

# AFRICAN HUMAN RIGHTS LAW JOURNAL

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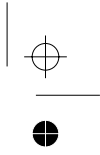
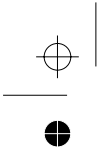
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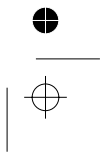
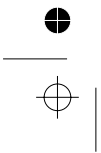
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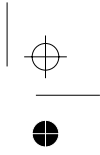
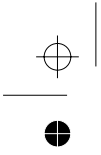
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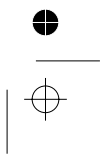
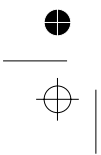
### **THIS JOURNAL SHOULD BE CITED AS (2003) 3 AHRLJ**

#### *African Human Rights Law Journal*

As democratic practices and the protection of human rights struggle to become rooted in Africa, and an African Court of Human and Peoples' Rights is in the process of being established, the *African Human Rights Law Journal* has been launched. There is a more pressing need for a monitoring and reporting periodical in this field in Africa than ever before. The *Journal* aims to publish contributions dealing with human rights related topics of relevance to Africa, Africans and scholars of Africa. In the process, the *African Human Rights Law Journal* hopes to contribute towards an indigenous African jurisprudence. The *Journal* appears twice a year, in March and October.



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Malcolm D Evans and Rachel Murray (eds) *The African Charter on Human and Peoples' Rights. The system in practice, 1986–2000* by Wolfgang Benedek . . . . . 188

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## Editorial

The contributions in this issue underscore the concrete and practical approach of this *Journal* to the African human rights system. Examples are the articles by Onoria and Gumedze, who show how the African Commission can be accessed effectively.

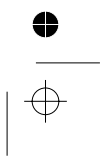
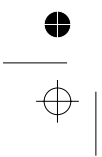
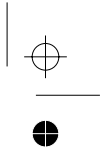
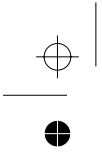
Despite the African Charter being lauded for including socio-economic rights alongside civil and political rights, the jurisprudence of the African Commission remained all but silent on this aspect. With the adoption of the *SERAC* decision, which has been published in the Commission's Fifteenth Annual Activity Report, the Commission found violations of the right to health and to a satisfactory environment, and read into the Charter a number of socio-economic rights. Two contributions review aspects of this decision.

One of the significant developments under the African Union has been the adoption of a Protocol Establishing an African Peace and Security Council. The contribution by Kindiki focuses on the potential role of this institution on a conflict-ridden continent.

The editors thank the following people who acted as referees over the period since the previous issue of the *Journal* appeared: John Barker; Gina Bekker; Jakkie Cilliers; Julia Harrington; Edward Kwakwa; Tiyanjana Maluwa; Gino Naldi; Chidi Odinkalu and EK Quansah.

Many of the sources referred to in this *Journal* (such as the African Charter and the African Charter on the Rights and Welfare of the Child) are reprinted in C Heyns (ed) *Human rights law in Africa 1996* up to *Human rights law in Africa 1999*, cited as eg *Human rights law in Africa 1996* in this *Journal*. These sources are also often available on the website of the Centre for Human Rights, [www.up.ac.za/chr](http://www.up.ac.za/chr).

This issue of the *Journal* should be cited as (2003) 3 *African Human Rights Law Journal*.



# The African Commission on Human and Peoples' Rights and the exhaustion of local remedies under the African Charter

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## SUMMARY

*This article examines the question of the exhaustion of local (or domestic) remedies under article 56(5) of the African Charter on Human and Peoples' Rights. Analysing the jurisprudence of the African Commission on Human and Peoples' Rights, the contribution examines issues involving the availability and effectiveness of local remedies. Attention is given to issues such as exceptions to the requirement to use local recourse in the event of massive violations, the absence of local remedies and 'ouster clauses'.*

## 1 Introduction

The African Charter on Human and Peoples' Rights (African Charter or Charter)<sup>1</sup> has over the past 20 years reflected efforts by a continent to grapple with concerns over human rights. The Charter, as is the case with international and other regional treaties, envisages scrutiny by treaty organs over state conduct that is in violation of human and peoples' rights. The primary organ for monitoring and protecting human (and peoples') rights under the Charter is the African Commission on Human and Peoples' Rights (African Commission or

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<sup>1</sup> African Charter on Human and Peoples' Rights, OAU Doc CAB/LEG/67/3, rev 5, 27 June 1981.

Commission).<sup>2</sup> Under the Charter, the Commission is expected to perform a multiplicity of functions, amongst which is a protectionist role in the form of receiving communications on allegations of violations of human and peoples' rights.<sup>3</sup> Invariably, the performance of this function by the Commission entails scrutiny of incidents and situations obtaining within the domestic legal order of the states that are party to the Charter. Of significance is the fact that the principle that human rights are not the preserve of the 'domestic jurisdiction of states' has been readily admitted and affirmed by the Commission.<sup>4</sup>

However, a critical issue has been the rationale behind the need to allow the domestic legal order the first opportunity to address and remedy any alleged violations of human rights. This issue has been reflected in the criteria for the admissibility of communications and more specifically in the requirement that local remedies must be exhausted. This requirement, which must be met for a communication to be receivable by the Commission, is an explication of a general principle of international law<sup>5</sup> that has since found its way into provisions of the various human rights treaties<sup>6</sup> and ultimately in the jurisprudence of international and regional human rights organs.

Under the African Charter, the exhaustion of local remedies rule is applicable in respect of both communications by state parties and the so-called 'other communications' under articles 47 and 55 respectively. The latter has largely underpinned communications by entities such as individuals and non-governmental organisations (NGOs). With regard to communications by the state parties, article 50 of the Charter provides:

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<sup>2</sup> On the establishment of the African Commission on Human and Peoples' Rights, see art 30 of the African Charter. The primacy and exclusivity of the Commission as the mechanism for protection and enforcement has since been supplemented by a proposed court: See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, adopted in 1998, not yet in force. As of 28 February 2003, six states — Burkina Faso, The Gambia, Mali, Senegal, South Africa and Uganda — had ratified the Protocol.

<sup>3</sup> n 1 above, arts 47 & 55.

<sup>4</sup> Communications 137/94, 139/94, 154/96 & 161/97, *International Pen and Others (on behalf of Saro-Wiwa Jr) v Nigeria (Ken Saro-Wiwa case)*, Twelfth Annual Activity Report, para 116. This contrasts with the European organs that were in the early years dogged by debate and controversy over the so-called 'reserved domain of domestic jurisdiction'. See eg *Belgian Linguistics case (Preliminary Objections)* (1967) EHRR Ser A 16–19.

<sup>5</sup> The rule is and remains the basis of diplomatic protection in international law; eg *Case of Certain Norwegian Loans (France v Norway)* (1957) ICJ Rep 9; *Interhandel case (Switzerland v United States)* (1959) ICJ Rep 6. For a recent postulation of the rule: ILC Draft Articles on State Responsibility, art 44(b) (2001) ILC Rep, GAOR, 56th sess, supp 10, (A/56/10), chap IV.E.1.

<sup>6</sup> On the regional human rights treaties: eg European Convention for the Protection of Human Rights and Fundamental Freedoms, art 35; American Convention on Human Rights, art 46(1)(a).

The Commission can only deal with a matter submitted to it after making sure that all local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged.

In respect of the 'other communications', article 56(5) of the Charter uses almost similar language — these are receivable to be considered by the Commission if they are, *inter alia*, 'sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged'. This rule is further embodied in the Rules of Procedure of the African Commission in respect of communications under article 55 of the Charter.<sup>7</sup> With only one communication having been brought by a state party to date,<sup>8</sup> most of the communications have been those under article 55, and the jurisprudence of the Commission has in effect necessarily been in respect of article 56(5).

This article examines the manner in which the Commission has since construed this significant aspect of its mandate in respect of the protection of human and peoples' rights in Africa. The Commission's conceptualisation of the exhaustion of local remedies rule, as embodied in the Charter, is examined in comparison with the approaches by international and other regional human rights enforcement organs.

## 2 Primacy of the domestic legal order over allegations of violations of human rights

Article 56 of the African Charter — and the Commission in certain decisions — uses the phraseology 'received' and 'receivable' in respect of what is traditionally the criteria for the admissibility of claims in the international plane.<sup>9</sup> Of these criteria, the most pivotal is that of the exhaustion of local remedies. The rationale for the local remedies rule has traditionally been to enable a state to deal with a claim brought against it using the judicial and administrative mechanisms within its domestic

<sup>7</sup> Rules of Procedure of the African Commission on Human and Peoples' Rights, 1995, rule 104(1)(f).

<sup>8</sup> Communication 227/99, *Democratic Republic of the Congo v Burundi, Rwanda and Uganda*. As of 28 February 2003, the communication had not been finalised.

<sup>9</sup> However, the phraseology 'irreceivable' is best applicable to communications brought against states not party to the Charter, while 'inadmissible' to communications that do not satisfy the criteria under art 56. See F Viljoen 'Admissibility under the African Charter' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986–2000* (2002) 61–63. For an overview of issues of admissibility under the Charter, see O Gye-Wado 'The rule of admissibility under the African Charter on Human and Peoples' Rights' (1991) 2 *African Journal of International and Comparative Law* 742; EA Ankumah *The African Commission on Human and Peoples' Rights: Practice and procedures* (1996) 61.

legal order.<sup>10</sup> In *World Organisation against Torture and Others v Zaire*, the Commission stated the *raison d'être* of the rule in the following terms:<sup>11</sup>

The requirement of exhaustion of local remedies is founded on the principle that a government should have notice of human rights violation in order to have the opportunity to remedy such violations before being called before an international body.

In *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia*, the Commission reiterated the import of the rule in similar terms:<sup>12</sup>

The rule requiring the exhaustion of local remedies as a condition of the presentation of an international claim is founded upon, amongst other principles, the contention that the respondent state must first have an opportunity to redress by its own means within the framework of its own domestic legal system, the wrong alleged to have been done to the individual.

In essence, the Commission has taken cognisance of the fact that the intention of the Charter is not to destroy the principle of the sovereignty of states. In light of this fact, the Commission has declared as inadmissible communications that have been filed before or without having exhausted the available local remedies. This has been the case where no 'sufficient information' has been given by a complainant in his or her communication, or in respect of subsequent requests by the Commission, as to the exhaustion of local remedies. In *Dumbaya v The Gambia*, the communication only mentioned the complainant's dismissal from government service and an attempt to seek an explanation from the Public Service Commission. After receiving no response, on two occasions, to requests for further information on the exhaustion of local remedies, the Commission pointedly stated that:<sup>13</sup>

The complainant has failed or neglected to respond to two requests by the Commission for information on whether all local remedies have been exhausted . . . In the circumstances the Commission . . . declare[s] the

<sup>10</sup> See in this regard: *Ambatielos Arbitration (Greece/Great Britain)* (1956) 12 RIAA 83. This rationale has since been affirmed in decisions of the human rights organs, eg under the European system: *De Wilde, Ooms & Versyp v Belgium (No 1)* (1974) 56 ILR 336.

<sup>11</sup> Communications 25/89, 47/90, 56/91 & 100/93, *World Organisation against Torture and Others v Zaire (Zaire mass violations case)*, Ninth Annual Activity Report, para 36.

<sup>12</sup> Communication 71/92, *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia (Zambian expulsion case)*, Tenth Annual Activity Report, para 11.

<sup>13</sup> Communication 127/94, *Dumbaya v The Gambia (Dumbaya case)*, Eighth Annual Activity Report, paras 2 & 3. See also Communication 8/88; *Buyingo v Uganda*, Eighth Annual Activity Report, paras 3 & 4; Communication 43/90, *Union des Scolaires Nigeriens and Another v Niger*, Seventh Annual Activity Report, para 8; Communication 53/91, *Capitao v Tanzania (Capitao case)*, Eighth Annual Activity Report, para 3; Communication 138/94, *International Pen (on behalf of Senn and Another) v Côte d'Ivoire*, Eighth Annual Activity Report, para 3; Communication 201/97, *Egyptian Organisation for Human Rights v Egypt*, Thirteenth Annual Activity Report, para 15; Communication 209/97, *Africa Legal Aid v The Gambia*, Thirteenth Annual Activity Report, para 15; Communication 230/99, *Sakwe v Cameroon*, Fourteenth Annual Activity Report, para 19.

communication inadmissible on account of lack of exhaustion of local remedies.

On the other hand, where there are cases pending before the domestic courts, such communications have been treated as inadmissible. The Commission has in most of such instances been availed information of the pending cases, although at times with no further information as to their status before the domestic courts. It is to be noted that in respect of such communications, the Commission has nonetheless advised that they could be re-submitted after the claims before the domestic courts had taken their course without any satisfactory remedy.<sup>14</sup> More crucially, the Commission has had to reflect upon the wording 'if any' in article 56(5) of the Charter, whose import is that the remedies must be in *existence* or *available* within the domestic legal order. Furthermore, it is necessary that the remedies are not only available but also *effective*.

### 3 Availability and effectiveness of domestic remedies

The exhaustion of local remedies rule requires that the remedies within the national legal order of a state are available and effective. In the *Zambian expulsion* case, the Commission observed that the exhaustion of local remedies rule 'does not mean, however, that complainants are required to exhaust any local remedy which is found to be, as a practical matter, *unavailable* or *ineffective*'.<sup>15</sup> The availability and effectiveness of local remedies has in fact been pronounced upon by the European Court of Human Rights in *De Jong, Baljet & van den Brink v The Netherlands*.<sup>16</sup>

The only remedies which . . . [are required] to be exhausted are those that relate to the breaches alleged and at the same time are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness.

In this regard, the African Commission has on several occasions declared domestic remedies unavailable or ineffective. This has particularly been the case where the remedy was in its view non-judicial or discretionary or its accessibility had been negated by ousting of the jurisdiction of the courts. In *Constitutional Rights Project v Nigeria*, the Robbery and Firearms (Special Provision) Decree of 1984 did not allow for judicial appeals against decisions of a special tribunal, but left the sentences of

<sup>14</sup> *Capitao case* (n 13 above) para 3. See also Communication 198/97, *SOS-Eslaves v Mauritania*, Twelfth Annual Activity Report, para 18.

<sup>15</sup> *Zambian expulsion case* (n 12 above) para 11 (my emphasis).

<sup>16</sup> *De Jong, Baljet & van den Brink v The Netherlands* (1984) 8 EHRR 20, para 39. This pronouncement has since been adopted *verbatim* by the African Commission in one of its decisions, Communications 147/95 & 149/96 *Jawara v The Gambia* (*Gambian coup case*), Thirteenth Annual Activity Report, para 35.

the tribunal subject to confirmation or disallowance by the governor of a state. The Commission considered this remedy as discretionary and non-judicial and therefore not one of a nature that required exhaustion for its attendant lack of effectiveness:<sup>17</sup>

The Robbery and Firearms Act entitles the Governor of a state to confirm or disallow the conviction of the Special Tribunal . . . This power is to be described as a discretionary extraordinary remedy of a non judicial nature. The object of the remedy is to obtain a favour and not to vindicate a right. It would be improper to insist on the complainants seeking remedies from sources which do not operate impartially and have no obligation to decide according to legal principles. The remedy is neither adequate nor effective . . . Therefore, the Commission is of the opinion that the remedy available is not of a nature that requires exhaustion according to article 56, paragraph 5 of the African Charter.

In *Achuthan and Another (on behalf of Banda and Others) v Malawi*, the likely remedy was also regarded as largely discretionary where the complainant, Aleke Banda, was being held on executive orders of the head of state.<sup>18</sup> In another case, that of *Courson v Equatorial Guinea*, although an appeal had been lodged, the fact that the victim had been granted amnesty led the Commission to conclude that 'it appears most unlikely for any domestic court to entertain this appeal as this would only be a purely theoretical exercise'.<sup>19</sup> Further, in *Avocats Sans Frontières (on behalf of Bwampamye) v Burundi*, in response to the argument by the state party that the complainant had not exhausted other remedies including the plea for pardon, the Commission remarked that a '[pardon] is not a judicial remedy'.<sup>20</sup> What is therefore apparent from the

<sup>17</sup> Communication 60/91, *Constitutional Rights Project (in respect of Akamu and Others) v Nigeria (Robbery and Firearms Decree case)*, Eighth Annual Activity Report, paras 9–11. The Commission took a similar view in the case of Communication 87/93, *Constitutional Rights Project (in respect of Lekwot & Others) v Nigeria*, Eighth Annual Activity Report, regarding the Civil Disturbances (Special Tribunal) Act of 1987 under which the Armed Forces Ruling Council was empowered to confirm or disallow penalties of a special tribunal; paras 6–9. See also Communication 151/96, *Civil Liberties Organisation v Nigeria*, Thirteenth Annual Activity Report, paras 11–16.

<sup>18</sup> Communication 64/92, 68/92 & 78/92, *Achutan (on behalf of Banda) and Another (on behalf of Chirwa and Another) (Chirwa case)*, Eighth Annual Activity Report, para 1.

<sup>19</sup> Communication 144/95, *Courson v Equatorial Guinea*, Eleventh Annual Activity Report, para 16. Notably, the Commission determined that no violation of the Charter had occurred as it had not been provided with 'sufficient enough information' to that effect. Whether the grant of amnesty itself foreclosed a claim for damages as an appropriate remedy to the victim has been questioned, see I Osterdahl *Implementing human rights in Africa: The African Commission on Human and Peoples' Rights and individual communications* (2002) 84. In a subsequent decision, the Commission considered an amnesty law adopted by the Mauritanian legislature as foreclosing 'suits or other actions seeking redress that may be filed by the victims or their beneficiaries': Communication 54/91, 61/91, 98/93, 164/97 & 210/98, *Malawi African Association and Others v Mauritania (Mauritan widows case)*, Thirteenth Annual Activity Report, para 83 (my emphasis).

<sup>20</sup> Communication 231/99, *Avocats Sans Frontières (on behalf of Bwampamye) v Burundi (Burundian fair trial case)*, Fourteenth Annual Activity Report, para 23.



jurisprudence of the Commission is that, for the domestic remedy to be effective, firstly, it must be of a 'judicial' nature and must be founded upon 'legal' principles. Secondly, it is evident that any influence or intervention on the part of the executive organ of the state party renders an otherwise available domestic remedy ineffective. These two aspects have since been clearly stated in *Amnesty International and Others v Sudan* where the Commission observed that:<sup>21</sup>

In a case of violations against identified victims, the Commission demands the exhaustion of all internal remedies, if any, if they are of a *judicial nature*, are effective and are not subordinated to the *discretionary power* of public authorities.

Thirdly, it is evident that the Commission adopts an objective test in determining whether domestic remedies exist and are effective, rather than a subjective test based on the perception of the complainant as to the existence or effectiveness of those remedies — thus its reluctance to pronounce on the non-effectiveness of the local remedies in the *Kenya Human Rights Commission v Kenya*.<sup>22</sup>

The inaccessibility of domestic remedies as a result of the ouster of the jurisdiction of the courts was considered in the 1991 case of *Civil Liberties Organisation v Nigeria*,<sup>23</sup> where the State Security and Detention of Persons Decree granted immunity from legal proceedings before the courts for human rights violations arising from anything done in pursuance of the decree. The local remedies rule invariably applies to remedies that are available and effective but further, in terms of article 56(5) of the Charter, whose procedure is not unduly prolonged. This is a facet of the rule requiring an individual to utilise the procedures that exist for the obtaining of a remedy unless it is evidently *futile* or *prolonged* to do so. The Commission has, in certain cases, considered the ouster clauses in domestic legislation as rendering local remedies not only likely to be *ineffective* but also *unduly prolonged*. In a subsequent 1994 case of *Civil Liberties Organisation v Nigeria*, the Commission took this view on the ousting of the jurisdiction of courts by the Political Parties (Dissolution) Decree of 1993:<sup>24</sup>

The communication meets all the specifications for admissibility set out in Article 56 of the Charter. With specific reference to Article 56(5), the

<sup>21</sup> Communication 48/90, 50/91, 52/91 & 89/93, *Amnesty International and Others v Sudan* (*Sudan detention without trial case*), Thirteenth Annual Activity Report, para 31 (my emphasis).

<sup>22</sup> Communication 135/94 (*Kenya Human Rights Commission case*), Ninth Annual Activity Report, para 16. On the objective test applied by the African Commission and other human rights bodies in determining the existence and effectiveness of local remedies, see Viljoen (n 9 above) 85–86.

<sup>23</sup> Communication 67/91, *Civil Liberties Organisation v Nigeria*, Seventh Annual Activity Report.

<sup>24</sup> Communication 129/94, *Civil Liberties Organisation v Nigeria* (*Nigerian legality of decrees case*), Ninth Annual Activity Report, para 9.

Commission accepted the complainant's argument that since the decrees complained of ousted the jurisdiction of the courts to adjudicate their validity, 'it is reasonable to presume that domestic remedies will not only be prolonged but are certain to yield no results'.

Noticeably, most of the cases involving ouster of the jurisdiction of the courts have been those brought against Nigeria. These cases demonstrate the tendency among African governments, especially military regimes, to trample upon the rights of citizens, particularly the freedoms of expression, assembly and association and the right to a fair trial, through legislative deprivation of any remedial recourse to the courts.<sup>25</sup> In the subsequent cases brought against Nigeria, the Commission has observed that ouster clauses rendered domestic remedies 'non-existent, ineffective or illegal or illusory', and did 'create a legal situation in which the judiciary can provide no check on the executive branch of government'.<sup>26</sup> In the *Nigerian media* case, the Commission took cognisance of the fact that the Newspaper Decree of 1993 had been declared null and void by the Lagos state courts, which decisions were not respected by the Nigerian government.<sup>27</sup> The Commission observed:<sup>28</sup> '[t]his is a dramatic illustration of the futility of seeking a remedy from the Nigerian courts'. The ouster clauses have had the effect of removing the power of the courts to review the decrees of the military regime in Nigeria or, more specifically, the power of the courts to grant judicial remedies. In another case against Nigeria, the Commission observed that the effect of the State Security (Detention of Persons) Amended Decree of 1994 was to prohibit courts in Nigeria from issuing a writ of *habeas corpus* — the Commission thus concluded that 'even the remedy of *habeas corpus* does not exist'.<sup>29</sup> In more recent decisions, the Commission took

<sup>25</sup> Account of Internal Legislation of Nigeria and the Dispositions of the African Charter on Human and Peoples' Rights, second extraordinary session, Kampala, 18–19 December 1995, Doc II/ES/ACHPR/4.

<sup>26</sup> *Ken Saro-Wiwa* case (n 4 above) para 76. See also Communications 105/93, 128/94, 130/94 & 152/96, *Media Rights Agenda and Others v Nigeria* (*Nigerian media* case), Twelfth Annual Activity Report, para 50; Communication 102/93, *Constitutional Rights Project and Another v Nigeria*, Twelfth Annual Activity Report, para 41; Communications 140/94, 141/94 & 145/95, *Constitutional Rights Project and Others v Nigeria*, Thirteenth Annual Activity Report, paras 29, 31; Communications 143/95 & 150/96, *Constitutional Rights Project and Another v Nigeria* (*Nigerian habeas corpus case*), Thirteenth Annual Activity Report, para 18; Communication 151/96, *Civil Liberties Organisation v Nigeria*, Thirteenth Annual Activity Report, para 14.

<sup>27</sup> n 26 above, paras 50–51.

<sup>28</sup> As above, para 51. For an exposition of the futility of orders of the courts in Nigeria, see M Ongungbe 'Ouster clauses and disobedience of court orders in Nigeria: A judicial impediment' (1999) 5(2) *East African Journal of Peace and Human Rights* 196.

<sup>29</sup> Communication 153/96, *Constitutional Rights Project v Nigeria* (*Nigerian detention without trial* case), Thirteenth Annual Activity Report, paras 9–10. In Communication 148/96, *Constitutional Rights Project v Nigeria*, Thirteenth Annual Activity Report, it was noted by the Commission that 'no matter how meritorious the victims' case for freedom may be the courts cannot entertain it [as their jurisdiction was ousted]': para 11.

constructive notice of the prevailing situation under the military regime in Nigeria, which had occasioned 'lack of *available* and *effective* domestic remedies for human rights violations in Nigeria',<sup>30</sup> and to that end, it has deemed it not 'proper to insist on the fulfilment of this requirement [on the exhaustion of local remedies]'.<sup>31</sup>

In spite of the subsequent transition to democratic governance in Nigeria, the nemesis of ouster clauses remained resilient, with the phenomenon since being manifested in the constitutional legal framework. The new federal Constitution of 1999 provides that no legal action can be brought to challenge 'any existing law made on or after 15 January 1966 for determining any issue or question as to the competence of any authority or person to make any such law'.<sup>32</sup> In response to this new manifestation of the ouster clause within the constitutional legal framework itself, the Commission has remarked: '[t]his means that there is no recourse within the Nigerian legal system for challenging the legality of any unjust laws', and in that regard, concluded that 'there were no avenues for exhausting local remedies'.<sup>33</sup> The major significance though is the fact that these cases reflect a deliberate and flagrant adoption of legislative measures by a state party to negate, rather than give effect, to the substantive rights enshrined in the African Charter.<sup>34</sup> It may be pointed out that in all these cases, after a determination on the inapplicability of the exhaustion of local remedies rule, the Commission went on to find the state party, Nigeria, to be in violation of the substantive rights and freedoms under the Charter.<sup>35</sup>

Overall, the ouster clauses have had the effect of denying or preventing access by the individual to the remedies under domestic law

<sup>30</sup> Communication 215/98, *Rights International v Nigeria (Nigerian torture case)*, Thirteenth Annual Activity Report, para 23 (my emphasis).

<sup>31</sup> Communication 205/97, *Aminu v Nigeria (Aminu case)*, Thirteenth Annual Activity Report, para 13; Communication 155/96, *The Social and Economic Rights Action Center and Another v Nigeria*, Fifteenth Annual Activity Report, para 41. These cases were decided after the *Nigerian torture case* (n 30 above).

<sup>32</sup> Constitution of the Federal Republic of Nigeria, 1999, art 6(6)(d).

<sup>33</sup> Communication 218/98, *Civil Liberties Organisation and Others v Nigeria*, Fourteenth Annual Activity Report, para 23; Communication 224/98, *Nigeria Rights Agenda v Nigeria (Editor of 'The Diet' case)*; Communication 225/98, *Huri-Laws v Nigeria (Civil Liberties Organisation case)*, Fourteenth Annual Activity Report, paras 38–39.

<sup>34</sup> This would in itself be in contravention of the spirit of art 1 of the Charter.

<sup>35</sup> See eg *Robbery and Firearms Decree case* (n 17 above), the Commission considered the ouster of jurisdiction of the courts as a violation of the 'right to appeal to a competent court' guaranteed under art 7(1) as well as leaving un-redressed the rights to life and liberty under arts 4 and 6 due to the non-access to the courts (n 17 above paras 13 & 14). In the *Legality of Decrees case*, the ouster was similarly held to violate art 7(1) (paras 16–20). In the *Nigerian media case* the Commission found a violation of art 7(1) as well as art 9 (para 82). In Communication 206/97, *Centre for Free Speech v Nigeria* (case, a violation of arts 6 and 7 was found by the Commission (paras 11–16).

by making them unavailable and non-existent.<sup>36</sup> The Commission has since defined the criteria for the application of the local remedies rule as entailing the remedy being 'available, effective and sufficient'.<sup>37</sup> Of these criteria, the Commission has explained that:<sup>38</sup>

[a] remedy is considered *available* if the petitioner can pursue it without impediment, it is deemed *effective* if it offers a prospect of success, and it is found *sufficient* if it is capable of redressing the complaint.

In light of these criteria, the Commission considers the ouster clauses as negating the availability and effectiveness of local remedies:<sup>39</sup>

[A] remedy is considered *available* only if the applicant can make use of it in the circumstance of his case . . . [R]emedies, the *availability* of which is not evident, cannot be invoked by the State to the detriment of the complainant. Therefore, in a situation where the jurisdiction of the courts have been ousted by decrees whose validity cannot be challenged or questioned, as is the position with the case under consideration, local remedies are deemed not only to be *unavailable* but also *non-existent*.

It can be said that the inaccessibility of remedies in the national legal orders as a result of ouster clauses and the creation of special tribunals has coincided with the Commission's finding of violations of the right to a fair trial guaranteed under article 7 of the Charter and, in a number of communications, a failure to secure independent and competent national organs as required under article 26 of the Charter. With regard to article 26 of the Charter, the Commission has regarded ouster clauses in domestic laws to constitute a failure to afford protection [to] the courts as *institutions* which give meaning and content to the *right to access national remedies* and which 'have traditionally been the bastion of protection of individual's rights against abuses of state power'.<sup>40</sup>

On the other hand, the Commission has been confronted with instances where a complainant has been *prevented* from utilising local remedies owing to non-legal factors such as flight from the territory of a state party, which renders it physically dangerous for the complainant to return and bring an action before the courts of the country of flight. In such instances, the Commission has declared remedies to be unavailable and the local remedies rule to be inapplicable. In *Abubakar v Ghana*, the complainant, a Ghanaian citizen resident in Côte d'Ivoire claimed

<sup>36</sup> In effect, the Commission's jurisprudence seems to have come close to an exception specifically stipulated under art 46(2) of the American Convention which provides that the local remedies rule would not be applicable where ' . . . (b) the party alleging violation of his rights has been *denied* access to the remedies under domestic law or has been *prevented* from exhausting them' (my emphasis).

<sup>37</sup> *Gambian coup* case (n 16 above) para 31.

<sup>38</sup> As above, para 32 (original italics). See also the *Sudan detention without trial* case (n 21 above) para 37.

<sup>39</sup> As above, paras 33–4, 38 (my emphasis).

<sup>40</sup> *Nigerian legality of decrees* case (n 24 above) para 15 (my emphasis). See also *Civil Liberties Organisation* case (n 33 above) paras 45–46.

inability to return to Ghana for fear of persecution. The Commission treated his situation as one in which the complainant was prevented from utilising local remedies:<sup>41</sup>

In this case, the complainant is residing outside the State against which the communication is addressed and thus where the remedies would be available. He escaped to Côte d'Ivoire from prison in Ghana and has not returned there. Considering the nature of the complaint, it would not be logical to ask the complainant to go back to Ghana in order to seek a remedy from national legal authorities. Accordingly, the Commission does not consider that local remedies are available for the complainant.

In the *Gambian coup* case, the complainant, a former head of state, could not return in the wake of his overthrow and trial *in absentia* and a general situation of terror and intimidation obtaining in The Gambia. In light of these facts, the Commission remarked that:<sup>42</sup>

[I]f the applicant can not turn to the judiciary of his country because of generalised fear for his life (or even those of his relatives), local remedies would be considered to be unavailable to him . . . The complainant in this case had been overthrown by the military, he was tried *in absentia*, former Ministers and Members of Parliament of his government have been detained and there was terror and fear for lives in the country. It would be an affront to common sense and logic to require the complainant to return to his country to exhaust local remedies . . . There is no doubt that there was a generalised fear perpetrated by the regime as alleged by the complainant. This created an atmosphere not only in the mind of the author but also in the minds of right thinking people that returning to his country at that material moment, for whatever reason, would be risky to his life. Under such circumstances, domestic remedies cannot be said to have been available to the complainant.

In situations where there is no adequate or effective remedy available to a complainant, the Commission has since considered there to have been a *constructive* exhaustion of domestic remedies. In the *Nigerian torture* case, the Commission found Mr Wiwa's inability to pursue any local remedies following his flight for fear of his life to Benin and subsequent grant of refugee status to him by the United States to satisfy the standard for constructive exhaustion of domestic remedies.<sup>43</sup> The Commission took a similar stance in *Ouko v Kenya* where the complainant's flight followed persecution for his political views and student activities at University of Nairobi, and for which he ended up being granted refugee status in the Democratic Republic of Congo. Regarding the exhaustion of local remedies, the Commission stated:<sup>44</sup>

[T]he complainant is unable to pursue any domestic remedy following his flight to the Democratic Republic of Congo for fear of his life, and his subsequent recognition as a refugee by the Office of the United Nations High Commissioner for Refugees. The Commission therefore declare[s] the

<sup>41</sup> Communication 103/93, *Abubakar v Ghana*, Tenth Annual Activity Report, para 6.

<sup>42</sup> n 16 above, paras 35–7.

<sup>43</sup> *Nigerian torture* case (n 30 above) para 24. See also *Aminu* case (n 31 above) para 13.

<sup>44</sup> Communication 232/99, *Ouko v Kenya*, Fourteenth Annual Activity Report, para 19.

communication admissible based on the principle of constructive exhaustion of local remedies.

Furthermore, the Commission has taken a similar stance in situations involving deportation of complainants from the territory of a state party. This was a view it took regarding the exhaustion of local remedies in *Amnesty International v Zambia*, where Chinula, at the time deported to Malawi, was prevented from returning to Zambia by threats of imprisonment, and was in effect outside the territory of the state party.<sup>45</sup> The Commission observed that Chinula's arbitrary deportation by Zambia 'prevented him from exercising this right' of exhausting domestic remedies.<sup>46</sup> Similarly, in *Modise v Botswana*, the Commission considered the legal process (for exhaustion of local remedies) wilfully *obstructed* by the government's repeated deportation of the complainant.<sup>47</sup>

However, in its subsequent decisions, the Commission seems to draw a distinction between the situations of *flight on account of persecution* and *deportation* of complainants. In the former, it seems the Commission is willing to admit a danger in seeking to exhaust local remedies, while in the latter, it considers that exhaustion can be sought through counsel even though the complainant is outside the territory of a state party. Thus, in *Legal Defence Centre v The Gambia*, in which the victim, a Nigerian, had been deported from The Gambia to Nigeria for allegedly writing newspaper articles critical of Nigeria, the Commission was reluctant to consider the local remedies inaccessible or unavailable, arguing that 'the victim need not be physically in a country to avail himself of the available domestic remedies, such could be done through his counsel'.<sup>48</sup> For it seems that a situation where a complainant is outside the territory of a state party will have the exhaustion of local remedies appreciated in light of the facts of a particular case.

Although somewhat in a related context, the Commission has nonetheless been hesitant to accept the exhaustion of local remedies rule on account of indigence of a complainant. In its view, the Commission considers that making such an exception would open floodgates of claims being taken direct to the Commission on the

<sup>45</sup> Communication 212/98, *Amnesty International v Zambia* (*Zambian deportation case*), Twelfth Annual Activity Report, para 7.

<sup>46</sup> As above, para 29 (my emphasis).

<sup>47</sup> Communication 97/93, *Modise v Botswana* (2), Tenth Annual Activity Report, para 20 (decision of the Commission at first determination of communication in April 1997). The *inaccessibility* of local remedies on account of detentions and subsequent expulsions of complainants from the territory of a state party has been upheld in other decisions: *Zambian mass expulsion case* (n 12 above) See also Communication 159/96, *Union Inter Africaine des Droits de l'Homme and Others v Angola*, Eleventh Annual Activity Report, para 12.

<sup>48</sup> Communication 219/98, *Legal Defence Centre v The Gambia*, Thirteenth Annual Activity Report, para 17.

grounds that the complainants are indigent. This is notwithstanding that, in Africa, the financial aspects of litigation remains a major constraint as regards the commencement of legal proceedings before domestic courts for the majority of litigants. This is more so in the face of weak or non-existent legal aid schemes in most African states.<sup>49</sup> Thus, in *Africa Legal Aid v The Gambia*, the Commission refused to accept the argument that the victim's lack of financial means should be a basis for exempting the requirement to exhaust local remedies.<sup>50</sup> Given that the majority of the cases that have come before the Commission have been initiated by NGOs, the reasoning of the Commission seems to suggest that in respect of such communications, the question of indigence of the complainant should not arise, and presupposes that the NGOs are financially secure.<sup>51</sup> However, it does not dispose off the question of whether a communication personally brought by an individual who is indigent is to be exempted from the requirement to exhaust local remedies.<sup>52</sup>

#### 4 Demonstration of efforts to exhaust domestic remedies alleged to be ineffective

Although the exhaustion of local remedies rule requires that the remedies be available and effective, it is not entirely sufficient for a claimant to merely allege that the available remedies are futile or ineffective without having made an attempt to exhaust them. In this regard, in its interpretation of the rule in article 56(5) of the African Charter, the Commission has required that a complainant demonstrate

<sup>49</sup> On the problem of legal aid, see AS Butler 'Legal aid before human rights treaty monitoring bodies' (2000) 49 *International and Comparative Law Quarterly* 360. It is to be noted that in the *Zambian expulsion* case, the Commission rejected Zambia's claim that the victims were at fault not to take advantage of the legal aid system, noting that since it was alleged that they were illegal persons, 'they would not be eligible for legal aid' (n 12 above) para 16.

<sup>50</sup> See Communication 207/97, *Africa Legal Aid v The Gambia*, Fourteenth Annual Activity Report, para 33.

<sup>51</sup> Interestingly, in the *Civil Liberties Organisation* case (n 33 above), the NGO which presented the communication was unable to attend the session of the Commission when the communication was being considered due to lack of funds; Osterdahl (n 19 above) 72.

<sup>52</sup> Notably, in the Inter-American context, indigence has been taken to exempt the requirement to exhaust local remedies: Exceptions to the Exhaustion of Domestic Remedies (Arts 46(1), 46(2)(a) and 46(2)(b) of the American Convention on Human Rights), Inter-American Court of Human Rights, Advisory Opinion OC-11/90, Ser A No 11, 10 August 1990. Similarly, in the European context, the high costs of legal procedures and poor financial position of a complainant has been a ground for exempting application of the local remedies rule: *X v Federal Republic of Germany* (1955-7) EHRyBk 139.

serious efforts to exhaust the local remedies. Thus, in *Manjang v The Gambia*,<sup>53</sup> the complainant, who alleged that he had been wrongfully detained at an airport, merely stated in his communication that the possibilities of remedies were 'very little and improbable'. The Commission regarded the lack of efforts towards exhaustion of local remedies as inexcusable, thus rendering the communication inadmissible.<sup>54</sup>

In *Ceesay v The Gambia*, there was no effort made by the complainant to pursue domestic remedies after he was charged with mutiny and subsequently dismissed from the Gambian national army. He contended that a rectification of the violations was not possible under the domestic courts as no action could be brought against the President of The Gambia. This was in fact a veiled attempt at arguing that any local remedies would be 'ineffective'. The Commission declared the communication inadmissible for failure to exhaust local remedies.<sup>55</sup>

In specific instances, the Commission has noted the remarkable efforts put in by a complainant to exhaust domestic remedies. Thus, in *Pagnouille (on behalf of Mazou) v Cameroon*, it observed that submissions and petitions had been made to the Ministry of Justice and the Supreme Court for settlement and reinstatement to employment of the complainant — although such actions failed to yield any results, the Commission held that 'local remedies had been duly exhausted'.<sup>56</sup> This has similarly been the case in *Peoples' Democratic Organisation for Independence and Socialism v The Gambia*;<sup>57</sup> *Legal Resources*

<sup>53</sup> Communication 131/94, *Manjang v The Gambia*, para 1 (version of communication on file with author, information not contained in the Seventh Annual Activity Report).

<sup>54</sup> Similarly, the failure to demonstrate any 'attempt to have recourse to national procedures' by an NGO on behalf of an individual was considered in Communication 92/93, *International Pen v Sudan*, Eighth Annual Activity Report, where the communication only referred to the fact that Sudan had denied the existence of incommunicado detentions — the Commission observed that this 'does not amount to saying that the case has been tried in Sudanese courts' (para 3). See also Communication 73/92, *Diakit  v Gabon*, Thirteenth Annual Activity Report, where the complainant, a national of Mali, never contested before the national courts the order of expulsion that had previously been issued against him since his return to Gabon (para 17).

<sup>55</sup> Communication 86/93, *Ceesay v The Gambia (Ceesay case)*, para 4 (version of communication on file with author, information not contained in the Eighth Annual Activity Report).

<sup>56</sup> Communication 39/90, *Pagnouille (on behalf of Mazou) v Cameroon (Mazou case)*, Tenth Annual Activity Report, para 13.

<sup>57</sup> Communication 44/90, *Peoples' Democratic Organisation for Independence and Socialism v The Gambia (Gambia voters registration case)*, Thirteenth Annual Activity Report, paras 18–20. In this case, several letters and a notice of objection were addressed to, and filed before, the Supervisor of Elections (and a Revising Court) — it was deemed that the local remedies had been exhausted.



*Foundation v Zambia*<sup>58</sup> and in the *Burundian fair trial case*.<sup>59</sup> Notably, it has been argued that in such situations, it may be useful as a practical matter to have copies of the relevant national decisions attached to communications.<sup>60</sup>

There is a specific concern raised by the Commission's decision in the *Ceesay* case above regarding the burden of proof (and upon whom it falls) as to the effectiveness or otherwise of the domestic remedies alleged to exist.<sup>61</sup> The general position in international law is to place the burden on whoever alleges a fact — thus a state pointing to some form of redress, which it claims should have been pursued, has to establish or prove that the remedy is in fact *effective* in the particular case. In respect of human rights, the onus is placed upon the state party to prove that the local remedies it alleges to exist within its domestic legal order are effective.<sup>62</sup> In the *Zambian expulsion case*, the Commission observed in respect of Zambia's contention that there were in fact remedies that had not been exhausted:<sup>63</sup>

When the Zambian government argues that the communication must be declared inadmissible because the local remedies have not been exhausted, the government then has the *burden of demonstrating* the existence of such remedies. The government of Zambia attempts to do so by referring to the Immigration and Deportation Act which provides for expulsion orders . . . The question is therefore whether, in the circumstances alleged, the Immigration and Deportation Act constitutes an *effective* and *adequate* remedy in respect to the complaints.

In light of the 'circumstances' of the mass and speedy character of the arrest and expulsion of the victims, which in fact deprived them of an opportunity to challenge the arrests and expulsions under the Immigration and Deportation Act, the Commission concluded:<sup>64</sup>

For complainants to contact their families, much less attorneys, was not possible. Thus the recourse referred to by the government under the Immigration and Deportation Act was as a practical matter not *available* to the complainants.

<sup>58</sup> Communication 211/98, *Legal Resources Foundation v Zambia*, Fourteenth Annual Activity Report, para 9 — the matter had been taken as far as the Supreme Court of Zambia.

<sup>59</sup> n 20 above, para 21 — the victim, who was sentenced to death, had appealed to the Ngozi Court of Appeal and the Burundi Supreme Court. The Commission noted that 'the domestic remedies have been duly exhausted'.

<sup>60</sup> Viljoen (n 9 above) 83. In the *Zambian deportation case* (n 45 above), decisions on suits and applications filed by Banda before courts in Malawi and Zambia from 1991–1995 were made available to the Commission, para 29.

<sup>61</sup> n 55 above (version of communication on file with author, information not contained in the Eighth Annual Activity Report).

<sup>62</sup> This position is evident in the decision of the European Court of Human Rights in the *De Jong, Baljet & van den Brink case* (n 16 above) para 39.

<sup>63</sup> *Zambian expulsion case* (n 12 above) paras 12–13 (my emphasis).

<sup>64</sup> As above, para 14 (my emphasis).

Thus, if it was indeed the fact, as alleged in the *Ceesay* case that the remedy in the circumstances could only be sought against the President, and that no such action could prevail under the national constitution, then any alleged local remedies should have been considered as 'ineffective'. The burden should then have been placed upon the state party, The Gambia, to prove that there are actually remedies in *existence* and that they are *effective*. In Africa, where there is a tendency to shelter acts of the government and its officials behind all manner of legal and political immunities, it may be imperative to place a stricter burden upon the state party to prove not only the existence of local remedies but also of their accessibility and effectiveness. The Commission has therefore in this case and others not addressed in a very satisfactory manner the element of the burden of proof.

## 5 Serious or massive violations of human rights as an exception to local remedies rule

The general exception to the exhaustion of local remedies rule in human rights treaties is the unavailability and ineffectiveness of remedies or that their procedures are likely to be unduly prolonged. Nonetheless, the notion of 'serious' or 'massive' violations as an exception to the applicability of the rule has since evolved in the jurisprudence of human rights organs. This is notwithstanding that it is not expressly spelt out in the provisions of the various human rights instruments as an exception to the rule. While the African Charter and its organ, the Commission, employ the phraseology 'serious' or 'massive' violations, the European system defers to the concept of 'a practice'. The rationale of the exception is premised upon the fact that the human rights organs are called upon to determine the general compatibility of the acts or conduct of the state party with its international obligations and to ensure cessation and non-recurrence of violations.<sup>65</sup> In this regard, the European Court of Human Rights observed in *Ireland v United Kingdom*:<sup>66</sup>

The concept of practice is of particular importance for the operation of the rule of exhaustion of domestic remedies. This rule, as embodied in article 26 of the Convention, applies to state applications, in the same way as it does to 'individual' applications, when the applicant state does no more than denounce a violation or violations allegedly suffered by 'individuals' whose place, as it were, is taken by the state. On the other hand and in principle, the rule does not apply where the applicant state complains of a practice as such, with the aim of preventing its continuation or recurrence, but does not ask the Commission or the Court to give a decision on each of the cases put forward as proof or illustrations of that practice.

<sup>65</sup> *Ireland v United Kingdom* [1978] 2 EHRR 25, para 159.

<sup>66</sup> As above.

Notably, the European Court observed that '[i]t is inconceivable that the higher authorities of a state should be, or at least should be entitled to be, unaware of the existence of such a practice'.<sup>67</sup> In the same vein, in a number of cases, the African Commission has declared the admissibility requirements under the African Charter met, including the exhaustion of local remedies, where *serious* or *massive* violations have occurred. The Commission has premised its decision upon the fact that, in view of the import of the local remedies rule being *notice* to the government of a state party, in such situations of *serious* or *massive* violations, the state has had *ample notice* of such violations.<sup>68</sup> The premise for the presumption of *ample notice* of the violations of the part of the state party arises from the fact that such situations involve numerous victims and violation of several rights. Further, the *ample notice* of human rights violations may arise from the international and national attention given to the situation in the territory of a state party. Thus, in the *Sudan detention without trial case*, the Commission observed that:<sup>69</sup>

In the cases under consideration, the government of Sudan has not been unaware of the serious human rights situation existing in that country. For nearly a decade the domestic situation has focused national and international attention on Sudan. Many of the alleged violations are directly connected to the new national laws in force in the country in the period covered by these communications. Even where no domestic legal action has been brought by the alleged victims, the government has been sufficiently aware to the extent that it can be presumed to know the situation prevailing within its own territory as well as the content of its international obligations.

Additionally, the Commission has observed that in such situations, it would be very impractical for each victim of the violations to present a claim before the domestic courts.

It can thus be said that the Commission has given new dimensions to the rationale of the 'practice' or 'serious violations' exception to the exhaustion of local remedies rule. Noticeably, the African Charter requires that where there is evidence of serious violations, the Commission should bring such a situation to the attention of the Assembly of Heads of State and Government.<sup>70</sup> This was the decision that the Commission took in *Lawyers Committee for Human Rights v Zaire*.<sup>71</sup>

<sup>67</sup> As above.

<sup>68</sup> *Zaire mass violations case* (n 11 above). The Commission made this observation on the basis that additionally, in respect of certain of the several communications, victims had protested to the government of Zaire or had approached national courts without result: para 55.

<sup>69</sup> n 21 above, para 33. See also the *Mauritian widows case* (n 19 above) para 81.

<sup>70</sup> Art 58 African Charter.

<sup>71</sup> Communication 47/90, *Lawyers Committee for Human Rights v Zaire*, Seventh Annual Activity Report, para 1. See also the *Zaire mass violations case* (n 11 above) para 15.

## 6 Length of time taken by complainant's claim before the domestic courts

It is noticeable that the Commission has regarded ouster clauses in domestic legislation and situations of serious or massive violations as likely to result in domestic remedies being *unduly prolonged*. However, it has also considered the question of the unavailability of local remedies where the procedure is unduly prolonged owing to the length of time taken before the domestic courts. In *Mouvement Burkinabé des droits de l'Homme et des Peuples v Burkina Faso*, where some of the victims had spent as long as 15 years trying to obtain redress for violations arising from disappearances and assassinations before the national courts without any success, the Commission implicitly admitted that the domestic remedies were unduly prolonged.<sup>72</sup> Interestingly, the Commission's views in the *Modise* case were a little baffling in some respects. The facts show that the complainant had sought recognition of his status as a Botswana citizen by birth before the national courts for over 16 years prior to filing a communication with the Commission.<sup>73</sup> Although in the end the Commission concerned itself with the fact of wilful obstruction of national legal procedures by Botswana through repeated deportations of the complainant,<sup>74</sup> the pronouncement that 'if issues related to the acquisition of full citizenship are not resolved by *competent domestic judicial authorities* Mr Modise can resort once more to the Commission'<sup>75</sup> is baffling. After battling for 16 years before domestic courts to establish his claim to citizenship by birth without success, what good would be achieved by referring the complainant to the same institutions?<sup>76</sup>

The Commission seems to take the view that the 'unduly prolonged' nature of local remedies is to be determined from the moment of initiation of local proceedings before national courts and submission of a communication to the Commission. However, it has been argued that it may be 'relevant to consider whether local remedies have not yet been exhausted at the time the Commission considers the communication (especially if the complainant has kept on trying to exhaust local remedies, after submission of the communication)'.<sup>77</sup> This is especially

<sup>72</sup> Communication 204/97, *Mouvement Burkinabé des droits de l'Homme et des Peuples v Burkina Faso*, Fourteenth Annual Activity Report, paras 4, 14 & 36.

<sup>73</sup> *Modise* case (n 47 above) para 20.

<sup>74</sup> As above.

<sup>75</sup> As above, para 40 (my emphasis).

<sup>76</sup> In the end, this resulted in the re-opening of the case that was first determined in April 1997 for further determination in October–November 2000. See Fourteenth Annual Activity Report.

<sup>77</sup> Viljoen (n 9 above) 91.

so where, as in the early communications, the Commission took inordinately long periods before rendering decisions on admissibility with regard to the exhaustion of local remedies.<sup>78</sup>

## 7 Nature and scope of domestic remedies to be exhausted

Traditionally, under international law, it has been the requirement that a claimant must exhaust all the judicial and administrative remedies that are available within the domestic legal order before engaging international tribunals.<sup>79</sup> The remedies must be judicial in character and capable of being premised upon or determined along legal principles. Therefore local remedies that are essentially *non-judicial* or *discretionary* are not the kind envisaged by the rule.<sup>80</sup> More significant is whether a quasi-judicial remedy is to be regarded a remedy for the purposes of the rule. In interpreting the rule under article 56(5) of the Charter, the Commission has pointed out that a complainant must make use of the available remedies of a 'judicial nature', and that recourse to certain quasi-judicial procedures without any effort to seize traditional courts left local remedies un-exhausted. In *Cudjoe v Ghana*, the complainant approached only the Ghana Commission on Human Rights and Administrative Justice, which upheld his claim. However, the

<sup>78</sup> See eg the *Modise* case (n 47 above) where the Commission rendered its decision on the exhaustion of local remedies five years after the filing of the communication in 1992. In any event the Commission found the repeated deportations of the complainant an obstruction to the exhaustion of local remedies (rather than the 16 years that his claim had been before the courts). In the *Diakité* case (n 62 above), where the communication was filed in 1992, the Commission rendered its decision on exhaustion of local remedies eight years later in May 2000. In the end, the complainant was found not to have at any time contested the order of expulsion issued against him before the national courts in Gabon. In the *Sudan detention without trial* case (n 21 above), the communication was filed in 1990 and a determination on admissibility was only made in 2000. Eventually, local remedies were deemed foreclosed and unavailable. Notably, in the *Kenya Human Rights Commission* case (n 22 above), the Commission not only regarded the passage of two months not to constitute 'undue delay' but found, as a fact, that the cases before the High Court of Kenya were 'still pending', while in Communication 220/98, *Law Offices of Ghazi Suleiman v Sudan*, Fifteenth Annual Activity Report, the Commission found no indication of proceedings having been instituted before the domestic courts.

<sup>79</sup> See Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, 1961, art 19 (claimant to employ all *administrative, arbitral and judicial remedies*); *Salem* case (Egypt/United States) (1932) 2 RIAA 1161 (claimant to have brought suit to the highest instance of *national judiciary*).

<sup>80</sup> In the *Salem* case, the arbitral tribunal regarded the 'recours en requête civile' not to be a regular legal remedy. On the other hand, the European organs considered the Danish Special Court of Revision, although an extraordinary remedy, as one that had to be exhausted: *Nielsen* case (1958-9) 2 YBECHR 413 436.

government refused to comply with the decision that was handed down. The Commission noted that there had been a failure to exhaust domestic remedies:<sup>81</sup>

For, it should be clearly stated, the internal remedy to which article 56.5 refers entails remedy sought from courts of a judicial nature, which the Ghanaian Human Rights Commission is clearly not. From the African Commission's point of view, seizing the said Commission can be taken as preliminary amicable settlement and should, in principle, considering the employer's failure to react, be followed by an action before the law courts.

Although the Commission may have been correct in its decision, it remains to be seen what it would say in respect of parallel human rights commissions in other state parties on the continent that are vested with judicial powers comparable with those of traditional courts.<sup>82</sup> Perhaps the major concern then is whether the individual will have exhausted the spectrum of local remedies. In this regard, it has been the position that the individual must utilise the processes of appeal or review as are available. In *Njoku v Egypt*, the Commission noted that 'all local remedies provided by Egyptian law, including the possibility of having the case reviewed' had been exhausted by the complainant.<sup>83</sup>

The processes of appeal or review must invariably be accessible, effective and not unduly prolonged. Thus, in the *Sudan detention without trial* case, the Commission noted that the appeal process did not exist as to the regular courts, and where it did, this was only in respect of a 'death penalty or prison terms over 30 years', and therefore did not fulfil the criteria of effectiveness.<sup>84</sup> The Commission made the following observation:<sup>85</sup>

[T]he right to appeal, being a general and non-derogable principle of international law must, where it exists, satisfy the conditions of effectiveness. An effective appeal is one that, subsequent to the hearing by the competent tribunal of first instance, may reasonably lead to a reconsideration of the case by a superior jurisdiction.

On the other hand, the further question is posed as to the breadth of the appeal or review and, for that matter, the institutions to be seized. This is of major concern given the differing systems of courts in the domestic legal orders of state parties to the Charter that have their origins or foundations in either anglophone or francophone traditions.<sup>86</sup> In the

<sup>81</sup> Communication 221/98, *Cudjoe v Ghana*, Twelfth Annual Activity Report, para 14.

<sup>82</sup> As of 2001, there are established Human Rights Commissions in 21 states in Africa: Human Rights Watch 'Protectors or pretenders? Government Human Rights Commissions in Africa', *World Report 2001*.

<sup>83</sup> Communication 40/90, *Njoku v Egypt*, para 57.

<sup>84</sup> n 21 above, para 36.

<sup>85</sup> As above, para 37.

<sup>86</sup> On these concerns, see eg C Anyangwe 'Administrative litigation in francophone Africa: The rule of prior exhaustion of internal remedies' (1996) 8 *African Journal of International and Comparative Law* 808; AA An-Na'im *Universal rights, local remedies: Implementing human rights in the legal systems of Africa* (1999).

*Gambian voters registration* case, the controversy over the local remedies concerned the extent of the appeal process, whether it extended to the Supreme Court of The Gambia or to the Privy Council. The state party, The Gambia, had initially argued on inadmissibility as appeals could be taken to the 'level of the (British) Privy Council'. In response, the complainants pointed out that the domestic legislation on elections stipulated that the judgment of the Supreme Court of The Gambia would be final, and therefore an appeal to the Privy Council was not necessary.<sup>87</sup> In the end, this issue was not addressed or dealt with by the Commission. Nor has it been canvassed in any of the other communications brought against The Gambia.

## 8 Absence of any remedies in the domestic legal order

In a number of instances, the Commission has had to reflect on the total absence or futility of any remedy in the domestic legal order of a state party in the particular circumstances. Where there is no remedy whatsoever, the Commission has considered the local remedies rule to be inapplicable. Such has been the case where there is no remedy in the domestic legal order as regards the particular right being claimed in the communication. This is apparently the view expressed by the Commission in *Katangese Peoples' Congress v Zaire* that there were 'no remedies available at national level to express the independence of the one area from the state'.<sup>88</sup> In a different context, the Commission has stated that there is no remedy to give a complainant the satisfaction sought where the victim had died at the hands of the government of a state party. Thus, in the *Ken Saro-Wiwa* case, the Commission noted that '[i]n light of the fact that the subjects of the communications are now deceased, it is evident that no domestic remedy can now give the complainants the satisfaction they seek'.<sup>89</sup> The Commission affirmed

<sup>87</sup> *Gambia voters registration* case (n 57 above), paras 34–35. It has been contended that the appeal to the Privy Council should not be construed as a local remedy in The Gambia owing to the fact that an individual would have to travel abroad to the United Kingdom; Ankumah (n 9 above) 69.

<sup>88</sup> Communication 75/92, *Congrès du Peuple Katangais v Zaire*, para 22. The complainant was seeking the independence of Katanga from Zaire in furtherance of the right to self-determination under art 20 of the Charter. In the end, the claim was dismissed by the Commission during hearing of the merits. In reflecting upon the manner of exercise of the right of self-determination under the Charter, the Commission remarked of its obligation to 'uphold the sovereignty and territorial integrity of Zaire, a member of the OAU and a party to the African Charter on Human and Peoples' Rights' para 27 (version of communication on file with author, not corresponding with Eighth Annual Activity Report).

<sup>89</sup> n 4 above, para 77.

this view of the total inapplicability of the local remedies rule in *Forum of Conscience v Sierra Leone*. In that case, 24 soldiers had been executed, following trial and death sentence by a court martial, for alleged involvement in a coup that overthrew an elected government of President Tijan Kabah. In light of the absence of a right of appeal against the decision and sentence of the court martial under the domestic military law, the Commission remarked:<sup>90</sup>

[T]he complaint was filed on behalf of people who were already executed. In this regard, . . . there were no local remedies for the complainant[s] to exhaust. Further, . . . even if such possibility had existed, the execution of the victims had completely foreclosed such a remedy.

The reasoning of the Commission in both cases is perhaps a little ambiguous, for it places emphasis on the execution of the victims as foreclosing local remedies. The crucial concern should have been whether there were any available local remedies to allow for the challenge of the validity of the executions (by relatives or otherwise). In the *Ken Saro-Wiwa* case, any such remedial recourse to the national courts was foreclosed by the *ouster clauses* in the domestic laws. On the other hand, in the *Sierra Leone death penalty* case, the unavailability of local remedies was occasioned by the absence of the *right of appeal* against the sentences of death under the domestic military law.<sup>91</sup> In the circumstances, it is the foreclosure of the domestic legal procedures rather than the executions that accounted for the unavailability of local remedies.

<sup>90</sup> Communication 223/98, *Forum of Conscience v Sierra Leone* (*Sierra Leone death penalty* case), Fourteenth Annual Activity Report, para 15.

<sup>91</sup> *Sierra Leone death penalty* case (n 90 above), Fourteenth Annual Activity Report, para 5. In the end, the Commission did in fact determine that the execution of the soldiers without a right of appeal was a violation of art 7(1)(a) of the Charter: para 17. Attention may be drawn to the fact that an incident that involved military execution of two soldiers in Uganda on 25 March 2002 mirrors the situation in the *Sierra Leone death penalty* case. The Uganda military law does not provide for an appeal from decisions of a Field Court Martial (the two soldiers were tried before this kind of military court). Nonetheless, two petitions have since been filed before the Constitutional Court of Uganda to challenge the provisions of the military law (including the non-existence of the right of appeal) as well as the executions: *Uganda Law Society v Attorney-General*, Constitutional Petition No 2 of 2002; *Karugaba v Attorney-General*, Constitutional Petition No 6 of 2002. The petitions raise issues of fair trial standards under domestic law, especially under the provisions of the national Constitution promulgated in 1995. By the end of 2002, the two petitions were yet to be heard by the Constitutional Court.



## 9 Conclusion

It is apparent from the decisions of the African Commission since 1988 that a fledgling yet impressive jurisprudence on the local remedies rule has emerged that compares favourably with that of its more illustrious European and Inter-American predecessors. The rationale of the rule itself in allowing a state party an opportunity to correct the prejudice to human rights has invariably come under a severe test. With the Commission making a determination on actual and due exhaustion of local remedies in only a very limited number of cases, reality dawns as to the apparent lack of effective and competent judicial organs in most of the state parties to the Charter. The phenomenon of *ouster clauses* in domestic law had on its own, in a decade of military regimes in Nigeria alone, underscored a situation in which there seemed in fact *no justice to exhaust*. This practice in Nigeria (and in other state parties such as The Gambia, Sudan and Mauritania) coupled with the attendant situations of *serious violations* in several of the state parties — Benin, Chad, Malawi, Togo, Zaire — in fact shows that the inapplicability of the local remedies rule in the claims brought against these states coincides with gross violations of substantive rights under the Charter.

There is therefore clearly a relationship between the findings on exhaustion of local remedies and the functional state of national judicial and legal procedures of the state parties to the Charter. This arises from either a deliberate deprivation of the *right of access to domestic ordinary courts* or placing *judicial power in the hands of special tribunals* that tend to be political and incompetent or a situation of *malfunctioning national judicial systems*. Firstly, the use of *ouster clauses* in foreclosing suits or appeals or remedies deprives access to the domestic judicial organs for vindication of claims involving violations of human rights. Secondly, deferring judicial power to special tribunals relegates the exercise of such power to vindicate human rights claims to largely incompetent bodies. And thirdly, the situations of serious violations of rights and the lengthy periods taken by claims before national courts epitomise the absence of effective judicial procedures or the existence of such procedures that nonetheless do not function satisfactorily. In the end, this has resulted in the Commission somehow becoming the court of first instance in many of the claims that have come before it, thus negating the whole essence of the local remedies rule.

More significant, though, is the fact that the Commission has been able, only at the stage of admissibility, to expose realities of the human rights situations in what have hitherto been Africa's foremost dictatorial regimes. It is also apparent that in a continent where states are not yet adept towards the protection of human rights within their domestic legal orders, the Commission (and, in the not so distant future, the Court) will remain fundamental in the scrutiny of state conduct that is in

violation of human and peoples' rights. As of the present, the plaudits must go to the Commission for its rejection of the contention put forward by the then Abacha regime in Nigeria that '[i]t is the nature of military regimes to provide ouster clauses'.<sup>92</sup>

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<sup>92</sup> *Nigerian media case* (n 26 above) paras 14 & 82.

## Election management bodies in Africa: Cameroon's 'National Elections Observatory' in perspective

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### Summary

*This article examines in detail the work of the Cameroonian National Elections Observatory (NEO) during the 1990s, at a time when democratic transition through multiparty elections took place around Africa. It is contended that regardless of such initiatives, many countries now show signs of returning to de facto one-party systems. Indicative of this regression has been the way elections have been managed and manipulated by the ruling party. It is suggested that the integrity of the election management process is a crucial factor in the facilitation of functional democratic elections. Considering that election management bodies (EMBs) are considered vital for ensuring a level playing field between all political actors to guarantee free and fair elections, it is emphasised that EMBs must be independent and accountable, with sufficient resources to sustain their effective operations. The article concludes that even though some of the EMBs set up in African countries have been successful, many others lack in autonomy, power and capacity. EMBs are often not sufficiently independent, have merely served as instruments for perpetuating rituals of symbolic elections and disguise signs of authoritarian revival. The NEO is analysed and compared with other EMBs in Africa.*

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## 1 Introduction

The early 1990s saw the onset of the so-called 'third wave'<sup>1</sup> of democratisation as African governments came under unprecedented pressure from their citizens to transform dictatorial one-party systems into democratic governments accountable to the people through regular, free and fair elections. The high hopes that this would usher a new era of constitutional democracy was reinforced by the successful multiparty elections in Benin in 1990 and Zambia in 1991, which resulted in the peaceful and constitutional change of leadership. In the last few years, however, regular multiparty elections of a hardly competitive nature in which the ruling elites have hardly changed and in which the ruling parties have been returned to power with increased majorities have raised the ominous signs of a return to the *de facto* one-party system and raised serious questions about the long term sustainability of the present democratic transition.

Conventional accounts of the evolution of the electoral processes in Africa in the last decade have tended to focus on the voting processes on election day or on the outcome of elections without paying much attention on who organised the elections, how they were conducted and the structure and processes put in place for doing this. The centrality of elections to the model of liberal democratic politics to which many African countries today aspire presupposes the existence of electoral institutions that will guarantee a free and fair contest. One of the key institutions essential to accomplishing this is an independent election management body (EMB). Institutions shape the choices available to political actors, and as Scarritt and Mozaffar succinctly put it: 'To craft democracies is to craft institutions'.<sup>2</sup> The type of EMB chosen must be recognised as one of the most important institutional structures for shaping the nature and extent of political competition not only because

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<sup>1</sup> This much-hackneyed expression was coined by S Huntington *The third wave: Democratisation in the late twentieth century* (1991) 15. He defines a 'wave of democratisation' simply as 'a group of transitions from non-democratic to democratic regimes that occur within a specified period of time and that significantly outnumber transitions in the opposite direction during that period'. He identifies two previous waves of democratisation: a long, slow wave from 1828 to 1926 and a second wave from 1943 to 1964. The 'third wave' is considered to have started in the 1970's although it only reached the African shores in the late 1980's and early 1990's, in what Larry Diamond refers to as a 'second liberation', in 'Developing democracy in Africa: African and international perspectives' <<http://democracy.stanford.edu/Seminar/Diamondafrica.htm>> (accessed 28 February 2003). The 'first liberation' in this respect, being the granting of independence to African countries in the early 1960's. Also see L Diamond 'Is the third wave over?' (1996) 7 *Journal of Democracy* 20.

<sup>2</sup> JR Scarritt & S Mozaffar 'The potential for sustainable democracy in Africa', paper presented at the International Studies Association Conference, San Diego, 19 April 1996.

it is one of the most manipulable instruments of politics, but also because it may decisively influence the outcome of elections. The great potential for EMBs to influence electoral outcomes has been responsible for the tremendous growth in election monitoring and election observer missions.<sup>3</sup> This is not to underestimate the potential effects of other factors such as the electoral system adopted and the electoral laws in place. In many respects, EMBs are merely one cog in the wheel of a much broader framework of institutional arrangements needed to pave the way for liberal constitutional democracy.

Using the example of Cameroon's oddly named 'National Elections Observatory' (NEO),<sup>4</sup> this paper will attempt to assess the importance, challenges and prospects of election administration in Africa. It will start with an overview of the electoral landscape of Africa generally, and the situation in Cameroon in particular, with emphasis on the post-1990 elections. It will consider whether, from the experiences of the numerous multiparty elections that have taken place, the electoral processes are now freer and fairer. The contribution further examines EMBs generally before focusing attention on Cameroon's NEO: Does the NEO provide a satisfactory framework for peaceful constitutional change and an incentive to all who aspire to political office through the ballot box?

The overall legitimacy and acceptability of an election depends on many factors, one of the most crucial of which is the integrity of the election management process. There is no foolproof or perfect EMB and, in fact, the search for more effective and credible election management systems is not a preoccupation unique to Africa's fledgling transitional regimes. Fundamental as they are, elections on their own are neither the sole means nor the exclusive end of democracy. They do provide a useful indicator of a country's democratic health.

In Africa's faltering transitional democratic landscape, elections are often a defining moment, a critical turning point with clear ramifications as to whether there will be greater or lesser opportunities for all political actors. The incentive for all political actors to behave in a manner that enhances democracy and lawfulness, depends very much on the legitimacy and acceptability of electoral outcomes. One of the vital requirements of the outcome is the integrity of the administration of the elections. The significance of EMBs today has to be appreciated in the light of the numerous challenges posed by the fragility and stunted

<sup>3</sup> See, generally, G Geisler 'Fair? What has fairness got to do with it? Vagaries of election observations and democratic standards' (1993) 31 *Journal of Modern African Studies* 613; J Elklit & P Svensson 'The rise of election monitoring: What makes elections free and fair' (1997) 8 *Journal of Democracy* 32.

<sup>4</sup> This is a rather curious and probably an unfortunate official and literal translation of the original French text that refers to it as 'L'Observation National des Elections'. This body certainly has nothing to do with an 'observatory' as that term is used in ordinary parlance.

character of the electoral processes inherited at independence and how these have continued to be manipulated in spite of the reintroduction of multiparty democracy.

## 2 The general African electoral landscape

Although elections have been an integral part of African politics before and after independence, until the late 1980s this hardly formed the basis of change of government. A few African heads of state, such as Morocco's late Hassan II and to a lesser extent the late Emperor Haile Sellassie of Ethiopia, were literally born to power. Far more heads of state seized power by force through *coups d'état*. Others conquered it after long guerrilla campaigns.<sup>5</sup> A notable exception during the 1980s was Mauritius, where a multiparty election resulted in a transfer of power. However, some of the deficiencies of the election administration in post-independence Africa can be traced to the colonial era. Most African governments achieved independence with very little experience of the art and craft of electoral politics. It was only because of strong opposition by nationalists fighting for self-determination and independence that the colonial powers introduced elections and a general right to vote in the 1950s and 1960s. Much of the electoral machinery inherited at independence was rudimentary and *ad hoc*, and was based on a narrow and restrictive franchise. In most cases the colonial electoral machinery was designed and contrived to ensure electoral success to parties favourable to the colonial regimes. To achieve this end, the colonial administrators exerted wide-ranging and manipulative influence. As Fred Hayward points out, the French colonial electoral experience, in particular, created a legacy of abuse that has lived on long after independence.<sup>6</sup>

After independence, the inherited EMBs were easily used by many of the new rulers to retain control and monopolise political power. These EMBs were either politicised and thus rendered ineffective as instruments for promoting free and fair elections, or were dissolved or suspended.<sup>7</sup> The basis for competitive electoral politics was thus undermined. Elections were used merely as a means to reinforce the dominance of the new elites and to keep out rivals or as meaningless political rites to grant periodic legitimisation to one-party regimes. In fact, with the notable exception of Botswana, The Gambia and

<sup>5</sup> See S Ellis 'Elections in Africa in historical context' in J Abbink & G Hesselings (eds) *Election observation and democratisation in Africa* (2000) 37.

<sup>6</sup> F Hayward *Elections in independent Africa* (1987) 8.

<sup>7</sup> See A Jinadu 'Matters arising: African elections and the problem of electoral administration' (1997) 2 *African Journal of Political Science* 2.

Mauritius, African states introduced the one-party systems under which elections assuring the victory of the ruling party as a forgone conclusion became the pattern. The one-party system and its emasculation of electoral administration in rendering competitive elections impossible also made constitutional change of government through the ballot box a rarity in Africa.

The question whether the advent of multipartyism, especially with regard to the so-called founding elections,<sup>8</sup> has improved the quality of electoral administration in Africa is not easily answered. Although a number of comparative studies have been carried out on the electoral experiences under the post-1990 wave of liberalisation and democratisation, none has critically investigated the EMBs specifically.<sup>9</sup> These studies have mainly addressed the extent to which the numerous post-1990 multiparty elections have served as a means of change of regime or government, which to a large extent has been influenced by the extent to which these elections have been free and fair compared to pre-1990 elections.<sup>10</sup>

A careful analysis of these elections shows that a distinction may be drawn between what has been referred to as the 'early' (1990–1994) and the 'late' (1995–1997) founding elections.<sup>11</sup> As noted earlier, prior to 1990 (in 1982), on only one occasion had an African leader been replaced at the polls (in Mauritius). Between 1990 and 1994, incumbent

<sup>8</sup> D Nohlen, M Krennerich & B Thibaut (eds) *Elections in Africa. A data handbook* (1999) 11 n 6 suggests that the concept of 'founding elections' has been borrowed from Latin American studies and describes a situation where 'for the first time after an authoritarian regime, elected positions of national significance are disputed under reasonably competitive conditions'. They, however, point out that with respect to African elections, there is no agreement as to whether the concept should be applied to all national elections, or only those that directly or indirectly select the chief political executive. Be that as it may, the essence of founding elections in Africa is that they broke with the well-established pattern of one-party ritualistic elections. See also Bratton 'Founding elections: Africa' in R Rose (ed) *International encyclopaedia of elections* (2000) 105–107.

<sup>9</sup> See, generally, Bratton & Van de Walle *Democratic experiments in Africa. Regime transitions in comparative perspective* (1997); M Cowen & L Laakso (eds) *Multi-party elections in Africa* (2002); Nohlen, Krennerich & Thibaut (n 8 above); R Sandbrook 'Transitions without consolidation: Democratisation in six African countries' (1996) 17 *Third World Quarterly* 69; JA Wiseman 'Early democratisation elections in Africa' (1992) 11 *Electoral Studies* 279; and T Young 'Elections and electoral politics in Africa' (1993) 63 *Africa* 299.

<sup>10</sup> The now familiar vague catchphrase 'free and fair' is made up of two distinct elements, the freedom dimension that consists of all the basic political rights and liberties enshrined in the various human rights conventions, and the fairness dimension, which consists of regularity and reasonableness, and both require a level playing field recognised and accepted by the various players as level. For a thorough analysis of the intricacies of this phrase, see, further, J Elklit & P Svensson 'The rise of election monitoring: What makes elections free and fair?' (1997) 8 *Journal of Democracy* 32, and J Elklit 'Free and fair elections' in Rose (n 8 above) 130.

<sup>11</sup> See Bratton (n 8 above) 105–107.

leaders were replaced in 14 out of 29 presidential elections. The most significant of this was the departure of Kenneth Kaunda in Zambia in October 1991. By contrast, the later founding elections of 1995–1997 have hardly led to any leadership or regime changes. Many international election observers and monitors had endorsed the early founding elections as free and fair, but have been less willing to endorse post-1994 elections. In fact, it has even been suggested that an electoral observation and monitoring industry has grown up around Africa's multiparty elections.<sup>12</sup> However, it appears as if many African incumbents caught off guard by the wind of change in the early 1990s had been unable to resist both domestic and international pressure to hold reasonably free and fair elections. With time, however, they have been able to recover sufficiently to return to the old habit of managing and manipulating elections. It is particularly significant that the tentative moves towards competitive or semi-competitive elections had not resulted in any serious attempts to reform the system of electoral administration, especially through the introduction of independent EMBs.

In fact, most recent elections have exposed many of the same elaborate schemes of electoral manipulation that came to be associated with one-party ritualistic elections. In broad terms, at least eight main forms of electoral malpractices have been associated with recent elections:<sup>13</sup>

- the imposition of restrictions on the activities of or even the existence of opposition parties;
- abuse of voter registration procedures;
- manipulation of the size of electoral constituencies;
- restrictions upon the selection or registration of candidates;
- the unfair use of state resources;
- the amendment of the constitution and the introduction of electoral laws and electoral systems that favour the ruling party;
- the abuse of voting and counting procedures; and
- the overturning of unfavourable results.

No discussion of the ills that have plagued African elections is complete without mentioning the effects of bribery and corruption.

<sup>12</sup> See Cowen & Laakso (n 9 above) 16 and in general Geisler (n 3 above).

<sup>13</sup> The most comprehensive account of the numerous electoral malpractices that have been noticed in post-1990 elections feature prominently in many of the election observers' and election monitors' reports that are regularly published after elections and that have led Cowen & Laakso (eds) (n 9 above) 1–26 to the opinion that there are probably more details about the conduct of elections in Africa than for any other continent. See further J Daniel & R Southall 'Electoral corruption and manipulation in Africa: The case for international monitoring' in J Daniel, R Southall & M Szeftel (eds) *Voting for democracy. Watershed elections in contemporary anglophone Africa* (1999).



Political liberalisation appears to have multiplied and intensified the complex patrimonial power structures and provided new avenues for one-party practices that continue to thrive with probably more sophistication under the new multiparty framework. Evidence from various studies suggests that the incidence of bribery, corruption and clientelism has increased during this multiparty era and involves both agents of the ruling and opposition parties.<sup>14</sup>

Although multiparty elections have become more frequent and regular, it is clear that the quality of these elections and their ability to provide an opportunity for citizens to determine who governs them has been steadily reduced since 1994. One of the major contributing factors has been the frequent irregularities in the administration of elections designed to favour incumbents. The situation in Cameroon in the last 20 years will be used as an example to illustrate the negative effects of poor election administration on the prospects for constitutional governance on the continent.

### 3 Background to elections in Cameroon

Modern Cameroonian constitutional history starts on 8 November 1982, with the accession to power of Paul Biya after the sudden and unexpected resignation of Cameroon's first president, Ahmadou Ahidjo. In his inaugural speeches, the new president promised a 'new deal' package based on 'liberalisation and democratisation' as well as 'rigour and moralisation'. During his early months in office, some attempts were made to remove some of the harsher restrictions to political freedom that his predecessor had put in place. But after an attempted *coup* in 1984, some of these restrictions were reintroduced. Some scholars have suggested that the abortive *coup* was the turning point that caused Biya to revise his liberal ideas.<sup>15</sup> However, many of Ahidjo's repressive laws were still in place, and not much had been done to implement the promises of greater liberalisation and democratisation. In particular, the ruling Cameroon People's Democratic Movement (CPDM) continued to be the sole political party. Biya argued that the one-party system had to serve as a school for democracy until the country was ripe for multi-partyism, although no time frame was given for this transition.

Until 1990, Biya's implementation of his promises of 'liberalisation and democracy' had been limited to holding semi-competitive elections

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<sup>14</sup> See Cowen & Laakso (n 9 above) 18 and Daniel, Southall & Szeftel (n 13 above) 37.

<sup>15</sup> See J Takougang & M Kriegler *African state and society in the 1990s: Cameroon's political crossroads* (1998) 75.

for officials within the various organs of the CPDM party.<sup>16</sup> In the 1980s, such semi-competitive elections had become a matter of much debate amongst political scientists. Some saw it as a means of guaranteeing a minimum of competition and accountability in systems where opposition parties were not allowed.<sup>17</sup> To some, this represented a genuine African variant of democratic elections, or as Chazan puts it, an 'African-derived formula for constructive popular representation'.<sup>18</sup> Others regarded these types of elections as a start of an incremental process that would eventually lead to true competitive elections.<sup>19</sup> However, Biya's semi-competitive elections, in which he excluded any contestation of his position, did not prove to be the start of 'incremental democracy' that could ultimately lead to full democracy, but turned out in many respects to be an attempt to hinder the democratic process itself.

The story of how multipartyism finally came to Cameroon in spite of resistance by the regime has been elaborately told in many recent accounts.<sup>20</sup> The Cameroonian legislature formally sanctioned multipartyism in December 1991 and set the stage for what many thought was going to be a new era in which the will of the people would determine who governs the country. The first test of this new-found liberty came in the multiparty parliamentary elections that took place on 1 March 1992, after several postponements. The main opposition parties, with the exception of the 'Union National pour la Démocratie et le Progrès' (UNDP), boycotted the elections because the government had reneged on an agreement reached with the opposition parties on 13 November 1991, that required the enactment of a new electoral code and the establishment of an independent electoral commission. To counter the risks of a total opposition boycott, the government made available the sum of 500 million CFA francs to each participating party. Only 35 of the 69 registered parties participated in the elections and on a

<sup>16</sup> In 1986, elections based on secret ballots were held at several levels of the party and resulted in over 50% of the old cell, branch and section leadership losing their positions. Dramatic results were also recorded when multiple CPDM candidates were allowed to stand for municipal elections in November 1987 and parliamentary elections in April 1988. In fact, in the parliamentary elections, 85% of those elected to the National Assembly were new. Significantly, however, in the presidential elections that were held at the same time, Biya was the only presidential candidate. Although in 1983, he had initiated an amendment to the Constitution permitting multiple candidates under certain conditions. The conditions were so onerous and unrealistic that they effectively ensured that nobody other than himself could qualify and contest for the presidency.

<sup>17</sup> See Nohlen, Krennerich & Thibaut (n 8 above) 7.

<sup>18</sup> N Chazan 'African voters at the polls: A re-examination of the role of elections in African politics', (1979) 17 *Journal of Commonwealth and Comparative Politics* 136.

<sup>19</sup> See R Sklar 'Democracy in Africa' (1983) 26 *African Studies Review* 11.

<sup>20</sup> Besides Takougang & Krieger (n 15 above), see also J Mbaku & J Takougang (eds) *The leadership challenge in Africa: Cameroon under Paul Biya*.

low voter turnout of about 30%, the CPDM won 88 seats, two short of a majority, and the rest were shared between the opposition — 68 for the UNDP, 18 for the 'Union National des Populations du Cameroun' (UPC), and six for the little-known 'Mouvement Démocratique de la République' (MDR). The CPDM was able to form a coalition with a slim majority with the MDR. Because of the close outcome of the elections, some commentators have concluded that the elections were generally free and fair.<sup>21</sup> Whilst it is not easy to speculate on how the parties that boycotted the elections would have fared, subsequent elections raise some doubts as to whether the regime would have conceded defeat.

What must now be considered as one of the major events in Cameroon's modern history and a turning point in the democratic transition was the anticipated presidential elections of 11 October 1992. A deeply divided opposition could not agree on a single candidate. Biya, with the support of some opposition parties grouped under the banner of 'presidential majority', was ultimately declared winner by an openly sceptical Supreme Court.<sup>22</sup> In the results themselves, Biya was declared to have won with about 40%, whilst John Fru Ndi was given 36%, Bello Bouba 19% and Adamu Ndam Njoya 4%. The Washington-based National Democratic Institute for International Affairs that had monitored the elections pointed out in their report that they found 'serious fault with the electoral process', which they felt did not 'make it possible to determine which candidate would have been the winner in a fair election'.<sup>23</sup> They stated that the 'election was designed to fail' and 'while several parties were responsible for election irregularities, the overwhelming weight of responsibility for this failed process' was said to lie with 'the government and President Biya'. The report also noted that 'the Cameroonian government took unusually extreme and illegitimate actions to ensure the president's victory'.<sup>24</sup>

The opposition parties have since then regularly accused the government of fraud and other malpractices in all the subsequent elections that have been held. Without necessarily going into details, a few pertinent aspects of some of these elections need to be noted. After rejecting the results of the second multiparty parliamentary elections

<sup>21</sup> See J Derrick 'Cameroon: One party, many parties, and the state' (1992) 22 *Africa Insight* 165-176.

<sup>22</sup> Under the 1972 Constitution, one of the functions of the Supreme Court, which in many respects was purely ceremonial but legally significant, was that of proclaiming the results of presidential elections and referenda. The Court in proclaiming the results of the 1992 presidential elections went beyond its normal practice in listing some of the alleged irregularities but pointed out that it had no powers to adjudicate these allegations.

<sup>23</sup> National Democratic Institute for International Affairs (NDI) *An assessment of the October 11, 1992 election in Cameroon* (1993) iii-iv.

<sup>24</sup> See, generally, National Democratic Institute for International Affairs (NDI) *An assessment of the October 11, 1992 election in Cameroon* (1993).

held in May 1997, which had been described by the Commonwealth Observer Group as 'flawed',<sup>25</sup> the leaders of the three main opposition parties decided to boycott the October 1997 presidential elections saying that the results were a foregone conclusion and that their participation would only lend credibility to an illegitimate and corrupt regime. Many international election observer groups such as those from the Commonwealth and the 'Francophonie' and the International Foundation for Election Systems (IFES) appeared to have agreed with them and declined invitations to observe the poll on an election that they felt did not have full public support. In what smacked of a pre-1990 single candidate presidential election, Biya was declared winner with 92.6% against seven little known candidates. Even then, the few international and local observer groups that had monitored the election still reported that it had neither been free nor fair.<sup>26</sup>

The most contentious issue surrounding all these elections has been the role that the different electoral laws<sup>27</sup> conferred on the Ministry of Territorial Administration (MINAT). This strategic Ministry is usually headed by one of the closest collaborators of the president and member of the ruling party, and has acted, until the 2002 elections, as an EMB with wide-ranging powers in organizing and supervising elections. It controls and directs operations at national, provincial, divisional and sub-divisional levels. As a result, the conduct and supervision of elections is inseparable from the highly politicised system of territorial administration, whose administrators are appointed by the president of the Republic and hold office at his pleasure. Each election has usually been preceded by transfers, promotions and reallocation of officials at MINAT all over the country raising suspicion of a deliberate design to place in strategic positions and key constituencies officials capable of carrying out the political instructions issued to them.<sup>28</sup>

<sup>25</sup> See Commonwealth Secretariat *The parliamentary elections in Cameroon, May 17 1997: The report of the Commonwealth Observers' Group* (1997); and T Bakary & S Palmer *May 17, 1997 legislative election in Cameroon: The report of the IFES International Observer Mission* (1997).

<sup>26</sup> See US Department of State *Country report on human rights practices, Cameroon, 2000* <<http://www.state.gov/g/drl/rls/hrrpt/2000/af/713.htm>> (accessed 28 February 2003).

<sup>27</sup> See particularly Law No 91-020 of December 1991 as modified by Law No 97-13 of March 1997.

<sup>28</sup> There are rare exceptions to their servility. For example, a week after the controversial 11 October 1992 polls, the governor of the Eastern Province, George Achu, resigned citing as reasons the management of the democratic process especially in the last two elections, and gave as example a meeting on 28 September 1992 during which the Minister of Territorial Administration had ordered the country's ten provincial governors to 'do everything fair and foul to ensure at least a 60% victory of the CPDM candidate in our provinces', and added that they had been issued copies of a six-page document detailing techniques of electoral fraud. See National Democratic Institute for International Affairs (n 24 above) 34.

The Electoral Law creates a series of Commissions charged with responsibility for various aspects of the electoral process. These can be summarised as follows:

- i) A Commission for the revision of the register of electors. This Commission exists at the council, sub-divisional or district levels and their membership comprises of a Chairperson appointed by the Senior Divisional Officer (SDO), the mayor or a municipal representative and a representative of each political party contesting election in the constituency.
- ii) A Commission charged with supervising the establishment and distribution of registration cards, with a composition identical to that of the Commission for the revision of the register of voters.
- iii) A Local Polling Commission at the level of polling stations whose Chairperson is appointed by the SDO and is composed of representatives from the different political parties.
- iv) A Divisional Supervisory Commission at the level of each division composed of the President of the divisional High Court, three representatives of the administration appointed by the SDO, one independent person appointed by the SDO and a representative of each of the political parties.
- v) The National Commission for the Final Counting of Votes whose membership comprises of the following: a Supreme Court judge appointed by the President of the Supreme Court as Chairperson, two other judicial officers also appointed by the President of the Supreme Court, ten representatives of the administration appointed by the Minister of Territorial Administration and ten representatives appointed by the political parties taking part in the elections.
- vi) The Constitution provides for the proclamation of the results by the Constitutional Council, after a verification of the polling operations on the basis of the reports and documents forwarded by the National Commission for the Final Counting of Votes.<sup>29</sup> As the Constitutional Council has not been created, its powers are presently being exercised by the Supreme Court, all the members of which are appointed by the Head of State, on the advice of the Higher Judicial Council.

Because of the key role played by MINAT and the government in general, in determining the composition and *modus operandi* of these different commissions, there is wide scope for abuse. For example, 11 of the 13 members of the National Commission for the Final Counting of Votes (NCFV), appointed by the government and charged with

<sup>29</sup> See art 48 of Law No 96-6 of 18 January 1996 to amend the Constitution of 2 June 1972.

overseeing, counting and tabulating the votes during the hotly contested 1992 presidential elections were drawn from the president's ethnic group in the Centre and South provinces. It therefore had no ethnic, regional or political balance that could inspire confidence in its transparency.

Gerrymandering of constituencies has also been a regular feature of Cameroonian election politics. Prior to the October 1992 presidential poll, the country's 10 provinces comprised of 49 divisions and 182 subdivisions. After the announcement of the elections, the Minister of Territorial Administration created seven additional divisions, five of which were hurriedly established just a month before polling day and for which the president appointed SDOs, and the two others were established just a few days before the elections. On 2 April 1997, the same day that parliamentary elections were announced, the president signed a decree increasing the total number of divisions and effectively redrawing a number of key constituencies. Besides this, some officials, such as judicial personnel, who play a crucial role at various stages in the electoral process, have been singled out for special treatment.<sup>30</sup>

One problem that has dominated Cameroonian politics during this transitional period has been the spread of corruption. Political corruption has always been a feature of Cameroonian politics and has been used partly as a means to wealth and status but mainly as a method of acquiring and retaining political power and influence. The advent of multipartyism has exacerbated both its level and scope. It is therefore no surprise that for two successive years, 1998 and 1999, Cameroon came top in Transparency International's corruption perceptions index.<sup>31</sup> However, this is not the place to analyse the full scope of Cameroonian

<sup>30</sup> As part of the preparations for the 1997 elections, magistrates, judges and other judicial personnel who intervene at certain critical stages in the various divisional and provincial vote counting commissions were suddenly given what could only be termed 'hush money' in the form of a hefty salary increase and exorbitant allowances. The size of the increases and the allowances and other fringe benefits for the judges of the Supreme Court who have the final say in elections for the first time placed their salaries above that of government ministers. This effectively transformed judges into 'super civil servants', very much like the military and security forces personnel, whose salaries had since 1992 been much higher than those of other civil servants, because of their extensive use in suppressing the political strikes that have marked the 1990 decade, and thus giving them a stake in the survival of the regime. See, generally, the discussion of political corruption in Cameroon in CM Fombad 'Endemic corruption in Cameroon: Insights on consequences and control' in KR Hope & B Chikulo (eds) *Corruption and development in Africa: Lessons from country case studies* (2000) 234 and the same authors' chapter 'The dynamics of record-breaking endemic corruption and political opportunism in Cameroon' in Mbaku & Takougang (n 20 above).

<sup>31</sup> See Transparency International (TI) 1998 Corruption Perception Index <<http://www.transparency.org/cpi/1998/cpi1998>> (accessed 28 February 2003) and 1999 Corruption Perception Index <<http://www.transparency.org/cpi/1999/cpi1999>> (accessed 28 February 2003).

political corruption,<sup>32</sup> but a few aspects of its deleterious impact on the management of elections need to be noted.

The degradation of the Cameroonian public service and the resulting inefficiency and waste has encouraged a culture of bribes and other improper practices that can be linked directly to the increasing politicisation of the public services and the spread of influence peddling. Although as a practical fact, hardly any government bureaucracy can pretend to be totally non-political, as the very formulation of policy, which is essentially a political matter, necessarily involves the bureaucracy, not all bureaucracies are to the same extent permeated by party politics. Extensive political infiltration of the Cameroonian bureaucracy makes it more or less a politico-administrative set up. Appointments, promotions and, sometimes, advancements and transfers are determined solely by political considerations. In fact, since the onset of the democratisation process, all senior or middle level civil servants known or suspected of being sympathetic to the opposition parties have been purged, especially from strategic politically sensitive positions and replaced by supporters or sympathisers of the ruling party. Ministers continue, as in the past, to retain such exclusive control over their ministries that new appointments and demotions within the ministries usually follow each ministerial reshuffle. Because the appointees know that they owe their positions to these ministers, the appointees openly show their loyalty and allegiance to their ministerial boss and engage in activities that will promote and protect his interests and the interests of his party rather than the interests of the state. This misplaced loyalty to the political leadership is carried down the chain of command.

This then is the problem that pervades MINAT, which is responsible for the organisation and supervision of elections. In the way it has operated, no clear distinction could be made between CPDM activities and the activities of the civil servants employed in this ministry. This confusion has been at the root of most of the election controversies that have called into question the results of the various multiparty elections and led to calls for the creation of an independent EMB in the country.

On 19 December 2000, President Biya promulgated as law, Law No 2000/016, a Bill introduced on 30 November 2000, creating the NEO and thus finally yielding to considerable international and national pressure to create an independent EMB.<sup>33</sup> It is this body that supervised

<sup>32</sup> For recent studies on Cameroonian corruption, see Fombad (n 30 above) 234–260; Fombad 'The dynamics of record breaking corruption and political opportunism in Cameroon' (n 30 above) and FE Stiftung & G Cameroon *Corruption in Cameroon* (1999).

<sup>33</sup> Almost all the international election observer mission or monitoring mission reports on Cameroonian elections since 1992 have often recommended the establishment of an independent EMB as the only means of promoting public confidence in Cameroonian elections. See, eg, Commonwealth Secretariat *The parliamentary*

the 2002 municipal and legislative elections. Before considering whether the NEO is the panacea for Cameroon's multiparty election problems, it is necessary to briefly look at EMBs in general, highlighting the various options that the Cameroonian legislator had to choose from.

#### 4 An overview of election management bodies

The successful management of a modern election with electors numbering several millions is an administrative undertaking of considerable size, involving a series of operations, the organisation and time of which must be carefully planned and supervised by trained personnel.<sup>34</sup> Whilst the overall legitimacy and acceptability of each election as binding by all the participants will depend upon many factors, the integrity of the management of the election is probably one of the most vital. The public will measure the legitimacy of an election on the basis of the actual integrity of the EMB and the transparency of the management process.

As we have seen, recent state experiences and practices in Africa underline the necessity for independent EMBs. Ideally, such monitoring bodies should enjoy the confidence of all political actors and the electorate as a whole, to enable them to act as impartial control mechanisms. The fragility of the present transitions and the mounting doubts about the impartiality of the administrative bodies that presently perform these functions in many countries make attaining this ideal all the more important. One of the most useful documents on EMBs is the Code of Conduct for the Ethical and Professional Administration of Elections, which was issued by the International Institute for Democracy and Electoral Assistance (IDEA), Stockholm, in 1997.<sup>35</sup> This Code, which has been endorsed by many electoral bodies around the world,<sup>36</sup> is based on the collation, analysis and synthesis of different codes and materials on the topic and provides minimum standards that EMBs should conform to. It identifies the main functions usually assigned to EMBs as comprising:<sup>37</sup>

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*elections in Cameroon, May 17 1997: The report of the Commonwealth Observers' Group* (1997) 29; and National Democratic Institute for International Affairs (NDI) *An assessment of the October 11, 1992 election in Cameroon* (1993) 54. For an African example, see the Electoral Commissions Forum of SADC Countries, *Zimbabwe Elections Observer Mission Report 24–25 June 2000* (2000) 55.

<sup>34</sup> See TE Smith *Elections in developing countries* (1960) 3.

<sup>35</sup> See <<http://www.idea.int/publications/conduct/admin/intro.htm>> (accessed 28 February 2003).

<sup>36</sup> See M Maley 'Administration of elections' in Rose (n 8 above) 7.

<sup>37</sup> See IDEA *The Functions of an election administration* <<http://www.idea.int/publications/conduct/admin/part1.htm>> (accessed 28 February 2003).



- conducting elections and referendums;
- compiling and maintaining a register of voters;
- promoting public awareness of electoral matters by conducting civic education and information programmes for members of the public, particularly for women, youth, the illiterate and disadvantaged minorities;
- training of electoral officials;
- informing candidates, political parties and other affected persons about the electoral process;
- ensuring that women and minorities are able to participate fully in the process;
- making regulations governing the electoral process;
- enforcing the electoral law;
- researching electoral policy and related matters;
- providing the government, the legislature, and organs of the executive with information and advice about electoral matters; and
- engaging in international co-operation and assistance.

It is generally agreed that a credible, efficient and effective EMB should be founded on principles of independence, non-partisanship and professionalism. It should also have clear procedures that make it sufficiently accountable and non-political so that it can operate in a political environment.<sup>38</sup> The IDEA Code also provides an expanded statement of five ethical principles, which form the basis of election administration. These require that an EMB must demonstrate respect for the law; be non-partisan and neutral; be transparent; be accurate; and be designed to serve voters.

However, the most contentious issue, especially in transitional regimes, has usually been that of determining the type of EMB a country should have. Around the world, there is a considerable variation in structures for administering elections, each of which reflects the administrative history of, and the environment prevailing in each country. Charles Lasham in a recent study has identified the following broad types of national EMBs:<sup>39</sup>

- temporary EMBs;
- permanent EMBs;
- independent EMBs, whether temporary or permanent;
- partisan temporary or permanent EMBs;
- mixed partisan/non-partisan EMBs;
- specialised judicial bodies;

<sup>38</sup> See A Scallan *Guiding principles* <<http://www.aceproject.org/main/english/em/em20.htm>> (accessed 28 February 2003).

<sup>39</sup> See a full discussion of these bodies at <<http://www.aceproject.org/main/english/em/emb01/default.htm>> (accessed 28 February 2003).

- government ministries;
- decentralised bodies; and
- others.

Whichever type of EMB is chosen, the crucial test is whether it is sufficiently founded on the principles of independence, non-partisanship and professionalism to be able to function efficiently. In addition to deciding the form the EMB will take, it must also be decided whether it should be established under the constitution or by statute. The ideal situation is to entrench an enabling provision for the EMB in the constitution and to supplement this with electoral legislation. The basic components of this framework, which should be clearly spelt out in the constitution, should include its essential characteristics such as its status, the manner of appointment of members, the size, and the tenure of office of appointees, as well as its budgetary autonomy and its powers. Where a simple statutory instrument creates it, this can easily be changed by the government of the day when it suits its convenience. For countries like Cameroon, where there is no effective means for controlling or restraining violations of the constitution by the executive or legislature,<sup>40</sup> it must be clearly provided that the provisions relating to the EMB cannot be amended without a qualified majority and a referendum.

The guiding principles governing the establishment and operation of the EMB, whatever form it may take, can therefore be stated to be as follows: Firstly, it should preferably be entrenched in a constitutional document that subjects its amendment to a special procedure. Secondly, it should be founded on principles of independence, non-partisanship and professionalism when discharging its functions. It is in the light of these principles as well as the history of electoral controversies surrounding the organisation and supervision of elections in Cameroon by the MINAT that the NEO is now being analysed.

## 5 The NEO as an EMB

### 5.1 A general overview of the NEO

The Cameroonian NEO appears to have been inspired by a similar body that was created in Senegal and that had successfully organised and supervised the elections that enabled the incumbent president, Abdou Diouf, to be beaten by his long time rival Abdoulaye Wade. However, the Cameroonian version of the Senegalese law is different from the latter in many material respects.<sup>41</sup>

<sup>40</sup> For the problems of control of constitutionality of laws in Cameroon, see CM Fombad 'The new Cameroonian Constitutional Council in a comparative perspective: Progress or retrogression?' (1998) 42 *Journal of African Law* 172.

<sup>41</sup> For example, while the Senegalese law was a compromise worked out between the government and the opposition, the government essentially imposed the

The NEO Law describes the NEO as 'an independent body charged with supervising and controlling elections and referendums'.<sup>42</sup> Its mission, according to section 2 of the Law, is to 'contribute to the observance of the electoral law in order to ensure regular, impartial, objective, transparent and fair elections, and to guarantee voters and candidates the free exercise of their rights'. The NEO is composed of 11 members appointed by presidential decree for a mandate that ends as soon as the electoral process is over. They are to be chosen from among 'independent personalities of Cameroonian nationality with a reputation for moral rectitude, intellectual honesty, neutrality and impartiality' and who in the discharge of their duties, should not 'request or receive instructions or orders from any public or private authority'.<sup>43</sup> A Chairperson and Vice-Chairperson from amongst the members of the NEO are also to be appointed by presidential decree. Section 5 of the Law contains a long list of persons who cannot be appointed as members of the NEO. They include:

- members of government and persons of similar status;
- judicial and legal officers in active service;
- secretaries-general of ministries and persons of similar status;
- directors in the central administration and persons of similar status;
- governors, senior divisional officers and their assistants, sub divisional officers and their assistants, district heads in active service or on retirement for less than three years;
- traditional rulers.

The only permanent feature of the NEO is its permanent Secretariat that is to be headed by a Secretary-General appointed by presidential decree, on the advice of the NEO Chairperson. The NEO may set up corresponding structures in the different regions, divisions and councils, the composition and functioning of which is to be determined by decree. During elections and referendums, the NEO may set up in provinces, divisions and councils corresponding structures which shall serve as its branches.<sup>44</sup> These structures must be 'dissolved' as soon as the election concerned is over. The duties of the NEO that are enumerated in section 6 of the Law are extremely wide ranging and include some of the duties usually associated with EMBs. The duties of

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Cameroonian law. Another significant difference is that under the Senegalese law, members of the EMB are appointed by the government after consultation with all political parties and civil society. No such consultation is provided for under the Cameroonian law and the members are simply appointed exclusively by the government, or more precisely, the President of the Republic.

<sup>42</sup> See sec 1 of Law No 2000/016 of 19 December 2000, hereinafter simply cited as the NEO Law.

<sup>43</sup> n 42 above, sec 3(3).

<sup>44</sup> Decree No 2001-306 of 8 October 2001.

the NEO are limited just to 'supervising and controlling' the specified activities. It can perform these duties either on its own initiative or where the competing political parties, candidates or voters submit a case to it. It also has the powers to draw up its internal rules and regulations.

As regards the cost of running the NEO, section 20 of the Law simply states that the 'state shall place at the disposal of NEO all the human and material resources necessary for the accomplishment of its mission', and that its running expenses and those of its branches shall be borne by the state and be included in the state budget. Section 7 provides that members of the NEO will be granted 'allowances and travelling expenses under conditions determined by decree'. All other matters not dealt with by the Law are subject to section 21, which provides that a decree shall lay down the modalities for the implementation of the law. The 2001 implementation decree allows the Chairperson of the NEO to request from any Minister that employees of that ministry be placed at the disposal of the NEO for the duration of an election.<sup>45</sup>

## 5.2 An appraisal of the NEO

The management of the 30 June 2002 municipal and legislative elections provided the NEO with its first major test. The elections had been due for January 2002, but were postponed to 23 June 2002 due to concerns that the NEO would not have had the time and the resources to prepare itself. Some of these concerns were lessened when the British government provided £73 000 that was used by the British Council and the Electoral Reform International Services (ERIS) in a capacity building programme project that combined the training of election observers and the running of a voter education programme. However, on polling day, 23 June 2002, after polling had started, a presidential decree was issued, postponing the elections for another week on grounds of lack of preparation on the part of MINAT. After the results of the elections had been announced, there were renewed calls from the opposition and some international organisations for the establishment of an EMB that was independent of the government.<sup>46</sup>

The NEO started its life from a severe disadvantage because, apart from the ruling party, most of the other parties were openly hostile to it, considering it as a body set up by the government to cover up electoral

<sup>45</sup> Decree No 2001-309 of 10 October 2001 appointed the 11 members of the NEO and Decree No 2001-310 of the same date appointed two of these members as Chairperson and Vice-Chairperson.

<sup>46</sup> Because of concerns over the scale of electoral irregularities, calls by the opposition parties for the establishment of a more independent body to replace the NEO were echoed in a declaration of the European Union issued in Brussels on 7 August 2002, and a Communiqué signed by the Secretary-General of the Cameroonian National Episcopal Conference as well as statements issued by the British government.

fraud. These misgivings were largely due to the controversy surrounding the way the Bill creating the NEO was handled. The Bill was introduced at the eleventh hour on 30 November 2000 and the government rejected amendments to it proposed by the opposition parties. In protest, these parties boycotted the final session of 6 December 2000 during which the Bill was finally approved. The opposition parties argued that the NEO Law was unconstitutional,<sup>47</sup> but due to the abstract, preventive and restricted character of the system for control of constitutionality of laws that was introduced by the amended 1972 Constitution, they could not bring this issue before the Supreme Court.<sup>48</sup> However, after its creation the NEO went to considerable lengths to organise meetings with representatives of the opposition parties in an attempt to build trust and confidence and also allay their fears.

At the heart of the NEO's problems are the doubts about its independence from the government and the ruling party. The NEO Law describes it in section 1 as an 'independent body'. In the context of EMBs, this is usually taken to mean that it is not subject to the control of the government of the day or any political party or other body and that it can act independently, impartially, fairly and professionally towards all parties. However, the reality is that several provisions in the NEO Law render the possibility of it acting independently difficult. For example, section 3 gives the President of the Republic the sole right to appoint both the members of the NEO as well as its chief officials, the Chairperson and Vice-Chairperson. Although President Biya in appointing the 11 members of NEO on 10 October 2001 ensured that all the ten provinces in the country were represented, most of those appointed were known supporters or members of the ruling party. In fact, the Chairperson himself was a prominent member of the CPDM who had held many ministerial positions for many years. It may be true that the NEO or similar bodies can never be entirely independent because the members must always be appointed by somebody. However, it can be argued that in this instance there was a need to allay all suspicion by providing for such appointments only after consultations with the opposition parties, or at least those of them represented in parliament.

Under the NEO Law the functions of the NEO are essentially limited to 'supervising and controlling' elections, whilst the actual organisation of

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<sup>47</sup> Sec 48 of the amended 1972 Constitution provides that the Constitutional Council shall ensure the regularity of elections and also deal with any challenges with respect to its regularity. It is difficult to reconcile this with secs 6-8 & 19 of the NEO Law, which substantially transfers these powers to the NEO without the Constitution being amended to this effect.

<sup>48</sup> See, generally, Fombad (n 40 above) 172-186.

the elections themselves remains with the much criticised MINAT. Given the time constraints under which it was operating and with only 2 116 personnel throughout the country, it is difficult to see how the NEO could have operated on its own. As we noted above, while Decree No 2001-306 of 8 October 2001 allowed the NEO not only to set up structures in provinces, divisions and councils but also to borrow civil servants, it strangely requires it to 'dissolve' all these structures immediately after the elections. As a practical matter, working with MINAT was both inevitable and unavoidable, and offered many organisational advantages. The NEO was able to use the services of the experienced staff of MINAT and its decentralised electoral management structures, as well as the voter information and other important data that it had accumulated over the years.

However, there are a number of disadvantages that are sufficiently serious to warrant a very serious consideration as to the desirability of maintaining these links. Firstly, many of the numerous irregularities that have marked post-1990 multiparty elections in the country have often been attributed to MINAT and its top officials.<sup>49</sup> Leaving MINAT with responsibility for organising elections, which is basically the most crucial aspect of the electoral process, removes any resemblance of a process that can be impartial and fair. All that said, it cannot be said that the NEO is structured in such a way that it is sufficiently insulated from individuals, parties or institutions that have an interest in the outcome of the elections that it is required to supervise and control. Secondly, the fact that the NEO is a temporary body that is required to 'dissolve' the decentralised structures that it is required to set up after every election means that there is the risk of an inconsistent approach to electoral management, loss of election 'memory', and little opportunity for the adoption of a professional approach to its tasks. This will only reinforce its dependence on MINAT.

Although it is widely accepted that elections are necessary not only for making peaceful changes of government possible but also for promoting successful democratisation, there is the danger that in some situations, bodies like the NEO may serve merely as instruments for perpetuating rituals of symbolic elections and serve to disguise signs of authoritarian revival. To underline this point, it is necessary to look at two sharply contrasting sets of facts that give a picture of the state of political freedoms in Cameroon and the yawning gap between electoralism and practical reality.

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<sup>49</sup> The closest official acknowledgment of MINAT's role in electoral fraud and other malpractices was the long catalogue of irregularities attributed to it by the Supreme Court when it declared President Biya the winner of the closely contested presidential elections of 1992. See, generally, National Democratic Institute for International Affairs (NDI) *An assessment of the October 11, 1992 election in Cameroon* (1993) 50.

Our first set of facts is based on Freedom House's 2000–2001 report, in which Cameroon is classified as one of the 18 countries from a sample of 49 African countries surveyed that is considered as 'not free', in terms of its political rights and civil liberties ratings.<sup>50</sup> With a rating of seven for political rights, which is the lowest possible rating in that category, Cameroon is amongst the 23 countries in the survey of 192 countries in the world where political freedoms are considered unacceptably low. It is one of the eight African countries that fall in this category, the others being Sudan, Rwanda, Libya, Democratic Republic of Congo, Equatorial Guinea, Eritrea and The Gambia. This means that there is, according to the Freedom House study, more political freedom in war-torn countries like Sierra Leone, Liberia and Somalia, which were also surveyed, than in Cameroon. The report concludes that the measures taken so far by the Cameroonian government are not 'anything more than lip service from one of Africa's most enduring and repressive regimes'.<sup>51</sup>

With an average rating of six during the period 1980–1990 and above 6.5 on average for the period 1990–1991 to 2000–2001, the advent of multipartyism has not, as would have been expected, brought about more political freedom to Cameroonians. In other words, since 1990 the level of political freedoms enjoyed by Cameroonians has progressively decreased rather than increased. This contrasts with the trend in most African countries where there have since 1990 been clear signs of improvements in the levels of political freedoms enjoyed. In Burkina Faso, for example, the rating of 6,5 in 1980–81, and of 7,6 in 1988–89, improved to 5,4 in 1994–95 and to 4,4 in 1999–2000.<sup>52</sup> Similarly, in Malawi, the rating improved from 7,6 in 1989–90 to 3,3 in 1999–2000.<sup>53</sup> Some other countries that reflect similar trends are Benin, Cape Verde, Central African Republic, Djibouti, Ethiopia, Gabon, Ghana, Guinea Bissau, Lesotho, Madagascar, Mali, Niger, Nigeria, Seychelles, South Africa and Tanzania.

This analysis should be contrasted with the performances in the elections held since the advent of multipartyism in 1992 by the different parties. Table 1, which is confined to legislative elections only, shows how the electoral fortunes of the ruling party has been increasing in

<sup>50</sup> See <<http://www.freedomhouse.org/ratings/index.htm>> (accessed 28 February 2003). This information is based on Freedom House's 'Freedom in the World Country Ratings 1972–73 to 2000–01'. Countries whose combined averages for political rights and for civil liberties fall between 1.0 and 2.5 are designated 'free'; between 3.0 and 5.5 as 'partly free' and between 5.5 and 7.0 as 'not free'.

<sup>51</sup> See Freedom House *Freedom in the World 2000–2001* <<http://www.freedomhouse.org/research/freeworld/2001/countryratings/cameroon.htm>> (accessed 28 February 2003).

<sup>52</sup> <<http://www.freedomhouse.org/ratings/bolivia.htm>> (accessed 28 February 2003).

<sup>53</sup> <<http://www.freedomhouse.org/ratings/lebanon.htm>> (accessed 28 February 2003).

inverse proportion to the decrease in the quantum of political freedoms enjoyed by Cameroonians.

PARTY	SEATS WON IN 1992 ELECTIONS	SEATS WON IN 1997 ELECTIONS	SEATS WON IN 2002 ELECTIONS
CPDM	88	116	149
SDF <sup>54</sup>	BO <sup>55</sup>	43	22
UNDP	68	13	1
UDC	BO	5	5
UPC	18	1	2
MLJC <sup>56</sup>	—	1	0
MDR	6	1	0
TOTAL	180	180	180

In the 30 June 2002 elections, the ruling CPDM won over 85% of the municipal councils seats and over 80% of the parliamentary seats. The trend shown in Table 1 in the legislative elections is also reflected in the municipal elections. In the 2002 elections, the CPDM won 286 out of 337 municipal councils, thus gaining 67 more councils than in 1996, with the two main opposition parties suffering the heaviest losses. The SDF won 36 councils (down from 62), the UNDP won three (down from 29), the CDU won eight (down from nine), the UPC won three (down from five) and the MDR won one (down from five). None of the more than 160 other smaller opposition parties that are officially registered won any council at all.

### 5.3 Comparing the NEO with other EMBs in Africa

On the whole, many African post-1990 multiparty elections have been marred by irregularities in one form or another linked with the election management authorities. This is so in spite of the evidence in many of the new post 1990 constitutions of attempts to reform the elections management systems. It can be said that the effectiveness and impartiality of the EMBs contributed to some of the few early 'successes',

<sup>54</sup> Social Democratic Front.

<sup>55</sup> BO indicates that the party concerned boycotted the election.

<sup>56</sup> Mouvement pour la Liberté des Jeunesses Camerounais.



in terms of free and fair elections, such as the Zambian 1991 elections. We shall briefly compare some of these EMBs with the Cameroonian NEO particularly from the point of view of some of the most contentious areas such as their independence, appointment procedure and their composition.

The types of EMBs that operate in Africa today are extremely varied. They range from permanent or semi-permanent and reasonably independent bodies, such as the Independent Electoral Commissions (IECs) in Botswana, South Africa and Namibia, which are so structured that they are reasonably insulated from political interference and manipulation by the governments in power, to others that are under the control of the government or monarch, such as that in Swaziland. As in section 3(3) of the NEO Law, the constitution or other statutory instrument creating the EMB in most African countries reiterate the fundamental principle that these bodies in performing their functions shall not be subject to the direction or control of any person or authority.<sup>57</sup> However, the manner of appointing the members of an EMB plays a crucial role in determining the extent of its independence and impartiality. In Botswana and South Africa, the members are appointed from nominations made by an all-party committee, in Malawi, on the basis of nominations by leaders of the political parties represented in the National Assembly, and in Mauritius, by the President following consultations with the Judicial Service Commission. The ideal situation that will ensure some degree of integrity in the process is one in which all the parties involved in the political process are adequately involved in the appointment process. A rather rare but interesting type is the Mozambican partisan EMB, called the National Electoral Commission, which is composed of representatives of all the political parties.<sup>58</sup>

Where, however, there are too many political parties, as for example in Cameroon, where there are about 168 registered political parties, it may become difficult to have all of them represented or, the body becomes unwieldy. Although the fact that voters may view a partisan EMB as representative of all the political forces in the country and this may enhance the body's prestige, there is a danger that the impartiality and efficiency of the body may be jeopardised because members may decide to pursue their own party's interests. This is exactly what happened with the Mozambican National Election Commission where

<sup>57</sup> See eg sec 56A of the Constitution of Botswana of 1966, art 46 of the Ghanaian Constitution of 1992, and art 74(11) of the Tanzanian Constitution of 1977.

<sup>58</sup> Art 15(1) of Electoral Law No 4/93 states that, to guarantee balance, objectivity and independence between the different political parties, the National Electoral Commission shall be constituted as follows: (i) ten members proposed by the Government; (ii) seven proposed by RENAMO; (iii) three members proposed by the political parties other than FRELIMO and RENAMO; (iv) one personality, who shall be the president of the commission.

decision-making within it became very slow due to its politicisation and the elaborate consultations processes within it.<sup>59</sup>

However, in most African countries, the members of the EMBs, just like Cameroon's NEO, are appointed by the president without inputs from opposition political parties. With such a system of appointment, there is always the risk that those appointed are likely to be biased and compliant supporters of the president and would do his bidding. But, it does not necessarily follow that such body cannot be neutral or act independently from the president or his government. For example, the Chairperson and members of the Zambian Independent Electoral Commission were appointed under the 1991 Constitution, by the then President Kenneth Kaunda. Nevertheless, this body supervised the 1991 elections that were won by Chiluba's opposition Movement for Multiparty Democracy (MMD). Be that as it may, in the uncertain and polarised political climate prevailing today in many African countries, the procedure for appointing members of the EMBs should be such as to leave no doubts about the impartiality of the body.

Another remarkable feature of many African EMBs is the role reserved for judges or members of the legal profession. In Tanzania and South Africa, it is expressly provided that at least one or more of the members must be judges or a member of the legal profession, whilst in Botswana, Lesotho, Malawi, Mauritius and Namibia, it is provided that the Chairperson must be a judge.<sup>60</sup> By contrast, in Cameroon, it is stated that judicial and legal officers in active service may not be appointed as members of the NEO. It is doubtful whether there are any valid reasons for excluding active judges. If the judiciary is independent, as it is provided for in almost all modern African constitutions, then it is better to appoint an active judge, whose impartiality can be assumed more than a retired judge, who because they often retire in most African legal systems at a very ripe age, and much later than other civil servants, may be too old to be effective.<sup>61</sup>

The power, autonomy and capacity of election authorities in many African countries are undermined by the lack of financial autonomy. Electoral administration entails huge economic costs and financial outlays that the cash-strapped African governments struggling to revive their economies in the present economic crisis usually find it difficult to bear. Lack of the necessary communication and logistical facilities has in many countries compromised the ability of the EMBs to operate

<sup>59</sup> See D Pottie & T Lodge 'Electoral management in Southern Africa' <[http://www.idea.int/ideas\\_work/22\\_s\\_africa/elections\\_1\\_electoral\\_mgmt.htm](http://www.idea.int/ideas_work/22_s_africa/elections_1_electoral_mgmt.htm)> (accessed 28 February 2003).

<sup>60</sup> See <[http://www.eisa.org.za/WEP/WEP\\_7.htm](http://www.eisa.org.za/WEP/WEP_7.htm)> (accessed 28 February 2003).

<sup>61</sup> Eg, in Botswana, after a 2001 Constitutional amendment, judges can now retire after they are 70 years old.

effectively. In many cases, such as the Zambian elections of 1991 and the Ghanaian elections of 1992, the funding came from foreign governments and international organisations, but this is often a one-off source. Even the South African Independent Electoral Commission, which represents a level of managerial efficiency and administrative sophistication that few countries in Africa can hope to command, raises questions about the financial sustainability of its operations.<sup>62</sup> Too often, as is the case with the NEO, African EMBs, because of lack of resources depend on the government for the deployment of public servants to perform electoral or election-related duties or the use of government buildings, vehicles and other facilities for election purposes.<sup>63</sup> This often compromises the position of the EMB because it becomes very difficult to distinguish between public servants and members of the ruling party or the government and the ruling party.

In general, EMBs in Africa have been bedevilled by the same phenomena — encroaching politicisation and political manipulation resulting in the gradual narrowing of the political space and the erosion of the competitive element in many recent elections. The Cameroonian 2002 elections in this respect merely reflects a trend that had already become manifest in the late 1990s. In this, there is a danger that EMBs, instead of being used as the instruments for promoting free and fair elections in Africa, might become part of the new strategy to perpetuate the *status quo ante* whilst maintaining a facade of competitive electoral democracy.

## 6 Challenges and prospects

The recent June 2002 elections in Cameroon, the first organised by the NEO, reveals some of the major challenges that Africa faces in its faltering attempt to institutionalise liberal democracy and respect for the rule of law. Mere electoralism, supported by institutions such as the NEO, is unlikely to guarantee long-term stability. Perhaps the most serious consequence of electoral malpractices is its capacity to destroy faith in peaceful change through the ballot box and raise the spectre of change by use of force. In the famous and frequently quoted words of the late President JF Kennedy, 'Those who make peaceful change impossible, make violent change possible',<sup>64</sup> or one could even say, inevitable. Elections could lose their relevance as an effective means of

<sup>62</sup> n 58 above.

<sup>63</sup> See A Chaligha 'Management of the elections: The role of the National Electoral Commission' in SS Mushi & RS Mukandala *Multiparty democracy in transition. Tanzania's 1995 general elections* (1997) 56.

<sup>64</sup> Cited in BO Nwabueze *Constitutionalism in the emergent states* (1973) 148–149.

enforcing governmental responsibility and accountability and may give rise to the feeling that a government can neglect the people's welfare as much as it likes and still manage to return to power against the will of the people. As Nwabueze points out, election rigging is a tragic aberration more for what it portends for the future than for the harm it has done in the past and the present.<sup>65</sup>

The possibility of a peaceful change of government is the hallmark of a liberal democracy or any country that seriously aspires to the ideals of liberal democracy. This is what keeps the political actors in such a polity committed to playing by the rules of the game. It institutionalises uncertainty, which is viewed as healthy precisely because it provides incentives for continued play within the rules as opposed to violent conflicts in the streets and *coups*.<sup>66</sup> If you feel that you have a chance of winning someday, you have the motive to play according to the rules. Independent EMBs are today considered as one of the best means for ensuring a level playing field between all political actors and guaranteeing free and fair elections. Most of the election observer and monitoring missions that have become part and parcel of African elections today have advocated for the establishment of autonomous and independent EMBs. These observer and monitoring missions have joined opposition parties and members of the general public to express reservations about the value added by many existing EMBs.

Many constitutions or other statutory instruments in Africa today provide for the establishment of an EMB in one form or another, but as the Cameroonian NEO has shown, there remain serious problems about their design and effectiveness. There may well be no single irreproachable model that is good for all societies at all times, nevertheless the basic principles that are required to ensure that such a body can remain politically neutral and operate in an independent and impartial manner to guarantee electoral fair play and transparency are too well established to raise any doubts.

What bodies like the Cameroonian NEO do is to remove the incentives on political actors to play according to the rules. They do no more than create a system of what Huntington and Moore have described as 'exclusionary elections' or liberal-Machiavellian elections, whereby the overall objective of the government is to prevent the authentic manifestation of popular wishes, while retaining a liberal façade.<sup>67</sup> If it is recognised that EMBs are a necessity, then the best means for ensuring that they work properly is to entrench them in the constitution itself and supplement this with other electoral legislation.

<sup>65</sup> *Democratisation* (1993) 78–80.

<sup>66</sup> See TD Sisk & A Reynolds (eds) *Elections and conflict management in Africa* (1998) 3.

<sup>67</sup> See S Huntington & CR Moore (eds) *Authoritarian politics in modern society* (1970) 15; and also K Johnson *Mexican democracy* (1971) 20.

The goal should be to have a body that is free from the political control of any party, and has adequate and secure funding to discharge its functions in an efficient, professional and independent manner. Finally, the most that the NEO can accomplish in its present form is a strategic power transfer, as happened in Zambia between former President Chiluba and his successor Levy Mwanawasa, and not a genuine constitutional change that can be brought about under free and fair elections. If future elections are to cease to become a predictable and meaningless ritual without any political meaning, then the Cameroonian NEO must be substantially redesigned to limit the avenues for any form of political interference with its proper functioning.

## Freezing the press: Freedom of expression and statutory limitations in Botswana

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### Summary

*Freedom of expression is guaranteed under section 12(1) of the Botswana Constitution. Limitations of this 'right' have to comply with the requirements in section 12(2), which allows for the limitation of freedom of expression under Botswana law. This article analyses a number of statutory provisions (the National Security Act, the Corruption and Economic Crime Act and Penal Code) and a government directive (to cease advertising in particular newspapers) that limit this right. The author investigates whether these limitations are in conformity with the Constitution. He concludes that there has been a significant erosion of freedom of expression, and laments the absence of judicial pronouncements on this issue.*

### 1 Introduction

The adoption of the Universal Declaration of Human Rights (Universal Declaration) by the United Nations General Assembly in 1948 ushered in an international consciousness for the recognition and respect for human rights. Subsequent thereto, a number of treaties and other instruments, such as the International Covenant on Civil and Political

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Rights (ICCPR) incorporated its provisions, in some cases wholesale. One common feature of almost all human rights treaties or instruments is the inclusion of the freedom of, or the right to expression.

The significance of this is that freedom of expression is regarded internationally as a human right that must prevail in any system that claims to uphold democratic values. It is an indispensable tool, and indeed one of the cornerstones of a democratic society. This freedom can meaningfully be enjoyed if there is in existence an accessible forum for the free exchange of ideas and information. This role is to a large extent played by the press, whether print or electronic, which does so by promoting debate on public issues, providing information to the public, thereby enabling the general populace to make informed decisions, and generally to influence political choices.<sup>1</sup> While the role of the media is acknowledged, it must be mentioned that the free flow of information and free speech generally, are not absolute. They are hedged in by limitations and restrictions that are usually brought to bear in the context of constitutional provisions and legislative enactments. A discussion on the limitations and restrictions on freedom of expression follow later on in this article.

The purpose of this contribution is to survey the law relating to freedom of expression in Botswana, the limitations that restrain the exercise of this freedom and determine whether some limitations set by parliament have constitutional validity. In Botswana, freedom of expression, its constitutional guarantees and statutory limitations have been a subject of debate in various fora.<sup>2</sup> In all these fora, the question that has invariably been asked is whether there is press freedom and freedom of expression in Botswana. I argue in this paper that although the Constitution of Botswana provides for freedom of expression, the enjoyment of that freedom is limited by laws that parliament has made and continues to make, and by regulations that the executive has made and continues to make. These laws, regulations and procedures have largely diluted the extent to which the freedom may be exercised. Although the judiciary has shown an inclination towards upholding the constitutional provisions, the incidence of litigation involving freedom of expression has been minimal.

<sup>1</sup> ST Sechele 'The role of the press in independent Botswana' in WA Edge & MH Lekorwe (eds) *Botswana: Politics and society* (1998) 415–416: He refers to a newspaper coverage that forced government to revise the lending policies of a national Bank after it exposed the indebtedness of the country's top politicians.

<sup>2</sup> See B Otlhogile 'The constitutional rights of the mass media in Botswana: An academic's view' in M Leepile (ed) *Botswana's media and democracy: Selected papers from the seminar on the media in a democracy* (1994); T Balule 'The media vis-à-vis the Constitution: Freedom of expression and the press in Botswana' paper presented at MISA Seminar in Gaborone, Botswana, 1996; K Dingake 'The media and the law in Botswana' paper presented at MISA Seminar in Gaborone, Botswana, 1996.

## 2 The constitutional framework of Botswana

Any discussion on freedom of expression in Botswana must necessarily start with the Constitution. At independence, Britain bequeathed to the newly born state of Botswana, as she did with the other former British colonies, a Westminster model of government.<sup>3</sup> These constitutions included provisions on the protection of the fundamental rights and freedom of the individual, in consonance with the Universal Declaration. The various colonies went beyond the Universal Declaration in that they made provision for the legal enforcement of those fundamental rights and freedoms.<sup>4</sup> These constitutions thus have binding legal force and have been made the supreme law of the land. The Botswana Constitution, unlike many written constitutions, has no provision making it the supreme law of the land.<sup>5</sup> Academic opinion leans in favour of the view that a written constitution must necessarily be supreme to other bodies established within the framework of such constitutions.<sup>6</sup> This view has received judicial support in the Court of Appeal of Botswana, which has declared that the Constitution is supreme, and that parliament may not enact laws that contravene or derogate from the provisions of the Constitution, unless such derogation is expressly sanctioned by the Constitution itself.<sup>7</sup>

The Constitution of Botswana protects fundamental rights and freedoms of the individual, providing as follows in section 12(1):

Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression; that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.

The same Constitution, however, places certain limitations on the exercise of the freedom of expression. In line with the limitations placed on the freedom by the Constitution, parliament has enacted laws which 'tend' to whittle down the content and exercise of freedom of expression.<sup>8</sup> Such limitations, which will be considered more fully below,

<sup>3</sup> It has been argued in some quarters that this is only partly correct. See B Otlhogile in Edge & Lekorwe (eds) (n 1 above) 153–4, who argues that the Botswana Constitution only embraces some features of the Westminster model. For example, Britain does not have a written constitution whereas most of her former colonies do.

<sup>4</sup> See eg sec 18(1) of the Constitution of Botswana.

<sup>5</sup> See eg art 2 of the South African Constitution Act 108 of 1996 and art 1(6) of the Constitution of Namibia.

<sup>6</sup> BO Nwabueze *Constitutionalism in the emergent states* (1973).

<sup>7</sup> *Dow v Attorney-General* [1992] LRC (Const) 623.

<sup>8</sup> Eg Penal Code Cap 08:01, sec 59, National Security Act 23:01, secs 3–5, Corruption and Economic Crime Act 1994, sec 44, among others.



are usually couched in vague, elastic and absolute terms, thus creating room for abuse. The question that has occupied the minds of media personalities, journalists and lawyers is whether these statutory provisions conform to the limitations set out under the Constitution. I argue that the limitations, to the extent that they do not set out in clear terms what conduct is being proscribed, do not conform to the constitutional test of 'being reasonably justifiable in a democratic society'. Any limitation that parliament places on freedom of expression must necessarily find justification in the Constitution, otherwise it is of no force and effect. Before embarking on a discussion on the various limitations, it is necessary to outline the content of the freedom upon which the limitations are placed.

### 3 Content of 'freedom of expression'

Any meaningful conclusion as to the existence of freedom of expression can only be reached after a determination of the content and substance of limiting provisions, constitutional or statutory, that impact on the freedom. To this end, an analysis of section 12 is in order.

It has already been pointed out above that chapter II (under which section 12 falls) protects fundamental rights and freedoms of the individual. While some concerns over chapter II are expressed as rights, such as the right to life and personal liberty, section 12 provides for 'freedom of expression'. This distinction in terminology (apparently deliberate) would appear to have been intended to convey a difference in scope and consequence. Freedom is defined as 'the power of acting, in the character of a moral personality, according to the dictates of the will, without other check, hindrance or prohibition than such as may be imposed by just and necessary laws and the duties of social life'.<sup>9</sup> It is also described essentially as a liberty. It is therefore liberty regulated by law, immunity from restraints, but not the absence of reasonable rules.<sup>10</sup>

The substantive content of a 'right', on the other hand, is one that has attracted a lot of academic debate for a long time.<sup>11</sup> A discussion on the different theories and approaches is something beyond the scope of this paper, but for our purposes here we will prefer the definition of a right in the Hohfeldian sense of a 'claim right'. Hohfeld took the view that the concept of a right is a generic one having a wide variety of meanings.<sup>12</sup> It

<sup>9</sup> *Black's law dictionary* (1990) 664.

<sup>10</sup> See IJ Wani 'An evaluation of the Convention on the Law of the Sea from the perspective of the landlocked states' (1982) 22 *Virginia Journal of International Law* 627 641.

<sup>11</sup> See the different theories alluded to in Lord Lloyd & MDA Freeman *Lloyd's introduction to jurisprudence* (1985) 432.

<sup>12</sup> WW Cook (ed) *Fundamental legal conceptions as applied in judicial reasoning and other legal essays* (1923) ch 1.

depicts a number of different ideas which in everyday, including legal, discourse, are easily confused. According to him, the existence of a right in favour of one person implies a corresponding duty on the part of another person.<sup>13</sup> It exists when in consequence of given facts the law declares that one person is entitled to enforce a claim against another person or to resist enforcement of a claim urged by another.

Hohfeld's analysis has, however, not gone unchallenged,<sup>14</sup> and it is not necessary here to go into a detailed discussion on the counter-analysis mounted against Hohfeld. What seems to be paramount in the distinction between freedom and right is the notion of enforcement. The existence of a right is normally accompanied by some mechanism of enforcement. For example, in terms of section 8 of the Constitution of Botswana, a person is protected from deprivation of property unless certain conditions are satisfied; for example where compulsory acquisition is necessary in the public interest and upon payment of adequate compensation.<sup>15</sup>

Freedom, on the other hand, does not impose any positive duties on the part of another person. At best it only implies negative responsibilities; those against unreasonable or unjustifiable interference. The High Court of Botswana has held, in *Media Publishing (Pty) Ltd v Attorney-General of Botswana and Another*,<sup>16</sup> impliedly following the Canadian Supreme Court in *Graham Haig and Others v Chief Electoral Officer and Others*<sup>17</sup> (but distinguishing the case on the facts), that where freedom of expression is couched in the negative (as is the case in Botswana), there is no legal obligation upon the state to take a positive step in order to enable an individual or group of individuals to enjoy that freedom. Consequently, where the government had taken a positive step of discontinuing advertising in the Guardian Group of Newspapers with the sole intention of showing its disapproval of the group's line of reportage (a punitive measure), it was held to be an infringement of the Newspaper Group's freedom of expression.

<sup>13</sup> As above. This accords with the definition in G Wille *Principles of South African law* (1977) 44: 'An interest conferred by, and protected by, the law entitling one person to claim that another person or persons either give him something, or do an act for him, or refrain from doing an act'.

<sup>14</sup> See eg A Halpin 'Hohfeld's conceptions: From eight to two' (1985) 44 *Cambridge Law Journal* 435.

<sup>15</sup> The Acquisition of Property Act was enacted essentially as a vehicle for the enforcement of the constitutional guarantees of rights to property. Under the Act, a person whose property has been compulsorily acquired is entitled to challenge the legality of acquisition as well as the amount of compensation. See secs 9 & 10: see also *Attorney-General v Western Trust (Pty) Ltd*, High Court Botswana, Civil Cause No 37/1981 (unreported) and more recently *President of the Republic of Botswana and Others v Pieter Bruwer and Another* 1998 BLR 86.

<sup>16</sup> Misc No 229/2001 (unreported) 19, per Lesetedi J.

<sup>17</sup> 1993 (2) SCR 995.

The view has been expressed that the content of freedom of expression will vary according to the form in which it is incorporated in different constitutions. However, it is said that at the very minimum it entails three positions. Firstly, it may mean simply the right to express opinions without censorship, whether by prior authorisation or subsequent prosecution. Secondly, it may mean the right to receive and impart information. Thirdly, it may mean a guaranteed access to forms of publication and broadcasting.<sup>18</sup> These concerns are clearly covered by section 12(1) of the Botswana Constitution. The position is that the person against whom duties would have existed in the case of freedom of expression, the state authority, is constitutionally entitled to impose such limitations as are reasonably justifiable in a democratic society and may pass laws the effect of which is to curtail this freedom as long as certain conditions are satisfied.<sup>19</sup>

In other systems, freedom of the press and speech is expressed in terms suggesting it is a right.<sup>20</sup> The First Amendment to the Constitution of the United States of America, for example, provides that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press . . .' There is immunity from state interference, and a disability on congress to curtail freedom of speech and of the press.<sup>21</sup> It is not expressed as entailing a positive obligation on the state. What is interesting about the position in the United States is that even in the absence of express limitations to the right, Congress may nevertheless make, and some states have made, laws restricting freedom of speech in the protection of public order, decency and other peoples' rights<sup>22</sup> and the judiciary has upheld the limitations.<sup>23</sup>

What seems to emerge is that even if the freedom of expression were expressed as a right under the Constitution, parliament could still properly make law restricting the exercise thereof as long as it is done to protect one or other of the heads of public interest, for example national security, the rights of others, public order, etc. Indeed, under the Constitution of Botswana, such derogations are permitted under the same provisions that provide for the protection of fundamental rights. The Court of Appeal of Botswana in *Attorney General v Unity Dow* has held that section 3 of the Constitution, which entitles (together with

<sup>18</sup> A Boyle 'Freedom of expression as public interest' (1982) *Public Law* 574 577-579.

<sup>19</sup> See sec 2(2) Botswana Constitution.

<sup>20</sup> See art 5 of the German Basic Law (*Information Freiheit*) and art 10 of the European Convention on Human Rights and Fundamental Freedoms.

<sup>21</sup> See EM Barendt *Freedom of speech* (1987) 80.

<sup>22</sup> G Robertson & A Nicol *Media law* (1992) 3; see also C Gearty 'Citizenship and freedom of expression' in R Blackburn (ed) *Rights of citizenship* (1993) 275-6.

<sup>23</sup> *Debs v United States* 249 US 211 (1919); see more recently *Rust v Sullivan* 114 L ED 2d 233 (1991).

section 12) a person to freedom of expression, is a substantive provision creating substantive rights. Freedom of expression has still not secured parliamentary blessing in the form of an enabling Act. Instead, parliament continues to enact a plethora of laws having a stifling effect on the freedom.<sup>24</sup> Since these limitations are, in the words of one scholar,<sup>25</sup> inevitable, perhaps the inquiry should not be whether there should be limitations at all, but whether the limitations are reasonably justifiable in a democratic society. In Botswana this is an essential condition for the validity of any statutory limitation passed in terms of the permissible derogations, as will be shown below.

#### 4 Statutory limitations and derogations

The freedom to express oneself is not absolute. All the major legal systems of the world recognise the importance of other public values like the reputation of other people, public order, national security and the suppression of disorder. These systems have devised mechanisms, usually in terms of existing legal orders, to protect these values. The justification for these limitations is perhaps, at least in principle, obvious. The exercise by individuals of rights should not harm others. The law sanctions restrictions to freedom of expression and speech and the position is best explained by some famous media law commentators who observe that '[t]he expression of facts and ideas and opinions never can be absolutely free. Words can do damage, even if they are true — by betraying a military position or by prejudicing a trial, or by inciting racial hatred'<sup>26</sup> and that 'free speech is what is left of speech after the law has had its say'.<sup>27</sup>

These views have been cemented by a judicial pronouncement in the United Kingdom where the Judicial Committee of the Privy Council said that '[f]ree speech does not mean free speech: It means speech hedged in by all the laws against defamation, blasphemy, sedition and so forth. It means freedom governed by law'.<sup>28</sup> The preponderance of the various limitations to freedom of expression fortify the view held by many that under the law, the position of the media is not different from that of an ordinary individual.<sup>29</sup> The legal restraints attached to citizen rights of

<sup>24</sup> Eg Penal Code Cap 08:01 sec 59, National Act Cap 23:01 secs 3–5, Corruption and Economical Crime Act 1994 sec 44 Cinematographic Act Cap 60:02 sec 12(1), Botswana Housing Corporation (Amendment) Act No 5 g 1994, among others.

<sup>25</sup> C Gearty 'Citizenship and freedom of expression' in R Blackburn R (ed) *Rights of citizenship* (1993) 275.

<sup>26</sup> Robertson & Nicol (n 22 above) 2–3.

<sup>27</sup> As above.

<sup>28</sup> *James v Commonwealth of Australia* [1936] AC 578 627.

<sup>29</sup> T Gibbons *Regulating the media* (1991) 18.

free speech apply with equal force to the media in spite of the latter's role in disseminating information, scrutinising official behaviour and providing a forum for debate on important issues of national concern.

The European Convention on Human Rights<sup>30</sup> and even the Universal Declaration provides for such limitations for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.<sup>31</sup>

Section 12(2) of the Constitution of Botswana provides as follows:

Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision —

- (a) that is reasonably required in the interest of defence, public safety, public order, public morality or public health; or
- (b) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, regulating educational institutions in the interest of persons receiving instruction therein, or regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless, broadcasting or television; or
- (c) that imposes restrictions upon public officers, employees of local government bodies, or teachers,

and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

Though the limitations under the various regimes are not identical, they cover essentially the same concerns. It is not enough for the legislature to pass the law that curtails freedom of expression in the interest of national security, public order and so forth: It must be 'reasonably justifiable in a democratic society'. This is a condition for the limitations that parliament may set. A proper determination of the reasonableness or otherwise of the limitations can only be done in regard to the particular circumstances and peculiar surroundings of each case. Where constitutional and legislative provisions do not carry with them particular definitions, it is only natural to derive guidance from the courts, and in most cases to regard the pronouncement of the courts as authoritative in terms of interpreting and defining particular concepts. It is also usual practice for the courts in one jurisdiction to derive guidance from pronouncements of courts elsewhere especially where the latter were concerned with similar provisions.

Accordingly, resort may be had to European human rights jurisprudence. This is one system that can be described as 'mature' both

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<sup>30</sup> Art 10(2).

<sup>31</sup> Art 29(2).

in respect of organisation and the importance attached to the existence of the court by the member states. It must, however, be pointed out that the European Convention employs language different from that used in section 12. While section 12 provides that the limitations must be 'reasonably justifiable', under the European Convention such limitations must be 'necessary' in a democratic society. In European human rights jurisprudence, 'necessary, implies a pressing social need.<sup>32</sup> In the well-known *Spycatcher* case, the European Court said the following:<sup>33</sup>

The adjective 'necessary' . . . implies the existence of a 'pressing social need'. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the law and the decisions applying it, even those given by independent courts. The court is therefore empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by Article 10 . . . What the court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued', and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'.

Such limitations must, however, be proportional to the aim (which must be legitimate) pursued, and the reasons in favour of the limitations must be relevant and sufficient. It is submitted that 'necessary' implies a higher degree of justification (than 'reasonably justifiable') and necessarily involves giving a central place to proportionality of the means of achieving a pressing and legitimate public purpose.<sup>34</sup> There must be a compelling need for the restrictive measures, the absence of which will threaten the peace, order and stability of the nation.

The phrase 'reasonably justifiable' has not been judicially defined in Botswana. A parallel may be drawn from the Canadian experience. In Canada, the limitations must be 'demonstrably justified' in a free and democratic society.<sup>35</sup> This expression received judicial scrutiny in *R v Oakes*,<sup>36</sup> where it was held that two criteria must be met if the limit is to be found reasonable: Firstly, the objective which the legislation is designed to achieve must relate to concerns which are pressing and substantial. Secondly, the means chosen must be proportional to the objective sought to be achieved. The broad guidelines in *R v Oakes* are sufficiently clear and do not require any elaborate explanation. Difficulties may arise, however, in determining whether particular legislation and measures taken in terms of that legislation fall within the parameters of these guidelines.

<sup>32</sup> *Lingens v Austria* (1986) 8 EHRR 407.

<sup>33</sup> *The Sunday Times v United Kingdom (No 2)* (1992) 14 EHRR 229 para 50.

<sup>34</sup> *Coetzee v Government of the Republic of South Africa and Others* (1995) 4 LRC 220.

<sup>35</sup> Sec 1 of the Canadian Charter of Rights and Freedoms.

<sup>36</sup> [1986] 1 SCR 103.

It is submitted the criteria in *R v Oakes* should apply in the Botswana context as well. What the criteria demand is that since the various freedoms are guaranteed under the Constitution, interference with or denial of the freedoms in any situation should be justified by a need to advance a 'superior' or overriding public interest. 'Reasonably justifiable' therefore seems to require that the measures taken, viewed in light of all the circumstances, were such as to have been taken by any competent authority properly directing itself. The purpose to be achieved is one that produces maximum degree of order and tranquillity to society generally and minimising the risk of anarchy.<sup>37</sup> If this is accepted as the threshold, interference with the freedom is more likely to be adjudged lawful in an African sense than in the European sense.

In South Africa, the limitations must be 'reasonable and justifiable' in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right, (b) the importance of the purpose of the limitation, (c) the nature and extent of the limitation, (d) the relation between the limitation and its purpose and (e) less restrictive means to achieve the purpose.<sup>38</sup> The factors to be taken into account in determining the reasonableness and justification of the limitations are laid down in part by the Constitution. It is clear that article 36 is inclusive rather than exhaustive. The terminology employed in the South African sense is much closer to that in the Botswana Constitution and it is submitted that the decisions in South African jurisprudence on article 36 would be very persuasive in Botswana.

Despite the distinction in terminology employed in the European Convention and the Botswana Constitution, the jurisprudence from both systems as well as other systems like the commonwealth have established common fundamental propositions in terms of interpreting the provisions on the protection of fundamental rights and freedoms and their limitations. Firstly, a constitution which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction.<sup>39</sup> The Botswana Court of Appeal explained this in the landmark case of *Unity Dow* in the following terms:<sup>40</sup>

Generous construction means in my own understanding that you must interpret the provisions of the Constitution in such a way as not to whittle

<sup>37</sup> This would seem to conform to utilitarian concepts: See Lloyd & Freeman (n 11 above) on utilitarianism generally.

<sup>38</sup> Art 36(1) Constitution of the Republic of South Africa Act 108 of 1996; see *Coetzee v Government of the Republic of South Africa and Others* (n 34 above).

<sup>39</sup> See *Ming Pao Newspapers Ltd v AG of Hong Kong (PC)* [1996] AC 907 917 per Lord Jauncey. In Botswana, see *Attorney-General of Botswana v Moagi* 1981 BLR 1, 32 per Kentridge JA; *Dow* case n 7 above 635 per Amisshah JP.

<sup>40</sup> n 7 above 668 per Aguda JA.

down any of the rights and freedoms unless by very clear and unambiguous words such interpretation is compelling. The construction can only be purposive when it reflects the deeper inspiration and aspiration of the basic concepts which the Constitution must forever ensure, in our case the fundamental rights and freedoms entrenched in section 3.

Thus, in construing the provisions of the Constitution and the limitations set out thereunder, the construction to be preferred is one that advances the freedom rather than one which has a limiting effect. Secondly, any restriction on the guaranteed right of freedom of expression, which constitutes one of the essential foundations of a democratic society, must be narrowly interpreted.<sup>41</sup> This consideration should apply with equal force to other freedoms. In Botswana, this was held applicable to all fundamental rights and freedoms.<sup>42</sup> Thirdly, any restrictions on the guaranteed right of freedom of expression must be proportionate to the aims sought to be achieved thereby.<sup>43</sup> This defines the term 'necessary' as used in the European Convention.

In our case the construction to be attached to the phrase 'reasonably justifiable' as described above appears to import, as near as possible, the same requirements. The pronouncements in the Botswana Court of Appeal in the cases referred to herein are strong indicators that Botswana's human rights jurisprudence has fallen in step with international trends. What remains to be established is how these broad principles have been applied in the country. Emphasis here is on the freedom of expression. Despite the numerous legislative enactments in existence which impact on the freedom of expression, there is very little case law on the subject. The position is even worse on the subject of the freedom to print or publish written material, which is our crucial concern here. In order to determine whether any enactment conforms to the permissible derogations or limitations under the Constitution, it is usually easy to look at factual propositions, which require the invocation of legislation that brings into practice the permissible derogation. In the majority of cases, this would be a criminal charge.

In Botswana, statutes that impact on freedom of expression do so by way of criminalising certain publications. This constitutes a significant form of intimidation to the print media whose primary function is the publication of information. In spite of the absence of judicial authority, a few of the statutory limitations will be discussed briefly hereunder. I intend to look at three pieces of legislation, in terms of which charges have been brought against journalists. These are the National Security Act,<sup>44</sup> the Corruption and Economic Crime Act<sup>45</sup> and the Penal Code.<sup>46</sup>

<sup>41</sup> *The Observer and the Guardian v United Kingdom* (1992) 14 EHRR 153 191.

<sup>42</sup> See *Clover Petrus v The State* [1984] BLR 14 37 per Aguda JA.

<sup>43</sup> *James v United Kingdom* (1986) 8 EHRR 123.

<sup>44</sup> Cap 23:01.

<sup>45</sup> Act 13 of 1994.

<sup>46</sup> Cap 08:01.



## 5 The National Security Act

This Act was passed in response to the increase in terrorist activities in the country, which were perpetrated from outside, especially from South Africa. People were being killed and injured through bomb blasts and there was a series of events that normally resulted in extensive damage to property. It was therefore the government's concern to combat acts of terrorism and sabotage. The purpose of the Act is captured in the memorandum to the bill as presented to parliament. Clause 4 thereof was to the following effect:<sup>47</sup>

The main purpose of this Bill is therefore to pass a law for the purpose of safeguarding the life and property of the people of this country and to prevent acts likely to be prejudicial to the safety and interests of Botswana.

The provision that affects the right of journalists to publish is section 5(1). The section prohibits publication or communication of any classified matter without the authority of an authorised officer. Classified matter under the Act means any information or thing declared to be confidential or secret by an authorised officer. Subsection (2) thereof provides:

In a prosecution for a contravention of subsection (1) it shall be no defence for the accused person to prove that when he committed the matter he did not know that it was a classified matter.

While the objectives and purpose of the Act as a whole may have been noble, the means of achieving them are, in my submission, overboard. Information becomes classified because a government official has decided that it should be. The determination as to what information should be classified rests solely on the discretion of the authorised officer, whose determination will be difficult to judicially review. Apart from the laborious task of having to ascertain whether information is classified or not, to prosecute for publication of information does not advance the purposes of the Act. Openness on the part of government is the hallmark of a democracy. Allowing the free flow of information especially that concerning the government advances this goal. The government can effectively circumvent this through the classification of information as either confidential or secret and prosecuting for publication thereof. Worse still, under section 10, the onus that ordinarily rests on the state in a criminal case is effectively thrown on the accused person. It is a strong tenet of our criminal justice system that a person is presumed innocent until proved guilty.<sup>48</sup> This is embedded in our Constitution, which provides that '[e]very person who is charged with a criminal offence shall

<sup>47</sup> National Security Bill 4 of 1986, published on 14 March 1986.

<sup>48</sup> *Woolmington v DPP* [1935] AC 462.

be presumed innocent until he is proved or has pleaded guilty'.<sup>49</sup> The Constitution, however, provides for a derogation of this rule:<sup>50</sup>

Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (2)(a) of this section to the extent that the law in question imposes upon any person charged with a criminal offence the burden of proving particular facts.

This provision does not shift the legal burden, but only provides for shifting of what has ordinarily come to be called the evidentiary burden.<sup>51</sup> This occurs when the state establishes a *prima facie* case and the accused person has to raise matter to displace the *prima facie* case. In the Constitution, what is allowed is a law that only imposes a burden on the accused person to 'prove particular facts'. Under the National Security Act, the defence that seems to be available to the accused person is that of a denial of publication altogether, which is difficult to sustain in the case of the print media. This is more so where the Act provides that it is necessary to show that the accused person was guilty of any particular act tending to show a purpose prejudicial to the safety or interests of Botswana, but may be convicted on the basis of his antecedents.<sup>52</sup> The accused person is clearly denied his rights to the due process of the law. The provisions of the Act do not advance the purposes and objectives which informed its enactment. They are overboard and whittled down, to a large extent, the constitutional guarantees to an individual or media houses generally. They are not reasonably justifiable in a democratic society to the extent that the state can under legislation conduct business in total secrecy, and the situation would not be worse off in the absence of this otherwise draconian piece of legislation. It is submitted therefore that the provisions under the National Security Act, to the extent addressed herein, are unconstitutional.

## 6 The Corruption and Economic Crime Act

This Act was primarily passed to make provision for the prevention of corruption and 'white collar' crime. The provision that impacts on freedom of expression is cast in the following terms:<sup>53</sup>

Any person who, without authority or reasonable excuse, discloses to any person who is the subject of an investigation in respect of an offence alleged or suspected to have been committed by him under this Act the fact that he is subject to such an investigation or any details of such investigation, or

<sup>49</sup> Sec 10(2)(a) Botswana Constitution.

<sup>50</sup> Sec 10(12)(a) Botswana Constitution.

<sup>51</sup> See LH Hoffman & D Zeffertt *The South African law of evidence* (1990) 495–529 for explanation of burden of proof and the cases cited therein.

<sup>52</sup> See sec 10(4).

<sup>53</sup> Sec 44 Corruption and Economic Crime Act 13 of 1994.

publishes or discloses to any other person either the identity of any person who is the subject of such an investigation or any details of such an investigation, shall be guilty of an offence and shall be liable, on conviction, to imprisonment for a term not exceeding one year or to a fine not exceeding P2 000, or to both.

A similar provision was subject to judicial scrutiny in Hong Kong in terms of the Hong Kong Prevention of Bribery Ordinance.<sup>54</sup> It was argued before the Privy Council (Hong Kong's highest appellate court) that the provision was inconsistent with article 16 of the Hong Kong Bill of Rights which guaranteed freedom of expression. It was also argued that the restriction under the ordinance was disproportionate to the legitimate aims of the scheme of the ordinance in that it criminalised disclosures even when no prejudice was caused or likely to be caused to investigations and even when the accused believed there would be no prejudice. The Court took the view that since bribery cases were particularly difficult to detect, the maintenance of secrecy as to an investigation was even more important in order not to put the suspect on his guard.<sup>55</sup> The section achieved the purpose of protecting the integrity of the investigation. The Court observed that in many cases it will be impossible to know whether an investigation had prejudiced an investigation or not. The Court gave an example of a suspect who might destroy incriminating documents of which the investigator is not and never would be aware, but which he would have discovered had there been no prior disclosure.<sup>56</sup> While the protection of the integrity of the investigation is accepted as necessary,<sup>57</sup> on the question of prejudice, it seems that the court favours the state. While in some cases the restriction will serve the purpose of protecting the integrity of the investigation, it may result in injustices to the suspect in other cases. The Court in the *Ming Pao Newspapers* case held that the provision in the ordinance was not inconsistent with the Bill of Rights.

Section 44 has not been scrutinised by the Botswana Court. The opportunity was lost in *State v Professor Malema and Others*,<sup>58</sup> when the

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<sup>54</sup> The provision under the Hong Kong legislation and our sec 44 are *in pari materia*. As a matter of fact, the Botswana legislation is almost a carbon copy of the Hong Kong legislation. When the Directorate on Corruption and Economic Crime was under the Act in 1994, its first director was recruited from Hong Kong where he has been Deputy Director of the Independent Commission Against Corruption (ICAC), the equivalent of the Botswana Directorate on Corruption and Economic Crime. Other officers now working in Botswana were also recruited from the ICAC. The reason behind this was apparently that the establishment of the directorate would effectively take root with experienced officers.

<sup>55</sup> *Ming Pao Newspapers v AG of Hong Kong* 1996 AC 907 920.

<sup>56</sup> As above, 921.

<sup>57</sup> In our criminal justice system, a court may deny an accused person bail pending trial if it is satisfied that the suspect will interfere with witnesses and thereby prejudice the trial.

<sup>58</sup> CRB 387/96 (unreported).

Chief Magistrate of Gaborone dismissed the charges as defective. It would have been referred to the High Court for a pronouncement on the constitutionality of section 44, but for the finding by the magistrate that the charge sheet was defective. It may be that the decision in the *Ming Pao Newspapers* case would be very persuasive to the Court. The Directorate of Economic Crime and Corruption explained reasons for the confidentiality of the investigation in a way that is very much in line with the reasoning in the *Ming Pao* case. They were (a) to avoid alerting the suspects lest they tamper with valuable evidence, and (b) that an investigation might actually exonerate a suspect; the suspect was not to have his reputation damaged if it was known that he or she was the subject of investigation.<sup>59</sup> Whether a court will enter a conviction or acquit will then depend on the nature of the charge laid against a suspect if the court holds the provision not to be inconsistent with the Constitution.

## 7 The 'false news' provisions and the *Okavango Observer* case

On 29 September 1995, the *Okavango Observer* (a newspaper circulating in the northwestern part of the country) carried an article under the title 'Terror Squad' Shocks Maun; in which it was reported that Maun residents were living in fear of a gang styled 'Ma Western' which terrorised and harassed villagers on various occasions. The gang was reported to have allegedly dug up a coffin at a graveyard, assaulted an elderly woman after refusing to give them beer, attacking a young man who was on his way home from a disco, stabbing another with a knife and several other bizarre incidents. The state then brought charges against Caitlin Davies and Letswetswe Phaladi, the editor and reporter respectively of the *Okavango Observer*. The two were accused of publishing a report contrary to section 59(1) of the Penal Code. The particulars of the charge disclosed that they had published a false report, which was likely to cause fear and alarm to the public.

Section 59 of the Penal Code provides as follows:

- (1) Any person who publishes any false statement, rumour or report which is likely to cause fear and alarm to the public or to disturb the public peace is guilty of an offence.
- (2) It shall be a defence to a charge under section 1 if the accused proves that prior to publication, he took such measures to verify the accuracy of such statement, rumour or report as to lead him reasonably to believe it was true.

In terms of the section, a statement, rumour or report must have been published. Secondly the statement, rumour or report should have

<sup>59</sup> Press Release of 8 November 1996.

been false. Thirdly, as was held in *State v Mbaiwa*,<sup>60</sup> there must be an intention to publish a false statement, rumour or report knowing or having reasonable cause to believe that it is likely to cause fear and alarm to the public or to disturb the public peace or doing so recklessly. Fourthly, it is not necessary that the report should *actually* have caused fear and alarm to the public or disturb the public peace. It is sufficient if it was only likely to do so. The determination as to the likelihood of disturbance of peace or fear and alarm being caused is left to the court. Under the Botswana criminal justice system, before charges may be laid against a suspect, the state agency responsible for prosecution must be satisfied that there is evidence available to bring the matter to court or that there is *prima facie* evidence which, if uncontroverted would lead to a conviction.<sup>61</sup> In this exercise, the personal idiosyncracies and predilections of the officer charged with the responsibility of drawing up the charges may play a part. A reporter may then be brought to court even where the elements of section 59(1) are not in place since the falsity of the report, the likelihood of fear having been caused, etc are matters to be resolved in court. The possibility of abuse of discretion by prosecutors cannot be ruled out, and section 59 may be used even though the report is not false. In the face of a risk of prosecution, the press will be deterred from publishing even true information and this has a chilling effect on freedom of speech and of the press.

There is another dimension of the charges in the *Okavango* case. The article carried interviews with people who allegedly fell victim to the activities of the 'Ma Western'. They number at least three. The Maun station commander is reported to have said it was possible the gang members acted under the influence of dagga, though none had been arrested for possession of drugs. This is an implicit acknowledgment of the possibility of terror having been caused by the gang. Besides, the existence of terror groups in Botswana generally is not something new. There had been occurrences of organised violence perpetrated by gangs in some major villages of the country.<sup>62</sup> For the record, it was always reported that members of the groups were mostly Form 2 dropouts, and a big village like Maun would reasonably be expected to have a number. The fear that was allegedly caused by the report would not, in view of the circumstances above, be such as to be made the subject of criminal

<sup>60</sup> [1988] BLR 314 322 *per* Livesey Luke CJ.

<sup>61</sup> *Ex parte Minister of Justice: In re R v Jacobson and Levy* 1931 AD 466 478; *S v Mtetwa* 1972 3 SA 766.

<sup>62</sup> Eg, there were the 'Makgaola 7' in Kanye in the late 1980s, the 'Ma Spoties' in Mogoditshane in the mid 1990s. All these activities received wide publicity in both the official and private media. While there might not have been fear caused to residents of Maun by the activities of the groups at the time, it was an activity that could reasonably be anticipated to be likely to occur at some future date, given the frequency of previous occurrences.

prosecution under section 59. If anything, it was something of a warning to society to be alert in their activities. In Maun, two men, allegedly leaders of the gang in question, were at the time of the report awaiting trial for offences involving violence allegedly connected to similar activities. This shows the extent to which Maun residents were familiar with the gang's illicit activities. From the standpoint of a journalist, section 59 is disturbing in several respects. Its uncertainty would require a reporter to conduct interviews to determine whether a story intended for publication would cause fear and alarm to the public. It might also be necessary to seek legal advice to determine if the intended publication falls foul of section 59. This retards communication of information. All this complexity in reporting in the face of a threat of prosecution has a chilling effect and stifles freedom of expression.

The Attorney-General entered a *nolle prosequi* in the *Okavango Observer* case.<sup>63</sup> While it may be said that dropping charges was appropriate, questions still linger in the minds of journalists and all those who cherish the ideas of a free press. Section 59 still remains and may be invoked anytime there is a publication which the state finds unpalatable. It is no panacea that nobody has ever been convicted under the provision. It is equally disturbing that charges may be left hanging on the heads of journalists as it happened in the *Okavango Observer* case.

It has been held in cases elsewhere that, whereas freedom of expression applies to free and unrestrained publication of information as long as it is done with due regard to other values and other people's rights, it is also applicable to information or ideas that offend, shock or disturb the state or any sector of the population.<sup>64</sup> One can do no better than adopt the views of Tendai Biti<sup>65</sup> on section 50(2) of the Law and Maintenance Orders Act of Zimbabwe, Cap 11:07.<sup>66</sup> Apart from the fact that the constitutional guarantees on freedom of expression in Zimbabwe<sup>67</sup> also exist under the Constitution of Botswana at section 12 as alluded to above, the 'false news' provision in Zimbabwe

<sup>63</sup> The charges were dropped after about two years. In the meantime the newspaper became defunct.

<sup>64</sup> *Open Door and Dublin Woman v Ireland* ECHR (29 October 1992) Ser A 246; see also V Berger *Case law of the European Court of Human Rights Vol II 1988–1990* (1992) 215.

<sup>65</sup> In a paper presented at the third Southern African Media Lawyers Conference at Kalahari Sands Hotel and Casino, Windhoek, Namibia, 26–28 August 1999 entitled 'National Security, Official Secrecy and Access to Information: A new approach for the next millenium'.

<sup>66</sup> It provides: 'Any person who makes, publishes or reproduces any false statement, rumour or report which (a) is likely to cause fear, alarm or despondency among the public or any section of the public; or (b) is likely to disturb the public peace; shall be guilty of an offence . . . unless he satisfies the court that before making, publishing or reproducing, as the case may be, the statement, rumour or report took reasonable measures to verify the accuracy thereof'.

<sup>67</sup> Sec 20 Zimbabwean Constitution.

(Section 50(2) of the Law and Maintenance Orders Act) is similar to section 59 of the Botswana Penal Code, although the former contains the term 'despondency' which does not exist in the latter. For purposes of this discussion, the two provisions will be treated as being similar. In the view of this writer, they were intended to criminalise the same kind of conduct and therefore serve the same purpose. The provisions are a colonial legacy that originated in the desire by the minority colonial governments to insulate themselves against dissent by the colonised. The absence of such provisions would, in the estimation of the colonial rulers, incite hatred and generate public uprisings which would lead to the demise of colonial rule and the advent of popular majority rule. As such the enactment of such provisions was a necessary political tool of survival.

In his paper, Tendai Biti argues that the provision does not criminalise false statements but rather those likely to cause despondency, alarm or public disorder. It is thus the potential to cause alarm, public disorder etc that is the gist of the offence. Since this potential cannot in all cases always be ascertainable before publishing the report or statement, the uncertainty translates into a chilling effect on those whose main pre-occupation is publishing. The offence created by the provisions is of a speculative nature in that it does not unambiguously advise the citizens as to the type of conduct proscribed. In the words of Biti, this is a breach of the concept of legality.<sup>68</sup> These provisions subject the maker of 'false news' to the subjective whims of the public which has different tastes and senses or levels of 'egg skull'.<sup>69</sup> These could not therefore be reasonably or demonstrably justifiable in a democratic society. Journalists cannot be expected to publish only that information which extols the virtues of those in power.

It is comforting to note that the false news provision has been struck down by the Zimbabwe Supreme Court in *Chavunduka and Another v Minister of Home Affairs and Another*<sup>70</sup> as being unconstitutional to the extent that it violates the constitutional guarantees of freedom of expression. The case concerned a newspaper article authored by the second applicant and published in the *Weekly Standard*, a weekly newspaper, entitled 'Senior army officers arrested', concerning an alleged coup attempt in which 23 members of the Zimbabwe National Army were alleged to have been arrested. It was alleged that the reason for the uprising was two-fold: mismanagement of the economy and Zimbabwe's participation in the war in the Democratic Republic of Congo. The article also noted general dissatisfaction within the army

<sup>68</sup> n 65 above 9.

<sup>69</sup> As above.

<sup>70</sup> [2000] 4 LRC 561 (*Chavunduka case*).

over the war, claiming that morale was low and that in defiance of orders some soldiers had refused to participate in the Congo conflict.

The editor of the newspaper, the first applicant and the author of the article were then charged under the false news provision in the Law and Order (Maintenance) Act, referred to above. They applied to court for an order declaring section 50(2)(a) of the Act to be in contravention of sections 20(1) and 18(2) which guarantee freedom of expression and the right to a fair trial. In upholding the applicants' claim, the Court observed that the offence in question was speculative and created out of a conjectural likelihood of fear, alarm or despondency which might arise out of the publication of any statement.<sup>71</sup> Since it was concerned with likelihood rather than reality, it was susceptible to too wide an interpretation. Accordingly, it exerted an unacceptable chilling effect on freedom of expression since people would tend to steer clear of the potential zone of application to avoid censure.<sup>72</sup> The Court went further and held that the phrase 'fear, alarm or despondency' was over-broad since almost anything that was newsworthy was likely to cause one or more of such emotional reaction which by its nature is subjective.<sup>73</sup> The provision was therefore insufficiently precise to demonstrate the particular conduct proscribed and it failed to provide guidance of conduct to persons of average intelligence. It therefore failed the requirement of being 'under the authority of any law'.

Although the Court accepted that section 50(2) of the Law and Order (Maintenance) Act was capable of serving one of the legitimate aims specified in section 20(2) of the Constitution, it nevertheless held that the limitation imposed thereby did not satisfy the requirement of being 'reasonably justifiable in a democratic society'.<sup>74</sup> In arriving at this conclusion, the Court, following its own<sup>75</sup> and Canadian jurisprudence,<sup>76</sup> had adopted a three-fold test in determining whether or not the limitation is permissible. Firstly, the Court asked whether the legislative objective which the limitation is designed to promote is sufficiently important to warrant overriding a fundamental right. In the particular circumstances of the case, the Court observed that since independence, a period of over 20 years, the need for recourse to section 50(2) had not been felt as there had not been any prosecution thereunder.<sup>77</sup> There was 'no longer a primary objective, directed to a 'substantial concern which justifies restricting the otherwise full

<sup>71</sup> As above, 572c.

<sup>72</sup> As above, 572d–e.

<sup>73</sup> As above, 572e.

<sup>74</sup> As above, 576b.

<sup>75</sup> See *Nyambirai v National Social Security Authority* [1996] 1 LRC 64 and *Retrofit (Pvt) Ltd v Posts and Telecommunications Corp* [1996] 4 LRC 489.

<sup>76</sup> *R v Zundel* (1992) 10 CRR (2d) 193.

<sup>77</sup> *Chavunduka* case (n 70 above) 575g–h.



exercise of the freedom of expression'. The retention of the provision could not be said to be required by any international obligation undertaken by the state. The first requirement was therefore not satisfied.

Secondly, the Court investigated whether the measures designed to meet the legislative objective are rationally connected to it and are not arbitrary, unfair or based on irrational considerations. In the particular circumstances of the case, the Court observed that the fact that the provision was never used since independence in 1980 strongly suggested that it was not rationally connected to, and essential for, the intended objective of avoiding public fear, alarm or despondency and to secure public safety or public order.<sup>78</sup> The anticipated danger was remote and conjectural. There was thus no proximate and direct nexus with the prohibited expression, and accordingly the second requirement was not satisfied.<sup>79</sup>

Thirdly, the question was whether the means used are no more than is necessary to accomplish the objective. This goes to proportionality. Here the Court observed that the expansive sweep of the provision covered just about anything the Attorney-General, in his deliberate judgment deemed to be likely to cause fear, alarm or despondency among the public or even a single member thereof. The provision imposed an acceptable chilling effect and was more far reaching than might be its intended objective. Accordingly, the third requirement was also not satisfied.<sup>80</sup>

In the event, the Court declared section 50(2) to be in contravention of section 20(1) of the Constitution.<sup>81</sup>

This somewhat elaborate discussion of the Zimbabwean case is undertaken as it provides an insight as to legality or otherwise of section 59 of the Botswana Penal Code. The two provisions are in *pari materia* as are the constitutional provisions. The High Court in Botswana, similarly circumstanced as the Zimbabwe Supreme Court, and the Canadian Court whose decisions were relied upon by the Zimbabwe Supreme Court, might well come to the same conclusion given the similarity in the bases for the conclusions. In the case of the *Okavango Observer*, charges were dropped after costs had been incurred in the form of legal fees. This is even more unfortunate in that costs are not generally awarded against the state should the charges be dropped or an acquittal entered. What is left is for the suspect to sue for malicious prosecution, a charge which is very difficult to establish. It is interesting to note, however, that the Court of Appeal of Botswana has adopted a

<sup>78</sup> As above, 576f–g.

<sup>79</sup> As above, 576g.

<sup>80</sup> As above, 578a.

<sup>81</sup> As above, 579d–e.

somewhat relaxed position to the rule regarding costs in criminal proceedings. In *Re Attorney General's Reference; State v Malan*,<sup>82</sup> the Court said that the High Court, and itself, have the inherent power of ordering a party to pay costs in criminal proceedings. This power, however, is to be exercised in very exceptional circumstances. It will be exercised by the court to mark its strong disapproval of high-handed conduct amounting to bad faith. This development is to be welcomed.

## 8 The 'Advertising Ban' case<sup>83</sup>

This case arose from a number of articles published in the *Botswana Guardian*, a weekly newspaper circulating in Botswana and owned by the applicant (which also owns the *Midweek Sun*, another weekly). The articles were critical of certain leaders of the country, among them the President and the Vice-President. The government (and it was accepted that it was the President's decision) then decided to stop advertising in the *Guardian* and *Sun* group of newspapers, and the decision was communicated by the permanent secretary in the Ministry of Mineral Resources, Energy and Water Affairs (curiously enough as this would ordinarily be done by the permanent secretary to the President!) to all government departments, parastatals and private companies in which the government is a shareholder as a directive. The directive was in the following terms:

ADVERTISING IN PRIVATE NEWSPAPERS: We would like to inform you that the government has decided that, with immediate effect, we should cease advertising in the *Guardian* and *Sun* Group of papers. This directive applies to all government Ministries/Departments, parastatals and Private Companies in which the government is a shareholder. You are of course, expected to use your discretion regarding any signed contracts. This is taken as an available option for all consumers.  
Thank you

It was not disputed that prior to the directive, the government, parastatals and companies in which government is a shareholder, used to put a lot of advertisements in the *Guardian* and *Midweek Sun* papers. The applicant challenged the directive on two bases: Firstly that the action in issuing the directive was unconstitutional as it violated the applicant's freedom of expression, and secondly that the directive needed to be reviewed and set aside. This constituted the main action, and in the interim, the applicant sought an order that the directive should not be implemented pending the outcome of the main action. The application for an interim order came before Lesetedi J.

<sup>82</sup> [1990] BLR 32.

<sup>83</sup> *Media Publishing (Pty) Ltd v The Attorney-General of Botswana and Another* Misc No 229/2001.

The judge then enumerated the requisites that the applicant had to satisfy in order to succeed: (a) Is there a right, whether clear or *prima facie*, that the interim order would protect? (b) If the right was only *prima facie*, was there a well-grounded apprehension of irreparable harm to the applicant if the interim relief was not granted and he ultimately succeeds in establishing his right? (c) Does the balance of convenience favour the granting of the interim relief? and (d) Does the applicant have any other satisfactory remedy? The determination as to whether the first requisite was fulfilled is what occupied most of the proceedings, and is what comes out more prominently in the judgment as it was based on an alleged infringement of a constitutionally entrenched freedom, the freedom of expression as provided for in section 12(1) of the Constitution.

The reason for the withdrawal of the benefit of advertising was, as stated by the permanent secretary to the President (hereinafter 'PSP'), 'to demonstrate government's displeasure at irresponsible reporting and the exceeding of editorial freedom'. It was submitted for the respondent, and accepted by the applicant, that the latter did not have a right to receive advertisements from the government for publication in its papers. It was, however, argued for the applicant that once the government had decided to confer a benefit of advertising (referred to in argument as 'patronage'), it could not withdraw that benefit or 'patronage' in order to punish or show disapproval of the applicant's conduct which was not acceptable to the government or top officials thereof. The respondent further argued that the advertising in the newspapers created a purely commercial relationship and that in as much as the government voluntarily decided to advertise in the applicant's newspapers, it was entitled, without assigning a reason, to withdraw from advertising in the applicant's papers. The PSP went on further to say that:

Newspapers are known to alter their editorial policy so that it conforms to the views of their advertisers, who are also known to demand adjustments in the editorial policy to conform to their expectations.

Although the court accepted that government is entitled to advertise in any medium it chooses, it observed that:<sup>84</sup>

There are many accepted parameters within which government may legitimately withdraw such patronage, for instance where the applicant's selling rates for publishing space is not competitive compared to that of other papers or where the applicant's publications do not reach the market targeted by the government for its advertisements.

The court observed that the list is not exhaustive. In deciding on the propriety or otherwise of the reason advanced by the government for the withdrawal of advertising from the two papers, the court drew inspiration from the United States of America Court of Appeal case of

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<sup>84</sup> At 20.

*Hyland v Wonder*,<sup>85</sup> in which the services of a volunteer with the San Francisco Juvenile Probations Commission were terminated after he had criticised the way the probate department was being run, which criticism reflected badly on the department. Mr Hyland applied to court to set aside his dismissal on the basis that it violated his constitutional right to freedom of expression as its sole purpose was to punish him for exercising his freedom of expression. In upholding his claim, the Court of Appeal (*per* Tang J) recalled its earlier position that a person who had no right to a governmental benefit could be denied the benefit for some reasons and not others. The government could not deny him a benefit<sup>86</sup>

on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalised and inhibited. This would allow the government to produce a result which it could not command directly. Such interference with constitutional rights is impermissible.

Lesetedi J found the *Hyland* case very persuasive, adopted its reasoning and went on to say:<sup>87</sup>

For that reason the government cannot act with a view to taking away an individual's benefits as an expression of its displeasure for the individual's exercise of a constitutional right as this would tend to inhibit the individual in the full exercise of that freedom for fear of incurring punishment. The message implicit in the directive is that an individual being a beneficiary to governmental patronage, who in the exercise of its freedom of expression goes beyond what the government is comfortable with, faces the possible unpleasant consequence of losing certain benefits which it would otherwise have received. This hinders the freedom to express oneself freely.

It therefore followed that the applicant had established at least a *prima facie* right stemming from the consequences of executive action. The other requisites were found to be in place and the application and the relief sought were granted.

The determination as to the existence of a right on the part of the applicant culminated in an affirmative finding based largely on the reasons assigned by government for the withdrawal of advertising from the papers. This would appear to be in step with the general principle in administrative law that discretionary power must be exercised for a proper purpose and for the proper objectives.<sup>88</sup> It was possible to make a determination in the particular case because reasons for the adverse governmental action were assigned.

What would have happened if government had not given reasons? Three positions are possible: Firstly, in the absence of reasons advanced

<sup>85</sup> 972 F 2d 1129.

<sup>86</sup> At 1136.

<sup>87</sup> n 83 above at 26.

<sup>88</sup> See *President of the Republic of Botswana and Others v Bruwer and Strumpher* Civ App No 13/97 (unreported); *Congreve v Home Office* 1976 QB 929; *University of Cape Town v Ministry of Education and Culture* 1988 3 SA 203.

by the government for its action, the court may have to infer. But this will be possible only if the circumstances place the court in a position in which it can make a reasonable inference. Secondly, the court may come to a finding based on the absence of an answering affidavit contradicting the averments made by the applicant in his or her founding affidavit,<sup>89</sup> but there must be proof of service. Thirdly, the conclusion can be reached that the government will be better off in not assigning reasons at all, or if executive action is punitive, different and more benign (but dishonest) reasons may be assigned by the government for its actions. This can, however, be dispelled by the applicant by laying down material before the court suggesting bad faith on the part of government in which case executive action stands to be reviewed.<sup>90</sup>

It can be said that the decision in the *Advertising Ban* case is a welcome one, as it went a step in protecting freedom of expression. However, one would be hamstrung in speculating as to the outcome of the final case on the merits. Such case is still pending before the court.

## 9 Conclusion

To the extent that the Constitution of Botswana provides for the protection of fundamental rights and freedoms of the individual, and establishes limitations, which exist even in other more democratic systems, it may be said our system embraces international standards. However, it is not sufficient that the Constitution should merely establish these fundamental ideas in terms of black letter law. The state authorities should be seen to be acting in a way that advances these freedoms. In terms of freedom of expression, we have seen the mushrooming of legislation whose effect is to muzzle the press, and the trend has been an increase rather than a decrease in legislation that drastically erodes the ability of the press to inform the public on important matters. Unfortunately, where charges had been brought and questions arose on the constitutionality of the provisions in terms of which the charges had been drawn, the opportunity for the constitutionality question to be decided had been lost either because charges had been withdrawn or dismissed at an early stage on a technicality. The idea of a Freedom of Information Act is being mooted in the country. If the Act comes to fruition, perhaps it will revolutionalise the system and uproot the higher authorities' belief in secrecy of information.

<sup>89</sup> See Order 20 Rule 4(3) of the High Court Act, Cap 04:02 and *Plascon Evans Paints v Van Riebeeck Paints* 1984 3 SA 623 (A).

<sup>90</sup> *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another* 1988 3 SA 132 (A); *Legodimo Kgotlafela Leipego v Moopare and Others* 1993 BLR 229; *Chief Seepapitso Gaseitsiwe v Attorney-General* 1996 BLR 54.

## A schematic comparison of regional human rights systems

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### Summary

*There are three regional systems for the protection of human rights in the world today, namely the African, Inter-American and European systems. This article is a comparative presentation of their salient features and focuses on key procedural and substantive aspects.*

Regional systems for the protection of human rights have become an important part of the international system for the protection of human rights, and a rich source of jurisprudence on human rights issues, also on the domestic level. This note, in the form of a schematic exposition, attempts to make possible an easy comparison of the most salient features of the three systems in existence today. Except where otherwise indicated, it sets out the situation in respect of the European, Inter-American and African systems as it was in the first part of 2002.

*Legend to schematic comparison:*

Italics: yet to enter into force/yet to be established

[ ] : now defunct

Where two dates are provided behind the name of a treaty, the first one indicates the date when the treaty was adopted, the second the date when it entered into force.

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	EUROPEAN	INTER-AMERICAN	AFRICAN
Regional organisations of which the systems form part	Council of Europe (CoE) (44 members)	Organisation of American States (OAS) (35 members)	Organisation of African Unity (OAU), replaced by the African Union (AU) in July 2002 (53 members)
General human rights treaties which form the legal base of the systems	Convention for the Protection of Human Rights and Fundamental Freedoms (1950/53), 44 ratifications and 13 additional protocols, the eleventh protocol created the single court (1994/98)	Charter of the OAS (1948/51), 35 ratifications, read together with the American Declaration on the Rights and Duties of Man (1948) American Convention on Human Rights (1969/78), 24 ratifications (21 accepted the compulsory jurisdiction of the court)	African Charter on Human and Peoples' Rights (1981/86) 53 ratifications <i>Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (1998/-), 5 ratifications, 35 signatures (15 ratifications required)</i>
Prominent specialised additional protocols and other instruments that are part of/supplement the system	European Social Charter (1961/65, as amended), 25 ratifications European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987/89), 44 ratifications	Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (1988/99), 12 ratifications Protocol to the American Convention on Human Rights to Abolish the Death Penalty (1990/91), 8 ratifications	OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969/74), 45 ratifications African Charter on the Rights and Welfare of the Child (1990/99), 25 ratifications

	EUROPEAN	INTER-AMERICAN	AFRICAN
<b>Supervisory bodies in respect of general treaties</b>	<p>Framework Convention on the Protection of National Minorities (1995/98), 35 ratifications</p> <p>Convention on Human Rights and Biomedicine (1997/99), 13 ratifications</p> <p>(All supplementing the system with separate implementation mechanisms)</p>	<p>Inter-American Convention to Prevent and Punish Torture (1985/87), 16 ratifications</p> <p>Inter-American Convention on Forced Disappearances of Persons (1994/96), 10 ratifications</p> <p>Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (1994/95), 31 ratifications</p> <p>Inter-American Convention on the Elimination of all forms of Discrimination against Persons with Disabilities (1999/-), 4 ratifications (requires 6)</p>	<p><i>Court: yet to be established</i></p> <p>Commission: established in 1987</p>
	<p>New (or 'single') Court established in 1998</p> <p>[The old Court was established in 1959]</p> <p>[The Commission was established in 1954 and ceased its activities in 1999]</p>	<p>The Court was installed in 1980</p> <p>The Commission was established in 1960 and its statute was revised in 1979</p>	



	EUROPEAN	INTER-AMERICAN	AFRICAN
<b>Based where</b>	[Old and] new Court [and former Commission]: Strasbourg	Court: San Jose, Costa Rica Commission: Washington DC, but also occasionally meets in other parts of the Americas	<i>Court Seat: still to be determined</i> Commission: Banjul, The Gambia, but often meets in other parts of Africa
<b>Case load: Individual communications per year</b>	The new Court decides several thousand cases per year (9 351 decisions and 888 judgments in 2001). Case load rapidly increasing (31 393 communications received and 13 858 cases registered in 2001) [The old Court decided less than 100 cases per year] [More than 4 000 applications per year were registered with the Commission towards the end]	Court: Decides on average 4-6 cases per year. Also one advisory opinion on average per year. Commission: 100 cases decided per year. Total number of cases pending at the moment: 1 000	An average of 10 cases per year have been decided by the Commission since 1988; 13 cases during 2000, 4 during 2001
<b>Case load: Number of inter-state complaints heard since inception</b>	Court: 2 [Old Court: 1] [Commission: 19]	Court: 0 Commission: 0	Commission: One case admitted
<b>Jurisdiction of the Court</b>	Contentious and limited advisory	Contentious and broad advisory	<i>Contentious and broad advisory</i>

	EUROPEAN	INTER-AMERICAN	AFRICAN
Who can seize the supervisory bodies in contentious matters?	New Court [and formerly the Commission]: Any person, NGO or group claiming to be a victim, and states [Old Court: States concerned and the Commission could approach the Court, after the Commission had given its opinion. In respect of states that had ratified the 9th protocol, individuals could also approach the Court]	Court: after the Commission has issued a report only states and the Commission can approach the Court Commission: Any person or group of persons, or NGO	Court: after the Commission has given an opinion, only states and the Commission will be able to approach the Court. NGOs and individuals will have a right of direct access to the Court where the state has made a special declaration Commission: Not defined in Charter, has been interpreted widely to include any person or group of persons or NGOs
How many members do the supervisory bodies have?	Court: Equal to the number of state parties to the Convention (44) [Old Court: equal to the number of CoE member states] [The Commission had as many members as there were state parties to the Convention]	Court: 7 Commission: 7	Court: will have 11 members Commission: 11

	EUROPEAN	INTER-AMERICAN	AFRICAN
Who appoints the members of the supervisory bodies?	Court: The Parliamentary Assembly of the CoE elects judges from 3 candidates proposed by each government [Commissioners were appointed by the Committee of Ministers from candidates proposed by each State's national group in the Parliamentary Assembly]	Judges and Commissioners are elected by the General Assembly of the OAS	Judges and Commissioners are appointed by the Assembly of Heads of State and Government
When do the supervisory bodies meet?	Court: Judges are appointed on a full-time basis [Old Court: 10 times per year for 10 days] [Commission met 8 times per year for 2 weeks towards the end]	Court: 3 regular 2-week meetings per year Commission: 2 regular 3-week meetings per year and 1 or 2 short special sessions	Court: Regularity of sessions to be determined Commission: 2 regular 2-week meetings per year. Two extraordinary sessions have been held
Terms of appointment of the members of the supervisory bodies	Judges are elected for 6 year terms, renewable [Old Court: 9 years renewable] [Commissioners were appointed for 6 year periods, renewable]	Judges are elected for 6 year terms, renewable only once Commissioners are elected for four year terms, renewable only once	Judges will be appointed for 6 years, renewable only once, only the president will be full-time Commissioners are appointed for 6 years, renewable
Who elects the chairpersons or presidents?	Court: President elected by Plenary Court (3 year term) [Commission: President was elected by Plenary Commission (3 year term)]	Court: The President is elected by the Court (2 year term) Commission: The Chairperson is elected by the Commission (1 year term)	The President is to be elected by the Court (2 year term) The Commission elects its own Chairperson (2 year term)

	EUROPEAN	INTER-AMERICAN	AFRICAN
<b>Form in which findings are made in contentious cases; remedies</b>	Court: 7-member Chambers render judgments on whether violation occurred, can order 'just satisfaction'; exceptionally rehearing by Grand Chamber (17 members); summary procedure on admissibility before Committee of 3 judges [The Commission issued reports on whether violations occurred and 'just satisfaction' should be provided]	Court: Renders judgments on whether violation occurred, can order money damages/ or other reparations Commission: Issues reports which contain findings on whether violations occurred and makes recommendations	Court: Will render judgments on whether violation occurred, orders to remedy or compensate violation Commission: Issues reports which contain findings on whether violations have occurred and sometimes makes recommendations
<b>Do the supervisory bodies require permission to publish their decisions?</b>	Court: No, decisions and judgments are in principle public [Commission: Decisions were public, reports confidential, but could be published with government consent or as a sanction by CoE Committee of Ministers]	Court: No Commission: No	Court: No Commission: Requires permission of the Assembly. In practice passed by the Assembly as a matter of course.
<b>Do the supervisory bodies have the power to issue interim/provisional/precautionary measures?</b>	Court: Yes [Commission: Yes]	Court: Yes Commission: Yes	Court: Will have the power Commission: Yes

	EUROPEAN	INTER-AMERICAN	AFRICAN
Where does the primary political responsibility for monitoring compliance with decisions lie?	New Court [old Court and Commission as well]: Committee of Ministers	Court and Commission: General Assembly and Permanent Council	<i>Court: Council of Ministers (and Assembly)</i> Commission: Presumably the Assembly
Country visits by Commission	[Was not part of practice]	82 on site fact finding missions conducted in 41 years	Five on-site missions since 1995. Also promotional country visits which can include fact-finding
Does the Commission at its own initiative adopt reports on state parties?	[Was not part of practice]	Yes, 53 so far	No, only resolutions
Appointment of special rapporteurs by the Commission	[Was not part of practice]	Thematic rapporteurs: Freedom of expression; prison conditions; women; children; displaced persons; indigenous peoples. Country rapporteurs: each OAS member state has a country rapporteur drawn from the Commission members	Thematic rapporteurs: Extra-judicial killings; prisons; and women Country rapporteurs: None
Are state parties required to submit regular reports to the Commission under the general treaties?	[No, but the Secretary-General of the CoE could request reports on national implementation measures]	No	Yes, every 2 years

	EUROPEAN	INTER-AMERICAN	AFRICAN
<b>Clusters of rights protected in the general treaties</b>	Civil and political, also education	Civil and political	Civil and political rights as well as some economic, social and cultural rights, and some 'third generation' rights
<b>Are duties recognised?</b>	No, except in relation to the exercise of freedom of expression	Yes, in the American Declaration Not in the American Convention	Yes, extensively
<b>Are peoples' rights recognised?</b>	No	No	Yes, extensively
<b>Annual budget</b>	Court: 29.8 million Euros The Court's budget forms 17.6% of the budget of the CoE	Court: US\$ 2.2 million Commission: US\$ 3.1 million and \$1 million in voluntary contributions The Court and Commission's combined budget of US\$ 3.5 million forms 5.6% of the total budget of the OAS of US\$ 78 million	<i>Court: To be determined</i> Commission: US\$ 760 000 from the AU. Additional funds raised by Commission
<b>Approximate number of staff numbers</b>	Court: As of 30 June 2002 total registry staff is approximately 348 of which 187 permanent (including 76 lawyers) and 161 on temporary contracts (including 78 lawyers) [Commission: 1997: 51 lawyers, 44 supporting staff]	Court: 5 budgeted posts (2 lawyers, 2 administrative employees), 4 contract lawyers, 2 clerical employees, 1 librarian, 1 driver and 1 security guard	<i>Court: To be determined</i> Commission: 12 staff members; Secretary to the Commission, legal officer for promotional activities, finance/admin officer, bilingual secretary, secretary/receptionist, officer clerk

	EUROPEAN	INTER-AMERICAN	AFRICAN
<b>Physical facilities</b>	Court: five storey building with two wings (16 500 m), 2 hearing rooms, 5 deliberation rooms, library, 421 computers	Commission: 22 budgeted posts (2 non-lawyer professionals, 13 lawyers, 7 administrative employees) plus 6 contract lawyers, 8 contract administrative employees, 1 contract part-time librarian, 6 fellows lawyers. Total 43 persons  Court: Own building Commission: Offices in General Secretariat facilities. 16 individual offices, 1 library, 1 conference room, filing room, 43 computers in total for the Court and Commission	<i>Court: To be determined</i> Commission: Two floors used as offices.
<b>Official website</b>	<a href="http://www.echr.coe.int">http://www.echr.coe.int</a>	<a href="http://www.corteidh.org.cr">www.corteidh.org.cr</a> <a href="http://www.cidh.org">www.cidh.org</a>	<a href="http://www.achpr.org">http://www.achpr.org</a> <a href="http://www.Africa-union.org/en/home/asp">http://www.Africa-union.org/en/home/asp</a>
<b>Other useful websites</b>	<a href="http://www.coe.int">http://www.coe.int</a>	<a href="http://www/iidh.ed.cr/en_index.htm">http://www/iidh.ed.cr/en_index.htm</a>	<a href="http://www.up.ac.za/chr">http://www.up.ac.za/chr</a> <a href="http://www.iss.co.za">http://www.iss.co.za</a> <a href="http://www1.umn.edu/humanrts/regional.htm">http://www1.umn.edu/humanrts/regional.htm</a>

	EUROPEAN	INTER-AMERICAN	AFRICAN
<b>Sources where decisions are published</b>	<p>Since 1996 the official European Convention law reports are the <i>Reports of Judgments and Decisions</i> published in English and French</p> <p>Prior to 1996 the official law reports were the <i>Series A Reports</i>. The <i>Series B Reports</i> include the pleadings and other documents</p> <p>From 1974, selected European Commission decisions were reproduced in the <i>Decisions and Reports Series</i></p> <p>The <i>European Human Rights Reports</i> series includes selected judgments of the Court, plus some Commission decisions</p>	<p>Court: Annual report, decisions series, precautionary measures volume, yearbook (with Commission)</p> <p>Commission: Annual report, country reports, rapporteur reports, yearbook (with Court), website, CD-Rom</p>	<p>Annual Activity Reports</p> <p>Institute for Human Rights and Development in Africa</p> <p><i>Compilation of Decisions on Communications of the African Commission on Human and Peoples' Rights (1994-2001)</i></p> <p>R Murray &amp; M Evans (eds) <i>Documents of the African Commission on Human and Peoples' Rights</i> Hart, 2001</p>
<b>Commonly cited secondary sources on system</b>	<p>P van Dijk &amp; GJH van Hoof <i>Theory and practice of the European Convention on Human Rights</i> Kluwer, 1998</p> <p><i>Yearbook of the European Convention on Human Rights</i> Kluwer</p>	<p>T Buergenthal &amp; D Shelton <i>Protecting human rights in the Americas</i> NP Engel Publishers, 1995</p> <p>F Martin <i>et al</i> (eds) <i>International human rights law and practice</i> Kluwer, 1997</p>	<p>M Evans &amp; R Murray (eds) <i>The African Charter on Human and Peoples' Rights</i> Cambridge UP, 2002</p> <p>C Heyns (ed) <i>Human rights law in Africa</i> series Kluwer, annual publication since 1996</p>



	<b>EUROPEAN</b>	<b>INTER-AMERICAN</b>	<b>AFRICAN</b>
<b>Relevant journals</b>	<i>European Human Rights Law Review</i> <i>Human Rights Law Journal</i> <i>Revue universelle des Droits de l'Homme</i>	<i>Revista del Instituto Interamericano de Derechos Humanos</i> (articles in English and Spanish)	<i>African Human Rights Law Journal</i> <i>East African Journal of Peace and Human Rights</i>

## Economic integration and human rights in Africa: A comment on conceptual linkages

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### Summary

*This paper focuses on treaties establishing African regional and subregional organisations for economic integration. These include AEC, COMESA, SADC, ECOWAS and EAC, all making reference to human rights. In addition, the founding treaties of all these organisations make provision for courts to determine trade disputes and interpret agreements. It is significant that trade arrangements such as Cotonou, AGOA and NEPAD also link economic integration to human rights by emphasising civil and political rights. It remains to be seen to what extent these organisations and agreements will apply human rights, in particular the African Charter on Human and Peoples' Rights. The paper reviews linkages and tensions between the rules and operations of the subregional economic institutions in Africa and human rights as conceptualised under the African Charter.*

### 1 Introduction

Globalisation means different things to different people. To some it means increased growth, opportunity and prosperity while to others it denotes an orgy of greed and inequality. In the context of human rights, globalisation has been seen by some as promoting human rights while others see it as negatively affecting efforts to promote and protect

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human rights. Both human rights and trade rules set limitations on what states can do. However, trade rules and the idea of economic liberalisation may also mean that the rules limit states in terms of welfare policies that are inextricably linked to socio-economic rights. From this perspective, globalisation has been seen as promoting what have been called 'market friendly human rights', while negatively affecting rights related to distributive justice. Inherently, civil and political rights are critical in ensuring the rule of law and place checks on governmental power in relation to administrative and judicial activities that affect trade.

African governments and people are today more resolute about regional and continental goals of economic co-operation and integration in a quest to benefit from the processes of globalisation. In the last two decades or so, there has been a marked expansion in subregional economic blocs in Africa. At the same time, during this period a normative framework and institutions for human rights protection have been established. This comment focuses on how the legal developments in regional and subregional economic law and practice in Africa have taken into account developments in human rights law and *vice versa*. It reviews conceptual linkages between the rules and operations of subregional economic institutions in Africa and human rights under the African Charter on Human and Peoples' Rights (African Charter or Charter). In particular, the comment examines whether there are tensions or convergences between regional and subregional economic law and human rights law in the various instruments that form the normative framework in these two legal regimes.

## **2 An overview of the African human rights and economic integration regimes**

### **2.1 The African human rights regime**

In the main, human rights norms have developed at three levels: international, regional and municipal. In Africa, under the auspices of the Organisation of African Unity (OAU), various instruments have been devised to meet the challenges of promoting and protecting human rights. The main regional instrument is the African Charter. There are three other basic instruments which together with the African Charter make up the normative framework of the African human rights system: the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights; the African Charter on the Rights and Welfare of the Child; and the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. A Protocol to the African Charter on the Rights of Women is currently being developed. The comment will, however, focus on the African Charter as the primary human rights instrument in Africa.

The African human rights regime became a reality in 1981 when the Assembly of Heads of State and Government of the OAU adopted the African Charter.<sup>1</sup> Africa thus became the third region after Europe and the Americas to put in place a regional intergovernmental system for human rights protection. The African Charter recognises the three generations of human rights, but develops a rather novel concept by placing all these rights on the same footing and in particular treating the first and second generation rights as inseparable and equal.<sup>2</sup> Essentially, the African Charter departs from the general trend in international human rights instruments of treating the first and second generation rights in separation and makes a clear statement about the indivisibility of human rights putting them side-by-side in a single document.<sup>3</sup> The obligation of the state parties to recognise the rights, duties and freedoms under the African Charter therefore implies that the state parties recognise all the three generations of rights as conceptualised under the Charter and not as separate and distinct categories of rights.<sup>4</sup> In theory, therefore, the African human rights regime conceptualises the three generations of rights as interdependent and indivisible.

Apart from the concept of indivisibility and interdependence, there are two other important features of the African Charter worth mentioning in the context of this comment. The first is the concept of the individual's duties and the second is the use of claw-back clauses. In addition to guaranteeing rights, the African Charter imposes duties not only on the state but also on the individual.<sup>5</sup> What is not clear, however, is the sanction for failure to fulfil the duties, which has led some human rights advocates and scholars to argue that the inclusion of duties only serves as invitation to states to impose unlimited restrictions to the enjoyment of rights.<sup>6</sup> So far the jurisprudence of the African Commission on Human and Peoples' Rights (African Commission or Commission) does not shed any light on the effect of individual duties. It remains to be

<sup>1</sup> The Charter was adopted on 17 June 1981 in Nairobi. It entered into force on 21 October 1986. The OAU had earlier in 1969 adopted the Convention Governing the Specific Aspects of Refugee Problems in Africa (1969) 8 *International Legal Materials* 1288.

<sup>2</sup> See eg arts 15, 16, 17 & 18 African Charter.

<sup>3</sup> See eg FJ 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) 47. It is important to note, however, that the African Charter does not contain the full catalogue of civil and political rights and socio-economic rights as set out under the 1966 UN Covenants.

<sup>4</sup> Art 1 African Charter.

<sup>5</sup> See art 29. While the African Charter is the first human rights document to meaningfully articulate the concept of combining individual rights and duties in the same instrument, the idea is not entirely without precedent. See eg M Mutua 'The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties' (1995) 35 *Virginia Journal of International Law* 339 364.

<sup>6</sup> Mutua (n 5 above); UO Umozurike *The African Charter on Human and Peoples' Rights* (1997) 65.

seen whether the African Court on Human and Peoples' Rights, once established, will take up the challenge.

The rights recognised under international human rights law are not absolute. For some rights and in some circumstances limitations may be imposed. A distinguishing feature of the African Charter is its use of claw-back clauses as opposed to the more traditional derogation clauses. The distinction between the two is that derogation clauses set out the extent and conditions under which a right may be limited or its enjoyment restricted, whereas claw-back clauses subject a right to state discretion.<sup>7</sup> Essentially, the claw-back clauses in the African Charter have the effect of subjecting the Charter's rights to limitations imposed by domestic law.<sup>8</sup> In the context of the discussion here, the claw-back clauses may be used to enable trade considerations to supersede human rights rules, particularly where subregional trade courts are called upon to apply human rights norms under the African Charter without a proper evaluation under human rights rules on the reasonableness of the measures.

## 2.2 Regional economic integration

In Africa, regional economic integration has taken place both at the continental level and at the subregional level. At the continental level, under the auspices of the OAU and now the African Union (AU), there is the African Economic Community (AEC), which establishes a continental economic bloc.<sup>9</sup> At the subregional level, there are four main economic groupings, namely: the Common Market for Eastern and Southern Africa (COMESA); the Southern African Development Community (SADC); the Economic Community of West African States (ECOWAS); and the revived East African Community (EAC).<sup>10</sup> Several countries have overlapping membership in the different subregional arrangements. The subregional economic blocs are seen as the building blocks for the AEC in line with the 1980 Lagos Plan of Action and the Final Act of Lagos, which envisaged African economic integration as an evolutionary and incremental process. The subregional economic blocs have in general the common goal of economic transformation and development.

<sup>7</sup> R Gittleman 'The Banjul Charter on Human and Peoples' Rights: A legal analysis' in CE Welch & RI Meltzer (eds) *Human rights and development in Africa* (1984) 152 154.

<sup>8</sup> Viljoen (n 3 above). The phraseology of the claw-back clauses includes phrases such as 'except for reasons and conditions previously laid down by the law'; 'within the law'; 'provided one abides by the law'; 'in accordance with the law'.

<sup>9</sup> The African Union is the successor to the OAU. The AEC Treaty was signed in Abuja in 1991.

<sup>10</sup> Other regional economic initiatives designated as pillars of the AEC are the Economic Community of Central African States (ECCAS) and the Arab Maghreb Union (AMU).

### 3 Trade and human rights in Africa: Conceptual linkages

There are many instances where the African regional and subregional economic treaties make specific reference to human rights. Most of the instruments establishing the various economic groupings in Africa, particularly those created after the African Charter explicitly refer to the promotion of human rights under the African Charter either as an objective or as a fundamental principle of the economic grouping. Apart from the direct references, there may also be other provisions that are closely linked to human rights concepts. For example, although at the time of the formation of the OAU there was no African human rights system, the OAU Charter makes reference to the Universal Declaration of Human Rights (Universal Declaration) as an objective of the organisation.<sup>11</sup>

The AEC Treaty establishes the recognition, promotion and protection of human and peoples' rights in accordance with the African Charter as a fundamental principle of the economic system it establishes.<sup>12</sup> In similar fashion, the COMESA Treaty also establishes the recognition, promotion and protection of fundamental human rights as a fundamental principle of the system in addition to liberty, fundamental freedoms and rule of law.<sup>13</sup> The EAC Treaty under article 6 establishes good governance, democracy, rule of law, equality and the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter as fundamental principles. The EAC goes further by requiring that any other states (apart from Kenya, Uganda and Tanzania which are the founding states) wishing to become a member must be seen to adhere to universally acceptable principles of good governance, democracy, rule of law and observance of human rights and social justice.

The ECOWAS Treaty follows the same approach as the AEC, COMESA and the EAC Treaties and ordains the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter as a fundamental principle of the economic system.<sup>14</sup> The SADC Treaty, although making no direct reference to the African Charter, also commits members to the fundamental principle of human rights, democracy and rule of law.<sup>15</sup>

<sup>11</sup> See art 2(1)(e).

<sup>12</sup> Art 3(g).

<sup>13</sup> See art 6.

<sup>14</sup> Art 4(g).

<sup>15</sup> Art 4(c).

At the textual level, it is fair to conclude that the African economic groupings tacitly recognise human and peoples' rights as conceptualised under the African Charter as fundamental principles of the trade regimes. There are therefore clear conceptual linkages between the regional and subregional economic rules and the human rights rules. In particular, specific reference to the provisions of the African Charter implies that all the three generations of human rights are considered fundamental in the formulation and implementation of trade rules. This may be at divergence with the idea of developing a core category of rights as those that must be recognised in the trade rules. However, there remains a question whether the trade institutions are designed to address distributive justice.

All the four subregional economic communities together with the AEC establish courts of justice fairly along the lines of the European Court of Justice.<sup>16</sup> The subregional regimes also tacitly acknowledge the overarching principles and objectives of the AEC. Direct reference to the African Charter in the various economic treaties in Africa would, at least in theory, mean that the courts of justice and tribunals are bound to directly apply human rights rules in determining trade disputes and interpreting the agreements. In that sense, the African Charter could be seen as a kind of bill of rights for the African regional economic systems. How true this becomes in reality will depend on the judges and lawyers practising in these courts, but one can clearly say that there exist very clear entry points for the application of human rights principles in trade matters. At the same time, the tacit reference to the African Charter should permit the African Court and the African Commission to apply a human rights test to governmental economic decisions which fail to take into account human rights. In addition, with the power to interpret the African Charter reposed in the African Court and the African Commission, interpretations of the African Charter by the two bodies will have strong persuasive authority for the trade courts when faced with questions of interpreting economic principles in light of the African Charter.

#### 4 Human rights and bilateral trade arrangements in Africa

There are numerous bilateral and multilateral economic initiatives, especially with donor countries, that also provide useful insights with regard to the relationship between international trade and human rights in Africa. The major initiatives in the recent past include the Cotonou Agreement, the United States (US) African Growth and Opportunity

<sup>16</sup> Only SADC has a tribunal which is not christened a 'court of justice'.

Act (AGOA)<sup>17</sup> and the New Partnership for Africa's Development (NEPAD). These initiatives, in more or less the same lines as the World Bank and IMF conditionalities, refer in one way or another to human rights concepts and have significant implications for the relationship between human rights and trade in the African context. A detailed analysis of human rights in the context of bilateral trade arrangements in Africa is beyond the scope of this comment and for our purposes the question is whether reference to human rights in bilateral trade agreements corresponds to the approach in the African economic instruments.

The US and the European Union (EU) in particular have adopted a system of conditioning economic aid to improvements in human rights and also conditioning trade privileges to human rights practices. In some cases, trade sanctions have been applied as a mechanism to ensure observance of human rights.<sup>18</sup> However, the concepts most commonly referred to are the rule of law and democratic governance, concepts that are more related to the first generation of human rights. The basic theory has been that where human rights are protected, open markets will flourish as stability and rule of law are ensured. Protection of civil and political rights has been seen as a necessary prerequisite for democratic governance which promotes trade and market access. It is therefore fair to say that in bilateral trade agreements, human rights have been approached from the context of their relevance for the administration of trade. A brief overview of the various arrangements bears this point out.

#### 4.1 The Cotonou Agreement

In its Preamble, the Agreement refers literally to all the main United Nations (UN) human rights instruments, including the International Covenant on Economic, Social and Cultural Rights, and to the European Convention on Human Rights, the African Charter and the American Convention on Human Rights. Its predecessor, Lome IV, also referred to human rights and democracy. Good governance, respect for human rights, democratic principles and the rule of law have been singled out as essential elements of the renewed partnership. By expressly acknowledging the rights in the UN Covenant on Economic, Social and Cultural Rights and the African Charter, the Cotonou Agreement can be said to be similar in approach to the general approach in the African subregional economic groupings. In reality, however, there still remains a pervading categorisation, particularly when one examines the substantive provisions of the Agreement.

<sup>17</sup> Trade and Development Act of 2000 <<http://thomas.loc.gov/cgi-bin/query/z?c106:H.R.434>> (accessed 28 February 2003).

<sup>18</sup> The latest example is the sanctions against Zimbabwe.



## 4.2 The African Growth and Opportunity Act

AGOA is part of the US Trade and Development Act 2000. The Act contains AGOA and the US-Caribbean Basin Trade Enhancement Act. The legislation establishes a framework that will govern future negotiations between United States and African countries. The approach here is related to broader participation in political process and political freedom and the typical rule of law notion.<sup>19</sup> A better picture of the approach can be seen by an examination of the eligibility requirements.<sup>20</sup> African countries will be eligible to participate in the programme if they ensure the protection of private property rights, the rule of law, political pluralism, due process, and recognition of workers' rights. In the area of private property, in particular, there would be an inevitable clash if African governments insisted on the application of human rights as conceptualised under the African Charter. For example, the tensions that exist between the protection of intellectual property rights and health would be resolved in favour of the right to health since the African Charter recognises the right to health but does not explicitly recognise intellectual property rights.

## 4.3 NEPAD

This initiative is intended to help in the eradication of poverty and ensure sustainable growth and development to ensure the full participation of Africa in the world economy. As has been the case on many occasions, the African leadership undertook to promote democracy and human rights. However, in specific terms, the undertaking is to develop standards of transparency, accountability and participation, a concept based on the traditional view of human rights in the market economy.

## 5 Conclusion

African economic treaties overwhelmingly recognise and acknowledge the promotion and protection of human and peoples' rights as conceptualised under the African Charter as a fundamental principle of continental trade relations. In that context, it can be concluded that there exist clear conceptual linkages between regional economic trade rules and human rights rules in Africa. It will be critical to observe how seriously the regional trade courts take into account human rights considerations in the adjudication of trade disputes and in the interpretation of the economic treaties. Bilateral trade arrangements also clearly recognise the interlinkages between trade rules and human

<sup>19</sup> See secs 102(7), 103(5) & 103(7).

<sup>20</sup> Sec 104.

rights although the approach in these arrangements is at variance with the concept of human rights embodied in the African Charter. The predominance of civil and political rights in the bilateral arrangements under this approach may run counter to the approach under African economic rules especially where economic, social and cultural rights come into play and balancing is required, as in the case of intellectual property rights and health. While more work and research is needed to establish the exact interrelation between trade rules and human rights in Africa, especially in practical terms, there exist very clear and promising entry points for integrating human rights into the economic rules, institutions and practices.

# The normative and institutional framework of the African Union relating to the protection of human rights and the maintenance of international peace and security: A critical appraisal

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## Summary

*This article examines norms and institutions developed under the auspices of the African Union (AU), dealing with human rights challenges on the continent. The article focuses on the possibilities these norms and institutions offer to the AU to undertake collective humanitarian intervention in response to massive and grave violations of human rights involving war crimes, crimes against humanity and genocide being perpetrated in a member state. The writer expresses optimism that the norms and institutions developed under the AU in relation to intervention are more progressive than those obtained under the AU predecessor, the Organisation of African Unity (OAU). If effectively implemented, they could contribute significantly to enhancing human rights protection in Africa.*

## 1 Introduction

During the 1990s, successive UN Secretaries-General Javier Perez de Cueller, Boutros Boutros-Ghali and Kofi Annan put forward proposals for a greater contribution by regional organisations with regard to issues of

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conflict resolution, the protection of human rights and the maintenance of international peace and security.<sup>1</sup> In Africa, the Organisation of African Unity (OAU) was over this period involved in modest efforts aimed at securing international peace, security and the protection of human rights in the region. By 2000, African states had decided to replace the OAU with the African Union (AU).

This contribution critically examines the normative and institutional framework of the AU relating to the protection of human rights and the maintenance of peace and security. The contribution seeks to show that the AU Constitutive Act presents an impressive normative and institutional structure, which, if backed by efficacious norm-enforcement approaches, is likely to lead to a better and safer Africa, in which human rights and human dignity are respected.

## 2 Background to the establishment of the African Union

By the middle of the 1990s, threats to peace, security and the preservation of human rights posed by armed conflicts in Africa became a source of concern for African leaders and the broader international community. This concern was reflected by the myriad conferences and summits held by the OAU to discuss the issue of conflicts and the array of treaties, protocols, declarations, and communiqués that emanated from these meetings.<sup>2</sup> It was soon realised that amidst armed conflicts, it would be difficult to achieve the objectives of the 1991 Treaty Establishing the African Economic Community (the Abuja Treaty), which was intended to set the stage for greater economic co-operation amongst African states.<sup>3</sup>

<sup>1</sup> See JP de Cueller (1990) *Report of the Secretary-General on the Work of the Organisation* 21; B Boutros-Ghali (1992) 'An agenda for peace: Preventive diplomacy, peacemaking and peacekeeping' *Report of the Secretary-General Pursuant to Security Council Statement of 17 June 1992* UN Doc A/47/277-S/24111 paras 60–65; B Boutros-Ghali (1992) *A Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the 50th Anniversary of the United Nations* UN Doc A/50/60-S/1995/1 of 3 January 1995 paras 79–96; K Annan (1997) 'Renewing the United Nations: A programme for reform' *Report of the Secretary-General* UN Doc A/51/950 of 14 July 1997.

<sup>2</sup> For a discussion on all the legal instruments adopted by the OAU since its establishment, see T Maluwa 'International law-making in the Organisation of African Unity: An overview' (2000) 12 *African Journal of International and Comparative Law* 201, generally.

<sup>3</sup> Adopted 3 June 1991, entry into force 12 May 1994. See The Treaty Establishing the African Economic Community OAU CAB/LEG/28.1; reprinted in (1991) 3 *African Journal of International and Comparative Law* 792, available also at <<http://www.oau-oua.org/generalinfo>> (accessed 28 February 2003), 52 signatures, 45 ratifications.

In order to address the challenges posed by armed conflicts, the OAU Mechanism for Conflict Prevention, Management and Resolution was established in 1993. Despite any normative and institutional developments that the regime of the Mechanism may have brought, it has been criticised for the apparent failure to halt the genocide in Rwanda, stop the civil war in Liberia, mitigate the crisis in Burundi or put an end to the conflict in the Democratic Republic of Congo (DRC).<sup>4</sup>

The end of the millennium presented an opportunity for re-positioning the OAU in order to set the African continent as a whole on a firm path to development, peace and the respect for human rights. On 8 and 9 September 1999, 44 Heads of State and Government of the OAU met in Sirte, Libya, in an extraordinary session of the OAU Assembly requested by Libyan leader Muammar Gaddafi, to discuss the formation of a 'United States of Africa'. The theme of this summit, 'strengthening OAU capacity to enable it to meet the challenges of the new millennium', was intended to provoke the leaders to seek solutions for the myriad political, economic and social problems confronting the continent.<sup>5</sup>

At this meeting the leaders adopted the 'Sirte Declaration',<sup>6</sup> which called for the establishment of an African Union, the shortening of the implementation periods of the Abuja Treaty, and the speedy establishment of all institutions provided for in the Abuja Treaty, such as the African Central Bank, the African Monetary Union, the African Court of Justice and the Pan-African Parliament.<sup>7</sup>

The details regarding the designing of this Union was to be left to the legal experts who were instructed to model it on the European Union, taking into account the Charter of the OAU and the Abuja Treaty.<sup>8</sup> The Declaration further stated that the decision to establish the AU had been reached after 'frank and extensive discussions'.<sup>9</sup> The OAU legal unit then drafted the Constitutive Act of the African Union (the AU Act). The OAU Assembly of Heads of State and Government in Lomé, Togo, on 11 July 2000, adopted the Act.<sup>10</sup> All members of the OAU had signed the Act by

<sup>4</sup> See eg A Abass & M Baderin 'Towards effective collective security and human rights protection in Africa: An assessment of the Constitutive Act of the new African Union' (2002) 49 *Netherlands International Law Review* 1 12.

<sup>5</sup> As above.

<sup>6</sup> OAU Doc EAHG/ DECL (IV) REV 1, reprinted in (1999) 7 *African Yearbook of International Law* 411.

<sup>7</sup> Para 8(ii) Sirte Declaration. The Sirte Declaration was adopted perhaps because African states had finally come to accept that only a strong regional organisation properly equipped to deal efficiently and expeditiously with the peculiar problems of the continent, could entitle them to the benefits of globalisation.

<sup>8</sup> Para 8(iii) Sirte Declaration.

<sup>9</sup> Para 8 Sirte Declaration.

<sup>10</sup> 36th ordinary session of the OAU Assembly of Heads of State and Government.

March 2001,<sup>11</sup> and therefore the OAU Assembly at its 5th extraordinary summit held in Sirte, Libya from 1 to 2 March 2001, declared the establishment of the AU.<sup>12</sup>

The Constitutive Act had to be ratified by two-thirds of the member states of the OAU<sup>13</sup> After this had been achieved, the AU became legal and political reality a month thereafter (on 26 May 2001), when the Constitutive Act entered into force.<sup>14</sup> The Union was eventually launched in Durban, South Africa, on 10 July 2002.

### 3 Human rights mechanisms and structures under the AU Act

The AU Act clearly departs from the regime of the OAU Charter in the area of human rights.<sup>15</sup> The importance of human rights was sparingly recognised under the OAU Charter, which only made reference to the United Nations (UN) Charter and to the Universal Declaration of Human Rights (Universal Declaration), but further established through the adoption of the African Charter on Human and Peoples' Rights (African Charter or Charter) in 1981.<sup>16</sup> The OAU 4th extraordinary summit held in Sirte did not specifically address the issue of human rights.

However, the protection of human rights was captured in the Summit's general determination to 'eliminate the scourge of conflicts' in Africa and to 'effectively address the new social, political and economic realities in Africa and the world'. The Summit also pledged 'to play a more active role and continue to be relevant to the needs of our peoples and responsive to the demands of the prevailing circumstances'.<sup>17</sup> The above provisions of the Sirte Declaration was a reaffirmation of the OAU

<sup>11</sup> OAU 'Decision on the African Union' 5th OAU extraordinary session of the Assembly of Heads of State and Government 1–2 March 2001, Sirte, Libya OAU Doc EAHG/Dec 1–4 (V).

<sup>12</sup> As above.

<sup>13</sup> See art 28 of the Act.

<sup>14</sup> See OAU CAB/LEG 23.15/Vol.IX paras 1–3.

<sup>15</sup> For an examination of the process leading to the transformation of the OAU into the AU, see, generally, E Baimu 'The African Union: Hope for a better protection of human rights in Africa?' (2001) 1 *African Human Rights Law Journal* 299; S Gutto 'The reform and renewal of the African regional human and peoples' rights system' (2001) 1 *African Human Rights Law Journal* 175; and KD Magliveras & G Naldi 'The African Union: A new dawn for Africa?' (2002) 52 *International and Comparative Law Quarterly* 415.

<sup>16</sup> However, in order to give due credit to the African Charter, it is worth noting that the Charter was the first human rights instrument ever to make reference to the Universal Declaration.

<sup>17</sup> See para 6 OAU Sirte Declaration, 2 September 1999.

Ministers' Grand Bay Declaration of 16 April 1999, which acknowledged that:<sup>18</sup>

[O]bservance of human rights is a key tool for promoting collective security, durable peace and sustainable development as enunciated in the Cairo Agenda for Action on relaunching Africa's socio-economic transformation.

The AU Act confirms a growing attachment to the importance of human rights in Africa by providing that it shall be the objective of the AU to 'encourage international co-operation, taking due account of the [UN Charter] and the Universal Declaration of Human Rights'.<sup>19</sup> The Act provides that the AU shall strive to 'promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments'.<sup>20</sup> The principles of the AU include the 'promotion of gender equality, respect for democratic principles, human rights, the rule of law and good governance'<sup>21</sup> as well as 'respect for the sanctity of human life'.<sup>22</sup>

The human rights provisions of the AU Act are more far-reaching than those contained under the OAU Charter. The provisions reinforce the earlier mentioned declarations made by African leaders to respect human rights, and suggests *bona fide* commitment to pursue human rights in Africa under the Act.<sup>23</sup> The consequence of the obligations of the AU regarding human rights is that, apart from the individual obligations of member states to ensure the guarantee of human rights within their jurisdictions, the AU has undertaken an institutional obligation to ensure the effective guarantee of human rights in Africa generally.

In order to achieve its aim of ensuring the protection and promotion of human rights, the AU requires an institutional framework with specific organs empowered to further the human rights mandate of the AU Act. Unfortunately, none of the 9 permanent organs established under the Act has defined tasks specifically relating to human rights.<sup>24</sup> This raises the question of how and through which organ the AU can fulfil its specific objective to protect and promote human rights.<sup>25</sup>

<sup>18</sup> The Grand Bay Declaration and Plan of Action on Human Rights in Africa was adopted after the first OAU Ministerial Conference on Human Rights, 12–16 April 1999, Grand Bay, Mauritius.

<sup>19</sup> Art 3(e).

<sup>20</sup> Art 3(h).

<sup>21</sup> Art 4(m).

<sup>22</sup> Art 4(o).

<sup>23</sup> See Abass & Baderin (n 4 above) 1 29.

<sup>24</sup> The Act currently establishes the following organs: the Assembly of the Union, the Executive Council, the Pan-African Parliament, the Court of Justice, the Commission, the Permanent Representatives' Committee, the Specialised Technical Committees, the Economic, Social and Cultural Council, and the Financial Institutions. None of the specialised committees established under art 14(1) relates to human rights. However, it is noteworthy that a human rights mandate may be inferred from powers and functions entrusted to ECOSOCC, the Commission and the Pan-African Parliament.

<sup>25</sup> See Abass & Baderin (n 4 above) 1 32.

One way to address this question would be to utilise the Economic, Social and Cultural Council (ECOSOCC) of the AU, established under article 22 of the AU Act. The functions and powers of the AU ECOSOCC are not yet determined.<sup>26</sup> In determining these powers and functions, lessons may be drawn from the UN Economic and Social Council (ECOSOC), whose functions include the making of 'recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms'.<sup>27</sup> Adopting such a function would easily make the AU ECOSOCC a human rights organ.

Another important area from which the AU ECOSOCC can benefit from the UN ECOSOC, despite the difference contexts in which the two institutions operate, relates to the role of non-governmental organisations (NGOs). NGOs accorded observer or consultative status with the UN ECOSOC play an important role in monitoring how the UN ECOSOC discharges its obligations of furthering the protection and promotion of human rights.<sup>28</sup> Equally, NGOs participate in the activities of the African Commission on Human and Peoples' Rights (African Commission or Commission).

However, neither the OAU Charter nor the AU Act contains any provision on the role of NGOs. It is proposed that in defining the mandate of the AU ECOSOCC, a provision is needed to afford NGOs observer or consultative status to participate in the activities of ECOSOCC. In this way, the AU will benefit from the experiences of the NGOs resulting in a more participatory process of protecting and promoting human rights on the continent.

In order to achieve its human rights related objectives, the AU has incorporated the OAU human rights organs into the AU framework. The AU Assembly in its Lusaka Summit in July 2001 adopted a declaration incorporating the 1993 Mechanism on Conflict Prevention, Management and Resolution as an organ of the AU. The Assembly particularly noted that the Mechanism was an organ within the OAU that constituted 'an integral part of the declared objectives and principles of the [AU]', thus reaching a decision to incorporate it 'as one of the [o]rgans of the [AU] . . .'.<sup>29</sup> Despite this positive move, the Assembly surprisingly failed to incorporate two OAU institutions directly concerned with promotion and protection of human rights, namely the

<sup>26</sup> See art 22 AU Act.

<sup>27</sup> See art 62(2) UN Charter.

<sup>28</sup> Such NGOs can avail information to the thematic and special rapporteurs of the Sub-Commission on the Promotion and Protection of Human Rights, which is a subordinate organ of ECOSOC. The NGO with observer status also can attend and participate in ECOSOC sessions, in which recommendations of both the Sub-Commission and the Commission on Human Rights are discussed and adopted.

<sup>29</sup> See 'Decisions on the implementation of the Sirte summit decision on the African Union' OAU Doc AHG/Decl 1 (XXXVII) para 8.



African Commission<sup>30</sup> and the African Committee of Experts on the Rights of the Child.<sup>31</sup>

After a year of uncertainty<sup>32</sup> regarding the fate of the above two institutions, the Assembly of Heads and State and Government incorporated the institutions into the AU framework in the Durban Summit held in July 2002.<sup>33</sup> According to the 2001 and 2002 AU declarations incorporating the above three OAU human rights institutions into the AU structure, the incorporation was done under article 5(2) of the AU Act, which gives the Assembly the power to establish new organs besides those already established under the Act.

It is contended that on a literal interpretation of article 5(2), the Assembly could not have acted under this provision because the institutions in question already existed. Instead, the OAU human rights institutions should have been regarded as having been integrated into the AU through article 3(h) of the AU Act, which provides that the AU will 'promote and protect human and peoples' rights *in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments*'.<sup>34</sup>

The latter assertion is based on the interpretation that these institutions were created either in accordance with the Charter, or under the provision for 'other relevant human rights instruments'. The human rights mandate of the AU may be realised by invoking articles 5(2) and 9(2) of the AU Act, which gives the AU Assembly the power to create new organs for the purposes of ensuring that the AU realises its objectives.

Ostensibly, this means that the Assembly can, in addition to the incorporation of the already existing organs, decide to establish new organs for the protection and promotion of human rights. The latter approach is likely to undo the progress that the above-mentioned OAU human rights institutions have achieved so far.<sup>35</sup> The OAU institutions already exist, and it would be beneficial to build on their past

<sup>30</sup> Established under art 30 of the African Charter on Human and Peoples' Rights (1982) 21 *International Legal Materials* 58.

<sup>31</sup> Established under art 32 of the African Charter on the Rights and Welfare of the Child OAU Doc CAB/LEG/153/REV 2 (1999), adopted in 1991, entered into force on 29 November 1999; reprinted in C Heyns (ed) *Human rights law in Africa 1997* (1999) 38.

<sup>32</sup> The uncertainty was expressed in various fora, including through scholarly publications. Abass & Baderin, or instance, writing in March 2002, expressed the concern that the failure to adopt the OAU institutions was undesirable, because it caused anxiety regarding the fate of those institutions. See Abass & Baderin (n 4 above) 1 33.

<sup>33</sup> See AU 'Decision on interim period' 1st ordinary session of the AU Assembly of Heads of State and Government AU DOC ASS/AU/Dec 1(I) para 9.

<sup>34</sup> My emphasis.

<sup>35</sup> Abass & Baderin (n 4 above) 1 34.

experiences. Moreover, it would be imprudent to set up additional organs under the AU because of financial implications.<sup>36</sup>

In a recent study, Baimu has warned of a likelihood of proliferation of human rights institutions under the AU, especially considering that the 'developmental arm' of the AU — the New Partnership for Africa's Development (NEPAD) — envisages the creation of other human rights institutions.<sup>37</sup> The ideas in the NEPAD were conceived and are being implemented under the auspices of the AU.<sup>38</sup> Although NEPAD has yet no legal status in international law and considering that it only exists in the agreement of states, the institutional structures to be created under it are, nevertheless, bound to interplay with existing structures under the AU.

NEPAD seeks to address Africa's underdevelopment through promoting democracy, human rights, accountability, transparency and participatory governance.<sup>39</sup> The structure of NEPAD consists of the Heads of State and Government Implementation Committee,<sup>40</sup> the Steering committee, which comprises the representatives of the Heads of State and Government of the five countries that have been at the forefront of promoting NEPAD,<sup>41</sup> and a secretariat based at Midrand, South Africa.

Two proposed institutions of NEPAD of relevance to human rights are the African Peer Review Mechanism (APRM), whose mandate is to evaluate compliance by states of NEPAD principles including human rights, and the position of the Commissioner for Democracy, Human Rights and Good Governance.<sup>42</sup> Baimu has argued for a cautious

<sup>36</sup> Recent studies have shown that the African Commission, for instance, has been heavily underfunded by the OAU. Sometimes the Commission has had to rely on external donors to discharge its obligations. See eg F Viljoen 'Review of the African Commission on Human and Peoples' Rights: 21 October 1986 to 1 January 1997' in Heyns (n 31 above) 47 111 and R Murray 'The African Charter on Human and Peoples' Rights 1987–2000' (2001) 1 *African Human Rights Law Journal* 1.

<sup>37</sup> The NEPAD document is available at <<http://www.nepad.org>> (accessed 28 February 2003).

<sup>38</sup> See E Baimu 'Human rights mechanisms and structures under NEPAD and the African Union: Emerging trends towards proliferation and duplication' Occasional Paper 15, Centre for Human Rights (2002) 7, where he discusses the linkage between NEPAD and the OAU/AU.

<sup>39</sup> Para 49 of the NEPAD Document.

<sup>40</sup> Para 60. This Committee will consist of 20 Heads of State and Government.

<sup>41</sup> Para 202. The five countries are Algeria, Egypt, Nigeria, Senegal and South Africa.

<sup>42</sup> The proposal for the establishment of the APRM was made by the Heads of State and Government Implementation Committee in October 2001, and was endorsed by the AU in its Durban Summit in July 2002. See AU 'Declaration on the Implementation of NEPAD' 1st ordinary session of the Assembly of Heads of State and Government of the AU, 9–10 July 2002, Durban, South Africa. Concerning the proposal or the creation of the position of the Commissioner for Democracy, Human Rights and Good Governance, see Communiqué issued at the end of the Second Meeting of the Heads of State and Government Implementation Committee, Abuja, Nigeria, 26 March 2002 para 12.

approach in the establishment of parallel human rights organs under the auspices of the AU.<sup>43</sup> Instead, he prefers institutional integration within the mainstream AU framework.<sup>44</sup> This cautious approach is advisable, considering that the number of the organs under the AU Act is numerous. In the long run, this could result in the cumbersome operation of the AU and also present a financial burden.<sup>45</sup>

#### 4 The AU Act, human rights and the norms of international law on non-intervention and non-use of armed force

The AU Act contains provisions that are of relevance to humanitarian intervention, consisting of, the use of force by states or states to pre-empt or halt gross human rights violations leading to massive loss of lives, without the consent of the target state.<sup>46</sup> Since humanitarian intervention is a response to human rights atrocities that may amount to breaches to peace and security, this section discusses some of the AU Act provisions which could be invoked to support a right of humanitarian intervention under the auspices of the AU.

The Act states that the AU shall 'promote peace, security and stability on the continent'.<sup>47</sup> Furthermore, it is provided that the AU shall function in accordance with the principles of the 'establishment of a common defence policy for the African Continent',<sup>48</sup> the right of member states 'to live in peace and security',<sup>49</sup> and the right of any member state of the AU 'to request intervention from the [AU] in order to restore peace and security'.<sup>50</sup>

A cursory evaluation of the above provisions prompts an impression that they contradict the time-honoured customary international law principle of non-intervention forming part of the AU Act.<sup>51</sup> Article 4(g) enshrines the non-intervention principle, stating that the AU shall

<sup>43</sup> Baimu (n 38 above) 12–15.

<sup>44</sup> As above.

<sup>45</sup> Magliveras & Naldi (n 15 above) 419.

<sup>46</sup> For definitions of the term 'humanitarian intervention', see eg JPL Fonteyne 'The customary international law doctrine of humanitarian intervention: Its current validity under the UN Charter' (1973–4) 4 *California Western International Law Journal* 203 204; D Kritsiotis 'Reappraising policy objections to humanitarian intervention' (1998) 19 *Michigan Journal of International Law* 1005; and A Roberts 'The so-called 'right' of humanitarian intervention' (2000) 3 *Yearbook of International Humanitarian Law* 1 3.

<sup>47</sup> Art 3(f).

<sup>48</sup> Art 4(d).

<sup>49</sup> Art 4(i).

<sup>50</sup> Art 4(j).

<sup>51</sup> See arts 4(g) & 4(f).

function according to the principle of 'non-interference by any member state in the internal affairs of another'. Arguably, this provision completely negates those discussed in the previous paragraph.

However, a closer examination of the wording of article 4(f) reveals otherwise. The AU provision differs fundamentally from its UN Charter 'equivalent' contained in article 2(7) of the UN Charter, which provides, *inter alia*, that:<sup>52</sup>

Nothing contained in the present Charter shall authori[s]e the [UN] to intervene in matters which are essentially within the domestic jurisdiction of any state.

The UN Charter provision above is addressed to the UN acting as such, and not to the member states. In contrast, article 4(f) of the AU Act is directed at member states, by requiring that no member state should interfere in the 'internal affairs of another'. Thus it is argued that article 4(f) does not have the same effect as article 2(7), because the former provision does not restrain the AU from intervening in the internal affairs of individual states. An additional argument to support the view that the AU provisions permitting intervention do not contradict article 4(f) is that human rights issues are not matters falling within the description of 'internal affairs'.

A provision of the AU Act of prime relevance to this contribution is article 4(h). Importantly, it gives the AU the 'right to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity'. Article 4(h) is couched in terms of a 'right', meaning that the AU Assembly has the discretion to decide whether or not to intervene. The consent of the target state will not be required. It would have been better if the provision required the AU to intervene as a matter of 'duty' because a sense of obligation to intervene is more likely to move the AU into action. Nevertheless, the provision raises at least two general legal issues, which are discussed below.

First, a question might arise whether or not article 4(h) is in conflict with article 2(4) of the UN Charter, which states that:

All members [of the UN] shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the UN.

It may be argued that the above provision precludes any consent that African states have given the AU to intervene in their internal affairs. In such a situation, then article 4(h) would be void for incompatibility with article 2(4), which is regarded as *jus cogens*.<sup>53</sup> Such a view would be strengthened by the fact that the UN Charter provides that obligations

<sup>52</sup> My emphasis.

<sup>53</sup> See, *inter alia*, JI Charney 'Anticipatory humanitarian intervention in Kosovo' (1999) 32 *Vanderbilt Journal of Transnational Law* 1231 and Abass & Baderin (n 4 above) 16.

of member states under the UN Charter supersede their obligations under any other treaty.<sup>54</sup> Furthermore, the Vienna Convention on the Law of Treaties provides that '[a] treaty is void, if at the time of its conclusion, it conflicts with a peremptory norm of general international law'.<sup>55</sup>

A response to such a concern would be that the means of force prohibited by article 2(4) is that which is 'against the territorial integrity or political independence of states'. Intervention under article 4(h) would not infringe upon the territorial integrity or political independence of the African states that are members of the AU. Had the provision been designed to allow such interference, the member states may not have agreed to allow the provision in the Act. The provision in article 4(h) presumes prior consent by every member state of the AU to the effect that the Union is allowed to intervene in their respective territories. One recent study adopts this reasoning, and argues as follows:<sup>56</sup>

What the AU members contracted out of by giving their consent to intervention by AU is the principle of 'non-intervention'. . . . By ratifying the AU Act, African states must be understood to have agreed that the AU can intervene in their affairs accordingly. In empowering the Union [AU] to that effect under article 4(h), the states must be taken to have conceded a quantum of their legal and political sovereignty to the African Union [AU].

Second, article 4(h) does not clarify who determines when to intervene and by what means. Indeed, the article is quite clear that it is the AU Assembly of Heads of State and Government that will make a decision for intervention. The means of intervention are not stated, but considering that the intervention under this provision will be responding to 'grave circumstances', of which are specified as 'war crimes, genocide and crimes against humanity', one may plausibly presume that the intervention will be by use of armed force. War crimes, genocide and crimes against humanity are most likely to be committed in the context of armed conflicts. Therefore, only proportional use of armed force is likely to address these 'grave circumstances'.

It must be accepted that it is the AU Assembly of Heads of State and Government that decides when to intervene, and that the intervention is likely to involve the use of armed force. Two subsidiary issues arise from this proposition. The first is that the Assembly's power to determine the existence of war crimes, genocide and crimes against humanity may be 'hijacked' by more powerful states within the AU. These states may want to politicise the interpretation of these terms.

<sup>54</sup> Art 103.

<sup>55</sup> Art 53.

<sup>56</sup> See Abass & Baderin (n 4 above) 1 19.

Fortunately, these terms have already been defined in the 1998 Rome Statute of the International Criminal Court.<sup>57</sup> This means that it may be difficult to develop other definitions. Furthermore, a decision to intervene will only require an endorsement of two-thirds of the member states, and no single member of the AU has the power to veto.<sup>58</sup> This will ensure that no single state can control the decision making process in respect of the operation of article 4(h) and the AU Act in general.

The second subsidiary issue arising from the above concern is that the AU Act does not envisage the AU's supervision by the Security Council. Yet, the UN Charter provides that the UN Security Council has 'primary responsibility' concerning the maintenance of international peace and security.<sup>59</sup> Indeed, the UN Security Council in exercising its primary responsibility has the mandate to supervise the AU, which is a regional arrangement or agency within the meaning of article 52 of the UN Charter.<sup>60</sup> Under such supervision, the AU would be bound by article 53 of the UN Charter, which states as follows:<sup>61</sup>

The Security Council shall, where appropriate, utili[s]e such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies *without the authori[s]ation of the Security Council*. . . .

The above provision restrains all activities of regional organisations with regard to the use of force, unless the Security Council has authorised such action. Yet, the AU Act in article 4(h) purports to authorise the AU to intervene without the authority of the Security Council. The AU Act does not anticipate the supervision of the UN Security Council, at least with regard to intervening in AU member states where war crimes, genocide or crimes against humanity are being committed. This may imply that the AU considers that it will not be expedient to wait for UN Security Council authorisation before responding to situations of war crimes, genocide and crimes against humanity.

<sup>57</sup> (1998) 37 *International Legal Materials* 999. The Rome Statute of the International Criminal Court entered into force on 1 July 2002, 60 days after the 60th ratification, pursuant to art 126 of the Statute. The definitions are in art 6 (genocide), art 7 (crimes against humanity) and art 8 (war crimes).

<sup>58</sup> Art 7(1) AU Act.

<sup>59</sup> Art 24 UN Charter.

<sup>60</sup> Nothing in the AU Act states that the AU is a regional arrangement or agency. According to Abass & Baderin (n 4 above) 1 20, the status of the AU as a regional arrangement or agency can only be assumed from its composition (African states only), the bond between the members (common historical, cultural and political values) and the territorial scope of its operation (the African continent). In any case, they argue, the OAU, whose member states have now formed the AU have been treated in the past by the UN and the general international community as constituting a regional arrangement or agency.

<sup>61</sup> My emphasis.

The omission by the AU Act of the requirement that the Security Council should supervise article 4(h) interventions is arguably intentional. This is because the same year the AU Act was adopted, the OAU Solemn Declaration on Security Stability Development and Co-operation in Africa expressly recognised 'the *primary* responsibility for the maintenance of international peace and security [lies] with the [UN] Security Council [with] the OAU in close co-operation with the [UN] and [sub-regional intergovernmental organisations] remaining the *premier* organi[s]ation for promoting security, stability, development and co-operation in *Africa*'.<sup>62</sup> In this Declaration, the 'primacy' of the UN Security Council in matters of international peace and security was recognised, although even then, the framers carefully added that the OAU remained the 'premier' organisation for the same purpose when it comes to the OAU's region of competence — Africa.

An approach similar to that of the AU had been taken in the past. The Economic Community of West African States (ECOWAS) intervened in Liberia and in Sierra Leone in 1990 and 1997 respectively, without the authority of the Security Council. In both cases, ECOWAS authorities invoked the doctrine of humanitarian intervention, as well as the provisions of the Protocol on Mutual Assistance and Defence.<sup>63</sup> ECOWAS is likely to continue with this trend under the provisions of the 1999 Mechanism for Conflict Prevention, Management and Resolution. Similarly, NATO's use of force in Kosovo was not authorised by the Security Council.

The reason behind the increasing tendency by regional organisations to acquire power to intervene in member states, to use the words of the AU Act, in 'grave circumstances', arises from the fact that the UN Security Council's bureaucratic procedures cannot guarantee a quick response in cases of gross human rights violations. Furthermore, the Council has either ignored some conflicts or has shown discrepant standards in those conflicts to which it has responded. Weller, for instance, notes that in Liberia, the Council first declined to intervene, then intervened, only after ECOWAS did, with considerably less vigour than it did in the Former Yugoslavia.<sup>64</sup> Thus, it may be argued, that where the UN Security Council refuses to intervene in a crisis of a UN member state, this enables concerned regional arrangements or agencies to undertake whatever actions deemed necessary.<sup>65</sup>

<sup>62</sup> See AHG/Decl 4 (XXXVI), para 9(9) (my emphasis).

<sup>63</sup> See West Africa 4–10 February 1991 140; West Africa 2–8 March 1992 210; Kufuor (1993) 529.

<sup>64</sup> M Weller *Regional peacekeeping and international enforcement: The Liberian crisis* (1994) Foreword IX.

<sup>65</sup> See Abass & Baderin (n 4 above) 1 24.

The right conferred upon the AU under article 4(h) can serve to complement the powers of the African Commission under article 58 of the African Charter. Under this article, the Commission may draw to the attention of the Assembly of Heads of State and Government any 'existence of a series of serious or massive violations of human and peoples' rights' that may be revealed by communications before the Commission.<sup>66</sup> The Assembly may then request the Commission to 'make an in-depth study' of these cases and to make findings and recommend specific action.<sup>67</sup>

However, the mandate of the Commission under article 58 is limited to the extent that it can only be exercised with the consent of the state where the violations are reportedly occurring.<sup>68</sup> Under the AU dispensation, article 4(h) will enable the Assembly to intervene, without the consent of the target state, in situations of gross violations of human rights, so long as the violations constitute the 'grave circumstances' specified in the article.

In light of the foregoing discussion, we conclude that the AU Act presents an opportunity for the AU to engage in treaty-based humanitarian intervention without the authority of the UN Security Council or of the target state. The AU Act, unlike the OAU Charter, has clear provisions relating to the protection and promotion of human rights. The AU has taken the right decision in incorporating into the AU framework, the main OAU human rights organs. This not only ensures continuity, but also avoids duplicity and the dissipation of resources.

Article 4(h), which permits intervention to pre-empt or stop war crimes, genocide and crimes against humanity, envisages humanitarian intervention under the auspices of the AU. Moreover, the restriction of the circumstances in which the AU can intervene in such matters, is considered to be of 'the greatest concern to the international community'.<sup>69</sup>

Finally, it is likely that the norm of humanitarian intervention may be espoused by further enactments by the AU in the future. This is so because of the fundamental difference between the contents of article 3 and that of article 4 of the AU Act. The provisions of the former article are expressed, as 'objectives' while those of the latter are expressed as 'principles'. Maluwa has stated that 'principles' form the main process by which the OAU embarked on lawmaking.<sup>70</sup> Arguably, this trend is likely to continue under the new dispensation of the AU.

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<sup>66</sup> Art 58(1).

<sup>67</sup> Art 58(2).

<sup>68</sup> As above.

<sup>69</sup> See art 2 Rome Statute of the ICC.

<sup>70</sup> See Maluwa (n 2 above) 201.



## 5 The Protocol Relating to the Establishment of the Peace and Security Council of the AU

The Protocol Relating to the Establishment of the Peace and Security Council of the AU (the Protocol) was adopted at the 1st ordinary session of the AU Heads of State and Government in Durban, South Africa.<sup>71</sup> Ratification by a simple majority of member states is required for its entry into force.<sup>72</sup>

The Protocol seeks to establish an African Peace and Security Council to take over the work of the OAU Mechanism for Conflict Prevention, Management and Resolution,<sup>73</sup> which, as stated earlier, is now part of the institutional structure of the AU.

The Peace and Security Council of the AU shall be composed of 15 member states of the AU elected for a term of two years with due regard to equitable geographical representation, and provided that five of the members shall be elected for a term of three years to ensure continuity.<sup>74</sup> To qualify for election, the prospective member state shall manifest among others commitment to uphold the principles of the Union, including humanitarian intervention.<sup>75</sup>

Such member states should also demonstrate respect for constitutional governance, the rule of law and human rights.<sup>76</sup> If these criteria are followed, it is likely that the humanitarian intervention envisaged in article 4(h) of the AU Act will be realised. Indeed, states constituting the Peace and Security Council are bound to be relatively democratic. These states should not shield those states involved in massive violations of fundamental human rights, as was the case during the existence of the OAU.

Moreover, the provision in the Protocol for decisions to be made by a simple majority if they concern procedural matters and by two-thirds majority if they relate to any other matter,<sup>77</sup> will empower the Council to make decisions which may be contested by some members. One of the obstacles on the functioning of the 1993 OAU Mechanism, as stated earlier, is the requirement that decisions are to be made by consensus.

<sup>71</sup> (AU) AAU, 1st ordinary session, 9 July 2002.

<sup>72</sup> Art 22(5) Protocol

<sup>73</sup> Art 22(1) of the Protocol provides that the Protocol 'replaces' the 1993 Cairo Declaration, which establishes the Mechanism for Conflict Prevention, Management and Resolution. Under art 22(2), the provisions of the Protocol shall supersede the resolutions and decisions of the OAU relating to the Mechanism which are in conflict with the Protocol.

<sup>74</sup> Arts 5(1)(a) & (b) Protocol.

<sup>75</sup> Art 5(2)(a) Protocol.

<sup>76</sup> Art 5(2)(g).

<sup>77</sup> Art 8(13) Protocol.

The AU Protocol also provides that decisions of the Peace and Security Council shall be guided by the principle of consensus, but in cases where consensus cannot be reached, decisions must conform to the manner described above.<sup>78</sup> Each member of the Peace and Security Council shall have one vote.<sup>79</sup> The Peace and Security Council shall meet at the Addis Ababa Headquarters of the AU at the level of Permanent Representatives, Ministers or Heads of State and Government.<sup>80</sup>

The Council is required to be so organised to enable it to function continuously.<sup>81</sup> For this purpose, the Council shall, at all times, be represented at the Headquarters of the AU.<sup>82</sup> This provision envisages that most of the decisions of the Council will be made at the level of Permanent Representatives for referral to the Council of Ministers and Heads of State and Government who, according to the Protocol will meet less frequently.<sup>83</sup> With regard to humanitarian intervention, the continuity of the work of the Peace and Security Council is particularly important. The Council may be required to take decisions to intervene to pre-empt mass loss of life or massive violations of human rights on short notice.

The objectives of the Peace and Security Council will include the anticipating and pre-empting of armed conflicts,<sup>84</sup> and preventing massive violations of fundamental human rights. It will also aim at the promotion and encouragement of democratic practices, good governance, the rule of law, human rights, the respect for the sanctity of human life and international humanitarian law.<sup>85</sup>

Among the principles to govern the Peace and Security Council is the principle in article 4(h) of the AU Act, by which the AU may intervene pursuant to a decision of the Assembly of Heads of State and Government, in member states with in respect of genocide, war crimes and crimes against humanity.<sup>86</sup> Also, the functions of the Council shall include 'intervention, pursuant to article 4(h) of the [AU Act]'.<sup>87</sup>

In order to enable the Peace and Security Council to perform this and other responsibilities, the Protocol provides for the establishment of the African Standby Force, composed of standby contingents 'for rapid deployment at appropriate notice'.<sup>88</sup> Such standby contingents shall be

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<sup>78</sup> As above.

<sup>79</sup> Art 8(12) Protocol.

<sup>80</sup> Arts 8(2) & (3) Protocol.

<sup>81</sup> Art 8(1) Protocol.

<sup>82</sup> As above.

<sup>83</sup> Art 8(2) Protocol. The Council of Ministers and the Heads of State and Government shall meet at least once a year, respectively, or as often as required.

<sup>84</sup> Art 3(b) Protocol.

<sup>85</sup> Art 3(f) Protocol.

<sup>86</sup> Art 4(j) Protocol.

<sup>87</sup> Art 6(d) Protocol.

<sup>88</sup> Art 13(1) Protocol.

established by member states of the AU, in terms of 'standard operating procedures' of the AU.<sup>89</sup> It appears from these provisions that the African Standby Force shall be an *ad hoc* force, constituted as need arises. The functions of the African Standby Force shall include 'intervention in member state in respect of grave circumstances in order to restore peace and security, in accordance with article 4(h) [of the AU Act]'.<sup>90</sup>

The Protocol defines the role of the AU Chairperson with regard to conflict prevention and resolution including the maintenance of peace, security and stability on the continent. His role includes bringing to the attention of the AU Peace and Security Council or the Panel of the Wise, any matter that is relevant for the promotion of peace, security and stability in Africa.<sup>91</sup> He may also use his good offices to prevent potential conflicts, resolve actual conflicts and promote peace-building and post-conflict reconstruction.<sup>92</sup> The Protocol requires the Chairperson to use the information gathered under the Protocol's 'early warning system' to advise the AU Peace and Security Council on potential conflicts and threats to peace and security in Africa and recommend the best course of action.<sup>93</sup>

The Protocol, once in force, will clarify at least three issues that the AU Act has left open for interpretation. First, as stated earlier, the Act is silent on who determines when the 'grave circumstances' justifying intervention in a state, and by what means is the intervention to be carried out. We argued that the specified 'grave circumstances of genocide, crimes against humanity and war crimes have already been defined in the Rome Statute of the ICC, and that these definitions may offer guidance. The Protocol supports this view, by providing that the AU Peace and Security Council will have the power to recommend to the AU Assembly of Heads of State and Government, intervention pursuant to article 4(h) of the AU Act in respect of 'war crimes, genocide and crimes against humanity as defined in relevant international conventions and instruments'.<sup>94</sup>

Concerning the means of intervention under article 4(h) of the AU Act, we argued earlier that the use of force is envisaged. This position is supported by the provision of the Protocol requiring the establishment of an African Standby Force with both 'military and civilian contingents' for purposes of 'rapid deployment at appropriate notice'.<sup>95</sup>

<sup>89</sup> As above.

<sup>90</sup> Art 13(3)(c) Protocol.

<sup>91</sup> Art 10(2) Protocol.

<sup>92</sup> As above.

<sup>93</sup> Art 12(5) Protocol.

<sup>94</sup> Art 7(1)(e) Protocol.

<sup>95</sup> Art 13(1) Protocol.

Second, we observed in the discussion of article 4(h) of the AU Act that neither the provision nor the rest of the Act clarifies the relationship between the AU and the UN in relation to issues touching on international peace and security. We concluded that the drafters of the Act deliberately left out any definition of this relationship, in order to ensure that the AU can act in emergency cases of the 'grave circumstances' and to attend massive violations of fundamental rights. The Protocol appears to discount this assumption by detailing out how the Peace and Security Council of the AU will work together with the UN Security Council.

In its Preamble, the Protocol recognises the 'provisions of the Charter of the [UN], conferring on the Security Council primary responsibility for the maintenance of international peace and security'.<sup>96</sup> It also takes cognisance of the 'provisions of the [UN] Charter on the role of regional arrangements or agencies in the maintenance of international peace and security, and the need to forge closer co-operation and partnership between the [UN], other international organisations and the [AU], in the promotion and maintenance of international peace, security and stability in Africa'.<sup>97</sup>

Also, the Peace and Security Council of the AU shall be guided by the principles of the AU Act and those of the *UN Charter* and the Universal Declaration.<sup>98</sup> The AU Council also has power to 'promote and develop a strong partnership for peace and security between the [AU] and the [UN] and its agencies . . .'.<sup>99</sup> Furthermore, the AU Peace and Security Council is enjoined by the Protocol to 'co-operate and work closely with the [UN] Security Council, which has the primary responsibility for the maintenance of international peace and security'.<sup>100</sup>

The above provisions manifest a sustained effort by the drafters of the Protocol to provide for an African regional mechanism for the maintenance of international peace and security that is subservient to the UN Security Council. Therefore, it may be argued that the Protocol clarifies that the AU will only intervene militarily in member states with the approval and under the supervision of the UN Security Council. However, it is possible that the drafters of the Protocol were either oblivious of the relevant provisions of the AU Act, or they intended to define the relationship between the AU and the UN Security Council, which the AU Act had omitted.

It is interesting to note that there exists an internal contradiction regarding the provisions of the Protocol on the relationship between the

<sup>96</sup> Preamble to the Protocol para 4.

<sup>97</sup> As above.

<sup>98</sup> Art 4 Protocol (my emphasis).

<sup>99</sup> Art 7(1)(k) Protocol.

<sup>100</sup> Art 17(1) Protocol.

AU Peace and Security Council and the UN Security Council. The Protocol states that the AU 'has the *primary* responsibility for promoting peace, security and stability in Africa'.<sup>101</sup>

Despite the elaborate provisions by the Protocol recognising the primacy of the UN Security Council in the promotion of international peace and security, that primacy only relates to peace and security in other parts of the world. Within Africa, the Protocol adopts the position taken under the AU Act — that of according the AU the primary role in matters of international peace and security, including the use of force in the maintenance thereof. This argument is supported by the fact that the Protocol does not provide anywhere that the AU Peace and Security Council or the AU Assembly of Heads of State and Government will require the authorisation of the UN Security Council before engaging in humanitarian intervention under article 4(h) of the AU Act.

The third and final issue in respect of the AU Act that the Protocol has clarified relates to the relationship between the Peace and Security Council of the AU and the African Commission on Human and Peoples' Act. The Protocol provides that the Council 'shall seek close co-operation' with the Commission in all matters relevant to the mandate and objectives of the Council.<sup>102</sup>

The Commission is obliged under the Protocol to bring to the attention of the Council 'any information relevant to the objectives and mandate of the [Council]'.<sup>103</sup> These provisions are likely to 'give teeth' to the Commission's mandate under article 58 of the African Charter, by attracting the attention of the OAU (AU) Assembly situations of gross and systematic violations of human rights. Information provided by the Commission under the Protocol may be a basis of a recommendation by the Council to the AU Assembly for humanitarian intervention under article 4(h) of the AU Act.

Finally, the prominent role of eminent personalities that was prominent in the functioning of the AU has also been recognised in the Protocol. A 'Panel of the Wise' is established with the mandate to 'advise the [Peace and Security Council of the AU] and the Chairperson of the [AU] Commission on all issues pertaining to the promotion and maintenance of peace, security and stability in Africa'.<sup>104</sup> The Panel of the Wise is to be composed of 'five highly respected African personalities from various segments of society who have made outstanding contribution to the cause of peace, security and development on the continent'.<sup>105</sup>

<sup>101</sup> Art 16(1) Protocol (my emphasis).

<sup>102</sup> Art 19 Protocol.

<sup>103</sup> As above.

<sup>104</sup> Art 11(1) Protocol.

<sup>105</sup> Art 11(2) Protocol.

The advice of the Panel of the Wise is likely to be headed by the AU machinery. The personal intervention of the Panel in situations of armed conflicts where massive violations of fundamental human rights are taking place may succeed in reconciling the warring parties, given Africa's respect for elders. The provision for the Panel of the Wise is an important development, as it will ensure that the use of force will only be resorted to if the Panel's mediation, conciliation and other peaceful methods of intervention have failed.

## 6 Conclusion

During the OAU Council of Ministers Session held in Lusaka, Zambia, in July 2001, the OAU Secretary-General stated that the AU was designed to be a new institution, completely different from the OAU. He said:<sup>106</sup>

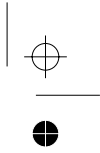
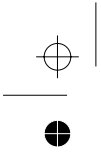
It is important to point out that when African leaders decided to establish the [AU] when they adopted the Sirte Declaration and, subsequently, the Constitutive Act, they did not aim at establishing an organisation which was going to be a continuation of the OAU by another name.

Although only time will tell whether or not the AU will be more effective than its predecessor, the OAU, it is noteworthy that the provisions of the AU Act, especially those concerning human rights, peace and security, radically depart from those of the OAU Charter. The analysis of the provisions of the AU Act leads us to the conclusion that the AU Act represents a major normative and institutional departure from that contained in the OAU regime. The AU Act, unlike the OAU Charter, has express provisions mandating it to deal with issues of human rights, peace and security in member states.<sup>107</sup>

Article 4(h) provides a basis for humanitarian intervention. The intervention will be exercised through the recommendations of the Peace and Security Council of the AU to the Assembly of Heads of State and Government. The Protocol Relating to the Establishment of the Peace and Security Council, unlike the AU Act, provides for the relationship between the AU and the UN Security Council relating

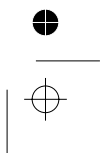
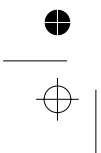
<sup>106</sup> See *Report of the Secretary-General CM/2210 (LXXIV)*, Council of Ministers, 74th ordinary session/9th ordinary session of the AEC, 2-7 July 2001 10.

<sup>107</sup> The relevant provisions are in review, with the aim of 'strengthening' them. The Executive Council of the AU, for example, met in Tripoli on 13 December 2002 and proposed, *inter alia*, that the AU Act be amended to highlight the role of women in continental development and their role in securing peace and security on the Continent. The Council also decided to replace the appellation 'founding fathers' with 'founders' in the understanding that those who created the AU predecessor did so well aware of women's contribution in this regard. See 'First extraordinary session of the Executive Council on the proposed amendments to the African Union', Tripoli, Libya, 11-13 December 2002, press release and information available at <<http://www.africa-union.org>> (accessed 28 February 2003).



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the use of force by the AU. However, the provisions of the Act, as well as those of the AU Act, fall short of expressly requiring that the AU shall have to obtain prior or *ex post facto* authorisation of the UN Security before engaging in the use of force under article 4(h) of the AU Act.



## Bringing communications before the African Commission on Human and Peoples' Rights

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### Summary

*The African Commission on Human and Peoples' Rights is increasingly playing an important role in the implementation of human rights in Africa. The Commission continues to develop jurisprudence particularly relevant to Africa. The Commission has also exhibited a propensity to interpret its mandate broadly at a time when governments continue to perpetrate serious violations of human rights. Notably, an important development is that the Commission considers itself free to consider communications falling short of alleged grave and massive violations. This article provides an overview of the steps in the process of submitting a communication to the African Commission. The initiation of 'litigation' before the Commission differs markedly from litigation at the domestic level. The procedure governing communications before the Commission is divided into four steps: seizure; admissibility; merits and remedies. Under the Charter the Commission has also been willing to conduct on-site investigations and recommend interim measures.*

### 1 Introduction

The African Commission on Human and Peoples' Rights (African Commission or Commission) is so far the only enforcement mechanism within the African regional human rights system. The African regional human rights system, also described as the pan-continental human

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rights system by Odinkalu,<sup>1</sup> is created under the patronage of the African Union under which a cluster of human rights instruments has been established.<sup>2</sup> The Commission is established in terms of article 30 of the African Charter on Human and Peoples' Rights (African Charter or Charter) of 1981<sup>3</sup> to protect and promote human and peoples' rights in Africa.

The promotion and protection of human rights are two interrelated and indistinguishable functions of the Commission because the objective of promoting human and peoples' rights is mainly to reduce the likelihood of their violation.<sup>4</sup> In addition to the above-mentioned functions of the Commission, articles 45(3) and (4) provide that the Commission shall interpret all the provisions of the Charter and also perform any other tasks entrusted to it by the Assembly of Heads of State and Government of the African Union. The interpretation of the Charter and the performance of any other tasks are aimed at complementing the promotion and protection mandate of the Commission.

The Charter is the principal instrument for the promotion and protection of human rights in Africa. It marks the beginning of an organised commitment to protecting human rights in Africa.<sup>5</sup> As a human rights instrument specifically designed to respond to 'African concerns, African traditions and African conditions',<sup>6</sup> the African Charter is an all-encompassing international human rights instrument with a special significance to the African continent owing to the provision of three generations of rights, namely civil and political rights,<sup>7</sup> economic, social and cultural rights,<sup>8</sup> and peoples' rights.<sup>9</sup> Moreover, the Charter is the only regional instrument incorporating collective rights under the

<sup>1</sup> CA Odinkalu 'The role of case and complaints procedures in the reform of the African regional human rights system' (2001) 1 *African Human Rights Law Journal* 226.

<sup>2</sup> These include the African Charter on Human and Peoples' Rights of 1981, the OAU Convention on Governing the Specific Aspects of Refugee Problems in Africa of 1969 and the African Charter on the Rights and Welfare of the Child of 1990. Reprinted in *Human rights law in Africa 1997* (1999) 34.

<sup>3</sup> OAU Doc OAU/CAB/LEG/67/3/Rev 5. Reprinted in *Human rights law in Africa 1996* (1996) 7.

<sup>4</sup> CA Odinkalu 'The individual complaints procedures of the African Commission on Human and Peoples' Rights: A preliminary assessment' as cited in H Steiner & P Alston *International human rights in context: Law, politics, morals* (2000) 925.

<sup>5</sup> C Flinterman & C Henderson 'The African Charter on Human and Peoples' Rights' in R Hanski & M Suksi *An introduction to the international protection of human rights* (1999) 387.

<sup>6</sup> T van Boven 'The relations between peoples' rights and human rights in the African Charter' (1986) 7 *Human Rights Law Journal* 186; also cited by E Ankumah *The African Commission on Human and Peoples' Rights: Practice and procedures* (1996) 1.

<sup>7</sup> Arts 2–13.

<sup>8</sup> Arts 14–18.

<sup>9</sup> Arts 19–24.

concept of 'peoples' rights',<sup>10</sup> and also provides for both state<sup>11</sup> and individual<sup>12</sup> duties.

Amongst other functions, the Commission may consider individual communications alleging violations of human and peoples' rights under article 55 of the Charter.<sup>13</sup> After considering such communications, the Commission is required to make recommendations to the Assembly of Heads of State and Government of the African Union and to the state party concerned. The overall function of considering communications and making recommendations to the Assembly of Heads of State and Government of the African Union is known as the protection mandate of the Commission.<sup>14</sup> The protection of human and peoples' rights also has a promotional aspect. By making recommendations relating to the violation of human and peoples' rights, the Commission indirectly promotes these rights.

Bringing communications before the Commission falls under the protective mandate of the Commission as provided for under article 45(2) of the Charter. Articles 55–59 of the Charter provide for guidelines on the 'litigation' procedures before the Commission. These articles are complemented by the Rules of Procedure, which were adopted by the Commission in terms of article 42(2) of the Charter.<sup>15</sup> The individual complaints procedure before the Commission potentially offers a concrete, result-oriented approach to human rights practice.<sup>16</sup> This

<sup>10</sup> See eg R Kiwanuka 'The meaning of peoples' rights in the African Charter on Human and Peoples' Rights' (1988) 80 *American Journal of International Law* 80 and Ankumah (n 6 above) 160.

<sup>11</sup> Arts 1, 25 & 26.

<sup>12</sup> Arts 27–29.

<sup>13</sup> Art 55 of the Charter refers these communications to 'other communications'. These communications are brought by individuals, groups of individuals and NGOs.

<sup>14</sup> The African Commission's protective mandate will be complemented by the African Court on Human and Peoples' Rights once the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights comes into force. For more detailed discussions on the African Court, see GJ Naldi & K Magliveras 'The proposed African Court of Human and Peoples' Rights: Evaluation and comparison' (1996) 8 *African Journal of International and Comparative Law* 944; M Mutua 'The African Human Rights Court: A two-legged stool?' (1999) 21 *Human Rights Quarterly* 343; A O'Shea 'A critical reflection on the proposed African Court on Human and Peoples' Rights' (2001) 2 *African Human Rights Law Journal* 285; KE Quashigah 'The African Court of Human Rights: Prospects, in comparison with the European Court of Human Rights and the Inter-American Court of Human Rights' (1998) *Proceedings of the Tenth Annual Conference of the African Society of International and Comparative Law, Addis Ababa 3–5 August 1998* 58; and NJ Udombana 'Towards the African Court of Human and Peoples' Rights: Better late than never' (1999) 8 *Revue Africaine des Droits de l'Homme* 338.

<sup>15</sup> The Rules of Procedure were deliberated and adopted by the African Commission at its 18th session held in Praia, Cape Verde on 6 October 1995. Reprinted in *Human rights law in Africa 1997* (1999) 11.

<sup>16</sup> Institute for Human Rights and Development in Africa website <<http://www.africaninstitute.org/>> (accessed 28 February 2003).

contribution seeks to explore the individual complaints procedure before the Commission which should be known by prospective complainants wishing to succeed with human rights communications before the Commission.

## 2 Who may be a complainant?

The Charter is silent as to who may submit a communication before the Commission. Article 56 of the Charter only makes reference to communications relating to human and peoples' rights referred to in article 55 of the Charter. Article 55 of the Charter provides for communications other than those of state parties. Additionally, the Rules of Procedure do not elaborate any further on this matter. Article 56(1) of the Charter requires a communication to indicate its 'author' but does not state who the author may be. Rule 104 of the Rules of Procedure uses the words 'his/her communication'. This connotes that the complainant may be an individual, that is, a human being. Hence the words 'individual communications' are often used to refer to these communications. If it is accepted that the complainant may be an individual, then the next question is: Who is an individual?

Umuzorike<sup>17</sup> adopts a liberal meaning of the word 'individual'. In his view the term 'other communications' refers to those that originate from any African or international non-governmental organisation (NGO), whether or not it has observer status with the Commission; any individual who lives in a country which has ratified the Charter and considers himself or herself a victim of a violation; if the victim is unable to submit the communication himself or herself, any other person or organisation may do so on his or her behalf.

From the individual complaints practice before the Commission, the above-mentioned meaning of an 'individual' may be valid. Thus, besides natural persons, any NGO, whether or not it has observer status before the Commission, may be classified as an 'individual' for purposes of litigating before the Commission. In most instances, NGOs submit communications on behalf of natural persons. However, this does not mean that NGOs cannot bring communications on their own behalf for violation of human and peoples' rights in Africa. As a matter of practice, NGOs may bring a communication on behalf of other NGOs.<sup>18</sup>

The use of the words 'his or her communication' in rule 104 of the Rules of Procedure presupposes that only one person may submit a communication against a respondent state. Otherwise the words 'or

<sup>17</sup> UO Umuzorike *The African Charter on Human and Peoples' Rights* (1997) 231.

<sup>18</sup> See Communication 225/98, *Huri-Laws v Nigeria*, Fourteenth Annual Activity Report, where the communication was submitted by Huri-Laws, an NGO registered in Nigeria on behalf of the Civil Liberties Organisation, an NGO also based in Nigeria.

their communication' should have been included in the rule. Nevertheless, a group of individuals may bring a class action against the respondent state. After all, the Charter also provides for peoples' rights. NGOs may also bring a communication against the respondent state.<sup>19</sup>

### 3 Legal representation

Neither the Charter nor the Rules of Procedure provides for legal representation in bringing a communication before the Commission. Neither is there an article or rule for the provision of legal aid to indigent complainants. Human rights NGOs have become important in providing legal representation and legal aid to indigent complainants bringing their communications before the Commission.<sup>20</sup> The importance of making use of NGOs, especially with observer status, in bringing communications on human rights violations before the Commission is premised on the right to participate in the public sessions of the Commission, where they may be able to lobby the Commission for a speedy consideration of their communications.<sup>21</sup> A complainant without legal representation should therefore seek assistance from a human rights NGO to assist in bringing a communication before the Commission.

While the individual complaints procedure before the Commission is straightforward, legal representation is becoming a necessity as the jurisprudence of the Commission is also becoming more and more sophisticated. An international human rights lawyer is likely to be better equipped to take a case to the Commission. Technical issues are likely to arise when it comes to the admissibility test under article 56 of the Charter, especially where local remedies have not been exhausted, and the procedure has been unduly prolonged or where no effective local remedies are available. A lawyer is also better positioned in the drafting of heads of argument which has become the practice for human rights NGOs submitting communications before the Commission.

<sup>19</sup> See Communication 159/96, *Union Inter Africaine des Droits de l'Homme and Others v Angola*, Eleventh Annual Activity Report; Communication 218/98, *Civil Liberties Organisation and Others v Nigeria*, Fourteenth Annual Activity Report.

<sup>20</sup> Examples of human rights NGOs specialising in human rights litigation include the International Centre for the Legal Protection of Human Rights, Constitutional Rights Project, Institute of Human Rights and Development in Africa, Amnesty International, International PEN, Civil Liberties Organisation, Huri-Laws, Media Rights Agenda and RADDHO. A human rights NGO which provides for legal aid under its 'Access to Justice Initiative' programme is the International Commission of Jurists (Kenya and Swedish Sections).

<sup>21</sup> Rule 75 of the Rules of Procedure provides that NGOs, granted observer status by the Commission, may appoint authorised observers to participate in the public sessions of the Commission and of its subsidiary bodies.

Complainants wishing to represent themselves in the proceedings may make use of the Guidelines for the submission of communications (Submission Guidelines) developed by the Commission to assist complainants bringing communications before it.<sup>22</sup> According to the Submission Guidelines, communications should include the following: the complainant's personal details; the government accused of the violation; the facts constituting the alleged violation; the urgency of the case; the provisions of the Charter alleged to have been violated; names and titles of government authorities who committed the alleged violation; witnesses to the violation; documentary proof of the violation; domestic legal remedies not yet pursued and the reasons why they have not been pursued; and other international fora which have considered the same complaint.<sup>23</sup>

#### 4 Processing communications

Bringing communications before the Commission differs from litigating before a national court. On the one hand, litigating at a national level involves the determination by a domestic court or tribunal of whether or not the national law in the form of legislation or the constitution has been contravened. On the other hand, complaints to the Commission fall under international law. It must be noted that international law not only governs relations between states, but it also protects human rights, thereby according individual human beings independent status and standing before international bodies such as the Commission.

Communications before the Commission must be limited to violations of international human rights standards. The Charter is the yardstick for testing whether or not there has been a violation of an international standard within the African human rights system. The Submission Guidelines assist complainants in distinguishing the two main categories of the rights covered in the Charter, namely individual rights and peoples' rights. It also highlights the specific articles of these rights in the Charter.<sup>24</sup> Adhering to these guidelines assists the legal officers of the Secretariat of the Commission (the Secretariat) to process the communications to be considered by the Commission without delay.

The Commission developed extensive Processing Guidelines for the processing of communications by the Secretariat.<sup>25</sup> The legal officers of

<sup>22</sup> See 'Guidelines on the submission of communications', Information Sheet No 2 of the African Commission on Human and Peoples' Rights. These Guidelines may also be used by NGOs assisting victims of human rights violations.

<sup>23</sup> As above, 10–11.

<sup>24</sup> As above, 4–5.

<sup>25</sup> *Appendix 1 — Strategy Plan 2000–2002* 1–5.

the Secretariat use these Processing Guidelines, which provide for the handling of communications by the Secretariat from their reception up to the drafting of decisions. It would therefore be advisable for complainants to acquaint themselves with these Processing Guidelines to better understand the complaints procedure before the Commission.

## 5 Kinds of human rights violations

There has been confusion surrounding the Commission's substantive jurisdiction. Initially, it was thought that only communications revealing a series of serious and massive violations of human rights could be submitted before the Commission.<sup>26</sup> In Communications 147/95 and 149/96, *Jawara v The Gambia*,<sup>27</sup> the Commission dismissed the argument that its power to consider communications was limited only to those cases revealing a series of serious and massive violations of human rights.<sup>28</sup> The Commission is therefore empowered to consider any communication from anyone as long as there has been a violation of human rights.

In submitting a communication before the Commission, the rights allegedly violated should be contained in the Charter. Rule 104(1)(d) of the Rules of Procedure provides that the Commission may request the author to furnish clarifications on the applicability of the Charter to his or her communication and to specify in particular the provisions of the Charter allegedly violated by the respondent state. This does not mean that a communication may not allege violations of other international human rights instruments, especially those binding upon the state party concerned.

Article 60 of the Charter provides that the Commission shall draw inspiration from international law on human rights and peoples' rights, particularly from various African instruments on human and peoples' rights, the Charter of the United Nations (UN), the Charter of the Organisation of African Unity (OAU), the Universal Declaration of Human Rights, other instruments adopted by the UN and by African countries in the field of human rights, as well as from provisions of various instruments adopted within the Specialised Agencies of the UN of which the parties to the Charter are members.

It would seem that any human rights instrument which is binding upon the respondent state might be used in support of a

<sup>26</sup> In line with the wording of art 58 of the African Charter.

<sup>27</sup> Thirteenth Annual Activity Report.

<sup>28</sup> See Communication 104/94, 109-126/94, *Centre for the Independence of Judges and Lawyers and Others v Algeria and Others*, where the Commission declared the communication inadmissible because the complainant did not allege grave and massive violations, amongst other reasons.

communication before the Commission. In drawing inspiration from other human rights instruments, the Commission enriches African human rights jurisprudence. Resolutions of the Commission elucidating the provisions of the Charter may also be used in support of a communication alleging violations of human rights. The latest resolutions of the Commission include the Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa and the Resolution on Guidelines and Measures for the Prohibition and Prevention Measures of Torture and Cruel, Inhuman or Degrading Punishment or Treatment in Africa (Robben Island Guidelines), which were both adopted during the 32nd ordinary session of the Commission. In effect, the Declaration of Principles on Freedom of Expression interprets article 9 of the Charter, and the Robben Island Guidelines are an interpretation of articles 4, 5 and 6 of the Charter.

A violation of any provision of the Charter contravenes article 1 of the Charter. This provision imposes an obligation upon state parties to the Charter to recognise the rights, duties and freedoms enshrined in the Charter and to undertake to adopt legislative or other measures to give effect to them. In Communications 147/95 and 149/96, *Jawara v The Gambia*, the Commission held that article 1 gives the Charter the legally binding character always attributed to international treaties and therefore a violation of any provision of the Charter automatically means a violation of article 1 of the Charter. As a violation of article 1 of the Charter goes to the root of the Charter, communications should therefore as a matter of priority mention the violation of this article in their communications. Thereafter, the other rights in the Charter violated by the respondent state should be dealt with in more detail.

## 6 Listing and transmitting communications

According to article 55(1) of the Charter, after a communication has been submitted to the Commission, the Secretariat compiles a list and transmits it to the members of the Commission. The compilation of the list is undertaken before each session of the Assembly of Heads of State and Governments. Rule 102(2) of the Rules of Procedure mandates the Commission to only accept individual communications against a state party to the Charter. So far, there are 53 state parties to the Charter.<sup>29</sup> A communication submitted against a non-state party is *prima facie* inadmissible. The individual communications must be sent to the Secretariat in Banjul, The Gambia.<sup>30</sup> It is also advisable to send the

<sup>29</sup> The state parties to the African Charter are also member states of the African Union.

<sup>30</sup> It is always advisable to submit directly to the African Commission's headquarters in Banjul, The Gambia. The communication should be addressed to the Secretary to the

communication in electronic form to make it easier for the Secretariat to transmit the communication to the members of the Commission.

Rule 103 of the Rules of Procedure authorises the Secretary to prepare a list of communications and to attach a brief summary of the contents of the list to be compiled and transmitted to the members of the Commission. This Rule naturally complements article 55(1) of the Charter. Rule 103 of the Rules of Procedure further authorises the Secretary to keep a permanent register of all communications, which is accessible to the public. The full text of each communication should be made available to the members of the Commission. It is always advisable for complainants to send their communications in the form of a legal brief outlining the facts of the claim, the provisions of the Charter violated, the question of admissibility and the remedies sought from the Commission.<sup>31</sup>

## 7 The seizure procedure

After having been listed and transferred to the commissioners, the commissioner concerned, otherwise known as the rapporteur, is required to make a recommendation on whether or not the Commission may be seized of a communication. This process may be referred to as the seizure procedure. Article 55(2) of the Charter provides that a communication may only be considered if a simple majority of the members of the Commission so decide. This article is complemented by rule 102(1) of the Rules of Procedure, which provides that the Secretariat shall transmit to the Commission communications submitted to it for consideration by the Commission in accordance with the Charter. The seizure procedure takes place in a closed session. This is in accordance with Rule 106 of the Rules of Procedure, which provides that the examination of communications by the Commission or its subsidiary bodies should be conducted in private. During the seizure procedure no oral arguments are required from the parties to the communication.

In order for the Commission to be seized with a communication, the communication must allege a *prima facie* violation of the provisions of the Charter. After a communication has been approved for seizure, the complainant and the respondent state are duly informed. It must be noted that the allegation of a *prima facie* violation of the provisions of the Charter must only be in respect of a member state of the African Union

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<sup>31</sup> This is despite the fact that the Charter is not clear on the African Commission's mandate to award remedies.



that has ratified or acceded to the Charter.<sup>32</sup> The African Union itself cannot be a respondent in any proceedings before the Commission.

The normal procedure is that the seizure procedure and the admissibility procedure are undertaken during separate sessions of the Commission. These sessions need not be successive. In Communication 97/93, *Modise v Botswana (2)*,<sup>33</sup> the Commission decided to be seized of the communication at its 13th session and declared it admissible at its 17th session. However, in Communication 204/97, *Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso*,<sup>34</sup> the Commission was seized of the communication at its 23rd session and declared it admissible at its 24th session.<sup>35</sup> It is therefore not surprising that the Commission lists the seizure procedure separately from the admissibility procedure.

After the seizure procedure and during the intersession, the Secretariat normally sends a *note verbale* to the respondent state informing it of the Commission's decision on seizure, calling for its reaction to the admissibility of the Communication. Similar letters are also sent to complainants or their representatives. This procedure conforms with article 57 of the Charter and Rule 112 of the Rules of Procedure, which provide that prior to any substantive consideration, all communications shall be brought to the knowledge of the state concerned by the Chairperson of the Commission. Normally, this exercise is undertaken by the Secretariat of the Commission. It may be argued that this is a case where the function of the Chairperson is automatically delegated to the Secretariat of the Commission. From the litigation practice before the Commission, it may be deduced that the seizure procedure is not a substantive consideration within the meaning of article 57 of the Charter and Rule 112 of the Rules of Procedure. It is only after the seizure procedure that the attention of the respondent state is drawn to the communication before the Commission.

<sup>32</sup> Communications which have been against non-African Union states and which have not been considered by the Commission include Communication 20/88, *Austrian Committee Against Torture v Morocco*, Communication 2/88, *Ihebereme v United States of America*, Communication 3/88, *Centre for the Independence of Judges and Lawyers v Yugoslavia* and Communication 38/90, *Wesley Parish v Indonesia*. Morocco is an African country, but it withdrew from the then Organisation of African Unity (OAU) in 1984 after the OAU had recognised the Sahrawi Arab Democratic Republic (Western Sahara). The withdrawal of Morocco from the OAU was effective from November 1985.

<sup>33</sup> Tenth Annual Activity Report.

<sup>34</sup> Fourteenth Annual Activity Report.

<sup>35</sup> In this communication, the Commission declared the communication admissible despite the fact that both parties expressed desire to settle the dispute amicably and requested the Commission's assistance to that effect.

## 8 Admissibility procedure

After a list of communications has been transmitted and the seizure of the same has been approved in terms of article 55(2) of the Charter as aforesaid, the Commission has to decide whether or not the communications satisfy the admissibility requirements of article 56 of the Charter. This may require an admissibility hearing to be undertaken. This stage may be referred to as the preliminary hearing in the sense that it is a *sine qua non* for the consideration of the merits of communications. It is therefore important for complainants to address the question of admissibility in their communications.

The Commission considers the communications in accordance with the order that they have been received by the Secretariat.<sup>36</sup> This ensures that every communication is given the utmost attention it deserves. In determining the admissibility of the communication, the Commission may set up one or more working groups, each composed of a maximum of three members.<sup>37</sup> The working groups submit recommendations on the admissibility as stipulated in article 56 of the Charter. Rule 113 provides that the Commission must decide as early as possible whether or not the communication shall be admissible under the Charter.

After the recommendation has been submitted, the Commission makes a final determination on the question of admissibility of the communications. In determining the admissibility of the communications, the Commission or the working group may request additional information or observance relating to the issue of admissibility.<sup>38</sup> This request is made to the respondent state concerned or the author of the communication. In order to avoid long delays, the Commission or working group is required to fix a time limit for the submission of the additional information or observance as the case may be.<sup>39</sup>

### 8.1 Admissibility requirements

For a communication to be considered on merit by the Commission, it has to undergo an admissibility test, which is provided for in article 56 of the Charter. Odinkalu argues that through its jurisprudence on admissibility, the Commission has exposed a philosophy of encouraging wide access to its protective procedures.<sup>40</sup> The Commission must therefore give clear reasons for its decisions on admissibility. The admissibility procedures are as follows:

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<sup>36</sup> Rule 114.

<sup>37</sup> Rule 115.

<sup>38</sup> Rule 117.

<sup>39</sup> As above.

<sup>40</sup> Odinkalu (n 1 above) 237.

- *Communications must indicate their authors even if they request anonymity*<sup>41</sup>

Every communication must have full particulars of the author or complainant. In Communication 70/92, *Diomessi and Others v Guinea*,<sup>42</sup> this requirement has been interpreted by the Commission to mean that authors must give their full identity. In Communication 57/91, *Bariga v Nigeria*,<sup>43</sup> the Commission further interpreted this requirement to include the author's contact address. In the case where the author has requested anonymity, the Commission, through the Secretary, may request the complainant's name, address, age and profession verifying his or her identity.<sup>44</sup>

Viljoen argues that anonymity will sometimes be difficult to maintain as the respondent state needs to be alerted to the specific situation that gave rise to the complaint against it.<sup>45</sup> The Charter and the Rules of Procedure are not clear on whether the complainant should request to remain anonymous in respect to the respondent state or the general public or even to some commissioners. It is submitted that the communication must specify the manner in which anonymity should be handled by the Commission.

Sometimes it would be wise for individuals who want to be anonymous to be represented by NGOs so that the Commission uses the name of the NGO in the title of the case without stating the person on whose behalf the NGO is submitting the communication. In cases where the complainant without legal representation wishes to remain anonymous, the Commission may be requested to use a pseudonym in order to protect the complainant's identity.

- *Communications must be compatible with both the African Charter and the Charter of the Organisation of African Unity*<sup>46</sup>

Litigants must ensure that their communications are in line with the provisions of the Charter and those of the OAU Charter. Ankumah argues that a controversy arises because there are a number of vague and ambiguous provisions in the Charter.<sup>47</sup> For instance, article 9(2) of the Charter provides that freedom of expression shall be exercised 'within the law'. Such phrases, referred to as 'claw-back clauses', tend to 'take away with the left hand that which it has given with the right hand',

<sup>41</sup> Art 56(1).

<sup>42</sup> Seventh Annual Activity Report.

<sup>43</sup> As above.

<sup>44</sup> Rule 104.

<sup>45</sup> F Viljoen 'Admissibility under the African Charter' in M Evans & R Murray *The African Charter on Human and Peoples' Rights: The system in practice, 1986–2000* (2002) 67.

<sup>46</sup> Art 56(2).

<sup>47</sup> Ankumah (n 6 above) 63.

in the sense that they make the Charter rights subject to limitations imposed by domestic law. According to Ankumah, it is therefore the inclusion of the unidentified restrictions in the Charter that is problematic.<sup>48</sup>

The Commission has, however, resolved this problem. In Communications 105/93, 128/94, 130/94 and 152/96, *Media Rights Agenda and Others v Nigeria*,<sup>49</sup> the Commission held that article 9(2) of the Charter did not mean that national or domestic law can set aside the right to express and disseminate one's opinion. The Commission reasoned that to allow national or domestic law to supersede or override the international law of the Charter would be to defeat the whole purpose of the rights and freedoms enshrined in the Charter. The Commission's decision was that international human rights standards must always prevail over contradictory national law and any limitation of the rights of the Charter must conform with the provisions of the Charter. The compatibility requirement should be understood to mean that communications should conform to the provisions of the Charter and the Charter of the OAU.

Communications must therefore allege a violation of the Charter and other supporting international human rights instruments. Communications which allege violations of national legislation and constitutional provisions, cannot be said to be compatible with both the Charter and the OAU. This requirement should also be interpreted to include the Constitutive Act of the African Union, which has recently succeeded the OAU.

- *Communications must not be written in disparaging or insulting language directed against the state concerned and its institutions or to the OAU*<sup>50</sup>

The Charter prohibits the use of disparaging and insulting language in communications. This requirement seeks to ensure respect for state parties and their institutions as well as the African Union. It is, however, unfortunate that the words 'disparaging or insulting language' are not defined. So far, the Commission has not interpreted this provision. Referring to this provision, Ankumah argues that even if this provision did not exist, it would not be prudent for a litigant to write a communication in disparaging or insulting language as it would tend to detract from the issues.<sup>51</sup> Whether or not the language is disparaging or insulting, it is the Commission that will have a final say.

<sup>48</sup> As above.

<sup>49</sup> Twelfth Annual Activity Report.

<sup>50</sup> Art 56(3).

<sup>51</sup> Ankumah (n 6 above) 64.

In Communication 65/92, *Ligue Camerounaise des Droits de l'Homme v Cameroon*,<sup>52</sup> the respondent state alleged that the author of the communication did not appear to be in his full mental faculties and that the allegations of the Ligue Camerounaise should be declared inadmissible because of disparaging and insulting language. The allegations contained statements such as 'Paul Biya must respond to crimes against humanity', '30 years of the criminal neo-colonial/regime incarcerated by the duo Ahidjo/Biya', 'regime of torturers', and 'government barbarism'. The Commission held that this statement was insulting language. Even though the Commission did not specifically base its findings on the insulting language for declaring the communication inadmissible, it, however, stressed the importance of communications containing a certain degree of specificity. It may be argued that in this decision, the Commission was expanding the admissibility test provided for in article 56 of the Charter.<sup>53</sup>

Regarding the requirement of specificity, the Commission referred to its decision in Communications 104/94 and 109-126/94, *Centre for the Independence of Judges and Lawyers v Algeria and Others*.<sup>54</sup> In this communication, the Commission found that the report submitted by the Centre for the Independence of Judges and Lawyers did not give specific places, dates and times of alleged incidents sufficient to permit the Commission to intervene or investigate. Furthermore the Commission found that in some cases, incidents were cited without giving the names of the aggrieved parties and numerous references were made to 'anonymous' lawyers and judges. Despite the fact that the requirement of specificity is not specifically provided for in article 56 of the Charter, it tends to work to the advantage of the litigant. The requirement does not, however, address the question of the meaning of disparaging and insulting language. An interpretation of this concept by the Commission would be of great assistance to prospective litigants.

- *Communications must not be based on news disseminated through the mass media*<sup>55</sup>

Complainants are advised not to base their communications on news disseminated through the mass media. It would be prudent, therefore, for those submitting communications to make it clear that information stated in the complaints are obtained from sources other than the mass

<sup>52</sup> Tenth Annual Activity Report.

<sup>53</sup> The addition of the requirement of specificity is contrary to Rule 116 of the Rules of Procedure, which provides that the Commission shall determine questions of admissibility pursuant to art 56 of the Charter. The use of the word 'shall' in Rule 116 of the Rules of Procedure and art 56 of the Charter means that the strict adherence to admissibility test is obligatory.

<sup>54</sup> Eighth Annual Activity Report.

<sup>55</sup> Art 56(4).

media.<sup>56</sup> Where the facts are not clear, the Commission may make a request to the author to clarify the facts of the claim, to request the purpose of the communication and provision(s) of the Charter allegedly violated.<sup>57</sup>

Expounding on this requirement, in Communications 147/95 and 149/95, *Jawara v The Gambia*, the Commission reasoned that it would be

damaging if the Commission were to reject a communication because some aspects of it are based on news disseminated through the mass media. This is borne out of the fact that the Charter makes use of the word 'exclusively'. There is no doubt that the media remains the most important if not the only source of information . . . the issue therefore should not be whether the information was gotten from the media, but whether the information is correct.

This means that if at all the communication is based on news disseminated through the mass media, the information must be correct.

- *Communications must be sent after all existing local remedies have been exhausted, if any, unless it is obvious that this is unduly prolonged*<sup>58</sup>

The rule on exhaustion of domestic remedies is the cornerstone of the adjudication and protective mandate of the Commission under the Charter.<sup>59</sup> The underlying principle of this requirement can be found in the *Interhandel* case,<sup>60</sup> where the International Court of Justice (ICJ) held that:

The rule requiring the exhaustion of domestic remedies as a condition for the presentation of an international claim is founded upon the principle that the responsible state must first have an opportunity to redress by its own means within the framework of its own domestic legal system the wrong alleged to be done to the individual.

In Communication 97/93, *Modise v Botswana (1)*, the African Commission decided to write to the author stressing the need for exhaustion of local remedies as envisaged by article 56 of the Charter. The decision of the Commission may also be taken as not amounting to a finding of admissibility, but as something constituting some kind of correspondence to the author that he may resubmit the communication after exhausting local remedies.

It is within the powers of the Commission to make a decision on whether or not a communication was unduly prolonged. In Communication 59/91, *Mekongo v Cameroon*, appeals and a petition for executive clemency had been pending for 12 years and the Commission

<sup>56</sup> Ankumah (n 6 above) 65.

<sup>57</sup> Rule 104.

<sup>58</sup> Art 56(5).

<sup>59</sup> Odinkalu (n 1 above) 227.

<sup>60</sup> 1959 ICJ Reports 27.

ruled that such a process had been unduly prolonged and that there was no need of exhaustion. However, in Communication 135/94, *Kenya Human Rights Commission v Kenya (Kenya Human Rights Commission case)*,<sup>61</sup> where a case had been pending for three months, the Commission held the delay as insufficient to constitute undue delay.

The question of whether or not local remedies have been exhausted is that of fact whose burden rests upon the author or applicant of the communication.<sup>62</sup> This is the reason the Commission is required to request the author to furnish clarifications regarding measures taken to exhaust local remedies or to give an explanation of why local remedies would be futile, if it is so alleged.<sup>63</sup> It must, therefore, be shown that an attempt had been made to have recourse to national procedures.<sup>64</sup> In Communication 8/88, *Buyingo v Uganda*,<sup>65</sup> the Commission failed to get a response from the complainant on whether or not he had recourse to local remedies as required by article 56 of the Charter.

As a general rule, if a matter is pending before the domestic courts or if a domestic court is still seized with the matter, domestic remedies cannot be said to be exhausted. In Communication 66/92, *Lawyers Committee for Human Rights v Tanzania*,<sup>66</sup> the complainant having been granted bail and subsequently the charges against him having been struck out by the court, the matter was accordingly closed in terms of article 55 of the Charter. This was due to the fact that as this was a communication on alleged false imprisonment, the complainant had not sought legal redress in the local courts of Tanzania.

The use of the words 'if any' in article 56(5) of the Charter means that remedies can be exhausted only if they are available. Viljoen gives five possible categories of cases in which remedies may be said to be unavailable.<sup>67</sup> These are: one, where a decree or other measure has ousted the jurisdiction of the courts, making judicial recourse impossible; two, where pursuing a remedy is dependent on extrajudicial considerations, such as a discretion or some extraordinary power granted to an executive state official; three, where the nature of the relief sought is not possible in domestic courts; four, where a situation of serious massive violations of human rights exists; and five, where complainants are detained without trial.

<sup>61</sup> Ninth Annual Activity Report.

<sup>62</sup> 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) 71.

<sup>63</sup> Rule 104(1)(f).

<sup>64</sup> Communication 92/93, *International PEN v Sudan*.

<sup>65</sup> Eighth Annual Activity Report.

<sup>66</sup> Seventh Annual Activity Report.

<sup>67</sup> Viljoen (n 62 above) 72.

- *Communications must be submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized with the matter*<sup>68</sup>

The Charter does not state the time frame within which the local remedies must be exhausted. The determination of a 'reasonable period', therefore, is left with the Commission to decide. The fact that the Charter does not specify the time frame within which a communication may be submitted to the Commission for consideration has, on the one hand, the effect of prejudicing valid claims. What is a reasonable period to one commissioner may not be necessarily so to another. On the other hand, the African system remains more accommodating when it comes to submitting communications to the African Commission. This is more important because of the fact that many victims of human rights violations in Africa are ignorant of the African Commission's procedures and if a time limit was to be prescribed, a lot of communications would be declared inadmissible due to non-compliance.

The African Charter is also silent as to when precisely does the need for exhaustion of local remedies arise. It seems that the decision only lies upon the African Commission after considering the facts of each particular communication. From the practice of the Commission, it seems that where a communication is still pending before available and effective domestic courts, the likelihood is that the communication would be declared inadmissible. In Communication 135/94, the *Kenya Human Rights Commission* case, the Commission found that there was still a need for exhausting local remedies because the complainants had stated that their communication was still pending before the courts of Kenya. In this communication, the complainants made no attempt to address the Commission on why the domestic courts had been bypassed.

- *Communications must not relate to cases, which have been settled by those states involved in accordance with the principles of the Charter of the UN or the Charter of the OAU or the provisions of the African Charter*<sup>69</sup>

No communications already heard and decided by UN or AU dispute resolution mechanisms may be submitted to the African Commission. If the ICJ or the Human Rights Committee, for instance, has decided a case under the auspices of the United Nations, no claim can be made to the African Commission. This has an effect of shutting the doors at the face of any complainant who wishes to seek protection from more than one human rights system, such as the UN and the African human rights systems.

<sup>68</sup> Art 56(6).

<sup>69</sup> Art 56(7).



The Commission may wish to seek clarification of the extent to which the same issue (but not the same communication) has been settled by another international investigation or settlement body. The Commission may through its Secretariat make a request to the author regarding this issue.<sup>70</sup> With the advent of the African Union, it may be argued that this requirement also includes the settlement of disputes in accordance with the Constitutive Act of the African Union.<sup>71</sup>

## 8.2 Admissibility hearing

In considering the communication, the Commission may allow the parties to present their case in person. This is provided within the meaning of article 46 of the Charter, which provides that the Commission may resort to any appropriate method of investigation and it may hear from the Secretary-General of the African Union or any other person capable of enlightening it. Normally, the parties approach the Secretary of the Commission to express their desire to make oral submissions on admissibility before the Commission. The Secretary informs the Chairperson of the Commission who in turn informs the other members of the Commission. If the Commission reaches a consensus, the parties are then allowed in to make their oral submissions on admissibility. The presence of the parties has been commended in that it facilitates proceedings, as the Commission is able to question the parties concerned and to receive immediate responses.<sup>72</sup> Accordingly, as the author of the complaint and alleged victim, the complainant is always in a position to enlighten the Commission about his case. Legal representation becomes very important in this regard.

The respondent state's representative can also be invited to make oral submissions before the Commission. In Communication 231/99, *Avocats Sans Frontières (on behalf of Gaëtan Bwampamy) v Burundi*,<sup>73</sup> apart from written submissions, both the respondent state and the legal representative of the complainant made oral submissions. In its oral submission, the respondent state argued that the complainant had not exhausted local remedies, which included '*le recours dans l'interet de la loi*', revision and the plea for pardon. After considering all the submissions from both parties, the Commission held the view that the complainant could not benefit from the first two remedies at the initiative of the Ministry of Justice. With regard to the plea of pardon,

<sup>70</sup> Rule 104(1)(g).

<sup>71</sup> CAB/LEG/23.15. The Constitutive Act was adopted on 11 June 2000 and entered into force on 26 May 2001. The first Summit of the AU was held in South Africa in July 2002. The Constitutive Act of the African Union may be accessed at <<http://www.iss.org.za>> (accessed 28 February 2003).

<sup>72</sup> Ankumah (n 6 above) 71.

<sup>73</sup> Fourteenth Annual Activity Report.

the Commission held that it was not a judicial remedy but served to affect the execution of a sentence. It may be argued that the presence of the legal representative of the complainant during the admissibility hearing was to the advantage of the complainant as the Commission declared the communication admissible.

The only disadvantage associated with inviting complainants to attend admissibility hearings is that not all complainants can afford to attend sessions of the Commission. Yet, their presence, together with their representatives, is very important. The Charter and the Rules of Procedure do not provide for the assistance of litigants for their attendance during the Commission's admissibility hearings. In some cases communications may be deferred to the next session because of a number of reasons. It becomes a double blow when the communications are deferred twice or even more when either the complainant or their representatives or both made it a point to attend the admissibility hearing at the instance of the Commission. During its 32nd ordinary session, the number of days for the session was abruptly reduced from 14 days to only seven days due to financial constraints. As a result the Commission deferred ten communications to the 33rd session for reasons of lack of time.<sup>74</sup> This was of course to the detriment of the complainants and their representatives who had been invited to make presentations on admissibility before the Commission.

### 8.3 Procedure arising from admissibility

The ultimate decision in so far as admissibility of a communication is concerned lies with the Commission. As mentioned earlier, article 55(2) of the Charter provides that a communication is considered admissible only if a simple majority of the members of the Commission so decide. Once a communication has been declared admissible, the Secretariat must notify the litigant and the respondent state concerned.<sup>75</sup>

The respondent state is further required to, within three months, submit in writing to the Commission explanations or statements elucidating the issue under consideration and indicating, if possible, measures taken to remedy the situation. All these explanations or statements submitted by the state party must in turn be communicated to the complainant of the communication through the Secretariat.

After receiving the statement of the respondent state, the author may submit, in writing, any additional information and observance within a time stipulated by the Commission. The Secretariat must also inform the respondent state from whom explanations or statements are sought,

<sup>74</sup> See paragraph 10 of the Final Communiqué of the 32nd ordinary session of the African Commission on Human and Peoples' Rights 17–23 October 2002, Banjul, The Gambia.

<sup>75</sup> Rule 119.

that failure to comply within those specified times would result to the Commission acting on the evidence before it.

The Commission, through its Chairperson, notifies and advises the litigant and the respondent state of the date upon which the communication will be considered.<sup>76</sup> The Secretariat must then submit as soon as possible the decision of admissibility and text of relevant documents to the state party concerned.<sup>77</sup> The Secretariat must inform the author of the decision about the admissibility of the communication. It is, however, not clear whether or not this duplication of tasks between the Chairperson and the Secretariat were intended. If it was, the rationale is not clear. It is submitted that this task can be best handled by the Secretariat of the Commission.

## 9 On-site investigations

The Charter authorises the Commission to conduct on-site investigations as this may be said to be 'resorting to any appropriate method of investigation' within the ambit of article 46 of the Charter. This is very crucial in that the Commission must have a clear insight into the matter in question. The only problem that arises is that conducting the site investigations is dependent upon the consent of the government against which the complaint is made. This inhibits the work of the Commission. It is submitted that the Commission may undertake an on-site investigation without requiring consent from the respondent state concerned upon the strength of a liberal interpretation of article 46 of the Charter 'resorting to any appropriate method of investigation'. The test, therefore, is whether that method is appropriate in the circumstances.

In Communications 25/89, 47/90, 56/91 and 100/93 (joined), *Free Legal Assistance Group and Others v Zaire*,<sup>78</sup> the Commission requested that a mission of two members be received in Zaire, with the objective of discovering the extent of human rights violations and to endeavour to help the government of Zaire to ensure full respect for the Charter. The government never responded to the request for a mission. Be that as it may, the Commission found that there was indeed serious and massive violations of the Charter, namely articles 4, 5, 6, 7, 8, 16 and 17.

During the 16th session of the Commission held in 1994, in considering sending missions to countries concerned, the Commission sought assistance of the Secretary-General of the OAU in obtaining permission from the states concerned. Given the fact that the African

<sup>76</sup> Art 57.

<sup>77</sup> Rule 119.

<sup>78</sup> Ninth Annual Activity Report.

continent is ravaged by all kinds of violations of human rights, it would seem that the action of 'resorting to any appropriate method' should be preferred by the Commission over bureaucratic diplomatic protocols in so far as serious violations of human rights are concerned.

On-site investigations undertaken by the Commission include a mission to Senegal, which was conducted from 1 to 7 June 1996, which resulted from a communication alleging serious and massive violations of human rights at Kaguitt, in Casamance, following a clash between the Senegalese Army and the rebels of the Mouvement des Forces Democratique de la Casamance (MFDC).<sup>79</sup> In Communications 54/91, 61/91, 98/93, 164/97, 196/97 and 210/98, *Malawi African Association and Others v Mauritania*,<sup>80</sup> there were allegations of serious violations of human rights and at its 19th ordinary session the Commission decided to send a fact-finding mission to Mauritania with a view to finding an amicable solution of bringing the violations to an end. This mission was undertaken from 19 to 27 June 1996.<sup>81</sup>

## 10 Interim measures

In the event that after deliberations of the Commission, one or more of the 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 must draw the attention of the Assembly of Heads of State and Government in accordance with article 58(1) of the Charter. This is what is known as taking an interim measure.<sup>82</sup> An interim measure requires the Commission to dispense with the admissibility procedure for obvious reasons. Serious or massive human rights violations have to be stopped as early as possible.

Interim measures are only necessary in cases of emergency. Article 58(1) of the Charter provides that a case of emergency duly noticed by the Commission shall be submitted to the Chairperson of the Assembly of Heads of State and Government. Rule 111(3) of the Rules of Procedure provides that in case of urgency, when the Commission is not in session, the Chairperson of the Commission, in consultation with other members of the Commission, may take any necessary action on behalf of the Commission and to report that action taken to the

<sup>79</sup> See *Report of Mission of Good Offices undertaken to Senegal* by the African Commission on Human and Peoples' Rights from 1 to 7 June 1996.

<sup>80</sup> Thirteenth Annual Activity Report.

<sup>81</sup> See *Report of Mission undertaken to Mauritania* by the African Commission on Human and Peoples' Rights from 19 to 27 June 1996.

<sup>82</sup> On interim measures, see GJ Naldi 'Interim measures of protection in the African system for the protection of human rights' (2002) 2 *African Human Rights Law Journal* 1.

Commission as soon as the latter convenes the next session. This suggests that the request by the Assembly of Heads of State and Government of undertaking an in-depth study is not necessary in some circumstances as the Chairperson may be authorised to take 'any action' on behalf of the Commission. The only requirements are that of consulting with the members of the Commission and reporting to it as soon as it convenes its next session. Those submitting a communication should state whether it should be treated as a case of emergency in order to give directions to the Commission.

In Communications 27/89, 46/90 and 99/93 (joined), *Organisation Mondiale Contre la Torture and Others v Rwanda*,<sup>83</sup> the Commission joined four communications, which made reference to the expulsion from Rwanda of Burundi nationals who had been in Rwanda for many years for allegedly being a national risk due to their 'subversive activities', as well as the arbitrary arrest and extra-judicial executions of Rwandans, mostly belonging to the Tutsi ethnic group. In this communication, the Commission held that the facts constituted serious or massive violations of the Charter, namely of articles 4, 5, 6, 12(3) and 12(5).

In Communication 60/91, *Constitutional Rights Project v Nigeria (in respect of Akamu and Others)*,<sup>84</sup> the Commission applied old Rule 109 (now Rule 111) of the Rules of Procedure, where the Constitutional Rights Project of Nigeria, an NGO, submitted a communication on behalf of individuals who were sentenced to death in Nigeria and were awaiting execution. The communication revealed a case of emergency, which required the application of interim measures to avoid irreparable prejudice pending its consideration. The Commission contacted Nigeria and requested it not to carry out the execution pending the full consideration of the communication. In so doing, the Commission resorted to a method that was appropriate in the circumstances.

The Commission declared that there had been a violation of articles 7(1)(a), (c) and (d) of the Charter. Although the Commission recommended that the government of Nigeria should free the complainants, their death sentences were eventually commuted to terms of imprisonment. The sentences were commuted by a local court in the case of *Registered Trustees of the Constitutional Rights Project v The President of Federal Republic of Nigeria and Others*.<sup>85</sup>

The provisions of the Charter and the Rules of Procedure do not state whether or not a decision taken on interim measures is binding. In Communications 137/94, 139/94, 154/96 and 161/97, *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*,<sup>86</sup> the Commission held

<sup>83</sup> Tenth Annual Activity Report.

<sup>84</sup> Eighth Annual Activity Report.

<sup>85</sup> Unreported judgment of the High Court of Lagos State, 5 May 1993, Suit No m/102/93.

<sup>86</sup> Twelfth Annual Activity Report.

that Rule 111 of the Rules of Procedure aimed at preventing damage being caused to a complaint before the Commission. The Commission noted that it had hoped that the respondent state of Nigeria would respond positively to its request for a stay of execution pending the final determination of the Commission. This decision clearly showed that the decision on interim measures was intended to be binding on the respondent state.

According to the Mauritius Plan of Action (1996–2001), it was noted that some cases of violations of human rights require urgent intervention on the part of the Commission. It was therefore recommended that the Commission should reflect on the possibilities provided by the Charter of processing adequate response to emergency situations. This of course would involve making use of article 46 of the Charter of 'resorting to any appropriate method of investigating' that emergency case and immediately ensuring the protection of human and peoples' rights as provided by article 45(2) of the Charter.

These interim measures are aimed at the protection of human and peoples' rights in Africa and they are in pursuance of the protection mandate of the Commission. In response to cases of emergency, the Commission, therefore, is given wide powers to resort to any appropriate method of investigation under article 46 of the Charter. In so far as article 46 of the Charter is concerned, Murray observes that this is a wide provision which provides the Commission with potentially a great deal of flexibility and discretion in all aspects of its work.<sup>87</sup> Complainants or their representatives should therefore take advantage of this article when preparing communications.

## 11 Undertaking an in-depth study

After the Commission has drawn the attention of the Assembly of Heads of State and Government to a series of massive or serious human rights violations, the latter may make a decision on whether to request the Commission to undertake an in-depth study and to make a factual report, which must be accompanied by the Commission's finding and recommendations.<sup>88</sup> Undertaking an in-depth study is only in respect to special cases, which reveal the existence of a series of serious or massive violations of human and peoples' rights. In these cases the admissibility procedure is dispensed with. This will obviously be after the Commission has been seized with the communication. This is because the first

<sup>87</sup> R Murray 'Evidence and fact-finding by the African Commission' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986–2000* (2002) 102.

<sup>88</sup> Art 58(2).

deliberation of that communication is when the rapporteur presents a summary of the facts and recommends to the other members that the Commission be seized with the case.

When presenting a special communication, complainants should assist the Commission by pointing out the envisaged remedies, that is, whether they wish the Commission to draw the attention of the Assembly of Heads of State and Government to the situation. However, complainants should not expect an instant action from the Commission because even if a communication reveals in the latter's opinion that there exists a series of serious or massive violations, it will only be in a position to investigate the matter once the Assembly of Heads of State and Government requests it to do so. So far, the Commission has not undertaken any in-depth study and neither has there been any request from the Assembly of Heads of State and Government for undertaking any such study.

## 12 Consideration of the merits

Consideration of the merits involves the consideration of the substantive issues in the communications before the Commission. For a communication to be considered on the merits, it must be declared admissible by the Commission. Consideration of the merits is undertaken by examining the allegations of violation of the provisions of the Charter and other international human rights instruments from which the Commission can draw inspiration.<sup>89</sup> The Commission devotes a separate session for the consideration of a communication on merits from the sessions where seizure and admissibility procedures take place. The practice is that the Secretariat is responsible for preparing draft decisions on the merits, taking into consideration all the facts as stated in the communication. Draft decisions are not meant to bind the Commission in deciding on the merits; instead they are meant to guide the Commission in its deliberations. The final decisions will of course be influenced by the written and oral submissions made by the parties before the Commission.

As already stated, bringing a communication before the African Commission involves the application of international law. Consideration of the merits involves the application of international human rights law, the direct interpretation of the Charter in relation to the contents of the communications and the weighing of arguments by both parties. Consideration of merits also involves the weighing of evidence presented to the Commission by the parties. The Commission acts on

<sup>89</sup> On sources of inspiration, see I Osterdahl *Implementing human rights in Africa: The African Commission on Human and Peoples' Rights* (2002) 34–67.

the evidence brought before it and no more. Rule 119(4) of Rules of Procedure provides that respondent states from which explanations or statements are sought within specified times shall be informed that if they fail to comply within those times the Commission will act on the evidence before it.<sup>90</sup>

Consideration of the merits also involves the importation of international human rights principles from other regional human rights systems, such as the Inter-American and European systems. In Communication 211/98, *Legal Resources Foundation v Zambia*,<sup>91</sup> the Commission made reference to the *Vide* cases of the Inter-American Commission<sup>92</sup> and to article 27 of the Vienna Convention on the Law of Treaties. In Communication 232/99, *Ouko v Kenya*,<sup>93</sup> the Commission made reference to United Nations Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, particularly Principles 1 and 6. The Commission also refers to its earlier decisions to restate its position on a certain issue. In Communication 74/92, *Commission Nationale des Droits de l'Homme et des Libertés v Chad*,<sup>94</sup> the Commission restated the principle that where allegations of human rights abuse go uncontested by the respondent state, the Commission must decide on the facts provided by the complainant and treat those facts as given. Regarding this principle, the Commission made reference to Communication 59/91, *Mekongo v Cameroon*,<sup>95</sup> Communication 60/91, *Constitutional Rights Project v Nigeria*<sup>96</sup> and Communication 101/93, *Civil Liberties Organisation (in respect of the Nigerian Bar Association) v Nigeria*.<sup>97</sup>

### 13 Recommendations

The Charter provides that all measures taken within the provisions of the Charter shall remain confidential until such time as the Assembly of Heads of State and Government shall decide.<sup>98</sup> 'All measures' include all recommendations taken by the Commission whether they are interim or final. Viljoen argues that the Commission understood the phrase 'all measures taken' not only to refer to specific steps taken against or

<sup>90</sup> On the presumption of truth, see Osterdahl (n 89 above) 144–151.

<sup>91</sup> Fourteenth Annual Activity Report.

<sup>92</sup> Nos 10.029, 10.036, 10.145, 10.10.372, 10.373, 10.374 & 10.375 in Report 29/92, 2 October 1992.

<sup>93</sup> Fourteenth Annual Activity Report.

<sup>94</sup> Ninth Annual Activity Report.

<sup>95</sup> Eighth Annual Activity Report.

<sup>96</sup> As above.

<sup>97</sup> As above.

<sup>98</sup> Art 59.



recommendations made to offending states, but also to the whole process of individual communications.<sup>99</sup> As a result individual communications remained confidential until the Seventh Annual Activity Report of 1994, which marked the first publication of individual communications.

In its Activity Report, which was submitted to the OAU after its 15th ordinary session in June 1994, the Commission included an Annex for the first time, which gave information about the individual communications submitted to it under article 55 of the Charter. When this report was considered, and approved by the Heads of State and Government, information about the communications procedure became available to the public for the first time. Although the information in the report was not comprehensive, the Annex watered down the secrecy under which the entire communication procedure had been hidden. The decisions on individual communications also include reports on amicable settlements and those on which the Commission resolved to take continuing action, in pursuit of amicable resolutions. This conforms with article 52 of the Charter which allows the Commission to facilitate amicable settlements.

The Commission's recommendations are always referred to as 'decisions'. It may be argued that these decisions have no binding effect because no article in the Charter or rule in the Rules of Procedure defines the status of the Commission's decisions. Of course this is ironic, considering the fact that the Commission is the only enforcement mechanism within the African human rights system. This is, however, not the case. It is submitted that recommendations made by the Commission are binding. By signing and ratifying the Charter, states signify their intention to be bound by and to adhere to the obligations arising from it even if they do not enact domestic legislation to effect domestic incorporation.<sup>100</sup> This principle is also expressed in article 14 of the Vienna Convention on the Law of Treaties of 1969.<sup>101</sup>

Article 1 of the Charter provides that member states 'shall recognise the rights, duties and freedoms enshrined in this Charter and shall

<sup>99</sup> FJ Viljoen *The realisation of human rights in Africa through inter-governmental institutions* unpublished LLD thesis, University of Pretoria, 1997 187.

<sup>100</sup> See the Botswana case of *Attorney-General v Dow* 1994 6 BCLR 1.

<sup>101</sup> Art 14 of the Vienna Convention, which entered into force on 27 January 1980, provides as follows: '1. The consent of a State to be bound by a treaty is expressed by ratification when: (a) the treaty provides for such consent to be expressed by means of ratification; (b) it is otherwise established that the negotiating States were agreed that ratification should be required; (c) the representative of the State has signed the treaty subject to ratification; or (d) the intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation. 2. The consent of a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification.'

undertake to adopt legislative or other measures to give effect to them'. The use of the word 'shall' means that the provision is peremptory. One such 'measure' which can be employed to give effect to the articles of the Charter is by the Commission making recommendations on communications. Member states are therefore obliged to 'undertake to adopt' this measure 'to give effect' to the rights, duties and freedoms enshrined therein.

The adherence to the Commission's recommendation 'measure' by the respondent state is also another 'measure' within the meaning of article 1 of the Charter giving effect to provisions of the Charter. It is submitted, therefore, that the use of the words 'shall' in article 1 of the Charter automatically renders the recommendations of the Commission binding in the same way that the provisions of the Charter bind member states.

Since its inception, the Commission has received over 260 communications.<sup>102</sup> The Commission's decisions on some of these communications have made a tremendous impact in so far as human rights law in Africa is concerned. For instance, in Communication 92/96, *Modise v Botswana*, Communication 211/98, *Legal Resources Foundation v Zambia* and Communication 212/98, *Amnesty International v Zambia*, the Commission denounced the restrictive constitutional provisions which tend to restrict the rights of certain classes of citizens or groups of individuals to politically participate in their governments and more specifically to qualify for the office of the Presidency. For purposes of supporting their arguments, complainants have to make use of the Commission's past decisions, which contain elaborations on a considerable number of substantive human and peoples' rights, to enhance their communications before the Commission. This will also be a contribution towards the development of the African human rights law jurisprudence.

## 14 Follow-up to communications

Once the Commission reaches a decision on the merits, it is authorised to forward a recommendation on that communication to be considered by the Assembly of Heads of State and Government. The Charter and the Rules of Procedure do not provide for any action on the part of the Commission after this stage such as enforcing and monitoring its recommendations on communications. This could mean that this is the Commission's final authority and no more. However, this is a strict

<sup>102</sup> According to the permanent register for the individual communications as at 6 January 2003, the number of communications received by the Commission stood at 263.

interpretation of the provisions of the Charter. This shortcoming may be circumvented because of the flexibility of the provisions of the Charter. For instance, complainants or their representatives may give the Commission guidelines in their communications on how they wish their decisions to be enforced for purposes of fulfilling the protection mandate of the Commission.

Article 59(2) of the Charter provides that after the Assembly of Heads of State and Government has considered the report on activities of the Commission, the Chairperson of the Commission shall publish it. This report contains the decisions of the Commission on communications. When publishing the report on the activities of the Commission, the Chairperson does so on the Commission's behalf.

The lack of an effective enforcement mechanism was one of the factors prompting the adoption of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, which is still undergoing a ratification process.<sup>103</sup> With the African Court, litigants are assured of binding decisions against their respondent states.<sup>104</sup> This will inevitably require litigants to understand the relationship between the African Court and the Commission.<sup>105</sup>

Implementing a decision of the Commission is the initial follow-up stage to communications. The Charter is, however, silent regarding the follow-up to communications. This presents a problem to the victims of human rights abuse. The Commission has, however, made some attempt to undertake follow-ups to some communications to determine whether or not its decisions have been implemented. In Communication 87/93, *Constitutional Rights Project v Nigeria*,<sup>106</sup> at its 16th session, the Commission found a violation of the Charter and recommended that the government of Nigeria should free the complainants. At its 17th session, the Commission decided to bring the file to Nigeria for a planned mission for purposes of making sure that the violation of rights had been repaired. The mission eventually took place in March 1997.

In Communication 211/98, *Legal Resources Foundation v Zambia*, the Commission made a request to the respondent state to report back when it submits its next country report in terms of article 62 of the Charter on measures taken to comply with its recommendations. It is

<sup>103</sup> Adopted by the Assembly of Heads of State and Government of the OAU in Ouagadougou, Burkina Faso on 9 June 1998. OAU/LEG/MIN/AFCHPR/PROT (III).

<sup>104</sup> Art 30 of the Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights provides that the states to the Protocol undertake to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution.

<sup>105</sup> See SB Gumedze *The relationship between the African Court and the African Commission* unpublished LLM thesis, University of Pretoria, 2001.

<sup>106</sup> Eighth Annual Activity Report.

argued that this is not an effective follow-up mechanism because not every member state to the Charter submits its country report. However, the Commission should be applauded for taking this 'country report' direction as means of following-up its decision.

In the absence of clear guidelines on the follow-up procedure and with the advent of the African Union and under the auspices of the Constitutive Act establishing it, it is hoped that a follow-up to the communication mechanism will be put in place. The lack of an effective follow-up mechanism is one of the existing concerns in so far as the protection mandate of the Commission regarding individual communications is concerned. Those submitting communications are therefore encouraged to explore ways within the context and meaning of the provisions of the Charter upon which the Commission may undertake an effective follow-up mechanism to their communications.

## 15 Remedies

The Commission is not given a clear mandate to order remedies for human rights violations.<sup>107</sup> Instead, it has over the years opted for a wide interpretation of its mandate to 'ensure the protection' of the rights of the Charter.<sup>108</sup> In Communication 101/93, *Civil Liberties Organisation (in respect of the Nigerian Bar Association) v Nigeria*,<sup>109</sup> the Commission recommended that a decree, which among other things excluded recourse to the court, be nullified.

In Communication 59/91, *Mekongo v Cameroon*, the Commission recommended compensation of an individual by an offending state. Although the Charter is silent regarding a recommendation for compensation, it can be argued that it derives such authority from its mandate of 'ensuring the protection of human and peoples' rights under the auspices of the provisions of the Charter'.<sup>110</sup>

In Communications 54/91, 61/91, 98/93, 164/97 to 210/98, *Malawi Africa Association and Others v Mauritania*,<sup>111</sup> the Commission made an elaborate recommendation in ordering remedies against the respondent state of Mauritania. For purposes of making future complainants aware of how the Commission ordered remedies in this communication, it is important to give the recommendation as stated in the communication. Although there are no guidelines, litigants must exercise common sense in drawing up their envisaged remedies.

<sup>107</sup> Viljoen (n 62 above) 58.

<sup>108</sup> Art 45(2).

<sup>109</sup> Eighth Annual Activity Report.

<sup>110</sup> Art 45(2).

<sup>111</sup> Thirteenth Annual Activity Report.

In the above-mentioned communication, the Commission ordered the following to the government of Mauritania:

(1) To arrange for the commencement of an independent enquiry in order to clarify the fate of persons considered as disappeared, and to identify and bring to book the authors of the violations perpetrated at the time the facts arraigned; (2) To take diligent measures to replace the national identity documents of those Mauritanian citizens, which were taken from them at the time of their expulsion and ensure their return without delay to Mauritania as well as the restitution of the belongings looted from them at the time of the said expulsion; and to take the necessary steps for the reparation for the deprivation of the victims of the above cited events; (3) To take appropriate measures to ensure payment of a compensatory benefit to the widows and beneficiaries of the victims of the above-cited violations; (4) To reinstate the rights due to the unduly dismissed and/or forcibly retired workers, with all legal consequences appertaining thereto; (5) As regards the victims of degrading practices, to carry out an assessment of the status of such practices in the country with a view to identifying with precision the deep-rooted causes for their persistence and to put in place a strategy aimed at their total and definitive eradication; and (6) To take appropriate administrative measures for the effective enforcement of Ordinance No 81-234 of 9 November 1981, on the abolition of slavery in Mauritania.

More importantly, the Commission assured the respondent state of Mauritania its full co-operation and support in the application of its recommendation. This meant that the Commission was more than willing to see to it that the culture of human rights prevailed in the respondent state. Complainants or their representatives submitting communications before the Commission should therefore take advantage of this decision. They may even categorically state in their briefs the ways in which the Commission can 'fully co-operate and support' a respondent state in the application of its decision, should it find that there has been a violation of the Charter.

## 16 Conclusion

Despite the availability to Africans of legal recourse before the Commission, the African continent continues to be ravaged by all kinds of violations of human rights. Part of the problem is associated with the fact that the African people are ignorant of these complaints procedures. There is also a lack of a human rights culture in most parts of the continent, especially at government level. Mugwanya argues that virtually all African states have been and continue to be the most egregious human rights violators, rendering human rights illusory in the daily lives of the majority of people in Africa.<sup>112</sup> This is due to the fact that

<sup>112</sup> GW Mugwanya 'Examination of state reports by the African Commission: A critical appraisal' (2001) 1 *African Human Rights Law Journal* 268.

at the primary level, member states of the African Union have failed to undertake the necessary measures to give effect to the provisions of the Charter as required by article 1 of the Charter. For this reason, Steiner and Alston maintain that:<sup>113</sup>

The African system has not yielded anywhere near the same amount of information and 'output' of recommendations or decisions — state reports and reactions thereto, communications (complaints) from individuals about state conduct, studies of 'situations' or investigations of particular violations — as have other systems.

Instituting communications before the Commission remains a positive step towards the effective protection of human and peoples' rights in Africa. At the International level, the Assembly of Heads of State and Government of the African Union must devise an effective mechanism for enforcing the decisions of the Commission. Failure to do so renders the litigation process before the Commission an exercise in futility. The success of ensuring the respect for human rights in Africa also lies with the Commission. The Commission must be a robust and innovative institution dedicated to its work and must enjoy the support from the Assembly of Heads of State and Government of the African Union, individual African states, intergovernmental organisations, national human rights institutions and civil society. Most importantly, the Commission must have an effective Secretariat to facilitate its smooth running in undertaking its functions as provided for in the Charter.

Viljoen's concluding remarks on the question of admissibility that 'the better a communication is prepared before the submission, the more likely the Commission is to come to a prompt decision favouring the complainant'<sup>114</sup> should be the golden thread running through the complaints process before the Commission. This will no doubt require a clear understanding of the Charter, the Rules of Procedure, the Submission and Processing Guidelines as well as the evolving practice of the Commission in so far as its protective mandate is concerned.

Bringing complaints before the Commission should also involve the development of innovative strategies in order to enhance African human rights law jurisprudence. These strategies can be best achieved with the basic knowledge of the existing litigation processes. The use of information and communication technology may be one such innovative strategy that may be employed by those bringing communications before the Commission. It is without any doubt that through an effective complaints process, the Commission's protective mandate can be fully achieved and the African continent saved from its current unfortunate predicament.

<sup>113</sup> UO Umozurike (n 17 above) 231.

<sup>114</sup> Viljoen (n 45 above) 99.



# The right to a satisfactory environment and the African Commission

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## Summary

*This article emphasises that the right to a satisfactory, healthy or clean environment is enshrined in over 60 constitutions from all regions of the world. Moreover, it is suggested that there is an increasing trend by victims of environmental damage to invoke human rights for protection and redress. National courts and global and regional human rights monitoring bodies, such as the UN Human Rights Committee and the Inter-American Commission, have addressed this issue. It is encouraging that the African Commission recently decided a case concerning the impact of oil operations in the Niger Delta, concluding that the African Charter recognises the importance of a clean and safe environment. The decision recognises a nexus between socio-economic rights and the right to environment to the extent that the environment affects the quality of life and safety of individuals and groups. In finding Nigeria in violation of the Charter, the Commission stated that the right to a satisfactory environment 'requires the state to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources'.*

## 1 Introduction

In contemporary times, the 'environmental issue' (particularly, environmental protection) is arguably one of the most important

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subjects on the global community's agenda. United Nations (UN) Special Rapporteur, Mrs Fatma Zohra Ksentini, observed in her report on human rights and the environment that the state of the environment is nowadays seen as a worldwide problem that should be addressed globally, 'in a co-ordinated and coherent manner and through the concerted efforts of the international community'.<sup>1</sup> More specifically, part of the current international discourse on the subject centres on the concept of the 'right to environment'.<sup>2</sup> The controversial question is whether there is an international 'human right to environment'. While some

<sup>1</sup> See Final Report prepared by Mrs Fatma Zohra Ksentini on her study of human rights and the environment (E/CN.4/Sub.2/1994/9/Corr.1, para 117). The study was commissioned by the United Nations (UN) Sub-Commission on Prevention of Discrimination and Protection of Minorities, by its decision 1989/108 of 31 August 1989.

<sup>2</sup> It has been suggested that the right to a satisfactory environment means that all human beings have the fundamental right to an environment adequate for their health and well-being and the responsibility to protect the environment for the benefit of present and future generations. See Charter on Environmental Rights and Obligations of Individuals, Groups and Organisations, art 1 (reprinted in Report on the Regional Conference at Ministerial Level on the Follow-Up to the Report of the World Commission on Environment and Development in the Economic Commission for Europe Region, Action for a Common Future, held at Bergen, Norway, 16–18 May 1990). Note that the concept of 'human right to a satisfactory environment' has a number of ramifications, including 'right to a satisfactory environment', 'right of environment' and 'environmental rights'. Briefly explained, 'right to a satisfactory environment' may be defined as 'the right to conserve, protect and improve the current environment' for the benefit of man. Essentially, this is substantive in character and anthropogenic in perspective. On the other hand, 'the right of environment is founded upon the notion that the environment possesses rights derived from its own intrinsic value, separate and distinct from human use of the environment'. See LE Rodriguez-Rivera 'Is the human right to environment recognised under international law? It depends on the source' (2001) 12 *Colorado International Environmental Law and Policy* 1. In contrast with 'right to a satisfactory environment' which confers rights on human beings, 'right of environment' confers right directly on the environment — as the best way of protecting the environment. On its part, 'environmental rights' 'encapsulate the procedural human rights necessary for the implementation of the substantive rights that are part and parcel of the expansive right to a satisfactory environment' (Rodriguez-Rivera 15). Notwithstanding these different shades of meanings, this article uses the expression 'right to a satisfactory environment' to denote the three ramifications of the 'human right to a satisfactory environment' noted here (and interchangeably with the other expressions). In any case, there is the issue of the quality of environment involved in the right to a satisfactory environment. As at yet, there is no agreement on the proper descriptive adjective; some of the adjectives employed by various authors and instruments include: healthy, healthful, adequate, satisfactory, decent, clean, natural, pure, ecologically sound, ecologically balanced and viable. Even so, it has been questioned whether it is realistic to have a precise minimum standard of environmental quality that allows for a life of dignity and well-being, given the scientific uncertainty surrounding the issue (Rodriguez-Rivera 10). Undoubtedly, definitional problems are inherent in any attempt to postulate environmental rights in qualitative terms: Surely, what constitutes a satisfactory, decent, viable or healthy environment is bound to suffer from uncertainty and ambiguity. Arguably it may even be incapable of substantive definition, or prove potentially meaningless and ineffective, like the right to development, and may undermine the very notion of human rights. (See A Boyle 'The



scholars maintain that an international human right to environment presently exists as part of the international bill of rights, others contend that no such right has emerged.<sup>3</sup> In fact, there is abundant legal literature affirming or rejecting the existence of a right to environment.<sup>4</sup> It is proposed to briefly consider the proponents' view here.

The proponents of the right to environment have pointed to its acceptance and incorporation into more than 60 national constitutions (as well as the constitutions of several component states of the United States of America).<sup>5</sup> In some cases, such constitutional provisions are declaratory of the state's duty to pursue environmentally sound development, sustainable use of natural resources and the maintenance of safe and healthy environment for the citizens of the state, while in others the constitution provides for the individual's right to a clean and healthy environment and a person's duty to protect and conserve the environment and natural resources. Moreover, in a few cases, these two approaches are combined. For the present purposes, a few examples will suffice to illustrate this increasing state practice.<sup>6</sup>

On the African continent, the relatively recent Constitutions of Mali, the Democratic Republic of Congo (DRC) and the Republic of South Africa provide good examples. In the case of Mali, section 15 of its 1992 Constitution provides:

Every person has a right to a healthy environment. The protection and defence of the environment and the promotion of the quality of life are a duty for all and for the state.

Similarly, section 46 of the 1992 Constitution of the DRC provides as follows:

Every citizen shall have the right to a satisfactory and sustainable healthy environment, and shall have the duty to defend it. The state shall supervise the protection and the conservation of the environment.

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role of international law in the protection of the environment' in A Boyle & M Anderson (eds) *Human rights approaches to environmental protection* (1996) 43 50.) Nonetheless, it has been rightly pointed out that ambiguity has not been an obstacle in implementation and enforcement of recognised human rights (such as economic, social and cultural rights) because 'in the public conscience of a given society, these concepts can have sufficient precision to permit a judge or administration to apply them' (Rodriguez-Rivera 11 — quoting A Kiss & D Shelton *International environmental law* (1991) 23). This article will not indulge in the 'doctrinal' debate, and employs the various qualitative adjectives interchangeably to denote an environment conducive to human health.

<sup>3</sup> For an interesting and informative discussion of the ongoing debate, see Rodriguez-Rivera (n 2 above).

<sup>4</sup> This point was also made by Rodriguez-Rivera (n 2 above) 4.

<sup>5</sup> See eg Ksentini (n 1 above) Annex III.

<sup>6</sup> Some of the relevant constitutional provisions are reproduced in Ksentini (n 1 above) Annex III. See also EB Weiss *In fairness to future generations: International law common patrimony and intergenerational equity* (1988) 306 (Appendix B).

With regard to South Africa, the first post-apartheid Constitution of the Republic of South Africa (which came into force on 27 April 1994) stipulates in section 29 that '[e]very person shall have the right to an environment which is not detrimental to his or her health or well-being'. This formulation has been extended in the 1996 Constitution.<sup>7</sup>

The same trend is also found in the constitutions of many Asian countries — for example, India and China. In India, the Federal Constitution of 1949 provides as follows in article 51A(g):

It shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers, and wild life, and to have compassion for living creatures.

China's 1982 Constitution imposes a duty on the state to protect and improve the living environment, and prevent and remedy pollution and other public hazards.<sup>8</sup> The Constitution also provides for the rational use of natural resources and the protection of rare animals and plants.<sup>9</sup>

Regarding Latin American and Caribbean countries, evidence indicates that all constitutions enacted in those regions since the 1972 Stockholm Conference on the Human Environment contain important environmental protection principles. Moreover, older constitutions have been amended to incorporate such principles. For example, the 1980 Constitution of Peru provides various rights and duties with regard to the environment. These include the rights of citizens to live in a healthy environment which is ecologically balanced and adequate for the development of life and the preservation of the countryside and nature, citizens' duty to conserve the environment, and the state's duty to prevent and control environmental pollution.<sup>10</sup> In the same vein, the 1980 Constitution of Chile guarantees all persons the right to live in an uncontaminated environment, and imposes a duty on the state to watch over the protection of this right and the duty to preserve nature. Moreover, the state has the power to make certain restrictions on the exercise of certain rights or freedoms where that is necessary to preserve the environment.<sup>11</sup>

<sup>7</sup> See sec 24 of the 1996 Constitution, which provides as follows: 'Everyone has the right (a) to an environment that is not harmful to their health or well-being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.'

<sup>8</sup> Ch 1 art 9.

<sup>9</sup> Ch 1 art 26. Similar constitutional provisions are contained in the Constitution of Philippines.

<sup>10</sup> Political Constitution of Peru, ch 2 art 123.

<sup>11</sup> Political Constitution of the Republic of Chile, ch 3 art 19(8). Similar constitutional provisions can be found in the Constitutions of Colombia and Costa Rica. In Europe, the Constitutions of Portugal and Bulgaria exemplify the trend. In Portugal, its 1982

Many state courts have rendered decisions enforcing the relevant constitutional provisions on the right to a satisfactory environment. In *Mehta v Union of India*,<sup>12</sup> for example, the Supreme Court of India restrained a series of tanneries from disposing of effluent into the river Ganges on the petition of an interested citizen. In reaching its decision, the Court relied on article 48A (which enjoins the state to endeavour to protect and improve the environment and to safeguard the wildlife of the country) and article 51A of the Indian Constitution.<sup>13</sup>

Further support for the existence of an international right to environment may be found in decisions of international human rights tribunals. Specifically, a number of international human rights committees and tribunals have increasingly recognised the application of the fundamental right to a healthy or healthful environment to situations concerning life-threatening environmental risks.<sup>14</sup> For example, within the UN system, the Human Rights Committee<sup>15</sup> has

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Constitution provides that 'everyone shall have the right to a healthy and ecologically balanced human environment and the duty to defend it' (pt 1 sec III). The Constitution further imposes a duty on the state to protect the environment, stipulating the necessary measures to be taken towards that goal (ch II art 66). In the case of Bulgaria, the 1991 Constitution obligates the Bulgarian state to ensure the protection and conservation of the environment, the sustenance of animals and the maintenance of their diversity and the rational use of natural resources. On the other hand, citizens also have an obligation to protect the environment (ch 2 art 31). In the United States, although there is no provision for a right to an environment in the national Constitution, a number of the component states of the country have included such a right in their constitutions. For example, art XI sec 9 of the Constitution of the state of Hawaii provides for the right to an environment: 'Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. 'A more detailed provision for right to a clean environment can be found in the Constitution of Massachusetts, which states (art 49, adopted on 7 November 1972): 'The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and aesthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose.'

<sup>12</sup> (1988) AIR 1037 SC.

<sup>13</sup> In another Case, the same court expressly held that the right to life is a fundamental right which includes the right of enjoyment of pollution-free water and air for full enjoyment of life. Accordingly, it said, if anything endangers or impairs that quality of life in derogation of laws, a citizen has the right to have recourse to art 32 of the Constitution for removing the pollution of water or air which may be detrimental to the quality of life (noted in FZ Ksentini 'Human rights, environment and development' in S Lin *et al* (eds) *UNEP's new way forward: Environmental law and sustainable development* (1995) 107).

<sup>14</sup> See PR Kalas 'International environmental dispute resolution and the need for access by non-state entities' (2001) 12 *Colorado Journal of International Environmental Law* 191 217.

<sup>15</sup> The Committee monitors state party implementation of the International Covenant on Civil and Political Rights (ICCPR).

examined a number of cases under the Optional Protocol dealing with threat to life in violation of article 6(1) of the International Covenant on Civil and Political Rights (ICCPR).<sup>16</sup> In *EHP v Canada*,<sup>17</sup> Canadian residents alleged that radioactive waste that remained after the government had conducted a cleanup constituted serious risks to health in violation of article 6 of the ICCPR. Although the Committee declared the case inadmissible,<sup>18</sup> it noted that the case 'raised serious issues with regard to the obligation of state parties to protect human life'.<sup>19</sup>

The same approach has also been followed in regional human rights protection bodies, particularly the Inter-American Commission on Human Rights. For instance, in a case filed by the Yanomami Indians of Brazil,<sup>20</sup> the Commission determined that environmental degradation

<sup>16</sup> Adopted on 16 December 1966. Art 6(1) provides: 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.'

<sup>17</sup> Communication 67/80, reported in 2 Selected Decisions of the Human Rights Committee Under the Optional Protocol (1990) 20.

<sup>18</sup> Specifically, the Committee held the communication inadmissible because domestic remedies have not been exhausted as required under Canadian law.

<sup>19</sup> Similarly, in the Communication 167/84, *Ominiyak v Canada* (26 March 1990) (*Lubicon Lake Band case*), UN Report A/45/40 vol II, Annex LX A, the Committee found that art 27 of the ICCPR (dealing with the protection of minority rights) had been violated. The case was submitted to the UN Human Rights Committee in 1984 by Bernard Ominayak, the Chief of Lubicon Band in the Province of Alberta, Canada. His argument was that Canada violated the Band's right to self-determination under art 1 of the ICCPR, particularly the rights of his people (1) to pursue their own development; (2) to freely dispose of their natural resources; and (3) not to be deprived of their own means of subsistence. According to him, the Lubicon Lake Band had continuously hunted, trapped and fished in their territory (a large area encompassing 10 000 square kilometres) in the province of Alberta. The Canadian government had allowed the Province of Alberta to expropriate part of the Band's territory for oil and gas exploitation. The Band challenged the expropriation policy through domestic political and legal processes, contending that the continued resource development caused irreparable harm to its way of life. (The government conceded that the Band had suffered a historical inequity.) Giving its decision, the Committee took the view that it was procedurally incompetent to address the claim of a right to self-determination. However, it found that many of Chief Ominayak's claims raised issues under art 27 of the ICCPR, which reads as follows: 'In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.' Significantly, the Committee recognised that the rights protected by this article (art 27, ICCPR) include the right to engage in traditional economic and social activities that are part of the culture of the community. In this regard, the Committee concluded that: 'Historical inequities, to which the state refers, and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of art 27 so long as they continue . . .' See Communication 167/84, *Ominiyak v Canada* (26 March 1990), Report A/45/40 vol II, Annex LX A, para 33.

<sup>20</sup> *Yanomami v Brazil*, Case No 7615, Inter-American Commission on Human Rights 24, OEA/Ser L/V/II 66, Doc 10 rev 1 (1985) (*Yanomami case*).

of Yanomami lands violated the right to life and other human rights (including right to cultural identity and right to property) set out in the American Convention on Human Rights.<sup>21</sup>

Although it may still be uncertain how the right to life may be interpreted in various environmental contexts, these cases demonstrate an increasing trend by victims of environmental damage to invoke human rights doctrine for protection and redress and an emerging trend by human rights tribunals to apply this doctrine, especially in life-threatening situations.<sup>22</sup>

In a recent case complaining about the abuse of human rights and the degradation of the Niger Delta environment by oil operations undertaken by Nigerian-based multi-national oil companies (especially Shell Oil Company), the African Commission on Human and Peoples' Rights (African Commission or Commission) was faced with questions relating to human rights to a 'satisfactory' and 'healthy' environment.<sup>23</sup> The article focuses on this decision with a view to determining the attitude of the Commission to the concept of a human right to a satisfactory environment, particularly in life-threatening situations. The context of the environmental impact of oil operations in the Niger Delta as well as related human rights abuses is now briefly sketched.

<sup>21</sup> *Yanomami* case 26–27. The complainants alleged that the degradation arose from the Brazilian government permission to private companies to exploit natural resources on Yanomami lands, and the construction of the Trans-Amazonian highway, the incursion of disease and outsiders into Yanomami territory, and the displacement of Yanomami people (a minority and indigenous group in Brazil). In giving its decision, the Commission stated that the Brazilian government approved development in the Amazonian region caused various life and culture threatening harms to the Yanomami population, including their displacement, the break-up of social organisation, introduction of prostitution and disease and destruction of encampments. A further example is a petition filed in 1990 on behalf of the Huaorani people of Ecuador against the government of the country, where it was alleged that oil operations violated the people's human rights under the American Convention on Human Rights (the violations allegedly included the contamination of water, soil and air). Finding in favour of the petitioners, the Commission stated that 'development must take place under conditions that respect and ensure human rights of the individuals affected. Decontamination is needed to correct mistakes that ought never to have happened' (noted in Kalas (n 14 above) 218–219).

<sup>22</sup> See ML Schwartz 'International legal protection for victims of environmental abuse' (1993) 18 *Yale Journal of International Law* 355–364. See further PE Taylor 'From environmental to ecological human rights: A new dynamic in international law?' (1998) 10 *Georgetown International Environmental Law Review* 309–341. Proponents of the existence of the right to a clean environment further support their position by pointing out that since 1968 an increasing number of international declarations and statements have, with growing specificity, recognised the fundamental connection between environmental protection and respect for human rights. For a discussion of some of these, see Kalas (n 14 above).

<sup>23</sup> See Communication 155/96, *The Social and Economic Rights Action Centre and another v Nigeria*, Fifteenth Annual Activity Report (SERAC case).

## 2 Oil operations and environmental degradation in the Niger Delta

Nigeria's vast oil resources are concentrated in the Niger Delta region of the country. As with other high technology-based industrial activities, the extraction of oil has as consequence different types of environmental problems occurring at different stages of oil operations.<sup>24</sup> However, for the purposes of this article it is sufficient to briefly consider two of the most important and well-known problems of oil operations in the Niger Delta, namely oil spills and gas flares. Additionally, the related problem of human rights abuses is briefly considered.

### 2.1 Oil spill and gas flare: Their impact on the Niger Delta environment

Several studies have provided evidence showing that oil spilling is a frequent occurrence in the Niger Delta (mostly in the swamp forests and offshore), inhabited by indigenous ethnic minorities.<sup>25</sup> More seriously, such spillages have resulted in several environmental problems that affect both the region and its local inhabitants. Interestingly, oil companies operating in the region acknowledge the frequency of oil spillages and their potential to cause damage to the inhabitants of the region. For example, Shell Oil Company — the leading oil multinational company operating in Nigeria's Niger Delta area — states that since 1989 it has recorded 'an average of 221 spills per year in its operational area' and that it is 'committed to paying compensation to affected communities'.<sup>26</sup>

<sup>24</sup> The principal stages of oil operations are seismic surveys, exploratory drilling, and production.

<sup>25</sup> See, eg, E Hutchful 'Oil companies and environmental pollution in Nigeria' in C Ake (ed) *Political economy of Nigeria* (1985) 113; C Iporukpo 'Management of oil pollution of natural resources in Nigeria' (1985) 20 *Journal of Environmental Management* 204; JG Frynas *Oil in Nigeria: Conflict and litigation between oil companies and village communities* (2000) 165; KSA Ebeku 'Legal aspects of environmental issues and equity considerations in the exploitation of oil in Nigeria's Niger Delta' unpublished PhD thesis, University of Kent at Canterbury, 2002, ch 3 (especially 192–198).

<sup>26</sup> See Shell Petroleum Development Corporation of Nigeria (SPDC) 'The environment' <<http://www.shell.com/nigeria>> (accessed 28 February 2003). However, there are suggestions that the incidence of oil spill is far higher than the 221 cases per year, as admitted by Shell. See Annual Reports of the Civil Liberties Organisation (CLO) — a Nigerian-based non-governmental organisation. Obviously, the payment of compensation suggests that damage has been done by the oil spill. Even so, critics have suggested that oil companies are usually unwilling to pay compensation to victims of their operations. See eg KSA Ebeku 'Compensation for damage arising from oil operations: *Shell Petroleum Development Company of Nigeria v Ambah* revisited' (2002) 7 *International Energy Law and Taxation Review* 155.

In one of the most important scientific studies of the environmental impact of oil operations in the Niger Delta region, it has been found that incessant oil spills of various magnitudes have resulted in massive pollution of water bodies as well as degradation of agricultural land, destruction of artisanal fishery, and generally adverse socio-economic consequences.<sup>27</sup>

With specific respect to land, it has been found, for instance, that oil spills adversely affect the availability and productivity of farmlands. In fact, scientific studies following the 1972 major oil spill at Shell's Bomu-11 oil field (which affected 242,8 hectares of farmlands close to human settlements) indicate that while the less affected soils were returned to production in less than one and a half year, the heavily affected soils remained agriculturally unusable for several years.<sup>28</sup>

In the case of the impact of oil spills on the ubiquitous water systems of the region,<sup>29</sup> it is now well known that water pollution as a result of oil spillages constitutes one of the most pressing problems in the Niger Delta region.<sup>30</sup> More specifically, it affects the local inhabitants' source of drinking water (the local inhabitants depend mostly on streams for the supply of their drinking water). Moreover, oil spillages frequently cause a film of oil to form on affected water bodies, thereby preventing natural aeration and causing the death of marine life (particularly fish) trapped below. Furthermore, fish ingest the spilled oil and thereby become unpalatable and sometimes poisonous for human consumption. A non-governmental organisation (NGO) had described the situation as 'catastrophic'.<sup>31</sup> Hutchful summed up the impact as follows:<sup>32</sup>

[S]pill of crude [oil], dumping of by-products from [oil] exploration, exploitation and refining operations (often in fresh-water environments) and overflowing of oily wastes in burrow pits during heavy rains has had deleterious effects on bodies of surface water used for drinking, fishing and other household and industrial purposes. The percolation of industrial wastes (drilling and production fluids, buried solid wastes, as well as spills of crude) into the soil contaminates ground-water aquifers.

<sup>27</sup> O Osibanjo 'Industrial pollution management in Nigeria' in EOA Aina & NO Adedipe (eds) *Environmental consciousness for Nigerian national development* (1992) 97.

<sup>28</sup> Hutchful (n 25 above) 118.

<sup>29</sup> One of the natural features of the Niger Delta is the multiplicity of rivers.

<sup>30</sup> JP Eaton 'The Nigerian tragedy, environmental regulation of transnational corporations, and the human right to a healthy environment' (1997) 15 *Boston University International Law Journal* 261 267.

<sup>31</sup> Nigerian Environmental Study/Action Team (NEST) *Nigeria's threatened environment: A national profile* (1991) 87.

<sup>32</sup> Hutchful (n 25 above) 118. See also Greenpeace, *UK Oil Briefing No 7: Human health impacts* (1993). It is common for oil companies operating in Nigeria's Niger Delta to discharge their effluents directly into fresh water bodies. Even where such direct disposal does not occur, the techniques adopted have not been pollution-proof. See Hutchful (n 25 above) 119. See also JP van Dessel *Internal position paper: Environmental position in the Niger Delta* (1995). (Van Dessel was a former head of Environment Department at Shell, Nigeria, and reportedly resigned in protest against Shell's 'environmental devastation' of the Niger Delta.)

In summary, oil pollution (oil spilling) is a frequent incidence in the Niger Delta.<sup>33</sup> More significantly, it has far-reaching adverse effects on the environment of the region, particularly on agricultural lands of the local inhabitants of the region, whose major occupations are farming and fishing. Frequent oil spills damage the soil nutrients, resulting in diminished yields. Moreover, oil spills and careless disposal of oil or petroleum by-products degrade water bodies (including underground water), thereby affecting people's source of drinking water and fish supply. Based on various findings, these effects appear to be the result of careless attitude of the oil companies operating in the region to environmental issues. The prevailing situation is better summed up by a journalistic account of a recent incident:<sup>34</sup>

About ten persons have been admitted at various hospitals in Sapele, Delta State, as a result of the side-effects [of] crude oil spillage which occurred at Ugborikoko village, near Sapele. The oil spillage occurred on a Shell Petroleum Development Company (SPDC) facility located on the Mayuka Creek on the river Ethiope, adjacent to Sapele gas station. The victims, our sources revealed, were rushed to hospitals, because of the complications arising from the consumption of polluted water from the adjoining rivers. Already, the accident had destroyed aquatic and other economic life of the people in [the] neighbourhood. Specifically, fishing activities had been paralysed in the entire Sapele and its environs as the spillage reportedly killed the fish in all the rivers in the areas. Our correspondent who visited the scene yesterday sighted condensed crude floating on the river and uncountable number of burnt shacks and dry trees. The *Vanguard* checks in the areas so revealed that the crude had spilled to over 35 kilometres on the river. The secretary, Sapele/Okpe community, Mr Onoriode Temiagin, who spoke with the *Vanguard*, confirmed the admission of ten of his kinsmen at various hospitals in Sapele. Temiagin, who claimed that the incident had brought untold hardship to his people, since they were predominantly fishermen, further lamented that 'it has rendered us jobless, it is unfortunate to recall that nobody has caught fish here since the incident occurred'.

Apart from the incidence of oil spillage, flaring of associated gas (that is gas produced alongside oil)<sup>35</sup> is another critical and hazardous aspect of oil operations in the Niger Delta region of Nigeria.<sup>36</sup> Moffat and Linden point out that Nigeria flares more gas than any other country in the world.<sup>37</sup> In fact, since the late 1950s when oil exploitation began in

<sup>33</sup> Most spills occurred in the swamp forests of the Delta, while much of the remainder occurred offshore. 'In other words, most spillage was located precisely where the greatest ecological damage might be inflicted' — Hutchful (n 25 above) 116.

<sup>34</sup> See 'Oil spillage occurs in Sapele' *Vanguard* 2002-02-18.

<sup>35</sup> When oil is first produced from the earth's crust, it is mixed with gas and water which are separated at different stages of the production.

<sup>36</sup> Gas flare is a process that uses tall flaming towers which burn off natural gas, a by-product of the [crude oil] refining process — Eaton (n 30 above) 261 (fn 18).

<sup>37</sup> D Moffat & O Linden 'Perception and reality: Assessing priorities for sustainable development in the Niger Delta' (1995) 24 *Ambio* 527 533. By way of comparison, the World Bank states that in 1995 up to 76% of the associated gas from oil wells in



the Niger Delta, virtually all associated gas had been flared,<sup>38</sup> and this has resulted in significant environmental problems. For example, the continuous flaring of associated gas has significantly contributed to the release of greenhouse gases into the atmosphere and reportedly caused acid rain.<sup>39</sup> Moreover, it has been claimed by the local inhabitants that 'gas flaring has destroyed plant and wildlife'.<sup>40</sup> The words of an Ogoni song bemoan the problem of gas flare:<sup>41</sup>

The flames of Shell are flames of hell, we bask below their light, nought for us to serve the blight, of cursed neglect and cursed Shell.

Remarkably, the effects of gas flaring are similar to those of oil spills in the region. The following statement sums up this position:<sup>42</sup>

Gas flaring has been the most constant environmental damage because in many places [in the Niger Delta] it has been going on 24 hours a day for over 35 years. There are hundreds of gas flares throughout the Niger Delta. It affects plant life, pollutes the surface water and as it burns, it changes to other gases which are not very safe. It also results in acid rain. With the pullout of Shell from Ogoniland, gas flaring has stopped in four of the five flow stations. Where the gas flaring has stopped, people were able to see a difference in their vegetation; farm yields are better than before. The people did not know what it was like to live without Shell. It is only now that the people in these areas can see what type of environmental devastation the gas flaring had been causing for the past 35 years. . . .

## 2.2 Protection of oil installations in the Niger Delta and human rights abuses

Closely associated with the problems of oil pollution and gas flares is the issue of human rights abuses, allegedly in the course of protection of oil installations by Nigerian security agencies.<sup>43</sup> Based on reported

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Nigeria was flared, as compared with 0.6% in the United States and 4.3% in the United Kingdom. See World Bank *Defining an environmental strategy for the Niger Delta* (1995) 59. This situation has led an author to conclude that 'if judged by the example of gas flaring, it would appear that oil companies have taken environmental concerns in Nigeria less seriously than in other countries'. See Frynas (n 25 above) 178 (fn 378).

<sup>38</sup> Explaining the practice of flaring associated gas and the quantity flared daily, SPDC claims that when most of its facilities were built there was no significant market for Nigerian gas nationally or internationally. In this situation, the company states, no system was built to collect associated gas, which is produced along with the oil, as a by-product. 'Consequently, almost all SPDC's associated gas is flared — some 1 000 million scf/d' (noted in M Kassim-Momodou 'Gas re-injection and the Nigerian oil industry' (1986/87) 6 & 7 *Journal of Private and Property Law* 69).

<sup>39</sup> Osibanjo (n 27 above) 97.

<sup>40</sup> See Human Rights Watch/Africa, *Nigeria: The Ogoni crisis — A case study of military repression in South-Eastern Nigeria* (1995) 8.

<sup>41</sup> Reproduced in AA Ikein *The impact of oil on a developing country: The case of Nigeria* (1990) 262.

<sup>42</sup> D Robinson *Ogoni: The struggle continues* (1996) 28.

<sup>43</sup> The authorities justify the protection on the ground that the country's economy is solely dependent on oil revenue.

accounts, since 1990 the local victims of environmental pollution frequently protest the degradation of their environment and the destruction of their means of livelihood by oil companies, asking for appropriate compensation. Often, the protest is in the form of blockade of oil pipelines and other oil production facilities, which may result in the stoppage of oil production.

There is abundant evidence to indicate that several human rights abuses have been perpetrated in the Niger Delta in the name of protection of oil production facilities against the actions of protesters. Several protesters have been beaten, unlawfully arrested and detained and even killed by the mobile police (a paramilitary organisation), the Nigeria Police, the Nigerian Army and a number of other specialised security forces based in the region (such as the Rivers State Internal Security Task Force, Rivers State Operation Fire For Fire, and the Bayelsa State-based Operation Salvage). Several international NGOs (for example, Human Rights Watch) have investigated a number of such abuses. In general it has been found that activists from human and environmental organisations who campaign against oil company disregard of environmental standards face regular harassment from the Nigerian authorities.<sup>44</sup> For example, Ken Saro-Wiwa was arrested and detained several times by various security agencies before his unlawful execution on 10 November 1995 along with eight other activists, after a trial for alleged murder charges before a tribunal which the international community rejected for non-compliance with international standards of due process.<sup>45</sup>

Although repressive military regimes, which had been blamed for authorising the abuses, had been replaced by civilian governments at all levels of government in Nigeria since 29 May 1999, oil facilities related human rights abuses do not appear to be at an end nor even in retreat. On the contrary, the local inhabitants of the Niger Delta continue to be under military siege, and only in 2000 did President Obasanjo allegedly authorise the destruction of the Odi community in Bayelsa state, where youths were protesting against environmental degradation of their area and inequity in the distribution of oil revenue among the states of the Federation of Nigeria.<sup>46</sup> That operation also witnessed the loss of several innocent lives in the community.

Against the background of the foregoing, the recent decision of the African Commission on human and environmental rights of the Ogoni people of the Niger Delta will now be considered.

<sup>44</sup> See Human Rights Watch *The price of oil* (1999), especially ch VIII.

<sup>45</sup> As above, 9.

<sup>46</sup> See Human Rights Watch 'The destruction of Odi and rape in Choba December 22, 1999' <<http://www.hrw.org/press/1999/dec/nibg1299.htm>> (accessed 28 February 2003).

### 3 The African Commission and the right to a satisfactory environment: *SERAC v Nigeria*

In 1996, two NGOs brought a complaint before the African Commission on behalf of the Niger Delta people of Nigeria (specifically the Ogoni people), in whose area Nigeria exploits its vast oil resources.<sup>47</sup> The case was aimed at achieving the redress of human rights abuses and the protection of the Niger Delta environment from degradation. This was the first time the Commission expanded on the meaning, interpretation and scope of the right to a satisfactory environment provided in the African Charter on Human and Peoples' Rights (African Charter or Charter).<sup>48</sup> In their communication<sup>49</sup> to the Commission, the complainants alleged as follows:<sup>50</sup>

- 1 That the government of Nigeria has been directly involved in oil production through the state oil company — the Nigerian National Petroleum Company (NNPC) — the majority shareholder in a consortium with Shell Petroleum Development Corporation (SPDC) — and that these operations have caused environmental degradation and health problems resulting from the contamination of the environment among the Ogoni People.
- 2 That the oil consortium has exploited oil reserves in Ogoniland with no regard for the health or environment of the local communities, disposing toxic wastes into the environment and local waterways in violation of applicable international environmental standards. The consortium also neglected and/or failed to maintain its facilities causing numerous avoidable spills in the proximity of villages. The resulting contamination of water, soil and air has had serious short and long-term health impacts, including skin infections, gastrointestinal and respiratory ailments, and increased risk of cancers, and neurological and reproductive problems.
- 3 That the Nigerian government has condoned and facilitated these violations by placing the legal and military powers of the state at the disposal of the oil companies. (The Communication contains a memo from the Rivers State Internal Security Task Force, calling for 'ruthless military operations'.)
- 4 That the Nigerian government has neither monitored operations of the oil companies nor required safety measures that are standard procedure within the industry. The government has withheld from Ogoni communities information on the dangers created by oil activities. Ogoni communities have not been involved in the decisions affecting the development of Ogoniland.

<sup>47</sup> *SERAC* case (n 23 above).

<sup>48</sup> For a review of the recent cases decided by the Commission, see CA Odinkalu 'African Commission on Human and Peoples' Rights: Recent cases' (2001) 1 *Human Rights Law Review* 97. See further GJ Naldi 'Interim measures of protection in the African system for the protection of human and peoples' rights' (2002) 2 *African Human Rights Law Journal* 1, especially at fn 11 (reference to recent cases).

<sup>49</sup> The equivalent of writ of summons or statement of claim under domestic judicial process.

<sup>50</sup> This summary is taken from the *SERAC* case (n 23 above) paras 1, 2, 3, 4, 5, 6 & 9.

- 5 That the government has not required oil companies or its own agencies to produce basic health and environmental impact studies regarding hazardous operations and materials relating to oil production, despite the obvious health and environmental crisis in Ogoniland. The government has even refused to permit scientists and environmental organisations from entering Ogoniland to undertake such studies. The government has also ignored the concerns of Ogoni communities regarding oil development, and has responded to protests with massive violence and executions of Ogoni leaders.
- 6 That the Nigerian government does not require oil companies to consult communities before beginning operations, even if the operations pose direct threats to community or individual lands.
- ... .
- 9 That the Nigerian government has destroyed and threatened Ogoni food sources through a variety of means. The government has participated in irresponsible oil development that has poisoned much of the soil and water upon which Ogoni farming and fishing depended. In their raids on villages, Nigerian security forces have destroyed crops and killed farm animals. The security forces have created a state of terror and insecurity that has made it impossible for many Ogoni villagers to return to their fields and animals. The destruction of farmlands, rivers, crops and animals has created malnutrition and starvation among certain Ogoni communities.

It could be observed that the substance of these complaints is consistent with the environmental impacts of oil exploitation in the Niger Delta as well as related human rights abuses, as briefly stated above. On the foregoing claims, the complainants alleged that the Nigerian state has violated articles 2, 4, 14, 16, 18(1), 21 and 24 of the African Charter. At this juncture, the most important of these are articles 16 and 24, which provide thus:

- 16(1) Every individual shall have the right to enjoy the best attainable state of physical and mental health.
- (2) State parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.
- 24 All peoples shall have the right to a general satisfactory environment favourable to their development.

Interestingly, the respondent state (Nigeria) 'admitted the gravamen of the complaints'<sup>51</sup> in its response to the case. In a *note verbale* submitted to the Commission at its 28th session in Cotonou, Benin, the Nigerian government admitted the violations of the alleged articles, stating that there is no denying the fact that a lot of atrocities 'were and are still being committed by oil companies in Ogoni-land and indeed in the Niger Delta area'.<sup>52</sup>

<sup>51</sup> As above, para 30.

<sup>52</sup> As above, para 42. Nonetheless, it proceeded to state the following, *inter alia*, as the measures it is taking to deal with the violations: (1) Establishing for the first time in the history of Nigeria, a Federal Ministry of Environment with adequate resources to

In its decision after considering the complaint, the Commission pertinently stated that articles 16 and 24 of the African Charter recognise the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual.<sup>53</sup> It found that the Niger Delta environment suffers from degradation as a result of oil pollution and held that an environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and development as the breakdown of the fundamental ecologic equilibrium is harmful to physical and moral health.<sup>54</sup> While acknowledging the right of the Nigerian state to produce oil, it pointed out that the care that should have been taken by the government to ensure sustainable development and the protection of the environmental and human rights of the local inhabitants of the region (specifically the Ogoni people) had not been taken.<sup>55</sup> Accordingly, the Commission found the Nigerian state to be in violation of the right to a clean environment under articles 16 and 24 of the African Charter.<sup>56</sup> Outlining the obligations of state parties under articles 16 and 24 of the Charter as well as under other relevant international instruments, the Commission pertinently stated:<sup>57</sup>

The right to a general satisfactory environment, as guaranteed under article 24 of the African Charter or the right to a healthy environment, as it is widely known . . . imposes clear obligations upon a government. It requires the state to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources. Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), to which Nigeria is a party, requires governments to take necessary

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address environmental related issues prevalent in Nigeria and as a matter of priority in the Niger Delta area. (2) Enacting into law the establishment of the Niger Delta Development Commission (NDDC) with adequate funding to address the environmental and social related problems of the Niger Delta area and other oil producing areas of Nigeria.

<sup>53</sup> As above, para 51.

<sup>54</sup> As above.

<sup>55</sup> As above, para 54. See also paras 52–53.

<sup>56</sup> In line with the approach of the American Commission on Human Rights, it recommended that the Federal Republic of Nigeria should ensure the protection of the environment, health and livelihood of the Niger Delta people (in particular, the Ogoni people) by (a) ensuring adequate compensation to victims of the human rights violations and undertaking a comprehensive cleanup of lands and rivers damaged by oil operations; (b) ensuring that appropriate environmental and social impact assessments are prepared for future oil development and that safe operation of any further oil development is guaranteed through effective and independent oversight bodies for the petroleum industry; and (c) providing information on health and environmental risks and meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations.

<sup>57</sup> *SERAC* case (n 23 above) paras 52–53.

steps for the improvement of all aspects of environmental and industrial hygiene. The right to enjoy the best attainable state of physical and mental health enunciated in article 16(1) of the African Charter and the right to a general satisfactory environment favourable to development (article 16(3)) . . . obligate governments to desist from directly threatening the health and environment of their citizens. The state is under an obligation to respect the just noted rights and this entails largely non-interventionist conduct from the state; for example, not from carrying out, sponsoring or tolerating any practice, policy or legal measures violating the integrity of the individual . . . Government compliance with the spirit of articles 16 and 24 of the African Charter must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.

The foregoing statement clearly shows the position of the Commission on the question of a human right to a satisfactory environment. Essentially, the Commission's view is that the right enjoins governments to provide sustainable development and forbids measures, actions or activities that may threaten the life and sustenance of a people. In this way, the decision is in line with the trend in other parts of the world in respect of the human right to a satisfactory environment.

Furthermore, with regard to allegations of violations of human rights (particularly the right to life and integrity of the human person under article 4 of the African Charter), the Commission found that various security forces were given the green light to 'decisively deal with the Ogonis' and that this was illustrated by the 'widespread terrorisations and killings'.<sup>58</sup> Accordingly, it held that killings of and other brutalities against the local people by security agencies violate the most fundamental of all human rights — the right to life. More significantly, the Commission held that pollution and environmental degradation to a level humanly unacceptable has made living in Ogoniland a nightmare, thus linking environmental protection to human rights in line with the trend elsewhere in the world. In the Commission's express words:<sup>59</sup>

International law and human rights must be responsive to African circumstances. Clearly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa.

Overall, the Commission's decision was a victory for the deprived, bruised and dehumanised people of Nigeria's oil region, specifically Ogoni people. However, it is merely a moral victory since the Commission's decisions are not binding but merely recommendatory. There is no evidence that oil-related environmental degradation has

<sup>58</sup> As above, para 67.

<sup>59</sup> As above, para 68.

ceased or that the brutalisation of the local people in the name of protection of oil facilities has abated. In any case, the decision is important in establishing that the people of the region as well as the people of other African state parties to the African Charter have a human right to a healthy environment, which insists, among others, that development must respect environmental issues and human rights.

#### 4 Conclusion

This article has examined the attitude of the African Commission to the concept of human right to a satisfactory environment. The opportunity for the Commission to address this issue came in a recent decision given in a case between the Ogoni people of the Niger Delta and the Nigerian state. The Commission considers environmental degradation as a violation of the right to a satisfactory environment and also the right to life and dignity of the human person. Being the decision of a regional quasi-judicial body, the case has helped to highlight the environmental problems of the Niger Delta region of Nigeria, oil development related human rights abuses and the general plight of the indigenous inhabitants of the region as a result of oil operations in the region. The facts contained in the communication and the findings of the Commission are consistent with the findings of various studies on the impact of oil operations in the Niger Delta as stated above.

Although the Commission's decisions are recommendatory and not legally binding,<sup>60</sup> it must not be supposed that they are devoid of any value. As Kalas has argued, it is not true that condemnation before an international tribunal or complaints body is without value. On the contrary, the mobilisation of political pressure on those who are violating recognised norms is one way of influencing a national government to implement environmentally favourable policies.<sup>61</sup> This is especially so where an indicted party has made a treaty part of its domestic law, as Nigeria has done with the African Charter. As a Nigerian judge put it in *Garuba & Others v Attorney-General of Lagos State*:<sup>62</sup>

The African Charter on Human and Peoples' Rights, of which Nigeria is a signatory, is now made into our law [*sic*] by the African Charter (Ratification & Enforcement) Act, 1983. Even if its aspect of our Constitution is suspended or ousted by any provision of our local law, the international aspect of it cannot be unilaterally abrogated . . . By signing international treaties we have put ourselves on the window of the world. We dare not unilaterally breach any of the terms without incurring some frowning of our international friends.

<sup>60</sup> Arts 52 & 53. For a suggestion that the Commission may have come to regard its decisions as binding, see Naldi (n 48 above) 3–4, especially fn 10.

<sup>61</sup> Kalas (n 14 above) 219, fn 116.

<sup>62</sup> Suit No ID559M/90 (unreported).

From this statement, one possibility is that the decision of the African Commission on the human right to a satisfactory environment will ultimately influence the decisions of Nigerian domestic judges. In any case, the African Commission has established that environmental degradation constitutes a violation of the right to a satisfactory environment under the African Charter.



## Considering the interpretation and implementation of article 24 of the African Charter on Human and Peoples' Rights in light of the *SERAC* communication

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### Summary

*In accordance with article 30 of the African Charter on Human and Peoples' Rights, an African Commission on Human and Peoples' Rights was established in 1987 with a mandate to promote and protect human rights in Africa. Under the Charter, the African Commission is empowered to consider complaints from both individuals and states. Until the SERAC communication, individual communications rarely dealt with socio-economic rights and in considering the Commission's jurisprudence, it becomes evident that the Commission showed a reluctance to elaborate on socio-economic rights. This contribution mainly deals with the Commission's consideration of the SERAC communication with a specific focus on the right to a satisfactory environment as guaranteed by the African Charter. It highlights the procedural aspects of this communication, the significance of article 24 as well as the Commission's interpretation of this article. Finally, aspects relating to the implementation and follow-up of the recommendations contained in this decision, specifically in relation to the environment, are examined.*

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## 1 Introduction

The Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR) communication against Nigeria before the African Commission on Human and Peoples' Rights (African Commission or Commission) reiterates the fact that inadequate protection of human rights at a domestic level necessitates the existence of human rights mechanisms at an international level.

The communication was jointly brought to the African Commission by SERAC and CESR based in Nigeria and the USA respectively. The communication alleges that the Nigerian government, through its involvement in the exploitation of the Niger Delta, contributed both directly and indirectly to gross violations of the rights of the Ogoni people. The rights that were allegedly infringed include the right to a healthy or satisfactory environment, the right to an adequate standard of health, the right to property and the right to housing. These rights have allegedly been violated through both the actions of Nigerian military forces, in protecting government's interest in the oil venture, and the negligent and environmentally unsound management of the oil exploration in the Niger Delta.<sup>1</sup>

The events that preceded the lodging of the complaint to the African Commission can be traced back at least four decades.<sup>2</sup> The starting point was in 1958 when the first oil drill was sunk into Ogoniland (Nigeria).<sup>3</sup> The oil exploration was restricted to the Niger Delta, the largest wetland in the world comprising four ecological zones.<sup>4</sup> From an environmental and conservation viewpoint, sound environmental practises are essential as the Delta contains high biodiversity characteristics with many unique plant and animal species as well as diverse and delicate ecosystems.<sup>5</sup> The oil exploration in Nigeria has over the last four decades contributed to the situation that prevails in the Delta. Transnational corporations, inadequate environmental regulations, ineffective policing of legislative measures, oil exploitation and the non-implementation of environ-

<sup>1</sup> Summary of the facts in Communication 155/96, *The Social and Economic Rights Action Centre and another v Nigeria* (SERAC case), Fifteenth Annual Activity Report; this report is available at <<http://www.achpr.org>> (accessed 28 February 2003); as well as the original complaint lodged to the African Commission by both SERAC and CESR.

<sup>2</sup> As above.

<sup>3</sup> Indicators are legislation adopted in order to regulate the oil exploration in Nigeria. Examples of this include the Oil Pipelines Act (31 of 1956), the Oil in Navigable Waters Act (34 of 1968), the Petroleum Act (51 of 1968), the Petroleum (Drilling and Production) Regulations (1969) and the Associated Gas (Reinjection) Act (1979).

<sup>4</sup> Coastal barrier islands, mangroves, fresh water swamp forests and lowland rainforests.

<sup>5</sup> Also see Human Rights Watch *The price of oil: Corporate responsibility and human rights violations in Nigeria's oil producing communities* available on the internet at <<http://www.hrw.org/reports/1999/nigeria>> (accessed 28 February 2003).

mentally sound management practices, greed and corruption on the part of government officials finally culminated in the 'SERAC decision'.

The complexity of the communication cannot be overemphasised as it extends beyond the violation of socio-economic rights. Events leading up to this communication severely impacted on both civil and political<sup>6</sup> and socio-economic rights.<sup>7</sup> However, in as far as socio-economic rights are concerned, it is indeed a landmark decision. This communication was the first time, since the inception of the African Commission in 1987, that the African Commission proclaimed a meaning to article 24 of the African Charter on Human and Peoples' Rights (African Charter or Charter), which stipulates that '[a]ll people shall have the right to a general satisfactory environment favourable to their development'. This decision thus established jurisprudence on the content of article 24, which was uncontested in the negotiation of the African Charter.<sup>8</sup> The mere adoption of article 24 without thorough consideration of the possible impact of a complaint based on this article is indicative of the failure of the negotiators to foresee the complexity of the inclusion of the right to a satisfactory environment in an international human rights instrument. Not only was the African human rights system the first regional system to

<sup>6</sup> Although not specifically claimed for, the Nigerian government violated both civil and political as well as socio-economic rights due to the actions of the River State Internal Task Force, government's inaction to stop the ongoing human rights violations in Ogoniland and government's direct interest in the oil venture. Civil and political human rights violations can be ascribed to the River State Internal Task force regularly burning houses, terrorising and killing animals of local communities. The Task Force also participated in waste operations coupled with psychological tactics of displacement. Security forces succeeded in displacing 80 000 people in 1993 during one month of looting and destroying villages of local communities (as per original communications submitted to the African Commission). Going beyond the wording of the communication and considering the unlawful detention and execution of Ken Saro Wiwa (an Ogoni environmental activist) in 1995, it becomes evident that the Ogoni crisis extended beyond violations of socio-economic rights.

<sup>7</sup> The environmentally unsound oil exploration resulted in a severe dilapidation of the Niger Delta environment. This led to grave violations of peoples' rights to a generally satisfactory environment and their right to health as guaranteed by the African Charter. The Ogoni people are primarily farmers and fisher folk. The irresponsible oil operations have contaminated the natural environment through gas flares, oil spillages and the dumping of toxic waste in unlined pits. This has in turn led to the eradication of aquatic life, an essential life source of the Ogoni people. In addition, the soil has been rendered virtually unusable by severe pollution. Not only have the Delta people been deprived of essential natural resources, but grave health problems have been experienced by the Ogoni as a direct consequence of the oil operations and environmental degradation. These problems include gastrointestinal problems, skin diseases, cancers and respiratory ailments.

<sup>8</sup> See the Report of the Secretary-General on the Draft African Charter which was presented at the 37th ordinary session of the OAU Council of Ministers, held in Nairobi, Kenya on 15–21 June 1981, reprinted in C Heyns (ed) *Human rights law in Africa 1999* (2002) 92.

recognise the right to a satisfactory environment but it was also the first system to pronounce on the meaning and content of the right.

The discussion that follows will firstly set out the procedure for lodging a complaint within the individual complaints mechanism of the African Commission. It will specifically relate to socio-economic rights and the approach followed in the *SERAC* communication. Secondly, the definition and content of article 24, on the right to a satisfactory environment, is analysed briefly, followed by a discussion pertaining to the merits of the *SERAC* case in an environmental context. Lastly, this discussion focuses on the recommendations made by the African Commission as well as on ways to achieve actual implementation. The importance of discussing the recommendations in detail is directly linked to the fact that the recommendations have a strong socio-economic backbone and appeal to the government of Nigeria to do more than merely realise socio-economic rights progressively within their available resources.

## 2 Litigating socio-economic rights within the individual complaints mechanism

A critical discussion on the merits of the *SERAC* case should be preceded by a brief clarification as to the functioning of the individual complaints procedure in the African regional human rights system. The focus here is specifically on how the communication was brought to and found admissible by the African Commission. The African Charter, forming the normative framework of the African human rights system, was adopted by the Assembly of Heads of State and Government of the Organisation of African Unity (OAU) on 27 June 1981 and came into force on 21 October 1986.<sup>9</sup> The African Charter not only guarantees civil and political rights but also economic, social and cultural rights. This is viewed as one of the characteristics that distinguish the African Charter from the founding treaties of the European and Inter-American regional human rights systems.<sup>10</sup>

In the past, economic, social and cultural rights were often viewed as being different in nature from civil and political rights. This was used as justification for the adoption of separate international instruments for

<sup>9</sup> All 53 AU member states have ratified the African Charter. Nigeria ratified the Charter on 22 July 1983.

<sup>10</sup> T Buergethal *International human rights in a nutshell* (1995) 229. Other distinguishing characteristics include the fact that the Charter sets forth not only rights but also duties, it addresses individual as well as peoples' rights and through 'claw-back clauses' it allows states to limit the extent of proclaimed rights.

these categories of rights.<sup>11</sup> The African Commission not only challenged this assumption but in deciding the *SERAC* communication, which primarily dealt with socio-economic rights, it reaffirmed the justiciability of socio and economic rights.<sup>12</sup>

In accordance with article 30 of the African Charter, an African Commission was established with a mandate to promote and protect human and peoples' rights.<sup>13</sup> In terms of the African Commission's protective mandate it can receive inter-state communications as well as 'other communications'.<sup>14</sup> The African Charter is not clear as to the meaning of 'other communications', but the African Commission developed its Rules of Procedure in such a way as to enable it from its third session (in 1988) to accept communications from individuals alleging human rights violations by a state party.<sup>15</sup> Communications from individuals are considered if a simple majority of the commissioners so decide.<sup>16</sup> Before considering an individual communication on its merits, certain admissibility criteria must be met, as set out in article 56 of the African Charter. Although seven conditions are specified in this article, it is sub-article (5) that is usually scrutinised by the African Commission.<sup>17</sup> This provision states that communications will only be considered if they 'are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged'. The purpose of the exhaustion of local remedies requirement is three-fold: (a) to avoid contradictory judgments of law at the national and international levels; (b) to afford governments an opportunity to remedy human rights violations domestically before they are held accountable to an international tribunal; and (c) to ensure that the African Commission does not become a tribunal of first instance.<sup>18</sup>

<sup>11</sup> Economic, social and cultural rights were described as rights of which the full realisation was dependent on the available resources of a state and which could only be realised progressively. Art 2(1) of the International Covenant on Economic, Social and Cultural Rights of 1966 is a case in point. Civil and political rights were (and still are) considered as absolute and immediate.

<sup>12</sup> A Eide 'Economic, social and cultural rights as human rights' in A Eide, C Krause and A Rosas (eds) *Economic, social and cultural rights — A textbook* (1995) 22.

<sup>13</sup> Art 45 of the Charter states the mandate of the African Commission.

<sup>14</sup> Arts 47 & 55 respectively.

<sup>15</sup> R Murray 'Decisions by the African Commission on individual communications under the African Charter on Human and Peoples' Rights' (1997) 46 *International and Comparative Law Quarterly* 413.

<sup>16</sup> Art 55(2) African Charter.

<sup>17</sup> In para 73 of Communications 137/94, 139/94, 154/96 & 161/97, *International PEN and others (on behalf of Ken Saro-Wiwa) v Nigeria*, Twelfth Annual Activity Report, the African Commission stated in reference to art 56(5): 'This is just one of the seven conditions specified by article 56, but it is that which usually requires the most attention.'

<sup>18</sup> See paras 37–39 of the *SERAC* case (n 1 above).

In the *SERAC* communication the African Commission held that notwithstanding the fact that Nigeria incorporated the African Charter into its domestic legal system (thus enabling the complainants to invoke all Charter rights in domestic courts), no adequate domestic remedies existed. This situation was created through the enactment of various decrees by the military government of Nigeria ousting the jurisdiction of domestic courts in cases alleging human rights violations committed by the government.<sup>19</sup>

Upon finding a communication admissible, the African Commission then moves on to a substantive consideration of the alleged human rights violations. Where the African Commission finds a state party in violation of its Charter obligations, it lists the articles violated and makes recommendations to assist the state party in rectifying the situation. The Assembly of Heads of State and Government (AHSG) of the AU (formerly the OAU) must approve the observations and recommendations made by the African Commission.<sup>20</sup> In practice the AHSG has always, without amendment, approved the Annual Activity Reports of the African Commission, with the African Commission's recommendations annexed. However, due to an overly strict interpretation of article 59 of the African Charter, annual activity reports initially only contained brief statements as to the number of communications received and considered without any reference to the African Commission's findings or recommendations.<sup>21</sup> The African Commission eventually adopted a more transparent approach and since its Seventh Annual Activity Report (in 1994), it publishes its observations on admissibility, merits and recommendations.

Nevertheless, it is only recently, since its Thirteenth Annual Activity Report (1999–2000), that the African Commission started to elaborate not only in its legal reasoning in finding violations of the African Charter but also in the formulation of recommendations. This becomes apparent if the *SERAC* communication is compared to previous communications that dealt with socio-economic rights.<sup>22</sup> In the past the African

<sup>19</sup> Para 41 of Communication 155/96.

<sup>20</sup> Rule 120 of the revised Rules of Procedure of the African Commission as adopted at its 18th session in October 1995.

<sup>21</sup> Art 59 stipulates that 'All measures taken within the provisions of the present Chapter shall remain confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide'.

<sup>22</sup> The majority of communications previously considered by the African Commission dealt with civil and political rights. Before the *SERAC* decision the only economic, social and cultural rights addressed by the African Commission were the right to property (art 14); the right to work (art 15); the right to health (art 16); the right to education (art 17); and the right to protection of the family and vulnerable groups (art 18). The *SERAC* decision therefore greatly contributed to the jurisprudence of the African regional human rights system by finding, for the first time, a violation of arts 21 and 24. Art 21 guarantees the right of all peoples to freely dispose of their wealth and natural resources and art 24 provides for the right of all peoples to a general satisfactory environment favourable to their development.

Commission merely stated the alleged facts and the corresponding article of the African Charter without any legal explanation for its findings.<sup>23</sup> In this sense the *SERAC* communication is progressive, in that it predominantly focuses on the violation of socio-economic rights and includes detailed discussions as to the content of the various rights followed by specific and comprehensive recommendations. In the following sections the legal substance of the *SERAC* communication is analysed in more detail followed by a discussion of the recommendations given by the African Commission with reference to ways of assuring implementation by the government of Nigeria.

### 3 The right to a satisfactory environment in the African human rights system

It is essential to briefly analyse the right to a satisfactory or healthy environment before considering the Commission's findings in this regard in the *SERAC* communication.<sup>24</sup> Through the adoption of the African Charter, the right to a satisfactory environment was finally recognised and included in an internationally binding human rights instrument.<sup>25</sup> Prior to this inclusion the right to a satisfactory environment or the relationship between this right and the natural environment found recognition only in non-binding international 'soft law'.<sup>26</sup> Elements of the core meaning of this right can, however, be

<sup>23</sup> In Communications 25/98, 47/90, 56/91 & 100/93, *Free Legal Assistance Group and others v Zaire*, Ninth Annual Activity Report, the African Commission held Zaire in violation of art 17 (the right to education). However, instead of outlining the content of the right to education, never previously considered by the African Commission, it simply stated that 'the closures of universities and secondary schools as described in Communication 100/93 constitutes a violation of article 17' (para 48). For a definite improvement in the jurisprudence of the African Commission, see Communications 54/91, 61/91, 98/93, 164/97 & 210/98, *Malawi African Association and others v Mauritania*, Thirteenth Annual Activity Report. In this decision the African Commission not only made the most concrete and specific recommendations ever, but it also discussed in detail certain socio-economic rights (arts 14, 16(1) & 18(1)) found to be violated by the government of Mauritania.

<sup>24</sup> Note that the right to a satisfactory environment and the right to a healthy environment should be interpreted as the same for the purpose of this discussion.

<sup>25</sup> The adoption of the Charter (1981) with the inclusion of this right in art 24.

<sup>26</sup> Examples of this would include a resolution passed by the United Nations General Assembly recognising the relationship between the quality of the environment and the enjoyment of human rights (UNGA Res 2398 XXII of 1968), the Declaration of the United Nations on the Human Environment (1972) which recognised the fundamental right to freedom, equality and adequate conditions of life *in an environment of a quality* that permits of dignity and well-being.

traced back at a regional level to the African Convention on the Conservation of Nature and Natural Resources of 1968.<sup>27</sup>

The right as phrased in the African Charter is vague and ambiguous. No clear indication is given by the African Charter as to what the terms 'satisfactory' and 'environment' entail. This allowed for different interpretations as to the exact meaning of this right by human rights scholars and environmentalists. This lack of clarity has initiated both positive and negative aspects of the interpretation. In a positive sense, the vagueness in itself can allow for a wider and more accommodating interpretation of the right to a satisfactory environment. On the other hand, the negative impact also tolerates a narrower and more restricted sense of interpretation, not giving this right the full recognition it deserves. A decision on the *SERAC* communication was expected to give jurists a better understanding as to the core content of this right. As will be discussed below, this was not the case.

Since its inclusion in the African Charter academics endeavoured to clarify the nature and content of the right to a satisfactory environment. Not only has the content of this right been contested, but to some extent its very existence.<sup>28</sup> Although the exact content and demarcation of this right was not determined in the *SERAC* decision, the African Commission did reaffirm its existence and established a certain amount of jurisprudence on the issue.

Traditionally, the right to a satisfactory environment and environmental rights have been categorised as 'third generation rights' or solidarity rights.<sup>29</sup> The nature of this right is relatively uncontested in that it is a right to which individuals, communities and the public at large can be beneficiaries of. This right also possesses the characteristics

<sup>27</sup> This treaty is reprinted in GJ Naldi (ed) *Documents of the Organization of African Unity* (1992) 65. These elements are elements such as conservation, development, customary rights and the notion of sustainable development. For a detailed discussion on this Convention and its revision process, see M Van der Linde 'A review of the African Convention on Nature and Natural Resources' (2002) 2 *African Human Rights Law Journal* 33.

<sup>28</sup> The debate between the existence of the right to a healthy environment in the context of the human rights-based approach to environmental protection brings to the foreground issues such as the protection of the environment as an environmental law concern and the issue of anthropocentrism. Anthropocentrism denotes the idea that the environment possesses an intrinsic value in its own right. This would not always be consistent with human rights ideologies. For a discussion on the issue of anthropocentrism see M Anderson 'Human rights approaches to environmental protection: An overview' in A Boyle & M Anderson (eds) *Human rights approaches to environmental protection* (1996) 15. Also see C Stone 'Should trees have standing — Towards legal rights for natural objects' (1972) *Southern Californian Law Review* 450.

<sup>29</sup> See A Rosas 'So-called rights of the third generation' in Eide *et al* (n 12 above) 243; J Glazewski *Environmental law in South Africa* (2000) 17; M Kidd *Environmental law: A South African perspective* (1997) 34.



of civil and political rights as well as socio-economic rights in that government must refrain from action or inaction that would impair an individual's enjoyment of the right to a satisfactory environment and refrain from practices that might be harmful to the environment. Government is further under the obligation to progressively realise and fulfil the right to a satisfactory environment. This would include conservation, the environmentally sound management of the environment as well as an attempt at improving the natural environment.<sup>30</sup>

The scope and effective application of the human rights approach to environmental protection relies on a two-fold process. The first would be procedural rights such as the right to information, the right to be informed of environmental risks, the right to legal address when this right has been violated, the facilitation of public environmental litigation, the right to effective redress in the event of environmental damage and the right to participate in environmental decision making. The procedural rights will play an integral role in ascertaining whether the right to a generally satisfactory environment has been violated. Procedural rights will furthermore assist in ascertaining the content of this right in a given situation such as the *SERAC* communication. The substantive rights denote the central part and meaning of this right. As indicated above, there is as yet no clear definition of this right nor is the content of this right clearly demarcated. To illustrate this point, consider the following observations on the right to a healthy environment:

. . . [W]hat States seek to secure in acknowledging a human right to the environment is not the right to an 'ideal' environment, which is probably difficult both to define and achieve. . .<sup>31</sup>

The existing concept of human rights protection should be extended in order to include the right to a healthy and decent environment, to include freedom from pollution and corresponding rights to pure air and water.<sup>32</sup>

In addition to the above, a number of African constitutions have devoted provisions to the environment or the right to a healthy environment.<sup>33</sup> The various viewpoints as expounded in these constitutions do not give a clear demarcation of the right to a healthy environment. What becomes evident is that in the determination of whether this right has

<sup>30</sup> E Ankumah *The African Commission on Human and Peoples' Rights: Practices and procedures* (1996) 168.

<sup>31</sup> T Maluwa *International law in post-colonial Africa* (1999) 311.

<sup>32</sup> R Cassin quoted by C Peter 'Taking the environment seriously: The African Charter on Human and Peoples' Rights and the environment' (1993) 3 *Review of the African Commission on Human and Peoples' Rights* 39.

<sup>33</sup> These constitutions include those of Benin (27), Burkina Faso (14 & 29), Congo (46-48), Ethiopia (44), Ghana (chapter 21), Lesotho (art 36), Madagascar (art 39), Malawi (13(4)), Mozambique (art 72), Niger (art 27), South Africa (art 24), and Uganda (arts 13, 21-23 & 27).

been violated a contextual approach is probably more suitable. In ascertaining the content of this right one must rely on both procedural and substantive rights.

The African Charter also links the right to a satisfactory environment to the issue of development through article 24. According to Maluwa, the relationship between the environment and development is a controversial relationship which is both contributory and remedial. In the contributory sense, environmental degradation is often caused by aspects relating to development and industrialisation. On the other hand, measures employed to remedy environmental degradation are often related to development processes.<sup>34</sup> The right as provided for by the African Charter potentially runs the risk of being negatively balanced by the right to development. In considering the African Commission's previous restrictive interpretations, this could have had as consequence that the right to a satisfactory environment in the *SERAC* communication could only be invoked in the event that it will not infringe on the requirements of social and economic developments.<sup>35</sup>

Regardless of the lack of clarity on the substance of this right, the inclusion of the right to a satisfactory environment is a progressive step and potentially a powerful mechanism in addressing environmental concerns in Africa. The fact that the African Commission has found the Nigerian government in violation of article 24 of the African Charter highlights the justiciability of this right. What remains unclear is whether a claim on the basis of a violation of the right to a satisfactory environment will succeed in isolation from the right to health or any other right contained in the African Charter.<sup>36</sup>

#### 4 Considering the merits of the *SERAC* communication

In evaluating the *SERAC* communication, it is crucial to consider the African Commission's previous actions in respect of the right to a satisfactory environment. Under the African Charter, states are required to report to the African Commission every two years on steps they have taken to give effect to the rights and freedoms contained in the African Charter.<sup>37</sup> According to the African Commission, states must report on

<sup>34</sup> For a full discussion on the linkage between the environment and development, see ch 12 'Environment and development in Africa the 1990s: Some legal issues' in T Maluwa *International law in post-colonial Africa* (1999) 307.

<sup>35</sup> Anderson (n 28 above).

<sup>36</sup> Also consider the *Lopez-Ostra* case European Court of Human Rights *Lopez-Ostra v Spain*, Series A, No 303-C (1995) 20 *European Human Rights Reports* 277.

<sup>37</sup> Art 62 African Charter.

the environment in order to ensure that the environment is protected and to ensure the establishment of an effective waste monitoring system in order to prevent pollution. In addition to the above countries are also to report on related matters such as the disposal of natural resources, adequate standards of living and the right to physical and mental health.<sup>38</sup>

In communications 25/98, 47/90, 56/91 and 100/93, *Free Legal Assistance Group and others v Zaire*, the Commission had an opportunity to consider article 24 of the Charter. In this instance the Commission could possibly have linked article 24 with article 16 (health) in their consideration of the Zairian government's duty to provide basic services such as clean drinking water. Although the Commission did find a violation of article 16, it unfortunately did not pronounce on article 24 of the Charter.

In March 1996 the African Commission received the *SERAC* communication against Nigeria alleging amongst others a violation of the right to a satisfactory environment. At its 20th ordinary session held in Mauritius in October 1996, the African Commission declared the communication admissible. However, the Commission did not take a decision on the merits of the communication until its 30th ordinary session held in The Gambia in October 2001.<sup>39</sup>

When the African Commission reached its decision, it was undisputable that this right does provide a great scope of protection for human beings, the environment and the relationship shared between them. It was also a breakthrough in the sense that jurisprudence was established by a regional complaints mechanism firmly pronouncing a violation of this contentious right and making remedial recommendations pertaining to the situation prevalent in the Niger Delta. The communication alleged that in respect of the environment and the right to health the Nigerian government failed to fulfil its minimum obligations under the African Charter as it participated directly in the contamination of the environment through air, water and soil pollution which in turn also adversely affected the health of the Ogoni people. The government failed to protect the local community against the harm caused by the oil consortium and failed to conduct impact and risk assessment studies on the potential and actual risk both to the environment and local communities.<sup>40</sup>

<sup>38</sup> See the Guidelines for National Periodic Reports under the African Charter adopted by the African Commission at its 5th ordinary session in April 1989, reprinted in C Heyns (ed) *Human rights law in Africa 1999* (2002) 176.

<sup>39</sup> The five year lapse would have been plausible had the Commission's consideration of the substance of article 24 in particular been remarkable and more substantial. The tendency of deferral is also questionable.

<sup>40</sup> Para 50 of the *SERAC* decision (n 1 above).

Before considering the merits of the communication, the African Commission emphasised at great length the obligation of governments to ensure that rights contained in the African Charter are respected, protected, promoted and fulfilled.<sup>41</sup> It also effectively reiterated the strong linkage between the environment and other rights in the African Charter, in this case the right to health.<sup>42</sup> Although this reaffirms the notion that human rights are indivisible, it raises earlier concerns as to whether or not a claim pertaining to the right to a satisfactory environment will succeed in isolation.

The African Commission briefly considered the right to a satisfactory environment as a right that requires a government to:

- take reasonable measures to prevent pollution and ecological degradation;<sup>43</sup>
- promote conservation and ensure ecological sustainable development and the use of natural resources;<sup>44</sup>
- permit independent scientific monitoring of threatened environments;<sup>45</sup>
- undertake environmental and social impact assessments prior to industrial development;<sup>46</sup>
- provide access to information to communities involved;<sup>47</sup>
- grant those affected an opportunity to be heard and participate in the development process.<sup>48</sup>

These obligations as spelled out by the African Commission clearly contain both the procedural aspects such as a right to access environmental information or information relating to a possible adverse impact on the natural environment and the opportunity to have one's case heard in the event that one's environmental rights are impaired or runs the risk of being impaired. It also contains substantive aspects such as government's duty to prevent pollution and ecological degradation as well as the obligation to promote conservation and sustainable development. In addition these obligations also reflect the values contained in international environmental principles such as the *preventative principle* and the *duty of care principle*.<sup>49</sup> These obligations,

<sup>41</sup> As above, para 44.

<sup>42</sup> As above, para 51. Note that this discussion will predominantly focus on the right to a satisfactory environment and not on other rights discussed in the decision, ie right to health, right to housing and the right to property.

<sup>43</sup> As above, para 52.

<sup>44</sup> As above.

<sup>45</sup> As above, para 53.

<sup>46</sup> As above.

<sup>47</sup> As above.

<sup>48</sup> As above.

<sup>49</sup> Kidd (n 29 above) 8.

additionally, clearly emphasise the socio-economic nature of these rights, which in the context can severely impact on the financial resources of the Nigerian government.

The African Commission acknowledged the fact that this communication would be examined in accordance with articles 60 and 61 of the African Charter which allows the African Commission to consider other relevant international and regional human rights principles in their interpretation of the provisions of the African Charter. In respect of the right to a satisfactory environment it is not clear which international instruments were considered when the African Commission interpreted the right to a satisfactory environment. It would have been an invaluable decision if the African Commission had actually explained how it arrived at government's obligations in terms of article 24 of the Charter. Contrary to Shelton<sup>50</sup> it becomes uncertain whether the African Commission considered the wealth of information on international environmental law and human rights jurisprudence available on the subject matter.<sup>51</sup> What is apparent is that the African Commission did not consider contemporary environmental developments on the continent such as the revised African Convention on the Conservation of Nature and Natural resources which is yet to be adopted.<sup>52</sup> What is also somewhat disappointing in the analysis of article 24 is that the African Commission did not pronounce itself on the core content and minimum obligation of article 24, with due regard to a contextual approach, as was the case in its discussion on the right to housing.<sup>53</sup>

Nevertheless, the African Commission boldly ventured out to consider this contentious right. In doing this, the African Commission gave clarity on the fact that although it can be balanced against development, the right to a satisfactory environment will not necessarily take a back seat if it impacts negatively on economic development.

<sup>50</sup> See D Shelton 'Decision regarding communication 155/96 (Social and Economic Rights Action Center/ Center for Economic and Social Rights v Nigeria)' (2002) 96 *American Journal of International Law* 941. Shelton is of view that the Commission did in fact consider the wealth of information available on the subject matter.

<sup>51</sup> These include but are not limited to the Stockholm Declaration on the Human Environment (1972); the Charter of Economic Rights and Duties of State (UNGA Res 3281 (XXIX) 1974); the Declaration on the Right to Development (UNGA Res 41/128 1986); the UN Convention on the Rights of the Child (1989); the Rio Declaration on Environment and Development (1992); Agenda 21 (1992); and the Draft Principles on Human Rights and the Environment (adopted by an experts group at the United Nations in Geneva) 1994. In addition to the above there also exists a wealth of academic scholarly on the topic.

<sup>52</sup> This revised convention could have aided the African Commission in their analysis of the substantive right. For a detailed discussion of this convention see Van der Linde (n 27 above).

<sup>53</sup> Paras 60 & 61 of the *SERAC* decision (n 1 above).

## 5 Implementing the recommendations of the African Commission in Nigeria

In utilising the individual complaints procedure as set out in the African Charter, the complainant seeks redress from a state party either by asking for a specific remedy such as compensation or more generally seeking a change in offending legislation to prevent similar violations in future. This relief is usually given in the form of recommendations by the African Commission to be implemented by the state party. The African Commission is not a judicial body and its recommendations therefore do not bind a state, as would the judgments of a court.<sup>54</sup> The African Commission has, however, been labelled as a quasi-judicial body, interpreting its functions to consider inter-state and 'other communications' as judicial functions, especially in the absence of an African Court on Human and Peoples' Rights (African Court).<sup>55</sup> Neither the African Charter nor the African Commission's Rules of Procedure sets out any mechanism to ensure follow-up to the recommendations given by the African Commission. There are also no legally prescribed consequences for a state's non-compliance with the African Commission's

<sup>54</sup> It has nevertheless been argued that it is not important whether such 'recommendations' bind the state parties and thus limit their sovereignty and power but 'what is relevant is the moral and legal authority which governments and other members of the international community attach to published reports and conclusions of the organs concerned'. M Tardu 'The protocol to the United Nations Covenant on Civil and Political Rights and the Inter-American system: A study of coexisting petition procedures' (1976) 70 (4) *American Journal of International Law* 784, quoted in R Murray *The African Commission on Human and Peoples' Rights and international law* (2000) 53–54.

<sup>55</sup> According to Umozurike, the African Commission in most communications acts quasi-judicially using the rules of natural justice such as *audi alteram partem* if the state is co-operative. In his view the recommendations may not have the judicial flavour of a court of human rights but they approximate to those of the former European Commission and the Inter-American Commission; UO Umozurike *The African Charter on Human and Peoples' Rights* (1997) 80. The 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 (1) Rev.2) was adopted, with the signature of 30 states, in June 1998. The Protocol requires 15 ratifications to come into force and has up to date only been ratified by six states. One of the reasons for the creation of an African Court is the fact that a Court can deliver judicially binding judgments. The legal value of the Court's decisions combined with the fact that the Protocol provides for a follow-up mechanism to be overseen by the AU Council of Ministers is viewed as important in the strive towards ensuring state compliance within the African regional human rights system. The African Commission will, however, co-exist with the Court and the prospect of a Court should therefore not diminish the importance of finding ways of achieving state compliance to its recommendations, especially where they are as comprehensive as in the SERAC communication.

recommendations.<sup>56</sup> Therefore, in the absence of an implementation mechanism, this section explores ways of achieving compliance by the government of Nigeria to recommendations of the African Commission in the communication at hand.

As a starting point to this discussion, a brief overview of the African Commission's progress in awarding remedies is given. Initially the African Commission did not award any relief to complainants and confined its powers in individual communications to merely finding a violation of the African Charter without making any remedial recommendations.<sup>57</sup> In other communications, such as those against the former Zaire, where evidence indicated the existence of a series of serious or massive violations of human and peoples' rights, the African Commission initially referred communications to the AHSG.<sup>58</sup> This practice stopped after it became apparent that the AHSG never followed up on these communications as stipulated in article 58 of the African Charter.<sup>59</sup> Eventually the African Commission developed a practice whereby it started to formulate recommendations. Nevertheless, most of these recommendations simply 'urge', 'request' or 'appeal' to governments to 'draw the necessary legal conclusions' or 'take the necessary steps' to comply with its obligations under the African Charter.<sup>60</sup> Some recommendations, on the other hand, were more specific and even recommended the payment of damages by the

<sup>56</sup> It therefore comes as no surprise that non-compliance is the rule rather than the exception and the African Commission in 1997 officially noted this. At its 22nd ordinary session the Secretariat stated that non-compliance by state parties to the recommendations of the African Commission constituted one of the major factors of the erosion of the African Commission's credibility. This discussion resulted in the drafting of a 'Draft Resolution on the Implementation of the Recommendations of the African Commission on Human and Peoples' Rights' (DOC/OS/50b (XXIV)). This resolution was never subsequently adopted and could be seen as living proof of the state parties' reluctance to add 'teeth' to the regional human rights system.

<sup>57</sup> See joined Communication 64/92, 68/92 & 78/92, *Krishna Achutan and another (on behalf of Orton and Vera Chirwa) v Malawi*, Eighth Annual Activity Report 1994-95, where the African Commission held that there has been a violation of arts 4, 5, 6 & 7(1)(a) (c) & (d) of the African Charter. The African Commission did not, however, specify how the situation should be rectified. This inaction on the part of the African Commission left complainants powerless especially since the African Commission did acknowledge that 'although the present government of Malawi did not commit the human rights abuses complained of, it is responsible for the reparation of these abuses', but did not indicate what actions should be taken by the new government. See para 14 of the communication.

<sup>58</sup> This procedure was in line with the African Commission's mandate as set forth in art 58 of the African Charter. See Communication 47/90, *Lawyers Committee for Human Rights v Zaire*, Seventh Annual Activity Report.

<sup>59</sup> According to comments made by African Commissioner Dankwa during a lecture at the University of Pretoria, 14 May 2002.

<sup>60</sup> See eg Communications 140/94, 141/94 & 145/95, *Constitutional Rights Project and others v Nigeria*, Thirteenth Annual Activity Report and Communications 147/95 & 149/96 *Sir Dawda K Jawara v The Gambia*, Thirteenth Annual Activity Report.

government<sup>61</sup> or ordered the release of journalists unlawfully arrested and detained.<sup>62</sup>

In 2000, the African Commission set a new precedent by making the most concrete and specific recommendations it has ever made.<sup>63</sup> It is too soon to determine whether this trend will be followed in all future communications, but the detailed recommendations set forth in the *SERAC* communication could be a positive indication. In the absence of an implementation mechanism in the African regional human rights system, the formulation of detailed recommendations is crucial in ensuring firstly state compliance to the provisions of the African Charter and secondly that the complainants receive the relief sought from the African Commission.

In the *SERAC* communication the African Commission found the Federal Republic of Nigeria to be in violation of articles 2, 4, 14, 16, 18(1), 21 and 24 of the African Charter.<sup>64</sup> The African Commission appealed to the government to ensure protection of the environment, health and livelihood of the people of Ogoniland and set forth five specific recommendations to achieve these goals.<sup>65</sup> In addition, the African Commission urged the government to keep it informed about the outcome of the work of (1) the Federal Ministry of Environment which was established to address environmental and environment related issues prevalent in Nigeria; (2) the Niger Delta

<sup>61</sup> Communication 59/91, *Embga Mekongo Louis v Cameroon*, Fifth Annual Activity Report.

<sup>62</sup> Communication 206/97, *Centre for Free Speech v Nigeria*, Thirteenth Annual Activity Report and Communication 102/93 *Constitutional Rights Project and another v Nigeria*, Twelfth Annual Activity Report.

<sup>63</sup> Communications 54/91, 61/91, 98/93, 164/97 & 210/98 *Malawi African Association and others v Mauritania*, Thirteenth Annual Activity Report.

<sup>64</sup> Since arts 14, 16, 18(1), 21 & 24 all address economic, social and cultural rights it makes the *SERAC/CESR* communication the first to be decided predominantly on rights other than civil and political. It is also the first communication finding violations of the right of all peoples to freely dispose of their wealth and natural resources (art 21) and the right of all peoples to a general satisfactory environment favourable to their development (art 24).

<sup>65</sup> The African Commission recommended (1) the stopping of all attacks on Ogoni communities and leaders by the Rivers State Internal Security Task Force and permitting citizens and independent investigators free access to the territory; (2) conducting an investigation into the human rights violations described above and prosecuting officials of the security forces, NNPC and relevant agencies involved in human rights violations; (3) ensuring adequate compensation to victims of the human rights violations, including relief and resettlement assistance to victims of government sponsored raids, and undertaking a comprehensive cleanup of lands and rivers damaged by oil operations; (4) ensuring that appropriate environmental and social impact assessments are prepared for any further oil development and that the safe operation of any further oil development is guaranteed through effective and independent oversight bodies for the petroleum industry; and (5) providing information on health and environmental risks and meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations.



Development Commission (NDDC) which was constituted by law to address the environmental and other social related problems in the Niger Delta and other oil producing areas in Nigeria; and (3) the Judicial Commission of Inquiry that was inaugurated to investigate issues of human rights violations.<sup>66</sup>

In specifically asking the government to keep it informed about the outcome of the work of the above mentioned institutions the African Commission is demonstrating an interest in the implementation of its recommendations.<sup>67</sup> Since little else is done from the African Commission's side to ensure follow-up, the task has in recent years fallen upon the shoulders of those non-governmental organisations (NGOs) that either filed the communication or litigated it before the African Commission. Some are truly successful in achieving state compliance, case in point being the *Modise* communication.<sup>68</sup> Others are fighting an uphill battle in the absence of support from the Secretariat of the African Commission or other organs of the AU.<sup>69</sup>

<sup>66</sup> The government indicated that these three institutions were part of remedial measures taken by the new civilian administration in respect of the grave violations reflected in the communications. This was done in a *note verbale* submitted by the government at the 28th ordinary session of the African Commission. See para 30 of the *SERAC* communication.

<sup>67</sup> A similar sentiment has been expressed by the African Commission in Communication 211/98, *Legal Resource Foundation v Zambia*, Fourteenth Annual Activity Report, where the African Commission requested the government to report back on measures taken to comply, when it submits its next country report in terms of art 62. For a critical opinion as to the successful utilising of the state reporting system in establishing follow-up, see J Harrington 'Introduction' to the *Compilation of decisions on communications of the African Commission on Human and Peoples' Rights* (2001) 6. Some attempt at follow-up to decisions has also been made during the presentation of state reports to the African Commission. African commissioners, in examining state reports during public sessions, have previously raised questions as to the implementation of recommendations made in communications against a state party.

<sup>68</sup> In Communication 97/93, *Modise v Botswana*, Fourteenth Annual Activity Report, the African Commission urged the government of Botswana to take appropriate measures to recognise Mr Modise as its citizen by descent and also to compensate him adequately for the violation of his rights as set out in the communication. The Attorney-General of Botswana agreed during the African Commission's 31st ordinary session to implement the recommendations upon receiving a written request from the African Commission in this regard together with specifications on implementation. The NGO Interights took it upon them to pursue the implementation of these recommendations, especially due to the willingness to cooperate displayed by the government. After officially meeting with high level governmental officials in Botswana in the months following the 31st session an agreement was reached whereby both Mr Modise and his children will be awarded citizenship together with monetary compensation. Information supplied by Chidi Odinkalu, lawyer with Interights, who represented Mr Modise and negotiated with the Government of Botswana.

<sup>69</sup> In the *Mauritania* case (n 23 above), NGOs have been lobbying, to no avail, both the African Commission and the government of Mauritania to achieve compliance with the African Commission's detailed recommendations. This communication has been highly praised for its elaborate remedies but due to the lack of political will on the part

SERAC is pursuing various strategies to ensure implementation of the recommendations set out above.<sup>70</sup> Firstly, in a bid to create widespread public awareness, SERAC disseminated copies of the decision together with a cover letter explaining the importance of the communication to various stakeholders including the President of Nigeria, relevant Nigerian government departments, the judiciary, media houses and multi-national oil companies. Secondly, the director of SERAC met with the leader of the Movement for the Survival of the Ogoni Peoples (MOSOP) to discuss strategies for implementation of those recommendations directly affecting the Ogoni. Thirdly, SERAC established contact with the Federal Ministry of Environment, the NDDC and the Judicial Commission of Inquiry, that were put in place by the government as part of its remedial measures. In this regard SERAC met with both the Federal Ministry of Environment and the chairman of the NDDC.<sup>71</sup> Fourthly, SERAC is monitoring the functioning of the Committee set up under the Federal Ministry of Petroleum Resources.<sup>72</sup> This Committee was established with the mandate to monitor oil exploration activities in the Niger Delta and to ensure that oil companies operate within the rules governing oil exploration.<sup>73</sup> Lastly, SERAC is campaigning for the drafting of new legislation to regulate oil exploration in Nigeria. Ideally this new law will combine all the existing legislation and will include a specific focus on the activities of multinational oil companies.<sup>74</sup>

From the above it is clear that SERAC is striving to achieve state compliance to the recommendations of the African Commission.

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of the Government of Mauritania none of the recommendations have been implemented up to date. The NGOs involved in this communication, during the 32nd ordinary session, formed a coalition headed by the Institute for Human Rights and Development in Africa to strengthen their efforts.

<sup>70</sup> The facts stated below in regard to the strategies pursued by SERAC were gathered during an interview held with Ndidi Bowei, senior legal counsel for SERAC, on 19 October 2002 during the 32nd ordinary session of the African Commission held in Banjul, The Gambia.

<sup>71</sup> In fulfilling its mandate, the NDDC has since July 2002 focused its resources on addressing health issues in the Niger Delta. New health centres were built and health personnel were stationed there. Only 3 000 people are reached through these efforts, a limited number if taken into account that the Niger Delta covers five states and houses a large portion of the Nigerian population. Other burning issues such as environmental clean-up exercises, food production through farming and housing problems are yet to be addressed by the NDDC.

<sup>72</sup> According to SERAC, the establishment of this Committee could be ascribed in part to the communication before the African Commission and in part due to the ongoing problems in the Niger Delta.

<sup>73</sup> The Committee was given 18 months to clean up drilling cuttings in the Niger Delta. In October 2002 it was unclear whether these operations have commenced or not.

<sup>74</sup> In March 2002 SERAC hosted a workshop for legislatures that focused specifically on sensitising them towards existing environmental problems that should be addressed through subsequent legislation.

However, on closer examination it is also apparent that they are not following up on all the recommendations set forth by the African Commission, especially those relating to prosecution of the perpetrators and the payment of compensation. The conclusion to be drawn here is that it should not be up to the NGO (that initiated the communication in the first place) alone to struggle to ensure the implementation of recommendations of the African Commission. There is a definite need within the African regional human rights system for a follow-up mechanism, that would function along the same lines as those already existing within the European and Inter-American regional human rights systems.

The European system is mentioned here, but it is not as applicable to the realities faced by Africa, as is the case with the comparisons drawn from the Inter-American system. This is due not only to socio-economic realities but also due to the fact that since the entry into force of Protocol 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Commission and Court of Human Rights were replaced with a singular permanent court. Within this system, the execution of the judgments of the European Court is the duty of the Committee of Ministers of the Council of Europe.<sup>75</sup> The upcoming African Court on Human and Peoples' Rights will function side by side with the African Commission.<sup>76</sup> This system will closely resemble that of the Inter-American system and it follows therefore that the development of a follow-up mechanism should be guided by the principles already existing in the Inter-American system.

With a view to improving and strengthening the Inter-American system, the Organisation of American States (OAS) General Assembly adopted Resolution AG/RES 1828 (XXXI-O/01) and subsequently amended its Rules of Procedure to provide for follow-up on compliance with recommendations of the IACHR. Articles 46(1) and (2) of the amended Rules of Procedure read as follows:<sup>77</sup>

- (1) Once the Inter-American Commission has published a report on a friendly settlement or on the merits in which it has made recommendations, it may adopt the follow-up measures it deems appropriate, such as requesting information from the parties and

<sup>75</sup> Art 46(2) of the European Convention on Human Rights determines that 'the final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution'.

<sup>76</sup> Art 2 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights explains the relationship between the Court and the African Commission. The monitoring of the execution of the judgments of the African Court will be the responsibility of the Council of Ministers, as is the case in the European system. In this regard see art 29 of the Protocol.

<sup>77</sup> Art 46 entered into force on 1 May 2000.

holding hearings in order to verify compliance with friendly settlement agreements and its recommendations.

- (2) The Inter-American Commission shall report on progress in complying with those agreements and recommendations as it deems appropriate.

In addition to these measures, the Inter-American Commission also developed a procedure whereby it requests information from the states concerning compliance with the recommendations issued in previous annual reports. From the 2001 Annual Report onwards, state compliance with recommendations are published in a table indicating full, partial and non-compliance. The Inter-American Commission also decided to include a copy of the responses of member states on its web page. Of recommendations made in 2000, there was partial compliance with two recommendations, and non-compliance with 16 recommendations.<sup>78</sup>

During the 32nd ordinary session of the African Commission, held in The Gambia from 17 to 22 October 2002, an appeal was made to the African Commission to devise an appropriate strategy aimed at increasing the likelihood of compliance by member states to its recommendations in individual communications.<sup>79</sup> The appeal mentioned some measures for the African Commission's consideration, most of which were closely modelled on those incorporated in the Inter-American system as discussed above. In addition it also suggested that the African Commission designate a special rapporteur on follow-up.

It will be up to NGOs such as SERAC, which have taken communications to the African Commission and received detailed recommendations, to continue lobbying the African Commission to get these or similar measures adopted.

## 6 Conclusion

In deciding the *SERAC* case as progressively as indicated above, the Commission has paved the way for increasingly filing complaints based on socio-economic rights in addition to civil and political rights. The Commission has indicated that it will not hesitate to make thorough and detailed recommendations that urge governments to oblige with their socio-economic obligations, as set out in the African Charter, beyond the boundaries of available resources and progressive realisation. These recommendations, however, will amount to nothing if measures are not put in place to ensure the establishment of a follow-up mechanism within the African regional human rights system. Without

<sup>78</sup> See <http://www.cidh.org> (accessed 28 February 2003).

<sup>79</sup> The appeal was made by the Institute for Human Rights and Development in Africa, an NGO based in The Gambia.

implementation and systematic follow-up, that should not be the sole responsibility of NGOs, the impact of cases such as the *SERAC* case will not make a difference to the human rights situation in Africa.<sup>80</sup> In the last instance implementation depends on the willingness of states to give effect to the Commission's recommendations. Political will depends on a multiplicity of factors, including the extent of democratisation in a particular country. It should also be highlighted that the case at hand is likely to have an impact on the socio-economic rights jurisprudence of the upcoming African Court on Human and Peoples' Rights.

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<sup>80</sup> Shelton phrases it differently stating that, 'If the Nigerian government acts to implement the recommendations of the Commission, the decision has the potential to have an impact on human rights law and practice well beyond Africa'. Shelton (n 50 above) 942.

## Recent publications

Malcolm D Evans and Rachel Murray (eds) *The African Charter on Human and Peoples' Rights. The system in practice, 1986–2000* Cambridge University Press (2002)  
397 pages

Wolfgang Benedek  
University of Graz, Austria

This well-written book provides substantive insights into the practice of the African regional system of human rights protection and promotion, which is still less accessible than the practice of other systems and therefore too little known. By bringing together 11 contributions from competent authors, it looks at all major aspects of the first 15 years of the African Charter on Human and Peoples' Rights, which came into force in 1986 and today has been ratified by all 53 OAU member states.

Starting from a critical analysis by Gino Naldi of the achievements of the Charter and the increasing role of the OAU in human rights, the question is put whether the decision taken in 2001 on creating an African Union may provide a new momentum. The effectiveness of the Charter depends on the well-functioning of its reporting and communication procedures, which are analysed by Malcolm Evans, Tokumbo Ige, Rachel Murray and Frans Viljoen regarding the hardly functioning reporting mechanism, the questions of admissibility as well as of evidence and fact-finding. The African Commission on Human and Peoples' Rights aims at a 'constructive dialogue', but depends on the timely submission and quality of the reports for which purpose improved guidelines have been elaborated. However, states do take the work of the Commission more seriously now, as can be seen from the reported presence of 50 diplomatic representatives at the 27th session of the Commission in 2000.

The political role of NGO 'shadow reports' is highlighted and suggestions made on how to improve the reporting procedure. The question of admissibility seems to never have been analysed in such depth. In view of the still very limited number of communications, the African Commission has taken a more open approach than other

regional commissions and over time also improved its rules on admissibility. In the field of collecting evidence the Commission since its 16th session has started to have oral hearings, showing flexibility by allowing also NGOs to represent individuals unable to participate. If governments do not respond, which happens rather frequently, the burden of proof is shifted to them. However, the Commission is also found to still depend too much on the cooperation of the states.

A wealth of information on the case practice of the Commission can be found in the contribution on civil and political rights in the Charter by Christof Heyns. The conclusion is that the jurisprudence of the Commission is still in an embryonic stage. Economic, social and cultural rights in the Charter are the subject of a broad analysis by Chidi Anselm Odinkalu in view of the system as a whole. It shows that there is as yet a very limited case practice and suggests a new approach to the protection of economic, social and cultural rights for Africa based on the experiences of peoples.

The challenge of culture for human rights in Africa is analysed in view of the universality of human rights by Commissioner N Barney Pitso. The interpretation of the African Charter by the African Commission, which explicitly finds inspiration from the 'values of African civilisation', is found to be very cautious, that is, with regard to 'peoples rights'. Surprisingly, hardly any cases on women's rights have reached the Commission, although there is a potential for it from traditional rulings by national courts as demonstrated by the author for the case of Zimbabwe. His conclusion is that 'a theory of applied cultural relativism is unavoidable' to achieve greater equality between cultures.

The special importance of the various contributions of non-governmental organisations (NGOs) to the development of the human rights system in Africa is described by Ahmed Motale, who concludes that especially NGOs from within Africa need to take their responsibility of support and critique of the Commission more seriously. An analysis by Evans and Murray of the work of the three Special Rapporteurs on Extrajudicial, Summary and Arbitrary Executions, on Prisons and Conditions of Detention and on the Rights of Women comes to mixed conclusions, finding their performance largely disappointing and suggesting not to draw special rapporteurs from the members of the Commission to give them more independence.

The major innovation of the African system in the future will be the African Court on Human and People's Rights, the statute of which only needs 15 ratifications to come into force. Julia Harrington provides a detailed analysis of its prospects in view of its mandate and organisation, describing also the lack of enthusiasm from African states. She arrives at the conclusion that there are several conditions to be met to make the Court effective, like to integrate it into the structure of the African Union and to endow it with adequate resources.

Finally, the extensive promotional role of the African Commission is discussed by Victor Dankwa. From his experience as former Chairperson of the African Commission he explains the various, partly innovative, ways the Commission took to fulfil its mandate, like the promotional visits to African states by commissioners, who had distributed responsibility for all parties of the Charter among themselves. Again, the importance of co-operation with NGOs is highlighted and the need to close the gap between adherence to the Charter and assurance of its rights in respective jurisdictions is emphasised. Also recognised is the need to make the work of the Commission better known by publication of its activities.

The appendix to the book conveniently contains the text of the African Charter and the Protocol on the Establishment of the African Court as well as the Grand Bay (Mauritius) Declaration and Plan of Action of 1999. The book also contains a list of the first 227 communications until 1999.

No doubt, this book provides one of the best analyses of the African system of human and peoples' rights, which cannot be ignored by any serious researcher. Although critical of its subject, it can be taken as a sign of hope against the widespread Afro-pessimism in the field of human rights.



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## AFRICAN HUMAN RIGHTS LAW JOURNAL

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International Council on Human Rights Policy *Journalism, media and the challenge of human rights reporting* (2002)  
154 pages; *Human rights after September 11* (2002)  
75 pages

*Frans Viljoen*

Centre for Human Rights, University of Pretoria

The International Council on Human Rights Policy is an international 'think-tank' on human rights. Its membership includes Theo van Boven (UN Special Rapporteur on Torture), Bacre Waly Ndiaye (Office of the UN High Commissioner for Human Rights) and Barney Pityana (member of the African Commission on Human and Peoples' Rights). The Council, meeting once a year, initiates applied research on matters of international human rights policy. It is strictly independent, international in membership and consultative in its approach. Founded in 1998, the Council functions through a small secretariat based in Geneva.

In line with its vision, the Council initiated a number of projects, which culminated in publications (reports). Some of these are:

- *Hard cases: Bringing human rights violators to justice abroad — A guide to universal jurisdiction* (1999);
- *Taking duties seriously: Individual duties in international human rights law — A commentary* (1999);
- *Performance and legitimacy: National human rights institutions* (2000);
- *Beyond voluntarism: Human rights and the developing international legal obligations of companies* (2002).

The Council's two latest publications are *Journalism, media and the challenge of human rights reporting* and *Human rights after September 11*, both published in 2002.

The first of these, *Journalism, media and the challenge of human rights reporting*, ponders on difficulties the media experiences in reporting human rights issues. This study exemplifies the stated 'consultative' approach of the Council. Numerous researchers (including journalists) contributed to this project, each preparing a paper. An international review meeting at which the preliminary research results were debated, was then organised. Present at the meeting was a wide and diverse range of experts. Two further consultations contributed to the report. A draft report was then sent to a range of journalists, media specialists and human rights organisations.

This wide consultation culminated in a very informative and balanced report. The crucial, but neglected role of media coverage of human rights is highlighted, emphasising that little is known even about the basic question as to the extent of coverage of human rights 'stories'.

A background to the 'professional environment' is sketched, both at the international and national levels. The extent to which technological change affects media presentation on human rights is further examined. This is followed by a very comprehensive overview of the editorial process, in which the report examines the concept 'newsworthiness'. Reference is made to Iraq (the impact of economic sanctions), Burundi (the 1995 crisis) and the events subsequent to the arrest of Pinochet (1998).

Bias, advocacy and precision in human rights coverage are then taken under review, after which the report reaches some conclusions and presents a number of recommendations. These recommendations underscore the importance of exchanges between journalists and human rights organisations and of the inclusion of courses on human rights issues in journalism curricula.

This report makes an important contribution to writing on human rights. Few, if any, publications provide such an incisive focus on and profound analysis of the role of human rights reporting in the media. *Journalism, media and the challenge of human rights reporting* should be widely read and taken to heart in media and human rights circles, and should be core reading in training programmes for journalists.

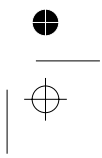
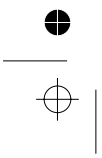
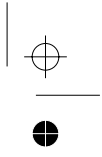
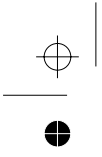
The second of the reports is entitled *Human rights after September 11*, and is also the result of a consultative process. It is based on an international seminar (organised in January 2002), attended by some 37 experts, at which ten background papers were presented and debated. The report raises a number of concerns to human rights organisations arising from the events of 11 September 2001. These concerns include the following (3):

- 'Multilateral and more diplomatic approaches to solving international problems may surrender ground to unilateral and more forceful approaches';
- 'Approaches to solving international problems based on the rule of law will give way to approaches that are security-driven'.

The report posits these concerns against the background of long-standing American exceptionalism and preferences for unilateralism. To a large extent, a distinction is drawn between *civil* rights (guaranteed in the American constitutional tradition) and *human* rights (which are international, and forms part only of foreign relations). US policy is therefore based on American constitutional values rather than an international consensus derived from a universalised understanding of human dignity. Global inequity is also introduced as an overriding concern, and its link to political violence (or sympathy for it) is examined.

The conclusions of this report, that human rights and human rights organisations, especially in the US, will increasingly become threatened, has been confirmed by subsequent events. One can only hope that the recommendation that 'military intervention should respect human rights and the framework of internal law' (61) will be respected in the conflicts of 2003 and thereafter.

*Human rights after September 11* is a serious and considered attempt to take account of the impact of the events of 11 September 2001 on human rights and the human rights movement.





**AFRICAN HUMAN RIGHTS LAW JOURNAL  
GUIDE FOR CONTRIBUTORS**

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- The submission must be original.
- The submission should not already have been published elsewhere.
- Papers should average between 5 000 and 10 000 words (including footnotes) in length.
- If the manuscript is not sent by e-mail, it should be submitted as hard copy and in electronic format (MS Word).
- The manuscript should be typed in Arial, 12 point (footnotes 10 point), 1½ spacing.
- Authors of contributions are to supply their university degrees, professional qualifications and professional or academic status.
- Footnotes must be numbered consecutively. Footnote numbers should be in superscript without any surrounding brackets.

The manuscript will be submitted to a referee for evaluation. The editors reserve the right to change manuscripts to make them conform with the house style, to improve accuracy, to eliminate mistakes and ambiguity, and to bring the manuscript in line with the tenets of plain legal language.

The following general style pointers should be followed:

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  - First reference to journal articles: eg C Anyangwe 'Obligations of states parties to the African Charter on Human and Peoples' Rights' (1998) 10 *African Journal of International and Comparative Law* 625.
  - Subsequent references to footnote in which first reference was made: eg Patel & Watters (n 34 above) 243.
  - Use UK English.
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- Proper nouns used in the body of the article are written out in full the first time they are used, but abbreviated the next time, eg the United Nations (UN).
- Words such as 'article' and 'section' are written out in full in the text. Where possible, abbreviations should be used in footnotes, eg ch; para; paras; art; arts; sec; secs. No full stops should be used.
- Words in a foreign language should be *italicised*.
- Numbering should be done as follows:
  - 1
  - 2
  - 3.1
  - 3.2.1
- Smart single quotes should be used; if something is quoted within a quotation, double quotation marks should be used for that section.
- Quotations longer than thirty words should be indented and in 10 point, in which case no quotation marks are necessary.
- The names of authors should be written as follows: FH Anant.
- Where more than one author are involved, use '&': eg FH Anant & SCH Mahlangu.
- Dates should be written as follows (in text and footnotes):  
28 November 2001.
- Numbers up to ten are written out in full; from 11 use numerals.
- Capitals are not used for generic terms — 'constitution', but when a specific country's constitution is referred to, capitals are used — 'Constitution'.
- Official titles are capitalised: eg 'the President of the Constitutional Court'.
- Refer to the *Journal* for additional aspects of house style.

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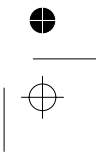
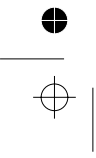
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**CHART OF RATIFICATIONS:  
OAU/AU HUMAN RIGHTS TREATIES**

Position as at 31 December 2002

	African Charter on Human and Peoples' Rights	OAU Convention Governing the Specific Aspects of Refugee Problems in Africa	African Charter on the Rights and Welfare of the Child	Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights
COUNTRY	Ratified/ Acceded	Ratified/ Acceded	Ratified/ Acceded	Ratified/ Acceded
Algeria	01/03/87	24/05/74		
Angola	02/03/90	30/04/81	11/04/92	
Benin	20/01/86	26/02/73	17/04/97	
Botswana	17/07/86	04/05/95	10/07/01	
Burkina Faso	06/07/84	19/03/74	08/06/92	31/12/98
Burundi	28/07/89	31/10/75		
Cameroon	20/06/89	07/09/85	05/09/97	
Cape Verde	02/06/87	16/02/89	20/07/93	
Central African Republic	26/04/86	23/07/70		
Chad	09/10/86	12/08/81	30/03/00	
Comoros	01/06/86			
Congo	09/12/82	16/01/71		
Cte d'Ivoire	06/01/92	26/02/98		
Democratic Republic of Congo	20/07/87	14/02/73		
Djibouti	11/11/91			
Egypt	20/03/84	12/06/80	09/05/01	
Equatorial Guinea	07/04/86	08/09/80		
Eritrea	14/01/99		22/12/99	
Ethiopia	15/06/98	15/10/73		
Gabon	20/02/86	21/03/86		
The Gambia	08/06/83	12/11/80	14/12/00	30/06/99
Ghana	24/01/89	19/06/75		
Guinea	16/02/82	18/10/72	27/05/99	
Guinea-Bissau	04/12/85	27/06/89		
Kenya	23/01/92	23/06/92	25/07/00	
Lesotho	10/02/92	18/11/88	27/09/99	
Liberia	04/08/82	01/10/71		
Libya	19/07/86	25/04/81	23/09/00	
Madagascar	09/03/92			

	African Charter on Human and Peoples' Rights	OAU Convention Governing the Specific Aspects of Refugee Problems in Africa	African Charter on the Rights and Welfare of the Child	Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights
COUNTRY	Ratified/ Acceded	Ratified/ Acceded	Ratified/ Acceded	Ratified/ Acceded
Malawi	17/11/89	04/11/87	16/09/99	
Mali	21/12/81	10/10/81	03/06/98	10/05/00
Mauritania	14/06/86	22/07/72		
Mauritius	19/06/92		14/02/92	
Morocco		13/05/74		
Mozambique	22/02/89	22/02/89	15/07/98	
Namibia	30/07/92			
Niger	15/07/86	16/09/71	11/12/96	
Nigeria	22/06/83	23/05/86		
Rwanda	15/07/83	19/11/79	11/05/01	
Sahrawi Arab Democratic Republic	02/05/86			
São Tom and Prncipe	23/05/86			
Senegal	13/08/82	01/04/71	29/09/98	29/09/98
Seychelles	13/04/92	11/09/80	13/02/92	
Sierra Leone	21/09/83	28/12/87	13/05/02	
Somalia	31/07/85			
South Africa	09/07/96	15/12/95	07/01/00	03/07/02
Sudan	18/02/86	24/12/72		
Swaziland	15/09/95	16/01/89		
Tanzania	18/02/84	10/01/75		
Togo	05/11/82	10/04/70	05/05/98	
Tunisia	16/03/83	17/11/89		
Uganda	10/05/86	24/07/87	17/08/94	16/02/01
Zambia	10/01/84	30/07/73		
Zimbabwe	30/05/86	28/09/85	19/01/95	
<b>TOTAL NUMBER OF STATE PARTIES</b>	<b>53</b>	<b>45</b>	<b>28</b>	<b>6</b>