

# The African Commission on Human and Peoples' Rights and the development of fair trial norms in Africa

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## Summary

*In this contribution, the author assesses the African Commission's efforts at developing and defending fair trial norms under the African Charter. After discussing resolutions and declarations dealing with fair trial rights adopted by the Commission, the case law of the Commission is analysed. Aspects that are covered include the right to counsel, to be tried within a reasonable time, the right to a public trial, the right to appeal and the prohibition of ex post facto laws. The author concludes that the African Commission should be commended for its inspiring interpretation of the African Charter, but notes that these norms are not given effect to by way of effective remedies.*

Arguably, the greatest challenge facing the Commission at the end of the millennium and into the second decade of its life, is to advance human rights jurisprudence as reflected in articles 45(1)(b) and (3) of the Charter.<sup>1</sup>

## 1 Introduction

Human rights have always been in peril in Africa. Individual freedoms were under intense and sophisticated threats during the dying days of military dictatorships in many countries. By any standard of assessment, the human rights practices of most states still fall far short of minimum conducts expected of governments. Rulers still smite the peoples in wrath with unceasing blow and rule the nations in anger with unrelenting persecution. Fair trial rights have had some worst moments in the

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<sup>1</sup> NB Pityana Preface in R Murray *The African Commission on Human and Peoples' Rights and international law* (2000) vi.

last few decades. Securing these rights and ensuring their enjoyment in Africa have been one of the major concerns, almost a crusade, of the African Commission on Human and Peoples' Rights (African Commission), the implementing institution of the African Charter on Human and Peoples' Rights (African Charter).<sup>2</sup> This article assesses the African Commission's efforts at developing and defending fair trial norms under the African Charter.

The African Commission develops human rights jurisprudence through interpretation of the African Charter and elaboration of resolutions and recommendations. With respect to fair trial, the Commission has fared well in terms of the harvest jurisprudence from its communications and in the development of soft laws. Its jurisprudence has expounded, explained, clarified, amplified and solidified the Charter's guarantees. This article notes, at the level of generality, that there is still a great gulf between the enunciated principles and the reality of human rights enforcement and enjoyment in Africa. It suggests steps that the African Union (AU) and its member states should take to make fair trial rights realisable at the domestic courts — the zones of accountability where objective assessment overrides assertion and propaganda.<sup>3</sup>

## 2 Fair trial as a human right

After briefly examining the meaning and contours of fair trial, this part explores the norms of fair trial under the African regional human rights system. The African Charter, however, receives special attention.

### 2.1 Meaning and contours of fair trial

The right to a fair trial is an aspect of the 'due process of law' principle, embodying the idea of fair play and substantial justice. Due process is essential to the maintenance of certain immutable principles of justice and constitutes standards that a society has the right to expect from those entrusted with the exercise of sovereign prerogatives.<sup>4</sup> As a legal concept, fair trial establishes rules and procedures applicable throughout a trial, intended to ensure the equilibrium between the parties and implement structures that are capable of safeguarding judicial independence and impartiality. As a fundamental norm of international law — its fundamentalness is illustrated by the proposal to include it among the non-derogable rights of article 4(2) of the International Covenant

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<sup>2</sup> See African Charter on Human and Peoples' Rights adopted on 27 June 1981, entry into force 21 October 1986 OAU Doc OAU/CAB/LEG/67/3/Rev5.

<sup>3</sup> I Brownlie Editors preface in D McGoldrick *The Human Rights Committee: Its role in the development of the International Covenant on Civil and Political Rights* (1994) v.

<sup>4</sup> See HN Muhammad 'Due process of law for persons accused of crime' in L Henkin (ed) *The International Bill of Rights: The Covenant on Civil and Political Rights* (1981) 138 139.

on Civil and Political Rights (CCPR)<sup>5</sup> — the right to a fair trial seeks to protect individuals from unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, especially the right to life and liberty of the person.

Fair trial is applicable to both the determination of an individual's 'civil rights and obligations'<sup>6</sup> in a 'suit at law'<sup>7</sup> and with respect to the determination of any 'criminal'<sup>8</sup> 'charge'<sup>9</sup> against him or her. This right is essential to the protection of all other fundamental rights and freedoms. Thus, fair trial questions could arise in criminal hearings before administrative bodies that are not independent and impartial, or in trials in which one party has a significant advantage over the other, thereby breaching the principle of 'equality of arms'. They could arise where there are excessive delays in bringing a case to trial or completing court proceedings, or in secret trials, or by denying procedural protection to accused persons, including the presumption of innocence. In *Avocats Sans Frontières (on behalf of Bwampamye) v Burundi*,<sup>10</sup> the African Commission, which jurisprudence is the subject of this study, stated:<sup>11</sup>

The right to fair trial involves fulfilment of certain objective criteria, including the right to equal treatment, the right to defence by a lawyer, especially where this is called for by the interests of justice, as well as the obligation on the part of courts and tribunals to conform to international standards in order to guarantee a fair trial to all.

<sup>5</sup> See International Covenant on Civil and Political Rights 999 UNTS 171 6 *International Legal Materials* 368. See Draft Third Optional Protocol to ICCPR, Aiming at Guaranteeing Under All Circumstances the Right to a Fair Trial and a Remedy Annex I in The Administration of Justice and the Human Rights of Detainees, the Right to a Fair Trial: Current Recognition and Measures Necessary for Its Strengthening *Final Report Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities* 46th session E/CN.4/Sub.2/1994/24 3 June 1994 (Final Report) 59-62.

<sup>6</sup> For elaboration of the phrase civil rights and obligation by the European Court, see eg *Ringeisen v Austria* (1971) 1 EHRR 455; where the Court held that the concept is autonomous within the meaning of art 6(1) of the European Convention on Human Rights, compared with their meaning in domestic law. See European Convention for the Protection of Human Rights and Fundamental Freedoms opened for signature 4 November 1950 ETS No 5 213 UNTS 221 as amended by Protocol No 11 (entry into force 1 November 1998) ETS No 155 (1994) 33 *International Legal Material* 960.

<sup>7</sup> The term suit at law refers to various types of court proceedings — including administrative proceedings, eg — because the concept of a suit at law has been interpreted as hinging on the nature of the right involved rather than the status of one of the parties; see McGoldrick (n 3 above) 415.

<sup>8</sup> On the autonomy of the word criminal, as used in art 6(1) of the European Convention, see eg *Engel v Netherlands* (1976) 1 EHRR 647 para 81.

<sup>9</sup> The European Court has defined the word charge, as used in art 6(1) of the European Convention, as the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence; *Deweer v Belgium* (1980) 2 EHRR 439. In a number of cases, the Court has also held that the word charge has to be understood within the meaning of the European Convention, as opposed to its uses in domestic law; see eg the *Engel* case (n 8 above) para 81; the *Ringeisen* case (n 6 above) para 110.

<sup>10</sup> (2000) AHRLR 48 (ACHPR 2000).

<sup>11</sup> n 10 above, para 26.

## 2.2 Fair trial norms in the African regional human rights system

Almost all the regional human rights instruments in Africa incorporate fair trial norms expressly or by necessary implication. The African Charter on the Rights and Welfare of the Child (African Children's Charter)<sup>12</sup> guarantees, in relation to juvenile justice, the right to special treatment for a child accused or found guilty of infringing any penal law. It commands its state parties to ensure that no child who is detained or imprisoned or otherwise deprived of liberty is subjected to torture or inhuman or degrading treatment or punishment.<sup>13</sup> It guarantees the rights to presumption of innocence, notice, interpreter, legal and other appropriate assistance in the preparation of defence, to be tried speedily by an impartial tribunal, to appeal, and not to be compelled to give testimony or confess guilt.<sup>14</sup> It prohibits the press and the public in trials involving juveniles.<sup>15</sup>

The African Charter will provide a template for consideration of fair trial norms in this article. It is tempting, without a thorough survey of the African Charter, to conclude that article 7 alone deals with fair trial norms. The truth is that fair trial norms proliferate the African Charter, for example the right to life guarantee, which provides that '[n]o one may be *arbitrarily* deprived of this right'.<sup>16</sup> The word *arbitrarily*, meaning 'without reason', evokes the demands of due process of law, which includes fair trial. In *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*,<sup>17</sup> where the accused persons were convicted and later executed based on a trial that was anything but fair, the African Commission held that the arbitrary execution violated articles 4 and 7 of the African Charter. According to the Commission:<sup>18</sup>

Given that the trial which ordered the executions itself violates article 7, any subsequent implementation of sentences renders the resulting deprivation of life arbitrary and in violation of article 4. The violation is compounded by the fact that there were pending communications before the African Commission at the time of the executions, and the Commission had requested the government to avoid causing any 'irreparable prejudice' to the subjects of the communications before the Commission had concluded its consideration.

Similarly, the African Charter's guarantee of personal liberty incorporates some fair trial provisions:<sup>19</sup>

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and

<sup>12</sup> See African Charter on the Rights and Welfare of the Child adopted 11 July 1990 entry into force 28 November 1999 OAU Doc CAB/LEG/TSG/Rev 1.

<sup>13</sup> n 12 above, art 17.

<sup>14</sup> As above.

<sup>15</sup> As above.

<sup>16</sup> Art 4 African Charter (my emphasis).

<sup>17</sup> (2000) AHRLR 212 (ACHPR 1998).

<sup>18</sup> n 17 above, para 103.

<sup>19</sup> Art 6 African Charter (my emphasis).

conditions previously laid down by law. In particular, no one may be *arbitrarily* arrested or detained.

To explain the import of this provision, reliance may be made to *Sanchez-Reisse v Switzerland*,<sup>20</sup> where the European Court of Human Rights (European Court) held that the possibility for a detainee to be heard either in person or, where necessary, through some form of representation features among the fundamental guarantees of procedure applied in matters of deprivation of liberty under the European Convention on Human Rights (European Convention).<sup>21</sup>

The writ of *habeas corpus*, which is a fundamental facet of common law legal systems and a component of the right to fair trial, was also developed as a response to arbitrary detention. It permits detained persons or their representatives to challenge their detention and to demand that the authority either release or justify all imprisonments.<sup>22</sup> The writ also allows a detained person to challenge detention proactively and collaterally, rather than wait for the outcome of whatever legal proceedings that may be brought against him. It is especially vital in those instances where charges have not, or may never be, brought against the detained individual. Consequently, the African Commission has held that '[w]here individuals have been *detained without charges being brought*, . . . this constitutes an arbitrary deprivation of their liberty and thus violates article 6'<sup>23</sup> and that where a violation of article 6 is widespread, *habeas corpus* rights are essential to ensure that those rights are respected.<sup>24</sup> The African Commission has also held that long detention without trial leading to a deterioration of the detainee

<sup>20</sup> *Sanchez-Reisse v Switzerland* (1986) 9 EHRR 71.

<sup>21</sup> Art 5 European Convention.

<sup>22</sup> Art 7(6) American Convention on Human Rights 1144 UNTS 123 (1970) (entered into force 18 July 1978) providing that '[a]nyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful.'

<sup>23</sup> *Constitutional Rights Project & Another v Nigeria* (2000) AHRLR 191 (ACHPR 1998) para 55 (my emphasis).

<sup>24</sup> See *Constitutional Rights Project & Another v Nigeria* (2000) AHRLR 235 (ACHPR 1999) para 24. Compare the Inter-American Court's view that *habeas corpus* cannot be suspended as it guarantees non-derogable rights such as the prohibition on torture: Advisory Opinion on Habeas Corpus in Emergency Situations (1988) 9 *Human Rights Law Journal* 94. Similarly, the American Convention deals not only with *habeas corpus*, but also with *amparo*; see American Convention arts 7(6) & 25(1). The significance of this provision is that, whereas *habeas corpus* only applies to deprivation of liberty, *amparo* refers to violations of any fundamental right recognised by the constitution or laws of the state concerned or by the Convention. This broad guarantee suggests that, under the American Convention, remedies are also available for challenging a denial of release from detention, conditions of pre-trial detention, or the failure to provide fair procedures prior to trial; J Kokott 'Fair trial — The Inter-American system for the protection of human rights' in D Weissbrodt & R Wolfrum (eds) *The right to a fair trial* (1997) 44 140.

violates article 16 of the Charter on the right to enjoy the best attainable state of physical and mental health.<sup>25</sup>

Article 7, however, provides for fair trial guarantees — safeguards to ensure that any person accused of an offence is given a fair hearing — and is the pivot on fair trial under the African Charter. It provides that everyone shall have the right to have his cause heard.<sup>26</sup> This comprises:

- (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force;<sup>27</sup>
- (b) the right to be presumed innocent until proven guilty by a competent court or tribunal;<sup>28</sup>
- (c) the right to defence, including the right to be defended by counsel of his choice;<sup>29</sup> and
- (d) the right to be tried within reasonable time by an impartial court or tribunal.<sup>30</sup>

The African Charter prohibits *ex post facto* laws, providing as follows:<sup>31</sup>

No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed.

This provision safeguards against arbitrary prosecution, conviction and punishment, ensuring that citizens, at all times, are fully aware of the state of the law under which they are living.

Article 7 is not as comprehensive as the European Convention and the African Charter; the African Charter provisions, building on the European Convention, are the most comprehensive of the three regional human rights instruments. However, like the two systems, article 7 provisions are rules of procedure, not substance; meaning that the African Commission or, in future, the African Court on Human and Peoples' Rights (African Court) cannot substitute its own assessment of the facts for that of the domestic court or tribunal. Its task, to borrow the language of the European Court, is 'to ascertain whether the proceedings in their entirety, including the way evidence was taken, were fair'.<sup>32</sup> This approach is known as the *quatrième instance* doctrine, meaning that a supra-national

<sup>25</sup> See *Media Rights Agenda & Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) para 91.

<sup>26</sup> Art 7(1) African Charter.

<sup>27</sup> Art 7(1)(a) African Charter.

<sup>28</sup> Art 7(1)(b) African Charter.

<sup>29</sup> Art 7(1)(c) African Charter.

<sup>30</sup> Art 7(1)(d) African Charter.

<sup>31</sup> Art 7(2) African Charter; art 7 European Convention.

<sup>32</sup> *Edwards v United Kingdom* (1992) 15 EHRR 417; *Van de Hurk v The Netherlands* (1994) 18 EHRR 481; Human Rights Committee in *Leonard John Lindon v Australia*, Communication 646/1995 UN Doc CCPR/C/64/D/646/1995 25 November 1998 para 6(3). The Committee reiterates that it cannot reverse decisions made by domestic courts under domestic law. The Committee's competence in this case is solely to consider whether the domestic procedures were in compliance with the Covenant.

human rights institution will not constitute a further court of appeal from decisions of national courts applying national law.<sup>33</sup>

Another important remark is that article 7, like other provisions of the African Charter, is mutually dependent on other rights. Where, for example, the right to a fair trial is infringed, other violations may occur, such as detention being rendered arbitrary. This flows from the indivisibility and interdependence of human rights that itself are benchmarks of the Charter.<sup>34</sup> Thus, in *Constitutional Rights Project and Another v Nigeria*,<sup>35</sup> where several individuals were 'held incommunicado with no access to lawyers, doctors, friends or family', the African Commission held that this 'clearly violates article 7(1)(c)' (providing for the right to defence, including the right to be defended by a counsel of one's choice) and 'article 18 to prevent a detainee from communicating with his family'.<sup>36</sup> The Commission also held that a provision for *habeas corpus* is not of much use without an independent judiciary to apply it.<sup>37</sup>

A fuller ramification of article 7 of the Charter will appear from an examination of the African Commission's decisions on communications, which the next part now undertakes.

### 3 The development of fair trial norms by the African Commission

Since its establishment, the African Commission has grappled with the question of due process in Africa, in particular the right to a fair trial. This part examines the contribution of the African Commission to the development of fair trial norms in Africa. The first segment deals with the development of fair trial norms through the Commission's many resolutions and declarations. The second segment deals with the Commission's case law, as distilled from some of the communications lodged before it pursuant to the African Charter.

#### 3.1 Resolutions and recommendations of the African Commission on fair trial

One way the African Commission discharges its interpretative mandate<sup>38</sup> is by elaborating resolutions and making recommendations on

<sup>33</sup> See DJ Harris *et al Law of the European Convention on Human Rights* (1995) 15.

<sup>34</sup> See Preamble to African Charter, providing that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.

<sup>35</sup> n 24 above, 69.

<sup>36</sup> n 35 above, para 29.

<sup>37</sup> n 35 above, para 34.

<sup>38</sup> Besides any other tasks which may be entrusted to it by the Assembly of the AU, the African Commission performs three primary functions: It promotes and protects human and peoples rights and interprets the provisions of the African Charter. See arts 30 & 45 African Charter.

specific human right issue affecting the continent. Though not hard law, the resolutions and recommendations are consequential rules from the experiences of the Commission, elaborated to give practicality and eliminate confusion from the broad formulae sometimes offered by the African Charter. They express the direction in which the law is evolving in Africa. They also serve as useful guidelines to give operational effect to certain Charter provisions and, consequently, the expectations that can, with the benefit of clarity, be placed on the African Commission. The resolutions are of considerable value in better understanding the norms and implementation problems in the legal systems of African countries.

The right to fair trial has occupied a greater, if not a central, part of the African Commission's resolutions. The Commission has also relied on and invoked many of its resolutions when interpreting and applying substantive fair trial norms in the African Charter. Such exercises invest the resolutions with the status of norms, albeit lesser norms *vis-à-vis* the Charter. Though these resolutions are not binding on states, they are precepts emanating from international bodies that conform in some sense to expectations of required behavior.<sup>39</sup>

### 3.1.1 Resolution on the Right to Recourse and Fair Trial

The Resolution on the Right to Recourse and Fair Trial was one of the earliest resolutions adopted by the African Commission, at its 11th ordinary session in Tunis, Tunisia, in March 1992.<sup>40</sup> Coming in the first five years of its inauguration, the resolution underscores the importance that the Commission attaches to the right to fair trial. The resolution recalled article 7 of the African Charter and stressed that 'the right to a fair trial is essential for the protection of fundamental human rights and freedoms'.<sup>41</sup> It restates the fundamental principle that every person whose rights or freedoms are violated is entitled to have an effective remedy.<sup>42</sup> It amplifies the African Charter's provisions on fair trial to cover the following:<sup>43</sup>

- (a) All persons shall have the right to have their cause heard and shall be equal before the courts and tribunals in the determination of their rights and obligations.
- (b) Persons who are arrested shall be informed, at the time of arrest, in a language which they understand of the reason for their arrest and shall be informed promptly of any charges against them.

<sup>39</sup> See SR Ratner 'International law: The trials of global norms' (1998) 110 *Foreign Policy* 65 67.

<sup>40</sup> See Resolution on the Right to Recourse and Fair Trial in Recommendations and Resolutions Adopted by the African Commission on Human and Peoples' Rights (2002) <http://www.achpr.org> (accessed 31 August 2006).

<sup>41</sup> n 40 above, Preamble.

<sup>42</sup> n 40 above, para 1.

<sup>43</sup> n 40 above, para 2.



- (c) Persons arrested or detained shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or be released.
- (d) Persons charged with a criminal offence shall be presumed innocent until proven guilty by a competent court.
- (e) In the determination of charges against individuals, the individuals shall be entitled in particular to —
  - (i) have adequate time and facilities for the preparation of their defence and communicate in confidence with counsel of their choice;
  - (ii) be tried within a reasonable time;
  - (iii) examine, or have examined, the witnesses against them and to obtain the attendance and examination of witnesses against them; and
  - (iv) have the free assistance of an interpreter if they cannot speak the language use in the court.

The resolution provides that persons convicted of an offence shall have a right of appeal to a higher court.<sup>44</sup> The African Commission expressed its desire to 'continue to be seized with the right to recourse procedures and fair trial with the view of elaborating further principles concerning this right'.<sup>45</sup> It called on state parties to the African Charter 'to create awareness of the accessibility of the recourse procedure and to provide the needy with legal aid'.<sup>46</sup> This stress on legal aid is significant, since the unavailability of legal aid in a country may affect the accessibility of a remedy. In Africa, the lack of resources to pursue a remedy for human rights violations 'is not a special circumstance but rather a common occurrence'.<sup>47</sup> The Commission has subsequently stressed that 'the lack of legal aid in Africa precludes the majority of the African population from asserting their human rights'.<sup>48</sup>

### 3.1.2 Resolution on the Respect and the Strengthening on the Independence of the Judiciary

In 1996, the African Commission, at its 19th ordinary session, adopted the Resolution on the Respect and the Strengthening on the Independence

<sup>44</sup> n 40 above, para 3.

<sup>45</sup> n 40 above, para 5. See also IAB El-Sheikh 'Preliminary remarks on the right to a fair trial under the African Charter on Human and Peoples Rights' in Weissbrodt & Wolfrum (n 24 above) 325 329-30.

<sup>46</sup> n 40 above, para 4.

<sup>47</sup> EA Ankuamah *The African Commission on Human and Peoples' Rights* (1996) 70. See also AS Butler Legal aid before human rights treaty monitoring bodies (2000) 49 *International and Comparative Law Quarterly* 360.

<sup>48</sup> Conclusions and Recommendations of the Seminar on the National Implementation of the African Charter on Human and Peoples' Rights in the Internal Legal Systems in Africa para 6(c), recommending that the question of legal aid and recourse procedures should be accorded greater attention in the work of the African Commission and that states and NGOs should take the initiative to promote the establishment of legal aid services in 1992-93 Annual Activity Report of the African Commission Annex VI.

of the Judiciary.<sup>49</sup> The resolution noted that justice is an integral part of human rights and a necessary condition for democracy.<sup>50</sup> It stressed the role of the judiciary 'not only in the quest for the maintenance of social equilibrium, but also in the economic development of African countries'.<sup>51</sup> It urged African states to have a strong, virile and independent judiciary that is geared towards sustainable democracy and development and that enjoys the confidence of the people.<sup>52</sup> The resolution called on African countries to repeal all legislation that are inconsistent with principles of judicial independence, especially on the appointment and posting of judges; provide the judiciary, with the assistance of the international community, with sufficient resources for it to fulfill its function; provide judges with decent living and working conditions for them to maintain their independence and realise their full potential; incorporate universal principles on judicial independence in their legal systems, especially with regard to security of tenure; and refrain from taking actions that could directly or indirectly threaten the independence and the security of judges and magistrates.<sup>53</sup> It urged African judges to organise periodic meetings to share experience and evaluate efforts undertaken in their countries to bring about an efficient and independent judiciary.<sup>54</sup>

The resolution was significant for several reasons. First, there is a love-hate relationship between the judiciary and the executive in most African countries. Judges have, in numerous occasions, been subjected to all forms of intimidation and persecution for carrying out their constitutional mandate. There have been subtle and even violent attacks on judges, including killings, disappearances, dismissals, and removal of judicial discretion.<sup>55</sup> The judiciary was particularly consigned and confounded into impotence during military regimes in many African countries. All of this has serious negative implications to the right to fair trial, since the harassment of judges makes them to look over their shoulders in the dispensation of justice.

### 3.1.3 Resolution on the Right to Fair Trial and Legal Assistance in Africa

The African Commission adopted the Resolution on the Right to Fair Trial and Legal Assistance in Africa during its 26th ordinary session in

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<sup>49</sup> See Resolution on the Respect and the Strengthening on the Independence of the Judiciary in Recommendations and Resolutions of the Commission (n 40 above) 158.

<sup>50</sup> n 49 above, Preamble.

<sup>51</sup> As above.

<sup>52</sup> As above.

<sup>53</sup> n 49 above, para 1.

<sup>54</sup> n 49 above, para 2.

<sup>55</sup> See M Rishmawi (ed) *Attacks on justice: The harassment and persecution of judges and lawyers* (2000) (reporting measures taken in different countries that affect judges or undermine the judiciary and the legal profession).

November 1999.<sup>56</sup> It recalled earlier resolutions on aspects of fair trial and stressed the need to strengthen the African Charter's provision, in particular legal assistance.<sup>57</sup> The resolution formally adopted the Dakar Declaration and Recommendations on the Right to a Fair Trial in Africa (Dakar Declaration)<sup>58</sup> and mandated the Working Group on Fair Trial to prepare a draft general principles and guidelines on fair trial and legal assistance under the African Charter, for the Commission's comments and observations.<sup>59</sup> The Dakar Declaration was the outcome of a collaborative seminar on the right to fair trial organised in Dakar, Senegal, in September 1999. The Declaration states, in its opening paragraph, that:

[t]he right to fair trial is a fundamental right, the non-observance of which undermines all other human rights. Therefore the right to fair trial is a non-derogable right, especially as the African Charter does not expressly allow for any derogations from the rights it enshrines. The realisation of this right is dependent on the existence of certain conditions and is impeded by certain practices.

The factors that could advance or impede fair trial, according to the Dakar Declaration, include the rule of law and democracy, independence and impartiality of the judiciary, military courts and special tribunals, traditional courts, independence of lawyers, bar associations and other human rights defenders. Others include impunity and effective remedies, victims of crime and abuse of power, legal aid, women and fair trial as well as children and fair trial.<sup>60</sup> The Declaration expressed concern that, in many countries, lawyers representing unpopular causes or persons or groups who perceived to be opponents of the government become targets for harassment or persecution. Yet, '[t]he ability of lawyers to represent their clients without any harassment, intimidation or interference is an important tenet of the right to a fair trial'.<sup>61</sup>

The Declaration called on states to allocate adequate resources to judicial and law enforcement institutions towards the provision of better and more effective fair trial guarantees to users of the legal process; to examine ways in which legal assistance could be extended to indigent accused persons, including through adequately funded public defender and legal aid schemes; and to improve judicial skills through programs of continuing education, giving specific attention to the domestic implementation of international human rights standards, and to increase the resources available to judicial and law enforcement institu-

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<sup>56</sup> See Resolution on the Right to Fair Trial (n 40 above).

<sup>57</sup> n 40 above, Preamble.

<sup>58</sup> Dakar Declaration and Recommendations on the Right to a Fair Trial in Africa.

<sup>59</sup> n 56 above, para 4.

<sup>60</sup> See generally Dakar Declaration (n 58 above) paras 1-11.

<sup>61</sup> n 60 above, para 5.

tions. The Declaration called on bar associations, *inter alia*, to institute a programme of continuing education for its members on issues that advance fair trial rights and seek appropriate technical assistance and resources for its realisation.

### 3.1.4 Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa

This resolution, adopted at the African Commission's 32nd ordinary session in October 2002,<sup>62</sup> aimed at assisting African states to meet their international obligations on the prohibition of torture and cruel, inhuman or degrading treatment or punishment.<sup>63</sup> It adopted guidelines on measures to prohibit and prevent torture, etc,<sup>64</sup> and established a follow-up committee with the mandate, *inter alia*, to organise seminars towards disseminating the guidelines and to develop strategies towards its implementation.<sup>65</sup> Certain provisions in the guidelines relate to fair trial, such as the requirement that states should establish readily accessible and fully independent mechanisms where all persons can submit allegations of torture and ill-treatment.<sup>66</sup> The guidelines demand that investigations into all allegations of torture or ill-treatment should be conducted promptly, impartially and effectively.<sup>67</sup> It contains basic procedural safeguards for those deprived of liberties, including the right of a relative or other appropriate third person to be notified of the detention; the right to an independent medical examination; and the right of access to a lawyer.<sup>68</sup>

The guidelines mandate states to adopt safeguards during pre-trial process, such as prohibiting the use of unauthorised places of detention and making it a punishable offence for any official to hold a person in a secret and/or unofficial place of detention;<sup>69</sup> prohibiting the use of incommunicado detention;<sup>70</sup> and ensuring that all detained persons are immediately informed of reasons for their detention.<sup>71</sup> Others are ensuring that all arrested persons are promptly informed of any charges against them;<sup>72</sup> and that all persons deprived of liberty are promptly

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<sup>62</sup> Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa in Recommendations and Resolutions of the Commission (n 40 above).

<sup>63</sup> n 62 above, Preamble.

<sup>64</sup> n 62 above, para 1.

<sup>65</sup> n 62 above, paras 2-3.

<sup>66</sup> n 62 above, para 17.

<sup>67</sup> n 62 above, para 19.

<sup>68</sup> n 62 above, para 20.

<sup>69</sup> n 62 above, para 23.

<sup>70</sup> n 62 above, para 24.

<sup>71</sup> n 62 above, para 25.

<sup>72</sup> n 62 above, para 26.

brought before a judicial authority, with the right to defend themselves or to be assisted by legal counsel of their choice.<sup>73</sup> The guidelines further mandate states to keep comprehensive written records of all interrogations, including the identity of all persons present during interrogations, and to consider the feasibility of using video and/or audio taped recordings of interrogations.<sup>74</sup> States should also ensure that statements obtained through torture or other similar acts are not admissible in evidence except against persons accused of torture.<sup>75</sup> They should keep comprehensive written records of those deprived of liberty at each place of detention, detailing, *inter alia*, the date, time, place and reason for the detention.<sup>76</sup> Finally, they should ensure that all persons deprived of their liberty can challenge the lawfulness of their detention.<sup>77</sup>

The guidelines enjoin states to establish mechanisms of oversight, including supporting the independence and impartiality of the judiciary,<sup>78</sup> and establishing and supporting effective and accessible complaint mechanisms empowered to receive, investigate and take appropriate action on allegations of torture, cruel, inhuman or degrading treatment or punishment. To succeed, such mechanisms must be independent from detention and enforcement authorities.<sup>79</sup>

### 3.2 Fair trial in the case law of the African Commission

There are presently no statistics showing subject matters categories of cases that the African Commission decides. However, a cursory glance at the communications shows that almost fifty percent of the cases lodged with the Commission relates to violations of fair trial norms, either alone or in conjunction with violations of other rights. Comparatively, it has been stated — with regard to the European Convention — that ‘more applications to Strasbourg concern article 6 than any other provision’.<sup>80</sup> This segment examines the Commission’s interpretation and application of fair trial norms under some ‘objective criteria’. Although the arrangement is not entirely chronological, the criteria cover matters that do arise both before pre-trial and during trial.

#### 3.2.1 The right of recourse to courts

Access to court is a central aspiration of all human rights instruments and is central to the rule of law.<sup>81</sup> Problems of access to court could

<sup>73</sup> n 62 above, para 27.

<sup>74</sup> n 62 above, para 28.

<sup>75</sup> n 62 above, para 29.

<sup>76</sup> n 62 above, para 30.

<sup>77</sup> n 62 above, para 32.

<sup>78</sup> n 62 above, para 38.

<sup>79</sup> n 62 above, para 40.

<sup>80</sup> *Harris et al* (n 33 above) 164.

<sup>81</sup> See eg *Golder v United Kingdom* (1979) 1 EHRR 524.

arise in a variety of contexts, including instances where, for reasons of *ordre public*, the state restricts access of persons who might be able to assist the individual in bringing proceedings, such as legal advisers. It could arise where the state denies legal aid to an indigent accused person where the state issues decrees ousting the jurisdiction of the court from entertaining certain complaints.

The African Charter provides for the right to an appeal to competent national organs against acts that violate guaranteed rights.<sup>82</sup> The Charter's provision extends to both criminal and civil proceedings. In *Constitutional Rights Project and Others v Nigeria*,<sup>83</sup> the Nigerian government promulgated some military decrees proscribing over 13 newspapers and magazines published by three media houses. The decrees prohibited the affected media houses from publication and circulation in Nigeria or any part thereof for a period of six months, with a proviso for extension, if necessary. The proscription occurred while suits were pending before competent courts over the illegal invasion and closure of the premises of the said media houses.<sup>84</sup> The African Commission held the act to be a violation of the right to fair hearing.<sup>85</sup>

To have a duly instituted court case in the process of litigation nullified by executive decree forecloses all possibility of jurisdiction being exercised by competent national organs. A civil case in process is itself an asset, one into which the litigants invest resources in the hope of an eventual finding in their favour. The risk of losing the case is one that every litigant accepts, but the risk of having the suit abruptly nullified will seriously discourage litigation, with serious consequences for the protection of individual rights. . . . The nullification of the suits in progress thus constitutes a violation of article 7(1)(a).

The word 'competent' in article 7(1)(a) is sensitive, encompassing facets such as the expertise of the judges and the inherent justice of the laws under which they operate.<sup>86</sup> Consequently, 'to deprive court of the personnel qualified to ensure that they operate impartially thus denies the right to individual's to have their case heard by such bodies'.<sup>87</sup> The African Commission has also held that '[t]he system of executive confirmation, as opposed to appeal, provided for in the institution of special tribunals, violates article 7(1)(a)'. The phrase 'court or tribunal' indicates that the African Charter applies to all courts and tribunals, whether specialised or ordinary. The Commission maintains that a military tribunal, *per se*, is not offensive to the rights in the Charter, nor does it imply an unfair or unjust process; neither is such a tribunal negated by the mere fact of being presided over by military

<sup>82</sup> Art 7(1)(a) African Charter.

<sup>83</sup> (2000) AHRLR 227 (ACHPR 1999).

<sup>84</sup> Above, para 12.

<sup>85</sup> n 84 above, para 33.

<sup>86</sup> *Amnesty International & Others v Sudan* (2000) AHRLR 297 (ACHPR 1999) para 69.

<sup>87</sup> As above.

officers. However, such tribunals present serious problems in areas of equitable, impartial and independent administration of justice. They must be subject to the same requirements of fairness, openness, justice, independence, and due process as any other process.<sup>88</sup>

### 3.2.2 The right to information upon arrest and the presumption of innocence

The presumption of innocence, which is guaranteed under the African Charter,<sup>89</sup> is fundamental to the protection of human rights. It imposes a duty on public authorities to refrain from prejudging the outcome of a trial and places the burden to prove a criminal charge beyond a reasonable doubt. The African Charter failed to provide for the corollary right of persons arrested to be informed at the time of arrest of reasons for their arrest — in a language that they understand — and to be informed promptly of any charges against them. It was the African Commission's Resolution on the Right to Recourse Procedure and Fair Trial that filled this normative gap.<sup>90</sup>

In *Media Rights Agenda and Others v Nigeria*,<sup>91</sup> Mr Niran Malaolu and three other staff of a Nigerian newspaper — the *Diet* newspaper — were arrested by armed soldiers at the editorial offices of the newspaper in Lagos on 28 December 1997. Neither Mr Malaolu nor his three colleagues were informed of the reasons for their arrest or shown a warrant of arrest. Three arrestees were later released, but Mr Malaolu continued to be held without charges until 14 February 1998, when he was arraigned before a special military tribunal for his alleged involvement in a *coup*. Throughout the period of his incarceration, he was not allowed access to his lawyer, doctor or family members. On 28 April 1998, the tribunal, after a secret trial, found the accused guilty of concealment of treason and sentenced him to life imprisonment.<sup>92</sup> The African Commission, relying on its earlier resolutions, held that the accused's right to a fair trial, including the right to be presumed innocent until proven guilty, had been breached.<sup>93</sup> It agreed with the complainant that<sup>94</sup>

<sup>88</sup> See *Civil Liberties Organisation & Others v Nigeria* (2001) AHRLR 75 (ACHPR 2001) paras 27 & 44. See UN Human Rights Committee General Comment No 13 (XXI/1984) para 4, maintaining that '[w]hile the Covenant does not prohibit such categories of courts (military or special courts which try civilians), nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantee stipulate in article 14'.

<sup>89</sup> Art 7(1)(b) African Charter.

<sup>90</sup> n 40 above, para 3.

<sup>91</sup> n 25 above.

<sup>92</sup> n 25 above, paras 3-8.

<sup>93</sup> n 25 above, para 43.

<sup>94</sup> n 25 above, para 47.

any possible claim to national security in excluding members of the public and the press from the actual trial by the tribunal cannot be justified, and therefore in breach of the right to fair trial, particularly, the right to presumption of innocence.

The Human Rights Committee has also expounded on the right to notice, in relation to CCPR. In its General Comment on the right to a fair trial,<sup>95</sup> the Committee stated that<sup>96</sup>

the right to be informed of the charge 'promptly' requires that information be given as soon as the charge is first made by a competent authority. In the opinion of the Committee this right must arise when in the course of an investigation a court or an authority of the prosecution decides to take procedural steps against a person suspected of a crime or publicly names him as such.

Presumption of innocence also means that public officials should not make statements that prejudice the accused while in detention or during trial. In *Allenet de Ribemont v France*,<sup>97</sup> the European Court found that certain public statements regarding the applicant's guilt made by the Minister for the Interior and the highest police officials while the applicant was in detention on remand violated the presumption of innocence.

### 3.2.3 The right to defence and to counsel

The right to defence, as provided for in article 7(1)(c) of the African Charter, includes the right of an accused to be informed of the charges against him and the evidence of the said charges, in short, 'all sorts of elements required to prepare his defence'.<sup>98</sup> Where these elements are not brought to the knowledge of the accused, then article 7(1)(c) of the Charter is violated.<sup>99</sup> A state, however, bears no responsibility for a defence lawyer's failure to make objections or call witnesses at trial,<sup>100</sup> unless the defence is denied access to the evidence on which the prosecution is based. In *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*,<sup>101</sup> files and documents required by the accused persons for their defence were removed from their residences and offices when security forces searched them during the trial.<sup>102</sup> The African Commission found this to be a violation of the right to defence under article 7(1)(c) of the African Charter.<sup>103</sup>

<sup>95</sup> General Comment No 13 (n 88 above).

<sup>96</sup> As above.

<sup>97</sup> See *Allenet de Ribemont v France* (1995) 20 EHRR 557.

<sup>98</sup> See *Courson v Equatorial Guinea* (2000) AHRLR 93 (ACHPR 1997) para 21.

<sup>99</sup> As above.

<sup>100</sup> Human Rights Committee in *Berry v Jamaica* Communication 330/1988 UN Doc CCPR/C/50/D/330/1988 (1994).

<sup>101</sup> n 17 above.

<sup>102</sup> n 17 above, para 99.

<sup>103</sup> n 17 above, para 101.



A corollary of the right to defence is the right to be defended by counsel of one's choice.<sup>104</sup> International law lays much stress on the importance of scrupulous adherence to procedural fairness in capital cases and the right to counsel in all criminal proceedings, even non-capital cases involving only the discretionary considerations of abstract legal issues. The right to counsel, which is essential to the assurance of a fair trial, must be available during detention, trial,<sup>105</sup> and even after conviction. The logic is that a lawyer could scarcely defend his client, in terms of article 7(1)(c), unless he has had some previous consultations with the client.<sup>106</sup> Indeed, international tribunals regard an adequate defence as depending on the accused earliest possible access to legal advice. The European Court has found governments in violation of article 6 of the European Convention in legally complicated cases<sup>107</sup> and simple ones,<sup>108</sup> and in situations where the proceedings were in high courts solely concerned with legal rules of general applicability.<sup>109</sup> Its goal in all cases has been to ensure that the contests between governments and individuals take place on a level field.

In *John Murray v UK*,<sup>110</sup> the applicant's right of access to a lawyer during the first 48 hours of police detention was restricted under section 15 of the Northern Ireland (Emergency Provisions) Act 1987. The authorities argued that they had reasonable grounds to believe that the exercise of the right of access would interfere with the gathering of information about the commission of acts of terrorism or make it more difficult to prevent such an act.<sup>111</sup> The European Court held that the act violated article 6 of the European Convention. It was of paramount importance for the rights of the defence that the accused had access to a lawyer at the initial stages of police interrogation and that<sup>112</sup>

the concept of fairness enshrined in article 6 requires that the accused has the benefit of the assistance of a lawyer at the initial stages of police investigation. To deny access to a lawyer for the first 48 hours of police questioning, in a situation where the rights of the defence may well be irretrievably prejudiced, is — whatever the justification for such denial — incompatible with the rights of the accused . . .

<sup>104</sup> Art 7(1)(c) African Charter.

<sup>105</sup> n 98 above, para 22, where the African Commission held that the right to defence included the right to be informed of the charges against one, as well as the evidence of the said charges as these were required to prepare a defence, and the right to a lawyer was to be exercised during detention and not just during the trial.

<sup>106</sup> See generally *Civil Liberties Organisation v Nigeria* (n 24 above).

<sup>107</sup> See eg *Granger* case (1990) 174 European Court of Human Rights (ser A) 18-19.

<sup>108</sup> See eg *Boner v United Kingdom* (1994) 300 European Court of Human Rights 66 75.

<sup>109</sup> See eg *Pakelli* case (1983) 64 European Court of Human Rights (ser A) 17-18.

<sup>110</sup> See *John Murray v UK* (1996) 22 EHRR 29.

<sup>111</sup> n 110 above, para 64.

<sup>112</sup> n 110 above, para 66.

In *Constitutional Rights Project and Another v Nigeria*,<sup>113</sup> the Nigerian government established a special military tribunal to try persons alleged to have plotted the forceful overthrow of Sani Abacha's military junta. The decree setting up the tribunal precluded the jurisdiction of ordinary courts. The trials were conducted in secret — as is typical of such trials — and suspects were not given the opportunity to state their defence or to access their lawyers or families. They were not informed of the charges against them until their trial. The government appointed military lawyers to defend the suspects.<sup>114</sup> The African Commission found a violation of article 7(1)(c) of the African Charter. In *Media Rights Agenda and Others v Nigeria*,<sup>115</sup> the complainant alleged that Mr Malaolu was denied the right to be defended by lawyers of his choice and was, instead, assigned a military lawyer by the tribunal, in contravention of the right to a fair hearing.<sup>116</sup> The African Commission agreed, relying on its Resolution on the Right to Recourse and Fair Trial, which provides, *inter alia*, that '[i]n the determination of charges against individuals, the individual shall be entitled in particular to: (i) . . . communicate in confidence with counsel of their choice'.<sup>117</sup>

The *Avocats Sans Frontières* case<sup>118</sup> raised an interesting component of the right to counsel. The issue involved the denial of an accused counsel the freedom to make oral submissions in criminal proceedings after written pleadings had been submitted — although the Criminal Appeal Court accorded this right to the prosecution. The complainant alleged that the accused was denied the right of defence and judicial assistance, including equality of treatment, which includes the freedom of counsel to renounce certain arguments contained in his note, depending on the issues raised by the prosecution.<sup>119</sup> In a striking passage deserving to be quoted *in extenso*, the African Commission stated as follows:<sup>120</sup>

The right to equal treatment by a jurisdiction, especially in criminal matters, means, in the first place, that both the defence and the public prosecutor shall have equal opportunity to prepare and present their pleas and indictment during the trial. Simply put, they should argue their cases before the jurisdiction on an equal footing. Secondly it entails the equal treatment of all accused persons by jurisdictions charged with trying them. This does not mean that identical treatment should be meted to all accused. The idea here is the principle that when objective facts are alike, the response of the judiciary should also be similar. There is a breach of the principle of equality if judicial or administrative decisions are applied in a discriminatory manner.

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<sup>113</sup> n 24 above.

<sup>114</sup> n 24 above, paras 2 & 3.

<sup>115</sup> n 25 above.

<sup>116</sup> n 25 above, paras 11 & 55.

<sup>117</sup> n 25 above para 56.

<sup>118</sup> n 10 above.

<sup>119</sup> n 10 above, paras 3-10.

<sup>120</sup> n 10 above, para 27.

In the case under consideration, it is expected of the Commission to attend to the first aspect, that is, observation of the rule of equality of the means utilised by the defence and the prosecution.

The Commission also held that the right to defence implies that, at each stage of the criminal proceedings, the accused and his counsel should be able to reply to indictment of the public prosecutor and should be the last to intervene before the court retires for deliberations.<sup>121</sup> It concluded that 'by refusing to accede to the request for adjournment, the Court of Appeal violated the right to equal treatment, one of the fundamental principles of the right to fair trial'.<sup>122</sup>

Threats and harassment of counsel by government agents during pendency of judicial proceedings are also violations of the right to counsel. Sadly, the harassment of counsel and judges are hallmarks of many judicial proceedings in Africa.<sup>123</sup> In the *International Pen* case,<sup>124</sup> the defence counsel was compelled to withdraw from the case because of harassment by the authorities, both in the conduct of the trial and in their professional and private lives. Two of the lawyers were seriously assaulted by soldiers acting on instruction of the military officer responsible for the trial.<sup>125</sup> On three occasions, defence lawyers were arrested and detained and two of them had their offices searched.<sup>126</sup> The harassment ceased only when the lawyers withdrew from the case.<sup>127</sup> Even the defence team chosen by the tribunal to replace the previous ones also later resigned due to harassment, leaving the accused persons with no counsel throughout the remainder of the trial.<sup>128</sup> The African Commission found a violation of article 7(1)(c) of the African Charter.<sup>129</sup>

Interestingly, such harassment of counsel is not peculiar to Africa, though the degree of harassment might differ. The Inter-American Commission had occasion to warn that 'the defence of the accused . . . can in no way constitute grounds for the malicious and unfounded linking of a defence lawyer to unlawful activities of which his client is falsely accused'.<sup>130</sup>

### 3.2.4 The right to be tried within a reasonable time

The trial of a person accused of a crime within a reasonable time is, in the language of the Strasbourg institution, 'designed to avoid that a

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<sup>121</sup> n 10 above, para 28.

<sup>122</sup> n 10 above, para 29.

<sup>123</sup> Dakar Declaration (n 58 above) para 5.

<sup>124</sup> n 17 above.

<sup>125</sup> n 17 above, para 97.

<sup>126</sup> As above.

<sup>127</sup> As above.

<sup>128</sup> n 17 above, para 98.

<sup>129</sup> n 17 above, para 101.

<sup>130</sup> Annual Report 1994 OEA/SerL/V/II 88 Doc 9 Rev 1995 123.

person charged should remain too long in a state of uncertainty about his fate'.<sup>131</sup> This right has always been regarded as a fundamental component of the right to a fair trial and the African Charter has made adequate provision in this regard.<sup>132</sup> The reality is that, in many African countries, government officials are given powers to detain citizens arbitrarily and sometimes without trial. Governments often use emergencies to ground such detentions, notwithstanding that the African Charter permits no derogation of rights during emergencies. Most times, the arrests and detentions are made during peace times but sheltered under some bogus reasons of state security. The African Commission has pronounced on such detentions.

In *Jawara v The Gambia*,<sup>133</sup> the state law gave the Minister of the Interior power to detain anyone without trial for up to six months, with the possibility for extension *ad infinitum*. The African Commission held that such a power was analogous to that of a court, and that the minister<sup>134</sup>

for all intents and purposes, . . . is more likely to use his discretion at the detriment of the detainees, who are already in a disadvantaged position. The victims will be at the mercy of the minister who, in this case, will render favour rather than vindicating a right.

Such a naked exercise of power, according to the African Commission, cannot be right, since it 'renders valueless the provision enshrined in article 7(1)(d) of the Charter'.<sup>135</sup>

The African Charter does not define the phrase 'reasonable time' and, consequently, what length of detention without trial will constitute an unreasonable time, but other sources suggest that the reasonable time runs from the moment that an individual is subject to a 'charge' and continue to apply until the case is finally determined.<sup>136</sup> The African Commission has held a two-year detention without charges being filed as an unreasonable delay and a violation of article 7(1)(d) of the African Charter.<sup>137</sup> Detentions for shorter periods could also be unreasonable, especially where there are no genuine grounds to support such detentions. The problem that the African Commission might confront in future is that the test of a reasonable time generally differs between

<sup>131</sup> *Stogmuller v Austria* (1969) 9 European Court of Human Rights (ser A) 40 (1969).

<sup>132</sup> Art 7(1)(d) African Charter; art 6(1) European Convention: In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Note that the African Charters provision does not expressly include determination of civil rights and obligations, though this may be implied from the use of the word cause in art 7(1).

<sup>133</sup> (2000) AHRLR 107 (ACHPR 2000) para 46.

<sup>134</sup> n 133 above, para 61.

<sup>135</sup> As above.

<sup>136</sup> n 131 above 173; *Harris et al* (n 33 above) 223.

<sup>137</sup> See *Constitutional Rights Project & Another v Nigeria* (n 24 above) para 20.

the common law and civil law systems of criminal justice. By the nature of a civil law jurisprudence, which is inquisitorial in nature, investigation of a crime generally takes a longer period,<sup>138</sup> during which an accused may spend several years in detention. Striking a balance between these two competing systems is a task that the Commission must address at the earliest opportunity.

### 3.2.5 The right to a public trial

Almost all international human rights instruments guarantee the right to a public trial in criminal proceedings, as such a trial serve the general interest in the open administration of justice. 'Publicity', says Bentham, 'is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial.'<sup>139</sup> Public trials also deter perjury, as witnesses are likely to come forward to confound lies when they learn that they are being told. They enable the press to report court cases, thereby enhancing public knowledge and appreciation of the workings of the law. Press reporting, in particular, assists the deterrent function of criminal trials and permits the revelation of matters of genuine public interest.<sup>140</sup>

Unfortunately, '[n]either the African Charter nor the Commission's Resolution on the Right to Recourse Procedure and Fair Trial contain any express provision for the right to public trial'.<sup>141</sup> In the *Media Rights Agenda* case, where members of the public and the press were excluded from the actual trial by the tribunal, the African Commission did not abdicate its responsibility to create such a norm. It appealed to articles 60 and 61 of the African Charter permitting the application of comparative international human rights law. Invoking these articles, the Commission called in aid UN Human Rights Committee's General Comment No 13<sup>142</sup> on the right to fair trial, paragraph 6 of which provides:<sup>143</sup>

The publicity of hearings is an important safeguard in the interest of the individual and of society at large. At the same time article 14, paragraph 1 acknowledges that courts have the power to exclude all or part of the public for reasons spelt out in that paragraph. It should be noted that, apart from such

<sup>138</sup> For the distinction between the adversarial (common law) and inquisitorial (civil law) system of criminal investigation, see Harris *et al* (n 33 above) 164-5.

<sup>139</sup> J Bentham cited in G Robertson *Freedom, the Individual and the Law* (1993) 341.

<sup>140</sup> As above.

<sup>141</sup> See *Media Rights Agenda & Others v Nigeria* (n 25 above) para 51.

<sup>142</sup> The General Comments, as formulated by the Human Rights Committee, are authoritative interpretations of rights under CCPR. Their purpose is to assist state parties in fulfilling their reporting obligations and to provide greater interpretative clarity as to the intent, meaning and content of the Covenant. On the Committee, see eg T Buergenthal 'The UN Human Rights Committee' in (2001) 5 *Max Planck Yearbook of United Nations Law* 241 (discussing the Committee's *modus operandi* and reflecting on the challenges facing the Committee).

<sup>143</sup> Cited in *Media Rights Agenda & Others v Nigeria* (n 25 above) para 51.

exceptional circumstances, the Committee considers that a hearing must be open to the public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons . . .

The African Commission observed that the exceptional circumstances justifying the exclusion of the public must be for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. These circumstances are exhaustive, as indicated by the use of the phrase 'apart from such exceptional circumstances'.<sup>144</sup> Rejecting the respondent government's *alibi*,<sup>145</sup> the Commission found that the exclusion of the public in the trial was unjustified and in violation of the victim's right to fair trial under the African Charter.<sup>146</sup>

The Commission has not yet been called upon to consider how the right to a public trial applies to criminal proceedings against children. The question may be asked if procedures generally considered to safeguard the rights of adults on trial, such as publicity, should be abrogated in respect of children in order to promote their understanding and participation. The principle in the *Media Rights Agenda* case seems to cover such a situation, but the Strasbourg Court has expressly pronounced on the question. In *V v UK*,<sup>147</sup> the Court stated:<sup>148</sup>

It is essential that a child charged with an offence is dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings. It follows that, in respect of a young child charged with a grave offence attracting high levels of media and public interest, it would be necessary to conduct the hearing in such a way as to reduce as far as possible his or her feelings of intimidation and inhibition.

There is a strange paradox in the whole concept of the right to a public trial. While the African Commission is calling on domestic courts and tribunals to conduct its proceedings in public, including allowing the press access to courts, the Commission conducts its own cases in cultic seceries. The confidentiality clause, which is rearing its head again in recent years, provides that '[a]ll measures taken within the provisions of the present Charter shall remain confidential until such a time as the

<sup>144</sup> n 25 above, para 52.

<sup>145</sup> The respondent government had presented an omnibus statement in its defence to the effect that the right to a fair hearing in public was subject to the proviso that the court or tribunal might exclude from the proceedings persons other than the parties thereto in the interest of defence, public safety, public order, etc; n 25 above, para 53. It did not, according to the Commission, specifically indicate which of these circumstances prompted it to exclude the public from such trial.

<sup>146</sup> n 25 above, para 54.

<sup>147</sup> See *V v UK* (1999) 30 EHRR 121.

<sup>148</sup> n 147 above, paras 86 & 87.

Assembly of Heads of State and Government shall otherwise decide'.<sup>149</sup> Besides the petitioner, respondent state, counsel and few secretarial staff, no other party is allowed to witness the Commission's proceedings during its 'private' sessions. The Commission must find a way out of this moral dilemma, since a teacher gains few proselytes by instruction that his own behaviour contradicts.

### 3.2.6 The right to appeal

Although the right to appeal is a general and non-derogable principle of international law, there is no express requirement of an appeal against conviction in the African Charter — unlike CCPR.<sup>150</sup> The African Commission implied the existence of this right, as part of article 7 fair hearing guarantee, in *Constitutional Rights Project and Another v Nigeria*.<sup>151</sup> In that case, the Commission held that the foreclosure of any avenue of appeal in criminal cases bearing penalties that affected life and liberty was a clear violation of article 7(1)(a) of African Charter and increased the risk that severe violations of those rights might go unredressed. This principle may not extend to all criminal cases, but it will most probably apply in cases where severe penalties are imposed.

The right to appeal, where it exists, must satisfy conditions of effectiveness. An effective appeal is one that, subsequent to the hearing by the competent tribunal of first instance, may reasonably lead to a reconsideration of the case by a superior jurisdiction. Such reconsideration requires that the court of superior jurisdiction should provide all necessary guarantees of good administration of justice.<sup>152</sup> A system of executive confirmation, as opposed to appeal, is a denial of the right of appeal under article 7(1)(a) of the African Charter.<sup>153</sup> In *Forum of Conscience v Sierra Leone*,<sup>154</sup> the complainant alleged that 24 soldiers were tried and sentenced to death by a court martial for their alleged roles in the *coup* that overthrew the elected government of President Tejan Kabbah; that the trial of the soldiers by the court martial was flawed in law and in violation of Sierra Leone's obligation under the African Charter; and that the court martial allowed the victims no right of appeal against conviction or sentence to a higher tribunal.<sup>155</sup>

Twenty-four soldiers were executed prior to the filing of the complaint before the African Commission, making the issue of exhaustion

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<sup>149</sup> Art 59 African Charter.

<sup>150</sup> See art 14(5) CCPR.

<sup>151</sup> n 24 above.

<sup>152</sup> n 86 above, para 37.

<sup>153</sup> n 24 above, para 22.

<sup>154</sup> (2000) AHRLR 293 (ACHPR 2000).

<sup>155</sup> n 154 above, paras 2-4.

of local remedies irrelevant.<sup>156</sup> The complaint having been declared admissible,<sup>157</sup> the Commission considered the merit of the case, reiterating its Resolution on the Right to Fair Trial and Legal Assistance in Africa and insisting that '[t]he purpose of military courts is to determine offences of a purely military nature committed by military personnel. While exercising this function, military courts are required to respect fair trial standards.'<sup>158</sup> The Commission held that the denial of the victim's right of appeal to competent national organs fell short of the requirement of the respect for fair trial standards expected of such courts and that their execution without the right of appeal was a violation of the African Charter. This violation, according to the Commission, was 'more serious given the fact that [it was] irreversible'.<sup>159</sup>

Such pronouncements may not have beneficial effect on the victims, who had already been executed, but they help to highlight the state of human rights in Africa. They also underscore the need for concerted efforts by civil societies to work towards changing the *status quo*.

### 3.2.7 The right to legal assistance

The right to provide an indigent person with free legal representation is almost a universally accepted component of a fair trial. Many human rights instruments require state parties to provide an indigent person with free legal representation whenever the demands of justice dictates.<sup>160</sup> The rationale is to ensure access to courts, which are fulcrums of the right to a fair trial. There can be no 'equality of arms' where parties to a suite, whether criminal or civil, are unable to approach

<sup>156</sup> On local remedies *vis-à-vis* the African Commission, see N Udombana 'So far, so fair: The local remedies rule in the jurisprudence of the African Commission on Human and Peoples Rights' (2003) 97 *American Journal of International Law* 1.

<sup>157</sup> n 154 above, para 14, stressing that the execution of the victims had completely foreclosed any local remedy.

<sup>158</sup> n 154 above, para 16.

<sup>159</sup> n 154 above, para 17.

<sup>160</sup> See eg art 14(3)(d) CCPR, providing for the right of everyone, in a criminal determination against him, to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interest of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it. The American Convention states that counsel provided by the state will be paid only if domestic law so provides. See art 8(2)(e) American Convention. However, the Inter-American Court interprets this provision liberally. In the Exceptions to the Exhaustion of Domestic Remedies in Cases of Indigency or Inability to Obtain Legal Representation because of a Generalised Fear within the Legal Community Advisory Opinion OC-11/90 Inter-American Court of Human Rights No 11 1990 reprinted in (1991) 12 *Human Rights Law Journal* 20, the Court explained that since the Convention does not stipulate that legal counsel be provided free of charge when required, an indigent would suffer discrimination for reason of his economic status if, when in need of legal counsel, the state were not to provide it to him free of charge. Art 8 must, then, be read to require legal counsel only when that is necessary for a fair hearing.



the temple of justice by reason of impecuniousness. The ultimate ability to vindicate other rights guaranteed in a human rights treaty as well as the individual's ordinary civil rights depends on access to court.<sup>161</sup> There is, however, a more extensive obligation to provide legal aid in criminal than in civil cases.<sup>162</sup>

Surprisingly, African states ignored this fundamental right when they elaborated and adopted the African Charter. Although the Charter remarkably guarantees several economic, social and cultural rights, yet it contains no provision on the right of an indigent person accused of a criminal offence to be provided with legal assistance by the state. Not surprisingly, the Dakar Declaration devotes much space to the obligations of states to provide legal aid and assistance to its citizens, and the case law of the African Commission also imputes the existence of such a right. In the *Avocats Sans Frontières* case,<sup>163</sup> where the trial court refused to designate a defence lawyer for the accused, the Commission 'emphatically' held that this was a denial of the right to a fair trial, '[m]oreso where the interests of justice demand it'.<sup>164</sup> The Commission further held that<sup>165</sup>

in the case under consideration, considering the gravity of the allegations brought against the accused and the nature of the penalty he faced, it was in the interest of justice for him to have the benefit of the assistance of a lawyer at each stage of the case.

In the case under survey, the trial court argued that Burundian law allowed a judge the liberty whether or not to designate a defence lawyer for the accused. The African Commission held that the argument flew in the face of a well-known general legal principle that 'no one may profit from his own turpitude'.<sup>166</sup> The Commission did not ground its decision on any rule of international law, but article 1 of the African Charter could logically have been called in aid. The availability of legal aid is relevant to the question whether a state satisfies the internationally guaranteed right to a fair trial. The African Charter itself provides that<sup>167</sup>

[e]very individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national or social origin, *fortune*, birth, or other status.

<sup>161</sup> See M Beloff & M Hunt 'The Green Paper on Legal Aid and international human rights law' (1996) 1 *European Human Rights Law Review* 4 7.

<sup>162</sup> See eg Harris *et al* (n 33 above) 261.

<sup>163</sup> note 10 above.

<sup>164</sup> n 10 above, para 30.

<sup>165</sup> As above.

<sup>166</sup> n 10 above, para 31.

<sup>167</sup> Art 2 African Charter (my emphasis).

The African Commission, in future, could validly invoke such provisions to ground the right to legal aid.

The African Commission can and should also ground the existence of the right to legal aid, objectively, on considerations of humanity. Considerations of humanity 'may be related to human values already protected by positive legal principles which, taken together, reveal certain criteria of public policy and invite the use of analogy'.<sup>168</sup> The Commission and, indeed, all judicial bodies in Africa must be mindful of the prohibitive costs of legal services in the continent and the fact that majority of Africans live at the outskirts of prosperity.

Given the rudimentary nature of the African Commission's jurisprudence on legal assistance, it is vital to draw some comparison with, and the Commission's attention to, other human rights bodies. The Human Rights Committee, for example, stresses that a component of free legal representation is effective representation, meaning that counsel must be competent and must consult with his client, especially if he intends to withdraw an appeal or to argue lack of merit in the appeal.<sup>169</sup> According to the Committee:<sup>170</sup>

While article 14, paragraph 3(d) [CCPR], does not entitle the accused to choose counsel provided to him free of charge, the court should ensure that the conduct of the case by the lawyer is not incompatible with the interests of justice.

The European Court also maintains that it is not open to national authorities to refrain from providing free legal aid to criminal defendants on the ground that there was nothing to prevent them from defending themselves personally.<sup>171</sup> The Court also refused to accept a government's argument that an appeal for which an applicant is making a request for legal aid does not stand any real chance of success.<sup>172</sup> It even imputes into the European Convention a right to legal aid in civil cases, notwithstanding the absence of an express provision to that effect. In *Airey v Ireland*,<sup>173</sup> the question was whether the applicant's

<sup>168</sup> I Brownlie *Principles of public international law* (1998) 27.

<sup>169</sup> See eg Human Rights Committee, in Case No 459/1991 adopted at the Committee's 55th session in October 1995 (where the Committee found a violation of art 14(3)(d) of CCPR because the legal aid counsel for the appeal conceded at the hearing that there was no merit in the appeal without consulting with the accused).

<sup>170</sup> As above.

<sup>171</sup> See eg *Pakelli v Germany* (1983) 6 EHRR 1, holding that failure of the German Federal Supreme Court to appoint an official defence counsel to represent the applicant in an appeal on a point of law violated art 6(3)(c) of the European Convention. The Court rejected the German government's argument that art 6(3)(c) did not require the grant of free legal assistance to the applicant because he could have appeared in person and presented his case to the Federal Court. See also *Campbell and Fell v UK* (1984) 7 EHRR 165, where the European Court found a violation of art 6(3)(c) of the European Convention.

<sup>172</sup> See eg *Boner v UK* (1994) 19 EHRR 246; *Maxwell v UK* (1994) 19 EHRR 97.

<sup>173</sup> (1979) 2 EHRR 305.

appearance before the Irish High Court without the assistance of a lawyer would be effective, that is to say, whether she would be able to present her case properly if her husband were represented by a counsel and she was not. The Court held that she would be disadvantaged, in view of the complexity of the procedure before the High Court.<sup>174</sup>

The Convention is intended to guarantee not right that are theoretical or illusory but rights that are practical and effective. This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial.

Legal aid questions should not be left to governments alone. As the Dakar Declaration stressed, '[t]he contribution of the judiciary, human rights NGOs and professional associations should be encouraged'.<sup>175</sup> The Declaration also recommends that bar associations should collaborate with appropriate government institutions and non-governmental organizations (NGOs) to enable paralegals to provide legal assistance to indigent suspects at the pre-trial stage, besides establishing programmes for *pro bono* representation of accused in criminal proceedings.

### 3.2.8 Prohibition of *ex post facto* laws

The purpose of *ex post facto* laws is to ensure that citizens, at all times, are fully aware of the state of the law under which they are living.<sup>176</sup> In the *Media Rights Agenda* case,<sup>177</sup> the African Commission stated that article 7(2) of the African Charter must be read to prohibit not only condemnation and infliction of punishment for acts not constituting crimes at the time they were committed, but to retroactivity itself. Since it is expected that citizens take the laws of the land seriously, they should know at any moment if their actions are legal.<sup>178</sup> The rule of law will be undermined if laws change with retroactive effect. It is no excuse that a retroactive law has not been enforced; '[a]n unjust but un-enforced law undermines ... the sanctity in which the law should be held'.<sup>179</sup>

Comparatively, the European Court has held that article 7 of the European Convention — the African Charter's equivalent — is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty<sup>180</sup>

<sup>174</sup> n 173 above, para 24.

<sup>175</sup> Dakar Declaration (n 58 above) para 9.

<sup>176</sup> n 133 above, para 63.

<sup>177</sup> n 25 above, 70.

<sup>178</sup> n 25 above, para 59.

<sup>179</sup> n 25 above, para 60.

<sup>180</sup> *Nullum crimen, nulla poena sine lege.*

and the principle that the criminal law must not be extensively construed to an accused detriment.<sup>181</sup> The Court, however, noted that the provision cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.

### 3.2.9 The independence of the judiciary

The independence of the judiciary is a precondition of any political system that aims to protect citizens against abuses of state power.<sup>182</sup> Independence implies regulations able to ensure the freedom of decision — requirements for assignment, retribution, carrying out functions etc — while impartiality refer to the judge's personal attributes and his intellectual and moral harshness.<sup>183</sup> In determining whether a judicial body is independent, regard has to be had to the manner of appointment of its members and the duration of their office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.<sup>184</sup> Similarly, a court is said to be independent if it exercises jurisdiction over all issues of a judicial nature and has exclusive authority to decide whether an issue submitted for decision is within its competence, as laid down by law. Impartiality has two aspects. First, the tribunal must be subjectively free of personal prejudice or bias. Second, 'it must be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect'.<sup>185</sup>

Judicial independence is a corollary to the right of access to court, since the right to a fair trial is breached where the independence and objective impartiality of courts — concepts that are closely linked — are not guaranteed and secured. The rights and freedoms of individuals enshrined in the African Charter can only be fully realised if governments provide structures that enable them to seek redress if they are violated. Article 26 of the African Charter — the obligation to establish and protect the courts — remains extremely relevant in this area. Regrettably, judicial independence has not been the experience in many African countries, particularly during the era of military regimes when military decrees were routinely employed to oust courts' jurisdictions. Ouster clauses prevent ordinary courts from taking up cases placed before special tribunals or from entertaining appeals from decisions of such tribunals. Curiously, the Nigerian government, in the

<sup>181</sup> See *Kokkinakis v Greece* (1993) 17 EHRR 397. See also *CR v UK* (1995) 21 EHRR 363.

<sup>182</sup> See Robertson (n 139 above) 370.

<sup>183</sup> See F Vasilescu *The right to a fair trial* <http://www.ccr.ro/Publicatii/Buletin%20CCR/Nr.1/Engleza/theright.htm> (accessed 31 August 2006).

<sup>184</sup> See eg *Findlay v UK* (1997) 24 EHRR 221 para 73.

<sup>185</sup> As above.

*Media Rights Agenda* case,<sup>186</sup> offered a stunning defence that 'it is in the nature of military regimes to provide for ouster clauses', because without such clauses the volume of litigation would make it 'too cumbersome for the government to do what it wants to do'.<sup>187</sup>

The African Commission has held that a government that ousts the competence of the ordinary courts to handle human rights cases, and ignores court judgments — as the Gambian military government did in *Jawara v The Gambia*<sup>188</sup> — demonstrates that the courts are not independent.<sup>189</sup> In *Lawyers for Human Rights v Swaziland*,<sup>190</sup> the Commission also held that retaining a law that vests all judicial powers in a king or the head of state, with the possibility of hiring and firing judges, directly threatens the independence and security of judges and the judiciary as a whole.<sup>191</sup> The African Commission urges countries to stop the practice of removing entire areas of law from the jurisdiction of the ordinary courts.<sup>192</sup> Whether African states are taking this admonition seriously remains to be seen in practice, but some newly democratised countries have repealed some obnoxious decrees.

The case of *Civil Liberties Organisation v Nigeria*<sup>193</sup> presented the African Commission with the opportunity to consider the relationship between the independence of the judiciary, access to court, and state's obligations under the African Charter. The military government enacted various decrees, including one suspending the Constitution and specifying that no decree promulgated after December 1983 could be examined in any court. Another decree dissolved political parties, ousted the jurisdiction of the courts and nullified any domestic effect of the African Charter. The Civil Liberties Organisation complained on the effect of these decrees on the independence of the judiciary and the inability to seek redress for acts violating fundamental rights. The Commission held that the right to have one's cause heard included complaints about violations of rights in treaties that Nigeria had ratified. Given that Nigeria has not denounced the African Charter, it could not negate the effects of its ratification through domestic action, but remains under an obligation to guarantee to all its citizens the rights under the Charter, including the one on fair hearing. The African Commission also held that the ousting of the courts' jurisdiction over decrees enacted, or to be enacted, since 1983 constituted 'an attack of incalculable proportions on article 7' on the right to be heard and the obliga-

<sup>186</sup> n 25 above, 242.

<sup>187</sup> n 25 above, para 78.

<sup>188</sup> n 133 above, 90.

<sup>189</sup> n 133 above, para 74.

<sup>190</sup> Communication 251/2002, *Lawyers for Human Rights v Swaziland* Eighteenth Activity Report.

<sup>191</sup> n 190 above, paras 54 & 58.

<sup>192</sup> n 24 above, para 17.

<sup>193</sup> (2000) AHRLR 188 (ACHPR 1995).

tion to establish and protect courts. The *Civil Liberties Organisation* decision indicates that the fair hearing guarantee in the African Charter, unlike other regional human rights instruments, is expressly applied to all guaranteed human rights. Consequently, the Commission is concerned that any ousting of the court's jurisdiction 'is especially invidious, because while it is a violation of human rights itself it permits other violations of rights to go unredressed'.<sup>194</sup>

Judicial independence is also assaulted where military personnel with little or no knowledge of the law are appointed to serve in judicial capacities; indeed, in the *International Pen* case,<sup>195</sup> the Commission held that the violation of the impartiality of tribunals occurs, in principle, regardless of the qualifications of the individuals chosen for a particular tribunal.<sup>196</sup> Appointment of non-judicial personnel into judicial bodies has been a regular feature of the judicial system in Africa, especially under military regimes. Governments usually justify the creation of these special tribunals on the need to ease the burden of cases on civil courts, but the African Commission rightly rejects such an alibi. It insists that<sup>197</sup>

if the domestic courts are overburdened, which the Commission does not doubt, the Commission recommends that government consider allocating more resources to them. The setting up of a parallel system has the danger of undermining the court system and creates the likelihood of unequal application of the laws.

Special tribunals also violate the African Charter to the extent that<sup>198</sup> their judges [are] specially appointed for each case by the executive branch, and would include on the panel at least one, and often a majority, of military or law enforcement officers, in addition to a sitting or retired judge.

In the *Media Rights Agenda* case,<sup>199</sup> the complainant alleged that the tribunal that tried and convicted the accused person was neither competent, independent nor impartial, as the then military head of state, the despicable General Sani Abacha, and his Provisional Ruling Council (PRC) hand-picked its members — the same persons against whom the alleged offence was committed. The President of the tribunal, Major-General Victor Malu, was a member of the PRC.<sup>200</sup>

The African Commission rightly found that the whole exercise was a contravention of Principle 10 of the Basic Principles on the Independence

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<sup>194</sup> n 193 above, para 12.

<sup>195</sup> n 17 above.

<sup>196</sup> n 17 above, para 86.

<sup>197</sup> n 24 above, para 23.

<sup>198</sup> n 24 above, para 21.

<sup>199</sup> n 25 above.

<sup>200</sup> n 25 above, paras 12 & 57.

of Judges.<sup>201</sup> The Commission found, in particular, that the setting up of the special tribunal for the trial of treason and other related offences impinged on the independence of the judiciary, 'in as much as such offences are being recognised in Nigeria as falling within the jurisdiction of the regular courts'.<sup>202</sup> The Commission relied on other universal instruments on fair trial, such as the UN Basic Principles on the Independence of the Judiciary,<sup>203</sup> and the General Comment of the UN Human Rights Committee on article 14 of CCPR<sup>204</sup> and restated its general position on the issue of trials of civilians by military tribunals in its Resolution on the Right to Fair Trial and Legal Assistance in Africa. It found that<sup>205</sup>

the arraignment, trial and conviction of Malaolu, a civilian, by a special military tribunal, presided over by serving military officers, who are still subject to military commands, without more, [was] prejudicial to the basic principles of fair hearing guaranteed by article 7 of the Charter.

It advised that special tribunals should not have jurisdiction over civilians and should not try offences that fall within the jurisdiction of regular courts.<sup>206</sup>

The Commission has also held that failing to recognise a grant of bail by a domestic court, as the Nigerian government did in *Constitutional Rights Project and Another v Nigeria*,<sup>207</sup> 'militates against the independence of the judiciary'.<sup>208</sup>

<sup>201</sup> n 25 above, para 60; and UN the Basic Principles on the Independence of the Judiciary Seventh UN Congress on the Prevention of Crime and Treatment of Offenders, Milan 26 August to 6 September 1985 UN Doc A/CONF 121/22/Rev 1 (1985) 59 Principle 10, providing that persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law.

<sup>202</sup> n 25 above, para 63.

<sup>203</sup> See UN Basic Principles (n 201 above) Principle 5, providing that [e]veryone shall have the right to be tried by the ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

<sup>204</sup> See General Comment of the UN Human Rights Committee on art 14 of CCPR: The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialised. The Committee notes the existence, in many countries, of military or special courts which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14. (See also its Comment on the Report of Egypt UN Doc CCPR/79/Add 3, para a of August 1993) cited in *Media Rights Agenda & Others v Nigeria* (n 25 above) para 65.

<sup>205</sup> n 25 above, para 61.

<sup>206</sup> n 25 above, para 62.

<sup>207</sup> n 24 above, para 30: The fact that the government refuses to release Chief Abiola, despite the order for his release on bail made by the Court of Appeal, is a violation of article 26 which obliges states parties to ensure the independence of the judiciary.

<sup>208</sup> As above.

## 4 Concluding remarks

The African Commission deserves commendation for its contribution to developing international law on fair trial. The Commission's resolutions and case law on fair trial are inspiring, contributing to an enhanced understanding of the normative implications of many of the provisions contained in the African Charter. There are, however, a few areas that the Commission needs to strengthen in its interpretation of the Charter, such as instances where allegations of human rights abuses go uncontested by the respondent government. In such cases, the Commission has rightly held that it decides on the facts provided by the complainant and treats those facts as given.<sup>209</sup> However, in many such instances, the Commission simply draws logical conclusions without seizing the opportunity to expound and expand on the norms involved, even in cases where communications reveal extremely novel issues. Such an easy route stultifies the development of the African Charter's provisions. The Commission should use such opportunity to expound and expand on the Charter's provisions.

As the Commission itself acknowledges, '[t]he uniqueness of the African situation and the special qualities of the African Charter . . . imposes upon the African Commission an important task'.<sup>210</sup> A liberal interpretation of the Charter's provisions on fair trial will particularly aid state parties in their bid to enact legislation towards improving the status of human rights in their countries. It will provide a rich body of jurisprudence for national courts daily grappling with interpretation and application of fair trial norms. It will encourage non-state entities to lodge more complaints before the Commission, which, in turn, will further develop the Charter's provisions. More importantly, a liberal interpretation of the Charter will inspire the future African Human Rights Court and serve as a template for the Court's interpretation and application of fair trial norms in cases that will be brought before it.

Every human rights institution has its Achilles heel. For the African Commission, it lies in the reality that African leaders always exhibit a spirit of furious indifference to the Commission's findings and recommendations. There is nothing more damaging to the cause human rights than an ineffective complaint procedure. In particular, the right

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<sup>209</sup> See eg *Constitutional Rights Project v Nigeria (1)* (2000) AHRLR 241 (ACHPR 1999) para 14, citing its earlier decisions on the subject, including *Embga Mekongo v Cameroon* (2000) AHRLR 56 (ACHPR 1995); *Constitutional Rights Project (in respect of Akamu & Others) v Nigeria* (2000) AHRLR 180 (ACHPR 1995); *Achuthan & Another (on behalf of Banda & Others) v Malawi* (2000) AHRLR 143 (ACHPR 1994); *Constitutional Rights Project (in respect of Lekwot & Others) v Nigeria* (2000) AHRLR 183 (ACHPR 1995); and *Civil Liberties Organisation (in respect of Bar Association) v Nigeria* (2000) AHRLR 186 (ACHPR 1995).

<sup>210</sup> *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).



to a fair trial is meaningless where there is no effective remedy. According to Byrnes:<sup>211</sup>

An effective procedure is one that provides an accessible and relatively speedy procedure for reviewing both parties' claims of fact and law in a fair manner, that results in the determination which gives a clear indication of the basis of finding and of the steps that need to be taken to remedy any violation, and that is acted upon by the state concerned within a reasonable time.

This is not the experience of Africans with respect to the findings and recommendations of the African Commission, where attempts are not always rewarded with success. At any rate, most of the violations discussed in this paper have gone without remedies to the complainants, made possible by the normative deficiency in the African Charter, for which the Commission cannot be blamed. There is no mechanism to compel states to abide by the Commission's recommendations. Much depends on the goodwill of the state concerned, which is patently lacking at the moment. The danger in all this, as the Dakar Declaration rightly noted, is that '[t]he failure of the state to deal adequately with human rights violations often results in the systematic denial of justice and, in some instances, conflict and civil war'.<sup>212</sup> Such irritating impunity is one of many reasons for the unremitting conflicts in Africa.

The Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights<sup>213</sup> seeks to strengthen these deficiencies. Of course, the Protocol, in itself, does not translate into effective remedies for human rights violations in Africa; to think so is to live in a fool's paradise. Nevertheless, the Protocol is the first and good place to start, 'an essential step in the historic process of ensuring judicially enforceable, effective recourse to Africans who have been denied their basic rights as human beings within their domestic jurisdictions'.<sup>214</sup> Regrettable, there is presently much confusion regarding the fate of the Court. The court project has been a speedy approach, in terms of adoption and ratification, but delayed arrival, because of the political

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<sup>211</sup> A Byrnes 'An effective complaints procedure in the context of international human rights law' in AF Bayefsky (ed) *The UN human rights treaty system in the 21st century* (2000) 139 143.

<sup>212</sup> Dakar Declaration (n 58 above) para 7.

<sup>213</sup> See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights OAU Doc OAU/LEG/MIN/AFCHPR/PROT (III). The Protocol establishes a court to complement the protective mandate of the Commission and provides that [i]f the Court finds that there has been a violation of human and peoples rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation (art 27(1)). Under the Protocol, state parties 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 (art 30).

<sup>214</sup> NJ Udombana 'Towards the African Court on Human and Peoples' Rights: Better late than never' (2000) 3 *Yale Human Rights and Development Law Journal* 45 47.

shadow that now surrounds its actual establishment. Lukewarm acceptance is more bewildering than outright rejection.

For the African Commission, it should make the best out of the current bad situation, bearing in mind that much remains to be done to get African states to appreciate the importance of the norms provided for in the African Charter and to give effect to them in their domestic legal systems. Many of these norms, as painstakingly amplified and elaborated by the Commission, are still like floating charges, hovering in the sky and awaiting specific actions to crystallise, since the constitutions of many African countries do not permit international treaties to operate automatically in these countries upon ratification. Such treaties have to be incorporated into domestic law for them to become justifiable in domestic courts.

The AU, undoubtedly, has made various pledges to respect human rights and democratic values, not only in the African Charter but also in several other instruments, including the AU Constitutive Act.<sup>215</sup> However, as this article has shown, the practices of member states are jumbles of inconsistencies. Egregious human rights violations of human rights by government officials occur daily in many, if not all, African countries. This is not just a pity; it is a danger, the danger that the continent might slide back into despotism. The AU has a responsibility to prevent such drift, by calling on its members to take necessary steps at all levels to make their human rights commitments crystallise and become fixed and enforceable before relevant judicial institutions. Africans will not take their governments seriously in their human rights rhetoric until the lines of enunciated principle are connected by dots of practice to bring about shapes of legitimate rules.

All this calls for that eternal vigilance that truly has been called the price of liberty. Africans should continue to resist authoritarianism in all shapes or forms, mindful that a submissive sheep is an easy prey for a wolf.

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<sup>215</sup> See eg art 3(g) Constitutive Act of the African Union, adopted 11 July 2000, entry into force 26 May 2001 OAU Doc CAB/LEG/23, which promises to promote democratic principles and institutions, popular participation and good governance; and art 3(h), to promote and protect human and peoples rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments.