

Bringing communications before the African Commission on Human and Peoples' Rights

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Summary

The African Commission on Human and Peoples' Rights is increasingly playing an important role in the implementation of human rights in Africa. The Commission continues to develop jurisprudence particularly relevant to Africa. The Commission has also exhibited a propensity to interpret its mandate broadly at a time when governments continue to perpetrate serious violations of human rights. Notably, an important development is that the Commission considers itself free to consider communications falling short of alleged grave and massive violations. This article provides an overview of the steps in the process of submitting a communication to the African Commission. The initiation of 'litigation' before the Commission differs markedly from litigation at the domestic level. The procedure governing communications before the Commission is divided into four steps: seizure; admissibility; merits and remedies. Under the Charter the Commission has also been willing to conduct on-site investigations and recommend interim measures.

1 Introduction

The African Commission on Human and Peoples' Rights (African Commission or Commission) is so far the only enforcement mechanism within the African regional human rights system. The African regional human rights system, also described as the pan-continental human

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rights system by Odinkalu,¹ is created under the patronage of the African Union under which a cluster of human rights instruments has been established.² The Commission is established in terms of article 30 of the African Charter on Human and Peoples' Rights (African Charter or Charter) of 1981³ to protect and promote human and peoples' rights in Africa.

The promotion and protection of human rights are two interrelated and indistinguishable functions of the Commission because the objective of promoting human and peoples' rights is mainly to reduce the likelihood of their violation.⁴ In addition to the above-mentioned functions of the Commission, articles 45(3) and (4) provide that the Commission shall interpret all the provisions of the Charter and also perform any other tasks entrusted to it by the Assembly of Heads of State and Government of the African Union. The interpretation of the Charter and the performance of any other tasks are aimed at complementing the promotion and protection mandate of the Commission.

The Charter is the principal instrument for the promotion and protection of human rights in Africa. It marks the beginning of an organised commitment to protecting human rights in Africa.⁵ As a human rights instrument specifically designed to respond to 'African concerns, African traditions and African conditions',⁶ the African Charter is an all-encompassing international human rights instrument with a special significance to the African continent owing to the provision of three generations of rights, namely civil and political rights,⁷ economic, social and cultural rights,⁸ and peoples' rights.⁹ Moreover, the Charter is the only regional instrument incorporating collective rights under the

¹ CA Odinkalu 'The role of case and complaints procedures in the reform of the African regional human rights system' (2001) 1 *African Human Rights Law Journal* 226.

² These include the African Charter on Human and Peoples' Rights of 1981, the OAU Convention on Governing the Specific Aspects of Refugee Problems in Africa of 1969 and the African Charter on the Rights and Welfare of the Child of 1990. Reprinted in *Human rights law in Africa 1997* (1999) 34.

³ OAU Doc OAU/CAB/LEG/67/3/Rev 5. Reprinted in *Human rights law in Africa 1996* (1996) 7.

⁴ CA Odinkalu 'The individual complaints procedures of the African Commission on Human and Peoples' Rights: A preliminary assessment' as cited in H Steiner & P Alston *International human rights in context: Law, politics, morals* (2000) 925.

⁵ C Flinterman & C Henderson 'The African Charter on Human and Peoples' Rights' in R Hanski & M Suksi *An introduction to the international protection of human rights* (1999) 387.

⁶ T van Boven 'The relations between peoples' rights and human rights in the African Charter' (1986) 7 *Human Rights Law Journal* 186; also cited by E Ankumah *The African Commission on Human and Peoples' Rights: Practice and procedures* (1996) 1.

⁷ Arts 2–13.

⁸ Arts 14–18.

⁹ Arts 19–24.

concept of 'peoples' rights',¹⁰ and also provides for both state¹¹ and individual¹² duties.

Amongst other functions, the Commission may consider individual communications alleging violations of human and peoples' rights under article 55 of the Charter.¹³ After considering such communications, the Commission is required to make recommendations to the Assembly of Heads of State and Government of the African Union and to the state party concerned. The overall function of considering communications and making recommendations to the Assembly of Heads of State and Government of the African Union is known as the protection mandate of the Commission.¹⁴ The protection of human and peoples' rights also has a promotional aspect. By making recommendations relating to the violation of human and peoples' rights, the Commission indirectly promotes these rights.

Bringing communications before the Commission falls under the protective mandate of the Commission as provided for under article 45(2) of the Charter. Articles 55–59 of the Charter provide for guidelines on the 'litigation' procedures before the Commission. These articles are complemented by the Rules of Procedure, which were adopted by the Commission in terms of article 42(2) of the Charter.¹⁵ The individual complaints procedure before the Commission potentially offers a concrete, result-oriented approach to human rights practice.¹⁶ This

¹⁰ See eg R Kiwanuka 'The meaning of peoples' rights in the African Charter on Human and Peoples' Rights' (1988) 80 *American Journal of International Law* 80 and Ankumah (n 6 above) 160.

¹¹ Arts 1, 25 & 26.

¹² Arts 27–29.

¹³ Art 55 of the Charter refers these communications to 'other communications'. These communications are brought by individuals, groups of individuals and NGOs.

¹⁴ The African Commission's protective mandate will be complemented by the African Court on Human and Peoples' Rights once the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights comes into force. For more detailed discussions on the African Court, see GJ Naldi & K Magliveras 'The proposed African Court of Human and Peoples' Rights: Evaluation and comparison' (1996) 8 *African Journal of International and Comparative Law* 944; M Mutua 'The African Human Rights Court: A two-legged stool?' (1999) 21 *Human Rights Quarterly* 343; A O'Shea 'A critical reflection on the proposed African Court on Human and Peoples' Rights' (2001) 2 *African Human Rights Law Journal* 285; KE Quashigah 'The African Court of Human Rights: Prospects, in comparison with the European Court of Human Rights and the Inter-American Court of Human Rights' (1998) *Proceedings of the Tenth Annual Conference of the African Society of International and Comparative Law, Addis Ababa 3–5 August 1998* 58; and NJ Udombana 'Towards the African Court of Human and Peoples' Rights: Better late than never' (1999) 8 *Revue Africaine des Droits de l'Homme* 338.

¹⁵ The Rules of Procedure were deliberated and adopted by the African Commission at its 18th session held in Praia, Cape Verde on 6 October 1995. Reprinted in *Human rights law in Africa 1997* (1999) 11.

¹⁶ Institute for Human Rights and Development in Africa website <<http://www.africaninstitute.org/>> (accessed 28 February 2003).

contribution seeks to explore the individual complaints procedure before the Commission which should be known by prospective complainants wishing to succeed with human rights communications before the Commission.

2 Who may be a complainant?

The Charter is silent as to who may submit a communication before the Commission. Article 56 of the Charter only makes reference to communications relating to human and peoples' rights referred to in article 55 of the Charter. Article 55 of the Charter provides for communications other than those of state parties. Additionally, the Rules of Procedure do not elaborate any further on this matter. Article 56(1) of the Charter requires a communication to indicate its 'author' but does not state who the author may be. Rule 104 of the Rules of Procedure uses the words 'his/her communication'. This connotes that the complainant may be an individual, that is, a human being. Hence the words 'individual communications' are often used to refer to these communications. If it is accepted that the complainant may be an individual, then the next question is: Who is an individual?

Umuzorike¹⁷ adopts a liberal meaning of the word 'individual'. In his view the term 'other communications' refers to those that originate from any African or international non-governmental organisation (NGO), whether or not it has observer status with the Commission; any individual who lives in a country which has ratified the Charter and considers himself or herself a victim of a violation; if the victim is unable to submit the communication himself or herself, any other person or organisation may do so on his or her behalf.

From the individual complaints practice before the Commission, the above-mentioned meaning of an 'individual' may be valid. Thus, besides natural persons, any NGO, whether or not it has observer status before the Commission, may be classified as an 'individual' for purposes of litigating before the Commission. In most instances, NGOs submit communications on behalf of natural persons. However, this does not mean that NGOs cannot bring communications on their own behalf for violation of human and peoples' rights in Africa. As a matter of practice, NGOs may bring a communication on behalf of other NGOs.¹⁸

The use of the words 'his or her communication' in rule 104 of the Rules of Procedure presupposes that only one person may submit a communication against a respondent state. Otherwise the words 'or

¹⁷ UO Umuzorike *The African Charter on Human and Peoples' Rights* (1997) 231.

¹⁸ See Communication 225/98, *Huri-Laws v Nigeria*, Fourteenth Annual Activity Report, where the communication was submitted by Huri-Laws, an NGO registered in Nigeria on behalf of the Civil Liberties Organisation, an NGO also based in Nigeria.

their communication' should have been included in the rule. Nevertheless, a group of individuals may bring a class action against the respondent state. After all, the Charter also provides for peoples' rights. NGOs may also bring a communication against the respondent state.¹⁹

3 Legal representation

Neither the Charter nor the Rules of Procedure provides for legal representation in bringing a communication before the Commission. Neither is there an article or rule for the provision of legal aid to indigent complainants. Human rights NGOs have become important in providing legal representation and legal aid to indigent complainants bringing their communications before the Commission.²⁰ The importance of making use of NGOs, especially with observer status, in bringing communications on human rights violations before the Commission is premised on the right to participate in the public sessions of the Commission, where they may be able to lobby the Commission for a speedy consideration of their communications.²¹ A complainant without legal representation should therefore seek assistance from a human rights NGO to assist in bringing a communication before the Commission.

While the individual complaints procedure before the Commission is straightforward, legal representation is becoming a necessity as the jurisprudence of the Commission is also becoming more and more sophisticated. An international human rights lawyer is likely to be better equipped to take a case to the Commission. Technical issues are likely to arise when it comes to the admissibility test under article 56 of the Charter, especially where local remedies have not been exhausted, and the procedure has been unduly prolonged or where no effective local remedies are available. A lawyer is also better positioned in the drafting of heads of argument which has become the practice for human rights NGOs submitting communications before the Commission.

¹⁹ See Communication 159/96, *Union Inter Africaine des Droits de l'Homme and Others v Angola*, Eleventh Annual Activity Report; Communication 218/98, *Civil Liberties Organisation and Others v Nigeria*, Fourteenth Annual Activity Report.

²⁰ Examples of human rights NGOs specialising in human rights litigation include the International Centre for the Legal Protection of Human Rights, Constitutional Rights Project, Institute of Human Rights and Development in Africa, Amnesty International, International PEN, Civil Liberties Organisation, Huri-Laws, Media Rights Agenda and RADDHO. A human rights NGO which provides for legal aid under its 'Access to Justice Initiative' programme is the International Commission of Jurists (Kenya and Swedish Sections).

²¹ Rule 75 of the Rules of Procedure provides that NGOs, granted observer status by the Commission, may appoint authorised observers to participate in the public sessions of the Commission and of its subsidiary bodies.

Complainants wishing to represent themselves in the proceedings may make use of the Guidelines for the submission of communications (Submission Guidelines) developed by the Commission to assist complainants bringing communications before it.²² According to the Submission Guidelines, communications should include the following: the complainant's personal details; the government accused of the violation; the facts constituting the alleged violation; the urgency of the case; the provisions of the Charter alleged to have been violated; names and titles of government authorities who committed the alleged violation; witnesses to the violation; documentary proof of the violation; domestic legal remedies not yet pursued and the reasons why they have not been pursued; and other international fora which have considered the same complaint.²³

4 Processing communications

Bringing communications before the Commission differs from litigating before a national court. On the one hand, litigating at a national level involves the determination by a domestic court or tribunal of whether or not the national law in the form of legislation or the constitution has been contravened. On the other hand, complaints to the Commission fall under international law. It must be noted that international law not only governs relations between states, but it also protects human rights, thereby according individual human beings independent status and standing before international bodies such as the Commission.

Communications before the Commission must be limited to violations of international human rights standards. The Charter is the yardstick for testing whether or not there has been a violation of an international standard within the African human rights system. The Submission Guidelines assist complainants in distinguishing the two main categories of the rights covered in the Charter, namely individual rights and peoples' rights. It also highlights the specific articles of these rights in the Charter.²⁴ Adhering to these guidelines assists the legal officers of the Secretariat of the Commission (the Secretariat) to process the communications to be considered by the Commission without delay.

The Commission developed extensive Processing Guidelines for the processing of communications by the Secretariat.²⁵ The legal officers of

²² See 'Guidelines on the submission of communications', Information Sheet No 2 of the African Commission on Human and Peoples' Rights. These Guidelines may also be used by NGOs assisting victims of human rights violations.

²³ As above, 10–11.

²⁴ As above, 4–5.

²⁵ *Appendix 1 — Strategy Plan 2000–2002* 1–5.

the Secretariat use these Processing Guidelines, which provide for the handling of communications by the Secretariat from their reception up to the drafting of decisions. It would therefore be advisable for complainants to acquaint themselves with these Processing Guidelines to better understand the complaints procedure before the Commission.

5 Kinds of human rights violations

There has been confusion surrounding the Commission's substantive jurisdiction. Initially, it was thought that only communications revealing a series of serious and massive violations of human rights could be submitted before the Commission.²⁶ In Communications 147/95 and 149/96, *Jawara v The Gambia*,²⁷ the Commission dismissed the argument that its power to consider communications was limited only to those cases revealing a series of serious and massive violations of human rights.²⁸ The Commission is therefore empowered to consider any communication from anyone as long as there has been a violation of human rights.

In submitting a communication before the Commission, the rights allegedly violated should be contained in the Charter. Rule 104(1)(d) of the Rules of Procedure provides that the Commission may request the author to furnish clarifications on the applicability of the Charter to his or her communication and to specify in particular the provisions of the Charter allegedly violated by the respondent state. This does not mean that a communication may not allege violations of other international human rights instruments, especially those binding upon the state party concerned.

Article 60 of the Charter provides that the Commission shall draw inspiration from international law on human rights and peoples' rights, particularly from various African instruments on human and peoples' rights, the Charter of the United Nations (UN), the Charter of the Organisation of African Unity (OAU), the Universal Declaration of Human Rights, other instruments adopted by the UN and by African countries in the field of human rights, as well as from provisions of various instruments adopted within the Specialised Agencies of the UN of which the parties to the Charter are members.

It would seem that any human rights instrument which is binding upon the respondent state might be used in support of a

²⁶ In line with the wording of art 58 of the African Charter.

²⁷ Thirteenth Annual Activity Report.

²⁸ See Communication 104/94, 109-126/94, *Centre for the Independence of Judges and Lawyers and Others v Algeria and Others*, where the Commission declared the communication inadmissible because the complainant did not allege grave and massive violations, amongst other reasons.

communication before the Commission. In drawing inspiration from other human rights instruments, the Commission enriches African human rights jurisprudence. Resolutions of the Commission elucidating the provisions of the Charter may also be used in support of a communication alleging violations of human rights. The latest resolutions of the Commission include the Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa and the Resolution on Guidelines and Measures for the Prohibition and Prevention Measures of Torture and Cruel, Inhuman or Degrading Punishment or Treatment in Africa (Robben Island Guidelines), which were both adopted during the 32nd ordinary session of the Commission. In effect, the Declaration of Principles on Freedom of Expression interprets article 9 of the Charter, and the Robben Island Guidelines are an interpretation of articles 4, 5 and 6 of the Charter.

A violation of any provision of the Charter contravenes article 1 of the Charter. This provision imposes an obligation upon state parties to the Charter to recognise the rights, duties and freedoms enshrined in the Charter and to undertake to adopt legislative or other measures to give effect to them. In Communications 147/95 and 149/96, *Jawara v The Gambia*, the Commission held that article 1 gives the Charter the legally binding character always attributed to international treaties and therefore a violation of any provision of the Charter automatically means a violation of article 1 of the Charter. As a violation of article 1 of the Charter goes to the root of the Charter, communications should therefore as a matter of priority mention the violation of this article in their communications. Thereafter, the other rights in the Charter violated by the respondent state should be dealt with in more detail.

6 Listing and transmitting communications

According to article 55(1) of the Charter, after a communication has been submitted to the Commission, the Secretariat compiles a list and transmits it to the members of the Commission. The compilation of the list is undertaken before each session of the Assembly of Heads of State and Governments. Rule 102(2) of the Rules of Procedure mandates the Commission to only accept individual communications against a state party to the Charter. So far, there are 53 state parties to the Charter.²⁹ A communication submitted against a non-state party is *prima facie* inadmissible. The individual communications must be sent to the Secretariat in Banjul, The Gambia.³⁰ It is also advisable to send the

²⁹ The state parties to the African Charter are also member states of the African Union.

³⁰ It is always advisable to submit directly to the African Commission's headquarters in Banjul, The Gambia. The communication should be addressed to the Secretary to the

communication in electronic form to make it easier for the Secretariat to transmit the communication to the members of the Commission.

Rule 103 of the Rules of Procedure authorises the Secretary to prepare a list of communications and to attach a brief summary of the contents of the list to be compiled and transmitted to the members of the Commission. This Rule naturally complements article 55(1) of the Charter. Rule 103 of the Rules of Procedure further authorises the Secretary to keep a permanent register of all communications, which is accessible to the public. The full text of each communication should be made available to the members of the Commission. It is always advisable for complainants to send their communications in the form of a legal brief outlining the facts of the claim, the provisions of the Charter violated, the question of admissibility and the remedies sought from the Commission.³¹

7 The seizure procedure

After having been listed and transferred to the commissioners, the commissioner concerned, otherwise known as the rapporteur, is required to make a recommendation on whether or not the Commission may be seized of a communication. This process may be referred to as the seizure procedure. Article 55(2) of the Charter provides that a communication may only be considered if a simple majority of the members of the Commission so decide. This article is complemented by rule 102(1) of the Rules of Procedure, which provides that the Secretariat shall transmit to the Commission communications submitted to it for consideration by the Commission in accordance with the Charter. The seizure procedure takes place in a closed session. This is in accordance with Rule 106 of the Rules of Procedure, which provides that the examination of communications by the Commission or its subsidiary bodies should be conducted in private. During the seizure procedure no oral arguments are required from the parties to the communication.

In order for the Commission to be seized with a communication, the communication must allege a *prima facie* violation of the provisions of the Charter. After a communication has been approved for seizure, the complainant and the respondent state are duly informed. It must be noted that the allegation of a *prima facie* violation of the provisions of the Charter must only be in respect of a member state of the African Union

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³¹ This is despite the fact that the Charter is not clear on the African Commission's mandate to award remedies.

that has ratified or acceded to the Charter.³² The African Union itself cannot be a respondent in any proceedings before the Commission.

The normal procedure is that the seizure procedure and the admissibility procedure are undertaken during separate sessions of the Commission. These sessions need not be successive. In Communication 97/93, *Modise v Botswana (2)*,³³ the Commission decided to be seized of the communication at its 13th session and declared it admissible at its 17th session. However, in Communication 204/97, *Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso*,³⁴ the Commission was seized of the communication at its 23rd session and declared it admissible at its 24th session.³⁵ It is therefore not surprising that the Commission lists the seizure procedure separately from the admissibility procedure.

After the seizure procedure and during the intersession, the Secretariat normally sends a *note verbale* to the respondent state informing it of the Commission's decision on seizure, calling for its reaction to the admissibility of the Communication. Similar letters are also sent to complainants or their representatives. This procedure conforms with article 57 of the Charter and Rule 112 of the Rules of Procedure, which provide that prior to any substantive consideration, all communications shall be brought to the knowledge of the state concerned by the Chairperson of the Commission. Normally, this exercise is undertaken by the Secretariat of the Commission. It may be argued that this is a case where the function of the Chairperson is automatically delegated to the Secretariat of the Commission. From the litigation practice before the Commission, it may be deduced that the seizure procedure is not a substantive consideration within the meaning of article 57 of the Charter and Rule 112 of the Rules of Procedure. It is only after the seizure procedure that the attention of the respondent state is drawn to the communication before the Commission.

³² Communications which have been against non-African Union states and which have not been considered by the Commission include Communication 20/88, *Austrian Committee Against Torture v Morocco*, Communication 2/88, *Ihebereme v United States of America*, Communication 3/88, *Centre for the Independence of Judges and Lawyers v Yugoslavia* and Communication 38/90, *Wesley Parish v Indonesia*. Morocco is an African country, but it withdrew from the then Organisation of African Unity (OAU) in 1984 after the OAU had recognised the Sahrawi Arab Democratic Republic (Western Sahara). The withdrawal of Morocco from the OAU was effective from November 1985.

³³ Tenth Annual Activity Report.

³⁴ Fourteenth Annual Activity Report.

³⁵ In this communication, the Commission declared the communication admissible despite the fact that both parties expressed desire to settle the dispute amicably and requested the Commission's assistance to that effect.

8 Admissibility procedure

After a list of communications has been transmitted and the seizure of the same has been approved in terms of article 55(2) of the Charter as aforesaid, the Commission has to decide whether or not the communications satisfy the admissibility requirements of article 56 of the Charter. This may require an admissibility hearing to be undertaken. This stage may be referred to as the preliminary hearing in the sense that it is a *sine qua non* for the consideration of the merits of communications. It is therefore important for complainants to address the question of admissibility in their communications.

The Commission considers the communications in accordance with the order that they have been received by the Secretariat.³⁶ This ensures that every communication is given the utmost attention it deserves. In determining the admissibility of the communication, the Commission may set up one or more working groups, each composed of a maximum of three members.³⁷ The working groups submit recommendations on the admissibility as stipulated in article 56 of the Charter. Rule 113 provides that the Commission must decide as early as possible whether or not the communication shall be admissible under the Charter.

After the recommendation has been submitted, the Commission makes a final determination on the question of admissibility of the communications. In determining the admissibility of the communications, the Commission or the working group may request additional information or observance relating to the issue of admissibility.³⁸ This request is made to the respondent state concerned or the author of the communication. In order to avoid long delays, the Commission or working group is required to fix a time limit for the submission of the additional information or observance as the case may be.³⁹

8.1 Admissibility requirements

For a communication to be considered on merit by the Commission, it has to undergo an admissibility test, which is provided for in article 56 of the Charter. Odinkalu argues that through its jurisprudence on admissibility, the Commission has exposed a philosophy of encouraging wide access to its protective procedures.⁴⁰ The Commission must therefore give clear reasons for its decisions on admissibility. The admissibility procedures are as follows:

³⁶ Rule 114.

³⁷ Rule 115.

³⁸ Rule 117.

³⁹ As above.

⁴⁰ Odinkalu (n 1 above) 237.

- *Communications must indicate their authors even if they request anonymity*⁴¹

Every communication must have full particulars of the author or complainant. In Communication 70/92, *Diomessi and Others v Guinea*,⁴² this requirement has been interpreted by the Commission to mean that authors must give their full identity. In Communication 57/91, *Bariga v Nigeria*,⁴³ the Commission further interpreted this requirement to include the author's contact address. In the case where the author has requested anonymity, the Commission, through the Secretary, may request the complainant's name, address, age and profession verifying his or her identity.⁴⁴

Viljoen argues that anonymity will sometimes be difficult to maintain as the respondent state needs to be alerted to the specific situation that gave rise to the complaint against it.⁴⁵ The Charter and the Rules of Procedure are not clear on whether the complainant should request to remain anonymous in respect to the respondent state or the general public or even to some commissioners. It is submitted that the communication must specify the manner in which anonymity should be handled by the Commission.

Sometimes it would be wise for individuals who want to be anonymous to be represented by NGOs so that the Commission uses the name of the NGO in the title of the case without stating the person on whose behalf the NGO is submitting the communication. In cases where the complainant without legal representation wishes to remain anonymous, the Commission may be requested to use a pseudonym in order to protect the complainant's identity.

- *Communications must be compatible with both the African Charter and the Charter of the Organisation of African Unity*⁴⁶

Litigants must ensure that their communications are in line with the provisions of the Charter and those of the OAU Charter. Ankumah argues that a controversy arises because there are a number of vague and ambiguous provisions in the Charter.⁴⁷ For instance, article 9(2) of the Charter provides that freedom of expression shall be exercised 'within the law'. Such phrases, referred to as 'claw-back clauses', tend to 'take away with the left hand that which it has given with the right hand',

⁴¹ Art 56(1).

⁴² Seventh Annual Activity Report.

⁴³ As above.

⁴⁴ Rule 104.

⁴⁵ F Viljoen 'Admissibility under the African Charter' in M Evans & R Murray *The African Charter on Human and Peoples' Rights: The system in practice, 1986–2000* (2002) 67.

⁴⁶ Art 56(2).

⁴⁷ Ankumah (n 6 above) 63.

in the sense that they make the Charter rights subject to limitations imposed by domestic law. According to Ankumah, it is therefore the inclusion of the unidentified restrictions in the Charter that is problematic.⁴⁸

The Commission has, however, resolved this problem. In Communications 105/93, 128/94, 130/94 and 152/96, *Media Rights Agenda and Others v Nigeria*,⁴⁹ the Commission held that article 9(2) of the Charter did not mean that national or domestic law can set aside the right to express and disseminate one's opinion. The Commission reasoned that to allow national or domestic law to supersede or override the international law of the Charter would be to defeat the whole purpose of the rights and freedoms enshrined in the Charter. The Commission's decision was that international human rights standards must always prevail over contradictory national law and any limitation of the rights of the Charter must conform with the provisions of the Charter. The compatibility requirement should be understood to mean that communications should conform to the provisions of the Charter and the Charter of the OAU.

Communications must therefore allege a violation of the Charter and other supporting international human rights instruments. Communications which allege violations of national legislation and constitutional provisions, cannot be said to be compatible with both the Charter and the OAU. This requirement should also be interpreted to include the Constitutive Act of the African Union, which has recently succeeded the OAU.

- *Communications must not be written in disparaging or insulting language directed against the state concerned and its institutions or to the OAU*⁵⁰

The Charter prohibits the use of disparaging and insulting language in communications. This requirement seeks to ensure respect for state parties and their institutions as well as the African Union. It is, however, unfortunate that the words 'disparaging or insulting language' are not defined. So far, the Commission has not interpreted this provision. Referring to this provision, Ankumah argues that even if this provision did not exist, it would not be prudent for a litigant to write a communication in disparaging or insulting language as it would tend to detract from the issues.⁵¹ Whether or not the language is disparaging or insulting, it is the Commission that will have a final say.

⁴⁸ As above.

⁴⁹ Twelfth Annual Activity Report.

⁵⁰ Art 56(3).

⁵¹ Ankumah (n 6 above) 64.

In Communication 65/92, *Ligue Camerounaise des Droits de l'Homme v Cameroon*,⁵² the respondent state alleged that the author of the communication did not appear to be in his full mental faculties and that the allegations of the Ligue Camerounaise should be declared inadmissible because of disparaging and insulting language. The allegations contained statements such as 'Paul Biya must respond to crimes against humanity', '30 years of the criminal neo-colonial/regime incarcerated by the duo Ahidjo/Biya', 'regime of torturers', and 'government barbarism'. The Commission held that this statement was insulting language. Even though the Commission did not specifically base its findings on the insulting language for declaring the communication inadmissible, it, however, stressed the importance of communications containing a certain degree of specificity. It may be argued that in this decision, the Commission was expanding the admissibility test provided for in article 56 of the Charter.⁵³

Regarding the requirement of specificity, the Commission referred to its decision in Communications 104/94 and 109-126/94, *Centre for the Independence of Judges and Lawyers v Algeria and Others*.⁵⁴ In this communication, the Commission found that the report submitted by the Centre for the Independence of Judges and Lawyers did not give specific places, dates and times of alleged incidents sufficient to permit the Commission to intervene or investigate. Furthermore the Commission found that in some cases, incidents were cited without giving the names of the aggrieved parties and numerous references were made to 'anonymous' lawyers and judges. Despite the fact that the requirement of specificity is not specifically provided for in article 56 of the Charter, it tends to work to the advantage of the litigant. The requirement does not, however, address the question of the meaning of disparaging and insulting language. An interpretation of this concept by the Commission would be of great assistance to prospective litigants.

- *Communications must not be based on news disseminated through the mass media*⁵⁵

Complainants are advised not to base their communications on news disseminated through the mass media. It would be prudent, therefore, for those submitting communications to make it clear that information stated in the complaints are obtained from sources other than the mass

⁵² Tenth Annual Activity Report.

⁵³ The addition of the requirement of specificity is contrary to Rule 116 of the Rules of Procedure, which provides that the Commission shall determine questions of admissibility pursuant to art 56 of the Charter. The use of the word 'shall' in Rule 116 of the Rules of Procedure and art 56 of the Charter means that the strict adherence to admissibility test is obligatory.

⁵⁴ Eighth Annual Activity Report.

⁵⁵ Art 56(4).

media.⁵⁶ Where the facts are not clear, the Commission may make a request to the author to clarify the facts of the claim, to request the purpose of the communication and provision(s) of the Charter allegedly violated.⁵⁷

Expounding on this requirement, in Communications 147/95 and 149/95, *Jawara v The Gambia*, the Commission reasoned that it would be

damaging if the Commission were to reject a communication because some aspects of it are based on news disseminated through the mass media. This is borne out of the fact that the Charter makes use of the word 'exclusively'. There is no doubt that the media remains the most important if not the only source of information . . . the issue therefore should not be whether the information was gotten from the media, but whether the information is correct.

This means that if at all the communication is based on news disseminated through the mass media, the information must be correct.

- *Communications must be sent after all existing local remedies have been exhausted, if any, unless it is obvious that this is unduly prolonged*⁵⁸

The rule on exhaustion of domestic remedies is the cornerstone of the adjudication and protective mandate of the Commission under the Charter.⁵⁹ The underlying principle of this requirement can be found in the *Interhandel* case,⁶⁰ where the International Court of Justice (ICJ) held that:

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.

In Communication 97/93, *Modise v Botswana (1)*, the African Commission decided to write to the author stressing the need for exhaustion of local remedies as envisaged by article 56 of the Charter. The decision of the Commission may also be taken as not amounting to a finding of admissibility, but as something constituting some kind of correspondence to the author that he may resubmit the communication after exhausting local remedies.

It is within the powers of the Commission to make a decision on whether or not a communication was unduly prolonged. In Communication 59/91, *Mekongo v Cameroon*, appeals and a petition for executive clemency had been pending for 12 years and the Commission

⁵⁶ Ankumah (n 6 above) 65.

⁵⁷ Rule 104.

⁵⁸ Art 56(5).

⁵⁹ Odinkalu (n 1 above) 227.

⁶⁰ 1959 ICJ Reports 27.

ruled that such a process had been unduly prolonged and that there was no need of exhaustion. However, in Communication 135/94, *Kenya Human Rights Commission v Kenya (Kenya Human Rights Commission case)*,⁶¹ where a case had been pending for three months, the Commission held the delay as insufficient to constitute undue delay.

The question of whether or not local remedies have been exhausted is that of fact whose burden rests upon the author or applicant of the communication.⁶² This is the reason the Commission is required to request the author to furnish clarifications regarding measures taken to exhaust local remedies or to give an explanation of why local remedies would be futile, if it is so alleged.⁶³ It must, therefore, be shown that an attempt had been made to have recourse to national procedures.⁶⁴ In Communication 8/88, *Buyingo v Uganda*,⁶⁵ the Commission failed to get a response from the complainant on whether or not he had recourse to local remedies as required by article 56 of the Charter.

As a general rule, if a matter is pending before the domestic courts or if a domestic court is still seized with the matter, domestic remedies cannot be said to be exhausted. In Communication 66/92, *Lawyers Committee for Human Rights v Tanzania*,⁶⁶ the complainant having been granted bail and subsequently the charges against him having been struck out by the court, the matter was accordingly closed in terms of article 55 of the Charter. This was due to the fact that as this was a communication on alleged false imprisonment, the complainant had not sought legal redress in the local courts of Tanzania.

The use of the words 'if any' in article 56(5) of the Charter means that remedies can be exhausted only if they are available. Viljoen gives five possible categories of cases in which remedies may be said to be unavailable.⁶⁷ These are: one, where a decree or other measure has ousted the jurisdiction of the courts, making judicial recourse impossible; two, where pursuing a remedy is dependent on extrajudicial considerations, such as a discretion or some extraordinary power granted to an executive state official; three, where the nature of the relief sought is not possible in domestic courts; four, where a situation of serious massive violations of human rights exists; and five, where complainants are detained without trial.

⁶¹ Ninth Annual Activity Report.

⁶² F Viljoen 'Review of the African Commission on Human and Peoples' Rights: 21 October 1986 to 1 January 1997' in C Heyns (ed) *Human rights law in Africa 1997* (1999) 71.

⁶³ Rule 104(1)(f).

⁶⁴ Communication 92/93, *International PEN v Sudan*.

⁶⁵ Eighth Annual Activity Report.

⁶⁶ Seventh Annual Activity Report.

⁶⁷ Viljoen (n 62 above) 72.

- *Communications must be submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized with the matter*⁶⁸

The Charter does not state the time frame within which the local remedies must be exhausted. The determination of a 'reasonable period', therefore, is left with the Commission to decide. The fact that the Charter does not specify the time frame within which a communication may be submitted to the Commission for consideration has, on the one hand, the effect of prejudicing valid claims. What is a reasonable period to one commissioner may not be necessarily so to another. On the other hand, the African system remains more accommodating when it comes to submitting communications to the African Commission. This is more important because of the fact that many victims of human rights violations in Africa are ignorant of the African Commission's procedures and if a time limit was to be prescribed, a lot of communications would be declared inadmissible due to non-compliance.

The African Charter is also silent as to when precisely does the need for exhaustion of local remedies arise. It seems that the decision only lies upon the African Commission after considering the facts of each particular communication. From the practice of the Commission, it seems that where a communication is still pending before available and effective domestic courts, the likelihood is that the communication would be declared inadmissible. In Communication 135/94, the *Kenya Human Rights Commission* case, the Commission found that there was still a need for exhausting local remedies because the complainants had stated that their communication was still pending before the courts of Kenya. In this communication, the complainants made no attempt to address the Commission on why the domestic courts had been bypassed.

- *Communications must not relate to cases, which have been settled by those states involved in accordance with the principles of the Charter of the UN or the Charter of the OAU or the provisions of the African Charter*⁶⁹

No communications already heard and decided by UN or AU dispute resolution mechanisms may be submitted to the African Commission. If the ICJ or the Human Rights Committee, for instance, has decided a case under the auspices of the United Nations, no claim can be made to the African Commission. This has an effect of shutting the doors at the face of any complainant who wishes to seek protection from more than one human rights system, such as the UN and the African human rights systems.

⁶⁸ Art 56(6).

⁶⁹ Art 56(7).

The Commission may wish to seek clarification of the extent to which the same issue (but not the same communication) has been settled by another international investigation or settlement body. The Commission may through its Secretariat make a request to the author regarding this issue.⁷⁰ With the advent of the African Union, it may be argued that this requirement also includes the settlement of disputes in accordance with the Constitutive Act of the African Union.⁷¹

8.2 Admissibility hearing

In considering the communication, the Commission may allow the parties to present their case in person. This is provided within the meaning of article 46 of the Charter, which provides that the Commission may resort to any appropriate method of investigation and it may hear from the Secretary-General of the African Union or any other person capable of enlightening it. Normally, the parties approach the Secretary of the Commission to express their desire to make oral submissions on admissibility before the Commission. The Secretary informs the Chairperson of the Commission who in turn informs the other members of the Commission. If the Commission reaches a consensus, the parties are then allowed in to make their oral submissions on admissibility. The presence of the parties has been commended in that it facilitates proceedings, as the Commission is able to question the parties concerned and to receive immediate responses.⁷² Accordingly, as the author of the complaint and alleged victim, the complainant is always in a position to enlighten the Commission about his case. Legal representation becomes very important in this regard.

The respondent state's representative can also be invited to make oral submissions before the Commission. In Communication 231/99, *Avocats Sans Frontières (on behalf of Gaëtan Bwampamy) v Burundi*,⁷³ apart from written submissions, both the respondent state and the legal representative of the complainant made oral submissions. In its oral submission, the respondent state argued that the complainant had not exhausted local remedies, which included '*le recours dans l'interet de la loi*', revision and the plea for pardon. After considering all the submissions from both parties, the Commission held the view that the complainant could not benefit from the first two remedies at the initiative of the Ministry of Justice. With regard to the plea of pardon,

⁷⁰ Rule 104(1)(g).

⁷¹ CAB/LEG/23.15. The Constitutive Act was adopted on 11 June 2000 and entered into force on 26 May 2001. The first Summit of the AU was held in South Africa in July 2002. The Constitutive Act of the African Union may be accessed at <<http://www.iss.org.za>> (accessed 28 February 2003).

⁷² Ankumah (n 6 above) 71.

⁷³ Fourteenth Annual Activity Report.

the Commission held that it was not a judicial remedy but served to affect the execution of a sentence. It may be argued that the presence of the legal representative of the complainant during the admissibility hearing was to the advantage of the complainant as the Commission declared the communication admissible.

The only disadvantage associated with inviting complainants to attend admissibility hearings is that not all complainants can afford to attend sessions of the Commission. Yet, their presence, together with their representatives, is very important. The Charter and the Rules of Procedure do not provide for the assistance of litigants for their attendance during the Commission's admissibility hearings. In some cases communications may be deferred to the next session because of a number of reasons. It becomes a double blow when the communications are deferred twice or even more when either the complainant or their representatives or both made it a point to attend the admissibility hearing at the instance of the Commission. During its 32nd ordinary session, the number of days for the session was abruptly reduced from 14 days to only seven days due to financial constraints. As a result the Commission deferred ten communications to the 33rd session for reasons of lack of time.⁷⁴ This was of course to the detriment of the complainants and their representatives who had been invited to make presentations on admissibility before the Commission.

8.3 Procedure arising from admissibility

The ultimate decision in so far as admissibility of a communication is concerned lies with the Commission. As mentioned earlier, article 55(2) of the Charter provides that a communication is considered admissible only if a simple majority of the members of the Commission so decide. Once a communication has been declared admissible, the Secretariat must notify the litigant and the respondent state concerned.⁷⁵

The respondent state is further required to, within three months, submit in writing to the Commission explanations or statements elucidating the issue under consideration and indicating, if possible, measures taken to remedy the situation. All these explanations or statements submitted by the state party must in turn be communicated to the complainant of the communication through the Secretariat.

After receiving the statement of the respondent state, the author may submit, in writing, any additional information and observance within a time stipulated by the Commission. The Secretariat must also inform the respondent state from whom explanations or statements are sought,

⁷⁴ See paragraph 10 of the Final Communiqué of the 32nd ordinary session of the African Commission on Human and Peoples' Rights 17–23 October 2002, Banjul, The Gambia.

⁷⁵ Rule 119.

that failure to comply within those specified times would result to the Commission acting on the evidence before it.

The Commission, through its Chairperson, notifies and advises the litigant and the respondent state of the date upon which the communication will be considered.⁷⁶ The Secretariat must then submit as soon as possible the decision of admissibility and text of relevant documents to the state party concerned.⁷⁷ The Secretariat must inform the author of the decision about the admissibility of the communication. It is, however, not clear whether or not this duplication of tasks between the Chairperson and the Secretariat were intended. If it was, the rationale is not clear. It is submitted that this task can be best handled by the Secretariat of the Commission.

9 On-site investigations

The Charter authorises the Commission to conduct on-site investigations as this may be said to be 'resorting to any appropriate method of investigation' within the ambit of article 46 of the Charter. This is very crucial in that the Commission must have a clear insight into the matter in question. The only problem that arises is that conducting the site investigations is dependent upon the consent of the government against which the complaint is made. This inhibits the work of the Commission. It is submitted that the Commission may undertake an on-site investigation without requiring consent from the respondent state concerned upon the strength of a liberal interpretation of article 46 of the Charter 'resorting to any appropriate method of investigation'. The test, therefore, is whether that method is appropriate in the circumstances.

In Communications 25/89, 47/90, 56/91 and 100/93 (joined), *Free Legal Assistance Group and Others v Zaire*,⁷⁸ the Commission requested that a mission of two members be received in Zaire, with the objective of discovering the extent of human rights violations and to endeavour to help the government of Zaire to ensure full respect for the Charter. The government never responded to the request for a mission. Be that as it may, the Commission found that there was indeed serious and massive violations of the Charter, namely articles 4, 5, 6, 7, 8, 16 and 17.

During the 16th session of the Commission held in 1994, in considering sending missions to countries concerned, the Commission sought assistance of the Secretary-General of the OAU in obtaining permission from the states concerned. Given the fact that the African

⁷⁶ Art 57.

⁷⁷ Rule 119.

⁷⁸ Ninth Annual Activity Report.

continent is ravaged by all kinds of violations of human rights, it would seem that the action of 'resorting to any appropriate method' should be preferred by the Commission over bureaucratic diplomatic protocols in so far as serious violations of human rights are concerned.

On-site investigations undertaken by the Commission include a mission to Senegal, which was conducted from 1 to 7 June 1996, which resulted from a communication alleging serious and massive violations of human rights at Kaguitt, in Casamance, following a clash between the Senegalese Army and the rebels of the Mouvement des Forces Democratique de la Casamance (MFDC).⁷⁹ In Communications 54/91, 61/91, 98/93, 164/97, 196/97 and 210/98, *Malawi African Association and Others v Mauritania*,⁸⁰ there were allegations of serious violations of human rights and at its 19th ordinary session the Commission decided to send a fact-finding mission to Mauritania with a view to finding an amicable solution of bringing the violations to an end. This mission was undertaken from 19 to 27 June 1996.⁸¹

10 Interim measures

In the event that after deliberations of the Commission, one or more of the communications apparently relate to special cases, which reveal the existence of a series of serious or massive violations of human and peoples' rights, the Commission must draw the attention of the Assembly of Heads of State and Government in accordance with article 58(1) of the Charter. This is what is known as taking an interim measure.⁸² An interim measure requires the Commission to dispense with the admissibility procedure for obvious reasons. Serious or massive human rights violations have to be stopped as early as possible.

Interim measures are only necessary in cases of emergency. Article 58(1) of the Charter provides that a case of emergency duly noticed by the Commission shall be submitted to the Chairperson of the Assembly of Heads of State and Government. Rule 111(3) of the Rules of Procedure provides that in case of urgency, when the Commission is not in session, the Chairperson of the Commission, in consultation with other members of the Commission, may take any necessary action on behalf of the Commission and to report that action taken to the

⁷⁹ See *Report of Mission of Good Offices undertaken to Senegal* by the African Commission on Human and Peoples' Rights from 1 to 7 June 1996.

⁸⁰ Thirteenth Annual Activity Report.

⁸¹ See *Report of Mission undertaken to Mauritania* by the African Commission on Human and Peoples' Rights from 19 to 27 June 1996.

⁸² On interim measures, see GJ Naldi 'Interim measures of protection in the African system for the protection of human rights' (2002) 2 *African Human Rights Law Journal* 1.

Commission as soon as the latter convenes the next session. This suggests that the request by the Assembly of Heads of State and Government of undertaking an in-depth study is not necessary in some circumstances as the Chairperson may be authorised to take 'any action' on behalf of the Commission. The only requirements are that of consulting with the members of the Commission and reporting to it as soon as it convenes its next session. Those submitting a communication should state whether it should be treated as a case of emergency in order to give directions to the Commission.

In Communications 27/89, 46/90 and 99/93 (joined), *Organisation Mondiale Contre la Torture and Others v Rwanda*,⁸³ the Commission joined four communications, which made reference to the expulsion from Rwanda of Burundi nationals who had been in Rwanda for many years for allegedly being a national risk due to their 'subversive activities', as well as the arbitrary arrest and extra-judicial executions of Rwandans, mostly belonging to the Tutsi ethnic group. In this communication, the Commission held that the facts constituted serious or massive violations of the Charter, namely of articles 4, 5, 6, 12(3) and 12(5).

In Communication 60/91, *Constitutional Rights Project v Nigeria (in respect of Akamu and Others)*,⁸⁴ the Commission applied old Rule 109 (now Rule 111) of the Rules of Procedure, where the Constitutional Rights Project of Nigeria, an NGO, submitted a communication on behalf of individuals who were sentenced to death in Nigeria and were awaiting execution. The communication revealed a case of emergency, which required the application of interim measures to avoid irreparable prejudice pending its consideration. The Commission contacted Nigeria and requested it not to carry out the execution pending the full consideration of the communication. In so doing, the Commission resorted to a method that was appropriate in the circumstances.

The Commission declared that there had been a violation of articles 7(1)(a), (c) and (d) of the Charter. Although the Commission recommended that the government of Nigeria should free the complainants, their death sentences were eventually commuted to terms of imprisonment. The sentences were commuted by a local court in the case of *Registered Trustees of the Constitutional Rights Project v The President of Federal Republic of Nigeria and Others*.⁸⁵

The provisions of the Charter and the Rules of Procedure do not state whether or not a decision taken on interim measures is binding. In Communications 137/94, 139/94, 154/96 and 161/97, *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*,⁸⁶ the Commission held

⁸³ Tenth Annual Activity Report.

⁸⁴ Eighth Annual Activity Report.

⁸⁵ Unreported judgment of the High Court of Lagos State, 5 May 1993, Suit No m/102/93.

⁸⁶ Twelfth Annual Activity Report.

that Rule 111 of the Rules of Procedure aimed at preventing damage being caused to a complaint before the Commission. The Commission noted that it had hoped that the respondent state of Nigeria would respond positively to its request for a stay of execution pending the final determination of the Commission. This decision clearly showed that the decision on interim measures was intended to be binding on the respondent state.

According to the Mauritius Plan of Action (1996–2001), it was noted that some cases of violations of human rights require urgent intervention on the part of the Commission. It was therefore recommended that the Commission should reflect on the possibilities provided by the Charter of processing adequate response to emergency situations. This of course would involve making use of article 46 of the Charter of 'resorting to any appropriate method of investigating' that emergency case and immediately ensuring the protection of human and peoples' rights as provided by article 45(2) of the Charter.

These interim measures are aimed at the protection of human and peoples' rights in Africa and they are in pursuance of the protection mandate of the Commission. In response to cases of emergency, the Commission, therefore, is given wide powers to resort to any appropriate method of investigation under article 46 of the Charter. In so far as article 46 of the Charter is concerned, Murray observes that this is a wide provision which provides the Commission with potentially a great deal of flexibility and discretion in all aspects of its work.⁸⁷ Complainants or their representatives should therefore take advantage of this article when preparing communications.

11 Undertaking an in-depth study

After the Commission has drawn the attention of the Assembly of Heads of State and Government to a series of massive or serious human rights violations, the latter may make a decision on whether to request the Commission to undertake an in-depth study and to make a factual report, which must be accompanied by the Commission's finding and recommendations.⁸⁸ Undertaking an in-depth study is only in respect to special cases, which reveal the existence of a series of serious or massive violations of human and peoples' rights. In these cases the admissibility procedure is dispensed with. This will obviously be after the Commission has been seized with the communication. This is because the first

⁸⁷ R Murray 'Evidence and fact-finding by the African Commission' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986–2000* (2002) 102.

⁸⁸ Art 58(2).

deliberation of that communication is when the rapporteur presents a summary of the facts and recommends to the other members that the Commission be seized with the case.

When presenting a special communication, complainants should assist the Commission by pointing out the envisaged remedies, that is, whether they wish the Commission to draw the attention of the Assembly of Heads of State and Government to the situation. However, complainants should not expect an instant action from the Commission because even if a communication reveals in the latter's opinion that there exists a series of serious or massive violations, it will only be in a position to investigate the matter once the Assembly of Heads of State and Government requests it to do so. So far, the Commission has not undertaken any in-depth study and neither has there been any request from the Assembly of Heads of State and Government for undertaking any such study.

12 Consideration of the merits

Consideration of the merits involves the consideration of the substantive issues in the communications before the Commission. For a communication to be considered on the merits, it must be declared admissible by the Commission. Consideration of the merits is undertaken by examining the allegations of violation of the provisions of the Charter and other international human rights instruments from which the Commission can draw inspiration.⁸⁹ The Commission devotes a separate session for the consideration of a communication on merits from the sessions where seizure and admissibility procedures take place. The practice is that the Secretariat is responsible for preparing draft decisions on the merits, taking into consideration all the facts as stated in the communication. Draft decisions are not meant to bind the Commission in deciding on the merits; instead they are meant to guide the Commission in its deliberations. The final decisions will of course be influenced by the written and oral submissions made by the parties before the Commission.

As already stated, bringing a communication before the African Commission involves the application of international law. Consideration of the merits involves the application of international human rights law, the direct interpretation of the Charter in relation to the contents of the communications and the weighing of arguments by both parties. Consideration of merits also involves the weighing of evidence presented to the Commission by the parties. The Commission acts on

⁸⁹ On sources of inspiration, see I Osterdahl *Implementing human rights in Africa: The African Commission on Human and Peoples' Rights* (2002) 34–67.

the evidence brought before it and no more. Rule 119(4) of Rules of Procedure provides that respondent states from which explanations or statements are sought within specified times shall be informed that if they fail to comply within those times the Commission will act on the evidence before it.⁹⁰

Consideration of the merits also involves the importation of international human rights principles from other regional human rights systems, such as the Inter-American and European systems. In Communication 211/98, *Legal Resources Foundation v Zambia*,⁹¹ the Commission made reference to the *Vide* cases of the Inter-American Commission⁹² and to article 27 of the Vienna Convention on the Law of Treaties. In Communication 232/99, *Ouko v Kenya*,⁹³ the Commission made reference to United Nations Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, particularly Principles 1 and 6. The Commission also refers to its earlier decisions to restate its position on a certain issue. In Communication 74/92, *Commission Nationale des Droits de l'Homme et des Libertés v Chad*,⁹⁴ the Commission restated the principle that where allegations of human rights abuse go uncontested by the respondent state, the Commission must decide on the facts provided by the complainant and treat those facts as given. Regarding this principle, the Commission made reference to Communication 59/91, *Mekongo v Cameroon*,⁹⁵ Communication 60/91, *Constitutional Rights Project v Nigeria*⁹⁶ and Communication 101/93, *Civil Liberties Organisation (in respect of the Nigerian Bar Association) v Nigeria*.⁹⁷

13 Recommendations

The Charter provides that all measures taken within the provisions of the Charter shall remain confidential until such time as the Assembly of Heads of State and Government shall decide.⁹⁸ 'All measures' include all recommendations taken by the Commission whether they are interim or final. Viljoen argues that the Commission understood the phrase 'all measures taken' not only to refer to specific steps taken against or

⁹⁰ On the presumption of truth, see Osterdahl (n 89 above) 144–151.

⁹¹ Fourteenth Annual Activity Report.

⁹² Nos 10.029, 10.036, 10.145, 10.10.372, 10.373, 10.374 & 10.375 in Report 29/92, 2 October 1992.

⁹³ Fourteenth Annual Activity Report.

⁹⁴ Ninth Annual Activity Report.

⁹⁵ Eighth Annual Activity Report.

⁹⁶ As above.

⁹⁷ As above.

⁹⁸ Art 59.

recommendations made to offending states, but also to the whole process of individual communications.⁹⁹ As a result individual communications remained confidential until the Seventh Annual Activity Report of 1994, which marked the first publication of individual communications.

In its Activity Report, which was submitted to the OAU after its 15th ordinary session in June 1994, the Commission included an Annex for the first time, which gave information about the individual communications submitted to it under article 55 of the Charter. When this report was considered, and approved by the Heads of State and Government, information about the communications procedure became available to the public for the first time. Although the information in the report was not comprehensive, the Annex watered down the secrecy under which the entire communication procedure had been hidden. The decisions on individual communications also include reports on amicable settlements and those on which the Commission resolved to take continuing action, in pursuit of amicable resolutions. This conforms with article 52 of the Charter which allows the Commission to facilitate amicable settlements.

The Commission's recommendations are always referred to as 'decisions'. It may be argued that these decisions have no binding effect because no article in the Charter or rule in the Rules of Procedure defines the status of the Commission's decisions. Of course this is ironic, considering the fact that the Commission is the only enforcement mechanism within the African human rights system. This is, however, not the case. It is submitted that recommendations made by the Commission are binding. By signing and ratifying the Charter, states signify their intention to be bound by and to adhere to the obligations arising from it even if they do not enact domestic legislation to effect domestic incorporation.¹⁰⁰ This principle is also expressed in article 14 of the Vienna Convention on the Law of Treaties of 1969.¹⁰¹

Article 1 of the Charter provides that member states 'shall recognise the rights, duties and freedoms enshrined in this Charter and shall

⁹⁹ FJ Viljoen *The realisation of human rights in Africa through inter-governmental institutions* unpublished LLD thesis, University of Pretoria, 1997 187.

¹⁰⁰ See the Botswana case of *Attorney-General v Dow* 1994 6 BCLR 1.

¹⁰¹ Art 14 of the Vienna Convention, which entered into force on 27 January 1980, provides as follows: '1. The consent of a State to be bound by a treaty is expressed by ratification when: (a) the treaty provides for such consent to be expressed by means of ratification; (b) it is otherwise established that the negotiating States were agreed that ratification should be required; (c) the representative of the State has signed the treaty subject to ratification; or (d) the intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation. 2. The consent of a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification.'

undertake to adopt legislative or other measures to give effect to them'. The use of the word 'shall' means that the provision is peremptory. One such 'measure' which can be employed to give effect to the articles of the Charter is by the Commission making recommendations on communications. Member states are therefore obliged to 'undertake to adopt' this measure 'to give effect' to the rights, duties and freedoms enshrined therein.

The adherence to the Commission's recommendation 'measure' by the respondent state is also another 'measure' within the meaning of article 1 of the Charter giving effect to provisions of the Charter. It is submitted, therefore, that the use of the words 'shall' in article 1 of the Charter automatically renders the recommendations of the Commission binding in the same way that the provisions of the Charter bind member states.

Since its inception, the Commission has received over 260 communications.¹⁰² The Commission's decisions on some of these communications have made a tremendous impact in so far as human rights law in Africa is concerned. For instance, in Communication 92/96, *Modise v Botswana*, Communication 211/98, *Legal Resources Foundation v Zambia* and Communication 212/98, *Amnesty International v Zambia*, the Commission denounced the restrictive constitutional provisions which tend to restrict the rights of certain classes of citizens or groups of individuals to politically participate in their governments and more specifically to qualify for the office of the Presidency. For purposes of supporting their arguments, complainants have to make use of the Commission's past decisions, which contain elaborations on a considerable number of substantive human and peoples' rights, to enhance their communications before the Commission. This will also be a contribution towards the development of the African human rights law jurisprudence.

14 Follow-up to communications

Once the Commission reaches a decision on the merits, it is authorised to forward a recommendation on that communication to be considered by the Assembly of Heads of State and Government. The Charter and the Rules of Procedure do not provide for any action on the part of the Commission after this stage such as enforcing and monitoring its recommendations on communications. This could mean that this is the Commission's final authority and no more. However, this is a strict

¹⁰² According to the permanent register for the individual communications as at 6 January 2003, the number of communications received by the Commission stood at 263.

interpretation of the provisions of the Charter. This shortcoming may be circumvented because of the flexibility of the provisions of the Charter. For instance, complainants or their representatives may give the Commission guidelines in their communications on how they wish their decisions to be enforced for purposes of fulfilling the protection mandate of the Commission.

Article 59(2) of the Charter provides that after the Assembly of Heads of State and Government has considered the report on activities of the Commission, the Chairperson of the Commission shall publish it. This report contains the decisions of the Commission on communications. When publishing the report on the activities of the Commission, the Chairperson does so on the Commission's behalf.

The lack of an effective enforcement mechanism was one of the factors prompting the adoption of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, which is still undergoing a ratification process.¹⁰³ With the African Court, litigants are assured of binding decisions against their respondent states.¹⁰⁴ This will inevitably require litigants to understand the relationship between the African Court and the Commission.¹⁰⁵

Implementing a decision of the Commission is the initial follow-up stage to communications. The Charter is, however, silent regarding the follow-up to communications. This presents a problem to the victims of human rights abuse. The Commission has, however, made some attempt to undertake follow-ups to some communications to determine whether or not its decisions have been implemented. In Communication 87/93, *Constitutional Rights Project v Nigeria*,¹⁰⁶ at its 16th session, the Commission found a violation of the Charter and recommended that the government of Nigeria should free the complainants. At its 17th session, the Commission decided to bring the file to Nigeria for a planned mission for purposes of making sure that the violation of rights had been repaired. The mission eventually took place in March 1997.

In Communication 211/98, *Legal Resources Foundation v Zambia*, the Commission made a request to the respondent state to report back when it submits its next country report in terms of article 62 of the Charter on measures taken to comply with its recommendations. It is

¹⁰³ Adopted by the Assembly of Heads of State and Government of the OAU in Ouagadougou, Burkina Faso on 9 June 1998. OAU/LEG/MIN/AFCHPR/PROT (III).

¹⁰⁴ Art 30 of the Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights provides that the states to the Protocol undertake to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution.

¹⁰⁵ See SB Gumedze *The relationship between the African Court and the African Commission* unpublished LLM thesis, University of Pretoria, 2001.

¹⁰⁶ Eighth Annual Activity Report.

argued that this is not an effective follow-up mechanism because not every member state to the Charter submits its country report. However, the Commission should be applauded for taking this 'country report' direction as means of following-up its decision.

In the absence of clear guidelines on the follow-up procedure and with the advent of the African Union and under the auspices of the Constitutive Act establishing it, it is hoped that a follow-up to the communication mechanism will be put in place. The lack of an effective follow-up mechanism is one of the existing concerns in so far as the protection mandate of the Commission regarding individual communications is concerned. Those submitting communications are therefore encouraged to explore ways within the context and meaning of the provisions of the Charter upon which the Commission may undertake an effective follow-up mechanism to their communications.

15 Remedies

The Commission is not given a clear mandate to order remedies for human rights violations.¹⁰⁷ Instead, it has over the years opted for a wide interpretation of its mandate to 'ensure the protection' of the rights of the Charter.¹⁰⁸ In Communication 101/93, *Civil Liberties Organisation (in respect of the Nigerian Bar Association) v Nigeria*,¹⁰⁹ the Commission recommended that a decree, which among other things excluded recourse to the court, be nullified.

In Communication 59/91, *Mekongo v Cameroon*, the Commission recommended compensation of an individual by an offending state. Although the Charter is silent regarding a recommendation for compensation, it can be argued that it derives such authority from its mandate of 'ensuring the protection of human and peoples' rights under the auspices of the provisions of the Charter'.¹¹⁰

In Communications 54/91, 61/91, 98/93, 164/97 to 210/98, *Malawi Africa Association and Others v Mauritania*,¹¹¹ the Commission made an elaborate recommendation in ordering remedies against the respondent state of Mauritania. For purposes of making future complainants aware of how the Commission ordered remedies in this communication, it is important to give the recommendation as stated in the communication. Although there are no guidelines, litigants must exercise common sense in drawing up their envisaged remedies.

¹⁰⁷ Viljoen (n 62 above) 58.

¹⁰⁸ Art 45(2).

¹⁰⁹ Eighth Annual Activity Report.

¹¹⁰ Art 45(2).

¹¹¹ Thirteenth Annual Activity Report.

In the above-mentioned communication, the Commission ordered the following to the government of Mauritania:

(1) To arrange for the commencement of an independent enquiry in order to clarify the fate of persons considered as disappeared, and to identify and bring to book the authors of the violations perpetrated at the time the facts arraigned; (2) To take diligent measures to replace the national identity documents of those Mauritanian citizens, which were taken from them at the time of their expulsion and ensure their return without delay to Mauritania as well as the restitution of the belongings looted from them at the time of the said expulsion; and to take the necessary steps for the reparation for the deprivation of the victims of the above cited events; (3) To take appropriate measures to ensure payment of a compensatory benefit to the widows and beneficiaries of the victims of the above-cited violations; (4) To reinstate the rights due to the unduly dismissed and/or forcibly retired workers, with all legal consequences appertaining thereto; (5) As regards the victims of degrading practices, to carry out an assessment of the status of such practices in the country with a view to identifying with precision the deep-rooted causes for their persistence and to put in place a strategy aimed at their total and definitive eradication; and (6) To take appropriate administrative measures for the effective enforcement of Ordinance No 81-234 of 9 November 1981, on the abolition of slavery in Mauritania.

More importantly, the Commission assured the respondent state of Mauritania its full co-operation and support in the application of its recommendation. This meant that the Commission was more than willing to see to it that the culture of human rights prevailed in the respondent state. Complainants or their representatives submitting communications before the Commission should therefore take advantage of this decision. They may even categorically state in their briefs the ways in which the Commission can 'fully co-operate and support' a respondent state in the application of its decision, should it find that there has been a violation of the Charter.

16 Conclusion

Despite the availability to Africans of legal recourse before the Commission, the African continent continues to be ravaged by all kinds of violations of human rights. Part of the problem is associated with the fact that the African people are ignorant of these complaints procedures. There is also a lack of a human rights culture in most parts of the continent, especially at government level. Mugwanya argues that virtually all African states have been and continue to be the most egregious human rights violators, rendering human rights illusory in the daily lives of the majority of people in Africa.¹¹² This is due to the fact that

¹¹² GW Mugwanya 'Examination of state reports by the African Commission: A critical appraisal' (2001) 1 *African Human Rights Law Journal* 268.

at the primary level, member states of the African Union have failed to undertake the necessary measures to give effect to the provisions of the Charter as required by article 1 of the Charter. For this reason, Steiner and Alston maintain that:¹¹³

The African system has not yielded anywhere near the same amount of information and 'output' of recommendations or decisions — state reports and reactions thereto, communications (complaints) from individuals about state conduct, studies of 'situations' or investigations of particular violations — as have other systems.

Instituting communications before the Commission remains a positive step towards the effective protection of human and peoples' rights in Africa. At the International level, the Assembly of Heads of State and Government of the African Union must devise an effective mechanism for enforcing the decisions of the Commission. Failure to do so renders the litigation process before the Commission an exercise in futility. The success of ensuring the respect for human rights in Africa also lies with the Commission. The Commission must be a robust and innovative institution dedicated to its work and must enjoy the support from the Assembly of Heads of State and Government of the African Union, individual African states, intergovernmental organisations, national human rights institutions and civil society. Most importantly, the Commission must have an effective Secretariat to facilitate its smooth running in undertaking its functions as provided for in the Charter.

Viljoen's concluding remarks on the question of admissibility that 'the better a communication is prepared before the submission, the more likely the Commission is to come to a prompt decision favouring the complainant'¹¹⁴ should be the golden thread running through the complaints process before the Commission. This will no doubt require a clear understanding of the Charter, the Rules of Procedure, the Submission and Processing Guidelines as well as the evolving practice of the Commission in so far as its protective mandate is concerned.

Bringing complaints before the Commission should also involve the development of innovative strategies in order to enhance African human rights law jurisprudence. These strategies can be best achieved with the basic knowledge of the existing litigation processes. The use of information and communication technology may be one such innovative strategy that may be employed by those bringing communications before the Commission. It is without any doubt that through an effective complaints process, the Commission's protective mandate can be fully achieved and the African continent saved from its current unfortunate predicament.

¹¹³ UO Umozurike (n 17 above) 231.

¹¹⁴ Viljoen (n 45 above) 99.