain observer status before the Committee. However, it is difficult to establish the number and focus of organisations with observer status with the Committee. It is time that the Committee includes on its website a section on NGOs with observer status. In addition to meeting the purpose of researchers and, indeed, the public who wish to have a quick impression of who and what these NGOs are, it will aid networking among the approved NGOs.

Another key event in 2016 was the presentation of the findings of the ongoing study on the impact on children in Africa of conflicts and crises by Pan-African Research Services (PARS). The session also hosted discussions on the need to incorporate SDGs and Agenda 2063 in the state reporting mechanism.

6 Extraordinary African Chambers

6.1 Establishment and jurisdiction

The Extraordinary African Chambers were created by an agreement between the AU and Senegal to try former Chadian dictator, Hissène Habré, and his accomplices for crimes allegedly committed between 1982 and 1990 while he was President.⁶⁹ The agreement was signed on 22 August 2012 for the establishment of the Chambers as a tribunal within the Senegalese judiciary and it was inaugurated in February 2013.⁷⁰ The charges proffered against Hissène Habré include

66 Concluding Recommendations by the African Committee of Experts on the Rights and Welfare of the Child on the Republic of South Africa Initial Report on the Status of Implementation of the African Charter on the Rights and Welfare of the Child, during its 1st extraordinary session held on 6-11 October 2014, para 65.

67 Concluding Recommendations by the African Committee on Experts on the Rights and Welfare of the Child on the Nigeria Report on the Status of Implementation of the African Charter on the Rights and Welfare of the Child, at its 12th session considered Nigeria's initial and first country periodic report submitted in July 2006.

68 Resolution 292: Resolution on the Need to Conduct a Study on Child Marriage in Africa, adopted at the African Commission on Human and Peoples' Rights meeting at its 16th extraordinary session held from 20-29 July 2014 in Kigali, Rwanda.

69 P Fabricius 'Now to make this extraordinary court, ordinary' (2016) <https://issafrica.org/iss-today/now-to-make-this-extraordinary-court-ordinary> (accessed 28 March 2017).

70 R Adjovi 'Introductory note to the Agreement on the Establishment of the Extraordinary African Chambers within the Senegalese judicial system between the

war crimes, crimes against humanity and torture.⁷¹ The African Chambers became a necessity following several unsuccessful attempts to prosecute Hissène Habré for crimes committed during his presidency. These efforts include the setting up of ‘a Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habré, his Accomplices and/or Accessories’ by Chadian President Idris Ito Derby in 1990 which concluded, among others, that ‘Habré’s regime led to “more than 40 000 victims, more than 80 000 orphans, more than 30 000 widows, more than 200 000 people left with no moral or material support as a result of this repression”’ and recommended the prosecution of the people involved in these crimes.⁷² Chad subsequently prosecuted Habré *in absentia* in 2008 and sentenced him to death,⁷³ even though they failed to secure his extradition from Senegal and consequently were unable to enforce the sentence.⁷⁴

Other attempts include efforts at prosecution within the Senegalese judicial system between 2000 and 2001, which were declared as lacking jurisdiction by the Court of Appeal and *Cour de Cassation* of Senegal.⁷⁵ The Committee Against Torture also issued a decision in 2006 in which it recommended that Senegal comply with its obligations under the Convention Against Torture (CAT) by either prosecuting or extraditing Habré.⁷⁶ Attempts by a group of victims to seek redress through the Belgian courts resulted in a dispute between Belgium and Senegal at the International Court of Justice which found on 20 July 2012 that Senegal had violated its obligations under articles 6(2) and 7(1) of the CAT by failing to investigate the alleged crimes committed by Habré and prosecuting him, and ordered Senegal to either prosecute or extradite Habré.⁷⁷

Government of the Republic of Senegal and the African Union and the Statute of the Chamber (2013) 52 *International Legal Materials* 1020.

71 As above.

72 As above. See also Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habré, His Accomplices and/or Accessories, ‘Chad: Report of the Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habré, His Accomplices and/or Accessories, reprinted in NJ Kritz (ed) *Transitional justice: How emerging democracies reckon with former regimes, Volume III: Laws, rulings, and reports* (1995) 51-79.

73 Adjovi (n 70 above); see also S Czajkowski ‘Chad court sentences ex-dictator Habré to death in absentia’ (2008) *Jurist* <http://www.jurist.org/paperchase/2008/08/chad-court-sentences-ex-dictator-habre.php> (accessed 5 April 2017).

74 Adjovi (n 70 above).

75 As above

76 As above; *Guengueng & Others v Senegal*, Merits, Committee against Torture, Decisions of the Committee Against Torture under Art 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc CAT/C/36/D/ 181/2001 19 May 2006) paras 9.6-9.12.

77 Adjovi (n 70 above); *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment, ICJ Reports 2012 422 para 122. For a further discussion of this case, see S Shah ‘Questions relating to the obligation to prosecute or extradite (*Belgium v Senegal*)’ (2013) 13 *Human Rights Law Review* 351.

In the meantime, in 2005 Senegal had sought the assistance of the AU on issues concerning Habré, which resulted in the AU Assembly commissioning a committee of experts in January 2006 to advise the AU on the matter.⁷⁸ Based on the recommendations of the committee of experts, the AU Assembly mandated 'the Republic of Senegal to prosecute and ensure that Hissène Habré is tried, on behalf of Africa, by a competent Senegalese court with guarantees for fair trial'.⁷⁹ Senegal proceeded to amend its domestic laws to enable it to try Habré in response to the AU Assembly decision. However, this was challenged by Habré before the ECOWAS Community Court of Justice (ECOWAS Court) which held that the legislation adopted by Senegal which had retrospective effect was a violation of Habré's rights. The ECOWAS Court concluded that Habré could only be tried by an international or hybrid court.⁸⁰ The decision of the ECOWAS Court led Senegal to engage with the AU towards the establishment of the Extraordinary African Chambers, culminating in the signing of the Extraordinary African Chambers agreement and statute in 2012.⁸¹

The Extraordinary African Chambers have jurisdiction over genocide, war crimes, crimes against humanity and torture⁸² committed over the period when Habré was in power and over any individual responsible for the commission of those international crimes during that period.⁸³ The Chambers comprise an investigative chamber, indictment chamber, trial chamber and appeal chamber.⁸⁴ The judges of the investigative and indictment chambers are of Senegalese nationality nominated by the Minister of Justice of Senegal and appointed by the Chairperson of the AU Commission.⁸⁵ The presiding judges of the trial and appeal chambers, however, are required to be of non-Senegalese nationality from another AU member state, who are nominated by the Minister of Justice of Senegal and appointed by the Chairperson of the AU.⁸⁶ The

78 Adjovi (n 70 above); African Union [AU], Decision on the Hissène Habré case and the African Union, AU Doc Assembly/AU/ Dec 103 (VI) [http://archive.au.int/collect/auassemb/import/English/Assembly%20AU%20Dec%20103%20\(VI\)%20_E.PDF](http://archive.au.int/collect/auassemb/import/English/Assembly%20AU%20Dec%20103%20(VI)%20_E.PDF) (accessed 5 April 2017).

79 African Union Doc Assembly/AU/3 (VII) <https://www.hrw.org/news/2006/08/02/decision-hissene-habre-case-and-african-union-doc-assembly/au/3-vii> (accessed 5 April 2017).

80 Adjovi (n 70 above) 1021; *Hissène Habré v Republic of Senegal*, Case ECW/ CCJ/ APP/07/08.

81 Adjovi (n 70 above).

82 Statute of the Extraordinary African Chambers within the Courts of Senegal Created to Prosecute International Crimes Committed in Chad between 7 June 1982 and 1 December 1998, 30 January 2013 (EAC Statute), 52 ILM 1028 (2013) art 4.

83 Adjovi (n 70 above); EAC Statute art 3.

84 EAC Statute art 11.

85 Arts 11(1) & (2).

86 Arts 11(3) & (4).

Extraordinary African Chambers are mandated to impose penalties from 30 years' to life imprisonment.⁸⁷

6.2 Hissène Habré trial and its implications

The Hissène Habré trial commenced on 20 July 2015 and was concluded on 11 February 2016, during which time a total of 96 witnesses testified, and 5 600 pages of transcripts and 56 exhibits were examined.⁸⁸ Habré was convicted of 'crimes against humanity of rape, sexual slavery, murder, summary execution, kidnapping followed by enforced disappearance, torture and inhumane acts'.⁸⁹ Habré was also convicted of 'war crimes of murder, torture, inhumane treatment and unlawful confinement committed against prisoners of war' and sentenced to life imprisonment.⁹⁰ These crimes were committed through the activities of the elite police force *Direction de la documentation et de la sécurité* (Documentation and Security Directorate (DSS)). Habré immediately appealed to the appeals chamber against his conviction, but judgment is yet to be delivered.⁹¹

The trial and conviction of Habré are 'an important and promising example of zero tolerance to impunity in Africa and also bring justice to victims of serious human rights violations constitutive of international crimes'.⁹² It arguably provides renewed hope that African regional institutions are capable of tackling massive human rights violations and bringing perpetrators to justice, especially in the face of recent bad blood between the AU and the International Criminal Court (ICC).⁹³

The *Habré* case also sets certain important milestones in international criminal justice. It is the first time that the domestic courts⁹⁴ of one country have successfully tried and convicted the former head of state of another country for serious violations of human rights.⁹⁵ While the International Criminal Tribunal for Rwanda

87 Art 24.

88 JP Pérez-León-Acevedo 'The conviction of Hissène Habré by the Extraordinary African Chambers in the Senegalese Courts: Bringing justice in cases of serious human rights violations in Africa' <https://africlaw.com/2016/06/30/the-conviction-of-hissene-habre-by-the-extraordinary-chambers-in-the-senegalese-courts-bringing-justice-in-cases-of-serious-human-rights-violations-in-africa/> (accessed 6 April 2017). For the full case, see *Ministère Public v Hissène Habré* http://www.chambresafricaines.org/pdf/Jugement_complet.pdf (accessed 6 April 2017).

89 Pérez-León-Acevedo (n 88 above). See also Radio-Canada 'Former Chadian President Hissène Habré sentenced to life imprisonment' <http://ici.radio-canada.ca/nouvelle/784314/hissene-habre-tchad-senegal-crimes-guerres-humanite> (accessed 6 April 2017).

90 As above.

91 *Africanews* 'Chad: A new trial in the Hissène Habré case'.

92 Pérez-León-Acevedo (n 88 above).

93 As above.

94 Even though the EAC was established pursuant to an agreement between Senegal and the African Union, the Court is fully integrated into the Senegalese judiciary rather than as an independent international or hybrid court.

95 Pérez-León-Acevedo (n 88 above).

(ICTR) convicted Jean Kambanda, former Prime Minister of Rwanda, for genocide and crimes against humanity, the ICTR was a purely international tribunal set up by the UN Security Council, independent of the Rwandan judiciary.⁹⁶ Similarly, former Liberian President Charles Taylor was convicted by the Special Court for Sierra Leone (SCSL) for war crimes and crimes against humanity, but the SCSL, even though a hybrid court, was structured as an independent international organisation.⁹⁷ The *Habré* trial before the Extraordinary African Chambers provides an important reinforcement for the principles of subsidiarity of international tribunals and the complementarity between national courts and international tribunals.⁹⁸

Significantly, the *Habré* case also serves as the first exercise of universal jurisdiction by the courts of one African country over crimes committed in another country.⁹⁹ The *Habré* case is also the first instance of a former head of state being convicted for personally raping a person and not merely being found responsible for rape committed by subordinates through the principle of command responsibility.¹⁰⁰ Furthermore, the *Habré* case represents the first time the AU has been involved in the establishment of an internationalised criminal court to successfully investigate, prosecute and convict perpetrators of serious human rights violations.

The *Habré* trial 'is also exemplary in showing how the fierce will of a handful of men and women ... can literally lift mountains and end up in a long trial considered utopian'.¹⁰¹ The *Habré* trial should encourage the many victims of massive human rights violations around Africa that they too may someday receive justice.

7 Africa's relationship with the International Criminal Court

The relationship between Africa and the International Criminal Court (ICC) remained tense, both at the AU level and among African member states. At the AU level, the AU Assembly continued to call on African member states to refuse to co-operate with the ICC

96 As above.

97 As above.

98 As above.

99 As above.

100 As above.

101 M Malagardis 'Hissène Habré condemned to perpetuity: A trial for history, but shares of sorry' *Liberation* 30 May 2016 http://www.liberation.fr/planete/2016/05/30/hissene-habre-condamne-a-la-perpetuite-un-proces-pour-l-histoire-mais-des-parts-d-ombre_1456113 (accessed 6 April 2017).

concerning the arrest warrant against Sudanese President Omar Al Bashir at both its 26th¹⁰² and 27th¹⁰³ ordinary sessions.

Among individual African member states of the ICC, South Africa¹⁰⁴ and The Gambia¹⁰⁵ deposited instruments of withdrawal from the ICC, while Burundi¹⁰⁶ commenced internal processes towards withdrawal after the UN had launched investigations into allegations human rights violations in the country.

8 Conclusion

The year 2016 was declared by the AU as 'the African year of human rights with particular focus on the rights of women'.¹⁰⁷ While some progress was recorded in terms of the advancement of human rights in the AU, it was far too modest than would have been expected in a year so designated for human rights. As was the case previously, modest progress was made in the African human rights system during the year under review and some set-backs were also recorded. In terms of normative developments, the AU Assembly adopted the Older Persons Protocol which provides comprehensive protection of the rights of older persons and sets new standards that all member states must aspire to in the protection of older persons within their territories. Member states must embrace the ideals espoused in this Protocol, ratify it, adopt relevant domestic legislation to give effect to the Protocol and take necessary practical measures to implement its provisions. The Executive Council also recommended that the AU Assembly amend article 5(1) of the African Court Protocol to include the African Children's Committee as one of the entities empowered to refer cases to the Court.

Significant progress was also recorded in the jurisprudence of the African Court as the Court delivered six judgments during the year. While this is not optimal, it is a marked increase from previous years. In terms of substance, the Court delivered an important decision on

102 AU Assembly 'Decision on the International Criminal Court' Doc EXCL/952(XXVIII).

103 AU Assembly 'Decision on the International Criminal Court' Doc EXCL/987(XXIX).

104 M Nichols 'SA begins process to withdraw from International Criminal Court' *Mail and Guardian* 21 October 2016 <https://mg.co.za/article/2016-10-21-south-africa-begins-process-to-withdraw-from-the-icc> (accessed 2 June 2017).

105 A Withnall 'Gambia pulls out of "racist" ICC amid fears of a mass African exodus' *Independent* 26 October 2016 <http://www.independent.co.uk/news/world/africa/gambia-international-criminal-court-south-africa-burundi-withdrawal-rome-statute-a7381336.html> (accessed 2 June 2017).

106 Aljazeera 'Burundi moves to quit the International Criminal Court: Lower house of parliament passes draft law to exit ICC after UN launches probe into alleged human rights abuses' <http://www.aljazeera.com/news/2016/10/burundi-moves-quit-international-criminal-court-161012132153065.html> (accessed 2 June 2017).

107 African Union 'Declaration by the Assembly on the theme of year 2016' in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2016) 165.

the right to political participation and, in particular, the organisation of electoral management bodies.¹⁰⁸ While this decision was delivered against Côte d'Ivoire, it is hoped that this will serve as a pivot for further challenges to similar arrangements in electoral management bodies across the continent. The African Court also handed down two significant judgments on the right to a fair trial and access to legal aid, holding that states have an obligation to provide legal aid to persons accused of serious crimes even if the accused person does not request legal aid.¹⁰⁹

On the downside, the Court witnessed the first real challenge to its legitimacy when Rwanda withdrew its declaration allowing direct access by individuals and NGOs. While the Court stood its ground in not covering to Rwanda's demand to protract all pending proceedings pursuant to the submission of its notice of withdrawal, it remains to be seen how the Court will handle its relationship with member states in the future.

On another encouraging note, an increasing number of states submitted reports to the African Commission and African Children's Committee. The Committee issued decisions on two cases¹¹⁰ and one ruling on admissibility.¹¹¹ The communication against Malawi, decided through amicable settlement, has led to a constitutional amendment increasing the age of childhood from 16 to 18 years. The Children's Committee also considered the draft joint General Comment with the African Commission on child marriage – an invasive violation plaguing children's rights on the continent.

Arguably, the crowning moment of the year for human rights and the fight against impunity on the continent was the conclusion of the Hissène Habré trial, which culminated in the Extraordinary African Chambers sentencing Habré to life imprisonment. While the Habré scenario may not anytime soon be replicated in other jurisdictions around the continent, it offers hope of the possibilities for justice for the victims of massive violations of human rights in Africa.

108 *Actions Pour la Protection des Droits de L'homme (APDH) v Republic of Côte d'Ivoire* – Appl 001/2014.

109 *Wilfred Onyango Nganyi & 9 Others v United Republic of Tanzania* – App 006/2013; *African Commission on Human and Peoples' Rights v Libya* – Appl 002/2013; *Mohamed Abubakari v United Republic of Tanzania* – Appl 007/2013.

110 *Institute for Human Rights and Development in Africa (IHRDA) v The Republic of Malawi*, Communication 004/Com/001/2014; *Minority Rights Group International and SOS-Esclaves on behalf of Said Ould Salem and Yarg Ould Salem v The Republic of Mauritania*, Communication 007/Com/003/2015.

111 *African Centre of Justice and Peace Studies (ACJPS) and People's Legal Aid Centre (PLACE) v The Government of Republic of Sudan* Communication 005/Com/001/2015.