

Standing and the African Commission on Human and Peoples' Rights

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Summary

The African Commission has in its individual communications procedure adopted an approach where no connection needs to be present between the victim and the complainant in a case. The reasoning is justified as allowing Africans with limited economic or technical abilities to have a chance to have their cases heard. The broad approach to standing has led to difficulties for complainants to provide sufficient evidence and information as well as unexplained withdrawals of cases. This article explores the Commission's approach to standing, focusing on the preparatory work of the African Charter and communications decided by the Commission. It concludes that a connection to the victim of the alleged violation should be present, while at the same time ensuring an open procedure, allowing accessibility for victims with limited economic or technical abilities. It is suggested that the procedure of the CEDAW Committee should be used as a point of departure. With the inauguration of the African Court on Human and Peoples' Rights, it is imperative that the African Commission works efficiently and smoothly to ensure a trustworthy regional mechanism, amongst others requiring that a solid foundation of evidence and certainty be present.

1 Introduction

The African Charter on Human and Peoples' Rights (African Charter) establishes the African Commission on Human and Peoples' Rights (African Commission) as a regional African mechanism for the promotion and protection of human and peoples' rights as well as interpreting the

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provisions of the African Charter.¹ The African Commission has been in existence since 1987. It convenes twice every year to, among other tasks, consider state reports, individual complaints and to adopt resolutions on human and peoples' rights issues. The African Charter provides for a complaints mechanism between states and an individual complaints mechanism. The latter is mentioned in article 55, which refers to 'communications other than those of state parties to the present Charter.'² The Commission over the years allowed a broad range of persons and organisations to submit these communications, without them necessarily having any affiliation with the alleged act in violation of the Charter. Such an approach is sometimes referred to with the Latin expression *actio popularis*, which is a principle referring to a general legal capacity of persons or institutions to instigate proceedings. However, this possibility for a broad range of actors to submit complaints has in some cases proved to be counterproductive as it has been difficult for the complainants to provide sufficient evidence and information on some violations. In the near future the African Commission must be part of a wider regional human and peoples' rights mechanism along with the African Court on Human and Peoples' Rights (African Court), recently inaugurated at the July 2006 AU Summit, in time probably to be transformed into the African Court of Justice and Human Rights. These developments make a discussion of the Commission's approach to standing pertinent.

This article addresses standing in the light of a historical approach thereto, taking into consideration the principles of standing of other international human rights tribunals. A few options that the African Commission has to consider in addressing this issue will be presented.

2 Standing of non-state actors in the communication procedure of the African Commission

2.1 Standing in the preparatory work of the African Charter

A thorough examination of standing should include research on the content of the preparatory works.³ The preparatory work of the African Charter consists of documents drafted by non-governmental organisations (NGOs), the United Nations (UN) and the Organization of African

¹ And other tasks, art 45 African Charter http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/Banjul%20Charter.pdf (accessed 31 July 2006).

² Art 55 African Charter.

³ Art 61 African Charter, referring to international conventions, customary international law and general principles of law, directly referring to art 32 of the Vienna Convention on the Law of the Treaties and preparatory work as a source of interpretation.

Unity (OAU).⁴ The process at the OAU level consisted of meetings of an Expert Committee and ministerial meetings. In the draft prepared by the Expert Committee, a direct reference was made to the rights of individuals, groups of persons or NGOs to submit communications alleging violations of the African Charter.⁵

The States Parties undertake to provide the Commission with such information as it may request of them as to the manner in which their domestic law ensures the effective application of any provision of this Charter.

In a subsequent draft, it was also stated that the African Commission would receive communications both from states (articles 47-54) and from others (articles 55-57). The wording is the following:⁶

Communications relating to Human Rights other than those from the States Parties to the present Convention, received at the Commission, shall be considered by the Commission if they comply with the following conditions.

However, the exact reference to 'persons, groups or NGOs' was left out in the second draft. Why this choice was made and whether it was intended to exclude either of these subjects is not clear. These drafts suggest that it was the intention of the Expert Committee that the African Commission should receive complaints not only from states but also from other entities. At the Ministerial Meeting held in Banjul from 8 to 15 June 1980, some changes were implemented in the article relating to the capacity of entities other than states to lodge complaints. The current wording of article 55(1) was agreed upon and the admissibility conditions were moved to the subsequent article 56. Article 55(1) has the following wording:⁷

Before each Session, the Secretary of the Commission shall make a list of the Communications other than those of State Parties to the present Charter and transmit them to Members of the Commission, who shall indicate which Communications should be considered by the Commission.

It is not mentioned why this change was made. It can be deduced from the preparatory work that it was intended that entities other than states should be able to submit complaints. However, because of the rephrasing of article 55, resulting in the wording in the quote above, it cannot

⁴ R Murray *The African Commission on Human and Peoples' Rights and international law* (2000) 10. The documents of the OAU consist primarily of the Meeting of Experts for the Preparation of the Draft African Charter of Human and Peoples' Rights convened in Senegal 28 November 1979 to 8 December 1979 and documents drafted at the Ministerial Meeting held in Banjul 8 to 15 June 1980 and the Second Ministerial Meeting held 7 to 19 January 1981.

⁵ Meeting of Experts in Dakar, Senegal, from 28 November to 8 December 1979, CAB/LEG/67/1.

⁶ Meeting of Experts for the Preparation of the Draft African Charter of Human and Peoples' Rights, Dakar, Senegal, 28 November 1979 — 8 December 1979, CAB/LEG/67/3/Rev1 art 55.

⁷ Ministerial Meeting on Human and Peoples' Rights, The Gambia, 9 to 15 June 1980, CAB/LEG/67/Draft Rapt. Rpt (II) Rev 4, 21.

be concluded that individuals, groups of individuals and NGOs were to have standing. A probable explanation is that the drafting states wished to leave the question of exactly which subjects, other than states, were to have standing for the Commission to decide.

2.2 Standing in the African Charter and the Rules of Procedure

Currently, neither the African Charter nor the Rules of Procedure of the Commission elaborates on the meaning of standing and there is no reference to the question of a link between the author of a communication and the victim of a violation. Article 55(1) of the Charter, the basis for individual communications, only refers to the elaboration of a list of communications other than those of state parties and that the Commission can consider communications on this list.⁸ However, the former Rules of Procedure referred to this issue. The victim could submit communications, as could non-victims, if the latter was unable to do so himself or herself.⁹ Non-victims as persons or organisations could also submit communications in cases of serious or massive violations.¹⁰ It was also mentioned that the African Commission could accept communications from any individual or organisation, irrespective of where they lived.¹¹ However, these provisions in the Rules of Procedure were removed at the 18th ordinary session of the Commission, held in Praia, Cape Verde, from 2 to 11 October 1995, when the current Rules of Procedure were adopted. There are no clear indications why this amendment was enacted.¹²

2.3 Standing in the decisions of the African Commission

The question of standing was raised in the case of *Achutan and Another (on behalf of Banda and Others) v Malawi*, decided at the 17th session in March 1995. Krishna Achutan submitted the case on behalf of his father-in-law.¹³ Similarly, in the same year, the African Commission decided the case *Free Legal Assistance Group and Others v Zaire*, where the authors of the communication were not the victims in the case.¹⁴ These two cases serve as examples of the application of the former Rules of Procedure as they were decided when these were still in force.

⁸ Art 55 African Charter.

⁹ Rules 114(1)(a) & 114(3)(b) of the Rules of Procedure, First Annual Activity Report of the African Commission on Human and Peoples' Rights, 28 April 1988 in *Documentation No 1 Activity Reports (1988-1990) (1990) 22-23*.

¹⁰ Rule 114(1)(b) 22.

¹¹ Rule 114(2) 22.

¹² Ninth Annual Activity Report, para 21 in African Commission on Human and Peoples' Rights, Annual Activity Reports vol 1 1987-1997 (1997) 297.

¹³ (2000) AHRLR 143 (ACHPR 1994) para 1.

¹⁴ (2000) AHRLR 74 (ACHPR 1995). 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) 75.

The case of *Malawi African Association and Others v Mauritania*,¹⁵ decided on 11 May 2000, was submitted by an NGO on behalf of ethnic groups in Mauritania. Serious and massive violations of the African Charter were established. The African Commission also established in *Constitutional Rights Project (in respect of Lekwot and Others) v Nigeria* that a human rights violation not necessarily needs to be serious or massive for others than the victim to submit the complaint.¹⁶ These two decisions do not elaborate on the reasoning for the application of the *actio popularis* principle, but they are in compliance with the previous decisions and reflect the principles in the former Rules of Procedure. The African Commission has also referred directly to the *actio popularis* principle:¹⁷

The Commission thanks the two human rights NGOs who brought the matter under its purview: the Social and Economic Rights Action Centre (Nigeria) and the Center for Economic and Social Rights (USA). Such is a demonstration of the usefulness to the Commission and individuals of *actio popularis*, which is wisely allowed under the African Charter.

An example of the reasoning behind the broad approach to standing was the case of *Odjouriby Cossi Paul v Benin*.¹⁸ This case was deferred several times because the complainant was not familiar with the procedures of the African Commission. Because the complainant, in the opinion of the Commission, had not submitted his case logically, it was entrusted to the NGOs Interights and the Institute for Human Rights and Development in Africa to present and process the case on his behalf.¹⁹ The case serves as an example of the reasoning on the broad standing principle and is a sound justification for a broad standing requirement reaching beyond a strict victim condition.

The approach by the African Commission also entailed that a specific victim did not need to be proven at all and that the victim or victims could be purely hypothetical and collectively defined. Other communications have concerned more individualised victims, but still within the category of *actio popularis*, such as 'all the national officials of the Universities Academic Staff Union (UASF)',²⁰ 'certain West African nationals',²¹ or 'Senegalese, Malian, Gambian, Mauritanian and other

¹⁵ (2000) AHRLR 149 (ACHPR 2000).

¹⁶ (2000) AHRLR 183 (ACHPR 1995).

¹⁷ *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

¹⁸ Communication 199/97, *Odjouriby Cossi Paul v Benin* Seventeenth Annual Activity Report Annex VI para 14.

¹⁹ Para 10.

²⁰ *Kenya Human Rights Commission v Kenya* (2000) AHRLR 133 (ACHPR 1995) para 9.

²¹ *Union Interafricaine des Droits de l'Homme & Others v Angola* (2000) AHRLR 18 (ACHPR 1997) para 1; *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia* (2000) AHRLR 321 (ACHPR 1996) para 1, referring to '517 West Africans'. See also I Österdahl *Implementing human rights in Africa, the African Commission on Human and Peoples' Rights and individual communications* (2002) 103-104.

nationals'.²² The question is whether such hypothetical and collectively defined groups allow for too broad a definition of standing, as it leaves open the question whether proper information and facts surrounding the case can be ascertained and it is difficult to know if a withdrawal of the case serves the interest of these alleged victims.

The African Commission also adopted the approach that persons from countries that were not state parties to the African Charter could submit communications. For example, in the case of *Baes v Zaïre*,²³ the Commission accepted a communication by a Danish national and foreign NGOs.²⁴ This application of the principles of standing is sound as a foreign individual or person can process a case as efficiently and thoroughly as someone who is based in Africa.

2.4 Comments on the African Commission's approach to standing

The broad standing approach described above results in a certain lack of control over the communications that may be submitted as the connection between the individual or NGO submitting it and the actual alleged violation of the African Charter is blurred. For the African Commission to be able to assess whether a violation of the Charter has occurred or not, it must have access to credible evidence and information on the violation. Such access is hampered due to the current interpretation of the standing requirement, as the following example illustrates. The case *Interights (on behalf of Safia Yakubu Husaini) and Others v Nigeria*²⁵ was filed by the NGO Interights on behalf of Ms Safiya Yakubu Husaini and others who allegedly had been subjected to gross and systematic violations of fair trial and due process rights in the Shari'a courts of Nigeria. Ms Safiya Hussaini herself was sentenced to death by stoning by a Shari'a court in Sokoto State in Nigeria. The complainant in the case alleged that this case was only one in many cases decided under the recently implemented Shari'a legislation in Northern Nigerian states. Various other applications of Shari'a legislation were mentioned in the communication. According to the complainant, these cases constituted violations of articles 2, 3, 4, 5, 6 and 7 of the African Charter. Throughout the development of the case, the NGO was unable to

²² Österdahl (n 21 above) 103-104.

²³ (2000) AHRLR 72 (ACHPR 1995).

²⁴ *Association pour la Sauvegarde de la Paix au Burundi v Kenya, Rwanda, Tanzania, Uganda, Zaïre and Zambia* (2003) AHRLR 111 (ACHPR 2003) para 1.

²⁵ Communication 269/2003, *Interights (on behalf of Safia Yakubu Husaini & Others) v Nigeria* Eighteenth Activity Report Annex III.

obtain the necessary information for its further process.²⁶ The NGO even suggested to the Commission that it continues processing the case until the necessary information was obtained.²⁷ The specific victim of the case would obviously, as the object of the violation, have better and more precise information on the violation and the circumstances surrounding it, compared to an NGO that has limited or no information on the violation or the condition of the victim. Such information does not pertain to the legal evaluation, which is up to the Commission to decide following the formal procedures, but to the actual facts surrounding the violation. In addition, the Commission itself does not have the capacity to investigate violations on its own.

The broad standing principle has also as consequence that any NGO or individual can choose to withdraw or cease to pursue the case without it necessarily being to the benefit of the victims. To the extent that a case is withdrawn or that it is not pursued seriously because of other reasons than the cessation of the violation, it is to the detriment of the victims. Such other reasons could be economic problems by the person or NGO involved, a shift in management, or a change in priority of the

²⁶ At an early stage of the procedure, the complainant was requested to submit additional information on the developments surrounding the application of penal provisions of Shari'a religious law before the Nigerian Shari'a courts as well as complete and specific cases of alleged irregularities. The complainant was also asked to furnish information regarding which of the specific decisions of the Shari'a courts had been executed and which had not (para 13). On 3 March 2002 the complainant wrote to the Secretariat of the Commission that it would assemble as many of the documents as possible and get back to it (para 17). Subsequently, the Secretariat wrote back that it was awaiting the information (para 18). On 2 April 2002 the Secretariat again wrote to the complainant reminding it of the need for further information on Ms Amina Lawal whom allegedly a Shari'a court in Katsina State had sentenced to a similar punishment as Ms Safiya Hussaini. Simultaneously, the Secretariat reminded the complainant that it was still waiting for the submission on material as indicated in its earlier letters (para 21). During the 31st ordinary session in Pretoria, the complainant informed the Secretariat orally that it was trying to compile the relevant information on the complaint and that it would be best if the Secretariat waited for the information before further action on the complaint (para 23). At the 32nd ordinary session of the Commission, the complainant informed the Secretariat orally that it was unable to compile the relevant information in time, that it was in touch with local partners in Nigeria and suggested that the Commission progressed in dealing with the complaint (para 26). In the period before the following session, the Secretariat called the complainant by telephone to inquire about the progress in furnishing the relevant information and on the status of the cases pending before national courts (para 27). At the 33rd ordinary session in Niamey, Niger, the Commission decided to be seized of the communication (para 28). Right after the session, on 12 June 2003, the parties were requested to submit their arguments on admissibility before the 34th ordinary session (para 29). However, the arguments on admissibility were never submitted in spite of reminders and deferrals of the communication. Finally, on 7 September 2004 another reminder was sent to the parties for the submission of arguments on admissibility before the 36th ordinary session, but during this session the complainant informed the Rapporteur orally of the communication of his wish to withdraw the case (para 38). Finally, during the 37th ordinary session the written request for withdrawal was obtained (para 42).

²⁷ Para 26.

work of an NGO. No matter what the reason is, the violation might still persist, while another international tribunal may have refrained from adopting the case because the Commission was processing it.

In *Centre for Advancement of Democracy, Social Justice, Conflict Resolution and Human Welfare v Nigeria*,²⁸ the case was submitted on behalf of Mr A Emmanuel. He was a member of the Movement for the Actualisation of the Sovereign State of Biafra. The communication alleges that the Nigerian Police Force arrested Mr Emmanuel during a raid at the organisation's headquarters and that, since the arrest no charges had been brought against him and attempts to have him released on bail had failed.²⁹ Accordingly, the complainant alleged that the government of Nigeria had violated articles 2, 3, 4, 5, 6, 7, 8, 10 and 20(1) of the African Charter.³⁰ The complainant suddenly withdrew the case and it was difficult for the African Commission to ascertain whether the victim was still being detained.³¹ If an NGO decides to withdraw the communication without further explanation and information, it leaves open the question whether this is the wish of the victim and in his or her interest. Even if the Commission in this case, contrary to the opinion of the complainant, had wished to pursue the case, the complainant insisted that he would not communicate further.³²

In *B v Kenya*,³³ the Secretariat received an e-mail from the author of the complaint withdrawing the communication, as she believed the matter was now being addressed by the respondent state. Again, it leaves open the question whether this was the wish of the victim and in his or her interest and whether the violation persisted or stopped. It is important that the uncertainty of the wish of the victim and the status

²⁸ Communication 273/2003, Eighteenth Activity Report Annex III para 2.

²⁹ Paras 3-4.

³⁰ Para 5.

³¹ A letter sent on 3 December 2003 by the Secretariat reminded the complainant to submit his arguments on admissibility. In the letter the Secretariat further informed the complainant of the difficulties it had encountered in contacting him and requested information as to whether the victim was still detained and about the conditions of his detention. In a new letter dated 19 April 2004 the Secretariat informed the complainant that it had not received any information despite constant reminders and that the Commission had decided to postpone the case for consideration at the 36th ordinary session (para 14). On 25 May 2004 the Secretariat received an electronic message from the complainant that the organisation was withdrawing its complaint and it was specified that the organisation would stop all correspondence on the subject (para 16). The Commission realised at the 35th ordinary session that the request for the withdrawal of the complaint came from the e-mail address of the complainant but not from the usual correspondent in the case. Accordingly, the Secretariat sent a request for confirmation on whether the request for withdrawal was genuine (para 17). No response was received in relation to later requests by the Secretariat to confirm the withdrawal and the case was closed because of a lack of interest (paras 18-24).

³² Para 16.

³³ Communication 283/2003, Seventeenth Annual Activity Report Annex VII paras 18 & 31.

of the violation themselves are problematic. In *Association Que Choisir Benin v Benin*, the Secretariat lost all contact with the author of the communication:³⁴

In the case at hand, the numerous letters from the Secretariat requesting the complainant for evidence that the said requirement had been satisfied remained, for a long time, without response. In fact, the Secretariat of the Commission lost contact with the complainant from October 2003.

Obviously, an NGO or an individual may also withdraw the case or cease to communicate because the violation has stopped. A possible approach is to consider a submitted communication, as falling within the exclusive domain of the African Commission and that only the Commission is able to withdraw communications. Such an approach does not compromise the nature of the individual complaint, as it is merely the continuation of a procedure that has already begun.

3 Standing, the African Commission and the African Court on Human and Peoples' Rights

The Protocol Establishing an African Court on Human and Peoples' Rights (African Court Protocol) entered into force on 1 January 2004.³⁵ Article 5 of the Protocol, read with article 34(6), does not allow direct individual petitions from individuals and NGOs without an explicit declaration to this effect by the state party. It is unknown what effect this will have on the standing of individuals and NGOs before the African Commission. There is a clear precedence in the decisions by the Commission to allow NGOs and individuals to submit communications without consent. Why was a more restrictive approach adopted in the African Court Protocol? During its drafting, the draft submitted by the African Experts to the Governmental Experts entailed that the Court could³⁶

on exceptional grounds, allow individuals, non-governmental organisations and groups of individuals to bring cases before the court, without first proceeding under article 55 of the Charter.

According to this formulation, the specific consent of the state party was probably not intended. At a meeting in Nouakchott, Mauritania, it was decided that the cases that could be submitted directly by individuals and NGOs to the African Court were restricted to 'urgent cases,

³⁴ Communication 264/2002, Eighteenth Activity Report Annex III para 22.

³⁵ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights http://www.achpr.org/english/_info/court_en.html (accessed 29 March 2005).

³⁶ Draft Protocol submitted by the OAU General Secretariat to Governmental Legal Experts, 6 to 12 September 1995, Cape Town, South Africa, art 6(1).

or serious, systematic or massive violations of human rights'.³⁷ It was also decided that such submission was optional for the state and depended on its consent.³⁸ Most of the delegates at the meeting in Mauritania were of the view that individuals and NGOs should have access to the African Court the same way as the African Commission and state parties, meaning without separate consent.³⁹ The important point was raised by some states that only because of the submission by NGOs and individuals had the Commission been functional and that state parties at the time had not submitted any complaints against each other.⁴⁰ However, Sudan, Nigeria and others opposed this point of view. Nigeria, in particular, wanted an optional solution which resulted in the current wording.⁴¹ At the subsequent meeting in Addis Ababa, the optional nature of the submission of cases of individuals and NGOs was preserved in the new article 5 and the reference to urgent or serious cases or a case involving systematic or massive violations was deleted.⁴²

The *actio popularis* rule would still be maintained at the Commission stage of the process for complaints that would later be submitted to the African Court. As it is still uncertain how many declarations will be submitted allowing direct complaints from individuals and NGOs to the African Court and when, the Court is dependent on the Commission for such cases and they need to be based on clear facts without being withdrawn prematurely in order for the new Court to establish itself as a credible human rights court. Such credibility is necessary for the contracting states to develop enough faith in the new system to submit declarations allowing direct petitions from NGOs or individuals. It is still unclear whether individuals submitting cases directly before the African Court have to be victims or can submit such cases on behalf of others. It has been argued that because the African Court Protocol does not refer to this issue, it is clear that no victim condition would apply.⁴³

³⁷ As above.

³⁸ n 36 above, art 6(5).

³⁹ Second Government Legal Experts Meeting on the Establishment of an African Court on Human and Peoples' Rights, 11 to 14 April 1997, Nouakchott, Mauritania, Report OAU/LEG/EXP/ AFCHPR/RPT(2) para 21.

⁴⁰ Para 22.

⁴¹ Para 24.

⁴² Conference of Ministers of Justice/Attorneys-General on the Establishment of an African Court on Human and Peoples' Rights, 12 December 1997, Addis Ababa, Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, OAU/LEG/MIN/AFCHPR/PROT(I) Rev 2. See also IAB El-Sheikh 'Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights' Introductory Note (1997) 9 *African Journal of International and Comparative Law* 943-4. Political circumstances surrounding the Nigerian dictatorship in power during the drafting of the Protocol have been raised as a possible explanation for the restrictive approach. J Harrington 'The African Court on Human and Peoples' Rights' in Evans & Murray (n 14 above) 320-321.

⁴³ F Viljoen 'A Human Rights Court for Africa, and Africans' (2004) 30 *Brooklyn Journal of International Law* 38.

However, it would be a mistake for the Court to adopt the extreme *actio popularis* principle used by the Commission. Such an approach would only repeat the problem of insufficient information and irrational withdrawals in cases of declarations pursuant to article 34(6) which allow NGO or individual complaints.

At the 3rd ordinary session of the African Union (AU) Assembly of Heads of State and Government (AU Assembly) in July 2004 in Addis Ababa, it was decided to merge the African Court and the African Court of Justice.⁴⁴ The reasoning behind this decision was the lack of funding for the two courts and it was believed to be unnecessary for two courts to have competence over human rights issues.⁴⁵ A protocol on the merger was drafted, but it was decided to continue with the operationalisation of the African Court. Currently, a single draft legal instrument on the merger has been made and a working group met from 21 to 25 November 2005 in Algiers, Algeria, to discuss this instrument.

At the January 2006 AU Summit in Khartoum, Sudan, the 8th ordinary session of the AU Executive Council elected the 11 judges of the African Court.⁴⁶ At the 7th ordinary session of the AU Assembly in July 2006, it was decided to endorse the recommendations of the Executive Council on the draft single instrument.⁴⁷ The AU Commission was requested to make recommendations on a draft protocol on the statute of the new court and submit these to the Executive Council in January 2007.⁴⁸ What the rules on standing will be after this probable merger of the African Court and the African Court of Justice is not clear. The Rules of Procedure for the African Court of Justice will probably elaborate on the matter.⁴⁹

⁴⁴ Assembly of Heads of State and Government of the AU, Assembly/AU/Dec 33-54(III), Decision on the Seats of the African Union, para 4 <http://www.africa-union.org/AU%20summit%202004/Assm%20en%20decl.htm> (accessed 15 September 2005).

⁴⁵ Coalition for an Effective African Court on Human and Peoples' Rights, Submission on the Single Legal Instrument relating to the Merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union, 28 March 2006 http://www.africancourtcoalition.org/merger_submission_eng_06.pdf (accessed 20 June 2006) 3. See also Coalition for an Effective African Court on Human and Peoples' Rights Legal and Institutional Issues Arising from the Decision by the Assembly of Heads of State and Government of the African Union to Integrate the African Court on Human and Peoples' Rights and Court of Justice of the African Union http://www.justiceinitiative.org/db/resource2/fs/?file_id=14964 (accessed 20 June 2006).

⁴⁶ AU Executive Council, Decision on the Election of Judges of the African Court on Human and Peoples' Rights (DocEXCL/241 (VIII)) EXCL/Dec 261 (VIII) para 2 http://www.africa-union.org/root/au/Documents/Decisions/com/AU6th_ord_Council_Decisions_Jan2006_Khartoum.pdf (accessed 14 September 2006).

⁴⁷ Assembly of the AU, Decision on the Draft Single Legal Instrument on the Merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union, DOC EX CL/253 (IX) Assembly/AU/Dec 118(VII) para 1.

⁴⁸ n 47 above, para 2.

⁴⁹ MA Baderin 'Recent developments in the African regional human rights system' (2005) 5 *Human Rights Law Review* 117 146.

4 Standing of non-state actors before international human rights tribunals

Three international human rights tribunals have a victim requirement. These are the European Court of Human Rights (European Court), the UN Human Rights Committee (HRC) and the UN Committee on Migrant Workers (MWC). Article 34 of the European Convention on Human Rights (European Convention) establishes that the person submitting a case must be a victim of a violation covered by the European Convention.⁵⁰ However, the European Court and the previous European Commission on Human Rights also accepted applications from relatives of a dead person, and in certain other cases a wide interpretation of the concept of victim has been applied. For example, in the *Klass* case, the European Court, concerning widespread telephone call interception, followed a broader standing principle.⁵¹ It is not sufficient that a law in general is alleged to be contrary to the European Convention for the establishment of standing of an individual. However, the individual has standing if the law directly affects the individual submitting the complaint and the law is applied to his detriment. In the *Klass* case, it was found that legislation allowing secret measures to be applied did not entail such direct interest to be present. Thus, the European Court follows a fairly strict standing principle.

According to article 1 of the First Additional Protocol to the International Covenant on Civil and Political Rights, the Human Rights Committee can only accept communications by individuals who claim to be victims of a violation.⁵² In *Shirin Aumeeruddy-Cziffra and Nineteen Other Mauritian Women v Mauritius*,⁵³ the Human Rights Committee interpreted this requirement to mean that the individual must be 'actually affected'. It was furthermore stated that 'no individual can in the abstract, by way of an *actio popularis*, challenge a law or practice claimed to be contrary to the Covenant'.

The HRC has also stated that the alleged violation must relate to specific individuals at a specific time.⁵⁴ However, there is some degree

⁵⁰ European Convention for the Protection of Human Rights and Fundamental Freedoms http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/English_Anglais.pdf (accessed 15 December 2005).

⁵¹ Communication 5029/71, *Klass & Others v Germany* 6 September 1978 <http://www.echr.coe.int> (accessed 8 September 2005) para 33.

⁵² First Additional Protocol to the Covenant on Civil and Political Rights adopted by General Assembly Resolution 2200A(XXI) of 16 December 1966 and entered into force 23 March 1976 <http://www.ohchr.org/english/law/ccpr-one.htm> (accessed 6 April 2006). See D McGoldrick *The Human Rights Committee: Its role in the development of the International Covenant on Civil and Political Rights* (1994); M Nowak *UN Covenant on Civil and Political Rights*. CCPR Commentary (1993).

⁵³ *Aumeeruddy-Cziffra & Others v Mauritius* (2000) AHRLR 3 (HRC 1981) para 9.2.

⁵⁴ *JH v Canada* Doc A/40/40 230 para 4.2; *Lovelace v Canada*; Communication R6/24 UN Doc SoppP No 40 Doc A/36/40 166 <http://www1.umn.edu/humanrts/undocs/session36/6-24.htm> (accessed 19 April 2006) para 10.

of flexibility, and the HRC has accepted that there may be circumstances when the mere existence of a domestic law may violate the International Covenant on Civil and Political Rights.⁵⁵

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families in article 77(1) establishes that the committee attached to the Convention can receive petitions from individuals 'who claim that their individual rights as established by the present Convention have been violated by that state party'.⁵⁶

Five tribunals have as their point of departure that the complainant need not be the victim. These are the African Committee on the Rights and Welfare of the Child, the Inter-American Human Rights Commission, the UN Committee against Torture, the UN Committee on the Eradication of Racial Discrimination and the Committee on the Elimination of Discrimination against Women (CEDAW Committee).

The African Charter on the Rights and Welfare of the Child states in article 44:⁵⁷

The Committee may receive communication, from any person, group or non-governmental organisation recognised by the Organization of African Unity, by a member state, or the United Nations relating to any matter covered by this Charter.

However, this Committee has yet to adopt any decision on communications.

Article 44 of the American Convention on Human Rights establishes that⁵⁸

[a]ny person or group of persons, or any non-governmental entity legally recognized in one or more Member States of the Organisation may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.

There is no victim requirement in article 44. In relation to NGOs, it is sufficient for the NGO to be recognised in the territory of a state party, but not necessarily in the particular case.⁵⁹ The International Conven-

⁵⁵ Communication 61/1979 CCPR/C/15/D/61/1979, *Hertzberg v Finland, Leo R Hertzberg, Uit Mansson, Astrid Nikula and Marko and Tuovi Putkonen, represented by SETA v Finland* UN Doc Supp No 40 (A/37/40) 161 (1982) <http://www1.umn.edu/humanrts/undocs/session37/14-61.htm> (accessed 14 October 2005).

⁵⁶ Adopted by General Assembly Resolution 45/158 of 18 December 1990 and entered into force 1 July 2003 <http://www.ohchr.org/english/law/cmw.htm> (accessed 15 December 2005).

⁵⁷ African Charter on the Rights and Welfare of the Child, OAU Doc CAB/LEG/24.9/49 (1990) entered into force 29 November 1999 www1.umn.edu/humanrts/africa/afchild.htm (accessed 23 September 2005).

⁵⁸ American Convention on Human Rights adopted at the Inter-American Specialised Conference on Human Rights San José Costa Rica 22 November 1969 <http://www.oas.org/juridico/english/Treaties/b-32.htm> (accessed 19 October 2005).

⁵⁹ Case 9213 (USA) Inter-American Commission on Human Rights, Annual Report, 1986-1987 184.

tion on the Elimination of all Forms of Racial Discrimination states in article 14(1) that communications may be brought 'not only by or on behalf of individuals, but also by or on behalf of groups of individuals'.⁶⁰ A similar provision is found in article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁶¹ The Optional Protocol to the Convention on the Elimination of Discrimination against Women establishes in article 2 that a communication may be submitted by (or on behalf of) alleged victims, but adds that⁶²

where a communication is submitted on behalf of individuals or groups of individuals, this shall be with their consent unless the author can justify acting on their behalf without such consent.

The CEDAW Committee has not yet elaborated on when applications can be submitted without the consent of victims. The approach by the European Convention, the HRC and the MWC seems to be narrow and, if applied to the Commission, would exclude deserving petitions. It is not clear why different solutions were arrived at by the different treaty bodies, besides that they have rules on standing reflecting the convention they are based upon. However, the CEDAW Committee's approach applies a victim condition, while at the same time allowing exceptions thereto.

The approach by the CEDAW Committee seems to be the best compromise as the benefits of both principles would be met. Possible grounds that may justify that 'consent' be dispensed with include the existence of massive or serious violations, and of substantiated obstacles that impede submission by the alleged victim personally. In comparison with the current approach, a victim requirement would be the point of departure. Although the CEDAW Committee has not yet elaborated in depth on when the consent of the victim can be deviated from, the same approach can be followed and it should be required that the victim be identified and facts surrounding the case presented. The approach by the CEDAW Committee is the only one that comes close to a compromise between individualising the victim or victims and allowing complaints to be submitted on their behalf if they are unable to do so themselves for economic or other reasons.

Consent by the victim, or at least the identification of the victim, would allow better information on the violation and foundations of

⁶⁰ Adopted by General Assembly Resolution 2106(XX) of 21 December 1965 and entered into force 4 January 1969 <http://www.ohchr.org/english/law/cerd.htm> (accessed 7 April 2005).

⁶¹ Adopted by General Assembly Resolution 39146 of 10 December 1984 and entered into force 26 June 1987 <http://www.hrweb.org/legal/cat.html> (accessed 15 December 2005).

⁶² Adopted by General Assembly Resolution A/54/4 of 6 October 1999 and entered into force 22 December 2000 <http://www.ohchr.org/english/law/cedaw-one.htm> (accessed 7 April 2005).

evidence and would limit the worst cases of lack of information, as in *Interights (on behalf of Safia Yakobu Husaini) and Others v Nigeria*.⁶³ Such an approach is further relevant when taking into account that, with the inauguration of the African Court, the African Commission will be part of a wider regional human rights mechanism and that cases that reach the African Court from the Commission should be based on solid facts and some comfort in the NGOs or individual's ability to present the case consistently. At the same time, the success of the new human rights mechanism depends on the possibility of cases reaching the African Court that would not otherwise do so because of the inability of the victim or victims to submit a communication. The success of the new human rights system therefore depends on finding this balance.

5 Conclusion

At the time the African Charter was drafted, a broad approach to standing was probably not intended. The African Commission later on developed its current approach where all individuals and organisations, whether foreign or African, could submit communications, no matter whether they had an actual connection with the victim or victims, or the act alleged to have been committed. This approach was intended to overcome the difficulties that the victims would have themselves in terms of economic or technical expertise in submitting the communications. However, this approach has also proven to be problematic because, as is explained above, the African Commission has experienced difficulties in obtaining sufficient evidence and information on the cases and inconsistency in the handling of cases. The current and future funding of the Commission does not allow for this.

Various approaches could be followed by the Commission to remedy its current approach. A connection to the victim should be established, as a point of departure, while at the same time ensuring an open procedure, making the Commission accessible for victims without the economic or technical abilities to do so. The CEDAW Committee has adopted a balanced approach between the two where, as a point of departure, only the victim can petition the CEDAW Committee and if a petition is submitted on behalf of a victim, it must be with their consent, unless it can be justified submitting it without their consent. Such justification would be the case of serious or massive violations pursuant to article 58 of the African Charter or a documented and well-reasoned problem for the victims in doing so themselves. An example could be actions by the government to impede the submission of a communication. It is also recommended that the approach in *Odjouriby Cossi Paul v Benin*⁶⁴ be pursued, where it was entrusted to another NGO to pursue

⁶³ n 25 above.

⁶⁴ n 18 above.

the case due to the inability of the victim. A list or database of NGOs or persons with the capability and will to do so could be developed. This approach corresponds to the previous concept of the African Commission owning the communication, as it will be the Commission which determines if and to which individual or NGO the complaint should be assigned.

A proper solution to the current problems of standing must take into account that, with the inauguration of the African Court, the African Commission will be part of a wider regional human rights mechanism. To ensure the success of the new system, it is imperative that the Commission works efficiently and smoothly. Accordingly, a solid foundation of evidence and certainty of the complainant NGO's ability to handle the case is imperative to ensure the functioning of the new African Court and the success of the new regional human rights mechanism.