

Human rights developments in the African Union during 2008

*Japhet Biegon**

Researcher and LLD candidate, Centre for Human Rights, University of Pretoria, South Africa

*Magnus Killander***

Researcher and LLD candidate, Centre for Human Rights, University of Pretoria, South Africa

Summary

The year 2008 saw significant developments towards harnessing the institutional framework for the promotion and protection of human rights in Africa. More financial resources were allocated to the system. The African Commission and Court adopted interim Rules of Procedure which, by the end of the year, were still not harmonised to enable the Commission to submit its first case to the Court. The slow progress towards making the Court operational impedes the impact of the African human rights system. Another impediment is the inadequate response of AU policy organs to gross human rights violations, undemocratic rule, and the question of impunity.

1 Introduction

The transformation of the Organisation of African Unity (OAU) to the African Union (AU) in 2000 brought with it a spate of changes that have re-defined, at least in theory, the political, socio-economic, security and human rights landscape on the continent. In the field of human rights, the transformation signifies a paradigm shift that has seen human rights issues moving from the fringes of the OAU towards the centre

* LLB (Hons) (Moi), Post-grad Dip Law (Kenya School of Law), LLM (Human Rights and Democratisation in Africa) (Pretoria); tehpajia@yahoo.com

** Jur Kand (Lund), EMA (Padua); magnus.killander@up.ac.za

of the AU. Despite this shift, however, developments in the promotion and protection of human rights in the continent are modest, seeing progress juxtaposed with retrogression. Recent developments within the African regional human rights system (African system) reveal this pattern.

This note reviews these developments. It covers the period January 2008 to December 2008. The focus is on the main human rights treaty bodies that compose the African system's supervisory mechanism: the African Commission on Human and Peoples' Rights (African Commission) and the African Court on Human and Peoples' Rights (African Court). The note also covers developments with regard to the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) and the main AU organs.

2 The African Commission on Human and Peoples' Rights

In existence now for 20 years, the African Commission remains the only fully operational human rights treaty body within the African system. In 2008, the African Commission held two ordinary sessions and two extraordinary sessions.¹ As usual, the ordinary sessions were preceded by the NGO forum. Significant developments emanating from these sessions and during the inter-session period are highlighted below.

2.1 Budget

A chronic problem that has impeded the African Commission's efficiency in conducting its mandate is the lack of adequate financial and human resources. Knowing too well that he who pays the piper calls the tune, the AU (and initially the OAU) has not been keen to financially empower the African Commission. In the words of Viljoen:²

[The] AU's schizophrenic attitude of praising the Commission for its accomplishments, yet starving it of resources, suggests that the AU does not wish to see the Commission become more effective and forceful.

As a consequence of its financial incapacitation, the African Commission has long relied on external donors to finance some of its activities;³

¹ The 43rd ordinary session was held in Ezulwini, Swaziland, in May and the 44th ordinary session in Abuja, Nigeria, in November 2008. The 4th and 5th extraordinary sessions were held in Banjul, The Gambia, in February and July 2008.

² F Viljoen *International human rights law in Africa* (2007) 416.

³ The African Commission has established a practice of acknowledging its external funders in its activity reports. Some of these funders include the Danish Institute for Human Rights, Rights and Democracy (a Canadian-based NGO) and the Danish International Development Agency (DANIDA).

a reliance that has opened the Commission to the criticism that it is subject to external manipulation.⁴

The financial position of the African Commission, however, changed for the better in January 2008 after it presented and defended, for the first time, its proposed budget for the 2008 fiscal year before the relevant AU policy organs.⁵ In supporting its case for increased resources, the Commission cited three reasons: the need to facilitate the effective implementation of its mandate; the need to remove the Commission's reliance on donor funding; and the need to ensure that the Commission is seen as independent.⁶ Consequently, US\$ 6 million was approved for the activities of the African Commission in the year 2008, marking a huge leap forward from the US\$ 1,2 million allocated to it in 2007.⁷ An important effect of the new dispensation is that activities such as missions can now be approved by the Chairperson of the Commission 'subject to the availability of funds as advised by the Secretary' rather than by the AU Commissioner for Political Affairs, as was previously the case.⁸ This arrangement brings a greater sense of the Commission's autonomy over finances allocated to it. The fact that the Commission was able to hold two extraordinary sessions in 2008 is another visible outcome of the increased funding.

While the increase in funding for the African Commission is lauded, the financial allocation, however, does not yet reflect the fact that the Commission is the only fully-operational human rights treaty body in the region. The African Court receives a higher financial allocation despite of its limited mandate as compared to that of the African Commission. Arguably, the African Court, being in its infancy stage, requires more funds to facilitate its establishment and full operation. However, if this argument is to hold, then the African Children's Committee, equally in its infancy stage, should receive more funding than it currently does. In essence, in the absence of an official public record

⁴ Zimbabwe, eg, in response to the resolution on the human rights situation in Zimbabwe, adopted at the Commission's 38th ordinary session in 2005, stated as follows: 'The resolution of ACHPR is an improper reproduction of the Amnesty International resolution ... This brings to question the relationship of the ACHPR with Western NGOs, more particularly those based in Europe, like Amnesty International, which use their financial contributions to the ACHPR budget to unduly influence ACHPR decisions in pursuit of the agendas of Western countries to effect regime change in Zimbabwe. It follows therefore that the funding of the ACHPR by donors and influential NGOs should be brought under close scrutiny of the Executive Council. Failure to act could further compromise the mandate, the independence and the integrity of the ACHPR.' See response by the government of the Republic of Zimbabwe to the resolution on the human rights situation in Zimbabwe, African Commission's 20th Activity Report, EX CL/279 (IX) annex III, 106.

⁵ Before January 2008, the budget allocation from the AU to the African Commission was subsumed under that of the AU Commission's Political Affairs Department.

⁶ 23rd & 24th Activity Report para 39.

⁷ 23rd Activity Report para 113; 24th Activity Report para 246.

⁸ 24th Activity Report para 234(vi).

outlining the criteria for allocating finances to the three human rights supervisory mechanisms, much is left to speculation.

2.2 Rules of Procedure

Although calls for the revision of the Rules of Procedure of the African Commission date back several years, it is only with the recent creation of the African Court that the necessity of these calls became clear and urgent. Thus, in May 2005 the Commission established the Working Group on Specific Issues Relevant to the Work of the African Commission.⁹ Its mandate included the revision of the Commission's 1995 Rules of Procedure. Following a series of meetings, the Working Group finalised its consideration of the new draft Rules of Procedure in July 2008. The interim Rules of Procedure were adopted by the Commission in November 2008.

The interim Rules embody some improvements from its current Rules of Procedure. For instance, the interim Rules provide for increased transparency with regard to the Commission's work in providing for the publication of non-confidential information on its website.¹⁰ Rule 66(1) states that '... official documents of the Commission and its subsidiary mechanisms shall be documents for general distribution unless the Commission decides otherwise'. However, rule 66(2) provides that '[u]pon their adoption by the Commission, reports shall be published in accordance with article 59(2) of the Charter'. This appears to require the decision of the AU Assembly before the publication of any reports, despite article 59(2) only being applicable to individual communications.

A useful feature of the Commission's work has been that it sometimes holds sessions outside its headquarters in Banjul. The Commission has always used this opportunity to engage the host country in a 'constructive dialogue' on human rights issues. Rule 30(5) of the interim Rules, however, stipulates that such sessions may not be held in a state under any sanction of the AU or which is in arrears with its reports to the Commission in terms of article 62 of the Charter. This rule will unnecessarily reduce the potential impact of the Commission by drastically reducing the number of potential hosts.

With regard to the relationship between the African Commission and the African Court, the interim Rules note that the Commission shall refer a case against a state party to the Court Protocol to the Court if the state does not comply with the Commission's recommendations.¹¹

⁹ See Resolution on the Creation of a Working Group on Specific Issues Relevant to the Work of the African Commission on Human and Peoples' Rights, ACHPR/Res 77 (XXXVII)05.

¹⁰ Rules 18(i), (j), 39(3), 40(1), 66(3), (4), 80(4) & 113(5). See also rules 62(2) & 63(1).

¹¹ Rule 119.

The state has up to a year to show its compliance.¹² In cases of serious and massive violations, the Commission may refer the case directly to the Court.¹³ When the Commission refers a case, it will inform the parties and 'invite the complainant to pursue the case and make representations before the Court'.¹⁴

Co-operation with other AU organs is important. The interim Rules thus provide that the Commission shall 'establish formal relations of co-operation ... with all African Union organs, institutions and programmes that have a human rights element in their mandate'.¹⁵ If put into practice efficiently, the co-operation envisaged in the interim Rules will have the effect of instilling a sense of co-ordination and synergy within the African human rights system.

It is suggested that when the Rules of Procedure have been finalised, the Working Group on Specific Issues should turn its focus on its other mandates. In particular, it should, in fulfilling its mandate, give attention to the establishment of a mechanism for following up the decisions and recommendations of the Commission. The lack of such a follow-up mechanism is largely responsible for the scepticism that surrounds the impact of the Commission and it being described as weak and ineffectual.¹⁶

2.3 State reporting

The examination of state party reports constitutes a core component of the promotional mandate of the African Commission. Thus, at each of its ordinary sessions, the Commission examines a number of state reports. As such, the periodic reports of the Sudan and Tanzania were examined at the 43rd session.¹⁷ Consideration of the periodic report of the Democratic Republic of the Congo (DRC), which had been scheduled to take place at the same session, was abandoned when the state representatives failed to attend the session.¹⁸ At the 44th session, only the periodic report of the host country, Nigeria, was considered.¹⁹ The examination of the report of a session's host, as was the case with

¹² Rule 115.

¹³ Rule 119(4). Such cases may also be referred to the Court by the African Commission on its own initiative without any communication having been received; compare rule 124(2).

¹⁴ Rule 124(1). The role of the African Commission before the Court is described as *amicus curia* though the Commission seems to have misunderstood this concept in that it provides that Commission shall submit pleadings, motions, etc before the Court; compare rule 115.

¹⁵ Rule 126(1).

¹⁶ See H Steiner *et al* (eds) *International human rights in context: Law, politics, morals* (2008) 1062.

¹⁷ 23rd-24th Activity Report para 21.

¹⁸ 23rd-24th Activity Report para 22.

¹⁹ 25th Activity Report para 106.

respect to Nigeria, is a practice that should be encouraged. Such a practice would have the effect of increasing the visibility of the state reporting procedure amongst the citizens of the host country.

Concluding observations on the Tanzanian and Nigerian reports were adopted in the sessions at which these reports were considered.²⁰ Due to time constraints, however, concluding observations on the report of Sudan were not adopted at the session at which it was considered.²¹ While the adoption of concluding observations is gradually being entrenched, their publicity and dissemination remain minimal at best. The concluding observations adopted in respect of the aforementioned countries were at the time of writing not available on the African Commission's website. The inaccessibility of these concluding observations undermines the efforts of civil society to follow up on the implementation of the African Commission's recommendations by the respective countries.

A chronic problem that continues to face the African Commission's reporting procedure is the high number of member states who are in arrears in the submission of their reports.²² Ironically, some of the states that have never submitted a report under the African Charter have a relatively better record of reporting under some of the United Nations (UN) treaties.²³ As such, one would surmise that, save for countries that are emerging from or are in civil conflict, the problem with the non-reporting states lies more in their attitude towards the reporting mechanism under the African Charter than in their capacity to report.

2.4 Resolutions

The adoption of resolutions has become an established practice in the sessions of the African Commission. Since its inception, it has adopted more than 100 resolutions on thematic, procedural and country-specific issues.²⁴ Through these resolutions, the African Commission has defined the contents of some of the rights in the African Charter; condemned human rights violations in specific African countries; and addressed administrative and procedural issues pertinent to its work.

²⁰ 23rd-24th Activity Report para 23.

²¹ 23rd-24th Activity Report para 24.

²² Thirteen state parties to the African Charter have never presented a report to the Commission. The states are Botswana, Comoros, Côte d'Ivoire, Djibouti, Equatorial Guinea, Gabon, Guinea Bissau, Liberia, Malawi, São Tomé and Príncipe, Sierra Leone and Somalia. See 25th Activity Report para 108.

²³ Eg, all the states that have never submitted a state report to the African Commission, save for Somalia, have submitted at least one report under the Convention on the Rights of the Child (CRC).

²⁴ Press releases by Special Rapporteurs during the inter-session period play an equally important and similar role as resolutions.

The resolutions have also formed a source of advocacy tools for human rights activists on the continent.

The African Commission adopted two resolutions at its 4th extraordinary session,²⁵ two at its 43rd session,²⁶ and nine at its 44th session.²⁷ The Resolution on Elections in Africa, adopted during the Commission's 44th session, deserves some mention here. In this resolution, the Commission deplored 'the emerging trends in establishing governments of national unity, which in certain circumstances legitimise undemocratic elections'. Clearly targeting the formation of governments of national unity in Kenya and Zimbabwe, this resolution would seem to be at variance with the AU position which has encouraged the creation of such governments in these two countries.²⁸ The depth of this variance may have been mitigated, however, by the Commission's recommendation in the same resolution that 'where necessary the establishment of a government of national unity must be inclusive and reflective of the election results'. The variance nevertheless speaks of the lack of a harmonised perspective within the AU on topical issues affecting the continent.

2.5 Missions

Members of the African Commission often undertake missions to African countries, either in terms of the Commission's promotional or its protective mandate. On these promotional visits, the Commission seeks to engage the state in question in a constructive dialogue concerning the state's obligations under the African Charter. A mission falling under the Commission's protective mandate is usually in response to specific allegations of human rights violations. Such missions often

²⁵ Resolution on the human rights situation in Kenya; and Resolution on the human rights situation in Somalia.

²⁶ Resolution on the human rights situation of migrants in South Africa; and Resolution on the run-off elections in Zimbabwe.

²⁷ Resolution calling on state parties to observe a moratorium on the death penalty; Resolution on the human rights situation in the DRC; Resolution on joint promotional missions; Resolution on the human rights situation in the Republic of The Gambia; Resolution on maternal mortality in Africa; Resolution on the human rights situation in Somalia; Resolution on elections in Africa; Resolution on the human rights and humanitarian situation in Zimbabwe; Resolution on access to health and needed medicines in Africa. See 25th Activity Report para 117. The resolutions are available at http://www.achpr.org/english/_info/44th_Com%20Activity.html (accessed 20 March 2009).

²⁸ The negotiations that led to the creation of a government of national unity in Kenya were done under the auspices of the AU with former UN Secretary-General, Kofi Annan, as the chief mediator. Although Zimbabwe's negotiations for a government of national unity were principally conducted under the auspices of the Southern African Development Community (SADC), it was backed by the AU. Indeed, the then AU Chairperson, President Jakaya Kikwete of Tanzania, attended the ceremony at which the power-sharing pact for Zimbabwe was signed.

take the form of a fact-finding mission and sometimes the mission may be linked to a communication pending before the Commission.²⁹

In 2008, promotional missions were undertaken to Libya, Tunisia, Liberia and Togo.³⁰ In addition, members of the Commission visited three prisons in Swaziland during its session hosted in that country. A fact-finding mission was undertaken to Botswana in August by the Special Rapporteur on Refugees. The mission sought to investigate the protection regime for refugees, asylum seekers and migrants in light of the increased influx of people from Zimbabwe to Botswana. A significant development in relation to missions involves the mission carried out to Togo by the Special Rapporteur on Human Rights Defenders jointly with her UN counterpart.³¹ This was the first mission of its kind conducted jointly between the African Commission and a UN Special Rapporteur.

2.6 Communications

The number of communications disposed of by the African Commission in its ordinary sessions has been minimal over the years. Eighty communications were tabled before the Commission at the 43rd session. However, only three cases were decided: *International Human Rights and Development in Africa (IHRDA) v Angola*; *IHRDA and Zimbabwe Lawyers for Human Rights (ZLHR) v Zimbabwe*; and *Mouvement Ivoirien des Droits Humains (MIDH) v Côte d'Ivoire*.³² The Commission convened the 5th extraordinary session to address its backlog. However, it only adopted two decisions on admissibility and two on the merits.³³ Three of these decisions were not included in the 25th Activity Report, but 'will be attached to the next Activity Report'.³⁴ At the 44th session, the Commission decided two cases: *Majuru v Zimbabwe*, discussed

²⁹ It has been the practice of the African Commission to defer action on a communication when it is intending to conduct a mission to a country in respect of which the communication is filed against. See *SOS-Enclaves v Mauritania* (2000) AHRLR 147 (ACHPR 1999); *Malawi African Association & Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000); *Media Rights Agenda & Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998).

³⁰ The Special Rapporteur on Human Rights Defenders and the Special Rapporteur on the Rights of Women undertook promotional missions to Libya and Tunisia in June 2008. The Chairperson of the Commission, the Chairperson of the Robben Island Guidelines follow-up committee and the Special Rapporteur on Prisons undertook a mission to Liberia in September 2008. See 25th Activity Report para 79.

³¹ 25th Activity Report para 79(vi).

³² 24th Activity Report para 256.

³³ 25th Activity Report paras 123-124. The report indicates that three cases were decided on the merits. However, the decision on Communication 262/2002, *MIDH v Côte d'Ivoire*, was adopted already at the 43rd session (see 24th Activity Report para 256).

³⁴ 25th Activity Report para 125. These cases are Communications 302/05, *Maitre Mambeolo v DRC*, 242/01, *Interights & IHRDA v Mauritania* and 262/02, *MIDH v Côte d'Ivoire*.

below, and *Wetshioconda v DRC*, where the Commission held that the state party had violated the African Charter. However, the latter case was not included in the 25th Activity Report because 'translation and harmonisation ... [are] still pending'.³⁵ The African Commission thus finalised nine cases in 2008 of which five had been published at the time of writing.

In *IHRDA v Angola*,³⁶ the complainants, who were mine workers in Angola, were arrested and deported as part of a government campaign of expelling foreigners from the country. In finding Angola in violation of the African Charter, the Commission noted that, whereas states may deny entry to or withdraw residence permits from non-nationals, the affected individuals should be allowed to challenge the order to expel them before competent authorities, or to have their cases reviewed. The Commission reiterated its position that the mass expulsion of non-nationals is unacceptable. With regard to individual redress, the Commission only recommended the government to take the necessary measures to redress the violations. However, the Commission recommended several measures aimed at making the Angolan policy on the treatment of non-nationals human rights-compliant. The government was requested to report back on the measures it took to implement these recommendations.

In *IHRDA and ZLHR v Zimbabwe*,³⁷ the African Commission laid down a test for determining a disparaging statement under article 56(3) of the African Charter. The Commission noted that article 56(3) must be interpreted bearing in mind article 9(2) of the African Charter, which provides for freedom of expression. The test was stated thus:

In determining whether a certain remark is disparaging or insulting and whether it has dampened the integrity of the judiciary, or any other state institution, the Commission has to satisfy itself whether the said remark or language is aimed at unlawfully or intentionally violating the dignity, reputation or integrity of a judicial officer or body and whether it is used in a manner calculated to pollute the minds of the public or any reasonable man to cast aspersions on and weaken public confidence on the institution. The language must be aimed at undermining the integrity and status of the institution and bring it into disrepute.

The test no doubt brings certainty to the question as to what constitutes 'disparaging language' in the context of article 56(3) of the African Charter. Until this test was laid down, the case law on the issue lacked uniformity.³⁸

³⁵ 25th Activity Report para 114.

³⁶ Communication 292/2004, 24th Activity Report.

³⁷ Communication 293/2004, 24th Activity Report.

³⁸ See *Ligue Camerounaise des Droits de l'Homme v Cameroon* (2000) AHRLR 61 (ACHPR 1997); *Ilesanmi v Nigeria* (2005) AHRLR 48 (ACHPR 2005); *Bakweri Land Claims Committee v Cameroon* (2004) AHRLR 43 (ACHPR 2004).

In *MIDH v Côte d'Ivoire*,³⁹ the complainant challenged provisions in the Ivorian Constitution which restricted the right to stand for election and provisions providing for amnesty for those involved in the *coup d'état* of 1999 and the rulers of the military transition period which followed. The Commission found the communication admissible, as the constitutional review process which could have challenged the provisions could only be initiated by the President or members of the National Assembly.⁴⁰ On the merits, the Commission held that to require that the parents of the President must be Ivorian by birth was unreasonable.⁴¹ The Commission further held that the amnesty violated the African Charter as it prevented victims from seeking redress and encouraged impunity.⁴²

In *Socio-Economic Rights and Accountability Project v Nigeria*,⁴³ it was alleged by the complainant that the respondent state had failed in its obligations to provide the minimum content of the right to education. The communication was declared inadmissible on the grounds that Nigerian case law showed that socio-economic rights were justiciable in Nigeria and that the complainant had therefore failed to exhaust local remedies.⁴⁴ This is a questionable conclusion, not fully supported by the case law cited by the Commission in the decision.⁴⁵ Arguably, the Commission could instead have declared the communication inadmissible based on article 56(2) of the African Charter as its vagueness could be seen as making it incompatible with the Charter.

In *Majuru v Zimbabwe*,⁴⁶ Mr Majuru alleged that Zimbabwe had violated his human rights, forcing him to flee to South Africa. However, the Commission found that 'there is no concrete evidence to link the complainant's fear to the respondent state'.⁴⁷ He could therefore have exhausted the local remedies, especially because Zimbabwean law does not require that a complainant is physically present in the country to access the courts.⁴⁸ The Commission also, for the first time, declared a communication inadmissible due to not having been submitted within a reasonable time. The Commission held that to submit a complaint

³⁹ Communication 246/02, 25th Activity Report.

⁴⁰ Para 49.

⁴¹ Para 85.

⁴² Para 98.

⁴³ Communication 300/2005, 25th Activity Report.

⁴⁴ Para 69.

⁴⁵ See S Ibe 'Beyond justiciability: Realising the promise of socio-economic rights in Nigeria' (2007) 7 *African Human Rights Law Journal* 225 241-243. The Commission seemingly in para 66 misquotes one of the Nigerian judgments, *Abacha v Fawehinmi*, to include a statement on the justiciability of socio-economic rights.

⁴⁶ Communication 308/2005, 25th Activity Report.

⁴⁷ Para 94.

⁴⁸ Para 100.

almost two years after the alleged violations was unreasonable.⁴⁹ As to Mr Majuru's submission that his reason for the late submission of the communication was that he thought the situation in Zimbabwe might improve, the Commission made the following bizarre statement: 'The complainant does not supply the Commission with medical proof to indicate he was suffering from mental problems, he does not indicate what gave him the impression that things might improve in Zimbabwe ...'⁵⁰

3 The African Court on Human and Peoples' Rights

The African Court, now in its third year, is yet to be fully operational. Primarily charged with the function of complementing the protective mandate of the African Commission, the Court has not entertained even a single case thus far. However, following developments in 2008, the Court is now set to receive its first case.

3.1 Election of new judges

The first batch of judges of the African Court was elected on 22 January 2006 at the 6th ordinary session of the Assembly of the AU, held in Khartoum, Sudan. Four of these judges were elected for a period of two years. As such, their term of office came to an end in July 2008. Accordingly, the AU Assembly at its 11th ordinary session re-elected Judges Sophia Akuffo (Ghana) and Bernard Makgabo Ngoepe (South Africa) to six-year terms. Two new judges were elected: Githu Muigai (Kenya) and Joseph Nyamihana Mulenga (Uganda).

Article 14(3) of the African Court Protocol provides that in the election of the judges, the Assembly shall ensure that there is adequate gender representation. It is thus not clear what proportional number of male and female judges will constitute 'adequate gender representation'. While it is clear that the phrase does not mean equal representation since the Court is composed of 11 judges, it is nevertheless submitted that, with only two women currently sitting as judges of the African Court, the gender balance in the composition of the Court is skewed. In contrast, seven of the 11 members of the African Commission are women.

3.2 Rules of Procedure

The process of formulating the Rules of Procedure of the African Court commenced in July 2006 at the African Court's first session held in Banjul, The Gambia, in which the Court constituted a committee of judges responsible for preparing a draft of the Rules. Consideration of the

⁴⁹ Para 110.

⁵⁰ As above.

draft Rules of Procedure then followed during the third session of the African Court, held in Addis Ababa, Ethiopia, in December 2006. The Court finally published its 'interim' Rules of Procedure in June 2008. It is unclear why it has taken so long to develop rules that to a large extent simply repeat what is already stated in the Protocol establishing the Court. At the time of writing, the African Commission and the African Court were in the process of harmonising their Rules.

With the Court's Rules of Procedure in place, the Court is now set to receive its first case. However, since the Court can neither solicit cases nor act *sua moto*, the challenge falls upon the African Commission, member states, African inter-governmental organisations, non-governmental organisations (NGOs) and individuals to present cases to the Court. It is, however, unlikely that the African Commission will present a case to the Court before its Rules of Procedure are harmonised with that of the Court. Moreover, with only two member states having made a declaration in terms of article 34(6) of the Court Protocol, NGOs and individuals are still limited in their access to the Court.

3.3 Merger with the African Court of Justice

An important development in 2008 was the adoption, at the 11th session of the AU Assembly, of the Protocol on the Statute of the African Court of Justice and Human Rights (ACJHR Protocol), which will merge the African Court on Human and Peoples' Rights with the African Court of Justice. The Statute of the African Court of Justice and Human Rights (ACJHR Statute) is annexed to the ACJHR Protocol. The Protocol will enter into force 30 days after the deposit of the instrument of ratification by 15 member states of the AU.

The ACJHR will be the main judicial organ of the AU. The ACJHR Protocol, upon coming into force, shall replace the two Protocols establishing the African Court, on the one hand, and the Court of Justice of the AU on the other. However, the African Court Protocol will remain in force for a transitional period of one year or as the Assembly of the Union may decide, so as to enable it to transfer its prerogatives, assets, rights and obligations to the ACJHR. The ACJHR will have its seat in Arusha, Tanzania, the current seat of the African Court. It will have two sections — a general affairs section and a human rights section — with eight judges each. As such, the full Court will have 16 judges elected from state parties. With the exception of the President and the Vice-President, all the judges of the ACJHR will serve on a part-time basis.

Unfortunately, individuals and NGOs accredited to the AU or its organs may only access the Court in respect of a state party that has made a declaration accepting the jurisdiction of the Court over cases submitted by individuals and NGOs. The restriction which follows from article 34(6) of the African Court Protocol is thus retained and dashes the hopes of human rights activists and NGOs that the new Court, unlike the African Court, would have allowed direct access for

individuals and NGOs. This restriction is a clear demonstration that, despite the lofty ideas embodied in the AU Constitutive Act, African states are yet to let go of the cloak of sovereignty and genuinely commit themselves to human rights protection on the continent.

4 The African Committee of Experts on the Rights of Welfare of the Child

Since it was established in 2001, the African Children's Committee has very little to show in terms of progress. Some progress was made when the Committee met for its 11th ordinary session in Addis Ababa from 26 to 31 May 2008. For the first time, it discussed state reports submitted to the Committee.⁵¹

5 The African Union's main organs and human rights

The AU Constitutive Act provides extensively for human rights in its Preamble, objectives and founding principles. As such, the AU Constitutive Act is the AU's 'authoritative and overriding normative beacon', guiding 'all its organs towards the accomplishment of human rights in all their activities'.⁵² In this regard, human rights issues are increasingly included on the agenda of the Executive Council and the Assembly. AU organs, such as the AU Commission, the Peace and Security Council, the Pan-African Parliament and the Economic, Social and Cultural Council (ECOSOCC) also have a role to play in improving the situation of human rights in Africa. Human rights are also included in the mandate of the African Peer Review Mechanism.

5.1 Standard setting

The AU has adopted a large number of treaties and declarations of relevance for human rights. In 2008, one such development relates to the process of developing an AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa. A draft has been prepared and a Special Summit of Heads of State and Government on Refugees, Returnees and Internally Displaced Persons is scheduled to take place in the course of 2009.⁵³ The African Commission's Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons

⁵¹ BD Mezmur & J Sloth-Nielsen 'An ice-breaker: State party reports and the 11th session of the African Committee of Experts on the Rights and Welfare of the Child' (2008) 8 *African Human Rights Law Journal* 596 597-598.

⁵² Viljoen (n 2 above) 180.

⁵³ Decision on the report on the situation of refugees, returnees and internally displaced persons in Africa, Doc EX CL/460 (XIV), EX CL/Dec.462 (XIV).

and Migrants has participated in the process of drafting the new legal instrument.

Another development in standard setting relates to the process, which is now underway, of establishing a normative framework for the protection of older persons in Africa. In this regard, the mandate of the focal person on older persons of the African Commission includes spearheading the process of developing a Protocol to the African Charter on the Rights of Older Persons in Africa.⁵⁴ As part of this process, a consultative meeting on the rights of older persons was held in Mauritius in October 2008.⁵⁵

While arguably the focus should now be on the implementation of existing instruments, the focus on the creation of new instruments will probably continue, as evidenced by the adoption of the Statute of the AU Commission on International Law by the AU Assembly in February 2009.⁵⁶ The mandate of the Commission includes 'codification and progressive development of international law on the African continent'.⁵⁷

5.2 Peace and security

The greatest challenge for the AU remains the maintenance of peace and security on the continent. Conflicts in countries such as Burundi, DRC, Somalia and Sudan continue to simmer in varying degrees with grave implications for human rights. Moreover, the post-election violence in Kenya in early 2008 and the xenophobic attacks in South Africa in May 2008 have demonstrated that even those African countries considered bastions of peace are, nevertheless, prone to conflicts accompanied by violations of human rights. Worth noting, the xenophobic attacks in South Africa undermined the spirit of pan-Africanism that underlies the AU. It made a mockery of the determination of Africa's founding fathers to 'promote unity, solidarity, cohesion and co-operation among the peoples of Africa and African states'.⁵⁸

5.3 Democracy

The principles of non-interference in the internal affairs of member states and state sovereignty continue to be embedded in the practice of the AU, even in the face of gross human rights violations and the

⁵⁴ Resolution on the Establishment and Appointment of a Focal Point on the Rights of Older Persons in Africa, adopted at the 42nd ordinary session of the African Commission, November 2007, <http://www.achpr.org> (accessed 23 March 2009).

⁵⁵ 25th Activity Report para 63(xi).

⁵⁶ Decision on the Draft Statute of the African Union Commission on International Law, Assembly/AU/Dec 209 (XII).

⁵⁷ *Note verbale* on the election of the members of the African Union Commission on International Law, BC/OLC/42.23/1353.09 vol II.

⁵⁸ AU Constitutive Act, Preamble para 1.

collapse of the rule of law. The response of the AU in the wake of the election violence and political stalemate in Kenya and Zimbabwe in 2008 serves to demonstrate this claim. While it was deeply concerned with the spate of violence and loss of life in these two countries,⁵⁹ the AU Assembly steered away from expressly questioning the alleged manipulation of elections by the incumbent governments. It is worth noting that while the response of the Assembly was muted, the election observer mission to Zimbabwe of the Pan-African Parliament found that the elections were not 'free, fair and credible'.⁶⁰

The lack of a common AU position on Zimbabwe's election is yet another pointer to the lack of a harmonised position on topical issues on the continent. Increasingly, therefore, there is a need to foster co-ordination and co-operation amongst all institutions within the AU that have a human rights mandate. Some progress was made towards this end in September 2008, when a meeting was held in Burkina Faso to discuss the relationship between the African Commission and other organs of the AU.⁶¹ In the main, however, there is yet to be a proper framework of co-ordination amongst AU institutions in general and those with a human rights mandate in particular.⁶²

5.4 Impunity

In February 2008, a Spanish investigative judge issued an indictment against members of the Rwandan Defence Forces (RDF) on charges including genocide and crimes against humanity.⁶³ In the same vein, Rose Kabuye, the Rwandan Chief of Protocol, and one of those against whom an arrest warrant had earlier been issued by a French investigative judge, was arrested in Germany in November 2008, and later appeared before a French court.⁶⁴

Clearly enraged by these incidents, the AU established a Commission on the Abuse of the Principle of Universal Jurisdiction. In July 2008, the

⁵⁹ See AU Assembly Decision on the Situation in Kenya Following the Presidential Election of 27 December 2007, Assembly/AU/Dec 187(X); and AU Assembly Resolution on Zimbabwe, Assembly/AU/Res.1(XI).

⁶⁰ Report of the Pan-African Parliament election observer mission, presidential run-off elections and House of Assembly by-elections, Republic of Zimbabwe, 27 June 2008, PAP/S/RPT/76/08, para 18.1. During 2008, the Pan-African Parliament also undertook election observer missions to Angola, Ghana and Swaziland.

⁶¹ 25th Activity Report para 64(vi).

⁶² See generally K Kindiki 'The African human rights system: Unnecessary overlaps or useful synergies?' (2006) 12 *East African Journal of Peace and Human Rights* 319.

⁶³ 'Spanish judge charges Rwanda's current military with genocide' *Associated Press* 6 February 2008 <http://www.ihf.com/articles/ap/2008/02/06/europe/EU-GEN-Spain-Rwanda.php> (accessed 25 March 2009).

⁶⁴ C McGreal 'Top Rwandan aide chooses French terror trial' *Guardian* 10 November 2008 <http://www.guardian.co.uk/world/2008/nov/10/rwanda-congo-kabuye> (accessed 24 March 2009).

AU Assembly took note of the report of the Commission and stated that:⁶⁵

The political nature and abuse of the principle of universal jurisdiction by judges from some non-African states against African leaders, particularly Rwanda, is a clear violation of the sovereignty and territorial integrity of these states.

Another development in this area involves the request made by the Prosecutor of the International Criminal Court (ICC) in July 2008 for the indictment of the President of Sudan, Omar al Bashir, for genocide, crimes against humanity and war crimes.⁶⁶ The AU, warning of widespread anarchy in Sudan if Al Bashir was indicted, called for the deferment of the decision to indict him.⁶⁷ Some observers have argued that the ICC is giving too much attention to Africa. However, it is important to note that all the situations examined by the ICC in Africa, except for Sudan, have been referred to the Court by the governments themselves as state parties to the Statute establishing the ICC.

6 Conclusion

This note reveals that 2008 saw significant developments towards harnessing the institutional framework for the promotion and protection of human rights. The African Commission began walking the path of financial stability and independence. It also adopted its interim Rules of Procedure, a step that is necessary in defining its relationship with the African Court. For its part, the African Court similarly adopted its Rules of Procedure and it is ready to receive its first case for adjudication. The African Children's Committee also recorded some developments in so far as it considered state party reports under the African Children's Charter. At the normative level, the ACJHR Protocol was adopted, establishing the framework for the merger between the African Court on Human and Peoples' Rights and the African Court of Justice and Human Rights. In addition, processes for adopting regional treaties to secure the rights of internally-displaced persons and older persons were initiated.

Despite these positive developments, the realisation of human rights in Africa is still challenged by a myriad of obstacles. At the AU level, a salient drawback is its ambivalent reaction to gross human rights violations, undemocratic rule, and the question of impunity. Moreover, there is a lack of co-ordination amongst AU institutions with a human

⁶⁵ Decision on the report of the Commission on the Abuse of the Principle of Universal Jurisdiction, Assembly/AU/Dec 199 (XIII).

⁶⁶ Decision on the application by the International Criminal Court for the indictment of the President of the Republic of the Sudan, Assembly/AU/Dec.221 (XII).

⁶⁷ 'AU warns of *coups*, anarchy if Sudan President indicted' <http://sudan.net/news/posted/16105.html> (accessed 2 August 2008).

rights mandate, a factor that continues to see divergent opinions on topical issues on the continent emanating from these institutions. In general, therefore, the challenge for the African human rights system lies in maximising the gains made so far and tackling the obstacles that still hamper the full realisation of human rights on the continent.