

Recent developments in the African regional human rights system

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1 African Commission's Annual Activity Report not adopted

The African Commission on Human and Peoples' Rights (African Commission) has a dual mandate, in that it aims at *promoting* and *protecting* the rights in the African Charter. Under article 59 of the African Charter on Human and Peoples' Rights (African Charter), measures taken by the African Commission remain confidential until approved by the Organization of African Unity (OAU) Assembly of Heads of State and Government (now the African Union (AU) Assembly). On the basis of this article, the sessions of the African Commission have been divided into public and private (closed) parts. During the public part of a session, the promotional work of the Commission is discussed. This part of the session includes reports by commissioners about their promotional activities, the examination of state reports submitted under article 62 of the Charter, and contributions by non-governmental organisations (NGOs) about their work and oral interventions on burning human rights issues in Africa. During private sessions, the Commission considers individual (and inter-state) communications alleging violations of the Charter by member states. This part of the proceedings is closed to the public, with the exception of litigants involved in the case.

The findings and full texts of these decisions are included in the Commission's Annual Activity Report, tabled at the sessions of the AU Assembly.¹ The Commission normally has two sessions annually, one around March and one around October. An annual report submitted in

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¹ These reports are available at <http://www.achpr.org> (accessed 31 October 2004).

June or July, when the Assembly usually meets, comprises findings of the last two Commission sessions. Decisions become part of the public domain only once they are published as part of an approved Annual Activity Report, which is the authentic source of, and one of the most important mediums for, disseminating the Commission's findings. Other matters, such as those of a financial or administrative nature, and the adoption of concluding observations after examination of a state report, are also dealt with during closed sessions. Also, any result of such deliberations is contained in the annual report, and becomes a public document only after adoption by the AU Assembly.

Over the years, the African Commission has not received much attention from the OAU Assembly, or from the Council of Ministers.² Its annual report was usually tabled late during the summit of African leaders, evoked little, if any, comment and was adopted without discussion. This state of affairs underscored the OAU's formalistic adherence to, rather than substantive engagement with, human rights matters. In the absence of any pressure at a political level, it is no small wonder that state compliance with findings of the Commission remained negligible.

At its 3rd ordinary session, the AU Assembly for the first time decided not to adopt the Commission's report. This decision followed a debate in the Executive Council about the Commission's report of a mission to Zimbabwe, undertaken soon after the 2002 presidential elections, in which the Commission seemingly 'presents damning allegations of a clampdown on civil liberties surrounding Zimbabwe's 2002 presidential elections, including arrests and torture of government opponents, lawyers, and pro-democracy activists'.³ The rather procedural objection was raised that the Zimbabwean government did not have prior access to the report, that it was surprised by the report, and was not given an opportunity to respond to the report. It is unclear why the Assembly accepted this objection, especially in the light of the Commission's usual practice to ask the government for its comments before adopting the report.⁴ It appears that the comments were solicited from one department in Zimbabwe (the Department of Justice), while another

² Meetings of the OAU Council of Ministers (now the AU Executive Council) usually precede the Assembly summit. Issues are debated more vigorously at ministerial level, leaving it to the Heads of State and Government to formally adopt a predetermined consensus position. The importance of the role of ministers is reflected in the Protocol Establishing an African Court on Human and Peoples' Rights, which in art 29(2) provides that the Council of Ministers (now the Executive Council) is to monitor the execution of the Court's judgments on behalf of the Assembly.

³ 'Zimbabwe govt shrugs off damning report' *Mail & Guardian Online* <http://www.mg.co.za/Contents/13.asp?ao=11833> (accessed 7 July 2004).

⁴ See eg the report of the mission of the African Commission to Sudan (1–7 December 1996), to which is attached the comments of the Department of Foreign Relations.

department (the Department of Foreign Affairs) was unaware of the report.⁵

In its decision, the Assembly urges all member states to co-operate with the African Commission and 'the various mechanisms it has put in place, and implement its decisions in compliance with the provisions of the African Charter'.⁶ Noting that some of the Commission's reports on state parties are presented 'without their observations', the Assembly invites the African Commission 'to ensure that in future its mission reports are submitted together with the comments of the State Parties concerned and to indicate the steps taken in this regard during the presentation of its Annual Activity Report'.⁷ The Assembly therefore decides to suspend 'the publication of the 17th Annual Activity Report . . . pending the possible observations by the Member States concerned'.⁸

It was reported that, in his initial response, the Zimbabwean Foreign Minister pledged to respond in seven days to the Commission's report. Subsequently, though, a spokesperson for the Department of Foreign Affairs insisted that a member state is expected to submit its response '*sine die* (with no time limit)', adding that the main concern of the Zimbabwean government is to 'establish the *bona fides* of the African Commission's report on Zimbabwe'.⁹ However, no public response seems to have been forthcoming since the suspension of approval of the report.

Consideration of the report should not have been suspended. Even if it is so that the incorrect department landed up with the report, this lack of government co-ordination should not be allowed to thwart the Commission's work by providing a disingenuous 'defence' to governments. The government's subsequent position should also be criticised. Governments cannot be allowed unlimited time to consider its response to reports by the Commission.¹⁰ Such an approach would mean that the Commission is held to ransom by the willingness of the state to respond. If this were the case, the Commission would be reduced to await a reply

⁵ According to the Zimbabwean Human Rights Forum, the government received the report on 5 February 2004 (*Mail & Guardian Online* (n 3 above)).

⁶ AU Doc Assembly/AU/Dec 49(III), Decision on the 17th Annual Activity Report of the African Commission on Human and Peoples' Rights, Doc EX.CL/109 (V) para 4.

⁷ n 6 above, para 5.

⁸ n 6 above, para 6.

⁹ G Phiri 'Zimbabwe in no hurry to respond to AU report' *The Zimbabwe Independent* <http://www.theindependent.co.zw/news/2004/July/Friday16/992.htm> (accessed 16 July 2004).

¹⁰ In respect of its communication procedure, the Commission has adopted the approach that 'where allegations of human rights abuse go uncontested by the government concerned the Commission must decide on the facts provided by the complainant and treat those facts as given'; *Free Legal Assistance Group & Others v Zaire* (2000) AHRLR 74 (ACHPR 1995) para 40.

without any means to accelerate the process. The essence of these reports is that they deal with issues of current concern. There are already many reasons why delay in the adoption of mission reports is rife, for example due to the requirement that the Commission as a whole has to adopt the report that has been undertaken by a small group or single commissioner. States cannot, every time they disagree with the views of a body set up under the regional AU body, cry foul.

In any event, the report was not adopted. As a consequence, the findings in the Commission's report have not been adopted and therefore cannot be made public. This unprecedented step by the government has stalled the work of the Commission.

Fortunately, the delay in publication of the report runs not for a year, as would have been the case in the past, but for only six months. At the same session, the time frame of AU Assembly meetings was changed. In the past, the Assembly met once a year, usually in June or July. In accordance with a decision, the Assembly now meets every six months.¹¹ The question may be posed whether the cycle of reports by the Commission should also be changed to coincide with that of the Assembly. There is no reason why the Commission's report should wait for the June meeting, if there is one in, say, January. The African Charter refers to 'reports' that have to be submitted, without indicating their periodicity.¹² One of the major drawbacks of the Commission's work have been delays at many levels. The Commission should therefore use the opportunity to submit a six-monthly report to the Assembly. In other words, the Commission should adopt a report after each session, to be tabled at the forthcoming Assembly meeting.

Despite the negative effect of the suspension of the report's consideration, the side effects may be viewed in a more positive light. Perhaps a precedent has now been set for a more open and rigorous discussion of the African Commission's annual reports. Ironically, the Commission may have been strengthened in that more prominence has been given to its work than before, thus raising its visibility and increasing its potential impact. Another unintended consequence was the amount of publicity given to the alleged human rights violations in Zimbabwe.¹³

¹¹ Decision on the periodicity of the ordinary sessions of the Assembly, AU Doc Assembly/AU/Dec 53 (III) (the Assembly now meets twice a year) para 4.

¹² Arts 59(2) & (3) African Charter.

¹³ See eg B Tromp 'AU slams abuses in Zimbabwe' *The Sunday Independent* (4 July 2004) 1.

2 Third extraordinary session of the Commission held on Darfur

In terms of its Rules of Procedure, the African Commission may decide to hold extraordinary sessions.¹⁴ In the OAU era, such meetings were held on two occasions: once in Banjul (June 1989), to adopt the Commission's Rules of Procedure, and once in Kampala, Uganda (December 1995), in the aftermath of the genocide in Rwanda. A third extraordinary meeting, aimed at formulating a response to the situation in the Darfur region of Sudan, was held in Pretoria between the Commission's 35th and 36th sessions, on 19 September 2004.

At its 35th ordinary session, in May/June 2004, the African Commission considered the second state report of Sudan.¹⁵ One agrees with the observations by Commissioner Rezag-Bara that the government of Sudan should be commended for submitting its human rights record for the Commission's examination in difficult and sensitive times. However, the examination of the report lacked focus and a consideration for the urgency of the situation in Darfur. Instead, detailed technical and routine questions were posed about issues such as institutional mechanisms, for instance the Civil Service Board, freedom of expression, personal status laws and the right of prisoners to vote. Although some incisive questions were also posed about Darfur, the misallocation of time caused these to be neglected: It took the commissioners about two and a quarter hour to ask questions, but after less than an hour the Sudanese representative was asked to wrap up and summarise his answers. As a result, a number of questions were left unanswered, allowing the representative to brush over alleged government involvement in the Darfur conflict.

Significantly, though, the Sudanese representative invited the Commission to undertake a mission to Sudan, and undertook to provide the mission with every possible aid and assistance. In its private session, the Commission decided to send a fact-finding mission to the region.¹⁶ This fact-finding mission visited Sudan from 8 to 18 July 2004. It was composed of Commissioner Sawadogo, the Chairperson of the African Commission, and three commissioners (Commissioner Melo, Special Rapporteur on the Rights of Women in Africa, Commissioner Nyanduga, Special Rapporteur on Refugees, Displaced Persons and Asylum Seekers in Africa and Commissioner Mohammed Abdellahi Ould Babana, commissioner responsible for human rights promotion in Sudan). A

¹⁴ Art 3 1995 Rules of Procedure of the African Commission.

¹⁵ The discussion of the 35th session is based on personal observations; notes on file with author.

¹⁶ Information about the fact-finding mission is derived from the Commission's press release.

legal officer at the Secretariat of the African Commission (Robert Kotchani) accompanied them. At the end of the mission, the Chairperson of the African Commission sent a request to President Bashir of Sudan, regarding the necessity to take urgent provisional measures in respect of security, the protection of women, access to displaced persons and the supply of humanitarian assistance, the need to reassure the safe return of displaced persons to their villages, the deployment of human rights observers and the to ensure the right to fair trial for political prisoners.

The Commission met in Pretoria on 19 September for its extraordinary session. The main purpose of the meeting was to discuss and adopt the report of the Commission's fact-finding mission to Darfur. This report also remains confidential until adoption by the Assembly. Even if it agreed on the report, and made recommendations, the Commission interpreted its mandate to mean that it can only make this report public once it has been contained in the Annual Activity Report, and once the Assembly has adopted that report.

Unofficial reports indicate that the Commission finds in its report that the government of Sudan, through its security forces, has been involved in 'war crimes and crimes against humanity, and massive human rights violations'.¹⁷ The Commission is further reported to have recommended the establishment of an independent international commission to investigate international crimes in Darfur.¹⁸

Two disappointing features characterised the extraordinary session. The Commission met for only one day, instead of the two days mentioned in its press release. NGOs that were flown in at great cost were not allowed an opportunity to make representations to the Commission.

The crisis in Darfur is not only testing the African Commission, but poses a challenge to the AU as a whole. Different to the OAU, the AU is armed with article 4(h) of its Constitutive Act, which allows for the 'right' of the AU to 'intervene' when the AU Assembly decides that grave circumstances so permit. A new body, the AU Peace and Security Council, has also been instituted to deal with Darfur-type situations.

Although its actions fall short of an 'intervention', the AU's efforts were not insignificant. The Peace and Security Council adopted a number of resolutions, for example, urging the Sudanese government to demonstrate a greater commitment and determination to address the prevailing situation in Darfur and to extend full co-operation to the AU

¹⁷ 'Darfur: the new name of genocide' *Vanguard* (Lagos), available at <http://clk.atdmt.com/goiframe/4544465/nwyrkepd0560000003ave/direct;wi.720;hi.300/01http://allafrica.com/stories/printable/200410010065.htm> (accessed 31 October 2004).

¹⁸ As above.

Mission in the Sudan (AMIS) to allow it to act more effectively.¹⁹ Together, the AU Assembly and Peace and Security Council involved themselves in encouraging and facilitating negotiation,²⁰ the establishment of a Ceasefire Commission and the deployment of observers as part of AMIS. By the end of October 2004, there were 597 troops on the ground in Sudan, still far short of the envisaged total of 3 320 personnel.²¹

3 Election of judges postponed; Assembly calls for integration of the African Court of Human and Peoples' Rights and African Court of Justice

Many years in the making, and adopted in 1998, the Protocol to the African Charter Establishing an African Court on Human and Peoples' Rights (Protocol) was ratified by the required 15 AU member states by December 2003 and entered into force on 25 January 2004. Currently, 43 states have signed the Protocol and 19 states²² have ratified it. As it is required to do under the Protocol, the AU Commission called for the nomination of judges to the African Court on Human and Peoples' Rights (African Court). In a *note verbale* of 5 April 2004,²³ the AU Commission gave the following very important direction relating to the application of article 18 of the Protocol, which provides that 'the position of judge of the Court is incompatible with any activity that might interfere with the independence or impartiality of such a judge or the demands of the Office, as determined by the Rules of Procedure of the Court':²⁴

. . . State parties should request nominees to complete detailed biographical information indicating judicial, practical, academic, activist, professional and other relevant experience in the field of human and peoples' rights. Such biographical information should also include information on political and other associations relevant to determining questions of both eligibility and incompatibility. In addition, nominees should submit statements indicating how they fulfil the criteria for eligibility contained in the Protocol.

¹⁹ AU Doc PSC/PR/Comm(XVI), 17 September 2004.

²⁰ Inter-Sudanese political talks on the crisis in Darfur have been going on in Abuja, Nigeria, since 23 August 2004, under the auspices of the AU, and with the support of the international community.

²¹ AU Press Release No 098/2004, Addis Ababa, 28 October 2004. The African Union deploys more troops in Darfur as part of its efforts to strengthen AMIS.

²² Algeria, Burkina Faso, Burundi, Comoros, Côte d'Ivoire, Gabon, The Gambia, Lesotho, Libya, Mali, Mauritius, Mozambique, Niger, Nigeria, Rwanda, Senegal, South Africa, Togo, Uganda.

²³ AU Doc BC/OLC/66.5/8/Vol V, Addis Ababa, 5 April 2004.

²⁴ A copy of the letter is on file with the author.

As a guide for state parties in interpreting the question of incompatibility, the Advisory Committee of Jurists in the establishment of the Permanent Court of International Justice (now the International Court of Justice (ICJ)) had pointed out that '[A] member of government, a Minister or under-secretary of State, a diplomatic representative, a director of a ministry, or one of his subordinates, or the legal adviser to a foreign office, though they would be eligible for appointment as arbitrators to the Permanent Court of Arbitration of 1899, are certainly not eligible for appointment as judges upon our Court.'²⁵

The *note verbale* also calls on states to consider involving civil society in the process and to 'employ a transparent and impartial national selection procedure in order to create public trust in the integrity of the nomination process'.

The Protocol prescribes that the election process should start 'upon entry into force of the Protocol', with a request to state parties to the Protocol to nominate candidates for the position of judge.²⁶ A list of candidates then has to be transmitted to all AU member states 'thirty days prior to the next session' of the Assembly.²⁷ However, these elections did not take place. One of the factors delaying the election was lobbying by NGOs on the basis that member states would have insufficient time to nominate appropriate candidates. As a consequence, the Assembly also did not decide on the seat of the Court.

Not only was consideration of these two issues postponed to the following Assembly session, the whole future of the Court was placed in jeopardy. Surprisingly, the Assembly overturned a previous decision not to fuse the African Court with the African Court of Justice.²⁸ In its 'Decision on the seats of the African Union', the AU Assembly decides, in paragraph 4, that 'the African Court on Human and Peoples' Rights and the Court of Justice should be integrated into one Court', and requests the Chairperson of the AU to 'work out the modalities on implementing Paragraph 4 above and submit a report to our next Ordinary Session.'²⁹

In a statement, a coalition of NGOs in South Africa responded to the challenge posed by the AU Assembly's resolution.³⁰ The statement

²⁵ See PCIJ/Advisory Committee of Jurists *Procès-Verbaux* of the Proceedings of the Committee 16 June–24 July 1920 693 715–716 (1920).

²⁶ Art 13(1) Protocol.

²⁷ Art 13(2) Protocol.

²⁸ When the Protocol on the African Court of Justice was adopted, the draft proposal providing for the fusion of that Court with the African Court on Human and Peoples' Rights was rejected. See AU Doc EX/CL/Dec 58 (III), July 2003, available at <http://www.africa-union.org> (accessed 31 October 2004).

²⁹ AU Doc Assembly/AU/Dec 45 (III), <http://www.africa-union.org> (accessed 31 October 2004).

³⁰ This initiative was supported by, amongst others, the following organisations and individuals: Foundation for Human Rights; Centre for African Renaissance Studies, University of South Africa; Human Rights Institute of South Africa; Centre for Human Rights, University of Pretoria; Centre for Socio-legal Studies, University of

accepts that there may be valid reasons to merge the two courts,³¹ but argues strongly that the Assembly decision to integrate the two courts 'should not be interpreted as suspending in the short term the process' to establish the African Court on Human and Peoples' Rights, 'since the Protocol establishing that Court has already entered into force'. The statement continues as follows:³²

There may be cogent reasons for the establishment of a single AU court. However, the process of drafting a new Protocol or to amend existing Protocols would be a lengthy one, considering that the drafting of the ACHPR Protocol took more than three years and the drafting of the ACJ Protocol took more than a year. Furthermore it took another five years before the ACHPR received the requisite number of ratifications for it to come into effect. A year after its adoption the ACJ Protocol has received only a quarter of the ratifications required for it to come into effect. Even if the process is speeded up it is likely to take another three or four years before a new Protocol comes into effect and a merged court is established. The urgency of the human rights situation in Africa cannot wait another four years for the establishment of the ACHPR.

It is therefore imperative that the ACHPR is established whilst the discussions around merger and the establishment of a single AU court continue. These deliberations cannot be rushed and have to carefully consider the various administrative, legal, political and juridical issues that would have to be incorporated into a new Protocol to ensure that human rights is not relegated in any merged court, but that it is given prominence alongside other issues of importance to the AU such as economic integration and trade. Civil society in South Africa is committed to playing an important role in these discussions.

The statement also calls for the speedy establishment of the Human Rights Fund, which has been recommended by the first AU Ministerial Conference on Human Rights held in Kigali, Rwanda, in May 2003.

It is therefore trusted that the Assembly will, at its next session, elect the eleven judges and assign a seat, so that the African Court on Human and Peoples' Rights may start functioning.

KwaZulu-Natal; Centre for the Study of Violence and Reconciliation; Human Rights Development Initiative; Centre for Conflict Resolution, University of Cape Town; Lawyers for Human Rights; Professor David McQuoid-Mason, University of KwaZulu-Natal, President of the Commonwealth Legal Education Association; Hanif Vally, Head of Human Rights Unit, Commonwealth Secretariat; and Prof Vincent O Nmehielle, School of Law, University of the Witwatersrand.

³¹ For some of these arguments, see NJ Udombana 'An African Human Rights Court and an African Union Court: A needful duality or a needless duplication?' (2003) 28 *Brooklyn Journal of International Law* 811. For some of the arguments against a merged institution, see F Viljoen & E Baimu 'Courts for Africa: Considering the co-existence of the African Court on Human and Peoples' Rights and the African Court of Justice' (2004) 22 *Netherlands Quarterly of Human Rights* 241 254–255.

³² The statement is on file with the author.