

## Special rapporteurs of the African Commission on Human and Peoples' Rights

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### 1 Introduction

Since its inception, the African Commission on Human and Peoples' Rights (African Commission or Commission)<sup>1</sup> has appointed three special rapporteurs. The first, the Special Rapporteur on Summary, Arbitrary and Extrajudicial Executions,<sup>2</sup> was appointed in 1994. The second, the Special Rapporteur on Prisons and Conditions of Detention in Africa,<sup>3</sup> was appointed in 1996. The third, on the Conditions of Women in Africa,<sup>4</sup> was appointed in 1999.

The practice of appointing special rapporteurs was well-established in the United Nations (UN) long before the African Commission began doing the same.<sup>5</sup> What is striking about these appointments in the African system is that the African Charter on Human and Peoples' Rights (African Charter or Charter), which sets out the African Commission's mandate, provides no explicit provision for them.

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<sup>1</sup> Established under art 30 of the African Charter on Human and Peoples' Rights, OAU Doc CAB/LEG/67/3/Rev 5 (entered into force 21 October 1986), reprinted in (1982) 21 *International Legal Materials* 59.

<sup>2</sup> Eighth Annual Activity Report of the African Commission, Annex VII.

<sup>3</sup> Tenth Annual Activity Report of the African Commission, Annex VII.

<sup>4</sup> Eleventh Annual Activity Report of the African Commission.

<sup>5</sup> At the moment, the UN has 14 special rapporteurs, appointed under the auspices of the UN Human Rights Commission. It also has three independent experts, two special representatives of the Secretary-General, two working groups, one representative of the Secretary-General and one expert.

The specific procedures of the African Commission provided for in the Charter are those of examination of communications (state and non-state, articles 47 to 59)<sup>6</sup> and state periodic reporting (article 62).<sup>7</sup> Article 45 sets out the general functions of the Commission as promotion, protection, interpretation, and anything else the Organisation of African Unity (OAU) Heads of State and Government asks it to do, in that order.<sup>8</sup> Article 42(2) states that '[t]he Commission shall lay down its Rules of Procedure', which it has done.<sup>9</sup> But where the Charter has proved too vague, simply unworkable, or inadequate, the Commission has moved beyond the text.

The African Commission's practice of appointing special rapporteurs is therefore an innovation, and should be seen in the context of the Commission's innovations generally. In other instances where the Charter is vague but its mandate is broad, the Commission has had to fill procedural vacuums. This has happened with regard to concrete procedural issues, information gathering, and the conduct of informal negotiations.

<sup>6</sup> Arts 45–54 set out general procedures for the Commission to hear 'communications from states'; arts 55–59 set out a general procedure for the Commission to hear 'communications other than those from states'. Especially as regards the non-state communications, the Charter is ambiguous on such basic points as to whether the Commission may consider any communications other than those dealing with grave and massive violations. See also arts 56 & 59.

<sup>7</sup> Art 62 reads: 'Each State Party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognised and guaranteed by the present Charter.'

<sup>8</sup> Art 45 reads: 'The functions of the Commission shall be:  
 1. To promote human and peoples' rights and in particular:  
 (a) to collect documents, undertake studies and researches in African problems in the field of human and peoples' rights, organise seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights and, should the case arise, give its views or make recommendations to Governments;  
 (b) to formulate and lay down, principles and rules aimed at solving legal problems related to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislation;  
 (c) co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights  
 2. Ensure the protection of human and peoples' rights under the conditions laid down by the present Charter.  
 3. Interpret all the provisions of the present Charter at the request of a State Party, an institution of the OAU or an African Organisation recognised by the OAU.  
 4. Perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government.'

<sup>9</sup> Rules of Procedure of the African Commission on Human and Peoples' Rights, adopted on 6 October 1995.

Specifically, in relation to the article 55 communications procedure,<sup>10</sup> the Commission has held hearings, heard witnesses, taken decisions and recommended specific remedies. The Commission has also made innovations with respect to taking investigatory missions.<sup>11</sup>

What makes the appointment of special rapporteurs distinct from other practical, procedural innovations, and a bolder step for the Commission than the elaborations of the communication procedure or its practice of taking missions, is that special rapporteurs are not clearly or logically required to fulfil the Commission's mandate, nor a necessary elaboration of a Charter-mandated procedure. Rather, they are a new initiative altogether. The question may be asked: What was the Commission's justification for this initiative, and what was the void that the Commission was trying to fill?

I argue that, in order to gain credibility, the Commission has had to move beyond the manifest inadequacy of the provisions of the Charter. But the appointment of special rapporteurs has held a combination of pitfalls for the Commission, linked to, or even duplicating, the very structural defects of the African system that it is trying to overcome. Against this background, I will examine the work of the Commission's three special rapporteurs, the factors contributing to their success or failure, and the implications of this for the future of the practice of appointing special rapporteurs and the African system as a whole.

## 2 Context of an innovation

From the time of its creation, the African Commission has had to struggle to gain the confidence of those in the human rights community. Firstly,

<sup>10</sup> Arts 55–59, cited above, do not indicate eg if the Commission should hold hearings on communications or not; what evidence it is permitted to hear, and what, if any, remedies it is permitted to recommend. For an in-depth discussion of recent developments in the art 55 procedures, see CA Odinkalu *et al* 'The African Commission on Human and Peoples' Rights: The development of its non-state communication procedures' (1998) 20 *Human Rights Quarterly* 235–280.

<sup>11</sup> Commissioners have always been expected to take 'promotional' missions to the countries for which they are responsible. In the early 1990s, the question of missions came up in relation to several communications which appeared to give evidence of serious and massive violations; the Commission wished to take missions before deciding the communications. Thus, missions were eventually taken to Mauritania, Senegal, Sudan, and Nigeria, but not to investigate the allegations in the communications *per se*. Reports were published of the missions to Mauritania and Senegal (see Ninth Annual Activity Report of the Commission). All states visited were ultimately condemned in relation to the communications submitted against them, but the role the missions played in bringing about these decisions will always be unclear. See eg decisions on Communication 48/90, *Amnesty International v Sudan*; Communication 50/91, *Comité Loosli Bachelard v Sudan*; Communication 52/91, *Lawyers Committee for Human Rights v Sudan*; Communication 89/93, *Association of Members of the Episcopal Conference of East Africa v Sudan*, Thirteenth Annual Activity Report.

the drafting procedures and the text of the African Charter were seen as reflecting the will of undemocratic governments, by definition antithetical to real protection of human rights.<sup>12</sup> Secondly, the commissioners elected by the Assembly of Heads of State and Government were not seen as truly independent, many retaining professional positions in which they represented their governments.<sup>13</sup> Thirdly, the OAU failed to provide the necessary material means and personnel. Until 1992, there was no lawyer at the Commission's Secretariat other than the Secretary, and since then staffing has been erratic at best.<sup>14</sup>

The textual confusions of the Charter and the reluctance of some commissioners to confront states, in the early years caused tension between the Commission's duty to promote the rights in the African Charter, and its duty to protect. Promotion received emphasis. Some commissioners have expressed discomfort with the article 55 procedure and stressed that the Commission is only a 'quasi-judicial' organ at best.

By 1994, however, the Commission began to standardise and expand its activities. It had been in operation for over five years.<sup>15</sup> It had examined nine state periodic reports<sup>16</sup> and had granted observer status to 133 non-governmental organisations (NGOs). The most active of these NGOs attended sessions regularly, and enjoyed considerable influence with the Commission, submitting draft resolutions to it for adoption<sup>17</sup> and other suggestions for its action.

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<sup>12</sup> M Mutua 'The African human rights system in a comparative perspective: The need for urgent reformulation' (1992) 44 *The Nairobi Law Monthly* 27-30. Similarly, Commissioner Dankwa at the 18th session in 1995 said: 'The Charter was conceived at a time when human rights was unmentionable on our continent' (transcript of the 18th session of the African Commission on Human and Peoples' Rights, on file with the Institute for Human Rights and Development).

<sup>13</sup> Of the 11 commissioners elected to the first Commission in 1987, the following were state employees: A Mokama was the Chief Justice of Botswana, A Gabou was the Interior Minister of Congo, HR Kisanga was a judge in Tanzania, M Chipoya was a civil servant in Zambia and Y Ndiaye a judge in Senegal.

<sup>14</sup> When the first legal officer appointed resigned after serving for a few months, there was again a gap of nearly three years before another was appointed.

<sup>15</sup> The Commission actually began operation in 1987, with the first session held in Addis Ababa.

<sup>16</sup> Danish Centre for Human Rights *The African Commission on Human and Peoples' Rights Examination of state reports (1991-1993)* (1995). The countries whose state reports were examined by 1994 were Rwanda, Togo, Libya, The Gambia, Zimbabwe, Tunisia, Ghana, Nigeria and Senegal.

<sup>17</sup> The NGO workshop held before the 14th session in December 1993 called on the Commission to act and make public statements on extrajudicial executions. They called for the establishment of an emergency mechanism and recommended that the Commission appoint a Special Rapporteur on Extrajudicial Executions. See International Commission of Jurists *The participation of NGOs in the work of the African Commission on Human and Peoples' Rights. A compilation of basic documents* (1996).

Amnesty International was one of the most involved observer NGOs. It was one of the first four NGOs to be granted observer status, in 1988. Amnesty International sent a representative from the International Secretariat in London to virtually all the African Commission's sessions. Needless to say, Amnesty International also had enormous experience in working with organs of the UN.

At the Commission's 14th session, held in Addis Ababa in 1993, Amnesty International proposed that the Commission appoint a Special Rapporteur on Extrajudicial Executions in Africa.<sup>18</sup> The Commission discussed the proposal in its public session and decided to defer the decision until the 15th session. In the meantime, the Commission instructed Commissioner Youssoupha Ndiaye of Senegal to contact the then Special Rapporteur of the UN on Extrajudicial Executions, Bacre Waly Ndiaye, also a Senegalese, to share his working methods with the Commission, presumably so that the Commission could have some idea of what kinds of activities and resources would be required.<sup>19</sup>

At the 15th session of the African Commission, Commissioner Ndiaye reported that the UN Special Rapporteur had met with him in Dakar and provided him with 'all the relevant documentation on his work' — presumably, copies of his mandate and reports he had produced.<sup>20</sup> Commissioner Ndiaye voiced the opinion that, given that the UN had had a Special Rapporteur on Summary or Arbitrary Executions since 1982, and had produced a total of 12 reports, the Commission should not duplicate this work. He also noted that the UN Special Rapporteur was administratively assisted by two staff members at the UN Centre for Human Rights in Geneva, 'one of whom is full-time', and that a similar arrangement would have to be made for a special rapporteur of the African Commission.<sup>21</sup>

In the discussion that followed, no opinion was expressed that appointing a special rapporteur was outside the Commission's mandate. Commissioner Ndiaye recognised that it was not provided for in the African Charter, but stated: 'We must go beyond the content of the Charter itself, and we must try to see . . . more courageous terms.' Subsequent commentators have argued that the appointment of special rapporteurs

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<sup>18</sup> See statement of Amnesty International to the 15th session of the African Commission on Human and Peoples' Rights, April 1995, on file with Amnesty International.

<sup>19</sup> Transcripts of the 14th session of the African Commission on Human and Peoples' Rights, on file with the Institute for Human Rights and Development.

<sup>20</sup> UN special rapporteurs are appointed by resolution. The UN Special Rapporteur on Summary or Arbitrary Executions produces an annual report which is submitted to the Human Rights Commission.

<sup>21</sup> Transcript of the 15th session, on file with the Institute for Human Rights and Development in Africa.

can be justified under article 46, which allows for 'any appropriate method of investigation'.<sup>22</sup>

The apparent lack of concern over mandate may have been due to the fact that the appointment of special rapporteurs is so common within the UN system, in which the UN Human Rights Commission freely appoints special rapporteurs without any text specifically authorising it to do so. Most commissioners were familiar with this practice. Appointing a special rapporteur may thus have seemed quite simple and straightforward. The African Commission may not have been consciously mimetic, but assumed that it had comparable powers to the UN Human Rights Commission.

Another element that may have hastened the Commission's decision to appoint a Special Rapporteur on Extrajudicial Executions was the situation in Rwanda. Amnesty International had proposed that the special rapporteur concentrate on extrajudicial executions in countries in conflict. The 15th session was held in April 1994, just as the massacres in Rwanda were beginning. The Commission apparently had several communications under the procedure in article 55 pending against Rwanda, but did not feel comfortable in taking a decision on them at that time.<sup>23</sup> The Commission limited itself to adopting a resolution on Rwanda.<sup>24</sup> Six months later, by the time of the 16th session, the worst of the Rwanda massacres were over, leaving more than half a million dead.<sup>25</sup> There was understandable frustration both within and without the Commission that the only African human rights body had failed to act in any concrete way.

In summary, in the face of overwhelming human rights violations, seminars, conferences and resolutions appear manifestly insufficient. Special rapporteurs may seem to be more responsive to violations, but also more proactive and simultaneously less threatening to states than the examination of cases brought by individuals.

The only real controversy was whether or not the African Commission could appoint special rapporteurs who were not members of the Commission. Commissioner Umozurike from Nigeria expressed the view

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<sup>22</sup> EG Bello 'The African Charter on Human and Peoples' Rights: A legal analysis' (1985-86) 194 *Hague Recueil* 9 79.

<sup>23</sup> Communications 27/89, 49/91 & 99/93, *Organisation Mondiale Contre La Torture & Others v Rwanda*, Tenth Annual Activity Report. The communications alleged serious and massive violations between 1990 and 1992. A report was submitted at the same time by Amnesty International detailing such violations as widespread massacres, extrajudicial executions and arbitrary arrests against the Tutsi ethnic group. The Commission finally decided in 1996 that the facts constituted serious or massive violations of the Charter.

<sup>24</sup> Seventh Annual Activity Report of the African Commission, Annex XII 93. See also Press Release, Annex XIII 94.

<sup>25</sup> Human Rights Watch *Leave no one to tell the story* (1999), <<http://www.hrw.org/reports/1999/rwanda>> (accessed on 22 March 2001).

— pointing as evidence to how few promotional visits commissioners had been able to undertake — that no commissioner had the time to travel as much as would be required of the special rapporteur, so an outside person should be found who could ‘collect the information, to work with a commissioner’.<sup>26</sup> He was quickly outvoted by those who thought that appointing an outside person was not within the competence of the Commission; that in essence outsiders could not be ‘trusted’; and that paying an outside ‘consultant’ would be expensive. Such a course of action would also imply that commissioners were not competent.<sup>27</sup>

It is interesting to find this reluctance so widespread among members of the Commission. On the other hand, the UN, which was supposedly their model for the institution of special rapporteurs, always appointed outside experts. Others proposed that while the holder of the title would be a commissioner, the rapporteur should have a professional, paid assistant.

The decision to appoint special rapporteurs only from within the African Commission may have been the result of unspoken unease about whether the Commission was within its powers or not. As long as the Commission appointed one of its own members, the work of the special rapporteur would be impossible to wholly separate from the work of a Commissioner, which sometimes is quite broad. In fact, it is questionable how much significance the act of appointing a special rapporteur from within the Commission has had. As we shall see, there was no provision made for expenses, and no written mandate until some time after the fact.

In the end, it was decided to appoint a special rapporteur from within the Commission. The Commission made its selection behind closed doors<sup>28</sup> and the name was not publicly announced until the 16th session.<sup>29</sup> For this reason, there are differing accounts given of when the special rapporteur was appointed. The first official documents attesting to his appointment date from the 16th session.<sup>30</sup>

The first Special Rapporteur of the African Commission, on Summary, Arbitrary and Extrajudicial Executions, was Commissioner Hatem Ben Salem of Tunisia, who was also at the time Vice-Chairperson of the Commission. It will never be known what criteria were applied in his selection, but language was mentioned as one,<sup>31</sup> and the decisive factor

<sup>26</sup> Transcript of the 15th session (n 21 above).

<sup>27</sup> As above.

<sup>28</sup> The Commission’s sessions consist of both open and closed meetings. Open meetings can be attended by anyone, while closed meetings are limited to the Commission and any individuals it summons for discussion of a specific item.

<sup>29</sup> Transcript of the 16th session of the Commission, on file with the Institute for Human Rights and Development in Africa.

<sup>30</sup> Final Communiqué of the 16th session, ACHPR/RPT/XVI.

<sup>31</sup> 16th session transcript (n 29 above). Commissioner Ben Salem speaks Arabic, French and English.

was probably the willingness of the individual. All commissioners have full-time jobs elsewhere, and even the minimum duties of commissioners were frequently not carried out.<sup>32</sup> In this context, the Commission must have been eager to appoint any commissioner who assured it of their willingness to undertake extra duties. One can perhaps say that Commissioner Ben Salem volunteered.

### 3 The Special Rapporteur on Extrajudicial Executions

An institution had been established, but what, exactly, was the Special Rapporteur supposed to do, and how was it to work? From the outset, there was a fundamental lack of clarity on these questions. This could be explained by the uneasiness on the part of the Commission about the implications of appointing a special rapporteur. This uneasiness also explains the strange carelessness or even resistance evidenced at the 16th session of the Commission to put the special rapporteur's mandate in writing.<sup>33</sup>

In the public discussion of the Special Rapporteur at that session, Commissioner Badawi read from the report of the 15th session,<sup>34</sup> which merely specified that:

Mr Hatem Ben Salem was appointed as Special Rapporteur on Extrajudicial Executions, and will report on the budget. Rwanda was to occupy primary importance. Consideration of the communication on Rwanda was postponed until the next session, pending the report of the Special Rapporteur.

The report recorded the decision of the Commission at the time of appointing Commissioner Ben Salem as being that 'the Special Rapporteur should work in areas which would work to complement the work of the UN instead of duplicating it . . . '.

Commissioner Badawi made the point that the 15th session report sets out the work of the Special Rapporteur in only the most general terms, and that terms of reference were needed. Commissioner Ben Salem stated his intention not to submit reports listing extrajudicial executions, saying that such a submission would duplicate the work of the UN Special Rapporteur and furthermore was an inadequate response to

<sup>32</sup> To be fair to commissioners, part of the failure to carry out promotional visits could have been due to lack of funds and administrative support in making the arrangements. The Raoul Wallenberg Institute provided funding for the Commission's missions, but the Commission's weak secretariat made accessing these funds difficult.

<sup>33</sup> Transcript of the 15th session (n 21 above).

<sup>34</sup> At the close of each session the Commission produces two documents: a session report, which is confidential, and a final communiqué, which is a public document distributed to all NGOs with observer status. The printed text of the session report is thus unavailable and knowledge of the report is limited to what was read by Commissioner Badawi in the public meetings of the 16th session.

extrajudicial executions. This agreement suggests that he was to submit no reports at all.

The Chairperson proposed that Commissioner Ben Salem should come to the next session with written proposals for his work. Commissioner Ben Salem protested somewhat that his mandate was already clear. Finally, another commissioner was assigned the task of drafting terms of reference.<sup>35</sup>

The Special Rapporteur's own vision of how he intended to carry out his mandate was founded on the assumed futility of written reports. Instead, he proposed that he would take up specific cases referred to him by NGOs and he would contact the governments concerned, in an effort to obtain compensation for the families of victims. He implicitly criticised the work of the UN as merely counting the dead. While denying that a substantial budget was required for the work, he called upon NGOs to provide him with information on 'cases, not hundreds and hundreds, but a few specific ones' for his potential intervention.

This proposal, made at the 16th session, received a generally positive reception, but several NGOs mentioned the importance of fighting impunity and preventing extrajudicial executions, as well as compensating them. Informal means of obtaining compensation, they emphasised, should not come at the expense of prosecution of those responsible for extrajudicial executions, which was closely linked with preventing future executions. The need to assign a staff member in the Secretariat of the Commission to assist the Special Rapporteur was raised by Commissioner Umozurike, but was not followed up.<sup>36</sup>

The terms of reference for the Special Rapporteur were, one would suppose, put forth at the 17th session, held in Lomé in April 1995, one year after the African Commission's decision to appoint the Special Rapporteur and six months after the appointment of Commissioner Ben Salem had been made public. However, there was no public discussion of the work of the Special Rapporteur at the 17th session, and no mention of the Special Rapporteur appeared in the Ninth Annual Activity Report, which was finalised at that session.<sup>37</sup> The only mention made of his work was in a statement by Amnesty International<sup>38</sup> criticising the lack of progress, and drawing a somewhat defensive response. It was a year

<sup>35</sup> Commissioner Jannah even stated that he had proposed the drafting of terms of reference at the previous session and been overruled. He was appointed to draft the Terms of Reference.

<sup>36</sup> 16th session transcripts (n 29 above).

<sup>37</sup> Each year at its odd-numbered sessions, the Commission prepares its annual activity reports, which it is required to submit to the Assembly of Heads of State and Government of the OAU, which meets once a year in June or July and approves the report.

<sup>38</sup> Statement of Amnesty International to the 17th session of the African Commission on Human and Peoples' Rights, on file with Amnesty International.

since the Special Rapporteur had been appointed and there had been no written report. Clearly, the urgency of extrajudicial executions and the hopes of the NGO community notwithstanding, the work was off to a slow start.

The problems that were to dog the Special Rapporteur for the remainder of his mandate, such as having the original two-year mandate renewed three times, were already abundantly apparent. It became difficult to submit reports.

Firstly, the Special Rapporteur had no expertise in the subject, no concrete notion of how to proceed, and no written mandate to guide him. Even when NGOs sent in specific information on allegations of extrajudicial executions, the process of contacting, let alone negotiating with, governments presented insurmountable difficulties.

The second problem was that there were no material means — financial or administrative — made available to the Special Rapporteur, even for writing and sending faxes and making phone calls. The Secretariat of the African Commission proved manifestly incapable of playing the role of administrative arm for the Special Rapporteur's activities. No portion of the Commission's budget was dedicated to his work.

Thirdly, the Special Rapporteur was professionally ill-placed to pursue investigations of, or negotiations with, African governments. At the time of his appointment he was a mayor. In 1997 he was appointed the Tunisian ambassador to Senegal. His diplomatic career continued to flourish, and he was subsequently posted to Turkey and Switzerland. Although superficially these positions might have seemed as presenting him with abundant opportunities to know and influence African governments, in practice the nature of his duty to represent his own state made it extremely difficult if not impossible for him to appear at other times in the guise of an independent rapporteur.

Any of these three problems, occurring individually, might have been overcome. If the Special Rapporteur had had the necessary expertise, or a clearly articulated mandate, he might have been more able to raise funds for his mandate and also to separate his diplomatic work from his work as special rapporteur. If he had had administrative support and a budget given by the Commission or an active donor, he might have been able to develop the necessary expertise, or hire an expert to work under him. Finally, if the Special Rapporteur had been more independent from his government and had the will to conduct his mandate seriously, he might have both identified resources and developed the necessary experience.

For the next several years of his mandate, however, there was little or no change in the Special Rapporteur's performance. At the 18th session, held in Cape Verde in October 1995, the report of the NGO workshop held just prior to the African Commission's session to discuss its work specified:

The recommendation of the workshop with regard to the role of the African Commission Special Rapporteur, was that there should be an early warning system, and a record of extrajudicial executions should be opened. A committee of NGOs should be established to keep this register. . . .

Later in the course of the session, the representative of Amnesty International stated that:<sup>39</sup>

We were encouraged by the remarks of the Special Rapporteur of the African Commission on Extrajudicial Executions that he will begin work soon. Amnesty International is willing to provide any assistance which our resources permit. We hope the Special Rapporteur will be able to undertake a visit to Rwanda before the 19th session.

Although apparently positive, this statement was actually a cause for concern. It had been two years since the Special Rapporteur was appointed and little work had been done.

The mandate of the Special Rapporteur, a one page, five point document, finally appeared in the Tenth Annual Activity Report of the Commission, made public in 1996.<sup>40</sup> In brief, the Special Rapporteur was charged with compiling lists of executions; investigating extrajudicial executions with an eye to prosecution; and informing the Commission of situations in which extrajudicial executions were likely to occur, so that it might try to get the OAU to act. He was able to encourage states to prosecute perpetrators and compensate victims of families; and to attempt setting up a compensation mechanism within the Commission.<sup>41</sup>

The Sixth Annex to the Tenth Annual Activity Report which contains this mandate is significant in that it is the first and last written report made public on the work of the Special Rapporteur on Extrajudicial

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<sup>39</sup> Transcripts of the 18th session of the African Commission, on file with the Institute for Human Rights and Development in Africa.

<sup>40</sup> Tenth Annual Activity report.

<sup>41</sup> The full text of the mandate is as follows (Tenth Annual Activity Report of the Commission, Annex VI):

1. To propose the implementation of a reporting system on cases of extrajudicial, summary and arbitrary execution in African states, specifically by keeping a register containing all information as to the identity of the victims.
2. To follow up, in collaboration with government officials, or failing that, with international, national or African NGOs, all enquiries which could lead to discovering the identity and extent of responsibility of authors and initiators of extrajudicial, summary, or arbitrary executions.
3. To suggest the ways and means of informing the African Commission in good time of the possibility of extrajudicial, summary or arbitrary executions, with the goal of intervening before the OAU Summit.
4. To intervene with States for trial and punishment of perpetrators of extrajudicial summary or arbitrary executions, and rehabilitation of the victims of these executions.
5. To examine the modalities of creation of a mechanism of compensation for the families of victims of extrajudicial, summary or arbitrary executions, which might be done through national legal procedures, or through an African compensation fund.

Executions. In addition to his mandate, Annex VI contains information on the Special Rapporteur's priorities, such as children, women, demonstrators and human rights activists and political opponents. It explains the late appearance of the terms of reference, noting that they were only adopted at the 18th session (October 1995) and concedes that the Special Rapporteur had not yet begun work due to the fact that<sup>42</sup>

[a]ll the parties together believed that it was imperative that the Special Rapporteur have minimum means, independent of the Secretary to the Commission, with the object of fulfilling his task in the best conditions . . .

and that

[t]hese conditions were not fulfilled until the beginning of 1996, thanks to a clarification of the mandate of the Special Rapporteur and to the logistical support of the North-South Centre of the Council of Europe, and the Swiss Directorate of Co-operation in Development and Humanitarian Aid.

The funding received illustrates that, although it may have been irresponsible of the African Commission to appoint a special rapporteur without making any provision for the funding of his activities, lack of material resources cannot be blamed as the sole, or even central, reason for the absence of activities undertaken. In addition to several donors who would have been willing to assist, the Special Rapporteur negotiated with several NGOs to assist him in different aspects of his mandate. Eventually, these collaborations all foundered on the reluctance or inability of the Special Rapporteur to devote the necessary energy and consistency to his work.<sup>43</sup>

In the following years, a certain routine was established. The Special Rapporteur consistently attended sessions<sup>44</sup> and delivered verbal reports, but these were generally restricted to descriptions of the difficulties he

<sup>42</sup> Tenth Annual Activity Report (n 3 above) Annex VI.

<sup>43</sup> Interights undertook a study for him on the modalities of providing compensation for the families of victims, (on file with Interights) and for a few years he was in discussions with the African Centre for Democracy and Human Rights Studies, based in Banjul, to provide him with assistance. Annex VI of the Tenth Annual Activity Report mentions HURIDOCs as offering advice on the setting up of a database of executions. Finally, in 1998, he entered into a co-operation with the Institute for Human Rights and Development in Africa. This collaboration yielded a report on the special rapporteur's activities in 1999, which inexplicably was never annexed to an activity report of the Commission.

<sup>44</sup> The only session that the special rapporteur did not attend was the 19th session, held in Ouagadougou in April 1996. It was pointed out at this session that his mandate would expire if not renewed, and that the special rapporteur had not sent any official word to the session on whether or not he wanted to continue in his mandate. The 2nd extraordinary session of the Commission, held in Kampala in December 1995 to consider the human rights situation in Nigeria, had decided that the special rapporteur on extrajudicial executions should accompany the Commission's planned mission, and that if the present rapporteur were discontinued it would be necessary to appoint another in order to comply with the decision of Kampala. The Commission decided to renew his mandate.

was encountering, and accounts of his attempts to co-operate with NGOs.<sup>45</sup> NGOs, in particular Amnesty International, routinely delivered statements expressing willingness to support the Special Rapporteur. They were also concerned over the lack of discernable achievements. Over the years, Ben Salem was mentioned as being committed to missions in Nigeria, Djibouti, Chad, Burundi, Rwanda, the Democratic Republic of Congo and Sierra Leone. However, none of these missions took place. After consultations with Rwandan refugees in Dakar, he compiled a list of over 1 000 names of Rwandans summarily executed during the genocide, but no public written record exists of this work.

The Special Rapporteur did explain at the 20th session that he felt it was improper to distribute written reports at sessions that had not yet been approved by the Commission. At one session he said he had submitted a written report and expressed surprise that the Annual Activity Report contained no report of his, as was required in his mandate. In 1999 the Institute for Human Rights and Development in Africa prepared a report for him that also, mysteriously, never appeared in an activity report nor was distributed at a session.

Ironically, the Commission had appointed the Special Rapporteur on Extrajudicial Executions in order to improve its credibility — to be seen to be doing something on an urgent issue. Yet the work of the Special Rapporteur on Extrajudicial Executions turned into a tragedy of missed opportunities to take real action, inflicting further damage to the Commission's credibility. The Commission was unable to overcome the general obstacle of lack of resources. It confirmed some critics' worst fears that commissioners were more concerned with the sensitivities of governments than with addressing the arbitrary killing of citizens.

As late as the 28th session in October 2000, the Special Rapporteur was blaming his inability to produce a report on the refusal of governments to permit him to visit the countries he wanted to visit. At the same time, he spoke in favour of the appointment of a Special Rapporteur on the Rights of Human Rights Defenders.<sup>46</sup> During the inter-session period, he resigned the office of Special Rapporteur on Extrajudicial Executions. This was announced at the end of the 29th session in April 2001, and the final communiqué of this session makes no mention of the appointment of a replacement.

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<sup>45</sup> Transcripts of discussions at sessions show that support for the work of the Special Rapporteur was offered by the African Centre for Democracy and Human Rights Studies; Amnesty International; HURIDOCs; Interights; Penal Reform International; and the Institute for Human Rights and Development in Africa.

<sup>46</sup> Transcripts of the 28th session of the African Commission on Human and Peoples' Rights, on file with the Institute for Human Rights and Development in Africa.

#### 4 The Special Rapporteur on Prisons and Conditions of Detention in Africa

Although the experience of the Special Rapporteur on Extrajudicial Executions was a source of frustration for all concerned from the beginning, the inauguration of the new mechanism served as an inspiration for those working on other specific issues to lobby the African Commission for other thematic rapporteurs. Quite naturally, the appointment of a special rapporteur became a kind of benchmark, a measure of the importance the Commission attached to particular issues and also, inevitably, of the status of the advocates for a certain theme.

As early as the 17th session in 1995, two additional Special Rapporteurs were being requested, one on Prisons and Conditions of Detention, the other on Women. Having not even approved the terms of reference for Commissioner Ben Salem and already coming under criticism for the slow start of his activities, the Commission deferred a decision on both.

The prime mover behind the proposal that the Commission should appoint a 'Special Rapporteur on Prisons and Conditions of Detention in Africa' was the Paris-based NGO, Penal Reform International (PRI). This NGO is devoted to improving prison conditions worldwide and advocates alternatives to incarceration. PRI was among the earlier holders of observer status with the African Commission.

At the 18th session NGO forum, considerable discussion was devoted to the proposal for a new special rapporteur. The participating NGOs adopted in principle the notion of a Special Rapporteur on Prisons.<sup>47</sup> Still, the Commission did not react and no appointment was made at the 18th session. There must have been some discussion of special rapporteurs in the closed meetings of the session, since the terms of reference for the Special Rapporteur on Extrajudicial Executions were finally adopted. One can imagine that appointing another special rapporteur so soon would have seemed over-ambitious.

PRI persisted, demonstrating consummate knowledge of how to lobby the Commission. The proposal for a Special Rapporteur on Prisons was reiterated in a letter to the Chairperson submitted in advance of the 19th session.<sup>48</sup> A draft resolution fixing the terms of reference was submitted for adoption at the 19th session itself, along with a list of names of outside experts who could be appointed to the position.

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<sup>47</sup> In the past, resolutions from the NGO workshops were regularly tabled at the Commission's session, and many of them were adapted and adopted by the Commission. This practice has largely ceased in recent years, with there being now no presumption that products of the NGO workshop will be taken up in such a direct way by the Commission.

<sup>48</sup> Transcripts of the 19th session of the African Commission on Human and Peoples' Rights, on file with the Institute for Human Rights and Development in Africa.

It was clear that PRI understood very well the root of the problems of the Special Rapporteur on Extrajudicial Executions. It knew how to avoid them, and how to convince the Commission that this experience would be completely different from that of the first special rapporteur. Foremost among the Commission's concerns was the issue of money. As the Chairperson said at the 19th session, with reference to the Special Rapporteur on Prisons:<sup>49</sup> '[O]nce bitten, twice shy . . . we should bear it in mind provisions of article 23 of the Rules of Procedure . . . that is before the Commission approves something leading to expenditure, the Secretary establishes a provisional budget for this proposal.'

PRI therefore raised funds to support the Special Rapporteur's work, and this was well known to the African Commission. PRI provided a comprehensive package, in the form of the draft terms of reference, a budget and candidates. All that was needed was for the Commission to approve the appointment of a special rapporteur.

Possibly even more important than the willingness of PRI to provide funds was its willingness to supervise the work. During discussions at the 19th session, PRI was asked to undertake tasks that were clearly the responsibility of the Commission. With respect to the list of proposed outside experts, the chairperson asked PRI:<sup>50</sup> 'Have you contacted these people to see if they would be willing?' If the Commission had any intention of appointing them, it should have done so itself.

The proposal of specific activities and the willingness of PRI to spearhead their implementation were no doubt an impetus and a reassurance to the Commission. Before the appointment of the Special Rapporteur on Prisons, both the Special Rapporteur and the Commission as a whole knew exactly what his work would entail, and that material and administrative resources were there to see that it was carried out. This was in striking contrast to the Special Rapporteur on Extrajudicial Executions, who was given almost no guidance by the Commission until long after his appointment. He rejected outright the model of practice of the UN and was unable to convincingly propose an alternative mode of practice, and there were no resources to implement it.

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<sup>49</sup> As above.

<sup>50</sup> As above.

A quick comparison reveals that the terms of reference of the Special Rapporteur on Prisons are nearly three times as long as those of the Special Rapporteur on Extrajudicial Executions.<sup>51</sup>

- <sup>51</sup> The Special Rapporteur was mandated in his terms of reference to 'examine the situation of persons deprived of their liberty within the territories of States Parties to the African Charter on Human and Peoples' Rights and to
- 3.1 examine the State of the prisons and conditions of detention in Africa and make recommendations with a view to improving them;
  - 3.2 advocate adherence to the Charter and international human rights norms and standards concerning the rights and conditions of persons deprived of their liberty, examine the relevant national law and regulations in the respective States Parties as well as their implementation and make appropriate recommendations on their conformity with the Charter and with international law and standards;
  - 3.3 at the request of the Commission, make recommendations to it as regards communications filed by individuals who have been deprived of their liberty, their families, representatives, by NGOs or other concerned persons or institutions;
  - 3.4 propose appropriate urgent action.
  - 4 The Special Rapporteur shall conduct studies into conditions or situations contributing to human rights violations of persons deprived of their liberty and recommend preventive measures. The Special Rapporteur shall co-ordinate activities with other relevant Special Rapporteurs and Working Groups of the African Commission and United Nations.
  - 5 The Special Rapporteur shall submit an annual report to the Commission. The report shall be published and widely disseminated in accordance with the relevant provisions of the Charter
  - ...
  - 7 The Special Rapporteur shall seek and receive information from States Parties to the Charter, individuals, national and international organizations and institutions as well as other relevant bodies on cases or situations which fall within the scope of the mandate described above.
  - 8 In order to discharge his mandate effectively the Special Rapporteur should be given all the necessary assistance and co-operation to carry out on-site visits and receive information from individuals who have been deprived of their liberty, their families or representatives, from governmental or non-governmental organizations and individuals.
  - 9 The Special Rapporteur shall seek co-operation with State Parties and assurance from the latter that persons, organizations, or institutions rendering co-operation or providing information to the Special Rapporteur shall not be prejudiced thereby.
  - 10 Every effort will be made to place at the disposal of the Special Rapporteur resources to carry out his/her mandate
  - ...
  - 11 In order to establish his/her mandate in the first two years, the Special Rapporteur shall focus on the following activities, while paying special attention to problems related to gender:
    - 11.1 Make available an evaluation of *the conditions of detention in Africa* highlighting the main problem areas. This should include areas such as: prison conditions; health issues; arbitrary or extra-legal detention or imprisonment; treatment of people deprived of their liberty; and conditions of detention of especially vulnerable groups such as: refugees, persons suffering from physical or mental disabilities, or children.  
The Special Rapporteur shall draw on information and data provided by the States.

Although PRI stated its preference for the appointment of an 'independent expert', that is a non-commissioner, the Commission did not depart from its previous precedent, and Commissioner Victor Dankwa from Ghana was appointed Special Rapporteur at the 20th session.<sup>52</sup> At the same session it was agreed in principle to appoint a Special Rapporteur on Women, but no one was named. Instead, the Commission 'decided to consider the proposals pertaining to this issue in its forthcoming session as will be submitted by its working group'. The contrast between the handling of the two matters can only be due to the fact that funding was immediately available for the Special Rapporteur on Prisons to begin work. The Special Rapporteur on Women had numerous NGO advocates, but no institution was willing to assume entire responsibility in the manner that PRI had done.

It is hard to over-emphasise the contrast between the functioning of the first and second Special Rapporteurs. With respect to each of the difficulties outlined above which hampered the work of the Special Rapporteur on Extrajudicial Executions, the position of the Special Rapporteur on Prisons was different.

Firstly, PRI provided the necessary expertise and concrete framework for action. In early January 1997, less than three months after the Special Rapporteur was appointed, the president of PRI, Ahmed Othmani, and the Secretary of the African Commission held consultations with Commissioner Dankwa in Banjul, The Gambia, for four days. A programme of activities was set out that was to involve two country missions a year.<sup>53</sup> Although the mandate of the Special Rapporteur was quite broad, his core activity became these missions. His first mission, to Zimbabwe, was undertaken in February 1997, less than four months after his appointment. Travel arrangements, meetings with officials, background legislation, identifying the prisons he was to visit, *per diem*, hotel reservations, the provision of an assistant to accompany Commissioner Dankwa, the subsequent drafting of a report, its publication and distribution were all foreseen and arranged.

Secondly, the resources for all these were provided by donors and administered by PRI. The budget for the Special Rapporteur's activities for the first year, as reported in the Tenth Annual Activity Report, was

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- 11.2 Make specific recommendations with a view to improving the prisons and conditions of detention in Africa, as well as reflect on possible early warning mechanisms in order to avoid disasters and epidemics in places of detention.
  - 11.3 Promote the implementation of the Kampala Declaration.
  - 11.4 Propose revised terms of reference if necessary, at the end of this two-year period to the African Commission and an overall programme for the following stage.'

<sup>52</sup> Final Communiqué of the 20th session.

<sup>53</sup> *Report of the Special Rapporteur on Prisons and Conditions of Detention to the 21st session of the African Commission on Human and Peoples' Rights, 15–24 April 1997, Nouakchott, Mauritania.* Included in the Tenth Annual Activity Report of the African Commission (n 3 above) Annex VII.

\$40 000, of which \$25 000 was 'travel and related expenses', obviously for the missions. The Special Rapporteur was also given funding to recruit an assistant who worked with him in Ghana.<sup>54</sup>

Of paramount importance, however, was the commitment of Commissioner Dankwa to undertake the activities agreed to. Even with administrative assistance, the job of Special Rapporteur added a heavy burden of travelling and writing to his other duties as a professor. Between 1995 and 1997, he was also Vice-Chairperson of the African Commission. As attested to by the reports he produced, he did indeed undertake the two missions a year as foreseen in his programme of activities.<sup>55</sup> After each mission, a mission report of substantial detail was published, describing the prisons visited, officials met and the legal background. The reports contain recommendations for governments as well. They usually appear in two languages, English and French. Copies were made freely available at sessions of the Commission, rather than annexed to activity reports of the Commission.

The conclusion is clear: Membership of the Commission does not, *per se*, make it impossible to undertake the work of a special rapporteur. A more difficult, yet more critical criterion to measure is the energy and independence of the individual concerned. All the funding and administrative support would not have produced results had the Special Rapporteur on Prisons not been willing to travel a considerable part of the year and undertake the rather unpleasant task of frequenting prisons, and publish his findings, which would likely be displeasing to the governments in question. It would seem that there was a productive combination of expertise, resources and will.

The experiment was thus a gamble that paid off. Those who might have been prepared to condemn the Commission and its work could see, at the very least, prison doors consistently opening to the Special Rapporteur. It is not known how many states carried out his recommendations. But Commissioner Dankwa clearly devoted time and attention to the problem of prison conditions in Africa, which was not being done by any other organ. The credibility of the Commission was thus, to a degree, burnished.

In October 1999, at the 26th session in Rwanda, Commissioner Dankwa was elected Chairperson of the African Commission for a two year term. At the 28th session, held in Benin in 2000, he resigned his

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<sup>54</sup> Indeed, at a subsequent session the special rapporteur lamented that his assistant, paid by donors, earned more than himself, a law professor at University of Legon, Ghana.

<sup>55</sup> His missions included Zimbabwe, Mali (August 1997), Mozambique (December 1997), Madagascar (February 1998), Mali (second visit, December 1998), The Gambia (June 1999), Benin (August 1999) and Central African Republic (June 2000). Reports of all these missions, except to Madagascar, are available in English, French and Portuguese. The Gambian report is also available in Arabic.

position as Special Rapporteur. A consensus seemed to be growing that being a special rapporteur was incompatible with holding other offices on the Commission, simply because of the time commitment required. Commissioner Dankwa was replaced by Commissioner Vera Chirwa of Malawi, who, at the time of writing, has not yet undertaken a single mission, but continues to enjoy the support of PRI. Interestingly, the 26th session also saw the resignation of Commissioner Julienne Ondziel-Gnelenga of Congo-Brazzaville from the position of Vice-Chairperson. She still holds the office of Special Rapporteur on Women, to which I now turn.

## 5 The Special Rapporteur on Women

By the time of the 23rd session in April 1998, the African Commission had achieved two examples of how the mechanism of special rapporteurs could operate. The reasons for the contrast must have been obvious to the members of the Commission, although they were only indirectly alluded to in public sessions.

In considering the appointment of a Special Rapporteur on Women, the Commission showed minimum cognisance of the lessons it should have learnt. It waited over a year after the appointment of the Special Rapporteur on Prisons, before naming Commissioner Julienne Ondziel-Gnelenga as the third Special Rapporteur. This was surely due to the fact that, although numerous NGOs spoke out in favour of the appointment of a special rapporteur, none came forward with the complete package that PRI had offered. There were no clear terms of reference, funding and an offer of administrative assistance. Indeed, it is a bit mystifying that the Commission appointed Commissioner Ondziel when it did, at the 23rd session, since so much was still lacking.

The impetus might have been provided by the ongoing discussions of a protocol to the African Charter that would address the rights of women. A nearly infinite process of meetings and revisions was under way, and Commissioner Ondziel, along with Commissioner Dankwa, was on the Commission's working group on the subject. The mandate of the Special Rapporteur on Women was defined so that the Rapporteur would study women's rights in Africa. The Rapporteur was also to propose new guidelines on women's rights for the state reporting procedure. The Rapporteur would also assist governments in preparing policies to protect women's rights, and work towards harmonising initiatives on women's rights in Africa. The Rapporteur would furthermore finalise the Draft Protocol on the Rights of Women and report to the Commission.<sup>56</sup>

<sup>56</sup> The full text is as follows:

'1 Conduct a study on the situation of the rights of women in Africa.

Yet, as could have been expected, the experience was all too reminiscent of that of the Special Rapporteur on Extrajudicial Executions. Commissioner Ondziel presented a 'preliminary' report six months after her appointment and then an 'activity report' at the 25th session; but neither of these reports found its way into an activity report of the African Commission. By the 26th session she reported receiving a printer and computer from the International Centre for Human Rights and Democratic Development of Montreal, Canada. She had also undertaken an 'information and awareness' mission to Liberia, funded by Women in Law and Development in Africa (WILDAF).<sup>57</sup> Yet, she had received no budget from the Commission, and no administrative assistance from the Secretariat.

Although Commissioner Ondziel presented her report to the 26th session of the Commission, along with one at the following session, these did not make their way into the Thirteenth Annual Activity Report and thus technically remain restricted documents. While she called upon NGOs to convey to her information on the status of women, no NGO absent from the session would have had any way of knowing about her mandate, although she mentioned using the opportunity of attending sessions and conferences to set up 'focal points' which presumably would feed her information.

In her activity report to the 27th session, held in Algiers in April 2000, she mentions two specific cases of violation of women's rights, both from Zimbabwe, brought to her attention by two NGOs, which she was trying to follow up, although one of them, concerning a woman sentenced to death for murder, was only coincidentally about women.

She also reported that the Montreal-based International Centre for Human Rights and Democratic Development had granted her an additional 30 000 Canadian dollars. Later in the year, the Centre began to pay an assistant, who began work at the Secretariat in Banjul, then

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- 2 Come up with guidelines for the preparation and consideration of States Parties periodic reports on the situation of the rights of women to enable the Commission to achieve enhanced monitoring of the application of the African Charter.
  - 3 Assist African governments in the preparation and implementation of policies of the promotion and protection of women's rights.
  - 4 Work in collaboration with NGOs, other organisations and agencies engaged in the promotion and protection of women's rights with a view to harmonising initiatives on women's rights in Africa. In this regard, the Special Rapporteur shall collaborate with the Special Rapporteur of the United Nations, of the African Commission and of other regional systems.
  - 5 Finalise the drafting of the draft protocol on the rights of women and follow the process of adoption.
  - 6 Report to the Commission as well as any recommendations for the improvement of the situation of women's rights in Africa.'

<sup>57</sup> *Report of Activities of the Special Rapporteur on the Rights of Women in Africa*, 26th ordinary session, DOC/OS/(XXVI)/124.

moved to Lomé to work with Commissioner Ondziel. She reported on two missions, one to Rwanda and one to Burundi, but, in contrast to the lengthy and detailed reports of the Special Rapporteur on Prisons, Commissioner Ondziel's missions merit only a few pages in her overall report and have not been circulated separately.

Commissioner Ondziel was absent from the 28th session, held in Benin in October 2000, although she did send notice to the 28th session that she was resigning her position as Vice-Chairperson, evidence of a growing consensus that being a special rapporteur is incompatible with holding other offices within the Commission.

Interestingly, in a report she specified that the mission of the Special Rapporteur on Women is to extend for four years. However, Commissioner Ondziel's term as commissioner expired this year, and the OAU Assembly of Heads of State and Government did not re-elect her (in July 2001). This could once again reopen the question of whether the Commission may have special rapporteurs who are not members, since Commissioner Ondziel may be willing to continue as Special Rapporteur. Only the Commission's decision at the 30th session in October 2001 will resolve these questions.

## 6 Conclusion

As evidenced by the widely varying experiences described above, attempts of the African Commission to break out of its procedural straitjacket have not always been successful. In reality, it is not so much the African Charter that hampers the African Commission's effectiveness, but lack of resources and, most critical of all, lack of will.

The attempt by the Commission to designate special rapporteurs in order to circumvent the constraints of the institution as a whole can only meet with success where the individual chosen has greater willingness than the Commission to devote energy to the task and to risk states' displeasure. Where this willingness exists, resources can be found and used profitably. Unfortunately, the Commission's choice of special rapporteurs from within its ranks has only highlighted the disparate nature of commissioners' commitment to the institution and human rights in general.

The mechanism of special rapporteurs may thus have a positive impact in the thematic areas for which dedicated rapporteurs happen to be chosen. It will be worse than ineffective where this is not true, merely serving to heighten the cynicism with which the Commission is viewed. Special rapporteurs are thus no panacea. The Commission would do better to try to first ensure the independence of its members, secure sufficient funding for all the activities it would like to undertake, and ensure the administrative capacity of its Secretariat to cater for these.