

Recent developments

Human rights developments in the African Union during 2015

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Summary

There were few significant normative developments in the African human rights system during 2015. Draft protocols on the death penalty and the right to nationality were adopted by the African Commission, but whether these will be adopted eventually by the African Union remains to be seen. The Commission also adopted soft law instruments, such as a General Comment on the right to life. The Commission made a small dent in the backlog of communications by adopting a number of merits decisions, including one decision in which it found that hanging as a method of executing the death penalty violated the African Charter. Other merits decisions dealt with the right to nationality and gender-based violence. Despite an increasing docket, the African Court handed down only one merits judgment in 2015. The African Children's Committee made some progress in examining state reports, while some attempts were made to revive the African Peer Review Mechanism, which has not in recent years made much progress in its mandate. The dominant challenge facing the African human rights system in 2015 was the reaction of the AU Executive Council to the granting by the African Commission of observer status to the Coalition of African Lesbians. The directives by the Executive Council clearly challenged the independence of the African Commission as an autonomous organ of the African Union.

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1 Introduction

This article considers the work of the main human rights bodies of the African Union (AU) in 2015: the African Commission on Human and Peoples' Rights (African Commission); the African Court on Human and Peoples' Rights (African Court); and the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee). The work, or lack thereof, of the African Peer Review Mechanism (APRM), which also has a clear human rights mandate, is also considered.

The article starts with an overview of the interaction of the AU political organs with the human rights organs. The focus is on the confrontation between the AU Executive Council and the African Commission following the granting by the latter of observer status to the non-governmental organization (NGO) Coalition of African Lesbians (CAL). The eventual outcome of this conflict has serious implications for the independence of the African human rights system.

2 African Union political organs and human rights

2.1 Developing the legal and policy framework

Following the adoption of six treaties in 2014,¹ the AU did not adopt any new international agreements in 2015. In April the African Commission adopted a Draft Protocol to the African Charter on the Abolition of the Death Penalty in Africa, and in August a Draft Protocol on the Right to Nationality.² It remains to be seen whether these draft protocols will make their way through the AU system and be adopted eventually by the AU Assembly.

The Draft Protocol on the Abolition of the Death Penalty was tabled for the consideration of the AU Specialised Technical Committee on Justice and Legal Affairs in November 2015. The Committee declined

1 AU Convention on Cyber Security and Personal Data Protection; Protocol on the Establishment of the African Monetary Fund; African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development; Protocol to the Constitutive Act of the African Union relating to the Pan-African Parliament; AU Convention on Cross-Border Co-operation (Niamey Convention); Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

2 Final Communiqué 18th extraordinary session, para 11.

to consider the draft protocol as it was of the opinion that the African Commission lacked the legal basis to initiate protocols.³ This is in contrast with earlier practice where the African Commission has been deeply involved in the development of legal instruments adopted by the AU Assembly, such as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol).

Should the Protocol abolishing the death penalty be adopted, Africa will be the third regional human rights system to adopt such a protocol after Europe and the Americas.⁴ A number of African states have ratified the Second Additional Protocol to the International Covenant on Civil and Political Rights on the Abolition of the Death Penalty, illustrating a slow movement towards the abolition of the death penalty on the continent. However, a few states go against this trend. For example, Egypt has been particularly vocal in its opposition to any move towards abolition.

A protocol on the right to nationality would be a complement to the UN conventions on statelessness. Other regions have also adopted legal instruments with regard to nationality, such as the European Convention on Nationality and the Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession.⁵

In addition to its decisions on the human rights bodies' reports, human rights concerns were highlighted in some AU Assembly decisions. For example, in July the Assembly reiterated 'the need to respect, in the fight against terrorism and violent extremism, the highest standards of human rights and international humanitarian law'.⁶

2.2 Budget

The overreliance on donor funding for the AU has for many years been a bone of contention within the organisation. The budget for 2016, adopted by the AU Executive Council in July 2015, is approximately US \$417 million of which US \$170 million is obtained from member states and US \$247 million is obtained from donors. Only the African Institute for Remittances (AIR) has an operational budget funded by donors.⁷ However, only US \$19 million of the total

3 Oral statement on the state of the death penalty in Africa at the 58th ordinary session of the African Commission on Human and Peoples' Rights, AFR 01/3808/2016, 12 April 2016.

4 Protocol 6 to the European Convention on Human Rights (1982); Protocol to the American Convention on Human Rights to Abolish the Death Penalty (1990). The Second Optional Protocol to the ICCPR on the death penalty was adopted in 1989.

5 See Council of Europe 'Nationality', http://www.coe.int/t/dghl/standardsetting/nationality/default_en.asp (accessed 30 October 2016).

6 Decision on the report of the Chairperson of the Commission on Terrorism and Violent Extremism in Africa, Assembly/AU/Dec.584(XXV).

7 Decision on the budget of the African Union for the 2016 financial year, Assembly/AU/Dec.577(XXV).

of US \$247 million AU programme budget comes from contributions by member states. This is a far cry from the 75 per cent of the programme budget which the AU in January decided should be funded from contributions by member states.⁸ In June the Assembly gave itself five years to implement this decision.⁹

Of the AU budget for 2016, more than US \$10 million is allocated to the African Court, of which US \$2,4 million comes from donors, and US \$5,6 million to the African Commission, of which US \$1,3 million is from donors. The budget of the African Children's Committee is US \$739 178, of which US \$445 802 is from partners.¹⁰

As in past years, it is noticeable that the African Court has a significantly higher budget than the African Commission despite having a more limited mandate. Also, fewer AU member states have subscribed to the jurisdiction of the Court than the Commission. By the end of 2015, 29 states had ratified the Court Protocol. By contrast, all 54 AU member states had ratified the African Charter.¹¹

In its decision on the 38th Activity Report of the African Commission, the Executive Council called on member states and the AU Commission to ensure that the African Commission is 'provided with adequate resources to enable it to carry out its mandate without over depending on external funding'.¹² In this context, it is worth noting that the 2015 budget was close to US \$5 million from member states, while the member states' share of the 2016 budget was lower at US \$4,3 million,¹³ indicating increasing rather than decreasing donor dependence.

2.3 Backlash

The most serious attack on the African Commission's independence in its almost 30 years of existence occurred in 2015 as a result of a procedure that has not in previous years attracted much attention from states, namely, the granting by the Commission of observer status to NGOs. Currently close on 500 NGOs have observer status with the Commission. NGOs with observer status can make statements at the Commission's sessions,¹⁴ and observer status with the African Commission is also a requirement for a NGO wishing to submit a case under the direct access provision of the African Court.

8 Decision on the report of alternative sources of financing of the African Union, EX.CL/Dec.867(XXVI) para 5.

9 Decision on the 2016 budget (n 7 above) para 8.

10 Decision on the 2016 budget (n 7 above).

11 Despite having ratified the African Charter, South Sudan had by the end of 2015 not yet deposited its instrument of ratification.

12 Decision on the 38th Activity Report of the African Commission on Human and Peoples' Rights, EX.CL/Dec.887(XXVII) para 8.

13 38th Activity Report (n 12 above) para 44.

14 Criteria for the granting of and for maintaining observer status with the African Commission on Human and Peoples' Rights (1999) II.1.

Observer status mostly has been granted by the Commission without much discussion. However, this is not always so, as is illustrated by the case of the Coalition of African Lesbians (CAL) which was finally granted observer status in 2015. To provide some context to this decision, it is worth highlighting CAL's earlier attempt to be granted observer status. CAL first applied for observer status in May 2008. The application was considered in public session in November 2009. Some commissioners and state delegates opposed the application, with the Ugandan delegation stating that it would 'leave the ACmHPR if observer status was ever granted to CAL'.¹⁵ The application was deferred again and, at the session in May 2010, a few NGO representatives involved in lesbian, gay, bi-sexual, transgender and intersex (LGBTI) rights were invited to a private session of the Commission. From the discussion it was clear that a number of commissioners were homophobic, arguing that LGBTI persons were not protected under the African Charter.¹⁶ A few days later, the Commission decided not to grant observer status. CAL was only notified about the decision in October, without the Commission providing any reasons for the decision.¹⁷ An explanation was provided in the Commission's 28th Activity Report, which noted:¹⁸

The ACHPR decided, after a vote, not to grant observer status to the Coalition of African Lesbians (CAL), South Africa, whose application had been pending before it. The reason being that, the activities of the said organisation do not promote and protect any of the rights enshrined in the African Charter.

CAL describes itself on its website as a 'regional network of organisations in sub-Saharan Africa committed to advancing freedom, justice and bodily autonomy for all women on the African continent and beyond'.¹⁹ It is not clear how this goes beyond the rights protected in the African Charter. It should also be noted that NGOs promoting LGBTI rights had previously been granted observer status, the difference possibly being that the names of these organisations did not make this clear in the same way as that of CAL.²⁰

At the session following the decision to grant observer status to CAL,²¹

many NGOs who took the floor to address the African Commission expressed solidarity with CAL and their disappointment with the decision of the Commission. They urged the Commission to reconsider its decision. On the other hand, some states (such as Zimbabwe) took the floor and

15 S Ndashe 'Seeking the protection of LGBTI rights at the African Commission on Human and Peoples' Rights' (2011) 15 *Feminist Africa* 28.

16 Ndashe (n 15 above) 30-31.

17 Ndashe 31.

18 Para 33.

19 <http://www.cal.org.za> (accessed 30 October 2016).

20 F Viljoen *International human rights law in Africa* (2012) 267.

21 J Biegon 'The African Commission grants observer status to Coalition of African Lesbians' *AU Watch* Issue 5, 14 May 2015 2.

lauded the Commission for upholding 'African values' by rejecting CAL's application.

The above provides the context for what occurred when CAL submitted a new application for observer status in August 2014, which application was considered at the Commission's 1st ordinary session in 2015. At its 56th ordinary session in April-May 2015, the African Commission granted observer status to seven NGOs, bringing the total number of NGOs with observer status to 485.²² The Activity Report does not mention which seven NGOs these were. However, the Communiqué of the 56th session lists the seven NGOs, but does not mention anything about the controversy surrounding the granting of observer status to one of these, CAL. However, the controversy was evident for anyone attending the session, as the question of whether to grant CAL observer status had been discussed in public session. Ultimately, five commissioners voted in favour of granting observer status, while three voted for consideration of the application to be deferred.²³ The other commissioners abstained or were not present.

As was to be expected, the AU political organs did not respond favourably. Homophobia is ingrained in the political rhetoric of many African leaders, including President Mugabe of Zimbabwe, who was the AU Chairperson in 2015. In its decision on the 38th Activity Report of the Commission in July, the Executive Council²⁴

[r]equest[ed] the ACHPR to take into account the fundamental African values, identity and good traditions, and to withdraw the observer status granted to NGOs who may attempt to impose values contrary to the African values; in this regard REQUESTS the ACHPR to review its criteria for granting observer status to NGOs and to withdraw the observer status granted to the organisation called CAL, in line with those African values.

The Executive Council further urged the African Commission to²⁵

- (i) observe the due process of law in making decisions on complaints received;
- (ii) consider reviewing its rules of procedure, in particular, provisions in relation to provisional measures and letters of urgent appeals in consistence with the African Charter on Human and Peoples' Rights;
- (iii) take the appropriate measures to avoid interference by NGOs and other third parties in its activities.

22 Activity Report para 14.

23 Biegon (n 21 above).

24 Decision on the 38th Activity Report of the African Commission on Human and Peoples' Rights, EX.CL/Dec.887(XXVII) para 7.

25 Para 12.

The Council authorised the publication of the African Commission's Activity Report 'after its update and due incorporation of the proposals made by member states and agreed upon, within that report, as reflected in these conclusions'.²⁶ The second quote above indicates that the Executive Council took the opportunity to express its concern not only over the CAL decision, but also other decisions that had upset member states, such as the complaints procedure, provisional measures, urgent appeal letters and 'interference' by NGOs and 'other third parties'. The reference to 'other third parties' may be linked to the opinion of some member states that Western states, through their donor agencies, wield too much influence over the agenda setting of the Commission, as discussed above.

It comes as no surprise that representatives of NGOs and national human rights institutions highlighted the importance of the independence and autonomy of the African Commission at the Commission's 2nd ordinary session in November.²⁷ Importantly, the representative of the state parties to the African Charter, the Angolan Secretary of State for Foreign Affairs, made no mention of the controversy, highlighted the importance of civil society, and called on AU member states 'to co-operate with the African Commission on Human and Peoples' Rights and to support the Commission's activities to promote and protect human rights in Africa'.²⁸ However, it is worth noting that only 24 out of the 54 AU member states sent representatives to the session, fewer than the 32 states at the April-May session.

In its 39th Activity Report, the African Commission provides its answer to the Executive Council with regard to the request to withdraw the observer status of CAL and reviewing the criteria for granting observer status:²⁹

Following extensive deliberations, the Commission decided to undertake a detailed legal analysis on this matter, including considering issues relating to the Commission's relationships with its various stakeholders, the notion of African values, the legal basis for the grant of observer status by the Commission, and the implications of withdrawing or retaining the observer status of NGOs.

A request for an advisory opinion on the powers of the AU Executive Council was submitted to the African Court by the Centre for Human Rights, University of Pretoria, and CAL, and is pending before the Court.³⁰

26 Para 11.

27 Final Communiqué of the 57th ordinary session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia, 4 to 18 November 2015.

28 Communiqué para 11.

29 Para 50.

30 African Court on Human and Peoples' Rights, Advisory Proceedings, Pending Opinions, Request 002/2015, <http://en.african-court.org/index.php/cases/2016-10-17-16-19-35#pending-opinions> (accessed 30 October 2016).

The challenge to the African Commission's independence goes against the trend of the AU political organs expressing support for the Commission's work in its decisions. However, the CAL situation is not unique in challenging the independence of the Commission. For example, the Executive Council in 2011 and 2012 refused to authorise the publication of the Commission's Activity Report as some states had argued that it included unverified facts. In 2015 only did the Executive Council request the Commission to delete references in its Activity Report to two merits decisions it had adopted against Rwanda and to reconsider these cases.³¹ This forms the background to the call in the Executive Council decision to '[o]bserve the due process of law in making decisions on complaints received'.

In September the AU Permanent Representatives' Committee (PRC) held a three-day meeting with African Governance Architecture (AGA) platform members³²

to explore practical ways of building functional linkages and interactions between AU member states and AGA platform members with the ultimate aim of promoting and sustaining democratic and participatory governance, constitutionalism and rule of law and respect for human and peoples' rights in Africa.

Whether meetings such as these served to diffuse tensions remains to be seen.

In 2015, the AU political organs were not only on a collision course with one of its own organs, but also continued its antagonistic relationship with the International Criminal Court (ICC), an international court with criminal jurisdiction over the crimes of genocide, crimes against humanity and war crimes, which many African states have subscribed to, but which has been irritating African leaders through its almost exclusive focus on Africa and indictment of incumbent heads of state of Kenya and Sudan. In 2015, the AU Assembly expressed its 'deep concern regarding the conduct of the Office of the Prosecutor and the Court and the wisdom of the continued prosecution against African leaders'.³³ It is worth noting that in 2015 no state ratified the Malabo Protocol, adopted in 2014, providing the African Court with criminal jurisdiction over, among others, crimes covered by the Statute of the ICC. This is in line with the idea that most states are likely to have supported the adoption of the Malabo Protocol as a political statement expressing displeasure

31 See Decision on the 37th Activity Report of the African Commission on Human and Peoples' Rights, EX.CL/Dec.864(XXVI) para 8: 'As regards Communications 426/12 and 392/10 concerning the government of Rwanda, Council REQUESTS that the cases in question be expunged from the report of the African Commission for the period June-December 2014 until Rwanda is offered the opportunity of oral hearing on the two cases, as requested through various correspondence to the ACHPR.'

32 ACERWC/ RPT(XXVI) para 33.

33 Decision on the progress report of the Commission on the implementation of previous decisions on the International Criminal Court (ICC), Assembly/AU/ Dec.547(XXIV).

with the ICC rather than expressing a genuine willingness to ratify the treaty.³⁴

3 African Commission on Human and Peoples' Rights

3.1 Composition

In 2015 Commissioner Kayietsi from Rwanda was re-elected to the Commission. The African Commission received two new members, Mrs Jamesina King from Sierra Leone and Mr Solomon Dersso from Ethiopia, who were sworn in at the November session. They replace Commissioner Khalfallah of Tunisia and Commissioner Manirikaza of Burundi. The Commission, thus, retained a majority of women, since two men left and one man and one woman were elected. The Commission is thus now composed of six women and five men. Two women were elected to lead the Commission. Commissioner Tlakula from South Africa was elected Chairperson and Commissioner Maiga from Mali as Vice-Chairperson.

The issue of LGBTI rights does not appear to have featured significantly in the election of new Commission members. Commissioner Khalfallah, who had as commissioner publicly expressed deeply homophobic views,³⁵ was not re-elected, while Commissioner Kayietsi, who had also voted against granting CAL observer status, was re-elected. Commissioner Manirikaza, who had voted in favour of granting CAL observer status, was not re-elected. As far as the new members are concerned, it may be noted that Mrs King is Vice-Chairperson of the Human Rights Commission of Sierra Leone, which in its report to parliament noted that it would 'continue to protect persons with different sexual orientation from violent attacks and discrimination'.³⁶

3.2 Sessions

The African Commission held four sessions in 2015: the 17th extraordinary session (19-28 February); the 56th ordinary session (21 April-7 May); the 18th extraordinary session (29 July-7 August); and the 57th ordinary session (4-18 November). These were all held at the seat of the Commission in Banjul, The Gambia, with the exception of the 18th extraordinary session, which was held in Nairobi, Kenya.

34 By the end of 2015, the Protocol had been signed by five states (Benin, Congo, Guinea-Bissau, Kenya and Mauritania) although none had ratified it. The fact that Kenya was the first state to sign the Protocol in January 2015 is hardly surprising, considering that Kenya had taken the lead in developing the Protocol following the indictment of the Kenyan President and other political leaders by the ICC.

35 Biegon (n 21 above).

36 Human Rights Commission of Sierra Leone *The state of human rights in Sierra Leone in 2013* (2014) 59.

3.3 State reporting

At its April session, the Commission considered the state reports of Djibouti, Ethiopia, Malawi, Niger, Nigeria, Senegal and Uganda. At its November session, the Commission considered the reports of Algeria, Burkina Faso, Kenya and Sierra Leone. Among the states reporting in 2015 were some states that had for a long time not reported. Of the state parties to the African Charter, only Comoros, Equatorial Guinea, Eritrea, Guinea-Bissau, São Tomé and Príncipe and Somalia have never submitted a state report to the African Commission. A few states, including major states such as Ghana, have not reported since the 1990s.

At the February session, the African Commission adopted Concluding Observations on the reports of Liberia and Mozambique that had been considered in 2014. At the August session, the Commission adopted Concluding Observations on Sahrawi (considered in 2014), Niger, Djibouti, Senegal and Ethiopia. However, the Concluding Observations on Djibouti, Sahrawi and Senegal had as of August 2016 not yet been made public by the Commission on its website. At the November session, the Commission adopted Concluding Observations on the reports of Malawi, Nigeria and Uganda.

In the Concluding Observations on the report of Malawi, the Commission noted 'with appreciation that Malawi was the first state party to the Maputo Protocol to submit to the African Commission a report on the measures that have been taken to implement the Protocol in the country'.³⁷ The Commission called on Uganda to report on the implementation of the African Women's Protocol (also referred to as the Maputo Protocol), taking into consideration the guidelines on state reporting.³⁸ However, the Commission does not consistently call for such reporting.³⁹

The fact that a state has not reported on the implementation of the Women's Protocol is no reason for the Commission to address issues arising in relation to women's rights in two brief paragraphs under the heading 'protection of women and children' as in the case of the Concluding Observations on Uganda.⁴⁰ It is even more surprising to note that the Commission in its Concluding Observations on Malawi does not relate its concerns with regard to women's rights to the provisions of the African Women's Protocol, but list recommendations in relation to rights under the Protocol mainly under the heading 'protection of the rights of women and children'.⁴¹

37 Para 10.

38 Concluding Observations: Uganda para 50.

39 See eg Concluding Observations: Mozambique.

40 Paras 69-70.

41 Paras 103-115.

The Concluding Observations on Uganda call on the state to report on the implementation of socio-economic rights in line with the Commission's guidelines. However, in all the Concluding Observations adopted in 2015, the Commission, in its list of concerns and recommendations, focuses much more on civil and political rights than on socio-economic rights.

3.4 Resolutions, guidelines and General Comments

The Commission adopted 22 resolutions in 2015. These resolutions may be divided into three categories: resolutions relating to the human rights situation in Africa or with regard to specific states; thematic resolutions providing normative guidance to states; and administrative resolutions with regard to Commission procedures. Some resolutions fall outside this categorization, such as the Resolution on the World Bank's Draft Environmental and Social Policy (ESP) and associated Environmental and Social Standard (ESS).

With regard to country-specific resolutions, the Commission adopted a resolution on elections in Africa in 2015 and resolutions on Burundi (one on the human rights situation and one on the urgency of undertaking a fact-finding mission), Egypt, The Gambia, Kenya, Nigeria and South Africa (with regard to xenophobic violence).

The African Commission only adopted three thematic resolutions: the resolution on the right to water obligations; the resolution on the right to rehabilitation for victims of torture; and the resolution on accessibility for persons with disabilities.

The ten procedural resolutions adopted by the Commission deal mainly with the mandates and composition of the Commission's working groups. The Resolution on the Governance of the Commission and its Secretariat is interesting in that the Commission has found it necessary to adopt a public resolution to 'ensure that the Secretariat provides it with full support in the execution of its mandate in conformity with the relevant provisions of its Rules of Procedure'.

The lack of thematic resolutions should be viewed in the context of the African Commission adopting a number of other types of normative instruments interpreting provisions of the African Charter. Thus, at the 56th ordinary session, the Commission launched General Comment 2 on article 14 of the African Women's Protocol, the Guidelines on Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa and studies on female human rights defenders in Africa, nationality in Africa, freedom of association and assembly in Africa. The Commission also adopted Principles and Guidelines on Human and Peoples' Rights While Countering Terrorism. In November 2015, the Commission adopted General Comment 3 on the Right to Life (article 4).⁴² The General Comment was developed by the Working Group on the Death Penalty and Extra-Judicial, Summary or

42 Draft Protocol on the Right to Nationality.

Arbitrary Killings in Africa. It explores various aspects with regard to the right to life in great detail, including the death penalty; the use of force in law enforcement; the use of force in armed conflict; responsibility for persons in custody; and responsibility for non-state actors.

Arguably, whether a normative 'soft law' instrument is called a resolution, guidelines or general comment is not very important. The importance of these instruments lies in the way in which they are used by the Commission and various stakeholders in holding states to account.

3.5 Communications

The focus in this section is on the six decisions on merit decided by the African Commission in 2015 which were available publicly at the time of writing.

*Interights and Ditshwanelo v Botswana*⁴³ was brought on behalf of Modisane Ping, sentenced to death for murder. Mr Ping unsuccessfully appealed to the Court of Appeal and his application for clemency to the President was denied. Mr Ping's mother and legal counsel were not allowed to see him before the execution.

On 31 March 2006 the Commission received the complaint. The Commission Secretariat attempted to submit a request for provisional measures to stay the execution while the case was being heard. However, its attempts to send a fax to the Office of the President of Botswana were unsuccessful. Before the Secretariat could find alternative means of reaching the relevant authorities, it was informed by the complainants that Mr Ping had been executed on 1 April 2006.⁴⁴ This situation is similar to the failure of the Commission to reach the Botswana authorities to prevent the execution of Ms Bosch in 2001.⁴⁵

Since the complainant contended that all the admissibility requirements had been met and the state did not make any submissions on admissibility despite several reminders, the Commission declared the communication admissible.

The complainant argued that the imposition of the death penalty violated the African Charter as Mr Ping had been assigned an inexperienced defence counsel. However, the Commission held that this could not merit the finding of a violation since this issue had not been raised in the Court of Appeal.⁴⁶ The Commission further held that it would not re-evaluate facts unless the domestic courts' 'evaluation of the facts are manifestly arbitrary or amounted to a

43 Communication 319/06.

44 Para 24.

45 *Interights & Others (on behalf of Bosch) v Botswana* (2003) AHRLR 55 (ACHPR 2003).

46 Para 72.

denial of justice'.⁴⁷ The complainant had not shown this to be the case. The same applied to the evaluation of extenuating circumstances. The Commission further held that powers of clemency were not subject to judicial review as they formed part of the state's prerogative powers.⁴⁸

With regard to the prohibition of torture and ill-treatment in article 5 of the African Charter, the Commission held that hanging as a method of execution 'causes excessive suffering' and, therefore, constitutes a violation of article 5.⁴⁹ The Commission held that the execution had not been unduly prolonged, thereby not giving rise to the so-called 'death row phenomenon', given the fact that Mr Ping was executed shortly after the end of the appeal and the clemency process had been concluded.⁵⁰ The Commission noted that prisoners on death row should be given 'adequate notice of their execution'. In line with its decisions in two other death penalty cases against Botswana, *Bosch*⁵¹ and *Spilg*,⁵² the Commission further held that the failure to inform the family and lawyer of Mr Ping of the time of the execution and the place of burial constituted a violation of article 5.⁵³

The most noticeable part of the decision is the finding that execution through hanging constitutes cruel, inhuman or degrading punishment under article 5 of the African Charter. The Commission did not go as far as fully outlawing the death penalty, even though it noted that 'it seems that no method of execution is appropriate under international law'.⁵⁴ However, the decision remains significant, given that the Commission in the *Spilg* case in 2013 had held that, while hanging could constitute cruel, inhuman or degrading punishment, it had not been shown to constitute such punishment in the case at hand.

In *The Nubian Community in Kenya v The Republic of Kenya* it was alleged that the Nubian community in Kenya has been denied their right to nationality. Kenya argued that the case should be declared inadmissible as the community had not exhausted local remedies. However, the Commission held that the complainants 'in the particular circumstances are unable to utilise local remedies mainly because of many procedural and administrative bottlenecks put in their path',⁵⁵ including the failure of the High Court to constitute a panel to hear a case filed by a Kenyan NGO in 2003.

47 Para 73.

48 Para 81.

49 Para 87.

50 Para 91.

51 *Interights* (n 45 above).

52 Communication 277/2003, *Spilg and Mack & Ditswanelo (on behalf of Lehlohonolo Bernard Kobedi) v Botswana* (2013).

53 Para 96.

54 Para 85.

55 Para 52.

On the merits, the Commission held that Kenya had acted in a discriminatory fashion against the Nubian community by imposing additional requirements for obtaining a Kenyan identity document to those that exist for Kenyan citizens of other ethnic groups.⁵⁶ The Commission held that this practice 'failed to recognise the legal status of Nubians' in violation of article 5 of the African Charter. The Commission further held that the lack of access to an identity document affected the right to political participation and access to public service, health and education. The Commission also held that eviction without notice or the provision of alternative housing or compensation violated the right to property of the Nubians affected. It should be noted that the African Children's Committee dealt with related violations against the Nubian community in Kenya in its first merits decision in 2011.⁵⁷

*Open Society Justice Initiative v Côte d'Ivoire*⁵⁸ dealt with the controversial nationality law of Côte d'Ivoire. With regard to the exhaustion of local remedies, the Commission noted that⁵⁹

the insecurity existing in Côte d'Ivoire at the time of the facts, especially towards the targeted communities, could not have motivated the victims to seek protection under the law from authorities involved in the alleged violations. In such circumstances, internal remedies could not be said to be available.

The Commission further noted that the violations were 'serious or massive' given that 'hundreds of thousands of persons' were stateless in Côte d'Ivoire as a result of the legislation complained of and that, in line with its jurisprudence, the exhaustion of local remedies was not required in these circumstances.⁶⁰ On the merits, the Commission held that Côte d'Ivoire had violated the African Charter through its nationality law, and recommended constitutional and legal reform, including a simplified application procedure for obtaining Ivorian nationality for specific groups, and a reformed birth registration system.

The Commission held that *Mbiankeu v Cameroon*⁶¹ was admissible since local remedies were not accessible to the complainant. The Commission noted that the complainant had provided evidence that she had submitted complaints to relevant Cameroonian authorities without any action being taken.⁶² The Commission noted that the

56 Paras 127, 134 & 135.

57 Communication 2/2009, *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of children of Nubian descent in Kenya) v The Government of Kenya* (22 March 2011). See M Killander & A Abebe 'Human rights developments in the African Union during 2010 and 2011' (2012) 12 *African Human Rights Law Journal* 199-221.

58 Communication 318/06.

59 Para 44.

60 Para 47.

61 Communication 389/10.

62 Para 52.

state had not 'provided the Commission with evidence that the formalities and means of seizure used by the complainant are prohibited by the relevant laws or fail to comply with these laws'.⁶³ The reversion by the Commission to only deal with admissibility issues that have been contested by the state, in this case the exhaustion of local remedies, should be welcomed. On the merits, the Commission found a violation of the right to property and adequate housing, the latter as an implied right under articles 16 and 18 of the African Charter.⁶⁴ As reparation, the Commission ordered both material and non-material damages.

In *Atangana Mebara v Cameroon*,⁶⁵ the complainant challenged his incarceration on corruption charges. Cameroon challenged admissibility on two grounds: insulting language (article 56(2) of the African Charter) and non-exhaustion of local remedies (article 56(5)). It is clear that what constitutes insulting language in a communication must be decided on a case-by-case basis. In the present case, the Commission held that the following quote from the complainant's submission did not constitute insulting language:⁶⁶

Faced with a largely negative balance sheet, the regime, which has been in power for thirty years, has come up with a hoax to scapegoat a number of senior officials, on the trumped-up charge of misappropriation of state funds, for the sole purpose of gaining credibility in the eyes of international donors.

The Commission held that local remedies had been unduly prolonged since the magistrate had not responded despite statutory timeframes for such response having expired.⁶⁷

With regard to the merits, the Commission held that Mr Atangana Mebara's right to be presumed innocent had been violated through public statements about his guilt.⁶⁸ The Commission also found a violation of the right to legal representation, the right to be tried within a reasonable time and the prohibition of arbitrary detention. As remedies, the Commission called for the release of the complainant (in line with a national High Court judgment), and the imposition of sanctions against those responsible and compensation. For most of its existence, the Commission has called for compensation without specifying the amount. In the current case, it decided to call for compensation in the amount of 400 000 000 CFA (approximately US \$650 000) for seven years of detention. The Commission noted:⁶⁹

63 Para 54.

64 Para 124.

65 Communication 346/07 *Mouvement du 17 Mai v Democratic Republic of Congo*; 325/06.

66 Para 54.

67 Paras 63 & 69.

68 Para 103.

69 Para 142.

In assessing the amount, it should also be noted that until his detention, the complainant was working as a senior research fellow and occupied senior posts in government. His prolonged detention brought his professional activities to a standstill while his reputation was ruined due to the presumption of guilt that he was subjected to before the public.

Apart from citing the practice of the European Court of Human Rights and the Economic Community of West African States (ECOWAS) Court of Justice in relation to compensation for arbitrary detention, the Commission provided no reasoning in relation to its decision of providing an exact amount of compensation in its decision. It is worth noting that the African Court has a much more elaborate system for providing reparations, which include a separate reparations judgment adopted after a merits judgment, finding violations of the African Charter or other relevant human rights instruments.

*Equality Now and Ethiopian Women Lawyers Association v Ethiopia*⁷⁰ was adopted by the African Commission in November 2015. The case dealt with the rape and abduction of a 13 year-old girl as part of a traditional practice in Ethiopia and the lack of response by the Ethiopian authorities. The perpetrator was initially convicted by a court, but the conviction was overturned on appeal. The Commission held that violators must be pursued with diligence and that the decisions of the national appeal courts had been 'manifestly arbitrary and affront the most elementary conception of the judicial function'.⁷¹ In addition to prosecution, the state had an obligation to adopt preventive measures. However, the Commission noted that it would not dictate what these would be, given the state's 'unique knowledge of the local realities'.

Two of the Commission's 2015 decisions on merit, both against the Democratic Republic of the Congo, were not publicly available at the time of writing.⁷²

The African Commission also adopted a few inadmissibility decisions, two of which are briefly discussed here.⁷³ In *Human Rights Council & Others v Ethiopia*,⁷⁴ the Commission held that the House of Federation, despite being part of the Ethiopian Parliament, was a 'dispute settlement body on constitutional issues' and that it was necessary to approach this body in relation to a constitutional complaint as part of the requirement to exhaust local remedies prior to submitting a case to the African Commission.

70 Communication 341/2007.

71 Para 137.

72 Communications 346/07 *Mouvement du 17 Mai v Democratic Republic of Congo*; 325/06 *Democratic Republic of Congo*.

73 The others are Communication 410/12, *Congress for Democracy and Justice (CDJ) v Gabon* (not available); Communication 400/11, *Reseau ouest Africain des defenseurs des droits humains et Coalition ivoirienne des defenseurs des droits de l'homme v Côte d'Ivoire* (failure to exhaust local remedies); Communication 477/14, *Crawford Lindsay von Abo v Zimbabwe* (submission within reasonable time after exhausting local remedies).

74 Communication 445/13.

A case brought by 529 persons sentenced to death in Egypt was declared inadmissible since a retrial had been ordered by an Egyptian court. However, the Commission took the opportunity to call on Egypt to implement a moratorium against the death penalty and to ensure that the 'retrial observes all standards of fair trial and due process'.⁷⁵ This followed an oral hearing in relation to the case at the 56th ordinary session.

At the extraordinary session in Nairobi, the African Commission held two oral hearings in cases against Rwanda. This followed the decision to reconsider the cases following the Executive Council's decision that references to the merits decisions should be removed from the Commission's Activity Report.

The Commission's Activity Reports note that the Commission adopted provisional measures with regard to some communications. However, apart from the case names, no public details on these have been provided and the general public would have to wait for the final decision on a communication to get information on the provisional measures.

At its November session, the Commission referred one communication to the African Court, namely, *Family of Late Audace Vianney Habonarugira v Burundi*.⁷⁶ This followed a response from Burundi in relation to provisional measures issued by the Commission.⁷⁷ Non-compliance with the provisional measures of the Commission is one of the grounds in the Commission's Rules of Procedure to refer a case to the Court. This is obviously subject to the state having ratified the African Court Protocol, which Burundi did in 2003. Countries with many cases pending before the Commission, such as Egypt, have not ratified the Court Protocol.

4 African Court on Human and Peoples' Rights

4.1 Docket

Close to two decades after the adoption of the African Court Protocol, the number of states that have subjected themselves to the jurisdiction of the Court remains limited. Cameroon deposited its instrument of ratification of the Protocol in August 2015, taking the number of ratifications to 29. Of these, only eight states (Burkina Faso, Côte d'Ivoire, Ghana, Malawi, Mali, Rwanda and Tanzania) had made a declaration allowing access to the Court. Cases can also be submitted to the Court by the African Commission.⁷⁸ Despite repeated calls by AU policy organs and the African Commission for

75 Communication 467/14 *Ahmed Ismael & 528 Others v Egypt* para 176.

76 Communication 472/14.

77 Para 31.

78 In an advisory opinion in 2014, the Court decided that the African Children's Committee may not refer cases to the Court.

states to ratify the Protocol and make an article 34(6) declaration, the number of states that have subjected themselves to the Court remains limited.

At the end of 2015, the African Court had not yet determined whether NGOs may request advisory opinions, an important issue considering that all pending requests for advisory opinions have been submitted by NGOs.

4.2 Decisions and judgments

The African Court delivered few judgments and orders in 2015. On 5 June it handed down the reparations judgments in *Zongo v Burkina Faso*.⁷⁹ This was the second reparations judgment of the Court. In the merits judgment in *Zongo*, the Court had held Burkina Faso responsible for the lack of due diligence in the investigation of the murders of the investigative journalist, Norbert Zongo, and his companions in December 1998. The reparations judgment dealt with the issue of damages to the family members and NGO that brought the case and also with the issue of whether the Court should order the reopening of the case.

After extensive discussion of relevant comparative case law, the Court held that those entitled to compensation for 'moral prejudice' are the spouses, children and parents of the deceased persons, and ordered the state to compensate each spouse with 25 million CFA (approximately US \$40 000), each child with 15 million CFA and each parent with 10 million CFA. The Court held that the state should give the NGO that submitted the case together with the relatives a token 1 CFA. The state was also ordered to pay costs amounting to more than 43 million CFA. The Court's order on compensation was unanimous, while Judge Tambala dissented with the Court's order that the state should 'reopen investigations with a view to apprehend, prosecute and bring to justice the perpetrators'.⁸⁰

On 20 November, the African Court delivered its first (and only) merits judgment for 2015, *Alex Thomas v Tanzania*.⁸¹ The Court held that Mr Thomas had been subjected to an unfair trial and sentenced to 30 years' imprisonment in 1997. The Tanzanian Court of Appeal dismissed Mr Thomas's appeal in May 2009. The Court held that the question whether the case before the Court had been submitted within a reasonable time should be determined based on the fact whether it was reasonable to file the application to the African Court in August 2013 when Tanzania had made the declaration under article 34(6) of the Protocol in March 2010. The Court held that a

79 *In the matter of beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blais Ilbudo & Burkinabe Movement on Human and Peoples' Rights v Burkina Faso* Application 013/2011, judgment on reparations, 5 June 2015.

80 Para 111(x).

81 *Alex Thomas v United Republic of Tanzania* Application 5/2013, judgment 20 November 2015.

delay of three years and five months in submitting the case was not unreasonable considering the circumstances of Mr Thomas as 'a lay, indigent, incarcerated person, compounded by the delay in providing him with Court records'.⁸² On the merits, the Court held that various fair trial rights had been violated, including the non-provision of legal aid despite the fact that the provision of legal aid was in the interests of justice. With regard to remedies, the Court held that Tanzania must take appropriate measures to redress the violations, but that these should not include the reopening of the defence case or a retrial, since this would be prejudicial to Mr Thomas, considering that he had already spent close to 20 years of a 30-year sentence in prison at the time of the Court's judgment. In a joint dissenting opinion, judges Thompson and Ben Achour argued that Mr Thomas had shown exceptional circumstances that would have merited an order that he should be released.

On 20 November, the African Court gave an order in the case of *Femi Falana v African Commission on Human and Peoples' Rights*.⁸³ The background was that Mr Falana, a Nigerian human rights lawyer, in May 2015 filed a case at the African Commission with regard to systematic and widespread human rights violations in Burundi. He submitted an application to the Court against the Commission when the Commission did not refer the case to the Court. Hardly surprisingly, the Court declared that it did not have jurisdiction. Judge Ougurgouz highlighted the fact that this was the type of case that should rather be dismissed administratively by the Registry than be subject to judicial determination by the Court.

5 African Committee of Experts on the Rights and Welfare of the Child

5.1 Composition

In January 2015, the AU Assembly adopted an amendment to article 37(1) of the African Children's Charter and decided that the amendment should enter into force with immediate effect. The amendment had been requested by the African Children's Committee and entailed that members of the Committee could be re-elected for a second term of five years. Under the original Charter, members were elected for a non-renewable term of five years.

In June the AU elected six members to the Committee of which two, Benyam Mezmur (Ethiopia) and Clement Mashamba (Tanzania), were re-elected to serve a second term. In appointing the members, the Assembly requested 'the [AU] Commission to prepare modalities to ensure the scrupulous respect of the principles of equitable regional

82 Para 74.

83 Application 19/2015, order 20 November 2015.

and gender representation in all AU organs and institutions, and to submit the modalities to the January 2016’.

5.2 Sessions

The African Children’s Committee held its 25th session from 20 to 24 April⁸⁴ and its 26th session from 16 to 19 November.⁸⁵ Both sessions were held in Addis Ababa, Ethiopia.

5.3 State reporting

The state reports of Madagascar, Namibia, Rwanda and Zimbabwe were considered at the 25th session. The Madagascar delegation was headed by the Minister of Justice, while the delegation of Namibia was headed by the Permanent Secretary of the Ministry of Gender Equality and Child Welfare, the Rwandan delegation by the Executive Secretary of the National Commission for Children, and the Zimbabwean delegation by the Minister of Health and Child Care. At the 26th session, the state reports of Algeria, Congo, Gabon and Lesotho were considered. The reports were presented by ministers, with the exception of the Algerian report which was presented by the Director of Political Affairs and International Security of the Ministry of Foreign Affairs.

The African Children’s Committee should be commended for providing detailed reports in its session reports on the examination of the state reports, including the answers of the state delegations to questions posed by the Committee. At its 26th session, the Committee decided that the time allocated at a session for the presentation of a report should be a maximum of 20 minutes, followed by questions by the Rapporteur for a maximum of eight minutes, while other members of the Committee would be given a maximum two minutes each to raise questions.

5.4 Communications

The African Children’s Committee did not adopt any decisions on communications in 2015. As opposed to the African Charter, there is no provision in the Children’s Charter that the communications procedure should be confidential. Despite this, the Committee does not provide any information on pending communications in its session reports. This is all the more remarkable, considering the fact that the Committee provides a database of national children’s rights cases on its website, which includes cases from Botswana, Kenya, Lesotho, Namibia, South Africa and Zimbabwe.⁸⁶

84 Report 25th ordinary session of the African Committee of Experts on the Rights and Welfare of the Child ACERWC/RPT (XXV).

85 Report 26th ordinary session of the African Committee of Experts on the Rights and Welfare of the Child, ACERWC/ RPT(XXVI).

86 <http://national-cases.acerwc.org/> (accessed 30 October 2016).

6 African Peer Review Mechanism

The African Peer Review Mechanism (APRM) has in recent years lost steam. Gruzd and Turianskyi noted with regard to the APRM Forum held in connection with the AU Summit in Addis Ababa in January 2015:⁸⁷

Only three (out of a possible 35) presidents attended the meeting of the African Peer Review Mechanism (APRM) Forum on 29 January 2015 in Addis Ababa, Ethiopia. This was in spite of the announcement and endorsement of a number of key decisions, which have the potential to revive and strengthen the APRM – the continent’s premier home-grown governance assessment and improvement tool.

Scheduled progress reports by Benin and Sierra Leone were not presented. On a positive note, a CEO for the APRM Secretariat, Prof Adebayo Olukoshi, was appointed. Côte d’Ivoire became the thirty-fifth state to sign up for the APRM at the January APRM Forum.⁸⁸

Financing remains a serious challenge, with many states not paying their membership contributions and very limited support for the APRM from international donors remaining. However, the lack of funds is not the only challenge. Gruzd and Turianskyi noted:

Enthusiasm around the APRM has been declining in recent years, with fewer new countries joining and fewer reviews taking place. What started out as an initiative that could transform Africa became an overly complex and technical academic review, with member states seemingly lacking the political will to implement proposed changes. It will be up to the new CEO and his team to demonstrate that there is still energy and drive in the APRM project, and to demonstrate tangible governance results. He will need to strategise how to re-engage the continent’s leaders to actively participate. And he will have to raise serious funding to fulfil the APRM’s potential aspirations.

At the June APRM Forum, Kenyan President Uhuru Kenyatta replaced Liberian President Ellen Johnson Sirleaf as Chairperson of the APRM Forum.⁸⁹ More than a decade after its establishment, only 17 states, less than half of the members, have been reviewed. The last country review report (Tanzania) was published in January 2013. It is unfortunate that African states have allowed a procedure that had great potential to bring improved governance to participating states to fail. It remains to be seen whether this moribund institution can be revived under the new leadership.

87 S Gruzd & Y Turianskyi ‘Where is the African Peer Review Mechanism heading?’ <http://www.saiia.org.za/opinion-analysis/where-is-the-african-peer-review-mechanism-heading> (accessed 14 September 2016).

88 ‘The 22nd Summit of the Committee of Participating HOSG of the APRM’ <http://aprm-au.org/viewNews?newsId=64> (accessed 14 September 2016).

89 Article 19 ‘Africa: African Peer Review Mechanism in dire need of review’ <https://www.article19.org/resources.php/resource/38001/en/africa-african-peer-review-mechanism-in-dire-need-of-review> (accessed 16 September 2016).

7 Conclusion

Close to 30 years after its establishment, the African Commission experienced the greatest challenge so far in relation to its independence through the granting of observer status to CAL and the ensuing fall-out with the AU Executive Council and other decisions of the Commission that had upset member states, such as the merits decisions against Rwanda, which the Commission was forced to remove from its activity report. At the end of the year, it seemed that the dust had settled somewhat, and to some extent it was back to business as usual. However, it is clear that LGBTI rights remain a sensitive issue for many member states, and indeed within the Commission itself.

With regard to communications, the Commission decided a number of important cases, including those on the death penalty and gender-based violence. In contrast, during 2015 the African Court was still struggling to get off the ground and delivered only one merits judgment and one judgment on reparations. The African Children's Committee made some progress, in particular in relation to state reporting. The APRM seems to have lost much of its initial appeal, and it remains to be seen whether attempts to revive it will yield results.