

**PROMOTION OF HUMAN
SECURITY IN AFRICA**

**THE ROLE OF AFRICAN
HUMAN RIGHTS INSTITUTIONS**

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EXECUTIVE SUMMARY

The paradigmatic shift in the discourse on and practice of security from state to human security has brought human rights into the realm of the security discourse and practice. It has now become common to employ human rights as an instrumental normative framework and concept to advance the objectives of human security. As a result, human rights are featuring prominently in the discourse on and practice of human security.

The human rights system has established dynamic norms and supervisory and enforcement institutions and procedures. Despite the huge potential that the human rights system has to contribute to the promotion and protection of human security, its relations to and roles in that field are not sufficiently analysed. Most particularly, in the African context, the relationship between these two and the contribution of African human rights bodies to the promotion of human security have attracted scant attention.

In Africa, where multiple conditions pervasively threaten human security, it is necessary that all available institutional, political and legal mechanisms be employed to address these threats and to contribute to providing human security to all individuals and communities. Indubitably, the African human rights system is one such mechanism that could contribute greatly to the protection and promotion of human security on the continent. In this regard, the role of African human rights bodies in the promotion and protection of human and peoples' rights and their contribution to human security need to be investigated.

This study aims to examine the role of the African Commission on Human and Peoples' Rights (ACHPR) and the African Court on Human and Peoples' Rights (AHRC) in the promotion of human security in Africa. It specifically addresses ways in which the human rights mechanisms used by these African human rights bodies for the protection and promotion of human rights contribute to the promotion of human security in Africa. It seeks to carry out this investigation within the framework of the relationship between human rights and human security. The study begins by examining the nexus between human rights and human security. Although the study of the role

of these human rights bodies in the promotion and protection of human and peoples' rights and their contribution to human security is fraught with difficulties, it is pursued to demonstrate the huge potential these two bodies have to contribute to human security in Africa.

The role and contributions of the two African human rights bodies are substantially affected not only by the nature of the mandates and the strength of the bodies themselves but also by their relationships with other relevant bodies, including civil society organisations. The study thus analyses the relationships between these two bodies and various relevant entities and the implications these relationships have for the role of the bodies in the promotion and protection of rights and their contributions to human security in Africa. If these two human rights bodies are to become effective institutions and the potential of their role and contribution in the promotion of human security is to be optimally realised, particular attention should be paid to the problems associated with their relations with other relevant entities, specifically responsible African Union organs. As this study demonstrates, the African human rights system in general and the two regional human rights bodies in particular have untapped potential to promote human security in Africa. While it is imperative to address the various challenges these bodies face in discharging their mandates, it is equally necessary to make use of their potential both to address the pervasive human security threats and to promote human freedom on the continent.

This study is presented in seven chapters. Chapter One introduces the subject and offers a background. The framework for analysis is set out in Chapter Two. In Chapter Three, the study discusses the normative basis of the African human rights system while Chapter Four investigates the role of the ACHPR in the promotion and protection of human and peoples' rights and its contribution to human security. In Chapter Five, the role of the newly established AHRC is discussed in general terms. The following chapter, Chapter Six, addresses the issue of the relations of these two bodies with other relevant bodies. Finally, Chapter Seven offers a conclusion and recommendations.

CHAPTER ONE

INTRODUCTION

Security discourse and practice underwent definitive changes during the post-Cold War period. Traditionally, the protection of the state and its institutions from external and internal military threats had been emphasised, prioritising norms such as state sovereignty and non-intervention in states' domestic affairs, as evidenced by Article 2(4) of the United Nations Charter and Articles 2(2)(c) and 3(3) of the Charter of the Organisation of African Unity (OAU). Since the end of the Cold War, members of the international community have developed a new security paradigm, shifting focus from state security to human security. Although state security remains important, it is now seen as a working component of the promotion of human security and a means to bring it about (Cherubin-Doumbia 2003:3). Therefore, human security extends beyond military threats to the state and its institutions; moreover, it is concerned with other threats and challenges to the welfare and advancement of individuals and communities.

This shift has revealed that other concepts and institutional frameworks can be important tools in advancing human security and are themselves essential aspects thereof. Human rights and the mechanisms for their enforcement and supervision present a good example. The normative focus of security discourse and practice has evolved, as illustrated by the plethora of human rights and humanitarian norms developed over the last five decades: current emphasis is on state responsibility rather than sovereignty, and on the international enforcement of humanitarian and human rights norms rather than non-intervention. This shift has thrust human rights as a key conceptual and normative system to protect people against critical threats to their well-being and to ensure the enjoyment of their rights and freedoms into the realm of human security.

This study intends to examine the roles of the African Commission on Human and Peoples' Rights (ACHPR)¹ and the African Court on Human and Peoples' Rights (AHRC)² in promoting human security in Africa and to discuss the contribution of the human rights mechanisms employed by these bodies. Furthermore, the study discusses the nexus between human rights and human security and the purpose and nature of the relationships

between these human rights organs and other African Union (AU) organs that deal with human security. It focuses specifically on the challenges presented by these relationships and the effect they have on the work of the African Commission and the African Court in promoting human security.

The study is divided into seven chapters. The introduction offers the background and positions the study in the context of the shift in focus of the discourse on and practice of security from state security to human security. The second chapter sets out the framework for analysis by examining the interface between human rights and human security largely on the basis of the report of the Commission on Human Security. Chapter Three discusses the normative basis of the African human rights system. It identifies the human security concerns embedded in various human rights norms and assesses the role they can play in promoting human security.

In Chapter Four, the African Commission's role in promoting human security is scrutinised via an analysis of the various mechanisms it employs to ensure the protection and promotion of human and peoples' rights. It examines ways in which these mechanisms have contributed to human security on the continent and their further potential in this regard. On the basis of readings of the Commission's works, the study argues that the mechanisms are fraught with limitations that undermine their effectiveness and their potential to ensure the enjoyment of human and peoples' rights and to contribute to the promotion of human security. The range of limitations extends from the nature of the mandate and the weaknesses of the African Commission to the failures of state parties and the African Charter and the political organs of the OAU/AU.

Chapter Five examines the role of the AHRC. It is noted that the Court's role lies mainly in remedying limitations inherent in the African Commission's mandate, particularly in terms of making legally binding judgements and ensuring higher compliance with the African Charter. In Chapter Six, the study deals with the relationship between the African Commission and the African Court and other relevant entities and its effect, albeit positive or negative, on their role in protecting human and peoples' rights and promoting human security. Finally, the study closes with a conclusion and recommendations set out in Chapter Seven.

CHAPTER TWO

INTERFACE BETWEEN HUMAN SECURITY AND HUMAN RIGHTS: A CONCEPTUAL OVERVIEW

The relationship between human security and human rights can be seen in two ways that are best characterised as *complementarity* and *interdependence*.

Complementarity

The concept of human security can be defined in various ways depending on perspective and purpose. This study relies on the definition in the African Union Non-Aggression and Common Defence Pact,³ according to which 'human security means the security of the individual with respect to the satisfaction of the basic needs of life; it also encompasses the creation of the social, political, economic, military, environmental and cultural conditions necessary for the survival, livelihood, and dignity of the individual'.⁴ Therefore, the focus is not merely on threats emanating from violent conflicts. As the Commission on Human Security (2003:6) explains, '[h]uman security is also concerned with deprivation: from extreme impoverishment, pollution, ill health, illiteracy and other maladies'.⁵ Human security, therefore, encompasses the provision and protection of the 'vital core of all human lives in ways that enhance human freedoms and human fulfilment' (Commission on Human Security 2003:4).

The composition of this 'vital core' is not, however, easily defined within the framework of the concept of human security. Even when one identifies elements of the 'vital core', they are often expressed in negative terms. Thus the human values that human security seeks to secure are usually identified by reference to conditions deemed to constitute serious threats to human security. In contrast, human rights specify in affirmative terms the contents of the vital core that human security seeks to protect. Moreover, human rights define the legitimate measures that need to be taken by various stakeholders to protect human freedom and to advance the well-being of peoples. The aspects and contents of the 'vital core' of human lives around which members of the international community have achieved a high degree of consensus are, therefore, given expression through human rights. In a

declaration adopted at a workshop on human rights and human security held in San José, Costa Rica, the participants emphasised this association between human rights and human security as follows:

We reaffirm the conviction that human rights and the attributes stemming from human dignity constitute a normative framework and a conceptual reference point which must necessarily be applied to the construction and putting into practice of the notion of human security. In the same manner, without prejudice to considering the norms and principles of international humanitarian law as essential components for the construction of human security, we emphasise that the latter cannot be restricted to situations of current or past conflict, but rather is a generally applicable instrument. (Commission on Human Security 2003:145)

The rights contained in the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), which together constitute the international bill of rights, establish the fundamental components of human rights. These include the rights to life; liberty; personal security and safety; equality and non-discrimination; a fair trial; family; privacy; participation; work; social security; an adequate standard of living; health; education; culture. They also include freedom from torture and other forms of cruel, inhumane or degrading treatment and freedom of religion; expression; association; and assembly and demonstration. The African Charter on Human and Peoples' Rights,⁶ the founding human rights instrument of the African system of human rights protection, enshrines the collective rights of peoples, or the rights that seek to protect the integrity of the collectivities within which people live. These rights bespeak the minimum conditions necessary for human well-being and advancement, and their promotion and protection play a significant role in ensuring that the goals of human security are attained.

This complementarity is aptly captured by the Commission on Human Security (2003:10):

Human rights and human security are ... mutually reinforcing. Human security help[s] identify the rights at stake in particular situation. And human rights help answer the question: How should human security be promoted? The notion of duties and obligations (inherent in human rights) complements the recognition of the ethical and political importance of human security.

Further exemplifying this complementarity, human rights not only define the rights necessary for promoting human security but also identify the corresponding obligations and the bearers thereof. Human rights as a normative system supplements human security by defining specific legal obligations that require institutions and people to respect, protect, promote and fulfil those rights. Amartya Sen describes the relevance of this statement for human security:

To give effectiveness to the perspective of human security, it is important to consider who in particular has what obligations (such as the duties of the state to provide certain basic support) and also why people in general, who are in a position to help reduce insecurities in human lives, have a common—though incompletely specified—duty to think about what they can do. (Commission on Human Security 2003:9)

At the same time, by the focus on threats to the well-being of individuals and communities, human security is instrumental in identifying which conditions put which rights at stake. In addition, it plays a pivotal role in enabling the system of human rights protection to urgently and effectively respond to threats of grave and serious human rights violations. This function can be ascribed to its focus on its early warning framework that helps detect and analyse situations of crisis. In effect, by outlining the specific obligations of institutions and peoples, human rights provide a guideline for the right course of action to ensure the enjoyment of human rights and, correspondingly, to avoid their violation. They articulate ways to avert threats to people's lives and well-being and to the enjoyment of rights and freedoms in general. When such threats materialise and violate rights, human rights provide a framework for redress;⁷ they are an important mechanism for the realisation of human security goals.

The two concepts complement each other in the context of the framework for the achievement of human security. To achieve the goals of human security, the Commission on Human Security (2003:10–12) formulated a framework that combines two interrelated strategies, namely the protection and the empowerment of people. Protection deals with norms, processes and institutions that shield people from dangers and systematically address insecurities. Undoubtedly, human rights proffer important norms, processes and institutions needed to address insecurities. Their emphasis on equality and non-discrimination, the standards they set, and their requirement for institutions and processes that enable individual liberties and freedoms, including political participation, make human rights an important framework for systematically

addressing human security threats such as conflict (Aka 2003:179). Besides protection, the empowerment of people is critical to attain the goals of human security. This strategy emphasises the need to enable people to actively defend their freedoms and to develop the capability to address insecurities. Furthermore, human rights concern the creation of conditions necessary to enhance the capabilities of individuals and communities. While civil and political rights look to the institutional and political conditions vital to liberty and freedom (including political participation), economic, social and cultural rights aim to secure the material, social and environmental conditions necessary for well-being. Moreover, the collective rights of peoples provide guarantees to collectivities with respect to various threats to their well-being and survival. Together, these enable people to achieve a life of dignity and worth.

Interdependence

Essentially, human rights entitle individuals to those rights that are vital to their well-being; moreover, persons require that those rights be protected from violations. Mary Robinson (2002) states the following:

The only long-term guarantor of security is through ensuring respect for human rights and humanitarian law. The essence of human rights is that human life and dignity must not be compromised and that certain acts, whether carried out by State or non-State actors, are never justified no matter what the ends. At the same time human rights and humanitarian law are tailored to address situations faced by States, such as a public emergency, challenges to national security, and periods of violent conflict. This body of law defines the boundaries of permissible measures, even military conduct.

Objects of human security and human rights clearly overlap, while the threats that cause human insecurity invariably menace the enjoyment of human rights. Thus it has long been recognised under the UN Charter and the UDHR that conflicts and wars endanger human rights.⁸ The act of protecting and promoting human rights is therefore regarded as the basis for freedom and peace and hence for human security.

In Africa, it is easy to appreciate this convergence between human rights and human security.⁹ African states have historically lacked the legal culture, institutional infrastructure and political will to ensure the protection and promotion of human rights. Africa's political history has been marked not only by a general neglect of the protection and promotion of human rights

but also by active efforts by state organs to commit acts of repression and violence in contravention of people's entitlements to human rights. Most importantly, the violent conflicts that have ravaged many African states since independence have seen grave human rights violations causing untold misery and insecurity for vast numbers of individuals and communities.¹⁰

Despite positive developments in the resolution of conflicts and a decrease in their number, conflict is still the primary source of human insecurity in Africa (Udombana 2003:55).¹¹ Violent conflicts in Africa remain the major cause of death of millions of people; displacement of many more others; disruption of livelihood; destruction of physical and human infrastructure and natural environment; and general socio-economic impoverishment (Anan 1998). In addition to conflict, maladies such as drought and famine, adjunct poverty and chronic diseases (including HIV/AIDS) pose serious threats to human security in Africa.¹²

Given the severity and pervasiveness of the threats to the enjoyment of human rights, the promotion of human rights in Africa is not merely a question of legality. It entails survival and the affirmation of people's dignity; it is generally a matter of political, economic and social imperative. The promotion and protection of human rights, as well as the advancement of dignity, freedom and choice, is an unquestionably critical mechanism for the promotion and achievement of human security on the continent.

Nonetheless, the relevance of human rights in realising human security depends on the implementation of human rights norms by state organs and other stakeholders. Importantly, it requires an effective international human rights apparatus that monitors and encourages national implementation and ensures the protection of those rights when national systems fail. Similarly, one cannot overemphasise the importance of a regional system of human rights protection to address human rights concerns engendered by the specific historical, political and socio-economic conditions of that region. Besides the international human rights protection system residing under the UN, there are currently regional systems.¹³ The role of human rights in advancing human security depends not only on the willingness and capability of state authorities for respect and protection but also on the efficacy of the international and regional mechanisms in place for their realisation. The study addresses this matter in subsequent sections by examining the African human rights protection mechanisms.

CHAPTER THREE

AFRICAN SYSTEM OF HUMAN RIGHTS PROTECTION: NORMATIVE FRAMEWORK

The role of the African human rights protection system in the promotion of human security can be examined in terms of its contribution of human rights guarantees and enforcement mechanisms established to protect individuals and communities against those conditions that threaten their well-being.

The African system derives its norms from various sources. Its founding instrument is the African Charter on Human and Peoples' Rights (the African Charter), but it also relies on instruments such as the OAU Convention Governing Specific Aspects of Refugee Problems in Africa of 1969. This convention was adopted in 1969 and came into force in 1974. The protections envisaged in this convention are of paramount importance as various conflicts in Africa have forced many people to flee their countries and seek refuge in neighbouring states.¹⁴ It provides a framework for the protection of the rights of refugees and the provision of humanitarian assistance. Thus the ACHPR (the African Commission), the body responsible for supervising the implementation of the African Charter, has entertained a number of complaints dealing with refugees.¹⁵

The rights of women are recognised by the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.¹⁶ The Protocol provides guarantees for women's rights with a combination of protection and empowerment. Article 4(2) obliges states to adopt all the legislative, institutional, budgetary, social and economic measures necessary for the prevention, prohibition and punishment of violence against women and the rehabilitation of women victims. It defines violence against women as

[a]ll acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and *during armed conflicts or of war*¹⁷ [my emphasis].

In this way, the Protocol seeks to protect women from acts of violence that threaten their well-being. It also recognises the right of women to peace.¹⁸ This

right guarantees women's rights to peaceful existence and protection from the consequences of violent conflict and requires that states take measures that enable women to contribute to the maintenance of peace and security. Accordingly, it provides for women's participation in educational programmes for peace; structures and processes for conflict prevention and management; national, regional and international decision-making processes; and post-conflict reconstruction and peace-building processes.¹⁹ Furthermore, this right requires that African states significantly reduce military expenditure in favour of spending on social developments and the promotion of women.²⁰

The African Charter on the Rights and Welfare of the Child of 1990 (the African Children's Charter) is also particularly relevant.²¹ This charter's relevance in the promotion of human security is illustrated by the requirement, in Article 22(2), that 'no child shall take a direct part in hostilities' and its specific prohibition of recruiting children (Lloyd 2002:11). This requisite is crucial as increasing numbers of children have been used in various internal armed conflicts in Africa in recent years.²² Within this framework, a complaint has already been filed before the African Committee on the Rights and Welfare of the Child, the body monitoring the African Children's Charter, concerning the plight of children in the Northern Uganda conflict. In addition, Article 23 requires states to take all appropriate measures to ensure that refugee children receive appropriate protection and humanitarian assistance in the enjoyment of the rights guaranteed by the Charter and other human rights and humanitarian instruments to which the states are parties.

Other instruments include the AU Convention on Preventing and Combating Corruption of 2003 (Olaniyan 2004:74), the Cultural Charter for Africa of 1976 and the African Convention on Nature and Natural Resources of 1968 (Van der Linde 2002:33).

Rights protected under the African Charter

As indicated, the African Charter is the founding instrument of the African human rights system. Although the notion of an African mechanism of human rights protection dates back to the meeting of African jurists in Lagos, Nigeria, in 1961 (Naldi 1999:109–113), it received the attention of the former OAU only in 1979 when the organisation convened a meeting of experts in Dakar, Senegal, to prepare a preliminary draft of a human rights charter for Africa (Heyns 2004:127).²³ The draft was finalised in Banjul, The Gambia, in 1981 and was formally adopted by the nineteenth summit of the OAU in Nairobi, Kenya, in June 1981.²⁴ Five years later, in October 1986, the African

Charter came into force with its ratification by a simple majority of OAU member states.

The African Charter is broadly divided into three parts: part one (Articles 1 to 29) specifies the list of human and peoples' rights and individual duties; part two (Articles 30 to 63) addresses the establishment and organisation of the ACHPR; finally, part three (Articles 64 to 68) contains general procedural provisions.

The Charter enshrines almost all internationally recognised rights. Accordingly, it recognises the civil and political rights of individuals, including those to freedom from discrimination; to equality; to bodily integrity and to life; to dignity and to protection from torture and inhumane treatment; to liberty and security; to a fair trial; to freedom of conscience; to freedom of expression, association, assembly and movement; to political participation; and to property. The objective of these guarantees is to protect people in Africa from institutional, political or social conditions that threaten their liberty, physical integrity and freedoms. They accord entitlement to protection from extrajudicial and arbitrary killings, unlawful detention or imprisonment, torture and other physical or psychological abuses that threaten human security. Moreover, these rights contribute to the promotion of peace and security by providing the necessary normative and institutional frameworks for maintaining due process of the law and democratic processes and for ensuring the participation of citizens in political processes (Adejumobi 2001).²⁵

However, the formulation of the provisions dealing with these and other rights remains flawed, as seen in the Charter's limitation of rights via drawback clauses. The Charter envisages the exercise of several civil and political rights as subject to the law, suggesting that rights can be exercised only to the extent that they are not restricted by national law (Heyns 2004:688). Thus Article 9 provides that '[e]very individual shall have the right to express and disseminate his opinions *within the law* [my emphasis]'. This provision led many early commentators (Ankumah 1996:176–177; Gittleman 1982:685) to contend that the Charter leaves broad scope for states and others to abrogate the rights guaranteed therein with impunity, fuelling a perception that the Charter was not strong enough to advance human rights and security on a continent whose history is riddled with human rights violations.

Although this problematic formulation can be fully corrected by a legislative amendment, in applying these provisions, the African Commission held, in what is recognised as one of its major innovations, that the proviso 'subject to or within the law' is not meant to allow national laws to override the rights

guaranteed in the African Charter. In its interpretation of Article 9(2), the Commission stated the following:

According to Article 9(2) of the Charter, dissemination of opinions may be restricted by law. This does not mean that national law can set aside the right to express and disseminate one's opinions; this would make the protection of the right to express one's opinions ineffective. *To allow national law to have precedent over international law of the Charter would defeat the purpose of the rights and freedoms enshrined in the Charter. International human rights standards must always prevail over contradictory national law*²⁶ [my emphasis].

The above remedy significantly supports states' accountability for violations they commit on the basis of repressive national laws (Heyns 2004:689–690).

The African Charter provides for economic, social and cultural rights on an equal footing with civil and political rights. These rights include those to equitable and satisfactory conditions of work; health; education; and protection of the family. In addition, 'Guidelines for National Periodic Reports' define parameters for, among others, the rights to social security, social insurance and an adequate standard of living, which are not expressly mentioned in the Charter (Heyns 2004:507). Furthermore, the African Commission jointly found that the Charter recognises the rights to food and housing.²⁷ In Africa, where a high degree of horizontal inequality exists between regions and groups, which often leads to violent conflict, the provision of economic and social rights obliges the state to use all its available resources to not only improve the socio-economic condition of its citizens but also rectify social and economic inequalities and imbalances. According to De Villiers (1996:2),

[t]he main purpose of socio-economic rights is to place the state under a legal obligation to utilise its available resources maximally to correct social and economic inequalities and imbalances. It has been stressed in the literature and confirmed by practical experience that democratisation and the protection of rights can be attained only if the social and economic conditions of individuals improved.

In the context of advancing human security imperatives, economic, social and cultural rights provide standards and instruments for the protection and empowerment of peoples. At the minimum, these rights aim to protect individuals and communities from critical threats such as drought, famine, disease, illiteracy and related maladies.²⁸ They are also important for addressing victims' needs in times of natural or other disaster. These rights

seek to guarantee the material and social conditions necessary to achieve a life of dignity.

Despite the role that the promotion and protection of these rights can play in meeting people's survival needs and mitigating social divisions that may trigger conflicts, they received scant attention from the Commission until recently. The African Commission and, when it becomes operational, the newly established African Court on Human Rights (the African Court), is expected to pay increasing attention to these rights, develop new and innovative ways to deploy them in the fight against poverty and mend social divisions that catalyse political competition and subsequent violent conflict. The situation in Africa demands this application of socio-economic rights to advance human rights and promote human security in a meaningful and sustainable manner.

While the Charter's inclusion of socio-economic rights as enforceable rights on an equal basis with civil and political rights is commended as a distinctive contribution to the corpus of human rights (Oloka-Onyango 2003:857),²⁹ its most important distinguishing feature vis-à-vis other human rights instruments is its elaboration of the collective rights of peoples (Kiwauka 1988; Swanson 1991). The formulation of these rights, while still problematic, is generous and comprehensive (Onguergouz 2003:203). It recognises a wide range of rights as peoples' rights, including some that had not previously found recognition in treaty form (Alston 2001:266). The Charter proclaims not only the internationally recognised right of all peoples to self-determination³⁰ but also the right of peoples to equality,³¹ existence,³² development,³³ national and international peace,³⁴ and environment.³⁵ Given the artificial nature and colonial origin of African states and the fact that conflicts often manifest along cultural, religious or linguistic fault lines, these rights play a fundamental role in providing a framework for resolving conflicts and achieving ethnic accommodation and peaceful co-existence within African states. However, subsequent discussion will show that this category of rights is one of the less developed in terms of the work of the various mechanisms of the African Commission for the protection and promotion of human and peoples' rights of the African Charter.

The above exposition of the nature and content of the rights enunciated under the African Charter reveals that a rich normative basis exists for the African Commission and the African Court to articulate and give effect to these rights in a way that addresses pervasive human rights problems and human security concerns on the continent. The following section examines whether and how these human rights bodies have used, and can use, this potential of the African Charter.

CHAPTER FOUR

ROLE OF THE AFRICAN COMMISSION

Like other founding human rights instruments, the African Charter established a body charged with the responsibility of monitoring its implementation and ensuring the protection of the rights enunciated therein and did so in the form of the African Commission. The African Commission comprises 11 commissioners elected by secret ballot by the AU Assembly of Heads of State and Government from a list of persons nominated by member states.³⁶ This section examines the African Commission's role in the protection and promotion of human and peoples' rights and the resulting contribution to human security in Africa.

Civil and political rights

It has already been noted that civil and political rights play an important role both in guaranteeing the enjoyment of individual liberties and freedoms and in maintaining the institutional and political framework for the protection of individuals and communities from situations that threaten their lives, personal security, liberties and freedoms. The protection of these rights safeguards people from extrajudicial acts of killing, massacre, genocide, torture, rape, unlawful detention or imprisonment and similar security threats. The African Commission's mandate includes the protection of these rights against such violations.

The Commission discharges its protective mandates through various mechanisms including the consideration of communications alleging violations of the rights enshrined in the African Charter,³⁷ the examination of state reports³⁸ and special procedures. To appreciate the Commission's role in protecting rights against such violations, one needs to examine the ways these mechanisms are used to that end.

Communications procedure

Article 55(1) of the African Charter provides the following:

Before each Session, the Secretary of the Commission shall make a list of the communications other than those of States parties to the present Charter and transmit them to the members of the Commission, who shall indicate which communications should be considered by the Commission.

In this way, the Charter authorises the Commission to consider communications other than those of states parties to the Charter.³⁹ If the phrase *communications procedure* is read in conjunction with the provisions on admissibility for communications other than those of states parties under Article 56, particularly paragraph 1, it can be logically argued that ‘communications other than those of states parties’ refers to communications lodged by, among others, victims of violations of the rights guaranteed under the Charter. Victims may include individuals as holders of individual rights, or groups such as minorities as holders of collective rights. Again, this makes the Charter the only international instrument that confers an international legal personality on collectivities such as minorities (Murray 2000:110–111).

This implies that the proviso ‘communications other than those of states parties’ puts no restriction on who may file a communication, which allows any individual, group or non-governmental organisation (NGO), whether or not direct victims of the violation at issue, to lodge a petition (Pedersen 2006:407). Thus, whereas victims of violations cannot lodge their complaints before the Commission for various reasons, NGOs espouse their claims and submit communications on their behalf. In the Ogoni case, the Commission expressed gratitude to the two human rights NGOs that brought the matter under its purview and emphasised the importance of *actio popularis* allowed under the African Charter.⁴⁰

The majority of cases brought before the Commission deal with civil and political rights (Heyns 2002:137). These cases reveal various situations in which individuals and groups of people experienced killings, torture and inhumane treatment and deprivation of their liberties, freedoms, livelihoods and properties. The Commission has frequently held that such violations are contrary to the rights guaranteed in the Charter, particularly the rights to life,⁴¹ dignity, liberty and security⁴² and protection against torture and inhumane treatment.⁴³

In several jointly considered communications against Zaire, it was alleged that people had been executed extrajudicially.⁴⁴ The Commission found that the extrajudicial killings constituted violations of the right to life⁴⁵ and held that the ‘massacre of a large number of Rwandan Villagers by the Rwandan

Armed Forces and the many reported extrajudicial executions for reason of their membership of a particular ethnic group is a violation of Article 4'.⁴⁶ Similarly, the execution of prisoners after summary and arbitrary trials and the extrajudicial execution of unarmed civilians in Sudan constituted violations of the right to life.⁴⁷

The African Commission further held that the right to life is the fulcrum of all other rights.⁴⁸ It therefore requires the utmost respect and protection. Thus the Commission has often maintained that besides committing acts of killing, putting people in conditions that threaten their lives constitutes a violation of the right to life. In a case against Nigeria, the denial of medication to a prisoner to the extent that his life was seriously endangered was found to be a violation of the right to life, even if the act did not cause death.⁴⁹ Similarly, in its decision on a series of cases against Mauritania, the Commission found that '[d]enying people food and medical attention, burning them in sand and subjecting them to torture to the point of death point to a shocking lack of respect for life, and constitutes a violation of Article 4'.⁵⁰

According to the Commission, people must be protected from violation of their rights, including threats to their lives, both in times of peace and of war. In a decision on communication against Chad, while finding that several accounts of killings and assassinations were contrary to the right to life, the Commission indicated that the state could not use the civil war in Chad as an excuse to violate rights, or to permit or tolerate violations of rights in the African Charter.⁵¹ Similarly, it emphasised that '[e]ven if Sudan is going through a civil war, civilians in areas of strife are specially vulnerable and the state must take all possible measures to ensure that they are treated in accordance with international humanitarian law'.⁵² Most importantly, the Commission held that people should be protected not only from life-threatening conditions and acts for which state authorities are directly responsible but also from those created or perpetrated by non-state actors. In the case against Sudan, it held that even if some of the executions committed were not the work of government forces, the government had a responsibility to protect all the people under its jurisdiction.⁵³ Furthermore, it held that Chad had a responsibility to secure the safety and liberty of its citizens and to conduct investigations into murders even where it could be proved that violations were committed by government agents.⁵⁴ The responsibility for observing and ensuring observance of the human and peoples' rights in the Charter is not solely that of governments. In many resolutions, the African Commission, in condemning massacre and violence against civilians by armed factions, has noted that it is bound to observe human rights and humanitarian norms.⁵⁵

In regard to protection from torture and inhumane treatment, the Commission's communication against Mauritania held that the widespread use of such treatment, including rape, beatings, sleep deprivation and electric shocks, violated the right to protection against torture and inhumane treatment.⁵⁶ In the case against Sudan, holding individuals, refusing them contact with their families and refusing to inform the families whether and where they were being held constituted inhumane treatment of both the detainees and the families.⁵⁷ It was also held that conditions of overcrowding, excessive solitary confinement, shackling within a cell, extremely poor quality food and denial of access to medical care constituted deprivation of the right to protection from torture and inhumane treatment.⁵⁸

The arrest and detention of persons on the grounds of ethnic origin alone were considered arbitrary deprivation of the individuals' liberty contrary to the right to liberty and personal security.⁵⁹ The detention of persons without trial for a long period, such as three months, is also contrary to the right to liberty,⁶⁰ as is holding individuals in detention after they have served their sentence term.⁶¹ In addition, the Commission held that the disappearance of persons was a violation of the right to physical integrity and security.⁶²

The African Commission has emphasised the importance of institutions of rights protection by securing the enjoyment of rights and freedoms by people.⁶³ Communication 129/94 showed that the military government of Nigeria had nullified the Constitution, dissolved political parties and ousted the jurisdiction of courts to examine any decree passed during preceding ten years.⁶⁴ In holding that these actions constituted a breach of Articles 26 and 7 of the African Charter, the Commission confirmed the following:

Article 26 of the African Charter reiterates the right enshrined in Article 7 but is even more explicit about States Parties' obligations to guarantee the independence of the Courts and allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights guaranteed by the present Charter.⁶⁵

In elucidating the need to safeguard institutions of rights protection, the Commission articulated the relationship between rights and those institutions:

While Article 7 focuses on the individual's right to be heard, Article 26 speaks of the institutions which are essential to give meaning and content to the right. This article clearly envisions the protection of the

courts which have traditionally been the bastion of protection of the individual's rights against the abuses of state power.⁶⁶

The Commission accordingly held that ousting the jurisdiction of courts constituted a breach of Article 7 and the obligation to establish and protect the courts provided for by Article 26 of the Charter.

However, this procedure is not employed as frequently as one would expect, given the nature of human rights problems on the continent.⁶⁷ Some authorities on Africa's human rights system say 'this could to some extent be attributed to a lack of awareness about the system, but even where there is awareness, there is often not much faith that the system can make a difference' (Heyns & Killander 2006:207).

Many factors undermine the potentially significant role of this procedure in protecting human rights and promoting human security, beginning with the nature of the authority of the African Commission itself. The Commission was not intended to serve as a full-fledged judicial body. According to the African Charter, it is empowered to make only those recommendations it deems useful. From a legal perspective, these recommendations are not binding in the way court judgments are.⁶⁸ Consequently, states comply with its recommendations essentially out of good will, not legal obligation.⁶⁹

Similarly, states' compliance with the Commission's recommendations has been a major impediment to the enforcement of human rights within the African Charter's framework (Naldi 2002:10). Studies have indicated that states mostly ignore the Commission's recommendations on communications (Heyns & Killander 2006:207).⁷⁰

Besides the non-binding nature of recommendations, states' non-compliance is attributable to factors such as the lack of an effective mechanism to follow up on responses to recommendations (Viljoen 2004:15). For some time, the African Commission did not go beyond finding a state to be in violation of human rights under the Charter. When the Commission makes recommendations on a course of action that must be taken by the respondent state to remedy the violation, its practice has been to leave the implementation 'to the state concerned without follow-up and trust that it will act accordingly' (Musila 2006:455). Moreover, the recommendations are often general and fall short of specifying remedies (Musila 2006:459-460).

Another reason for non-compliance is the attitude of states towards the African Commission. Many states share the perception that the Commission lacks a

mandate to instruct, and it is not deemed an authoritative body. This belief is partly due to the negligible position the Commission occupies within the framework of the AU.

All these problems have severely compromised the capacity of the African Commission and its communications procedure to afford remedy to victims of violations and to improve the human rights situation on the continent, thereby advancing the goals of human security. There is consensus that for the system of human rights protection to be meaningful to the peoples of Africa, these institutional and working deficiencies need to be rectified.

State reporting

States party to the African Charter have undertaken to submit, every two years, 'a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognised and guaranteed by the present Charter'.⁷¹ This is an additional vehicle used by the African Commission to supervise the implementation of guaranteed rights. Although less incisive than the communications procedure, it plays an important role. As Karp (2003:37) argues, reporting 'may prove to be an effective means to develop a universal culture of rights, one in which the actual meaning of rights and their implementations for specific individuals and groups are commonly understood and internalised by governments and civil society alike'. This statement is made because, as envisaged in 'Guidelines for Reporting' (Heyns 2004:508), accounting gives the Commission and state parties an opportunity to have constructive dialogue. This is particularly important as civil society organisations are also involved in the process by, among others, preparing and submitting shadow reports. Furthermore, the state acquires an understanding of the way in which the Commission gives normative understanding to the African Charter through its interpretations. Most importantly, it helps the Commission identify human rights concerns and areas that require special attention. Unlike the communications procedure where investigation is limited to the circumstances described in the complaint, reporting allows the Commission to scrutinise the state on a range of issues including political violence, conflict, poverty, press freedom, discrimination and the rights of vulnerable groups.⁷²

An examination of the Commission's consideration of reports reveals that it increasingly pays attention to systematic and serious threats to the human rights and security of peoples. In its concluding observation on the initial periodic report of the Democratic Republic of Congo (DRC), the Commission expressed concern about serious violations of the human rights of the Pygmy/Batwa

populations of the DRC, particularly in the eastern districts, which included forced removals, deprivation of the right to life and total deprivation of basic means of livelihood.⁷³ Its concluding observations on the consolidated periodic report of Sudan noted that the judicial supervision of the nature and duration of police custody, where citizens were arrested for political offences, was not satisfactory in terms of the regulations of the African Charter.⁷⁴ Emphasising the importance of national mechanisms and processes to implement the rights guaranteed in the Charter, particularly in the prosecution of perpetrators of human rights violations, the Commission recommended that the Sudanese government diligently carry out investigations with a view to prosecuting these perpetrators before independent and impartial courts.⁷⁵ After examining the first periodic report on South Africa, the Commission's concluding observation voiced concern about the high incidence of sexual violence against women and children. It furthermore noted the need to undertake 'studies with a view to designing and implementing appropriate policies and measures, including care and rehabilitation, to prevent and combat the sexual exploitation of children'.⁷⁶ The most important shortcoming of such findings and recommendations is that they are worded in a general way.

The African Commission has noted that conflicts result in serious violations of human rights and emphasised the need to resolve them. Its observations on the periodic report of the DRC included deep concern over the continued conflict that has resulted in numerous deaths, destruction of property and massive displacement. It thus recommended that urgent measures be taken to stop the conflict 'so as to ensure the security of the people'.⁷⁷ However, the recommendation has been made in general terms and without sufficient conceptualisation of how human rights can be observed in situations of conflict and be integrated in conflict resolution. Although the African Commission observed that '[b]loody and devastating armed conflicts which have been going on for decades in some parts of Sudan have resulted in often serious violations of human rights and represent a major obstacle to the implementation of the rights and freedoms prescribed and guaranteed by the African Charter',⁷⁸ it offered no specific recommendations on ways to observe human rights and promote the security of civilians in conflicts and peace processes aimed at conflict resolution.

Generally, as with the communications procedure, state reporting has serious flaws that undermine its efficacy and potential contribution to human rights on the continent (Bulto 2006:57). The first such flaw lies in states' failure to submit reports in accordance with Article 62 of the African Charter. Of the 53 states party to the Charter, 18 have yet to submit a report to the Commission.⁷⁹ Consequently, the Commission is unable to evaluate

the human rights situation of about half of the states party to the Charter. Moreover, the constructive dialogue that the reporting system intends to achieve is lacking: states that submit reports often fail to send representatives when the Commission considers their reports, and when they do, these representatives are often unable to engage with the Commission.⁸⁰ Until 2001, the absence of concluding observation and follow-up posed an additional problem. The role of the reporting procedure is further diminished 'by the fact that neither the state reports nor the concluding observations are published by the Commission' (Heyns & Killander 2006:209).

Addressing these deficiencies is a prerequisite to realising the potential of the reporting procedure to attend to human rights problems within states party to the Charter. This procedure also offers scope to incorporate and address human security concerns and dimensions within the continental human rights infrastructure. The African Commission could engage in dialogue with reporting states on matters of national security where, for example, this issue has been raised in defence of restricting human rights. The Commission can also address disproportionate expenditure by states on arms and national defence in the broad context of human security. Human rights NGOs would play a critical role here by, for example, raising human security concerns in their shadow reports or by supplying additional information on human security problems and on measures that could be recommended within the framework of the African Charter. It is nonetheless critical that human rights NGOs combine human security and human rights approaches.

Special procedures: Rapporteurs

The above two procedures have their own limitations. The communications procedure is by nature reactive and does not operate until a complaint is lodged with the African Commission; the latter cannot initiate this procedure. Moreover, the process is slow, with a long time lapse between the filing of a communication and a final decision. Thus it is not suited to deal with a wide range of human rights violations, particularly those involving serious and large-scale violations. Similarly, the reporting procedure is periodic⁸¹ and relies heavily on information submitted by the state and by civil society organisations. Appointing special rapporteurs to explore human rights situations, in a particular state or on a certain theme, is a valuable mechanism that supplements these procedures.

The Commission has appointed a number of special rapporteurs who all deal with specific thematic issues. Prompted by the large-scale human rights

violations that emerged in the course of the civil war and horrific genocide that ravaged Rwanda, the Commission appointed a Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions at its fifteenth session in 1994.⁸² The rapporteur's mandate encompasses individual cases and serious or massive violations. It includes a preventive role where he or she can 'suggest ways and means of informing the African Commission in good time of the possibility of executions with the goal of intervening before the OAU summit'⁸³ and the ability to use his or her good offices to mediate and investigate. To the dismay of many observers, however, the rapporteur failed to give proper effect to this mandate (Harrington 2001:254–259; Evans & Murray 2002:282–289). This neglect undermined the role the procedure could play not only in attending to urgent and large-scale or systematic human rights problems but also in acting as a fact-finding mechanism.

The Commission has also appointed other rapporteurs to deal with specific civil and political rights issues. These include the Special Rapporteur on Prisons and Conditions of Detention⁸⁴ and the Special Rapporteur on Freedom of Expression.⁸⁵ However, despite recognition that conflicts seriously inhibit people's enjoyment of rights and freedoms, the Commission does not have a systematic mechanism to address conflicts and human rights. While this lack warrants attention, it does not imply that the African Commission has to establish a special rapporteur on human rights and conflicts. It could, for example, be addressed by expanding the mandate of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions to include human rights and conflicts.

Generally, as the Commission's experience of rapporteurs has shown, there is much room for improvement (Harrington 2001; Evans & Murray 2002). Assuming such improvement is made, this mechanism could become a key instrument for responding to urgent human rights concerns and threats to human security. To this end, it is essential that the Commission use the human security approach rather than the established human rights approach and treat conditions identified as threats to human security as manifestations of human rights problems.

Economic, social and cultural rights

Little doubt exists that in the African context, human security threats such as poverty, drought, disease and illiteracy constitute serious impediments to the enjoyment of human rights. This makes economic, social and cultural rights particularly important to the people of Africa. Indeed, the

incorporation of these rights into the African Charter is better understood in terms of an effort to meet the needs of Africa's peoples. By emphasising the importance of these rights, the Commission expressed concern at Africa's lack of human security, which is due to prevailing poverty and underdevelopment and the failure of African states to address poverty through development.⁸⁶

Communications procedure and protection of people from socio-economic threats

The Commission's decisions on the few cases involving violations of economic, social and cultural rights have revealed the potential of these rights to ensure protection from pervasive threats. Furthermore, they establish standards that states should observe to realise economic, social and cultural rights and fulfil the basic needs of their peoples.

Communication 100/93 revealed that a lack of provision for basic services including a shortage of medicines.⁸⁷ It further alleged that universities and secondary schools were arbitrarily closed for two years. The complainants submitted that these conditions constituted violations of the rights of the Charter, specifically the rights to health (Article 16) and education (Article 17). The Commission found that the failure to provide basic services such as safe drinking water and electricity and the shortage of medicine constituted violations of Article 16,⁸⁸ and that the closure of universities and secondary schools violated the right to education.⁸⁹

Communication 159/96 presented allegations of the mass expulsion of a group of West Africans from Angola by Angolan authorities.⁹⁰ In its findings, the Commission held that

... [mass] expulsion of any category of persons, whether on the basis of nationality, religion, ethnic, racial or other considerations 'constitute[s] a special violation of human rights'

and that

[t]his type of deportation call[s] into question a whole series of rights recognised and guaranteed in the Charter: such as the right to property, the right to work, the right to education and results in the violation by the State Party of its obligations under Article 18 paragraph 1 which stipulates that 'the family shall be the natural unit

and basis of society. It shall be protected by the state, which shall take care of its physical and moral health.⁹¹

Although it does not elaborate on the protection these rights afford to non-nationals, the decision provides certain safeguards against some of the insecurities of being in a foreign country.

In the Ogoni case, it emerged that the Ogoni people were exposed to the despoliation and degradation of their land, including the contamination of water, soil and air, with serious consequences for their health and environment.⁹² Furthermore, the communication alleged that their food sources had been ruined and their houses destroyed. The complainants submitted that these acts constituted a violation of the rights to health and environment. In its decision, the Commission agreed that these rights had been violated and argued that the right to health, at the minimum, required the government 'to desist from carrying out or sponsoring or tolerating any practice, policy or legal measures violating the integrity of the individual'.⁹³ Linking the statement to economic and social rights, it further held that the right to environment required the state 'to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure [an] ecologically sustainable development and use of natural resources'.⁹⁴

The Commission articulated the nature and types of obligations imposed by the rights guaranteed in the Charter. Consistent with the framework of protection and empowerment in human security proposed by the Commission on Human Security, it pointed out that all rights 'generate at least four levels of duties, namely the duty to respect, protect, promote and fulfil'. It further stated that '[t]hese obligations universally apply to all rights and entail a combination of negative and positive duties'. In the same way that the framework of protection is intended to apply, the Commission believes that these obligations dictate taking measures against political, social and economic interferences and similar threats.⁹⁵ Similarly, the obligations to fulfil and promote operate as would the framework of empowerment. They are concerned respectively with the creation of an environment that enables individuals 'to exercise their rights and freedoms, for example, by promoting tolerance, raising awareness, and even building infrastructure',⁹⁶ and the provision of the necessary material or other conditions for the realisation of rights by individuals.⁹⁷

The African Commission recognises that the availability of resources implies limitations for efforts to realise socio-economic rights. Cognisant of the impact

of both this limitation and of poverty on the enjoyment of the right to health, it stated the following:

Millions of people in Africa are not enjoying the right to health maximally because African countries are generally faced with problems of poverty which render[s] them incapable to provide the necessary amenities, infrastructure and resources that facilitate the full enjoyment of this right. Therefore, having regard to this depressing but real state of affairs, the African Commission would like to read into article 16 the obligation on the part of states party to the African Charter to take concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind.⁹⁸

This finding establishes that states are obliged to optimally use resources at their disposal to ensure the enjoyment of socio-economic rights. Therefore, a state may be in violation of the Charter's socio-economic rights unless it can demonstrate that its failure to provide for its people is due to a lack of resources. For example, in the communication against Zaire, the Commission found that the failure to provide basic services necessary for basic health alongside evidence of mismanagement of public finances was a violation of the right to health.⁹⁹ However, the Commission did not elaborate on states' obligation to establish measures and institutions to prevent corruption and counter the embezzlement of public funds that should be directed at service provision. Clearly, to the extent that such serious abuses of public institutions hamper development efforts and empowerment, they frustrate the goals of human security. Given the high levels of poverty, disease and illiteracy in Africa, it is a security and human rights imperative that the African Commission and the newly established African Court engage proactively against, among others, corruption and the misapplication of public funds. Furthermore, the bodies should approach such abuses of public institutions as violations of socio-economic rights.

Therefore, while the Commission has made significant findings supporting protection against socio-economic threats, there is still room for improvement. For example, some decisions found violations of rights without defining which conditions constituted such violations. Furthermore, the Commission needs to concretise the link between resources and rights by finding violations when a state fails to prevent the embezzlement of funds. The Commission must also, on finding a violation, specify remedies in a systematic and consistent manner. The remedies it awarded in the Ogoni case, including compensation, are commended and should be replicated.

State reporting

The state reporting procedure is particularly important for the supervision of the implementation of economic, social and cultural rights. Since the Commission can and should consider all relevant factors on its own initiative, it can decide which conditions frustrate the enjoyment of these rights including socio-economic threats such as poverty, disease, illiteracy and mismanagement of public funds. It can also specify which policies, measures and actions states should employ to protect people from such conditions and provide for the realisation of economic and social rights.

In its examination of the initial state report on Namibia, the Commission emphasised that ‘we cannot talk about human rights without insisting on the need to emphasise social, economic and, cultural rights to allow a major proportion of our population to have a minimum living standard’ (as quoted in Odinkalu 2002:204). It stressed that this action involved a commitment to eliminating poverty and providing access to basic services. Commenting on a Togo state report, the Commission identified poverty due to inadequate resources as an impediment to people’s enjoyment of rights. It recommended, with little detail, that ‘the Government take[s] adequate measures to fight poverty by protecting every vulnerable stratum against impoverishment’.¹⁰⁰

In some of its concluding observations, the African Commission identified certain conditions as threats to life and socio-economic well-being. After examining the DRC report, it noted the crippling impact of the collapse of the country’s economy and infrastructure, such as roads and bridges, on its ability to mobilise its natural resources for the benefit of its people. Similarly, in observations on the Seychelles report, the Commission expressed its concern that HIV/AIDS had compromised years of development effort.¹⁰¹ In neither of the cases, however, did it recommend ways to improve these conditions.

The Commission understands the need to identify conditions that threaten the enjoyment of socio-economic rights and to evaluate the extent to which they are enjoyed. It commended the Cameroonian government’s efforts to provide equal educational opportunities for boys and girls, access to medical care and protection to marginalised groups.¹⁰² At the same time, the Commission criticised the Sudanese government for not providing information on HIV/AIDS, reasons for the low level of education or any remedial measures taken.¹⁰³ However, the Commission is still far from developing the comprehensive standards, benchmarks and policy frameworks necessary to set priorities and evaluate states’ progress.

The effect of conflict on socio-economic rights has been identified as a major obstacle to the enjoyment of civil and political rights. In its concluding observation on the state report of the DRC, the Commission noted that the long conflict and resultant ethnic hatred inhibited economic development and the creation of an environment conducive to the enjoyment of human rights.¹⁰⁴ It made similar observations about the conflict in Sudan, noting that the emergency situation prevailing in the country for several years 'curtails the normal exercise of and enjoyment of the rights and freedoms prescribed by international instruments relating to human rights and to the African Charter on Human and Peoples' Rights'.¹⁰⁵

The Commission's record in applying this procedure to supervise the implementation of socio-economic rights remains unsatisfactory. Its requests that states furnish information on areas of concern relating to the enjoyment of socio-economic rights have been ad hoc. Similarly, while some of its concluding observations make specific recommendations, many do not. In its concluding observations on the Cameroon report, the Commission specifically recommended that the government strengthen its policies on free, compulsory and universal basic education.¹⁰⁶ Meanwhile, recommendations in many other concluding observations were general and gave little guidance on focus areas and remedial actions.

Given the many conditions in Africa that inhibit the enjoyment of basic needs, one would expect the Commission to be more proactive in requiring states to report on the measures and institutions put in place to achieve, for example, food security and the protection of people from such socio-economic threats. It has not entirely failed in this respect, as evidenced by its criticism of Sudan on HIV/ AIDS and education. Examining Ghana's report at its fourteenth ordinary session, the Commission asked about the right to work and the consequences of economic structural adjustment, which often include retrenchment and restricted access to basic services (as quoted in Odinkalu 2002:205). The crux of the charge is that the Commission has not achieved these results in a systematic fashion.

The preceding discussion reveals the potential of the state reporting procedure to identify conditions that create socio-economic threats and to define mechanisms to protect people from these conditions and realise the enjoyment of socio-economic rights. As Odinkalu (2002:205–206) points out, there is 'considerable room for the Commission to further develop the norm-clarification, standard setting, policy-formulation and benchmarking roles of this otherwise invaluable procedure of state reporting to the implementation of economic, social and cultural rights'.

Special procedures: Working group and resolutions

The importance of economic, social and cultural rights in the African context cannot be overemphasised. Indeed, the preamble to the African Charter stressed this fact when it proclaimed that

... [i]t is ... essential to pay particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights ... and that the satisfaction of economic, social and cultural rights is a guarantee to the enjoyment of civil and political rights.

These rights have received particular attention in special procedures of the African Commission.

At its thirty-sixth ordinary session in Dakar, Senegal, the Commission adopted a resolution on economic, social and cultural rights.¹⁰⁷ This resolution referred to the recognition of these rights in several articles of the African Charter and the commitment in the Constitutive Act of the AU to, among others, the promotion of social justice to ensure a balanced economic development. Affirming the need to attend to these rights, the Commission noted that economic, social and cultural rights remain marginalised in their implementation.

The Commission furthermore identified various conditions that frustrate the enjoyment of socio-economic rights, including 'the ongoing and longstanding conflicts' and, important for this study, 'the lack of human security in Africa due to prevailing conditions of poverty, under-development, and the failure of African states to address poverty through development'. The Commission further expressed the 'urgent need for human rights judicial and administrative institutions in Africa to promote human dignity based on equality and to tackle the core human rights issues facing Africans including, food security, sustainable livelihoods, human survival and the prevention of violence'.

Against this backdrop, the Commission established the Working Group on Economic, Social and Cultural Rights. The working group has a broad mandate that includes the following: to develop and propose to the Commission principles and guidelines on economic, social and cultural rights in the context of state reporting and to undertake studies and research on specific economic, social and cultural rights. The Commission directed its special rapporteurs and working groups to include these rights in their focus,

and it adopted the Pretoria Statement on Economic, Social and Cultural Rights.

The Pretoria Statement clearly identifies areas that need particular attention for the full realisation of economic, social and cultural rights.¹⁰⁸ Specifically, it urges states to take measures to protect people from pervasive socio-economic security threats such as illiteracy, lack of awareness, under-development of social amenities, adverse effects of globalisation and HIV/AIDS and other diseases. It also notes the need to tackle the abuses of public institutions that hamper the enjoyment of socio-economic rights, including mismanagement of resources; lack of good governance and planning; failure to allocate sufficient resources for the implementation of economic, social and cultural rights; lack of political will; and corruption.

Clearly, the Commission's resolution, together with the Pretoria Statement, focuses on economic, social and cultural rights: it identifies conditions that inhibit their realisation and elaborates steps to mainstream and prioritise them. The impact of this course on the African Commission's approach to its role in the protection and promotion of these rights and the resultant contribution to human security in Africa is yet to be seen.

Peoples' rights

It has often been observed that in Africa, individuals experience various political and social sufferings and insecurities because of their group membership. As the situations in Rwanda and now in Darfur illustrate, in its extreme manifestations this targeting can involve genocide and other serious crimes against humanity. Many of the conflicts and civil wars in Africa have been conducted along ethnic and religious lines. As former Secretary-General of the OAU Salim Ahmed Salim stated (as quoted in Murray 2004:127):

While one of the major causes of internal conflicts has been [on] the distribution of power and control over resources, the tendency to affirm one's identity by rejecting outside cultural influence has also been a factor in internal conflicts.

These conditions, together with Africa's peoples' vulnerability to exploitation of their natural resources and to other violations, dictate the protection of communities through peoples' rights. The African Commission recognises the importance of these rights when it declares that '*collective rights* (peoples'

rights) [my emphasis], environmental rights and economic and social rights are essential elements of human rights in Africa'.¹⁰⁹

Communications procedure

For a long time, the Commission did not equate the recognition of people's rights with the entitlement of specific communities to protection. Communications 49/91 and 99/93 revealed that many people of the Tutsi ethnic group were arbitrarily arrested and massacred and had their villages destroyed.¹¹⁰ Although the right to existence is recognised in the African Charter as one of the fundamental rights of peoples under Article 20, the Commission treated the matter as an individual rights issue. Instead of finding these actions to be violence against not only individuals but also the entire Tutsi ethnic group, threatening is very existence contrary to Article 20, it found that the massacre and extrajudicial execution of large numbers of Tutsis for belonging to a particular ethnic group was a violation of the right to life alone.

In relatively recent cases, the African Commission has begun to use peoples' rights as included in the Charter to enhance the protection of groups within states from various violations, including environmental degradation, exploitation of natural resources and disturbance of peace and security (Dersso 2006:358). One of the recognised collective rights of peoples is the right to peace. Article 23 provides for the right of all peoples to national and international peace and security. Given the prevailing reality in many parts of Africa, this provision can be understood as a guarantee for the various constituent communities in African countries against internal conflicts and inter-state wars. The Commission's application of this right supports such an interpretation. In a series of communications against Mauritania,¹¹¹ it was alleged that numbers of black Mauritians were being murdered,¹¹² expelled from their lands¹¹³ and inhumanely treated and tortured in custody¹¹⁴ and that their goods were being confiscated and their villages destroyed.¹¹⁵ In the decision handed down in May 2000, the African Commission stated the following:

Central to the communications in question is the domination of black Mauritians by a ruling Arab clique, for which the communication presents abundant evidence. The subsequent discrimination against black Mauritians goes against a principal objective of the Charter, that of equality. Such oppression constitutes a violation of Article 19.¹¹⁶

Even more significant was the Commission's interpretation of the right to peace and security. Although a reading of Article 23 suggests that the term *peoples*

in this context refers to the population of a state as a whole, the African Commission innovatively interpreted it right to extend protection to a part of the population of a state. Specifically, 'the unprovoked attack on the villages [of black Mauritians] constitutes a denial of the right to live in peace and security'.¹¹⁷ The burden of securing this right lies with the state in that it must not only respect this right but also ensure its protection from violation even by others within the state.¹¹⁸ If the interpretation is applied to the ongoing crisis in Darfur, the government of Sudan cannot escape responsibility for various violations, including the massacre of Darfurians by the Janjawid militia, even if the government is not in any way linked to them.¹¹⁹

In the Ogoni case, the Commission examined the right of peoples to freely dispose of the wealth and natural resources guaranteed under Article 21 of the Charter. It held as follows:

The origin of this provision may be traced to colonialism, during which the human and material resources of Africa were largely exploited for the benefit of outside powers, creating tragedy for Africans themselves, depriving them of their birthright and alienating them from the land. The aftermath of colonial exploitation has left Africa's precious resources and people still vulnerable to foreign misappropriation. The drafters of the Charter obviously wanted to remind African governments of the continent's painful legacy and restore co-operative economic development to its traditional place at the heart of African Society.¹²⁰

In an era of increased globalisation and growing demand for resources, many communities are concerned about the exploitation of natural resources with no consideration of the conditions of the rightful owners and often with debilitating consequences for their environment and livelihood. The right of a people to freely dispose of natural resources for the benefit of its members is intended, therefore, to protect them from the exploitation thereof, and it requires states to implement legislative, institutional and ethical mechanisms to safeguard their peoples against such exploitation. In the above case, it was established that 'despite its obligations to protect people from interferences in the enjoyment of their rights, the Nigerian Government facilitated the destruction of Ogoniland' and allowed private companies to 'devastatingly affect the well-being of the Ogonis' through destructive exploitation of the oil reserves.¹²¹ The Commission found that no benefit accrued to the local people from this destructive exploitation¹²² and that all these practices constituted a violation of Article 21 of the African Charter.¹²³

The above discussion demonstrates that peoples' rights provide important tools, not necessarily offered by individual rights, to protect the well-being of communities and enable them to assert their rights and achieve development. It also reveals the potential of these rights, in the African context, to facilitate the protection of people from serious environmental and economic threats. However, it is one of the least developed areas of the African Charter. The African Commission, and now the newly established African Court, needs to make an added effort to develop the application of these rights and freedoms to address the various situations that inhibit their enjoyment.

State reporting

The 'Guidelines for State Reporting' specify the information that states are expected to furnish in regard to peoples' rights. On the right of all peoples to equality, for example, states are to report on 'precautions taken to proscribe any tendencies of some people dominating another as feared by the article'. As regards the right to self-determination, reports should provide information on legislative and administrative machinery for the full participation of all communities in political activities and equal opportunities in the country's economic activities, both of which should occur according to independent choices. Although the formulation is problematic in some ways, it indicates the nature of the protections afforded by virtue of these rights. In the examination of periodic reports of states, the African Commission requires insight into ways in which these rights are institutionalised and given application within the various legal systems. At the same time, this information should facilitate states' insights into the policy measures needed to realise peoples' rights and the various mechanisms for institutionalising them in a manner suited to each country's unique situation.

The record of the Commission's examination of state reports shows that Commission members have expressed reservations about applying peoples' rights to various communities within African states. During the examination of the state report of Rwanda, Commissioner Nguema rhetorically asked the following:

Does that mean we have to take into account the rights of the Hutu community, the Tutsi Community or the Tua community? I think that according to the interpretation and even the principles which are enforced in the OAU at the level of the states it is admitted that we do not have to take account of the rights of various ethnic groups to consider them as peoples' rights.¹²⁴

He further stated that

... when the term 'peoples' was introduced ... we meant peoples ... for instance the Nigerian people. We did not distinguish the Yorubas or the Minas etc. *These are not the communities or peoples we are aiming at. ...[I]n Africa, it is not meant to recognise the identity of the various ethnic groups comprising the state*¹²⁵ [my emphasis].

It has now been recognised that the various communities within African states are entitled to the protection of the peoples' rights of the African Charter. In its concluding observation on the report of DRC, the Commission not only raised concern about the violation of the rights of the Batwa people but also recommended that urgent measures be taken to

... ensure the protection of the rights of the Pygmy/Batwa people in the whole territory of the DRC and move particularly to stop the serious violations of the rights of these people in the eastern districts. In this regard, the Government is urged to put in place as quickly as possible legislation recognising the rights of the Pygmy/Batwa people.

Similarly, after reviewing the report on Sudan, the Commission made a recommendation 'to adopt and implement positive measures for the integration of vulnerable and minority groups living in Sudan'. Furthermore, it recommended that Togo 'take specific measures to cater for the needs of minority and vulnerable groups and promote and protect the rights of these groups'.

Despite the potential of peoples' rights to promote equality, peaceful co-existence and all-inclusive political and economic processes, the Commission did not effectively and systematically use its examination of state reports to ensure that the rights are employed to that end. For example, the Commission urged Cameroon to promote a culture of respect for human rights to reduce tensions between English-speaking and French-speaking citizens and promote peaceful co-existence among different ethnic groups without specific reference to these rights.

There is a need to elaborate on ways in which these rights can be used to advance peace and social justice for all groups within African states. In addition, the Commission needs to provide sufficient guidance and insight into the application and institutionalisation of these rights within African countries, particularly where inter-communal conflicts and tensions and high levels of inequality exist among communities.

Special procedures: Working group

During its twenty-eighth session, the African Commission adopted a resolution establishing a Working Group of Experts on the Rights of Indigenous Populations/Communities in Africa.¹²⁶ The working group was mandated to examine the concept of indigenous people and communities in Africa and to study the implications of the African Charter for the human rights and well-being of indigenous communities. It was directed to give particular attention to the role of the peoples' rights of the African Charter. After studies and consultations with local experts and indigenous peoples' organisations, it submitted a report that was adopted by the Commission at its thirty-fourth ordinary session in November 2003.¹²⁷ The report highlights the serious threats facing indigenous peoples in Africa as regards the enjoyment of their rights and freedoms. It examined the relevant provisions of the African Charter and their application in protecting these communities from conditions threatening their well-being and ensuring their enjoyment of rights and freedoms. Since the working group did not address the application of peoples' rights to all situations and holders of peoples' rights, there may be a need to consider supplementing this work.

Responding to violent conflicts and/or series of serious and massive violations: On-site investigations, resolutions and good offices of the African Commission

As noted in the introduction, violent conflicts constitute major threats to human security in Africa. During the last two decades of the twentieth century, more than half of the African countries engaged in violent conflicts. These violent conflicts brought incalculable damage to human life and to the environment, livelihood and socio-economic infrastructure of many African societies. In Rwanda alone, close to one million people perished as a result of the 1994 genocide and an estimated 4,7 million died in the war in the DRC from 1997 to 2004. The ongoing conflict in Darfur has claimed the lives of hundreds of thousands and has displaced millions more.

These violent conflicts present a serious challenge to the protection and promotion of human rights. There is little doubt that such conflicts often result in gross human rights violations, as evidenced by the Rwanda genocide and the Darfur crisis. One can clearly note a link between violent conflict and human rights abuses. According to Parlevliet (2006:82), violent conflicts not only cause human rights violations: they can result from a sustained denial of rights over a period of time. In both cases, where violent conflicts

lead to human rights violations and where they result from systematic violation of rights, human rights bodies such as the African Commission can play a significant role. Similarly, institutions that follow the human security approach, such as the Peace and Security Council of the African Union, will benefit tremendously from the insights of the human rights approach.

One mandate of the African Commission is to respond to a series of serious or massive violations of human rights.¹²⁸ This directive clearly serves as a mechanism for the operationalisation of the framework of protection in human security. The Commission can respond to large-scale and urgent violations and conflict situations through various mechanisms, including on-site investigations and good offices.

As the primary human rights body with wide quasi-judicial mandates, the Commission has the scope to use these mechanisms to contribute significantly to dealing with conflicts and other circumstances presenting threats or actual violations in at least two ways. First, as one of the bodies with the competence to deal with human rights violations in violent conflicts, it can respond through on-site investigations, establishing focal points and collecting reports on the situation and information to warn of impending problems. Furthermore, it can serve as a fact-finding body where allegations exist of serious international crimes such as genocide or crimes against humanity. One could also consider including a representative from the African Commission in AU peace-keeping missions to monitor the observance of human rights and humanitarian norms.

The African Commission's using a fact-finding mission is not expressly mandated, but it can be deduced from its broad mandate to ensure the promotion and protection of human rights¹²⁹ and from its authority to resort to any form of investigation.¹³⁰ Where it has made a finding of a series of serious or massive violations, the Commission has conducted on-site visits to investigate human rights situations. These include fact-finding missions to Mauritania and Zimbabwe and the mission of good offices to Senegal.

Prompted by communications alleging serious or massive violations of human rights, the African Commission decided at its nineteenth ordinary session to send a fact-finding and investigative mission to Mauritania 'with a view to finding an amicable resolution to put an end to the situation'.¹³¹ The Commission said the purpose of the investigation 'was not to decide whether what was encountered was wrong or right, but above all to listen to all sides with the objective of bringing clarification to the Commission in its contribution to the search for an equitable solution through dialogue'.¹³²

The mission consisting of three commissioners and a legal advisor conducted its fact-finding activities from 19 to 27 June 1996. The report, subsequently adopted by the African Commission, presented the views of the government and community members consulted by the mission. It simply provided a conclusion without analysing the various views to clearly establish the facts that led to the communications. The conclusion itself was formulated in general terms and stopped short of making two general recommendations.¹³³ Even then, there is no account of the implementation of these recommendations as the Commission has no follow-up mechanisms. Moreover, as the AU Assembly failed to act on the findings when the Commission drew its attention according to Article 58 of the Charter, little use is being made of the Article 58 mechanism for further measures.

In response to a communication that described grave and massive violations of human rights resulting from a clash between the Senegalese army and the rebel *Mouvement des Forces Démocratiques de la Casamance* (MFDC), the African Commission decided, at its seventeenth, eighteenth and nineteenth ordinary sessions, to send a mission of good offices to Senegal 'with a view to contributing to the amicable resolution of the conflict'.¹³⁴ After analysing the positions of government and the separatist movement, the Commission rejected the separatists' claim for independence for Casamance from Senegal as lacking 'pertinence'.¹³⁵ Although it criticised the Senegalese state for 'a mechanical and static conception of national unity', the Commission recommended that the issue be addressed within the framework of 'the cohesion and continuity of the people of the unified Senegalese state in a community of interest and destiny'.¹³⁶ Significantly, however, in outlining the objectives for constructive dialogue between the two parties, the Commission recommended that the search for a solution must aim 'to post in Casamance so far as possible, officials native to the region'.¹³⁷ This recommendation implies some form of self-administration for the Casamance, to whom the Commission referred as 'people'.¹³⁸ Unfortunately, the Commission neither sustained its assistance in negotiations between the government and the MFDC on the one hand and Senegal on the other, nor followed up on the implementation of its recommendations. Moreover, the OAU failed to absorb the matter, as part of its mandate to seek solutions to conflicts, from the work of the Commission when it adopted the Commission's annual report containing these recommendations.

The fact-finding mission to Zimbabwe is interesting for several reasons. It was the first mission initiated by the Commission itself and was motivated by allegations of 'widespread human rights violations in Zimbabwe'.¹³⁹ Furthermore, the report's publication was suspended by the AU Assembly of Heads of State and Government.

The mission took place from 24 to 28 June 2002. The report presented detailed and well-articulated findings on the human rights situation in Zimbabwe.¹⁴⁰ The report identified the Zimbabwe government's failure to observe human rights norms and ensure the respect of human rights by its agencies. It made several recommendations on a range of issues such as national reconciliation, independence of the judiciary and national institutions and the media and the police. When the African Commission submitted its seventeenth annual activity report, which contained the report of this mission, to the third ordinary session of the AU Assembly, the latter suspended its publication because the Zimbabwe government argued that it had not been given a chance to respond to its findings.¹⁴¹ The Assembly invited the Commission 'to ensure that in the future its mission reports are submitted together with the comments of the State Parties concerned and to indicate the steps taken in this regard during the presentation of its annual activity report'.¹⁴²

While the Commission's initiative in this case is commendable and is a potentially useful response for dealing with serious or massive human rights violations, clear guidelines are needed on the conduct of missions to ensure that objectives are achieved and to obviate confrontation between the Commission and states under investigation. Furthermore, the Commission needs to develop a follow-up mechanism to ensure the implementation of its recommendations and needs to help the relevant state address the root causes of conflicts and violations. However, one cannot overemphasise that in Africa, the efficacy of institutions and mechanisms for the enforcement of human rights depends on the commitment and willingness of member states and the AU to effectively operationalise these institutions and mechanisms. In this regard, one regrets the AU's failure to take appropriate measures when the Commission, on the basis of Article 58(1) of the Charter, drew its attention to a series of serious or massive violations. If the AU is serious about human rights, it can show its commitment by acting on the Commission's findings by taking appropriate measures.

CHAPTER FIVE

ROLE OF THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

As indicated, one of the deficiencies of the African Commission is that it cannot pass a legally binding judgement. Similarly, the Commission's weak judicial powers under the African Charter are reflected in states' failure to comply with the recommendations of the Commission and the body's incapacity to ensure compliance. It was widely believed that establishing a human rights court was the best way to rectify this institutional deficiency of the African human rights system (Mutua 1999:342).

After 13 years' experience of human rights protection under the African Commission, African states were convinced that an effective judicial mechanism for the protection of human rights was both desirable and necessary in Africa, as in other parts of the world.¹⁴³ Following the finalisation of a protocol after four years, the Protocol on the African Court on Human and Peoples' Rights was adopted in 1998, in Addis Ababa, Ethiopia. Six years later, in January 2004, the protocol entered into force. In July 2004, the AU summit decided to merge the African Human and Peoples' Rights Court (African Court) with the African Court of Justice. Pending the finalisation of the legal and technical processes of the merger, however, the AU Assembly decided at its July 2005 summit that 'all the necessary measures for the functioning of the Human Rights Court be taken, including particularly the election of the judges, the determination of the budget and the operationalisation of the registry'.¹⁴⁴ Accordingly, pursuant to Article 11 of the protocol, 11 judges were elected in January 2006 in accordance with the procedures laid down under Articles 12 to 13.¹⁴⁵

When the African Court becomes operational, it is expected to complement the protective mandates of the African Commission (El-Sheikh 2002:252). The Court will have competence to decide 'all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned'¹⁴⁶ and to provide an opinion on any legal matter relating to the Charter or any other relevant human rights instrument.¹⁴⁷

In terms of its mandates, the Court is vested with the power to make binding decisions. Article 27 of the protocol stipulates that 'if the Court finds that there

has been a violation of a human or peoples' rights, it shall make appropriate orders to remedy the violations, including the payment of fair compensation or reparation.' Paragraph 2 of the same article grants it the power to adopt provisional measures as it deems necessary. Unlike the African Charter, the protocol obliges the Council of Ministers of the AU to monitor the execution of the Court's judgements on behalf of the AU Assembly.¹⁴⁸

The nature of the powers given to the African Court suggests that its establishment will greatly complement the protective mandates of the African Commission and will strengthen the African system of human rights protection. It is anticipated that the Court will facilitate broad scope for articulating the application of human rights in a way that remedies damages resulting from threats to human security that manifest themselves in human rights violations, including serious or massive violations. Given the particular legal and political weight apparently attached to its decisions, it is further expected that the Court could use its power to adopt provisional measures in response to serious or massive violations resulting from conflict situations. The Commission's experience has been that states ignore its provisional measures, particularly in politically sensitive cases.¹⁴⁹ However, whether the African Court will become an effective human rights enforcement body in similar situations depends on several factors and will be discernible only when it becomes operational.

Since the Court's mandate is limited to the protection of human rights,¹⁵⁰ the African Commission is expected to play an equally important role in the promotion and protection of human rights. Under the protocol, individuals or civil society organisations have access to the Court in exceptional cases only. Articles 5 and 34(6) of the protocol require that two conditions be met before individuals have standing before the Court. First, the state party concerned must have made a declaration pursuant to Article 34(6) of the protocol. Second, the Court must choose to exercise its discretion to receive individual communications. The declaration required by Article 34(6) is an unfortunate limitation that could prevent access to the Court for countless victims of human rights violations.

The broad mandates and various procedures of the African Commission discussed above will remain vital instruments for enhancing states' observance of human rights and dealing with widespread threats to human security on the continent. Therefore, it is crucial that those involved in human rights and human security do not reject the Commission as irrelevant. Since it can act on its own motion, the possibility of a rapid response to human rights violations and an incorporation of a human security approach remains

largely with the Commission. This is a strong rationale for all stakeholders to insist that it be strengthened and mainstreamed within the activities of other organs of the AU, including the Assembly, Council of Ministers and the Peace and Security Council.

CHAPTER SIX

RELATIONSHIP OF THE AFRICAN COMMISSION AND THE AFRICAN COURT WITH OTHER KEY ENTITIES

Relationship between the African human rights bodies and the International Criminal Court

The role of African human rights bodies in the enforcement of human rights norms has its own limitations. In the case of human rights violations that amount to international crimes, the most these bodies can do is demand that the relevant state take the necessary steps to bring the perpetrators of the violations, including its officials, to justice. They may play a significant role in investigating allegations of international crimes. Beyond this possible function, they are not supposed to serve as judicial bodies with the competence to try criminal matters. At this point, the role of international criminal bodies, such as the International Criminal Court (ICC), becomes significant in addressing human rights violations, especially in conflict situations. The African Commission has adopted resolutions on the ICC¹⁵¹ that affirm its role. Scenarios that clearly illustrate how the ICC complements the works of the human rights bodies include the following: first, where national systems fail to prosecute perpetrators of human rights violations that constitute crimes prohibited under the Rome Statute; second, where national authorities are unable to prosecute such perpetrators where, for example, they are members of a rebel movement, such as the Lord's Resistance Army (LRA). The objective here is to fight impunity and deter the future commission of similar violations. Clearly, the competent bodies for such situations are international criminal courts and particularly the ICC.¹⁵²

The ICC is established on the basis of the Rome Statute that was adopted on 17 July 1998 by the majority of states attending the Rome Conference. After receiving the necessary 60 ratifications, it became effective on 1 July 2002. The ICC has jurisdiction over the most serious crimes of concern to the international community as a whole, such as genocide, crimes against humanity, and war crimes, which are all defined in the Rome Statute.¹⁵³ The ICC's role in complementing the work of the human rights bodies has already been seen in some of the cases before it. To date, the office of the ICC prosecutor has received three referrals for prosecution. The first case concerns crimes committed during the civil war in the DRC¹⁵⁴ and the

second relates to crimes perpetrated by the LRA during its armed struggle against the government of Uganda.¹⁵⁵ In addition to these two referrals by state parties, the UN Security Council referred a case for the prosecution of those responsible for atrocities committed in the Darfur crisis in the Sudan.¹⁵⁶ Subsequently, the African Commission, in its resolutions on the Darfur situation, called on the government of Sudan to cooperate fully with the ICC to bring perpetrators of crimes to justice.¹⁵⁷

Relationship between the African Commission, the African Court and other African Union organs

Various new bodies were established under the Constitutive Act of the African Union. The supreme organ of the African Union (AU) is the AU Assembly.¹⁵⁸ The Assembly, which is composed of heads of state and government or their duly accredited representatives, has the mandate and responsibility to: determine the common policies of the AU; receive, consider and take decisions on reports and recommendations of other organs of the AU; consider requests for membership of the AU; monitor the implementation of AU policies and decisions; and ensure compliance therewith by all member states; and adopt the budget of the AU.¹⁵⁹

The African Charter provides that the African Commission submit its activity reports to the Assembly of Heads of State and Government.¹⁶⁰ Reports may be published only after they have been considered and approved by the Assembly.¹⁶¹ The Protocol on the African Court similarly requires the Court to submit a report to each regular session of the Assembly.¹⁶² Although this practice is no different from that of other regional human rights bodies, the experience has not been comforting in Africa. In many instances, the Assembly has served merely as a rubber stamp for the publication of the Commission's reports (Heyns & Killander 2006:210). The Assembly has shown little interest in properly considering the submissions of violations of human rights in such reports or in ensuring that member states comply with either their state reporting obligations or adverse decisions on individual communications (Murray 2004:58). However, the Assembly's consideration of the reports has raised fears that the system's legitimacy may be undermined as the very people whose human rights practices are scrutinised are the ones taking the final decision. It was noted previously that Zimbabwe's protest against the report of the fact-finding mission of the African Commission prompted the suspension of its seventeenth annual activity report. Similarly, the Assembly authorised the publication of the Commission's nineteenth annual activity report by excluding annexes containing resolutions on Eritrea,

Ethiopia, the Sudan, Uganda and Zimbabwe.¹⁶³ These examples illustrate that the problematic efficacy and legitimacy of the African human rights system can be largely ascribed to a lack of commitment and political will from African states and AU political organs to execute their responsibilities under the African Charter. This raises inevitable questions as to whether the African Court's inception will influence this situation. It remains to be seen if and how the Assembly will enforce Court judgements when a state party fails to execute such a judgement contrary to its obligations under the Protocol on the African Court.¹⁶⁴

Since the Assembly is responsible for the election of commissioners to the African Commission, the independence of the commissioners until recently was debatable. In most cases, commissioners have occupied government posts as ambassadors, judges, senior officials and civil servants.¹⁶⁵ In an attempt to correct this situation, the AU's request for nominations for four commissioners' posts in 2005 was accompanied by a *note verbale* to member states instructing them not to nominate senior civil servants and diplomatic representatives.¹⁶⁶

Another AU body, the Executive Council, is composed of ministers of foreign affairs or other government designates. The Executive Council's responsibility and mandate include formulating policies in areas of common interest to member states in a range of fields, such as foreign trade, energy, industry and mineral resources, water resources, irrigation, transport and communications, education and social security.¹⁶⁷ In addition, the Executive Council assists the Assembly in its consideration of decisions and reports. Accordingly, the Assembly delegated the consideration of the African Commission's reports to the Executive Council although the Assembly formally adopts the reports. While this decision could increase the engagement of political bodies with the Commission's decisions, it simultaneously creates an opportunity for member states condemned for the violation of human rights to hinder the approval of reports and undermine the enforcement of human rights by the African Commission. Clearly, for the realisation of human rights in Africa, African states and the political bodies of the AU must go beyond rhetoric and the ceremonial enactment of human rights norms and start to live by those standards. When one ascribes the problem of the enforcement of human rights to the institutional weaknesses of the African Commission, one is taking the wrong action because of an incorrect interpretation of the situation.

The Executive Council is additionally tasked to monitor the execution of the Court's judgements on behalf of the Assembly.¹⁶⁸ If the African Commission's experience is a barometer, the Court will face formidable challenges in its

relations with the AU organs on which it depends for both its finances and the execution of its judgements. This time, however, it will not be as easy for the political bodies of the AU to blame problems of enforcement of human rights on the weaknesses of the human rights bodies.

The African Commission experienced serious challenges in its relations with the now defunct OAU. For example, the OAU's failure to provide the necessary human and material resources seriously undermined the proper functioning of the Commission. This prompted the Commission to tell the OAU, in 1998, that it 'could not carry out quite a number of its activities, despite their importance, owing to the paucity of the human, financial and material resources needed to ensure its smooth running'.¹⁶⁹ The Commission was forced to depend on support from outside sources (Dankwa 2002:337). Udombana (2002:1243) observed the following about this regrettable neglect of the African Commission by its parent institution:

The Commission has survived on handouts from inter-governmental and non-governmental foreign institutions. ...Financial matters and survival strategies have taken up substantial spaces at the Commission's bi-annual sessions, instead of the Commission using those limited periods to deliberate on important aspects of its mandate.

The transition of the OAU to the AU, with an emphasis on human rights, sparked hope that the African Commission would receive the required resources and institutional support. However, despite the AU's focus on human rights as expressed in its Constitutive Act, the act neither mentions nor expressly incorporates the Commission. The AU incorporated the African Commission within its framework only very recently and did so through a resolution.¹⁷⁰ The proliferation of AU organs with mandates involving human rights matters has led to fears that the Commission will again be marginalised because 'the proliferation of human rights institutions could lead to diversion of attention and resources allocated to the existing human rights institutions' (Baimu 2002:301). The AU urgently needs to consider how the Commission's positions can be strengthened within the AU framework, and the Commission needs to demand that the political organs of the AU take their supervisory role seriously. In this regard, the Commission's adoption of the Resolution on the Creation of a Working Group on Specific Issues Relevant to the Work of the African Commission on Human and Peoples' Rights is highly commendable.¹⁷

Another AU organ with substantial mandates in the protection of human rights and the promotion of human security is the Peace and Security

Council (PSC) (Murray 2004: 124–126). The PSC was established by the Protocol Relating to the Establishment of the Peace and Security Council of the AU adopted at the first ordinary session of the AU Assembly of Heads of State and Government in Durban, South Africa, in July 2002.¹⁷² After being ratified by the required majority, the protocol became effective on 26 December 2003 and operational on 25 May 2004, following the election of 15 AU member states as its members in March 2004.

According to the protocol, the PSC's objectives include the promotion of peace and security; the prevention and management of conflicts; the promotion and encouragement of democratic practices; good governance; and rule of law; and the protection of human rights and fundamental freedoms.¹⁷³ The principles that guide its actions include respect for rule of law, fundamental human rights and freedoms, and the interdependence between socio-economic development and the security of peoples and states.¹⁷⁴ The most important powers of the PSC, as specified in Article 7, include the following:

- e) recommend to the Assembly, pursuant to Article 4(h) of the Constitutive Act, intervention, on behalf of the Union, in a Member State in respect of grave circumstances, namely war crimes, genocide and crimes against humanity, as defined in relevant international conventions and instruments; ...
- m) follow-up, within the framework of its conflict prevention responsibilities, the progress towards the promotion of democratic practices, good governance, the rule of law, protection of human rights and fundamental freedoms, respect for the sanctity of human life and international humanitarian law by Member States; ...
- p) support and facilitate humanitarian action in situations of armed conflicts or major natural disasters.

The protocol defines the PSC's powers in respect to peace and conflict resolution and the protection of human rights; in addition, it articulates the nature of the relationship between the PSC and the African Commission. It stipulates that the PSC 'shall seek close cooperation' with the Commission in all matters relevant to the mandate and objectives of the Council'.¹⁷⁵ The protocol also requires the Commission to bring to the attention of the PSC 'any information relevant to the objectives and mandate of the Council'.¹⁷⁶ This requirement clearly underscores the interrelationship between peace

and security and human rights. It ensures that the PSC benefits from the insights of the Commission as a body that has special competence on matters of human rights which is based on the interpretation and application of law. Thus the Commission may provide the PSC with information and legal advice for use as the basis of a recommendation to the AU Assembly for humanitarian intervention under Article 4(h) of the AU Constitutive Act. It furthermore reinforces the works of the Commission in the protection of human rights. These provisions are likely to give effective power to the African Commission's protective mandate, particularly with respect to serious or massive violations under Article 58 of the African Charter.

Since it became operational, the PSC has referred a matter to the African Commission. On 25 May 2004, at the tenth meeting of the PSC held in Addis Ababa, Ethiopia, the body's decision on Côte d'Ivoire noted grave concern 'over the executions, killings and human rights violations perpetrated since the beginning of the crisis, [and] support[s] [for] any initiative aimed at investigating these violations and putting an end to impunity'.¹⁷⁷ While endorsing the initiative of the United Nations High Commissioner For Human Rights to set up a commission to investigate human rights violations perpetrated since the beginning of the crisis in the country, the PSC 'reiterates its request to the African Commission on Human and People's Rights to carry out an investigation into human rights violations in Côte d'Ivoire'.¹⁷⁸ At that time, the thirty-fourth ordinary session of the African Commission was underway and it adopted a resolution on Côte d'Ivoire¹⁷⁹ deploring 'the grave and rampant human rights violations committed against the civilian populations, such as summary and arbitrary executions, torture and arbitrary detention and disappearances'. The resolution additionally

... urges the Ivorian authorities to spare no efforts in ensuring that the perpetrators of the violation of human rights during the period of 24th to 26th March 2004 and any other violations perpetrated are brought to justice and the victims and their families appropriately compensated; calls upon the Ivorian Government to ensure full compliance with the provisions of the African Charter on Human & Peoples' Rights and other international human rights instruments.

Similarly, when it considered the situation of the Republic of Guinea at its seventeenth meeting, the PSC condemned

... the disproportionate use of force and the repression of the civilian population and, in this regard, requests the opening of an independent inquiry, with the participation of the African Commission on Human

and People's Rights, in order to identify and bring to justice the perpetrators of the atrocities and other acts of violence committed during these events.¹⁸⁰

Clearly, the relationship between the PSC and the African Commission envisaged by the protocol has already become operational. It is not clear, however, if a feedback system has been created to properly apply referral between the two. Although the Commission has often, in its resolutions, referred to communiqués of the PSC and established missions to investigate violations in conflict situations, it is not apparent whether this mention has been in recognition of the PSC's call to conduct such investigations. How the PSC would use the findings of the Commission's investigations has not been indicated, suggesting a strong need to properly define the feedback system between the two bodies and between the African Court and the PSC.

African Commission, African Court and non-governmental organisations

Since becoming operational, the African Commission was long criticised for the inadequate involvement of NGOs. Nonetheless, over time the Commission has established increasingly strong relationships with NGOs whose contribution is now an essential component of its processes; they include submissions of communications; presentations of shadow reports; constructive interventions in the examination of state reports; assistance in the establishment and operationalisation of special procedures, such as those of special rapporteurs and working groups; proposals of resolutions; and provisions of valuable information during on-site investigations (Gutto 1999; Motala 2002).

The largest number of communications brought before the African Commission involve complaints filed by NGOs on behalf of individuals or peoples whose rights were allegedly violated (Motala 2002:257). The Commission has acknowledged that this action has been instrumental in bringing to its purview many human rights violations that might otherwise have escaped its attention. NGOs' role in this regard has further enriched the jurisprudence of the Commission and has created scope to incorporate the concept of human security in the interpretation and application of the rights contained under the African Charter.

In addition to confidentially channelling shadow reports to the Commissioners, NGOs' submissions and interventions during the examination of reports help to identify overlooked difficulties and complement reports (Motala 2002:260).

More so than in the communications procedure, NGOs can easily use the concept of human security to highlight human rights concerns in the reporting state. Thus there is always opportunity to improve the examination of a state report by forwarding independent information to the commissioners and by using the descriptively rich and early warning approach of human security, not only in terms of the application of human rights to address conditions that endanger the enjoyment of human and peoples rights but also in terms of the speedy response to crisis situations to avert grave violations.

As the experience of the African Commission attests, NGOs have been instrumental in proposing and providing technical support for the establishment of special rapporteurs and working groups (Motala 2002:268–272). After Amnesty International had proposed the appointment of a Special Rapporteur on Extrajudicial Executions in Africa to the African Commission during its fourteenth ordinary session,¹⁸¹ the Commission considered the establishment at its fifteenth ordinary session and made the appointment official at its sixteenth ordinary session. Similarly, the main proponent of a proposal that the Commission appoint a Special Rapporteur on Prisons and Conditions of Detention in Africa was the Paris-based NGO, Penal Reform International (Harrington 2001:260). NGOs have played a prominent role in the establishment of certain working groups, for instance that of the Working Group of Experts on the Rights of Indigenous Populations/Communities.

The African Commission has adopted many resolutions on both situations in specific countries and on thematic human rights issues. Many of these resolutions were proposed by NGOs with observer status at the Commission. Furthermore, NGOs have helped the Commission discharge its protective and promotional mandate through on-site missions by proposing the dispatch of fact-finding missions and by supplying information vital to achieving their aims.

When the African Court becomes operational, NGOs are expected to contribute to its operations in at least three ways. First, when a state has made an Article 34(6) declaration, NGOs can help individuals within that state's territory to submit their complaints to the Court. Second, NGOs will help the Court to collect evidence by adducing the relevant documentation and other materials. Third, NGOs will play a significant role in operationalising the Court's power to adopt provisional measures in situations of extreme gravity and urgency to avoid irreparable harm. NGOs' access to a wealth of current information will allow them to alert the Court to the emergence of such situations, enabling it to respond quickly.

CHAPTER SEVEN

CONCLUSION AND RECOMMENDATIONS

This study is an analysis of the role of the African Commission and the African Court in the promotion of human security in Africa. It began by noting the importance of the promotion and protection of human rights both as a legal necessity and as an instrumental mechanism to attend to the numerous and pervasive threats to the well-being of the peoples of Africa and to achieve the ideals of human security. The discussion of the main theme of the study was preceded by an analysis of the interface between human rights and human security. This section highlighted not only the inherent link between the two but also the important ways in which human rights advance the cause of human security. In Africa, a regional human rights protection system was established and its operation has been based on the African Charter.

The study examined the normative basis of the regional human rights system and the nature and formulation of the rights enunciated under the African Charter. It has been noted that although the African Charter is the most comprehensive human rights instrument in terms of the reach of the various sets of recognised rights, its formulation is such that several rights are poorly and restrictively framed while important rights have been omitted. Given the diversity, pervasiveness and severity of the conditions that threaten the enjoyment of human rights and the security of individuals and peoples, many observers legitimately expressed fears that the Charter would not afford strong protection to human rights on the continent. As this study highlights, one of the Commission's contributions to the promotion and protection of human rights has been its innovative interpretation of the Charter's provisions, countering certain flaws therein.

The study has also outlined the various mechanisms institutionalised by the African Commission for the enforcement of the rights included in the Charter and for a response to various human rights violations. The creation of some of these mechanisms was expressly authorised by the African Charter while others are essentially the innovations of the Commission. The institutionalisation and operationalisation of these mechanisms have contributed significantly to not only providing victims of violations with

opportunities for hearing and redress but also addressing a wide range of human rights concerns and threats to human security in Africa.

It has nonetheless been observed that the promotion and protection of human rights by the African Commission are fraught with problems. It specifically suffers from institutional weakness. It is not a judicial body capable of making binding decisions, and its decisions are not legally enforceable but are mainly recommendatory. Consequently, states have shown little interest in honouring them and many of its recommendations have not been implemented. This general lack of implementation has been exacerbated by the absence of a follow-up mechanism and the failure of the political organs of the OAU/AU to ensure their implementation.

The operations of the African Commission have been far from smooth. They have been severely hampered by the failure of the OAU/AU to provide it with the required financial, human and material resources and with institutional support. Moreover, the Commission's legitimacy has been questioned, specifically the independence of its commissioners and its own institutional independence. During the era of the OAU, OAU member states and political bodies made little attempt to take the recommendations of the African Commission seriously and to ensure their implementation. Under the AU, the political organs sometimes failed to honour the Commission's decisions. A legal and political culture in the enforcement of human rights is lacking, and this situation could be attributed to a need for awareness among political bodies about the role of human rights in conflict resolution and in the promotion of peace, security, rule of law and good governance, all priority issues on the AU agenda.

The African Commission has not been effective in its response to urgent and large-scale violations of human rights attendant to violent conflict; its response has generally been weak and inconsistent. Although some of the enforcement mechanisms could enable the Commission to respond effectively to extraordinary situations, their application has been inconsistent and lacking in coherence and organisation. In many ways, the Commission has not used these mechanisms optimally.

To remedy the deficiencies and to strengthen the effectiveness of the African human rights system in the enforcement of human rights norms and the promotion of human security on the continent, certain steps are recommended.

As other regions and particularly Europe show, the human rights bodies within the framework of the AU need to be centralised. Given its apparently strong

human rights commitment, the AU should strengthen the position of the African Commission and the African Court, mainstream their activities within the framework of its various organs and ensure the implementation of their decisions and recommendations. It must provide the African Commission with a permanent budget, supply it with the required human and material resources and guarantee its independence. Without these measures, there is little hope that the Charter-based human rights enforcement system will become an effective instrument for improving the human rights situation on the continent and for advancing the cause of human rights.

The African Commission needs to demand that its mandate and role be taken seriously and should exert all possible effort to command the position and respect that it deserves. These efforts should not be limited to adopting resolutions; the Commission should additionally employ diplomatic techniques. Furthermore, in collaboration with and through the legal department of the AU Commission, it can exert its influence by performing activities that assist the political bodies in making legal decisions. This step could facilitate an affirmation of both the relevance and the particular importance of its works in realising the objectives of the AU.

The African Commission and the African Court should incorporate the notion of human security into their work. This measure would not only enrich the jurisprudence of these bodies in the interpretation and application of the African Charter but also increase the relevance of their activities to the African reality and thereby enhance the legitimacy of the human rights system. Thus the African Commission would be enabled to respond in a coherent and principled fashion to large-scale human rights violations, particularly in situations of violent conflict.

The AU and its relevant organs, particularly the PSC and the two human rights bodies, the Commission and the Court, should jointly establish a working group to study the relationship between violent conflicts and human rights violations and the importance of human rights for both the prevention and the resolution of conflict. It should propose mechanisms to use and incorporate the human rights perspective within the framework of the peace and security structure of the AU. In this regard, the example of the Organisation for Security and Cooperation in Europe (OSCE) Commissioner for Minorities or the UN Working Group on Minorities can be taken as a model.

Finally, collaboration between the human rights bodies and other relevant organs of the AU, as well as NGOs involved in human security, is recommended.

Such collaboration is crucial to strengthen the interdependence of the human rights and human security approaches and to maximise the contribution of both to the achievement of peace, stability and well-being of individuals and communities in Africa.

NOTES

- 1 See African [Banjul] Charter on Human and Peoples' Rights adopted in Nairobi, Kenya, on 27 June 1981, OAU Doc CAB/LEG/67/3 Rev 5 (1981) reprinted in 21 *ILM* (1982) 59.
- 2 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights adopted in Addis Ababa, Ethiopia, on 10 June 1998, OAU Doc CAB/LEG/66.5
- 3 African Union Non-Aggression and Common Defence Pact adopted in Abuja, Nigeria, on 31 January 2005. Available at www.africa-union.org [Hereinafter referred to as 'Common Defence Pact'.]
- 4 See Common Defense Pact Article 1(k).
- 5 See the report of the UN Commission on Human Security, *Human Security Now*. [Hereinafter referred to as '*Human Security Now*'] Although this report was prepared at the international level, the issues that it seeks to address are particularly relevant to the situation in Africa and to the struggle to achieve human security on the continent. Moreover, the report directly engages with African issues in substantive ways. It can, therefore, be said that the report can offer important insights to the discourse and practice of human security in Africa.
- 6 African Charter on Human and Peoples' Rights OAU Doc CAB/LEG/67/3 Rev 5 (1981), reprinted in 21 *ILM* (1982) 59. [ACHPR: hereinafter referred to as 'the Charter' or 'the African Charter'.]
- 7 One must, however, remember that the method employed in regard to human rights is not necessarily congruent with that envisaged by human security. Since human security emphasises avoiding threats to human security, it may under certain circumstances resort to measures that may not be consistent with the human rights approach. During the conflict in the former Yugoslavia when Serbs, Muslims and Croats were expelled from their homes, the Office of the UN High Commissioner for Refugees (UNHCR) was accused of assisting ethnic cleansing by helping people to flee enclaves surrounded by armed groups. Similarly, while the human rights approach insists that those who perpetrated grave violations of human rights, such as crimes against humanity, be brought to justice and face trial, human security may dictate that such individuals be protected from facing trial to end the continuation of violent conflicts and the resultant victimisation of

peoples. Whereas human rights tend to be legalistic, human security generally has a pragmatic orientation.

- 8 The preamble to the UN Charter expressing the determination of the peoples of the United Nations 'to save successive generations from the scourge of war ...' reaffirms faith in fundamental human rights and in the dignity and worth of the individual. Similarly, the UDHR affirms not only that the recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace but also that disregard and contempt *Please confirm as original text used 'concept' instead of contempt and perhaps there are other words missing rather than a misuse.* for human rights have resulted in and cause grave violations and hence, by necessary implication, human insecurity.
- 9 In the African human rights system, in addition to individual rights, collective rights of peoples are recognised under the African Charter. The importance of this acknowledgement in the context of the focus of this study is considered below.
- 10 The OAU/AU recognises that conflicts bring about massive human rights violations albeit not in a systematic fashion. The organisation condemned 'all acts of violence and mass murder' that took place in the DRC and the 'untold human suffering including the deaths of hundreds of thousands of people, and massive human displacements'. See the report of the Secretary-General on the situation in the DRC, CM/2099(LXX)-d, para 17, and the introductory note of the Secretary-General to the seventy-fourth ordinary session of the Council of Ministers, para 32. See also the report of the Secretary-General on the situation in Burundi, central Organ/MEC/MIN/2A(V), para 5.
- 11 The author describes how conflicts have continued to cause displacement, loss of human life, destruction of livelihood and collapse of state institutions in pages 59 to 63.
- 12 Some 204 million people on the continent suffer from malnutrition, and current food shortages affect 35 million people in 24 sub-Saharan African countries. Although Africa has only about 12 per cent of the world's population, it is home to more than 60 per cent of all people living with HIV/AIDS. See the following: United Nations Office of the Special Advisor on Africa 2005. *Human security in Africa*, 30, 34.
- 13 These include those in Europe and the Americas. The European system of human rights is based on the European Convention on Fundamental Human Rights. The Inter-American system of human rights operates on the basis of the Inter-American Convention of Human Rights.
- 14 The number of African refugees and asylum seekers is estimated at 3,25 million. See the following: United Nations Office of the Special Advisor on Africa 2005. *Human security in Africa*, December.

- 15 See, for example, Communication 27/89, 46/91, 49/91, 99/93; *Organization Mondiale Contre la Torture et al v Rwanda*; Tenth Annual Activity Report of the ACHPR; Communication 71/92; *Rencontre Africaine pour la Défense de l'Homme v Zambia*; Tenth Annual Activity Report of ACHPR.
- 16 The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa was adopted in Maputo, Mozambique, on 11 July 2003 and came into force on 25 November 2005. [Hereinafter referred to as 'the Women's Protocol' or 'the Protocol'.]
- 17 Article 1, Women's Protocol (emphasis added).
- 18 Article 10, Women's Protocol.
- 19 Article 10(2), Women's Protocol.
- 20 Article 10(3), Women's Protocol.
- 21 The African Charter on the Rights and Welfare of the Child adopted by the twenty-sixth ordinary session of the Assembly of Heads of State and Government of the OAU in the Ethiopian Capital, Addis Ababa, on 11 July 1990; CAB/LEG/153/Rev 2 reprinted in Heyns, C (ed) 1999. *Human rights law in Africa*:38.
- 22 This fact prompted the OAU to adopt a resolution on the plight of African children in situations of armed conflict. See OAU Resolution 1659 (LXIV) adopted in Yaoundé, Cameroon, in July 1996.
- 23 The meeting was convened on the basis of a decision of the Assembly of Heads of State and Government of the OAU. See the following: Heyns, C (ed) 1999. *Human rights law in Africa*:127.
- 24 African Charter on Human and Peoples' Rights adopted by the OAU summit at Nairobi, Kenya, 27 June 1981; OAU Doc CAB/LEG/67/3 Rev 5 (1981) reprinted in 21 *ILM* (1982) 59. (Hereinafter referred to as 'the Charter' or 'the African Charter'.)
- 25 Adejumobi (2001) has examined the relationship between denial or violation of civil and political rights and conflicts and civil wars in Africa.
- 26 ACHPR Communications 105/93, 128/94, 130/94 and 152/96, *Media Rights Agenda and Constitutional Rights Project v Nigeria*, Twelfth Annual Activity Report (1998–1999), Annex V, para 66 (emphasis added).
- 27 See ACHPR Communication 155/96, *The Social and Economic Rights Action Center and Another v Nigeria*, Fifteenth Annual Activity Report (2001–2002), paras 60 and 65. [Hereinafter referred to as 'the Ogoni case'.]
- 28 See the General Comments 4, 7, 11, 12, 13, 14 and 15 of the Committee on Economic, Social and Cultural Rights. They stress that these conditions impair the enjoyment of economic, social and cultural rights and emphasise the need to implement these rights to protect people from such conditions.

- 29 Joa Oloka-Onyango summarised this particular achievement of the Charter as follows: 'The African Charter on Human and Peoples' Rights ("Charter") became widely recognized for breaking new conceptual ground in human rights law by including civil, political, economic, social and cultural rights in a single instrument.' Joa Oloka-Onyango '[r]einforcing marginalized rights in an age of globalization: International mechanisms, non-state actors, and the struggle for peoples' rights in Africa' (18 *American University International Law Journal* 851, 857).
- 30 Article 20.
- 31 Article 19.
- 32 Article 20.
- 33 Article 22.
- 34 Article 23.
- 35 Article 24.
- 36 Article 30(1) and Article 33, African Charter.
- 37 Article 47 and Article 55, African Charter.
- 38 Article 62, African Charter.
- 39 Article 49 of the African Charter authorises state parties to submit communications if any state has reasonable grounds that show that another state party has violated the rights provided for under the Charter.
- 40 Ogoni case. Vide *infra* 93, para 49.
- 41 Article 4, African Charter.
- 42 Article 6, African Charter.
- 43 Article 5, African Charter.
- 44 Communications 25/89, 47/90, 56/91, 100/93 (joined), Free Legal Assistance Group, Lawyers' Committee for Human Rights, *Union Interfricaine des Droits de l'Homme, Les Temoins de Jehovah v Zaire*, Ninth Annual Activity Report of the ACHPR (1995–1996), paras 2 and 4.
- 45 *Ibid*, para 47.
- 46 See Communications 27/89, 46/91, 49/91, 99/93, *Organisation Mondial Contre la Torture and Association Internationale des Juristes Democrates, Commission Internationale des Juristes (CIJ), Union Interfricaine des Droit de l'Homme v Rwanda*, Tenth Annual Activity Report of the ACHPR (1996–1997), para 25. [Hereinafter referred to as 'Communications against Rwanda'.]
- 47 Communications 48/90, 50/91, 52/91, 89/93, *Amnesty International, Comite Loosli Bachelard, Lawyers Committee for Human Rights and Association of Members of*

- Episcopal Conference of East Africa v Sudan*, Thirteenth Annual Activity Report (1999–2000), para 52. [Hereinafter referred to as ‘Communications against Sudan’.]
- 48 Communications 223/98 *Forum of Conscience v Sierra Leone*, Fourteenth Annual Activity Report (2000–2001), para 20.
- 49 Communications 137/94, 139/94, 154/96 and 161/97, *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr and Civil Liberties Organization v Nigeria*, Twelfth Activity Report (1998–1999), para 104. [Hereinafter referred to as the ‘Ken Saro-Wiwa case’.]
- 50 See Communications 54/91, 61/91, 98/93, 164/97, 196/97, 210/98, *Malawi African Association, Amnesty International, Sarr Diop, Union Inter africaine des Droits de l’Homme et des Peuple and RADDHO, Collectif des Veues et Ayants-Droits, Association Mauritanienne des Droit de l’Homme v Mauritania*, Thirteenth ACHPR Annual Activity Report (1999–2000), ACHPR/RTP/13th, para 120. [Hereinafter referred to as ‘Communications against Mauritania’.]
- 51 Communication 74/92, *Commission Nationale des Droits de l’Homme et des Libertes v Chad*, Ninth Annual Activity Report (1995–1996), para 21. [Hereinafter referred to as ‘Communication against Chad’.]
- 52 Communications against Sudan. Vide supra 48, para 50.
- 53 Ibid.
- 54 Communication against Chad. Vide supra 52, para 22.
- 55 See *Resolution on Burundi*, Ninth Annual Activity Report of the ACHPR (1995–1996), Annex VII; *Resolution on the Situation in Rwanda*, Seventh Annual Activity Report of the ACHPR (1993–1994), Annex XII; *Resolution on Sudan*, Eighth Annual Activity Report of the ACHPR (1994–1995), Annex XII. It required armed groups to, among others, immediately cease the use of military force to interfere with the delivery of humanitarian assistance to the civilian population and allow such assistance to be delivered.
- 56 See Communications against Mauritania. Vide supra 51, paras 115–118.
- 57 See Communications against Sudan. Vide supra 48, paras 53–57.
- 58 Communications 64/92, 68/92/ 78/92, *Krishna Achuthan, Amnesty International v Malawi*, Eighth Annual Activity Report of the ACHPR (1994–1995), para 7.
- 59 Communications against Rwanda. Vide supra 64, paras 28–29.
- 60 See the Ken Saro-Wiwa case. Vide supra 50, para 83.
- 61 See Communications 39/90, *Annette Pagnouille (on behalf of Abdoulaye Mazou) v Cameroon*, Eighth Annual Activity Report (1994–1995).
- 62 See Communication 24/97, *Mouvement Burkinabe des Droits de l’Homme et des Peuples v Burkina Faso*, Fourteenth Annual Activity Report (2000–2001), para 44; Communications against Mauritania, vide supra 51, para 114.

- 63 The Commission has in its resolutions reiterated the obligation of states to ensure that institutions of rights protection are protected not only in times of peace but also in times of war or conflicts. See, for example, *Resolution on Burundi*, Ninth Annual Activity Report of the ACHPR (1995–1996), Annex VII, para 1.
- 64 *Civil Liberties Organization v Nigeria*, Ninth Annual Activity Report (1995–1996), para 1.
- 65 *Ibid*, para 15.
- 66 *Ibid*.
- 67 At the 39th Ordinary Session of the African Commission, the number of communications stood at 320, an insignificant one for a continent with serious human rights problems.
- 68 See ACHPR ‘Non-compliance of States Parties to Adopted Recommendations of the African Commission: A legal Approach’, 24th ordinary session, OAU Doc/OS/50b (XXIV).
- 69 The African Commission nevertheless seems to regard its recommendations on communications as binding on states parties to the African Charter, although it admits that it functions only as a quasi-judicial body. See Communications 129/94, *Civil Liberties Organisation v Nigeria*, Ninth Activity Report (1995–1996); Communications 137/94, 139/94, 154/96 and 161/97, *International Pen and others on behalf of Ken Saro Wiwa Jr and Civil Liberties Organization v Nigeria*, Twelfth Annual Activity Report (1998–1999). Certain authors have concurred that the Commission’s recommendations are binding. See the following: George Mukundi Wachira and Abiola Ayinla 2006. Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples’ Rights: a possible remedy. *AHRLJ*, 6:465.
- 70 Of 44 cases where the commission found state parties in violation of the African Charter, there has been full state compliance in only six. The study revealed that there has been non-compliance in 13 cases, partial compliance in 14 cases, seven cases of situational compliance (through change of government) and unclear compliance in four cases, as cited in Heyns and Killander (2006:207).
- 71 Article 62, African Charter.
- 72 During the examination of the state report of Rwanda, for example, commissioners raised various questions about discrimination and the problems of ethnic war in that country. Noting that Rwanda was in a state of war resulting from long-standing tribal conflicts, Commissioner Nguema recommended that ‘the Government had to take steps to resolve the root of the problem, and that education and educational policies would be instrumental in this.’ See ACHPR Examination of the State Report of Rwanda, ninth session, March 1991.

- 73 Concluding observations on the initial periodic report of DRC of the ACHPR's thirty-fourth ordinary session held in The Gambia from 6 to 20 November 2003. Available at http://www.chr.up.ac.za/hr_docs/themes/theme02.html [Hereinafter referred to as 'ACHPR observations on DRC'.]
- 74 Concluding observations on the second periodic report of Sudan of the ACHPR's thirty-fifth ordinary session held in The Gambia from 21 May to 4 June 2004. Available at http://www.chr.up.ac.za/hr_docs/themes/theme02.html [Hereinafter referred to as 'ACHPR observations on Sudan'.]
- 75 Ibid.
- 76 Concluding observations on the first periodic report on South Africa on the ACHPR's thirty-eighth ordinary session held in The Gambia from 21 November to 5 December 2005. Available at http://www.chr.up.ac.za/hr_docs/themes/theme02.html
- 77 ACHPR observations on DRC, vide supra 98.
- 78 Ibid.
- 79 See the Status of the State Reporting under the African Charter at the official website of the ACHPR available at www.achpr.org.
- 80 The procedure provides that 'representatives should be able to reply to questions put to him/her by the Commission and make statements on reports already submitted by this state'. Rule 83, Rules of Procedure of the African Commission on Human and Peoples' Rights (as amended) (1995), ACHPR/RP/XIX.
- 81 Article 62 stipulates that states are required 'to submit every two years ... a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter'.
- 82 The fifteenth session of the African Commission took place between 18 and 27 April 1994 in Banjul, The Gambia. During this session, the Commission adopted the resolution on Rwanda expressing its deep concern 'about the alarming human rights situation in Rwanda characterised by serious and massive human rights violations', condemning the violence and the massacre, and urging all parties to the conflict to resolve the conflict peacefully and respect the African Charter and the principles of humanitarian law. See Resolution on the Situation in Rwanda, Seventh Annual Activity Report (1993–1994).
- 83 See Tenth Annual Activity Report, Annex VI.
- 84 ACHPR Final Communiqué, twentieth ordinary session.
- 85 See Resolution on the Mandate and Appointment of a Special Rapporteur on Freedom of Expression, passed at the thirty-sixth ordinary session held from 23 November to 7 December 2004, in Dakar, Senegal.

- 86 Resolution on Economic, Social and Cultural Rights, adopted on 7 December 2004 at the thirty-sixth ordinary session of the ACHPR held in Dakar, Senegal. Available at www.achpr.org
- 87 Communications 25/89, 47/90, 56/91, 100/93, *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Inter africaine des Droit de l'Homme, Les Temoins de Jehovah v Zaire*, Ninth Annual Activity Report (1995–1996), para 4. [Hereinafter referred to as 'Communications against Zaire'.]
- 88 *Ibid*, para 47.
- 89 *Ibid*, para 48.
- 90 *Union Inter africaine des Droits de l'Homme, Federation Internationale des Legues des Droits de l'Homme, Recontre Africaine des Droits de l'Homme, Organization Nationale des Droit de l'Homme au Senegal and Association malienne des Droit de l'Homme v Angola*, Eleventh Annual Activity Report of the ACHPR (1997–1998), para 1.
- 91 *Ibid*, paras 15 and 17.
- 92 ACHPR Communication 155/96, *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* ACHPR/COMM/A044/1, 27 May 2002 [the Ogoni or SERAC case].
- 93 *Ibid*, para 52.
- 94 *Ibid*.
- 95 *Ibid*, para 46.
- 96 *Ibid*.
- 97 *Ibid*, para 47.
- 98 Communication 241/2001 *Purohit and Moore v The Gambia*. Sixteenth Annual Activity Report (2002–2003), para 84.
- 99 Communications against Zaire. Vide supra 88.
- 100 Concluding observations on the periodic report of Togo during the thirty-first ordinary session the ACHPR held in Pretoria from 2 to 16 May 2002. Available at http://www.chr.up.ac.za/hr_docs/themes/theme02.html
- 101 *Concluding observations of the African Commission on Human and Peoples' Rights on the initial report of Seychelles*. Available at http://www.chr.up.ac.za/hr_docs/themes/theme02.html
- 102 *Concluding observations of the African Commission on Human and Peoples' Rights on the initial report of Cameroon*. Thirty-first ordinary session held in Pretoria, South Africa, from 2 to 16 May 2002. Available at http://www.chr.up.ac.za/hr_docs/themes/theme02.html

- 103 ACHPR observations on Sudan. Vide supra 75.
- 104 ACHPR observations on DRC. Vide supra 74.
- 105 ACHPR observations on Sudan. Vide supra 75.
- 106 ACHPR observations on Cameroon. Vide supra 131.
- 107 Resolution on Economic, Social and Cultural Rights, adopted 7 December 2004 at the thirty-sixth ordinary session of the ACHPR held in Dakar, Senegal. Available at www.achpr.org
- 108 See the statement from the seminar on social, economic and cultural rights in the African Charter reproduced in the *African Human Rights Law Journal*, 5 (2005:182).
- 109 Ogoni case. Vide supra 93, para 68 (my emphasis).
- 110 See communications against Rwanda. Vide supra 47.
- 111 See communications against Mauritania. Vide supra 51.
- 112 Communication 98/93 provides a list of villages that were destroyed. Ibid.
- 113 Communication 96/93 provides a list of villages all or almost all of whose inhabitants were expelled to Senegal. Ibid.
- 114 Communication 61/91 contains a list of 339 persons believed to have died in detention. Ibid.
- 115 The case against Mauritania. Vide supra 51, para 17.
- 116 Communications 54/91, 61/91, 98/93, 164/97, 196/97, 210/98, *Malawi African Association, Amnesty International, Sarr Diop, Union Interafricaine des Droits de l'Homme et des Peuple and RADDHO, Collectif des Veues et Ayants-Droits, Association Mauritanienne des Droit dethis is the second time I changed 'he' to 'de'-I have not seen 'he' before in French.change back if I am wrong pls. l'Homme v Mauritania*. Thirteenth Activity Report of the African Commission (1999–2000), Addendum, paras 65–67, as quoted in the following: Pityana, B 2002. The challenge of culture for human rights in Africa: the African Charter in a comparative context. In M Evans and R Murray (eds), pp 232–233.
- 117 The case against Mauritania. Vide supra 51, para 140.
- 118 This interpretation has a particular contemporary relevance to Africa in the light of the violations that have been and continue to be perpetrated against one group or another in the context of civil wars, inter-ethnic conflicts and situations of political crisis. The unabated plight of various communities in the Darfur region of Sudan aptly demonstrates the need to ensure respect for the right to peace for groups within the state.
- 119 In its resolution on Darfur, the African Commission has called on 'the Government of The Sudan to cooperate fully with the Prosecutor of the International Criminal

- Court (ICC) in his investigation under the terms of the United Nations Security Council referral of the Darfur situation to the ICC, in order to investigate and bring to justice all persons suspected of perpetrating crimes of concern to the international community'. Resolution on the Human Rights Situation in Darfur, Sudan, adopted at the thirty-seventh ordinary session of the African Commission held in Banjul, The Gambia, from 27 April to 11 May 2005.
- 120 The Ogoni case. Vide supra 93, para 56.
- 121 Ibid, para 58.
- 122 Ibid, para 55.
- 123 Ibid, para 58.
- 124 ACHPR examination of state reports (Libya–Rwanda–Tunisia) general discussions, Ninth session, March 1991. Available at www.umn.edu/humanrts/achpr/sess9-generaldiscussions.htm [accessed on 15 May 2006]. (Hereinafter referred to as 'State Reports'.)
- 125 Ibid (emphasis mine).
- 126 Resolution on the rights of indigenous populations/communities in Africa adopted in October 2000 at the twenty-eighth ordinary session of the African Commission held in Cotonu, Benin, are available at www.achpr.org
- 127 Resolution on the adoption of *Report of the African Commission's Working Group on Indigenous Populations/Communities* at the thirty-fourth ordinary session of the African Commission held in Banjul, The Gambia, from 6 to 20 November 2003 are available at www.achpr.org
- 128 Articles 58 and 46 of the African Charter.
- 129 Article 30, African Charter.
- 130 Article 46, African Charter.
- 131 Tenth Annual Activity Report (1996–1997), Annex IX.
- 132 Ibid, para 1.
- 133 Only two substantive recommendations were made by the Commission in the six-paragraph conclusion. In para 3, deploring all the tragic events and their consequences in Mauritania, the Commission 'recommends that all might be implemented so that the effects of these events might be repaired, with a view to the reconciliation of all elements of Mauritanian society'. In para 5, after indicating that several unresolved matters remained, such as those involving widows and black Mauritanian survivors, the Commission recommended that the government 'put in place mechanisms and procedures likely to accelerate the process of indemnification and reparation in satisfactory manner and [to] maintain a dialogue with the organisation of civil society' (*Report of the Mission to Mauritania, Tenth Annual Activity Report*, Annex IX).

- 134 Ibid.
- 135 Ibid.
- 136 Ibid.
- 137 Ibid.
- 138 'The Commission maintains ... that the sincerity, loyalty, and the transparency which the authorities demonstrated throughout the mission will contribute to reestablish peace, justice and wellbeing of the populations of Senegal and of the *people of Casamance* in particular' (Report on the Mission to Senegal). Note that the Commission distinguishes between two terms: it uses *Senegalese* generally to refer to the populations of Senegal, and *the people of Casamance* for the community inhabiting Casamance.
- 139 Seventeenth Annual Activity Report of the African Commission (2004–2005), Annex II, para 1.
- 140 Arguably, it is the only report that warrants the title of a 'report of a fact-finding mission', not only in terms of the format of its presentation but also in terms of the depth of the recommendations made.
- 141 See AU Doc Assembly/AU/Dec.49 (III), Doc EX.CL/109 (V).
- 142 Ibid, para 4.
- 143 The Assembly of Heads of State and Governments adopted a resolution in 1994 requesting the Secretary-General of the OAU to convene a meeting of experts to consider the establishment of an African Court on Human and Peoples' Rights.
- 144 Decision on the Merger of the AHRC and the Court of Justice of the African Union–Assembly/AU/Dec.83 (V) (Doc Assembly/AU/6 (V), para 3.
- 145 See Assembly/AU/Dec. 100(IV) Decision on the Election of Judges of the African Court on Human and Peoples Rights Dec.EX.CL/241 (VIII), Sixth Ordinary Session of the Assembly of Heads of State and Government, January 2006.
- 146 Article 3 of the protocol.
- 147 Article 4 of the protocol.
- 148 Article 29(2) of the protocol.
- 149 The Nigerian government executed Ken Saro-Wiwa despite requests from the African Commission for a stay of execution. See the Ken Saro-Wiwa case, supra 50.
- 150 Article 2 of the protocol.
- 151 See, for example, Resolution on the Ratification of the Statute of the International Court of Justice by OAU Member States, ACHPR/Res 59 (XXXI)02.
- 152 This belief was underscored by the African Commission when it expressed its conviction that 'by dealing with crimes against humanity, war crimes, crimes of

- aggression, crimes of genocide and by putting an end to the tradition of impunity, the International Criminal Court will enhance and contribute sensitively to the protection of Human and Peoples' Rights'. See ACHPR/Res 59 (XXXI) 02.
- 153 See Articles 5 to 8 of the Rome Statute.
- 154 See the press release of the Office of the Prosecutor of the International Criminal Court, 19 April 2004, 'Prosecutor Receives Referral of the Situation in the Democratic Republic of the Congo'.
- 155 'President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC', The Hague, 29 January 2004.
- 156 See UN SC Res 1539, 31 March 2005.
- 157 See, for example, *Resolution on the Human Rights Situation in Darfur, Sudan* (2004) adopted at the Thirty-seventh ordinary session of the ACHPR/Res 74 (XXXVI) 05.
- 158 See Article 6 of the Constitutive Act of the AU.
- 159 See Article 9.
- 160 Article 59(1) of the African Charter.
- 161 Article 59(2) of the African Charter.
- 162 See Article 31 of the Protocol to the Court.
- 163 Assembly/AU/Dec 101(VI) Decision on the Nineteenth Annual Activity Report of the African Commission Doc EX.CL/236 (VIII), sixth ordinary session of the Assembly of Heads of State and Government of the AU, January 2006.
- 164 Pursuant to Article 30 of the Protocol on the African Court, state parties 'undertake to comply with the judgement (of the Court) in any case to which they are parties within the time stipulated by the Court and to guarantee its execution'.
- 165 Of the 11 commissioners elected to the first commission in 1987, the following were state employees: A Mokama, chief justice of Botswana; A Gabou, interior minister of Congo; HR Kisanga, judge in Tanzania; M Chipoya, civil servant in Zambia; and Y Ndiaye, judge in Senegal.
- 166 Unlike the African Charter, the Protocol on the African Court stipulates provisions for the independence of the Court under Articles 17 and 18.
- 167 For further information, see Article 13, AU Constitutive Act.
- 168 Article 29(2), Protocol on the African Court.
- 169 Interim Report on the African Commission, CM.2056 (LXVII), para 22. See the financial rules and regulations governing the functioning of the African Commission on Human and Peoples' Rights ACHPR/Recom 2(III) 1988; Recommendation of the Commission on Human and Peoples' Rights ACHPR/Recom 4(V) 1989.

- 170 AU Decision on the Interim Period, First Ordinary Session of the AU Assembly of Heads of State and Government, AU Doc Ass/AU/Dec 1(I), para 9.
- 171 See Resolution on the Creation of a Working Group on Specific Issues Relevant to the Work of the African Commission on Human and Peoples' Rights, African Commission on Human and Peoples' Rights, thirty-seventh session, from 27 April to 11 May 2005 in Banjul, The Gambia.
- 172 AU First Ordinary Session, 9 July 2002.
- 173 See Article 3, Protocol to PSC.
- 174 See Article 4, Protocol to PSC.
- 175 See Article 19, Protocol to PSC.
- 176 Ibid.
- 177 *Decision on the Situation in Côte d'Ivoire*, Communiqué of the Solemn Launching of the Tenth Meeting of the Peace and Security Council PSC/AHG/COMM.(X) at 3, para 4.
- 178 Ibid.
- 179 *Resolution on the Situation of Human Rights in Côte d'Ivoire*, Seventeenth Annual Activity Report of the ACHPR (2003–2004).
- 180 See communiqué of the seventy-first meeting of the Peace and Security Council PSC/PR/Comm (LXXI), para 2.
- 181 See Amnesty International and the fifteenth ordinary session of the African Commission, April 1995.

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