

The African Charter on Human and Peoples' Rights 1987–2000: An overview of its progress and problems

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1 Introduction

From the adoption in 1981 and coming into force in 1986 of the African Charter on Human and Peoples' Rights (African Charter),¹ this regional mechanism has been criticised for being ineffective, poorly funded, lacking impartiality and based on ambitious and unenforceable rights,² and even neglected in the mainstream debate on human rights law. Early writings on the Charter and the African Commission on Human and Peoples' Rights (Commission) questioned whether such an ambitious document could ever be implemented,³ and although it is clear that there are problems with the African human rights mechanism, as there are with all international and regional bodies, it has made some significant contributions to the development of international human rights law in its relatively short existence. This article seeks to consider the progress which has been made to implement the Charter over the last thirteen

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1 Reprinted in (1982) 21 *International Legal Materials* 58; C Heyns (ed) *Human Rights Law in Africa 1996* (1996) 7.

2 E Ankumah *The African Commission on Human and Peoples' Rights. Practices and Procedures* (1996) and R Murray *The African Commission on Human and Peoples' Rights and International Law* (2000) ch 2.

3 E Bondzie-Simpson 'A critique of the African Charter on Human and Peoples' Rights' (1988) 31 *Howard Law Journal* 643–65.

years as well as raise some of the difficulties which will face the system in the future.

2 Positive contribution?

2.1 Interpretation of the Charter

The provisions of the African Charter were both criticised for their unrealistic and radical approach and praised for their progressive inclusion of civil and political, economic, social and cultural, peoples' rights and individual duties in one document.⁴

The eleven-member Commission created by the Charter⁵ has asserted a mandate not only to promote and protect human and peoples' rights through state reporting and communication procedures, but also to interpret the provisions of the Charter.⁶ For many years, apart from a few references to economic, social and cultural rights,⁷ the Commission seemed unwilling to focus on the more unusual aspects of the Charter.⁸ Most of its jurisprudence related to violations of articles 5, 6 and 7 of the Charter.⁹ The membership of the Commission did not create a dynamic organisation.¹⁰

Its reticence in interpreting the more unusual provisions of the Charter could be explained by the Commission's unease at developing rights where there was little other international concrete jurisprudence, thus attracting attention to itself. In addition, many of the interpretations of Charter provisions result from communications, many of which have been submitted by non-governmental organisations (NGOs). As no cases were submitted which related to the more unusual rights,¹¹ the Commission was arguably not given the opportunity to develop them.

4 n 2 above.

5 Art 31.

6 Art 45.

7 Guidelines on national periodic reports, Second Activity Report of the African Commission on Human and Peoples' Rights 1988–1989, ACHPR/RPT/2nd, Annex XI.

8 These aspects include the concepts of individual 'duties' (in eg arts 19–24 of the Charter) and 'peoples' (in eg arts 27–29 of the Charter).

9 These are the rights to be free from torture and inhuman or degrading treatment or punishment, freedom from arbitrary arrest and detention, and the right to fair trial, respectively.

10 See 3.1 below on concerns about the Commissioners' lack of independence.

11 An early decision on the Katangese people was submitted and the Commission made an important statement here in relation to peoples' right to self-determination; see Communication 75/92 *Katangese Peoples' Congress v Zaire*, Eighth Activity Report of the African Commission on Human and Peoples' Rights 1994–1995, ACHPR/RPT/8th, Annex VI.

Recent decisions, however, have indicated a willingness by both NGOs and the Commission to use these provisions of the Charter. In cases against Mauritania,¹² which alleged discrimination against the black Mauritanian population, the Commission used article 17 to argue for protection of language, stating:¹³

Language is an integral part of the structure of culture; it in fact constitutes its pillar and means of expression par excellence. Its usage enriches the individual and enables him to take an active part in the community and in its activities. To deprive a man of such participation amounts to depriving him of his identity.¹⁴

In the same decision it also implied that article 23 and the right of a people to national and international peace and security could be used to protect the villages of black Mauritians against attacks,¹⁵ and that discrimination against black Mauritians was the domination of one people over another in violation of article 19.

It has also been more willing to tackle some of the controversial aspects of other rights. In a recent decision, for example, it held that Shari'a law should not be applied to non-Muslims and should also, in any event, comply with the provisions of international human rights law.¹⁶ It has also adopted decisions upholding the rights to health,¹⁷ to work¹⁸ and to education.¹⁹

12 Communications 54/91, 61/91, 98/93, 164/97–196/97, and 210/98, *Malawi African Association, Amnesty International, Ms Sarr Diop, Union Inter africaine des Droits de l'Homme and RADDHO, Collectif des Veuves et Ayants-droit, Association Mauritanienne des Droits de l'Homme v Mauritania*, Thirteenth Activity Report of the African Commission on Human and Peoples' Rights, 1999–2000, ACHPR/RPT/13th, Annex V.

13 Art 17 reads: '2. Every individual may freely take part in the cultural life of his community. 3. The promotion and protection of morals and traditional values recognised by the community shall be the duty of the state.'

14 Communications 54/91, 61/91, 98/93, 164/97–196/97, and 210/98 (n 11 above) para 137.

15 Para 140 (n 14 above).

16 Communications 48/90, 50/91, 52/91, 89/93, *Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan*, Thirteenth Activity Report of the African Commission on Human and Peoples' Rights 1999–2000, ACHPR/RPT/13th, Annex V, para 73.

17 Communications 54/91, 61/91, 98/93, 164/97–196/97, and 210/98 (n 11 above) para 122; Communications 137/94, 139/94, 154/96, 161/97 *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro Wiwa Jr. and Civil Liberties Organisation v Nigeria*, Twelfth Annual Activity Report of the African Commission on Human and Peoples' Rights (1998–1999), AHG/215 (XXXV), Annex IV.

18 Communication 39/90 *Annette Pagnoule (on behalf of Abdoulaye Mazou) v Cameroon*, Tenth Activity Report of the African Commission on Human and Peoples' Rights 1996–1997, ACHPR/RPT/10th, Annex X.

19 Communications 25/89, 47/90, 56/91, 100/93, *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Inter africaine des Droits de l'Homme, Les Témoins de Jehovah v Zaire*, Ninth Activity Report of the African Commission on Human and Peoples' Rights 1995–1996, ACHPR/RPT/9th, Annex VIII.

2.2 Women's rights

There are several instances where the African system has given a profile to women's rights. Firstly, with the Commission itself being composed of four women,²⁰ it is certainly the most gender representative of all the regional mechanisms.²¹ Secondly, the Protocol on the Court²² has specifically required that there be gender representation in both the nomination and appointment of judges.²³

Most notably, however, has been the appointment of a Special Rapporteur on Women's Rights and the moves to adopt a Protocol on Women's Rights.²⁴ It is unfortunate that the Special Rapporteur has so far failed to undertake any of the studies on the situation of women's rights in Africa that were initially planned.²⁵

The Draft Protocol as it now stands²⁶ was a joint effort between NGOs and Commissioners. Its provisions are progressive: female circumcision is prohibited;²⁷ it includes articles against sexual violence during conflict,²⁸ and on polygamy,²⁹ and provisions for the inclusion of women into political life,³⁰ structures on dealing with conflict,³¹ as well as

20 Ms Julienne Ondziel-Gnelenga, Ms Florence Butegwa, Dr Vera Chirwa, Ms Jainaba Johm. The other Commissioners are: Prof Isaac Nguema, Prof Victor Dankwa, Mr Kamel Rezag-Bara, Dr Barney Pityana, Mr Andrew Chigovera, Dr Badawi El Sheikh, Dr Hatem Ben Salem.

21 Less than a quarter of the European Court of Human Rights judges are women; no members of the Inter-American Commission nor Court are women.

22 For further information on the Court, see 4.2 below.

23 Arts 12(2) and 14(3) of the Protocol to the African Charter on the establishment of an African Court on Human and Peoples' Rights.

24 The approval for producing a protocol was provided by the Assembly of Heads of State and Government at its 34th session, Decision AHG/Dec 126 (XXXIV). Government experts are due to meet sometime this year to discuss the draft in order for it to be submitted for adoption to the Summit of the OAU in June/July 2001.

25 See Draft programme of activities of the Special Rapporteur on women's rights in Africa for the period 1999–2001, DOC/OS/53(XXIV); Report of the Special Rapporteur on women's rights, DOC/OS/57(XXIV).

26 Draft Protocol to the ACHRP on the rights of women in Africa, CAB/LEG/66.6 13 September 2000. The articles cited below refer to this Draft Protocol. The Draft Protocol is reprinted on 53–63 of this journal.

27 Art 6 Draft Protocol reads: 'State Parties shall . . . undertake to take all the necessary measures, *inter alia* . . . b) to prohibit the amelioration or preservation of harmful practices such as the medicalisation and para-medicalisation of female genital mutilation and scarification, in order to effect a total elimination of such practices.'

28 Art 4(d) Draft Protocol reads that states should 'ensure that in times of conflict and/or war, rape, sexual abuse and violence against girls and women are considered a war crime and are punished as such'.

29 Art 7(c) Draft Protocol reads: '[P]olygamy shall be prohibited.'

30 Art 10 Draft Protocol.

31 Art 11 Draft Protocol.

conditions of work,³² health,³³ food,³⁴ housing and environment³⁵ and development.³⁶ Although it is unfortunate that the Commission chose to make the Protocol an additional document, requiring the ratification by 15 states for it to enter into force,³⁷ the argument that an additional protocol will give its terms more force is clearly a strong one.

2.3 Increased involvement of states

All Organisation of African Unity (OAU) states are now party to the African Charter. Increasing numbers of states are attending the sessions of the Commission and contributing to the debates. At the 25th session several government representatives responded to comments made by NGOs on the human rights situation in their countries.³⁸ This indicates not just a move towards a dialogue between organisations, the Commission and states but also illustrates the serious concern of states that their compliance with the Charter is being discussed during the session.

2.4 Relationship with NGOs and others

The Commission has an important relationship with NGOs. It is clear that in the course of its existence NGOs have greatly influenced the action taken by the Commission. It was their lobbying that prompted the Commission to appoint Special Rapporteurs on Prisons and Other Conditions of Detention, on Summary, Arbitrary and Extrajudicial Executions and on Women's Rights,³⁹ and NGOs have been essential to their successful functioning. For example, one NGO, Penal Reform International, has not only produced the reports of the Special Rapporteur on Prisons but has organised, advised and accompanied him on his visits.

The Commission recognises the importance of its relationship with NGOs. Such organisations are entitled to apply for observer status with the Commission, which enables them to participate and make statements during its sessions. So far around 250 organisations have obtained such status.⁴⁰ A couple of years ago, however, the Commission

32 Art 13 Draft Protocol.

33 Art 14 Draft Protocol.

34 Art 15 Draft Protocol.

35 Arts 16 and 18 Draft Protocol.

36 Art 19 Draft Protocol.

37 Art 25(1) Draft Protocol.

38 See R Murray 'Report of the 2000 sessions of the African Commission on Human and Peoples' Rights' *Human Rights Law Journal* (forthcoming).

39 These are individual Commissioners.

40 Status of submission of NGO Activity Reports as at 30 September 2000, DOC/OS(XXVIII)/182b.

suspended the granting of any more observer status to NGOs after the Assembly of Heads of State and Government of the OAU expressed its concern about the responsibilities of organisations to the Commission.⁴¹ The Commission thus reviewed its criteria for observer status, a move to be recommended given that they had been unclear in the past, and produced rules, stressing that NGOs should submit reports every two years on their activities.⁴² Since the criteria have been adopted the Commission has again accepted applications for observer status. It regularly now produces, as it does for state reports,⁴³ a list of whether NGOs are up to date with their commitments.⁴⁴ Although it is clear that many are not and have failed to attend the sessions and work with the Commission, and despite indications that this could lead to withdrawal of observer status, the Commission has taken no action against them.

Although it is often the same NGOs who attend the sessions, the Commission's combined policy of holding open sessions which anyone can attend, and holding sessions in different African states, has enabled local NGOs which may not have had the resources to travel to Banjul, where the Commission's Secretariat is based, for example, to participate.⁴⁵ This was particularly noticeable in Mauritania, where many local organisations attended the session, albeit after attempts by the government to prevent them from entering the hall.⁴⁶ Subsequently, many of these applied for, and obtained, observer status and many used the communication procedure of the Commission to submit allegations of serious violations of human rights. The Commission was prompted to undertake a mission.⁴⁷ A series of decisions condemning the action of the Mauritanian government has just been released.⁴⁸ There are valid criticisms that the

41 Declaration and decisions adopted by the thirty-fourth ordinary session of the Assembly of Heads of State and Government, Ouagadougou, Burkina Faso, June 1998, AHG/Dec 126 (XXXIV).

42 Resolution on the co-operation between the African Commission on Human and Peoples' Rights and NGOs having observer status with the Commission, Twelfth Annual Activity Report of the African Commission on Human and Peoples' Rights (1998–1999), AHG/215 (XXXV), Annex IV.

43 For further information on state reporting, see below.

44 Status of submission of NGO Reports (n 40 above).

45 As well as at the headquarters in The Gambia, sessions have been held in Senegal (second), Gabon (third), Egypt (fourth), Libya (fifth), Nigeria (ninth), Tunisia (eleventh), Ethiopia (first and fourteenth), Togo (seventeenth), Cape Verde (eighteenth), Burkina Faso (nineteenth), Mauritius (twentieth), Mauritania (twenty-first), Burundi (twenty-fifth), Rwanda (twenty-sixth), Algeria (twenty-seventh), Benin (twenty-eighth) and Uganda (second extraordinary).

46 R Murray 'Report of 1997 sessions of the African Commission on Human and Peoples' Rights' (1998) 19 *Human Rights Law Journal* 169.

47 Report of the Mission to Mauritania of the African Commission on Human and Peoples' Rights, Nouakchott, 19–27 June 1996, Tenth Activity Report of the African Commission on Human and Peoples' Rights 1996–1997, ACHPR/RPT/10th, Annex IX.

48 n 12 above.

decisions were delayed for many years, the mission was not sufficiently independent, and the manner in which the Commission dealt with the situation lacked impartiality.⁴⁹ What it does indicate, however, is the increased awareness given by holding the sessions in various countries.

3 Existing concerns

3.1 Lack of independence

This has been one of the criticisms directed at the Commission for many years. Commissioners are appointed by the political Assembly of Heads of State and Government of the OAU.⁵⁰ Until recently, members of the Commission have been a mixture of former government persons and members of the judiciary and academic legal profession.⁵¹ In the most recent appointments in 1999, however, there was an attempt to appoint members from the NGO community.⁵² It is hoped that this trend will continue.

In this respect, it is not just the appearance of the lack of independence, with the inclusion of ambassadors amongst its members and senior government figures, but also evidence of an actual lack of impartiality. For example, missions taken to states were criticised for the one-sided manner in which they were conducted.⁵³ Not all mission reports have been released⁵⁴ and communications which prompted the missions in the first place have often only been published years after the visits.⁵⁵ In the case of Nigeria, the communications were published after

49 Interights, Constitutional Rights Project, RADDHO, Missions for Protective Activities, submitted to 21st session of the African Commission, 1997; R Murray 'On-site visits by the African Commission on Human and Peoples' Rights: A case study and comparison with the Inter-American Commission on Human Rights' (1999) 11 *African Journal of International and Comparative Law* 460.

50 Art 33.

51 See F Viljoen 'Review of the African Commission on Human and Peoples' Rights: 21 October 1986 to 1 January 1997' in C Heyns (ed) *Human Rights Law in Africa 1997* (1999) 51–2.

52 For example, the most recent appointments included Dr Vera Chirwa and Dr Florence Butegwa.

53 Interights (n 49 above) and Murray (n 49 above).

54 Only those of missions to Mauritania and Senegal, issued in the Tenth Activity Report, have been made public: see Report of Mission of Good Offices to Senegal of the African Commission on Human and Peoples' Rights (1–7 June 1996), Tenth Activity Report of the African Commission on Human and Peoples' Rights 1996–1997, ACHPR/RPT/10th, Annex VIII; Report of the Mission to Mauritania (n 47 above). The missions to Nigeria and Sudan, taken in 1997, have still not been reported on to the public.

55 Thirteenth Activity Report of the African Commission on Human and Peoples' Rights 1999–2000, ACHPR/RPT/13th, Annex V, which contains decisions against Mauritania, Nigeria and Sudan.

a change in government,⁵⁶ suggesting that pressure from the previous regime may have had a role to play in the past.⁵⁷

NGOs have consistently questioned the issue of Commissioner independence and at one stage it was a regular feature on the agenda of the Commission.⁵⁸ One can only hope, therefore, for the position of Commissioner to gain a better profile and that NGOs and others can lobby at the national level for non-governmental nominations and thus influence subsequent appointments to the Commission.

3.2 Lack of organisation at sessions

The Commission holds two sessions per year now lasting fifteen days each. When the OAU recently increased the budget to the Commission it enabled the latter to extend the period from ten days. Around half of the session is held in public, which anyone can attend, and the other half is in private, where confidential matters are discussed and communications heard.

There has been a marked improvement in recent years, with the location and dates of sessions now being decided at the previous session, without changes. Draft agendas are now often sent out in advance along with information on accommodation, for example.

What is still lacking, however, is the efficient use of time during the session itself. This largely depends upon the skills of the Chair to ensure time limits are respected, debate is relevant, and that the meeting keeps to items on the agenda. There has been evidence of this increasingly being the case — certainly time limits are often enforced. However, there is still no written, detailed record of the debate and decisions taken at the session. A final communiqué is produced at the end of the session, but this is only a few pages long and often does not detail discussion on specific points.⁵⁹ As a result, there are many occasions where it is either not possible to remember what issues were raised, whether any decision was reached at a previous session and, if so, what it was. There is thus considerable repetition of previous discussions, which wastes valuable time. While submissions made by participants at the session are now collected, copied and disseminated to participants, sometimes by the

56 As above.

57 R Murray 'Digest of cases of the African Commission on Human and Peoples' Rights' (2001) *South African Journal on Human Rights* (forthcoming).

58 Agenda of the 25th Ordinary Session (26 April–5 May 1999, Bujumbura, Burundi), DOC/OS(XXV)/80, item 9 reads 'Review of some of the provisions of the African Charter in the light of mainly the issue of incompatibility of the membership of the Commission'. The issue was not on the agendas of the 26th and 27th sessions.

59 Final Communiqué of the 28th Ordinary Session of the African Commission on Human and Peoples' Rights, 23 October–6 November 1999, ACHPR/FIN.COMM/XXVIII, Rev 2.

end of that day, this has been a recent development.⁶⁰ The Commission could easily improve its own efficiency by requiring its Secretariat to make a detailed report of the session and disseminate this widely amongst Commissioners, NGOs, states and other participants.

3.3 Lack of follow-up to communications

The Commission has interpreted the Charter, contrary to what was originally feared, to enable it to receive communications from individuals and NGOs alleging violations of the Charter.⁶¹ Indeed, in its latest report it made a statement expressly affirming its power to do so.⁶² All OAU states are now party to the Charter and thus subject to the Commission's jurisdiction. To date it has received nearly 300 communications and its decisions have been published, in increasing detail, since its Seventh Activity Report.

The effectiveness of the communication procedure is hampered by several factors. Firstly, although the Commission has started to lay down clearly at the end of some of its decisions what action is required of the state,⁶³ this is not done consistently. Without a clear indication of what is required it is arguable that the state may feel less pressure to respect the Commission's ruling and there is also no benchmark against which to assess any response it might make.

In addition, there has been no attempt by the Commission to check whether its rulings have been implemented or not. Certainly, there does not appear to have been any follow-up or supervisory function undertaken by the OAU organs. The Commission submits its annual report to the OAU before it can be made public. In previous years little discussion was ever taken on the contents of the report at this level. There have now been improvements, with debate taking place at the meetings of the Council of Ministers.

Article 58 enables the Commission to alert the Assembly of Heads of State and Government to situations of serious or massive violations, with the possibility that the latter will request the Commission to undertake

60 Murray (n 38 above).

61 While arts 47–54 are entitled 'Communications from states', arts 55–59 are entitled 'Other communications' and do not expressly list the procedure by which they should be considered.

62 Communications 147/95 and 149/96, *Sir Dawda K Jawara v The Gambia*, Thirteenth Activity Report of the African Commission on Human and Peoples' Rights, 1999–2000, ACHPR/RPT/13th, Annex V, para 42.

63 Communications 54/91, 61/91, 98/93, 164/97–196/97, and 210/98 (n 12 above).

further study.⁶⁴ No response has been forthcoming from the OAU despite several cases being submitted to it.⁶⁵ It is suggested that a Special Rapporteur on follow-up would be an effective appointment. Without such a mechanism, the Commission often believes its job is finished once the decision is published, the communication does not get the necessary publicity, and it is not clear whether the victims received the remedy they deserved.

The issue of publicity is particularly important. Documents produced regularly by the Commission and available to the public are final communiqués from each session and an annual activity report. The Commission has developed a practice of publishing its decisions on communications in detail in its activity reports. Unfortunately, these reports are not disseminated widely. Those working closely with the Commission obtain them relatively easily, but there is no website for the Commission and no press release accompanying the adoption of decisions, for example. Although the reports are not withheld by the Commission and can be found in various other places on the internet⁶⁶ and obtained from various individuals, there is no coherent policy by the Commission of disseminating them at all levels, national, local and international. Few international bodies are aware of the Commission's decisions and the extent to which African and other governments receive copies is not known. It appears that even some of the OAU organs do not necessarily receive a copy of the Commission's reports. This goes clearly to the heart of the effectiveness of the Commission's communication procedure and some improvements could be made with minimal cost. Many NGOs have offered to set up a website for the Commission and others have offered to work with the Commission to publish its documents. Although a website is clearly inadequate for dissemination in all circumstances, particularly at the local level, it would be a useful starting point.

What is hampering such efforts is the reticence of the Commission to distribute its material, which is difficult to explain sometimes. It is submitted that there is a perception among the Commission that at present documents are controlled and that if they were widely disseminated the Commission would be opening itself to criticism and

64 Art 58 reads: 'When it appears after deliberations of the Commission that one or more communications apparently relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights, the Commission shall draw the attention of the Assembly of Heads of State and Government to these special cases. 2. The Assembly of Heads of State and Government may then request the Commission to undertake an in-depth study of these cases and make a factual report, accompanied by its findings and recommendations. . . .'

65 Communications 25/89, 47/90, 56/91, 100/93 (n 19 above).

66 For example, the Centre for Human Rights at the University of Pretoria <<http://www.up.ac.za/chr/ahrd/ahrd.html>>; Interights <<http://www.interights.org>>.

condemnation either from governments for finding them in violation of the Charter, or from other sources for failing to go far enough. The lack of dynamism and sometimes confidence of the Commission in its own powers and functions, which is due in part to the lack of independence of some of its members, is most apparent here.

As a result, there is little interest in or attention paid to its work in the international arena. Rarely is the work of the Commission mentioned in detail in leading international textbooks, drawn upon by other international human rights bodies, or discussed in any meaningful way. The Commission is thus depriving itself of the respect it could have and the resultant impact that this would have on states to comply with its decisions.

3.4 Lack of monitoring role

Under article 62 of the Charter states are obliged to submit reports every two years on the legislative and other measures taken to implement the Charter. As with other international reporting mechanisms it is clear that states are behind in their obligations.⁶⁷ The Commission has taken action encouraging states to submit, but this has been limited.⁶⁸ Since November 1995 the Commission has been willing to receive reports which combine several years.⁶⁹

Even where reports have been submitted the procedure by which they are examined could be improved. States are invited to send a representative to the session, where questions are posed by Commissioners. Although these questions are increasingly focused, drawing upon information received from other sources, there is still not the 'constructive dialogue' the Commission says it is aiming for.⁷⁰ The Commissioners often do not probe for an answer if none is provided and the system for examination, where all questions are asked first and then all answers are given after a short break period, does not really permit matters to be delved into further. The combination of all these difficulties means that the Commission does not really monitor the ongoing situation in states through this mechanism.

Other methods available include the regular item on the agenda on the human rights situation in Africa.⁷¹ Consistently at every session NGOs and others present the situation in various African countries. Little seems

67 Just over half of all states have submitted their initial reports.

68 It adopted a Resolution on overdue reports for adoption, Fifth Annual Activity Report of the African Commission on Human and Peoples' Rights 1991–1992, ACHPR/RPT/5th, Annex VIII. Commissioners are, however, now starting to ask the authorities about the status of their reports on the promotional visits to states.

69 Note Verbale ACHPR/PR/A046, 30 November 1995.

70 Guidelines on national periodic reports (n 7 above).

71 28th Ordinary Session of the ACHPR. Annotated Agenda, item 8(a).

to be done with this information. At one stage the Commission produced a document summarising some information but with no clear indication of its subsequent action.⁷² It is submitted that NGOs should request specific action from the Commission and continue to raise these requests at subsequent sessions. Article 46⁷³ either in conjunction with or separate from article 58⁷⁴ could be used by the Commission to undertake a study on a particular country on its own initiative. So far, however, it has not exploited these provisions.

A positive development is that Commissioners have started to use their promotional functions more effectively. Commissioners are assigned particular countries for promotion. Often this means merely visiting the country. However, Commissioners have recently produced detailed reports of promotional visits⁷⁵ with clear indications of action taken by them in relation to the authorities.

All these mechanisms provide the Commission with an opportunity with which to monitor the situation in a state, but it is regrettable that so far the Commission has not used them to their full potential. A dynamic Commission, composed of individuals committed to human rights, would go some way to ensuring that these resources are employed appropriately.

3.5 Too much reliance on NGOs

This reactive rather than proactive attitude of the Commission impacts on its work with NGOs. The awareness of the Commission of this source of support has led it, on many occasions, to place the blame for its inaction on the failure of NGOs to support it. NGOs are expected to partner the Commission when it comes to holding seminars and to find the funding.⁷⁶ There does not now seem to be a presumption that these might be tasks of the Secretariat. While this might be realistic to a certain extent, it has resulted in the Commission almost abdicating any responsibility for its actions, or inaction. A clear example is the Special Rapporteur on Summary, Arbitrary and Extrajudicial Executions. This Commissioner has been in the post for six years, but so far nothing

72 The human rights situation in Africa, DOC/OS(XXV)/96.

73 Art 46 reads: 'The Commission may resort to any appropriate method of investigation; it may hear from the Secretary General of the Organization of African Unity or any other person capable of enlightening it.'

74 See n 64 above.

75 Commissioner Pityana's Report of the promotional mission to the Republic of Mozambique 7–9 August 2000, DOC/OS(XXVIII)/187/5; Commissioner Rezag-Bara's Report on a mission to the Republic of Chad, DOC/OS(XXVIII)/187/6 and Report on the promotional mission undertaken by Commissioner Kamel Rezag-Bara to the Republic of Djibouti (26 February–5 March 2000), DOC/OS(XXVIII)/187/6; Commissioner Chirwa's Report of mission to Republic of Tanzania, DOC/OS(XXVIII)/187/6.

76 Murray (n 38 above).

concrete has been produced. He has failed to visit countries, specifically Rwanda and Burundi, and failed to establish the database of victims or intended compensation fund.⁷⁷ One NGO offered assistance to the Commissioner, and when he was questioned at the session he attributed his lack of work to the failure of the NGO to obtain funding.⁷⁸

The Special Rapporteur on Women's Rights has also attributed her inability to function to the lack of funding, again calling on NGOs to live up to their commitments.⁷⁹ There does not appear to be a perception among the Commission that Commissioners could themselves carry out some work with minimal funding.

There must be a change in attitude from the Commission. While it is important that human rights promotion and protection are seen as the responsibility of all individuals and organisations, the status of an international institution such as the African Commission puts it in a powerful position to take a proactive role. The Commission should be exploiting its position, not hiding behind NGOs for its failure to act.

4 Future influences

Some recent developments suggest other influences on the Commission may become increasingly important.

4.1 Increased role of national human rights institutions

The Commission has recently formalised its relationship with these institutions, adopting criteria for them to apply for 'affiliated status' and thus participate and speak at its sessions.⁸⁰ The Commission has so far considered applications from and granted status to six institutions⁸¹ and an increasing number are being created and are attending the sessions of the Commission.

77 Amnesty International, *The African Commission on Human and Peoples' Rights: the Role of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, AI Index, IOR 63/05/97.

78 Murray (n 38 above).

79 R Murray 'Report of the 1999 sessions of the African Commission on Human and Peoples' Rights' *Human Rights Law Journal* (forthcoming).

80 Resolution on granting observer status to national human rights institutions in Africa, Twelfth Annual Activity Report of the African Commission on Human and Peoples' Rights (1998–1999), AHG/215 (XXXV), Annex IV.

81 National Human Rights Observatory, ONDH (Algeria), National Human Rights Commission (Rwanda); National Human Rights Commission (Malawi), *Commission Nationale des Droits de l'Homme et des Libertés* (Niger), the National Commission for Democracy and Human Rights (Sierra Leone) and the *Comité Sénégalais des Droits de l'Homme*; see also Final Communiqué of the 28th Session (n 59 above) and Thirteenth Activity Report (n 55 above).

The Commission has at least recognised the difficulties of ensuring that such institutions are not just another arm of the government by requiring in its criteria that there is adherence to the Paris Principles. At its 28th session it heard from the institution in Niger and condemned the interference in its work by the government.⁸² In addition, the application of the Nigerian Human Rights Commission has been postponed over concerns that members were appointed by, or were in fact members of, the government.⁸³ The African Commission's approach, however, has not been consistent as the commission in Algeria, a body which has been criticised for its lack of impartiality, has been granted status.

How the Commission's relationship with such institutions will develop in the future is not clear. Obviously such institutions could have an influential role and provide support for NGOs, as long as the Commission ensures that only independent bodies are accepted. If it chooses to accept bodies closely tied to the governments, however, the Commission will have to contend with pressure from two government sources, influence which it might not be able to resist.

4.2 An African Court

In 1998 the Assembly of Heads of State and Government adopted a protocol establishing an African Court on Human and Peoples' Rights.⁸⁴ This provides for an eleven-member Court of independent judges with advisory and contentious jurisdiction. Several issues were controversial in the drafting of the Protocol, most notably whether individuals and NGOs should be able to submit a case to the Court directly, its relationship with the Commission, and also where the Court should sit.⁸⁵ The resulting provisions for the standing of individuals and NGOs are dealt with in articles 5 and 34(6). These provide that the Commission, the state party which lodged a complaint, the state against which a complaint was lodged, and the state whose citizen was a victim and African intergovernmental organisations are entitled to submit cases to the Court. In addition, article 5(3) then adds that 'the Court may entitle relevant Non Governmental Organisations (NGOs) with observer status

82 Murray (n 38 above).

83 As above.

84 Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights, OAU/LEG/MIN/AFCHPR/PROT (I) Rev 2.

85 Report of the Experts' Meeting, Third Government Legal Experts' Meeting (enlarged to include diplomats) on the establishment of the African Court on Human and Peoples' Rights, 8–11 December 1997, Addis Ababa, Ethiopia, OAU/LEG/EXP/AFCHPR/RPT(III) Rev1; Report of the Secretary General on the conference of Ministers of Justice/Attorneys General on the Draft Protocol on the establishment of the African Court on Human and Peoples' Rights, 23–27 February 1998, CM/2051 (LXVII).

before the Commission, and individuals to institute cases directly before it, in accordance with article 46(6) of this Protocol'. Article 34(6) additionally requires states which have ratified the Protocol to make a declaration saying that they accept the jurisdiction of the Court in those circumstances. It is thus not clear exactly what standing NGOs and individuals may in fact have.

The relationship with the Commission is not fully clarified by the Protocol. The Preamble notes that the establishment of a Court is necessary to 'complement and reinforce the functions' of the Commission and article 2 states that the Court should, in carrying out the Protocol 'complement the protective mandate' of the Commission. Thus it would appear that the Commission will continue to be solely responsible for promotion. Article 4 prohibits the Court from giving an advisory opinion on a matter that is presently before the Commission. Article 8 requires the Court to have regard to the 'complementarity between the Commission and the Court' when determining its Rules of Procedure. Article 29 requires that the Court transmit its judgment to the Commission, among other things.

However, when contentious cases will go to the Court is not clear. Article 5(1)(a) enables the Commission to submit a case to the Court, but article 6(1) states that the Court will have a role in decisions on admissibility. This provision notes that 'when deciding' on admissibility the Court 'may request the opinion of the Commission which shall give it as soon as possible'. Further, article 6(3) enables the Court, under issues of admissibility, to 'consider cases or transfer them to the Commission'.

The Commission has been talking for some time about holding an extraordinary session to consider this relationship, but so far no date or firm arrangements have been made.⁸⁶ Given that only four states out of the fifteen required to bring the Protocol into force have ratified,⁸⁷ the pressure on the Commission to do so is not strong.

There is no reference in the Protocol and still no consensus on where the Court will sit.⁸⁸ Until we approach the number of ratifications required, this is unlikely to be a pressing issue. Then only will it be necessary to determine whether the Court and Commission should both sit in The Gambia or elsewhere, requiring the difficult political decision of moving the Commission. Alternatively, it will need to be considered whether the Commission should remain in The Gambia and the Court placed elsewhere, a decision which has considerable significance for their future relationship.

86 Murray (n 38 above).

87 These states are Senegal, Burkina Faso, The Gambia and Mali.

88 Art 25(1) of the Protocol states that the seat will be determined by the Assembly but it could convene in any state 'when the majority of the Court considers it desirable and with the prior consent of the State concerned'. The seat could also be changed if the Assembly is consulted: art 25(2).

4.3 Relationship with the OAU

Behind the Commission and central to its functioning lies the OAU. The African Charter expressly notes the central role played by the OAU and its organs in the funding and functioning of the Commission.⁸⁹ Yet it is clear that its involvement has been seriously limited, in particular in providing financial support, causing the Commission to rely on other sources.⁹⁰ There is no real indication that the OAU has taken an increasing interest in the work of the Commission over the years, leaving it largely to its own devices in The Gambia. However, given the changes with the adoption of the Constitutive Act of the African Union and the increased attention paid to human rights, at least in its provisions,⁹¹ it is possible that this relationship will become more important.

The Commission and OAU could collaborate on various issues. The Commission has for years discussed the possibility of an early warning mechanism, with former Commissioner Umozurike proposing a nine-point plan at a seminar on the issue.⁹² The Commission has not yet decided whether this should be formally adopted, opting for an interim solution whereby the Chair deals with any emergency in between sessions. The OAU's Conflict Mechanism has an early warning system, also in its early stages, but there has been no attempt to connect the two. Similarly, the African Commission has recently paid attention to refugees. The OAU's Refugee Division was suggested as a possible partner, but the Commission chose to determine its own procedures first before collaborating with the Division.⁹³

Thus, both the Commission and the various OAU organs have been unwilling to forge close relationships. Certainly, when advocating closer involvement with the OAU one must bear in mind that there may be unwanted political influence. But a balance can be struck whereby the OAU provides the Commission with the support necessary to carry out its functions, such as appointing adequate and effective staff committed

89 For example, as noted above in relation to the appointment of Commissioners, art 41 requires the Secretary General of the OAU to appoint the Secretary of the Commission and to ensure the adequate staff and resources. The OAU is to fund it. Art 46 envisages the involvement of the Secretary General when the Commission is undertaking investigations. The OAU also plays a role in interstate communications (arts 47–54) and in art 58, as noted above, regarding serious or massive violations or emergency situations. The Commission also submits its annual report to the OAU for its consideration (art 54).

90 See Thirteenth Activity Report (n 55 above) 12, 13.

91 For example, the promotion and protection of human and peoples' rights are expressly included amongst the objectives and principles of the proposed Union, arts 3(h) and 4(m).

92 Mechanisms for urgent response to human rights emergencies under article 58 of the African Charter on Human and Peoples' Rights, 21st session (no reference, on file with author).

93 Murray (n 38 above).

to the cause of the Commission, and taking an increased interest in and contributing to the publicity of its documents and work.

5 Conclusion

An examination of the evolution of the African Charter since its inception clearly shows that it has developed procedures and frameworks which could enable it to be a dynamic and effective system. Unfortunately, the members of the Commission so far, in general, have not felt able or willing to exploit these possibilities. The result is an organisation which is undertaking important work, has special rapporteurs on important themes and is adopting radical and progressive jurisprudence, but which seems to want such activities to remain secret and not scrutinised by any other than the small group of NGOs and those who regularly attend its sessions. This is depriving the local and international community of its contributions and the necessary publicity to pressurise governments to respect its decisions.