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Recent developments

Human rights developments in the African Union (January 2017-September 2018)

*Magnus Killander**
Professor, Centre for Human Rights, Faculty of Law, University of Pretoria, South Africa

*Michael Gyan Nyarko***
Doctoral candidate, Centre for Human Rights, Faculty of Law, University of Pretoria, South Africa

Summary

The African Human Rights Decade (2017-2027) did not get off to a good start. The African Commission on Human and Peoples' Rights has been facing a backlash from the African Union Executive Council since granting observer status to the Coalition for African Lesbians in 2015, which has escalated to a level where the independence of the Commission is at stake. While the number of cases decided by the Commission has dropped steadily, its other monitoring roles and its role as a norm setter remain important. Many cases are pending before the African Court on Human and Peoples' Rights. However, almost all the contentious cases are against the few states that have made a declaration allowing direct access to the Court. The limited access to the Court is also as a result of its own jurisprudence. Thus, the opportunity of NGOs to submit requests for advisory opinions was severely limited by the Court in the SERAP *case. The increased hostility of states towards the African human rights system demonstrates that many states are sensitive to human rights criticism.*

* Jur kand (Lund), EMA (Padua), LLD (Pretoria); magnus.killander@up.ac.za
** LLM (Pretoria); m.gyannyarko@yahoo.com

The future will tell whether states will take further steps to weaken the system, for example through their choice of appointments to the monitoring bodies, or disengagement, or whether they will finally take action to meet their rhetoric and strengthen the system they started to build more than three decades ago.

Key words: *African Union; African Commission; African Court; backlash; case law*

1 Introduction

The African Union (AU) Assembly in July 2016 decided to

> enhanc[e] efforts aimed at entrenching and reinforcing a deeper understanding of the culture of human and peoples' rights, in particular the rights of women, and their promotion and popularisation amongst the African peoples by declaring the next ten years as 'the Human and Peoples' Rights Decade in Africa'.[1]

As with the African Youth Decade (2009-2018) that is coming to an end in 2018, it may be difficult to see concrete results from these initiatives. The same applies to previous thematic years such as the 2016 African Year for Human Rights with a focus on the rights of women, the 2017 thematic year on Harnessing the Demographic Dividend through Investments in Youth, and the 2018 African Anti-Corruption Year.

These thematic years and decades may play some role in highlighting issues. However, developments in AU member states and by AU institutions themselves make it difficult to take seriously a commitment to end human rights violations and corruption. As so often in the past, human rights form part of a rhetorical game played by African leaders where they, on the one hand, wish to be viewed as taking human rights seriously but, on the other, despise what they view as outside interference. In this game, they sometimes forget the important institutions they, themselves, have created at the national, sub-regional and regional level to be watchdogs over their behaviour, in accordance with rules that they have agreed to.

An important development in the period under review was the re-admittance of Morocco as a member of the AU in January 2017. Morocco left the continental organisation, the Organisation of African Unity (OAU), in 1984, following the admittance to the OAU of the Sahrawi African Democratic Republic (Western Sahara). The dispute over Western Sahara has not been resolved and it remains to be seen

1 Declaration by the Assembly on the theme of year 2016, Assembly/au/decl.1(xxvii)rev.1 para 2.

what role Morocco will play in the AU over the coming years.[2] It is worth noting that, apart from the AU Constitutive Act, Morocco had as of September 2018 not ratified any other AU treaties, including the African Charter on Human and Peoples' Rights (African Charter) to which all other 54 AU member states are party.[3] The number of ratifications of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (African Court Protocol) remains at 30 and no new states have made a declaration under article 34(6) allowing for direct access to the Court.

During the period under review the AU made some progress towards economic integration which for decades has been high on the African agenda.[4] A Protocol on an African Continental Free Trade Area was adopted, even though much work remains to be done before it will be operationalised.[5] A Protocol on the Free Movement of Persons, Right of Residence and Right of Establishment was also adopted. As of September 2018 only Rwanda had ratified the Free Movement Protocol. This is in line with Rwanda's liberal visa policy which allows citizens of all countries to obtain a 30-day visa upon arrival with no requirement of prior application.[6] It is likely to take many years before Africa as a whole will reach the same level of free movement as achieved in some of the sub-regional organisations such as the East African Community and the Economic Community of West African States (ECOWAS).

The focus of the article is on the work of the main human rights bodies of the AU, namely, the African Commission Human and Peoples' Rights (African Commission); the African Court on Human and Peoples' Rights (African Court); and the African Committee on the Rights and Welfare of the Child (African Children's Committee). The article also refers to the work of the AU Peace and Security Council (PSC); the Pan-African Parliament (PAP); the Advisory Board on Corruption; the AU Commission; and of AU electoral observation missions. It further considers the role played by the highest decision-making organs in the AU, the Executive Council and the Assembly of Heads of State and Government which, for good and bad, have in

2 Morocco has been active in getting Western Sahara off the agenda of the Peace and Security Council after having been elected to a member in April 2018; see https://www.dailymaverick.co.za/article/2018-09-11-au-limits-its-role-in-western-sahara-crisis/ (accessed 24 September 2018).

3 However, it should be noted that Morocco was one of 20 states attending the African Commission's session in May 2017.

4 See eg Treaty Establishing the African Economic Community (adopted in 1991, entered into force in 1994).

5 Agreement Establishing the African Continental Free Trade Area, adopted 21 March 2018.

6 https://www.migration.gov.rw/fileadmin/templates/pdf_files/communique/public_announcement/public_announcement_-_new_visa_regime_final.pdf (accessed 24 September 2018). See also http://www.peaceau.org/uploads/661-psc-comm-23-02-2017free-movement-of-people-final.pdf (accessed 24 September 2018).

recent years taken an increased interest in human rights issues, and the role of the Permanent Representatives' Committee (PRC), the powerful body consisting of the member states' ambassadors to the AU.

The article is structured as follows: In the first place the various human rights developments, positive and negative, highlighted by the African Commission, the African Children's Rights Committee, the PSC and AU electoral monitoring bodies are discussed. Thereafter two themes, corruption and women's rights, are discussed. The article further discusses the backlash against the AU human rights monitoring bodies, in particular the African Commission. Finally, the decisions and judgments on individual complaints of the Commission, the Committee and the Court are discussed.

2 Human rights developments in Africa

In its Activity Reports the African Commission highlights positive and negative developments in relation to human rights in Africa. With regard to positive developments, the Commission tends to focus on the ratification of international instruments and the adoption of national laws. With regard to national judgments, the Commission highlighted the declaration of unconstitutionality of criminal defamation in Kenya; the annulment of the Kenyan election results; the declaration of the mandatory death penalty as unconstitutional in Kenya; and an ECOWAS Court of Justice judgment on criminal libel. The African Commission further highlighted the release of schoolgirls who had been kidnapped by Boko Haram in Nigeria. With regard to executive action, the Commission highlighted the moratorium on the death penalty in The Gambia; the commuting of death sentences in Tanzania, Nigeria, Mauritania and Sudan; the pardoning of prisoners in Ethiopia and Zimbabwe; and the release of petty offenders in Nigeria. The Commission further highlighted the peaceful transfer of power in The Gambia; the peaceful elections in Ghana, Egypt, Liberia and Sierra Leone; and the publication of an election date in the Democratic Republic of the Congo (DRC).[7]

A positive assessment of elections in Africa was made by the electoral observation missions fielded by the AU. The AU and its predecessor, the OAU, has since 1989 been fielding electoral observation missions (EOMs) across the continent.[8] In the period under review, the AU sent observer missions to Angola,[9] Djibouti,[10]

7 43rd Activity Report para 35.

8 CC Aniekwe & SM Atuobi 'Two decades of election observation by the African Union: A review' (2016) 15 J*ournal of African Elections* 25.

9 https://au.int/en/pressreleases/20170828/african-union-election-observation-mission-23-august-2017-general-elections (accessed 24 September 2018).

10 https://au.int/sites/default/files/pressreleases/33865-pr-declaration_preliminaire_djibouti_2018._f.pdf (accessed 24 September 2018).

Equatorial Guinea,[11] Sierra Leone[12] and Zimbabwe, among others.[13] The preliminary statement of the EOMs are generally very positive. Some of the more critical comments, such as those in relation to the lack of female candidates in many elections, are easily obtained from a desk review. It is a matter of concern that generally only the preliminary statements of the EOMs are easily accessible online while the final reports are not easily accessible. The African Charter on Democracy, Elections and Governance (African Democracy Charter) provides that the reports should be made available to the state concerned but makes no provision in relation to publication.[14]

The PSC noted in August 2018 that Togo was the first country to submit its report on the implementation of the African Democracy Charter, and called on other states to do the same.[15] It is worth noting that the Chairperson of the AU Commission had already congratulated Togo on the submission of its report in March 2017.[16] The Democracy Charter entered into force in 2012 and has been ratified by 32 AU member states.[17] Under article 49 of the African Democracy Charter, states are required to report to the AU Commission every second year on their progress in implementing the Charter. The procedure by which the AU Commission will examine the reports submitted under the African Democracy Charter remains unclear.

One of the positive aspects of the African Commission's work is its normative development of the law under the African Charter. Thus, during the time under review some of the most important normative developments by the Commission were its adoption of Guidelines for the Policing of Assemblies by Law Enforcement Officers in Africa; the General Comment on the Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment under article 5 of the African Charter; and Guidelines on Combating Sexual Violence and its Consequences. The Commission also adopted a Joint General Comment with the African Children's Committee on Child

11 https://au.int/en/newsevents/20171112/12th-november-2017-parliamentary-election-republic-equatorial-guinea (accessed 24 September 2018).

12 https://au.int/en/pressreleases/20180402/preliminary-statement-aueom-2018-run-presidential-elections-republic-sierra (accessed 24 September 2018).

13 https://au.int/sites/default/files/pressreleases/34682-pr-aueom_preliminary_statement_-_zimbabwe_2018.pdf (accessed 24 September 2018).

14 See also *Guidelines for African Union electoral observation and monitoring missions* (2002), https://www.eisa.org.za/pdf/au2002guidelines.pdf (accessed 24 September 2018).

15 http://www.peaceau.org/en/article/communique-of-the-791st-psc-meeting-on-the-theme-peace-security-prosperity-and-embracing-the-value-of-democracy-and-governance-is-the-african-charter-on-democracy-elections-and-governance-adequate (accessed 24 September 2018).

16 https://au.int/en/pressreleases/20170327/togo-first-au-member-state-submit-state-report-african-charter-democracy (accessed 24 September 2018).

17 In the period under review, Algeria, Comoros, Equatorial Guinea, Liberia, Madagascar and Mozambique deposited their instruments of ratification.

Marriage. The African Children's Committee further adopted its General Comment 5 on 'State party obligations under the African Charter on the Rights and Welfare of the Child (article 1) and systems strengthening for child protection'.

Among the areas of concern the African Commission highlighted in its Activity Reports were the non-ratification of human rights instruments and low levels of state reporting. Substantive issues were slavery in Libya; the extension of the death penalty in Mauritania; the shutdown of media houses in Kenya despite court orders; the prohibition on the education of pregnant girls and young mothers; discrimination against persons with HIV in Tanzania; the eviction of indigenous peoples in Tanzania, Ethiopia and Kenya; discrimination against people with albinism in Tanzania, Uganda and other parts of Africa; conflict-related violations (including internal displacement) in Togo, the DRC, South Sudan, Somalia, Niger, Mali, Burkina Faso, Nigeria and Egypt; the impact of natural disasters in Niger and Sierra Leone; and hunger in Nigeria, South Sudan and Somalia. Other issues include the impact of epidemics such as cholera in the DRC and laws criminalising abortion 'despite the high rates of maternal mortality resulting from unsafe abortion'; the drowning of migrants in the Mediterranean; xenophobic attacks in South Africa; harassment of human rights defenders in Cameroon, Burundi, Eritrea, Sudan and South Sudan; states of emergency and torture in Ethiopia and Tunisia; inadequate conditions of detention; lack of transparency in relation to concessionary contracts; and poor regulation of extractive industries.[18]

Conflict prevention is high on the AU agenda as also reflected in the work of the Peace and Security Council.[19] That peace and security are viewed broadly to include human rights is clear from the agenda items of the PSC. For example, a meeting in August 2018 was dedicated to the issue of child marriage in Africa which has been placed high on the AU's human rights agenda.[20] The inclusion of human rights discussions on the agenda of the PSC is in line with the movement away from viewing security in a narrow sense to broader notions of human security.

The AU views criminal justice as sometimes coming into conflict with conflict prevention.[21] In particular, the continental organisation maintains that the International Criminal Court (ICC) should not

18 43rd Activity Report of the African Commission para 36.

19 http://www.peaceau.org/en/page/42-psc (accessed 26 September 2018).

20 http://www.peaceau.org/uploads/psc.789.-press-statement.ending.child.marriage.14.08.pdf (accessed 26 September 2018).

21 See eg Decision on the International Criminal Court, Assembly/AU/Dec.672(XXX) para 4: 'Takes note of the sovereign decision made by the Republic of Burundi to withdraw from the ICC effective October 27th, 2017, and condemns the decision by the ICC to open an investigation into the situation prevailing in the Republic of Burundi as it is prejudicial to the peace process under the auspices of the East African Community, and constitutes both a violation of the sovereignty of Burundi and is a move aimed at destabilising that country.'

indict African leaders as it did with the Presidents of Sudan and Kenya (the latter indictment was later withdrawn). Despite calls by the AU Assembly for ratification of the 2014 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol),[22] which would provide the African Court of Justice and Human Rights with criminal jurisdiction, by September 2018 no state had ratified this Protocol.

3 Corruption

2018 was declared by the AU the Year of Winning the Fight Against Corruption. The African Union Convention on Preventing and Combating Corruption, adopted in 2003, entered into force in 2006 and had as of September 2018 been ratified by 40 states. The main institutional mechanism set up under the Convention is the African Advisory Board on Corruption (AUABC). In June 2018 a member of the AUABC, Daniel Batidam, resigned, noting as follows:[23]

> After witnessing several instances and degrees of bad governance, including the abuse of entrusted power (or corruption), lack of probity, accountability, transparency and integrity at the Secretariat of the AUABC and some departments of the AU Commission itself over a period of three years now, while all efforts at seeking redress have yielded no results, I have decided on grounds of principle that enough is enough.

It may be that the AU has finally taken some action against financial misappropriation. In its decision on the report of the Permanent Representative Committee's report, the AU Executive Council in July 2018 expressed its 'deep concern over the findings contained in the Report of the Board of External Auditors',[24] and requested the AU Commission 'to take punitive action against staff and to report to the Executive Council on any required actions to be taken against elected officials found guilty of financial malpractices'.[25] Despite expressing 'serious concern over the malpractices within the AUABC',[26] the Advisory Board was allocated a budget of US $3 million for 2019, close to 10 times the allocation to the African Children's Committee and half of the allocation given to the African Commission.[27] This is despite the Advisory Board arguably having accomplished little of

22 Decision on the International Criminal Court, Assembly/AU/Dec.672(XXX).

23 Letter from Daniel Batidam to the Chairperson of the AUABC dated 8 June 2018, http://en.rfi.fr/africa/20180616-official-quits-au-anti-corruption-body-over-multiple-irregularities-african-union (accessed 26 September 2018). See also in relation to this and alleged corruption within PAP, https://www.dailymaverick.co.za/article/2018-07-05-as-pan-african-parliament-undergoes-urgent-audit-its-president-seeks-protection-against-sa-media-harassment/ (accessed 26 September 2018).

24 EX.CL/Dec.1008(XXXIII) para 5.

25 Para 6(v).

26 EX.CL/Dec.1016(XXXIII) para 1.

27 EX.CL/Dec.1020(XXXIII).

note in its more than a decade of existence. As of September 2018 the two main items highlighted on the website of the Board is the UNECA Regional Anti-Corruption Programme for Africa (2011-2016) and the Advisory Board's Strategic Plan (2011-2015).[28]

4 Women's rights

The AU is in the process of developing a gender strategy for the next decade.[29] The strategy aims at 'bringing together all the existing commitments and aligning them to Agenda 2063 and the Sustainable Development Goal (SDG) Agenda 2030'.[30]

In a memorandum dated January 2018 to the AU Commission Chairperson, Moussa Faki Mahamat, 37 female AU staff members said that they were 'totally appalled by the entrenchment of professional apartheid against female employees in the Commission as manifested in the Peace and Security department'. After a media report about the memorandum, the Chairperson of the AU Commission denied that he had received it but ordered an investigation noting that he 'will not allow discrimination against women under [his] watch'.[31] By September 2018 the report of the investigation had not been published.[32]

To achieve progress on women's rights, the composition of the human rights monitoring bodies is also important. In early 2017 Ms Bensaoula Chafika (Algeria) and Ms Chizumila Rose Tujilane (Malawi) replaced Mr Fatsah Ouguergouz (Algeria) and Mr Duncan Tambala (Malawi) as judges of the African Court, thereby reaching the required gender parity for the first time in its history with five female judges and six male judges on the bench.[33] Both Ms Chafika and Ms Tujilane are judges in their home countries. Ms Tujilane was the ombudsman of Malawi from 2010 to 2015. With the election of three new judges in July 2018, there are now six females and five males on the bench. The new judges are Ms Imani Aboud (Tanzania), Ms Stella Isibhakhomen Anukam (Nigeria) and Prof Blaise Tchikaya (Congo).[34]

28 http://www.auanticorruption.org/auac/en (accessed 26 September 2018).

29 http://genderlinks.org.za/wp-content/uploads/2017/10/augenderstrategydrafttwo__mmmclm_112017.pdf; https://au.int/en/pressreleases/20180510/african-union-calls-ministers-responsible-gender-and-women%e2%80%99s-affairs-more (accessed 2 October 2018).

30 Strategy draft 2 iv.

31 https://twitter.com/ebbakalondo/status/993461942718287873 (accessed 2 October 2018).

32 https://www.thereporterethiopia.com/article/au-delays-release-investigative-reports (accessed 2 October 2018).

33 http://www.african-court.org/en/index.php/news/press-releases/item/127-two-new-judges-appointed-to-the-african-court-on-human-and-peoples-rights (accessed 3 October 2018).

34 https://ilg2.org/author/jdawuni/ (accessed 3 October 2018).

This clearly strengthens the 'social legitimacy' of the Court,[35] and may lead to an increased interest among women's rights non-governmental organisations (NGOs) to bring women's rights cases before the Court. The African Commission has for some time had a majority of women members. As of September 2018, six of the 11 commissioners were women.[36] The African Children's Committee has seven female members and four male members.[37]

5 Backlash

In its Strategic Plan 2015-2019, the African Commission identified six external threats that affected its work, namely, (i) non-compliance with recommendations; (ii) slow response by states to requests by the Commission; (iii) limited visibility; (iv) armed conflict; (v) poverty and its link to under-utilisation of the Commission; and (vi) the creation of new mechanisms leading to less funding for existing ones. It is clear that to these threats must be added the backlash by the AU policy organs, which clearly threatens the independence of the African Commission.

In April 2015 the African Commission granted observer status to the Coalition of African Lesbians (CAL). This decision was not well received by the AU policy organs, and in June 2015 the Executive Council called on the African Commission to withdraw this observer status.[38] In November 2015 a request for an advisory opinion to the African Court on the legitimacy of the Executive Council decision was submitted by CAL and the Centre for Human Rights, University of Pretoria. The request was dismissed by the Court in 2017 due to a lack of standing of the two NGOs that had brought the case.[39] The issue no longer being under consideration by the African Court, the African Commission was required to make a decision on the Executive Council's 2015 request to withdraw the observer status of CAL. In its Activity Report to the January 2018 Summit the Commission noted that the decision to grant CAL observer status was 'properly taken' and that it was the duty of the Commission to protect the rights in the African Charter 'without any discrimination because of status or other circumstances'.[40] The Executive Council responded to the report by expressing concern over the Commission's non-compliance

35 N Grossman 'Sex on the bench: Do women judges matter to the legitimacy of international courts?' (2012) 12 *Chicago Journal of International Law* 647. See also J Dawuni *International courts and the African woman judge: Unveiled narratives* (2018).

36 http://www.achpr.org/about/ (accessed 3 October 2018).

37 https://acerwc.africa/the-experts/ (accessed 3 October 2018).

38 For a discussion, see M Killander 'Human rights developments in the African Union during 2015' (2016) 16 *African Human Rights Law Journal* 532.

39 *Request for Advisory Opinion by the Centre for Human Rights of the University of Pretoria and the Coalition of African Lesbians*, Application 002/2015 (2017).

40 Para 51.

with its 2015 request to the Commission to withdraw CAL's observer status.[41] To address 'various concerns' with the African Commission, the Executive Council decided that a retreat between the Permanent Representatives' Committee (PRC) and the African Commission should be organised. The retreat was held from 4 to 6 June 2018 in Nairobi, Kenya. By this time, the Commission had already deliberated on the Executive Council's reiterated request to withdraw CAL's observer status. In its 44th Activity Report, the African Commission notes that at its 62nd ordinary session in May 2018 it decided that it

> has to abide by and apply due process in order to ensure legality, compliance with the African Charter and its juridical mandate. Accordingly, the Commission will forthwith institute a process for judicially determining the request to withdraw NGO observer status from CAL. The Commission will report its final determination on this matter in its next Activity Report.[42]

The African Commission presumably was severely criticised at the retreat. In its decision on the outcome of the retreat, the Executive Council took its harshest stance yet against the Commission and included a number of decisions threatening the independence of the Commission.[43] The decision of the Executive Council included the revision of the criteria for NGO observer status to be in line with the (restrictive) criteria for accreditation with the AU, and that the revised criteria should be adopted by the AU policy organs and not by the Commission itself. The Executive Council further called on the African Commission to 'withdraw the accreditation of the Coalition for African Lesbians (CAL) NGO by 31st December 2018 at the latest, in accordance with previous decisions of AU Policy Organs'.

On 8 August 2018 CAL received a letter of notification from the African Commission informing the organisation that its observer status with the African Commission had been revoked by the Commission in compliance with the Executive Council's 2016 and 2018 decisions.[44] The decision to withdraw CAL's observer status had been taken at the 24th extraordinary session of the Commission held from 30 July to 8 August 2018. At this session the Commission also established three-member committees to consider a code of conduct for commissioners and to prepare a document on the interpretative mandate of the Commission in line with the Executive Council's July decision.

41 EX.CL/Dec.995(XXXII) para 3.

42 44th Activity Report para 43.

43 For a discussion, see J Biegon 'The rise and rise of political backlash: African Union Executive Council's decision to review the mandate and working methods of the African Commission', https://www.ejiltalk.org/the-rise-and-rise-of-political-backlash-african-union-executive-councils-decision-to-review-the-mandate-and-working-methods-of-the-african-commission/ (accessed 4 October 2018).

44 https://www.cal.org.za/2018/08/17/women-and-sexual-minorities-denied-a-seat-at-the-table-by-the-african-commission-on-human-and-peoples-rights/ (accessed 4 October 2018).

Egypt, which will chair the AU in 2019, has taken the lead in attacks against the African Commission, according to Biegon.[45] This may be related to the large number of cases against Egypt submitted to the Commission. With the AU Summit in January 2019 and the 64th ordinary session of the Commission in April-May 2019 set to be held in Egypt, it remains to be seen whether further attacks on the Commission's independence will ensue. Egypt's leading role in the attacks against the Commission's independence should be seen in the context of the actions taken by the Egyptian government to further limit civil society space.[46]

Backlash is not only an issue for the African Commission. The African Court has seen its powers curtailed by Rwanda's withdrawal of its article 34(6) declaration allowing direct access to the Court after the exhaustion of local remedies.[47] A controversial judgment by the African Court could lead the policy organs of the AU to suffocate it if an aggrieved state would take the lead and others follow. This is what led to the SADC Tribunal's demise and the access restrictions to the East African Court of Justice.[48] However, it should be noted that it is often not sufficient that one state is aggrieved, as illustrated by The Gambia's attempts under President Jammeh to curtail the powers of the ECOWAS Community Court of Justice.[49]

The backlash against the independence of the regional human rights institutions goes against the idea underlying the declaration of the AU Assembly in June 2016 regarding 2017-2026 as the 'Human and People's Rights Decade in Africa'. In the declaration, the members of the AU reiterated their

> unflinching determination to promote and protect human and people's rights and all basic freedoms in Africa and the need for the consolidation and the full implementation of human and peoples' rights instruments and relevant national laws and policies as well as decisions and recommendations made by the AU organs with a human rights mandate.[50]

The Assembly further called on the AU Commission 'to ensure the independence and integrity of AU organs with a human rights mandate by providing adequate financing and shielding them from

45 Biegon (n 43).

46 https://www.amnesty.org/download/documents/afr0173842017english.pdf (accessed 4 October 2018).

47 For a discussion of the withdrawal and the Court's judgment on the date when the withdrawal took effect, see M Nyarko & A Jegede 'Human rights developments in the African Union during 2016' (2017) 17 *African Human Rights Law Journal* 304.

48 KJ Alter, JT Gathii & LR Helfer 'Backlash against international courts in West, East and Southern Africa: Causes and consequences' (2016) 27 *European Journal of International Law* 293.

49 As above.

50 Assembly/AU/Décl.1(XXVII) Rev 1 para 4.

undue external influence'.[51] Lack of finances, in particular resulting in inadequate staffing of the Commission Secretariat, remains a challenge, although there are some signs of improvement.[52] However, 'independence' and 'undue external influence' should not only be viewed in the context of alleged undue influence by donors and NGOs, but also the need for the Commission to be able to undertake its mandate without undue influence from the AU policy organs. This interpretation is in line with the quotation above on the need for full implementation of the 'decisions and recommendations made by the AU organs with a human rights mandate'.[53]

It is perhaps symptomatic of a lack of real commitment that despite various consultations, an African Human Rights Action Plan 2017-2026, as foreseen by the Assembly decision, had at the time of writing not been adopted and the website dedicated to the project has not been updated.[54]

Perhaps the most important measure to ensure independent and effectively functioning regional human rights bodies is to ensure that their members fulfil the criteria for membership as set out in the founding treaties and other decisions of the AU. Members of the African Commission should, according to the African Charter, be chosen 'from amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights'.[55] Three new commissioners were appointed in 2017, namely, Mr Hatem Essaiem (Tunisia); Ms Maria Teresa Manuela (Angola); and Prof Remy Ngoy Lumbu (DRC). Commissioner Essaiem is a career diplomat who has been the Tunisian ambassador to Lebanon, the United Arab Emirates, Oman and Iran.[56] Maria Teresa Manuela is Deputy Attorney-General of Angola.[57] Since the appointment procedure is not transparent, it is difficult to determine whether the new appointees fulfil the criteria in the African Charter. The only new member with clearly-documented human rights experience is the new commissioner from the DRC, Remy Ngoy Lumbu, who is a professor of human rights law at the University of Kinshasa.[58]

51 Decision on the report on the joint retreat of the Permanent Representatives' Committee (PRC) and the African Commission on Human and Peoples' Rights (ACHPR), EX.CL/Dec.1015(XXXIII).

52 44th Activity Report of the African Commission para 40.

53 See also the acknowledgment of the important role played by donors, para 15.

54 http://www.africahuriplan.org/ (accessed 4 October 2018).

55 Art 31(1) African Charter.

56 http://www.businessnews.com.tn/la-tunisie-elue-a-la-commission-africaine-des-droits-de-lhomme-et-des-peuples,520,73341,3 (accessed 4 October 2018).

57 http://www.peaceau.org/en/resource/90-organ-peace-security-council (accessed 4 October 2018).

58 https://www.digitalcongo.net/article-en/595e242248d13a0004c2c414/ (accessed 4 October 2018). Dr Lumbu completed his doctorate in human rights law at the Université de Louvain, Belgium, in 2007 with a thesis on establishing an individual

The election of an ambassador and a deputy attorney-general is disturbing, particularly if indicative of a future trend. Since 2005 the AU's note verbale calling for nominations of members for the human rights monitoring bodies has requested that nominees be independent from government.[59] Members with close links to government have been the exception since the 2005 note verbale, and the African Commission has in recent years consisted of a mix of legal practitioners, judges, staff of NGOs, academics and leaders of independent national institutions such as national human rights institutions and electoral commissions.[60] An exception is Mumba Malila from Zambia who became a commissioner in October 2006. At the time he was the Chairperson of the Human Rights Commission of Zambia. However, already in December 2006 he was appointed Attorney-General of Zambia, a post which he held until December 2009 and then again from September 2011. He served on the African Commission until November 2011, including as Vice-Chairperson from 2009 to 2011.[61]

6 Jurisprudence of the AU human rights institutions

6.1 African Court on Human and Peoples' Rights

The African Court held a number of public hearings and delivered five rulings on admissibility; five rulings on requests for advisory opinions submitted by various NGOs; four rulings on requests for provisional measures;[62] 13 judgments on the merits; and three judgments on the interpretation of previous merits decisions. The following paragraphs provide brief reviews of some of these decisions.

Of the five rulings on admissibility, four were declared inadmissible for non-exhaustion of local remedies.[63] Local remedies were deemed to have been exhausted in the fifth admissibility ruling (*Gombert v*

communication mechanism under the International Covenant on Economic, Social and Cultural Rights, https://dial.uclouvain.be/pr/boreal/en/object/boreal%3a4697/datastreams (accessed 4 October 2018).

59 F Viljoen 'Promising profiles: An interview with the four new members of the African Commission on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 237.

60 M Killander & A Abebe 'Human rights developments in the African Union during 2010 and 2011' (2012) 12 *African Human Rights Law Journal* 200-201.

61 https://www.linkedin.com/in/mumba-malila-sc-97538049/ (accessed 4 October 2018).

62 *Leon Mugeserav v Republic of Rwanda*, Application 012/2017 (Order For Provisional Measures, 2017); *Dexter Eddie Johnson v Republic of Ghana*, Application 016/2017 (Order For Provisional Measures, 2017); *General Kayumaba Nyamwasa & Six Others v Republic of Rwanda*, Application 016/2015 (Order For Provisional Measures, 2017); *Alfred Agbesi Woyome v Republic of Ghana*, Application 001/2017 (Order For Provisional Measures 2017).

63 *Fidele Mulindahabi v Republic of Rwanda*, Application 008/2017 (2017); *Diakite Couple v Republic of Mali*, Application 009/2016 (2017); *Rutabingwa Chrysanthe v Republic of Rwanda*, Application 022/2015 (2018); *Mariam Kouma & Ousmane Diabatev v Republic of Mali*, Application 040/2015 (2018).

Côte d'Ivoire).[64] The facts giving rise to the *Gombert* case relate to a dispute between two private companies represented by the two principal shareholders of each of the companies. It was contended that local remedies had not been exhausted because the initial dispute was between two private individuals and the violations were not raised as an issue against the state. The Court, however, concluded that even though the initial dispute was a private dispute and not directly against the respondent state, the applicant had gone through the judicial process of the respondent state and brought the alleged violations of his right to a fair trial to the attention of the state during this process, thereby exhausting local remedies. Indeed, it would be unreasonable to expect an applicant who has raised pertinent issues at various stages of a trial to be told by the African Court to go back and exhaust local remedies. However, the case was declared inadmissible on the basis that it had already been settled by the ECOWAS Court.

In terms of its advisory jurisdiction, the African Court for the first time had the opportunity to consider a request for an advisory opinion submitted by an NGO in the *SERAP* case.[65] The Court had to decide whether the Socio-Economic Rights and Accountability Project (SERAP) is an African organisation recognised by the AU to clothe it with standing to request an advisory opinion from the Court. SERAP argued that the 'non-restrictive' use of the word 'organisation' in article 4 of the Court's Protocol suggests that the drafters contemplated both African inter-governmental organisations and NGOs. SERAP further argued that since it is an NGO registered in Nigeria and having been granted observer status before the African Commission, an organ of the AU, it was an African organisation recognised by the AU in terms of article 4 of the Court Protocol and, therefore, had standing to petition the Court for an advisory opinion.[66] SERAP's application was supported by Zambia[67] and Cape Verde,[68] but opposed by Nigeria and Uganda.[69]

The Court held that the term 'organisation' as used in article 4 of the Protocol covers both intergovernmental organisations and NGOs given that where the drafters of the Protocol wanted to limit its application to intergovernmental organisations, they expressly provided so, as they did in article 5 of the Protocol.[70] The Court further held that an NGO qualifies as an African organisation 'if [it is] registered in an African state, has structures at the sub-regional,

64 *Jean-Claude Roger Gombert v Republic of Côte D'Ivoire*, Application 038/2016 (2018).

65 Request for Advisory Opinion by the Socio-Economic Rights and Accountability Project (SERAP), 001/2013, Advisory Opinion, 26 May 2017, para 3. The Centre for Human Rights, University of Pretoria, submitted an *amicus* brief.

66 Request by SERAP (n 65) paras 4-6.

67 Request by SERAP para 27.

68 Request by SERAP paras 30-31.

69 Request by SERAP paras 25-26 & 28-29.

70 Request by SERAP paras 46-47.

regional or continental level, or undertakes its activities beyond the territory where it is registered, as well as any organisation in the diaspora recognised as such by the African Union'.[71] The Court consequently declared that SERAP was an African organisation in terms of article 4 of the Protocol.[72]

However, on the issue of recognition by the AU, the Court held that article 4 of the Protocol draws a clear distinction between the AU and its organs and, therefore, 'only African NGOs recognised by the African Union as an international organisation with its own legal personality are covered by this article, and may bring a request for Advisory Opinion before the Court'.[73] The Court justified this conclusion by citing article 5 of the Court Protocol, which expressly includes observer status granted by the African Commission as the basis for NGOs to seize the contentious jurisdiction of the Court against countries that have made the article 34(6) declaration.[74] Consequently, the Court concluded that since the drafters of the Protocol did not expressly include observer status granted by the African Commission as one of the bases for recognition of NGOs qualified to submit requests for advisory opinions, it could not be implied against the express provisions of the Protocol. The Court concluded that recognition by the AU may be proved by way of observer status before or a memorandum of understanding concluded with the AU.[75] Since SERAP did not have observer status before or MOU with the AU, the application was declared inadmissible for lack of personal jurisdiction.

The Court has subsequently applied this precedent to four other requests for advisory opinion brought by various NGOs and dismissed all for want of personal jurisdiction. These requests raised pertinent issues, including the independence of the African Commission;[76] the negative impact of mining on local communities;[77] unconstitutional changes of government;[78] and the registration of marriages.[79]

On a positive note, it is important that the Court rejected the argument by Uganda that only intergovernmental organisations

71 Request by SERAP para 48.
72 Request by SERAP paras 49-51.
73 Request by SERAP para 53.
74 Request by SERAP para 54.
75 Request by SERAP para 64.
76 Request for Advisory Opinion by the Centre for Human Rights of the University Of Pretoria & The Coalition of African Lesbians, Application 002/2015 (2017). See discussion above on the backlash against the African Commission following the granting of observer status to CAL.
77 Request for Advisory Opinion by L'Association Africaine de Defense des droits de L'homme, Application 002/2016 (2017).
78 Request for Advisory Opinion by Rencontre Africain pour la Defense des droits de L'homme, Application 002/2014 (2017).
79 Request for Advisory Opinion by the Centre for Human Rights – University of Pretoria, Federation of Women Lawyers – Kenya, Women's Legal Centre, Women Advocates Research and Documentation Centre & Zimbabwe Women Lawyers Association, Application 001/2016 (2017).

qualify to request an advisory opinion from the Court. Such a conclusion would have completely closed the door to NGOs and would have rendered the advisory jurisdiction of the Court almost redundant since most cases before the Court have been presented by NGOs. Second, it is also important that the Court rejected arguments by Nigeria that only NGOs from states that have made the article 34(6) declaration should be allowed to petition the Court for an advisory opinion. This argument clearly has no basis since the advisory jurisdiction of the Court is not exercised against any state in particular.

However, the textual interpretation adopted by the Court, as in its previous advisory decision on a request submitted by the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee), raises concerns over how far the Court is willing to go to protect human and peoples' rights on the continent. As one commentator notes, a purposive interpretation by the Court, taking into consideration the complementary role of the Court in the interpretation of the African Charter as envisaged by the Protocol, provided an avenue for the Court to include NGOs with observer status before the Commission as part of the organisations contemplated by article 4 of the Protocol.[80] This restrictive interpretation adopted by the Court means that even though the possibility exists, it is less likely that NGOs will have the opportunity to access the Court's advisory jurisdiction. This is because the AU has stringent and arguably unreasonable requirements for granting observer status to African NGOs, including the fact that they generate at least two-thirds of their funding from their membership.[81] This requirement is paradoxical, given that many African states rely on donor support and the AU itself has the bulk of its budget financed by development partners.[82]

The majority of the merits judgments delivered by the Court relate to the right to fair trial, which in the recent past has featured prominently on the Court's cause list, but also include new areas of human rights, such as indigenous peoples' rights, rights to citizenship and women's rights.

80 A Jones 'Form over substance: The African Court's restrictive approach to NGO standing in the SERAP Advisory Opinion' (2017) 17 *African Human Rights Law Journal* 321.

81 Criteria for granting African Union observer status to non-governmental organisations (NGOs), para 7, Report of the PRC and legal experts on various legal matters, EX.CL/195 (VII), Annex IV, http://www.peaceau.org/uploads/ex-cl-195-vii-e.pdf (accessed 21 October 2018), adopted by the AU Executive Council in July 2005, EX.CL/Dec. 230 (VII).

82 African Union 'Financing of the Union: by Africa for Africa' http://www.theeastafrican.co.ke/sponsored/financing-of-the-union-by-africa-for-africa/4358802-4685156-vdy982/index.html (accessed 26 September 2018); African Union 'Financial reforms at the African Union lead to massive cuts to the union's budget' https://au.int/en/pressreleases/20180706/financial-reforms-african-union-lead-massive-cuts-union's-budget (accessed 26 September 2018).

In *Ingabirie Victorie Umuhoza v Rwanda*,[83] the leader of one of the opposition parties, *Forces Démocratiques Unifiées (FDU Inkingi)*, was sentenced by the Supreme Court to 15 years' imprisonment. The applicant's conviction was based on statements that highlighted crimes that were committed during the Rwandan genocide, not only against Tutsis but also against Hutus. The second set of statements were criticisms of government officials. The applicant, therefore, approached the African Court citing violations of her rights to equal protection of the law, fair trial and freedom of expression contrary to articles 3, 7 and 9 of the African Charter and commensurate provisions of the International Covenant on Civil and Political Rights (ICCPR).

On the merits, the Court held that the right to a fair trial of the applicant had been violated by the failure of the High Court to allow the applicant's legal team to cross-examine her co-accused who testified against her, and denying the applicant access to documents which were used against her at the trial.[84] On the issue relating to the crime of 'negation and minimisation of genocide' and the right to freedom of opinion and expression, the Court held that such a restriction on freedom of expression served a legitimate purpose given the context of Rwanda in terms of the sensitive issue of the genocide.[85] However, on the facts, the Court agreed with the applicant that there was nothing in her statements that suggested that she sought to negate or minimise the genocide.[86] On her criticisms of the government, the Court held that while some of the remarks may be offensive and discredit the integrity of the government and public officials in the eyes of citizens, these are expected in a democratic society and should be tolerated.[87]

The decision in this case is an important affirmation of the Court's decision in *Konaté v Burkina Faso*,[88] where the Court emphasised the need to ensure that restrictions to the right to freedom of expression in a democratic society should be as minimal as possible and proportionate to the purpose sought to be achieved by the limitation or restriction. However, after the judgment Rwanda has adopted additional legislation curtailing freedom of expression. For instance, in October 2018 it was reported that Rwanda's revised Penal Code criminalises 'any writings or cartoons that "humiliates" lawmakers, cabinet members, or security officers'.[89] With regard to Ms Ingabire, it was reported in September 2018 that she had been released through

83 Application 003/2014 (2017).
84 Paras 97-98.
85 Para 158.
86 Para 159.
87 Para 161.
88 *Lohé Issa Konaté v Burkina Faso*, Application 004/2013 (2014).
89 https://qz.com/africa/1410418/rwanda-bans-cartoons-that-humiliate-government-officials/ (accessed 2 October 2018).

a presidential pardon after having served eight years of her 15-year sentence.[90]

The recurring theme in the remainder of the fair trial cases (all against Tanzania) relates the right to free legal aid which the Court held (applying its previous decision in *Abubakari v Tanzania*[91]) to be an important component of the right to fair trial where the accused is facing serious criminal charges, and consequently the failure of the respondent state to provide free legal aid in such circumstances is a violation of the applicant's right to a fair trial. [92] There was only one case in which the Court found no violation.[93] The Court also held that a delay in providing or failure to provide an applicant with witness statements or copies of a criminal judgment against the applicant,[94] and the failure of the respondent state to facilitate the attendance of witnesses called by an accused person who is in custody, constituted a violation of the right to a fair trial.[95] Another pertinent finding of the Court was to the effect that proof of rape should not be limited to the medical report that the victim has been raped but also confirmation that the offence was committed by the accused person, such as through DNA tests, where possible. The Court in this case ordered the respondent state to reopen a criminal trial because previous trials before the domestic courts were in violation of the applicant's right to a fair trial.[96]

One other issue worth noting in the new fair trial cases relates to the fact that the Court seems to have improved on its remedial orders. Notably, in previous cases, after the Court had refused to order the release of the applicants from prison even though it found that their right to a fair trial had been violated and reopening the case would occasion an injustice, it made the rather vague order that the respondent state should take the necessary measures to remedy the violation. This prompted Tanzania to return to the Court to seek clarification about what measures it could take to ensure satisfaction of the order. Consequently, in recent cases, while the Court did not specifically order the release of the applicants, it included in the

90 BBC News 'Victoire Ingabire: Rwanda frees 2 000 people including opposition figure' https://www.bbc.com/news/world-africa-45532922 (accessed 2 October 2018).

91 *Mohamed Abubakari v United Republic of Tanzania,* Application 007/2013 (2016).

92 *Kennedy Owino Onyachi & Charles John Mwanini Nkoka v United Republic of Tanzania*, Application 003/2015 (2017); *Christopher Jonas v United Republic Of Tanzania*, Application 011/2015 (2017); *Thobias Mang'ara Mango & Shukurani Masegenya Mango v United Republic of Tanzania*, Application 005/2015 (2018); *Amiri Ramadhani v United Republic Of Tanzania*, Application 010/2015 (2018); *Diocles William v United Republic of Tanzania*, Application 016/2016 (2018); *Anaglet Paulo v United Republic of Tanzania*, Application 020/2016 (2018); *Kijiji Isiaga v United Republic of Tanzania*, Application 032/2015 (2018).

93 *George Maili Kemboge v United Republic of Tanzania*, Application 002/2016 (2018).

94 *Owino & Nkoka*; *Mango & Mango*; *Nguza Viking (Babu Seya) & Johnson Nguza (Papi Kocha) v United Republic of Tanzania*, Application 006/2015 (2018).

95 *Diocles William v United Republic of Tanzania*, Application 016/2016 (2018).

96 As above.

remedial order that the measures the respondent state could adopt to satisfy the order included the release of the applicants from prison custody. The Court, therefore, should be commended for improving on its remedial orders and providing more guidance to the respondent state on the measures that may be taken to satisfy the order.

In *APDF & IHRDA v Mali*[97] the Court for the first time had an opportunity to pronounce itself on the provisions of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol). The Court held that the Persons and Family Code of the respondent state had several provisions that were in contravention of the African Women's Protocol and the African Charter on the Rights and Welfare of the Child (African Children's Charter), notably violations of the minimum age of marriage, consent to marriage, rights to inheritance and harmful cultural practices.[98] The Court rejected the respondent state's argument that the law on minimum age of marriage should be seen in the context of the social, cultural and religious realities of Mali, as it serves no purpose to enact laws that would be difficult to implement.[99]

Anudo v Tanzania[100] involved allegations by the applicant that the respondent state had illegally revoked his citizenship and deported him to Kenya even though he had a Tanzanian birth certificate and both his parents were Tanzanians. The Court held that even though the right to nationality is not expressly guaranteed under the African Charter or ICCPR, it is guaranteed by article 15 of the Universal Declaration of Human Rights (Universal Declaration) which, according to the Court, is recognised as forming part of customary international law.[101] In this regard, the Court noted that even though the determination of citizenship and revocation lies within the sovereignty of states, this cannot be arbitrarily determined and must be done in accordance with international law to avoid statelessness. The Court also noted that since it was the respondent state that was challenging the citizenship of the applicant, the burden of proof was on the state to prove the contrary.[102] Consequently, the Court held that since the respondent state did not deny the nationality of the applicant's parents and refused to conduct a DNA test to confirm the paternity of the applicant, as requested by the applicant's father, the deprivation of the applicant's citizenship was arbitrary and in violation of article 15(2) of the Universal Declaration. The Court also held that the

97 *Association Pour Le Progres Et La Defense Des Droits Des Femmes Maliennes (APDF) & Institute for Human Rights and Development in Africa (IHRDA) v Republic of Mali*, Application 046/2016 (2018).

98 Para 9.

99 Para 66.

100 *Anudo Ochieng Anudo v United Republic of Tanzania*, Application 012/2015 (2018).

101 Para 66.

102 Para 80.

respondent was in violation of article 13 of ICCPR for arbitrarily expelling the applicant from its territory,[103] and further that arbitrarily expelling the applicant without the possibility to appeal to national courts was a violation of his right to be heard contrary to articles 7(1)(a), (b) and (c) of ICCPR.[104] The Court, therefore, ordered the respondent state to amend its laws to provide individuals with judicial remedies in the event of a dispute over citizenship and to restore the applicant's rights by allowing him to return to Tanzania.[105]

African Commission v Kenya[106] relates to the eviction in 2009 of the Ogiek indigenous community by the Kenya Forestry Services from the Mau Forest. The case was first filed before the African Commission in 2009 by the Centre for Minority Rights Development (CEMIRIDE) and Minority Rights Group International (MRGI) on behalf of the Ogiek Community. The African Commission submitted the case to the Court on account of the lack of response from the respondent state when the Commission ordered provisional measures against it.

The Court held that the Ogiek, being an indigenous community, had the right to occupy, use and enjoy their ancestral lands.[107] Even though the Court agreed that this right was not absolute and may be restricted in the public interest in terms of article 14 of the African Charter, such measures must be necessary and proportional.[108] The Court, therefore, rejected the respondents' arguments that evicting the Ogiek from the forest was necessary to preserve the natural ecosystem as the evidence showed that the main causes of environmental degradation in the Mau Forest was the encroachment by other groups, government's excision for settlements and ill-advised logging concessions, rather than the presence of the Ogiek.[109] The Court thus found the respondent state in violation of the right to property of the Ogiek in violation of article 14 of the African Charter.[110] The Court further held that the right to non-discrimination, freedom of religion, culture, free disposal of natural resources and the right to development had been violated. The Court held that rather than evict the Ogiek from the forest for public health reasons, there were less restrictive measures that the respondent could have taken to ensure the enjoyment of their rights while maintaining law and order and public health. Such measures could include sensitisation about public health requirements on burying the dead and collaboration towards maintaining religious sites.[111]

103 Paras 100-106.
104 Paras 107-115.
105 Paras 132 (viii) & (ix).
106 *African Commission on Human and Peoples' Rights v Republic of Kenya*, Application 006/2012 (2017).
107 Para 128.
108 Para 129.
109 Para 130.
110 Para 131.
111 Paras 164-167.

The Court further issued three interpretation judgments.[112] In two of the interpretation judgments, *Thomas* and *Abubakari,* the Court clarified that its order that Tanzania must take all appropriate measures was intended to offer the state 'room for evaluation to enable it to identify and activate all the measures that would enable it to eliminate the effects of the violations established by the Court'.[113] The Court further clarified that it did not conclude in the merits decisions that the applicants' request to be released from prison were unfounded, but merely that it could only make such an order directly if there were specific and compelling circumstances which, in the opinion of the Court, the applicants had not established.[114] On the issue of how to remedy the violations, the Court clarified that '"all necessary measures" included the release of the applicant and any other measure that would help erase the consequences of the violations, establishe and restore the pre-existing situation and re-establish the rights of the applicant[s]'.[115]

In the third interpretation judgment, occasioned by a request from Côte d'Ivoire, the application was declared inadmissible on the basis that it sought the Court's opinion on how to implement the judgment rather than clarifying the operative provision of the judgment.[116]

The fact that the Court has had to issue three interpretation judgments successively should be a cause for concern to the Court and arguably an indication that the Court's remedial orders do not have sufficient clarity to ensure that states found in violation know what remedial measures to adopt.

6.2 African Commission on Human and Peoples' Rights

The African Commission was seized of at least 39 communications, issued provisional measures in at least 15 communications, declared at least five communications admissible and decided two communications on merits.[117] Only one of the two communications decided on the merits, *Patrick Okiring and Agupio Samson (represented by Human Rights Network and ISIS-WICCE) v Republic of Uganda*,[118] was publicly available. The complainants alleged that they had been arrested together with other individuals in 2004 on suspicion of being members of an armed group working to overthrow the Ugandan

112 *Alex Thomas v United Republic of Tanzania*, Application 001/2017 (Interpretation Judgment, 2017); *Mohamed Abubakari v United Republic of Tanzania,* Application 002/2017 (Interpretation Judgment, 2017)*; Actions Pour La Protection Des Droits De L'homme (APDH) v Republic of Côte D'Ivoire,* Application 003/2017 (Interpretation Judgment, 2017).

113 Common para 35 of both judgments.

114 Common para 36 of both judgments.

115 Paras 39 & 38 of *Thomas* and *Abubakari* respectively.

116 *APDH*, para 18.

117 See 42nd, 43rd and 44th Activity Reports of the African Commission http://www.achpr.org/activity-reports/ (accessed 4 October 2018).

118 Communication 339/2007 (2017).

government. They were, however, neither charged nor brought before a court of law. Approximately one year later, in 2005, they were charged together with the leader of Uganda's main opposition party, Kizza Besigye, with treason and concealment of treason. Even though the High Court granted them bail, they were not released and were charged the next day with the offence of terrorism before the General Court Martial on the same facts as those presented before the High Court. Two constitutional petitions were filed to respectively challenge the legality of the concurrent trials and the refusal to release them on bail in breach of the High Court ruling. The Constitutional Court ruled that their continued detention and the trial before the Court Martial were illegal and ordered their release, but this was not complied with. Following the Constitutional Court ruling, a warrant was issued to the Commissioner of Prisons to produce the accused persons before the High Court to have their bail processed, but this was ignored. The Attorney-General subsequently filed an application for review of the High Court's bail decision, but this was rejected by the Court. Mr Okiring and Mr Samson were subsequently charged with new offences and granted bail, whereupon Mr Okiring was released after having satisfied the bail requirement. The state claims that Mr Samson has also been released but there is no information on his whereabouts. The complainants alleged violations of the right to dignity and freedom from torture, the right to liberty and the right to a fair trial contrary to articles 5, 6 and 7 of the African Charter.

On the allegations of torture, the African Commission held that the complainants had neither presented evidence to substantiate this, nor was it indicated that complaints of torture had been brought to the attention of the respondent state and that nothing had been done about it. The Commission, however, held that the subsequent arrest and detention of the victims after they had been granted bail were arbitrary, unlawful and in violation of the right to liberty, contrary to article 6 of the African Charter. The Commission also held that the trial of the victims, who were civilians, before a court martial, and the denial of access to lawyers were in violation their right to a fair trial. The Commission further found the respondent in violation of its obligation to guarantee the independence of courts in terms of article 26 of the Charter for its failure to comply with the bail orders and constitutional declarations of the courts.

Mr Okiring and Mr Samson were part of the original claimants in the *Katabazi* case before the East African Court of Justice (EACJ). However, they withdrew from this case before the EACJ handed down its judgment on 1 November 2007. The African Commission, therefore, held that the case was admissible as it had not been considered by another international body. It is not clear why it took the Commission almost a decade longer than the EACJ to hand down its decision.

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

The African Children's Committee delivered two rulings on admissibility in the cases of *Sohaib Emad v Egypt*[119] and *Ahmed Bassiouny v Egypt*,[120] both of which were declared inadmissible for failure to exhaust local remedies. In *Sohaib Emad,* a case dealing with the arrest of a minor, the respondent state objected to the jurisdiction of the Committee on the basis that it had entered a reservation on articles 44 and 45 of the African Children's Charter from which the African Children's Committee derives its individual communications mandate. However, the Committee held that the reservation was not compatible with the object and purpose of the Children's Charter and thus contrary to article 19(c) of the Vienna Convention on the Law of Treaties. The Committee refused a request for provisional measures on the grounds that the complainant had not provided evidence of a situation of gravity or urgency that would result in irreparable harm in violation of the rights provided for in the Children's Charter. On admissibility, the Committee ruled that the applicant had neither exhausted local remedies nor provided any cogent reasons why an exception to the rule must be allowed in this case, except casting aspersions on the judiciary of the respondent state. The case, therefore, was declared inadmissible for a failure to exhaust local remedies. The Committee's refusal of the request for provisional measures is an interesting conclusion given the fact that the complainant had indicated that both his knees were swollen and that he only had access to painkillers at the detention centre. The right to health is one of the rights that are protected by the Children's Charter and the deterioration of the complainant's health clearly may result in irreparable harm.

Minority Rights Group International and SOS-Esclaves on behalf of Said Ould Salem and Yarg Ould Salem v Mauritania[121] was submitted on behalf of two victims of slavery. The complainants alleged that Said and Yarg were born in 2000 and 2003 respectively to a mother from Mauritania's Haratine slave class. As a result, the children automatically became slaves of the El Hassine family. The boys worked seven days a week herding camels and doing domestic chores. They were called slaves in the El Hassine family rather than by their given names, were only allowed to eat leftovers and did not attend school like the other children of the household.[122] Said escaped in 2011 and went with his aunt to file a case at the police station against the El Hassine family, some of whom were charged with the crime of practising slavery and depriving the boys of education. Some members of the family and the mother of the boys were convicted

119 Communication 008/com/002/2016 (Decision on Admissibility 001/2017).
120 Communication 009/com/001/201 (Decision on Admissibility 002/2017).
121 Communication 007/com/003/2015 (Decision 003/2017).
122 Paras 5-6.

and sentenced to various prison sentences ranging from a maximum of two years and a fine of $1 500 for the slave owner to the lowest of a two-year suspended sentence and a fine of $300 for his brothers. Said was awarded compensation of $2 500 and Yarg $700. The complainants alleged that despite the unsatisfactory decision of the court, no appeal was pursued by the prosecutor and the slave owner was released on bail after four months.[123] An appeal hearing requested by the lawyer of the complainants was repeatedly postponed. The whereabouts of the slave owner, who appears to be in breach of his bail conditions, is unknown. The complainant alleged that the respondent state was in violation of the obligation of state parties (article 1) as well as the rights to non-discrimination (article 3); best interests of the child (article 4); survival and development (article 5); education (article 11); leisure (article 12); protection from economic exploitation (article 15); protection against harmful practices (article 16); and prevention of the sale, trafficking in and abduction of children (article 29), contrary to the African Children's Charter.[124] The Children's Committee undertook a fact-finding mission to familiarise itself with the situation in the respondent state.[125]

On admissibility, the Committee ruled that since the appeal had been pending before the Court of Appeal for four years without any progress, the local remedies were unduly prolonged and ineffective, which is not in the best interests of the child and, therefore, need not be exhausted by the complainants. On the merits, the Committee held that the obligations of member states under article 1 of the Children's Charter encompassed a duty to adopt legislative, administrative and other measures, including the obligation to act with due diligence to prevent violations or ensure that appropriate redress is afforded to victims. A state that is found to condone violations has not fulfilled its due diligence obligations. The Committee concluded that even though the respondent had enacted legislation criminalising slavery, there was little evidence that it had actually taken steps to enforce the law. The Committee cited, for instance, the fact that the criminal prosecution had been triggered by the aunt of the victims, that the slave owner was sentenced to only two years' imprisonment, which is below the minimum sentence required by the anti-slavery law, and that the appeal against the sentence of the slave owner had been pursued by the victims' lawyer and not the public prosecutor. The Committee also found the respondent in violation of the right of the victims to non-discrimination, on account of its failure to exercise due diligence when the violations were brought to its attention. The Committee further found the respondent in violation of all the rights alleged to have

123 Paras 7-10.
124 Para 12.
125 Para 4.

been violated by the complainants, except the sale of and trafficking in children.

In Institute for Human Rights and Development in Africa & Finders Group Initiative on behalf of TFA (a minor) v Cameroon,[126] the complainants alleged that a 10 year-old girl had been raped multiple times in 2012. The attention of the respondent state was drawn to this violation through a report to the police. The police requested that the victim be sent to the hospital for a medical examination, which confirmed the allegations. The victim led the police to the house of the suspect, who was an influential figure in the community. The victim was not allowed into the house to identify the suspect. It was further alleged that a subsequent identification parade had been organised by the police at which, due to a combination of heavy disguise worn by the accused and intimidation of the victim by the lawyers for the suspect, the victim was unable to identify him. Evidence was submitted to the examining magistrate after three months and were summarily dismissed for not disclosing any case against the suspect. Requests to the examining magistrate for a copy of the ruling to enable representatives of the victim to pursue an appeal were denied on the grounds that only the state could appeal against the decision. One of the representatives of the victim and the victim's aunt were subsequently charged with defamation on the basis that a text message sent by the victim's aunt on a radio show highlighting the victim's plight was orchestrated to defame the examining magistrate, imputing that he was corrupt. The complainants alleged that the failure of the respondent state to properly investigate the crime and to prosecute the accused amounted to a violation of the obligations of the state (article 1), the right to non-discrimination (article 3) and protection against child abuse and torture (article 16) of the African Children's Charter. The Committee agreed with the applicants and found the respondent state in violation of its obligation under article 1 for failing to thoroughly investigate the crime and provide a remedy to the victim; a violation of the right to non-discrimination on account of rape being a form of gender-based violence and gender discrimination; and a violation of its obligation to protect children against child abuse for failing to act with due diligence to protect the rights of the victim. The African Children's Committee consequently ordered the respondent state to ensure the prosecution of the perpetrator, to provide compensation of 50 million CFA to the victim, and to undertake other structural changes such as enacting and implanting legislation on violence against women, and educating the police, prosecutors, judges and other government officials on the protection of children's rights.

126 Communication 006/com/002/2015 (Decision 001/2018).

7 Conclusion

The AU and its member states have committed themselves to respecting human rights. This includes having established independent bodies to monitor their own human rights performance. The decisions on the activity reports of these bodies, the African Commission, the African Court and the African Children's Committee, abound with commitments to support them and comply with decisions, including on provisional measures.[127] However, as illustrated in this article, some states clearly feel that the human rights bodies are interfering too much and seek ways to undermine them. Most states are hesitant to sign up to further scrutiny as illustrated by the stagnant number of ratifications of the Court Protocol and only eight states having made a declaration allowing for direct access to the Court.[128] Indeed, almost all cases that have been decided by the Court have been against states that have made the article 34(6) declaration, illustrating that the Court must put in place a plan on how to deal with a potential substantial increase in cases should more states ratify the Court Protocol and make the article 34(6) declaration. Indeed, Morocco's seeming hesitation to ratify the African Charter may be illustrative of the fact that a number of AU member states have become increasingly hostile to the system that they started to build more than three decades ago. It remains to be seen what changes another decade, a human rights decade no less, will bring.

127 See eg Decision on the 44th Activity Report of the African Commission on Human and Peoples' Rights, EX.CL/Dec.1014(XXXIII), para 9; Decision on the 2017 Activity Report of the African Court on Human and Peoples' Rights, EX.CL/Dec.994(XXXII)Rev.1, para 9.

128 Benin, Burkina Faso, Côte d'Ivoire, Ghana, Malawi, Mali, Tanzania and Tunisia. It should be noted that five of these states are members of ECOWAS and individuals or NGOs in these states could thus choose to submit cases to the ECOWAS Community Court of Justice which has a clear human rights mandate. The East African Court of Justice, of which Tanzania is a member, has a more limited rule of law mandate.