

Promising profiles: An interview with the four new members of the African Commission on Human and Peoples' Rights

Frans Viljoen*

Professor of law, Centre for Human Rights, Faculty of Law, University of Pretoria, South Africa

1 Introduction

Over the last six decades, the international human rights discourse shifted from celebrating ever-expanding substantive normative frameworks to questioning the inadequacies in the implementation and enforcement of these norms. Concomitant with this development came greater interest in human rights treaty bodies and human rights courts, leading to more attention being paid to election processes and an increased awareness of the role played by the individual members of these bodies. In this contribution, the focus falls on the four new members of the African Commission on Human and Peoples' Rights (African Commission), who took their seats at the Commission's 38th ordinary session, held from 21 November to 5 December 2005, in Banjul, The Gambia. Departing from the premise that an institution is its people, and that it is instructive to get to know these four new commissioners, I conducted interviews with each of the four new commissioners during that session.

The process leading to the election of the four new members was set in motion by a *note verbale* from the African Union (AU) Commission, in which state parties were requested to submit nominations that set out the 'complete information indicating judicial, practical, academic, activist, professional and other relevant experience in the field of human and peoples' rights' of the candidates.¹ However, this information is not

* LLB MA LLD (Pretoria), LLM (Cambridge); frans.viljoen@up.ac.za

¹ AU Doc BC/OLC/66/Vol XVIII, dated 5 April 2005. In crucial aspects, this *note verbale* mirrors the one issued in 2004 in respect of the nomination of judges to the African Court on Human and Peoples' Rights (AU Doc BC/OLC/66 5/8/Vol V).

publicly accessible. This contribution aims to fill this void on the basis of the interviews conducted. Evidently, they are all quite new to their roles, and their answers should be understood as an initial reaction and a reflection on the possibilities of their roles.

The newly elected commissioners are Ms Reine Alapini-Gansou (a national of Benin), Mr Musa Ngary Bitaye (a Gambian national), Advocate Faith Pansy Tlakula (a South African national) and Mr Mumba Malila (a Zambian national). They replace Commissioners Chigovera, Chirwa, Dankwa and Johm, from Zimbabwe, Malawi, Ghana and The Gambia, respectively, whose terms expired in 2005.²

As three of the four outgoing commissioners also served as Special Rapporteurs of the African Commission, their positions became vacant. By opting not to appoint 'outside experts' (non-commissioners) to these positions, the newly constituted Commission stuck to the approach followed by the African Commission in the past. These positions are filled as follows:³ Commissioner Malila replaces Commissioner Chirwa as Special Rapporteur on Prisons and Conditions of Detention in Africa; Commissioner Alapini-Gansou becomes Special Rapporteur on Human Rights Defenders in Africa in the place of Commissioner Johm; and Commissioner Tlakula follows Commissioner Chigovera as Special Rapporteur on Freedom of Expression in Africa. Commissioner Rezag-Bara takes over as Chairperson of the Working Group on Indigenous Populations/Communities in Africa, while Commissioner Bitaye is appointed a member of that Working Group. Commissioner Tlakula is also a member of the Working Group on Specific Issues Relating to the Work of the African Commission on Human and Peoples' Rights.

Commissioners serve in their personal capacities and do not represent their countries.⁴ Although the African Charter on Human and Peoples' Rights (African Charter) does not prescribe a particular geographical representation, it is important that the five regions of the AU should be represented in the institutional membership so as to ensure continent-wide involvement.⁵ After the election of the four new commissioners, the regions of Africa are represented as follows: three from West Africa; two from North Africa; two from East Africa; none from Central Africa; two from East Africa and four from Southern

² For their contact details, and those of other commissioners, see the Commission's website <http://www.achpr.org> (accessed 28 February 2006).

³ See the final communiqué that the Commission issued at the end of the 38th session, <http://www.achpr.org> (accessed 28 February 2006).

⁴ Art 31(2) of the African Charter provides that commissioners serve in their personal capacity.

⁵ See, by way of contrast, art 14(2) 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 requires that the elected judges have to represent 'the main regions of Africa' and its 'particular legal traditions'.

Africa. This means that one region, Central Africa, is not represented, and that Southern Africa is over-represented.

The official languages of the AU are Arabic, English, French, Portuguese, Spanish, Kiswahili and any other African language.⁶ In practice, the working languages of the African Commission are mainly English and French. At its sessions, interpretation is available in Arabic, English and French. Of the four new commissioners, one is francophone (Ms Alapini-Gansou), able to read and speak English; one is bilingual (Mr Bitaye), and two anglophone (Adv Tlakula and Mr Malila).

Commissioners serve terms of six years, and may be re-elected indefinitely.⁷ Aged mostly below 50,⁸ the arrival of the newly elected commissioners has significantly reduced the average age of the Commission.

2 Commissioners' professional background

A recurring problem of the African Commission is the close ties between some commissioners and the executives of their countries. Some served at ministerial or ambassadorial levels at the time of their election.⁹ Non-governmental organisations (NGOs) have in the past raised concerns about their lack of independence. Eventually accepting the validity of and acting on these concerns, the 2005 AU Commission *note verbale* calls on states to nominate persons independent from government.¹⁰ This *note verbale* seems to have had a positive effect. At the time they were nominated and elected, all the new members complied with the directive of the *note verbale*.¹¹ Mr Bitaye is a lawyer who has his own practice, and is Chairperson of the Gambian Bar Association. Ms Alapini-Gansou is a practising lawyer, having been admitted as an

⁶ Art 11 of the 2003 Protocol on Amendments to the Constitutive Act of the African Union.

⁷ Art 36 African Charter.

⁸ Their ages range between 61 (Bitaye), Alapini-Gansou (49), Tlakula (48) and Malila (40).

⁹ At its first session, in 1987, the membership of the African Commission included a Minister of the Interior of Congo (Commissioner Gabou) and a civil servant from Zambia (Chipoya), as well as three persons holding high judicial office. At the moment, the Chairperson of the Commission (Commissioner Sawadogo) is an ambassador, and Commissioner Babana holds high government office.

¹⁰ The *note verbale* (n 1 above) cites the following from a 1920 opinion of the Advisory Committee of Jurists concerning the eligibility criteria for appointment to the Permanent Court of International Justice: '[A] member of government, a Minister or Under-Secretary of State, a diplomatic representative, a director of a ministry, or one of his subordinates, or the legal advisor to a foreign office . . . are certainly not eligible for appointment as judges upon our Court.'

¹¹ This leads to an anomaly: Some of the serving commissioners fall foul of the eligibility criteria that guided the most recent elections.

advocate at the Benin Bar in 1986. She also teaches criminal law and labour law part-time at the Université Nationale du Benin. Adv Tlakula is the Chief Electoral Officer of the South African Independent Electoral Commission (IEC). Mr Malila is a lecturer at the Law School of the University of Zambia and, since April 2004, the Chairperson of the Zambian Human Rights Commission. If one looks back further in time, the picture alters slightly. Mr Bitaye was once — albeit briefly, in 1995 — the Attorney-General (Minister of Justice) of The Gambia. However, the short duration of his affiliation with the government and the time lapse minimise any concerns about a possible lack of independence.

Although the African Charter only requires that ‘particular consideration’ be given to ‘persons having legal experience’,¹² a formal legal qualification has become accepted as a minimum prerequisite for election. All four are lawyers, and hold basic and further law degrees. Commissioner Alapini-Gansou holds a *Maîtrise* in law from the Université Nationale du Benin and a *Diplome d’Etudes Approfondies (DEA)* in environmental law from the Université de Lomé, Togo. Commissioner Bitaye was awarded a first degree in the liberal arts in 1973, with sociology, education and French as majors, and studied law in England. In 1978 he was called to the bar, practised for a short while in the UK, then in The Gambia. Commissioner Tlakula holds the degrees LL.M (North), LL.B (Witwatersrand) and LL.M in International Human Rights Law and Human Rights Advocacy (Harvard). Commissioner Malila obtained his first law degree from the University of Zambia in 1987, followed by an LL.M, which he completed in 1989 at Cambridge University. They all are also admitted to legal practice. Two (Alapini-Gansou and Bitaye) are still practising.

3 Human rights background and experience

In line with the *note verbale*, the new commissioners all have some human rights experience. It is, however, clear that they generally lack prior in-depth training on and involvement in the African regional human rights system.

Commissioner Alapini-Gansou has been actively involved in human rights since 1990, especially in women’s rights. She is the executive secretary of WILDAF Benin. Her work evolved more broadly into the sub-region, as she became a member of the co-ordinating committee of WIPNET (Women in Peace Building Network) Benin, which is part of the West African Network for Peace Building (WANEP). WIPNET works for increased involvement of women activism in peace building. She

¹² Art 31(1) African Charter.

obtained a certificate at the Strasbourg Institute for Human Rights and also trained at the African Centre for Democracy and Human Rights Studies, and the Institute for Human Rights and Development in Africa, both based in Banjul.

While at Cambridge, Mumba Malila studied Civil Liberties (essentially dealing with human rights) and International Law. When he returned to the University of Zambia, he taught international law, but not human rights. Like Commissioner Alapini-Gansou, he also attended the Strasbourg International Human Rights Institute, where he did a two-month course on the teaching of international human rights. A founder and current member of the Legal Resources Foundation, he served as the Vice-Chairperson of the Human Rights Association of Zambia until 2004, and as Secretary of the Law Association of Zambia, where he was part of a team running the legal aid programme.

After being admitted to practice, Pansy Tlakula went to teach at what is now the University of the North West. She then became law advisor in the Department of Justice of the erstwhile Bophuthatswana. Later she joined the Black Lawyers Association (BLA), and became its National Director. She was appointed to the first South African Human Rights Commission, on which she served from 1995 to 2002.

Musa Bitaye's practice was not a human rights practice as such, but in several instances he 'litigated cases linked to human rights in the Gambian Constitution', mostly dealing with the right to due process, such as the right of an accused or detained person to be informed of the charge against him or her.

4 Domestic process of nomination and election

Apart from stipulating that state parties 'may not nominate more than two candidates',¹³ the African Charter does not prescribe the domestic procedure for nomination. In the 2005 *note verbale* of the AU Commission, state parties are invited to consider the following three guidelines:

- 1 The procedure for nomination should, 'at the minimum', be 'that for appointment to the highest judicial office' in a particular country.
- 2 States should encourage civil society participation in the domestic selection process.
- 3 The domestic nomination process should be 'transparent and impartial' ... 'in order to create public trust in the integrity' in that process.

It is therefore interesting to get some insight into how this process played out in fact. Although their routes to the nomination process

¹³ Art 34 African Charter.

differ markedly, all four the interviewees were eventually nominated by the Department of Foreign Affairs of their country.

Ms Alapini-Gansou was actively involved in her own nomination and election process. After being exposed to the African Charter and Commission at various training sessions, and specifically after perusing materials provided as part of a course organised by the Institute for Human Rights and Development in Africa, in Banjul in 2002, she discovered that many AU members, including Benin, had never been represented in the African Commission. On her return, she approached the authorities with the evidence and argued that Benin should address this situation. She was duly nominated, but due to an administrative delay, her nomination did not 'go forward'. When vacancies arose again in 2005, her candidacy was renewed. This time, she went personally to the AU Assembly meeting, held in Sirte, where she successfully lobbied for her election.

The other three new members were somewhat less involved in the process that led to their election. Commissioner Bitaye does not know of any set procedure for nomination in The Gambia. The Permanent Secretary of the Ministry of State for Foreign Affairs approached him with a request to submit a *curriculum vitae*. In South Africa, the process is not very clearly defined, but seems to be based on a recommendation by the Department of Justice. In Zambia, a special *ad hoc* panel makes nominations. While judicial appointments usually take place through the Judicial Services Commission, appointments to international positions are made by an *ad hoc* 'National Group'. This panel consists of the Attorney-General, the Deputy Chief Justice, the Chairperson of the Law Association, the Dean of the School of Law and one other person.

The interviews reveal that the nominating states have not followed the advice of the AU Commission to ensure transparency and to involve civil society in the national nomination process. Only one state, Zambia, abided by the 'minimum' requirement of applying the usual process of appointment to the highest judicial office also in respect of nominees to the African Commission.

5 What do the new commissioners bring to the Commission?

Emphasising matters related to their personalities and professional experience, the commissioners were quite clear about what they are bringing into the African Commission. Here, they express themselves in their own words:

Commissioner Alapini-Gansou: 'I have a strong belief in what I do. I am also willing to learn, and to assist in improving the Commission.'
Commissioner Bitaye: 'What I bring to the Commission is my formal, legalistic training, my aptitude for engaging people in promotional

matters, as well as my aptitude for organisational structures, and, of course, an interest in the field of human rights.’ Commissioner Malila: ‘I am focused and am scared of failure. I am goal-oriented. I therefore bring a little more focus to the Commission. I am keen to see the Commission improve its image, its respectability and its visibility.’ Commissioner Tlakula: ‘What I bring to the Commission is the similar experience I have gained working as a member of the South African Human Rights Commission. In addition, I bring experience on government. I not only served in elected posts, but also in administration, thus achieving a holistic perspective on the functioning of government. As head of a government institution, the IEC, I also bring the quality of leadership to the Commission.’

6 Perceptions about the Commission

With the exception of Ms Alapini-Gansou, who attended two sessions as representative of NGOs before she became a member, and Mr Malila, who attended one session as Chairperson of the Zambian Human Rights Commission, the commissioners were not well informed about the African Commission as an institution at the time of their election. For the most part, they relied on information acquired as part of formal or informal studies as source of knowledge on the Commission. Most of their studies did not deal in any depth with the Commission, or viewed its work relatively negatively. As a consequence, they either lacked information about the Commission or had a relatively negative view of the body.

7 What do the new commissioners consider to be the main human rights challenges facing Africa, and the role of the African Commission in addressing them?

Commissioner Alapini-Gansou identified poverty, refugees, threats to democracy and globalisation as some of the major challenges in Africa today. Commissioner Bitaye focused on what he termed the ‘cultural rights challenge’: ‘What stands out for me, given my short experience, is the cultural rights challenge. This seems to be divisive, or contradictory, in the sense that, on the one hand, you have claims and a desire for modernity, and at the same time, there is a premium placed on cultural rights.’

Commissioners Malila and Tlakula both stressed the importance of socio-economic rights, and focused on the need to make these rights justiciable. Malila added: ‘The African Commission can play a role if it shifted its emphasis, which has so far principally been on civil and political rights. The Commission should in future attach equal weight

to these rights, especially as the African Charter recognises them as equal. The Commission should sensitise governments to address these rights as species of rights that are indivisible and justiciable.' Tlakula expressed the opinion that 'the African Commission can play a role if a number of countries entrench these rights in their Constitutions. This can contribute to the eradication of poverty.'

8 Role of NGOs in the African regional system

NGOs have played a significant role in the activities of the African Commission. Two contributions are highlighted here: By submitting communications and by presenting arguments about substantive rights in the African Charter, they have assisted in the elaboration of the Commission's jurisprudence. By lobbying for the establishment of an African Court on Human and Peoples' Rights (African Court) and a Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women's Protocol), they have contributed greatly to the normative expansion of the African human rights system.

Two interviewees were unequivocal about the importance they attach to the role of NGOs in the African regional human rights system. Coming from an NGO environment herself, Commissioner Reine Alapini-Gansou regards NGOs as crucial to the African Commission. Without NGOs, she observes, the Commission would not have evolved as it did. NGOs assisted the Commission in overcoming numerous problems. She views her previous involvement with NGOs as a strength, and as a factor that would make it easier for her to promote and defend human rights in Africa. Mr Mumba Malila also considers NGOs to be very important allies in the work of the Commission. They are the ones who first and foremost work in communities, monitoring governments. As most violations are perpetrated by governments, local NGOs are in the best position to bring human rights violations that occur to the attention of government.

Mr Musa Bitaye expressed a guarded view about the role of NGOs in the African human rights system. 'Within limits', he noted, 'the type of peer pressure that they bring about is very positive'. However, he pointed out that 'from a formally legalistic perspective, some of the interventions during the public session would be "inadmissible", if they were part of an official communication'. It is up to the Commission to 'sift the grain from the chaff'. The bottom line remains that NGOs are important in bringing pressure to bear on states. For Adv Pansy Tlakula, the relationship between the Commission and NGOs is one of complementarity. It will be to the benefit of both the Commission and NGOs if their respective roles are kept distinct and separate. Their roles are different and they have to keep to their respective roles. This distinction

should be kept in mind at all times; one should not confuse the separate roles the two institutions play.

9 The relationship between the Commission and the African Court on Human and Peoples' Rights

The new commissioners take their seats at a time when the African Court is in the process of being established. Belatedly following the entry into force of the Protocol to the African Charter Establishing an African Court in January 2004, the AU Assembly confirmed the election of 11 judges in January 2006, and a seat should be assigned at the Assembly meeting in June 2006.¹⁴

Commissioner Alapini-Gansou sees the African Commission as a filter that will ensure that only those cases that need to go to the African Court will reach the Court. To her, the Court is the logical end result of the Commission: While the Commission can only give recommendations, and can try to persuade states to follow them, the Court will be able to give binding judgments.

To Commissioner Bitaye, the coexistence of the African Commission and the African Court seems — at least superficially — like a duplication of efforts. For the time being, this may be a good arrangement. The jurisprudence of the Commission can, for example, be of assistance to the Court. In the structure of the Court itself, it seems the Commission has the right to appear, and this seems to be a duplication. In the long term, he would like to see the two institutions being fused into a single institution.

By contrast, Commissioner Malila is of the view that the African Court will not — and should not — replace the African Commission. While it is true that some things are better done by a judicial institution, a court is unable to do many other things. The Commission is much more flexible, and can, for example, engage in promotion and sensitisation much more effectively than a court.

Commissioner Tlakula emphasises that the African Commission is not a court of law, and should never aspire to take that role. Having said that, it still is an open question whether the Court will consider the Commission's recommendations, or whether it will hear a matter *de novo*. In other words, it is not clear whether the Court will be guided by the Commission's findings when it arrives at its decisions.

¹⁴ Assembly/AU/Dec 100 (VI) <http://www.africa-union.org> (accessed 28 February 2006).

10 A role in their own countries?

It was pointed out earlier that commissioners do not 'represent' their countries of origin. When the African Commission considers communications, the practice has developed that a commissioner from a particular country does not participate in the deliberation.¹⁵ As far as the division of countries among commissioners for promotional activities is concerned, commissioners are usually not assigned their 'own' countries. In respect of the examination of the reports of state reports, the established practice is that a commissioner from a particular country does not participate in the examination of a state report from that state. Despite these constraints, three of the new commissioners attached some importance to their domestic role.

Commissioner Alapini-Gansou has some definite ideals in respect of her role in Benin. She is concerned that Benin has only once submitted a report under the African Charter. By reporting and making recommendations to the Ministries of Foreign Affairs and of Justice, she would like to see that Benin have prepared its overdue reports by the next session. She intends to supplement the activities of the commissioner who has Benin as part of his or her promotional mandate. She also wants to work with partners in Benin to ensure the promotion of domestic and international rights in Benin. Commissioner Malila would like to see that his presence at the African Commission brings about the following results: There should be an increase in the visibility of the African Commission. As member of the African Commission and as Chairperson of the Zambian National Human Rights Commission, he wishes to ensure that Zambia submits all overdue reports to the African Commission. Through his membership of the African Commission, he would like to ensure that more attention is paid to the African human rights protection mechanism than so far has been the case. Commissioner Tlakula proposes to try to get the South African government to commit itself to supporting the Commission. She also sees herself working closely with government and civil society to get other states to join South Africa in supporting the African Commission.

Commissioner Bitaye expresses himself in the following words: 'Whatever ideals I have for The Gambia, I would like to see this come through someone who has no emotional attachment to The Gambia, someone who is really independent and objective about the situation here.'

¹⁵ Rules 109 and 110 of the 1995 Rules of Procedure on 'incompatibilities' and 'withdrawal' do not require the recusal under such circumstances.

11 At the end of six years ...

The new commissioners have high ideals, all expressing the desire to leave a concrete legacy after their six year terms.¹⁶ Each commissioner received an opportunity to state their ideals for their terms, providing a yardstick against which to assess their work at the conclusion of their terms.

Ms Alapini-Gansou: 'I would like to contribute effectively to the promotion and protection of human rights in Africa, to attain a sustainable level of development. In particular, I would like to make a contribution towards improving the position of human rights defenders in Africa.'

Mr Bitaye: 'I would like to look back and point to some concrete achievement, something that has become a reality, in one of the fields of interest to the African Commission, in terms of its promotional or protective mandate.'

Mr Malila: 'If I have to look back at my term after six years, I will consider myself to have failed if people of the continent have never heard of the African Commission. People need not necessarily know the procedures of the Commission, but should have heard about the Commission. In short, the African Commission should after six years be more visible than it is today. At the very least, those that are educated, and who are not lawyers, should know about it. This can be accomplished through a vigorous campaign for the inclusion of the African Charter in teaching at school level and an increase in public debate and discussion, using the media, seminars, etc. Above all, closer strategic alliances must be forged with national NGOs who have a closer reach than the African Commission. Curricula, from those directed at children of an early age up to the graduate level, have to focus on Africa beyond the national borders.'

Adv Tlakula: 'I would feel I have accomplished my mission if I have brought something new to the Commission, some tangible output. I want to accomplish something, even if it is relatively small. I would also work towards the improvement of the Commission's efficiency and effectiveness.'

12 Conclusion

With the establishment of the African Court, the African Commission needs to demonstrate that it has the capacity to accomplish its mandate. The Commission has made some significant advances in the fulfilment of both its promotional and protective mandate, but progress has

¹⁶ Art 36 African Charter.

not been consistent. With matters so delicately poised, the energy and talents of the four new commissioners are important in realising the promise and potential of the African Commission. All four new commissioners have, in these interviews, committed themselves to playing a positive role and to making a difference.

It transpires from the nominations practice revealed here that state parties need to develop transparent domestic procedures, involving civil society, for the nomination of members to the African Commission. At the level of the AU itself, nomination and election should also be more transparent, allowing broader and more inclusive scrutiny involving civil society and the press. A leaf could be taken from the Council of Europe, where the Council's Parliamentary Assembly elects the judges of the European Court of Human Rights on the recommendation of a sub-committee of the Parliamentary Assembly.¹⁷ The sub-committee's recommendations are based on reviews of every *curriculum vitae* and interviews with judicial nominees.¹⁸ The Pan-African Parliament seems well positioned to perform a similar advisory function to guide the AU Assembly in the election of judges to the African Court.

¹⁷ See Interights *Judicial independence: Law and practice of appointments to the European Court of Human Rights* (2003).

¹⁸ See Resolution 1082 (1996), Recommendation 1295 (1996) and Resolution 1200 (1999).