

The 38th ordinary session of the African Commission on Human and Peoples' Rights, November 2005, Banjul, The Gambia

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1 Introduction

Every six months, the African Commission on Human and Peoples' Rights (African Commission) holds an ordinary session in one of its member states. This session provides a platform for dialogue and debate concerning matters of mutual interest to the African Commission as the pre-eminent African treaty-monitoring body, as well as state parties and national human rights institutions (NHRIs) and non-governmental organisations (NGOs) who wish to highlight particular developments and regressions in the human rights situation in Africa.

In terms of rule 1 of the Rules of Procedure of the African Commission, the Commission holds these sessions in order to enable it to carry out its functions in conformity with the African Charter on Human and Peoples' Rights (African Charter). The 38th ordinary session was held from 21 November to 5 December 2005 in Banjul, The Gambia.¹ Two hundred and eighty-two participants, representing 22 state parties to the African Charter, nine NHRIs, six inter-governmental organisations and 135 African and international NGOs attended the session. At the

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¹ The commissioners who participated in the African Commission session were the following: Amb (Ms) Salamata Sawadogo (Burkina Faso) (Chairperson); Mr Yaser Sid Ahmad El-Hassan (Sudan) (Vice-Chairperson); Mr Kamel Rezag-Bara (Algeria); Dr Angela Melo (Mozambique); Mr Bahame Tom Mukirya Nyanduga (Tanzania); Ms Sanji Mmasenono Monageng (Botswana); Mrs Reine Alapini-Gansou (Benin); Mr Musa Ngary Bitaye (The Gambia); Adv (Ms) Faith Pansy Tlakula (South Africa); and Mr Mumba Malila (Zambia).

start of this session, four new commissioners were sworn in and the incumbent Chairperson and Vice-Chairperson were elected for a further two-year period.

The session marked the end of the 12 years of office by the outgoing Secretary, Mr Germain Baricako, who has been transferred by the African Union (AU) to Sudan. Ms Adwoa Coleman replaced Mr Baricako at the Secretariat. The session will also be remembered for the fact that the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa entered into force during the session, on 25 November 2005.

Some of the positive developments that have been taking place with regard to the promotion and protection of human rights across the continent over the preceding six months were highlighted at the beginning of the session. The Chairperson further highlighted the alarming increase in the number of African immigrants who are crossing into Europe from Morocco, due to factors such as extreme poverty and globalisation. She declared that the African Commission deplored the unnecessary casualties associated with this process. The Chairperson urged all AU member states to ratify international and regional human rights instruments and to give concrete effect to the rights enumerated therein.

The most egregious institutional weakness of the African Commission is often said to relate to funding. As Commissioner Monageng put it during the session, 'funding problems are an embarrassment to the Commission'. A voluntary fund to support the Commission has yet to be established, and *ad hoc* financial contributions from partners continue to support much of the work. To date, the Commission has been unable to secure representation at the AU meetings at which the Commission's budget is set. Because of insufficient funding, commissioners cannot undertake promotional missions and research the human rights situation in the countries to which they are assigned. A secondary institutional weakness is that the personnel of the Secretariat generally have no security of tenure as they work on a contractual basis.

2 Consideration of communications

The Commission's mandate is two-fold, and consists of protecting and promoting the rights in the African Charter. As far as the protective mandate is concerned, the African Commission considers complaints related to alleged violations of human and peoples' rights within the various state parties to the African Charter and makes appropriate recommendations where it is found that violations are perpetrated. During the 38th ordinary session, the African Commission considered 54 communications, including 13 decisions on seizure and four deci-

sions on admissibility. It decided to remove two communications from its list of communications.

While the consideration of communications is a time-consuming and responsible task, the African Commission has in the past too easily deferred the consideration on merits of a number of high-profile and sometimes urgent matters. By way of illustration, throughout 2005, only one single decision was taken on merits, on a communication against Swaziland during the 37th ordinary session. It would potentially be defeating the object of its very existence if the African Commission were to continue to defer communications, because a huge backlog is developing which is tantamount to negligence on the part of the Commission.

As the Commission considers individual communications during private sessions, this aspect is not discussed here any further. Instead, this report focuses on the Commission's fulfilment of its promotional mandate, which mainly takes the form of the examination of state reports.

3 State reporting

States ratifying the African Charter must every two years submit a report on the legislative and other measures taken with a view to giving effect to the rights and freedoms recognised and guaranteed in the African Charter.² By the end of the 38th session, a mere 12 states had submitted and presented all relevant reports, while 18 have never presented a single report, and 21 have submitted one or more reports but are still not complying fully with their obligations.³

On the issue of the Seychelles report, which was submitted in September 1994 but not yet considered because of the absence of state representatives, a decision was taken that the procedure followed in the United Nations (UN) system should be applied and that the report will be examined at the 39th ordinary session, regardless of whether or not Seychelles mandates a delegation to present the report to the Commission.

² Art 62 African Charter.

³ This situation should be considered in the context of the continuous urging by the African Commission, even at the level of the Assembly of Heads of State and Government, for states to comply with their obligations under art 62 and to accordingly submit the relevant reports. Further, it should be recalled that the African Commission has also granted permission to states to combine overdue reports into single reports covering that period of time, thus facilitating the state reporting procedure as well as potentially lightening the financial and personnel burden on member states.

3.1 Presentation of the second periodic state report of the Republic of South Africa

South Africa's initial report, submitted in 1998, was examined in 1999, at the African Commission's 25th session. Having submitted its second periodic report earlier in 2005, the Republic of South Africa presented its report at this session. The Minister of Justice and Constitutional Development, Ms Brigitte Mabandla, presented the report which concerned the period from 1999 to 2001, and was due in 2001.⁴ Mindful of her government's failure to conform to the African Charter's requirement of submitting a report every two years, the Minister stated at the outset that, following the recent accession to numerous international treaties in combination with restructuring and capacity building at government level, it is anticipated that future reports to the various treaty-monitoring bodies will be presented on time.

Due to its volume, the report was assigned to two rapporteurs: Commissioner Rezag-Bara and Commissioner Monageng. They assessed South Africa's compliance with the provisions of the African Charter from the perspective of civil and political rights, and economic, social and cultural rights.

Commissioner Rezag-Bara concerned himself with issues such as the status of the Commission for the Protection of the Rights of Cultural, Linguistic and Religious Communities. He further requested to know how the executive level of government is implementing the decisions of the Constitutional Court.⁵ The commissioner stated that the prisons were overpopulated and that the conditions were deplorable, requesting statistics and a demographic breakdown of the prison population in South Africa.⁶ He also raised matters of particular importance, such as the implementation of legislation governing the elimination of discrimination, racism and apartheid. In relation to the family, he noted that the Domestic Violence Act had come into force, but requested more information on how the police, judiciary and social welfare agencies address domestic violence. Commissioner Rezag-Bara explicitly mentioned the issue of domestic security and anti-terrorism activity in light of the formulation of anti-terrorism laws, which potentially violate basic human rights standards.

⁴ The full text of the 2nd Periodic Report of the Republic of South Africa as well as the NGO Shadow Report to the South African State Report are available on the website of the Centre for Human Rights, University of Pretoria, <http://www.chr.up.ac.za> (accessed 28 February 2006).

⁵ Specific mention was made of the 211 prisoners who had been given the death penalty. Subsequent to the abolition of the death penalty in South Africa, alternative sentences were not initially conveyed to the prisoners and this was deemed a violation of their fundamental rights.

⁶ An elucidation of the stage of implementation of the 2004 mission report by the Commission's Special Rapporteur on Prisons and Conditions of Detention in Africa was asked of the Minister.

For her part, Commissioner Monageng declared that the Commission would have preferred more contemporary statistics and gender-disaggregated information. In particular, she addressed the rights to education,⁷ training and employment,⁸ social security, housing⁹ and health care.¹⁰ In light of the HIV/AIDS pandemic, Commissioner Monageng asked the Minister what programmes South Africa had initiated to deal with the consequences of HIV/AIDS,¹¹ and whether South Africa had engaged in parallel-importing or licensing of high-cost medicines and anti-retroviral drugs.

South Africa was congratulated for ratifying the Protocol on the Rights of Women, but asked why article 16 of the Protocol had been reserved and whether there was a possibility of reversing this reservation. Similarly, South Africa was congratulated for ratifying the Protocol Establishing the African Court of Human and Peoples' Rights, while noting that the Commission hoped for a reversal of the decision not to make the article 34(6) declaration giving individuals and NGOs direct access to the Court.

After the two rapporteurs had posed their questions and made comments, other commissioners raised some further concerns. Commissioner Melo highlighted the need to focus on women's employment in the informal sector while addressing the high unemployment rate. She also asked for evidence of concrete measures to ensure judicial independence, to act as a reference point for the rest of Africa. Finally, she asked whether South African women could rightfully own land, and whether women in the agricultural and industrial sectors could benefit from poverty alleviation programmes.

Commissioner Malila expressed his concern about the insecurity caused by the inability of the Department of Home Affairs to process asylum applications, and asked what the government was doing to

⁷ Steps taken by government to ensure that poor families are not educationally disadvantaged and the success of the national primary school nutrition programme were specifically addressed by Commissioner Monageng.

⁸ Commissioner Gansou noted her alarm at the high rate of unemployment and requested to know why the level of unemployment had become so high. She also wished to know what steps the government was taking to address the very difficult problem of unemployment.

⁹ A request for further particulars on the steps taken by the government to actualise court orders relating to the delivery of socio-economic rights, such as *Government of RSA v Grootboom & Others* 2000 1 SA 46 (CC) and *City of Cape Town v Rudolph* 2004 5 SA 39 (CC), received much attention from the Commission.

¹⁰ Problems relating to mental health care were raised, especially in respect to the measures taken by government to ensure the monitoring and improvement of conditions in psychiatric hospitals.

¹¹ The focus on HIV/AIDS was echoed by many other commissioners who wished to know whether the government's plans addressed gender inequalities, such as the inability of many women to negotiate effectively in their sexual relations because of the male dominated society.

verify the status of asylum seekers and illegal immigrants who have been arrested and detained. Updated and specific information was also requested by the commissioners on the issue of Islamic marriages, sexual offences and the plight of the indigenous San population.¹² Both Commissioners Malila and Alapini-Gansou noted the lack of continuity between the initial state report and the present report and therefore requested to know to what extent the recommendations made after the presentation of the initial report had been implemented.

Commissioner El Hassan requested information concerning the so-called 'brain drain' experienced by South Africa and then enquired into whether the post-apartheid policies for promoting disadvantaged groups had proven successful. In the context of equality, Commissioner El Hassan commented on the case brought by the National Coalition for Gay and Lesbian Equality and enquired as to whether same-sex marriages were permissible in South Africa.¹³

The Chairperson commenced by asking for clarification on the national drug policy.¹⁴ She then went on to highlight the innovative one-stop child justice centres and asked whether these centres could potentially be emulated in other African countries. In general, the Chairperson raised her concern about the rights of children, especially relating to child labour.

In response to the contributions from commissioners, the Minister stated that it was important for state parties to subject themselves to peer review. She conceded that state reporting is a daunting challenge for many African countries. The Minister pledged to provide full answers to all of the commissioners' questions upon her return to South Africa. She confirmed that civil society experts and NGOs contributed to the preparation of the South African state report. However, the Minister queried whether participation by NGOs in drafting the report itself would not undermine their role as impartial watchdogs.¹⁵ However, she affirmed that all the departments of the South African government invariably worked with NGO networks to deliver services.

¹² Commissioner Malila wanted to know what measures South Africa had taken to implement the recommendations of the UN Special Rapporteur on Indigenous Peoples in their report to the South African government earlier in 2005.

¹³ Having asked this question, Commissioner El Hassan then reflected on South Africa's position with reference to the provisions of art 18 of the African Charter which stipulates that the family is the custodian of morality and values. Commissioner El Hassan's concern was whether same-sex marriages were compatible with South Africa's obligations under the African Charter.

¹⁴ Her concern was whether access to basic medication was guaranteed and whether or not it was made available free of charge to the indigent members of the population.

¹⁵ The Minister contended that that the proper role of NGOs was to critique their governments and contribute towards policy making.

Regarding the Commission on Cultural, Religious and Linguistic Communities, the Minister stated that it was presently developing its programme of work in the context of a state with 11 official languages and has thus far established a pan-South African language board which is a constitutionally-assigned body. According to the Minister, the South African government is mindful of the marginalisation of indigenous peoples, who suffered greatly under apartheid. The Minister categorically stated that the Koi and the San are not discriminated against. They have freedom of movement and benefit from social programmes, with money that has been budgeted for them within the Department of Agriculture. In addition, she stated that indigenous groups have had the benefit of land restitution. Indigenous peoples have their own radio station and can access health and education services.

On the subject of the judiciary, the Minister stated that a Superior Courts Bill would reconfigure the South African court system to bring justice closer to the people. There has been significant debate about the independence of the judiciary, which the Minister stated constituted a healthy dialogue. The magistracy in South Africa is now representative of the population, but there is a need to expand the number of female judges.¹⁶

With regard to the right to sexual orientation, the Minister stated that the recognition of such rights in South Africa goes to the very principle of equality. She expressed her belief that this recognition does not constitute any derogation from the African Charter.

The Minister stated that the Constitution requires the government to deliver on socio-economic rights on a progressively realisable basis and that the government is actively working on developing its housing policy in order to improve the quality of life of all South Africans. In terms of the right to safe, clean water, the Minister confirmed that access to water remains a major challenge in South Africa. Note was made of the dramatic increase in access to safe water from 61% in 1994 to 91% in 2005.

Significantly, in relation to HIV/AIDS, the Minister cited the resources spent by the South African government, increasing from R342 million in 2001/2002 to R3,6 billion in 2005/2006, including allocations for treatment. She acknowledged the constant encouragement by NGOs in South Africa for the government to do more in this area.

In relation to the prominent role played by NGOs in securing respect for human rights, the Minister stated that NGOs focusing on disabled people remain the most active and vocal, thus being responsible for their own empowerment. The Minister noted that as a direct result of the commitment by disabled peoples' groups, the Presidency had

¹⁶ In 1994 there was only one female judge, but at present there are at least 30.

established an Office on Disability. Furthermore, the government's public works policy requires all state buildings to have ramps, and that sign language is being introduced in public agencies. Additionally, there is a new Braille library, with imported materials, including important works on HIV/AIDS.

The Minister indicated that the issue of child justice remains challenging in South Africa. There are concerns about the numbers of young persons in prison, and officials are working hard to introduce realisable programmes. Following small-scale piloting of child justice centres, this will also feed into a parallel national criminal justice review. The Minister concluded her response with reference to innovative new programmes on child maintenance, on affirmative action to attract black women into business and to address the needs of those in the second economy.

3.2 Statements by NGOs concerning state reports

The Centre for Human Rights made an appeal to the Commission concerning the necessity for the Commission to adopt concluding observations after the presentation of state reports under article 62 of the African Charter. Specifically, the issue centres on the publication and accessibility of these concluding observations in order to assist state parties in the drafting process, but also to inform NGOs about which areas require more attention and ways in which to undertake an assessment of the performance of the state in terms of its obligations. It was contended that, by allowing the concluding observations to enter into the public domain, civil society would be able to participate actively. An important consideration is that publication of the concluding observations will ensure continuity of dialogue between the state and the Commission and thereby strengthen the institutional memory of the Commission.

4 Other promotional activities

4.1 Forum for discussions and interventions

State parties are routinely given the opportunity at Commission sessions to make representations concerning the measures taken towards implementing human rights in their respective countries. National human rights institutions and NGOs are also given an opportunity to make pertinent observations regarding the situation of human rights enforcement in Africa. The African Commission's sessions thus provide a forum for state parties to justify their policies and practices within the rubric of the human rights situation in Africa.

Active collaboration takes place between the African Commission and NHRIs affiliated to the Commission. Commissioner Rezag-Bara revealed that out of a total of 53 state parties to the African Charter, 36 have

established NHRIs. A total of 25 of these NHRIs engage themselves meaningfully with the Commission, but only 17 NHRIs have affiliate status with the Commission.¹⁷

Fourteen NGOs applied for observer status with the African Commission during the 38th session, of which 12 were successful.¹⁸ This brings the total number of NGOs granted observer status by the African Commission to 344. Many of these NGOs made presentations during the 38th ordinary session.

4.2 Organisation of conferences and seminars

In terms of article 45(1)(a) of the African Charter, the Commission may 'organise seminars, symposia and conferences' under its promotional mandate. It was agreed that during 2006, seminars would be held on the following themes: terrorism and human rights; Islam and human rights; contemporary forms of slavery; and refugees and internally displaced persons in Africa.

4.3 Promotional activities by commissioners

During the inter-session period, the commissioners are actively involved in human rights activities across the continent and internationally.

The members of the African Commission adopted the reports of promotional missions to Botswana, Central African Republic, Guinea Bissau, Mauritania, São Tomé and Príncipe and Seychelles. In addition, the reports of the missions of the Special Rapporteur on the Rights of Women in Africa to Djibouti and Sudan, the report of the mission of the Special Rapporteur on Refugees, Asylum Seekers and Internally Displaced Persons in Africa to Senegal, as well as the reports of the missions of the Working Group on the Indigenous Populations/Communities to Botswana and Namibia were adopted.

¹⁷ Disappointingly, despite the Resolution on the Granting of Affiliate Status to NHRIs which stipulates the duties of NHRIs who have obtained affiliate status, only two NHRIs have complied with the duty to submit reports detailing their activities towards the promotion and protection of human rights in their respective countries.

¹⁸ The 12 NGOs granted observer status during the 38th ordinary session are: Association of Women Heads of Family (Mauritania); Community Law Centre, University of the Western Cape (South Africa); Mbororo Social and Cultural Development Association (Cameroon); Civic Aid International Organisation (United Kingdom); Burkinabé Association for Childhood Survival (Burkina Faso); Congolese Association for the Control of Violence Against Women and Girls (Democratic Republic of the Congo); Kataliko Action for Africa (Democratic Republic of the Congo); Franciscans International (Switzerland); Access to Justice (Nigeria); Association for the Reconstruction and Development of Moko-oh Peoples (Cameroon); Global Network for Good Governance (Cameroon); Sudan Organisation Against Torture (United Kingdom).

4.4 The entry into force of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

The Protocol on the Rights of Women in Africa obtained legal status within the African regional system on 25 November 2005.¹⁹ The African Commission, in collaboration with civil society organisations, held a special congratulatory celebration to commemorate this significant day.

4.5 Resolutions within the African regional system: Opportunity for political reform?

During the 38th ordinary session, the African Commission adopted a total of 17 resolutions. These dealt with the renewal of the term of the Special Rapporteur on the Rights of Women in Africa (Commissioner Melo); the composition and operationalisation of the Working Group on the Death Penalty (Commissioner El Hassan as Chairperson),²⁰ the renewal of the mandate and composition of the Working Group on Specific Issues relative to the work of the African Commission, where Commissioner Tlakula was designated as a new member; the composition and extension of the mandate of the Working Group on Indigenous Populations/Communities in Africa, with Commissioner Rezag-Bara being designated as Chairperson, while Commissioner Bitaye was designated as a new member; the nomination of Commissioner Malila as Special Rapporteur on Prisons and Conditions of Detention; the nomination of Commissioner Alapini-Gansou as Special Rapporteur on Human Rights Defenders in Africa; and the nomination of Commissioner Tlakula as Special Rapporteur on Freedom of Expression in Africa.

In addition to these, the African Commission adopted resolutions to facilitate the establishment of structures and mechanisms, which will invariably complement the work of the Commission. These resolutions are: the status of women in Africa and the entry into force of the Protocol to the African Charter on the Rights of Women in Africa; the operation of an independent and effective African Court on Human and Peoples' Rights; ending impunity in Africa; on the domestication and implementation of the Rome Statute of the International Criminal Court; and the protection of human rights and the rule of law while countering terrorism.

Country-specific resolutions were also adopted on the human rights situation in Darfur, the Democratic Republic of the Congo, Eritrea, Ethiopia, Uganda and Zimbabwe.

¹⁹ The 25th instrument of ratification was deposited on 26 October 2005, ensuring the smooth entry into force of the Protocol on the Rights of Women at relatively ground-breaking speed.

²⁰ Commissioner Bahame Tom Nyanduga along with five experts representing the different regions of the continent were designated as members.

The African Commission's resolution on Zimbabwe revealed the Commission's condemnation for

the continuing violations and the deterioration of the human rights situation in Zimbabwe, the lack of respect for the rule of law and the growing culture of impunity the number of internally displaced persons and the violations of fundamental individual and collective rights resulting from the forced evictions being carried out by the government of Zimbabwe.

Simultaneously with the African Commission's resolution, human rights NGOs such as Zimbabwe Lawyers for Human Rights and Amnesty International, amongst others, issued a petition to prominent African Heads of State, including Presidents Mbeki and Obasanjo, as well as to the Chairperson of the African Union Commission, His Excellency Alpha Omar Konare, stressing that the human rights situation in Zimbabwe is deteriorating at an alarming rate and that political and diplomatic interventions are desperately needed. The cumulative effect of the resolution and NGO-exerted pressure is that Africans and African institutions are holding their leaders accountable in the true spirit of peer review.²¹

The African Commission adopted a resolution in which compliance by Eritrea with the provisions of the African Charter is implored. The illegal and arbitrary detention of numerous human rights defenders in Eritrea has formed the basis of at least two communications submitted to the African Commission,²² but the recommendations have gone entirely unheeded. Furthermore, the UN Security Council approved a diplomatic mission by the United States Assistant Secretary of State for African Affairs, but the Eritrean foreign minister said he doubted the 'legality' and 'political relevance' of the mission, thus the mission was prematurely concluded.²³

Similar resolutions were passed relating to Darfur, the Democratic Republic of Congo and Uganda. As is noted in the editorial comments at the outset of this volume,²⁴ the AU Assembly refused the publication of the Activity Report of the African Commission because of these resolutions.

²¹ See further A Meldrum 'African leaders break silence over Mugabe's human rights abuses' *The Guardian* 4 January 2006 <http://www.guardian.co.uk/zimbabwe/article/0,2763,1677460,00.html> (accessed 4 January 2006). However, as is mentioned in the editorial comments (v above), the AU Assembly did not allow the Report to be published because of this and other resolutions.

²² Communication No 250/2002, *Liesbeth Zegveld & Mussie Ephrem v Eritrea & Communication No 275/2003, Article 19 v Eritrea*.

²³ 'US "shortens" Eritrea mission' *News 24* 19 January 2006 http://www.news24.com/News24/Africa/News/0,,2-11-1447_1865655,00.html (accessed 19 January 2006).

²⁴ v.

5 Conclusion

A press conference was held immediately after the closing ceremony on the final day of the session. Various members of the press and civil society were present to obtain some insight into the opinion of the African Commission concerning issues such as the human rights situation in Darfur, Mauritania and Sudan. A question was also posed concerning the fact that The Gambia is behind schedule relating to her obligation to submit periodic state reports. Questions posed also dealt with the mechanism which the African Commission makes use of in order to assess violations of human rights and the non-binding nature of the decisions and recommendations of the African Commission.