

## Major African legal instruments

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### Introduction

The African Charter on Human and Peoples' Rights (hereinafter *the African Charter* or *Charter*), at the very core of the African human rights system, has reached full ratification status. With the deposit of Eritrea's instrument of ratification on 14 January 1999, all member states of the African Union (AU) have signified their willingness to be bound by the obligations created by the Charter. Yet given the state of human rights enjoyment from Asmara to Abidjan, from Cape Town to Cairo and everywhere in between, one would be tempted to question the commitment of states to translate the rights contained in the African Charter into tangibles. Ten years after the adoption of the Grand Bay (Mauritius) Declaration and Plan of Action in April 1999, little has changed in the list of 19 identified causes of human rights violations in Africa.<sup>1</sup> Economic, social and cultural rights still receive less attention than civil and political rights, while violations of civil and political rights continue on a massive scale. The concept of group rights is still in an embryonic stage.

The African Commission on Human and Peoples' Rights (hereinafter *the African Commission*), established under Article 30, is the treaty body monitoring

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<sup>1</sup> First Organisation of African Unity Ministerial Conference on Human Rights in Africa, (12–16 April 1999), Grand Bay, Mauritius, Grand Bay Declaration and Plan of Action, paragraph 8 identifies the following as the causes of violations of human rights in Africa: (a) contemporary forms of slavery; (b) neo-colonialism, racism and religious intolerance; (c) poverty, disease, ignorance and illiteracy; (d) conflicts leading to refugee outflows and internal population displacement; (e) social dislocations which may arise from the implementation of certain aspects of structural adjustment programmes; (f) the debt problem; (g) mismanagement, bad governance, and corruption; (h) lack of accountability in the management of public affairs; (i) monopoly in the exercise of power; (j) harmful traditional practices; (k) lack of independence of the judiciary; (l) lack of independent human rights institutions; (m) lack of freedom of the press and association; (n) environmental degradation; (o) non-compliance with the provisions of the OAU Charter on territorial integrity and inviolability of colonial borders and the right to self-determination; (p) unconstitutional changes of governments; (q) terrorism; (r) nepotism; and (s) exploitation of ethnicity.

implementation of the African Charter. Set up in 1987, it is mandated to watch over states' compliance of the human and peoples' rights therein contained and to ensure their protection. While it was not the purpose of this paper to review the African Commission, it is through its work that the Charter becomes a living document and not just words with little real strength when people need its protection. Reference has inevitably been made to its jurisprudence.

Article 66 of the African Charter provides that –

... special protocols or agreements may, if necessary, supplement the provisions of the present Charter.

To date, two protocols have been enacted. The first is the Protocol on the Establishment of an African Court on Human and Peoples' Rights. Enacted on 10 June 1998, it entered into force on 25 January 2004. It will remain in force for a transitional period not exceeding one year or any period determined by the AU Assembly, after the entry into force of the Protocol of the Court of Justice and Human Rights.<sup>2</sup>

The second, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (hereinafter the *Women's Protocol*), was adopted in Maputo, Mozambique, in 2003 and entered into force on 25 November 2005. So far, 26 countries have ratified the Women's Protocol.<sup>3</sup> It provides for the protection of women's human rights and its key provisions are highlighted below.

Under Article 45(c) of the African Charter, the African Commission is mandated –

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<sup>2</sup> A resolution to integrate the African Court on Human and Peoples' Rights (established by the Protocol to the African Charter) and that of the African Court of Justice (established under the Constitutive Act of the African Union) was adopted by the AU Summit in July 2004. A protocol merging the two courts – the Protocol of the Court of Justice and Human Rights – was adopted in June 2008 in Sharm el Sheikh, Egypt, replacing the 1998 and the 2003 protocols. See Protocol on the Statute of the African Court of Justice and Human Rights.

<sup>3</sup> These are Algeria, Benin, Burkina Faso, Cape Verde, the Comoros, Djibouti, The Gambia, Ghana, Guinea-Bissau, Libya, Lesotho, Liberia, Mali, Malawi, Mozambique, Mauritania, Namibia, Nigeria, Rwanda, Senegal, the Seychelles, South Africa, Tanzania, Togo, and Zambia; available at <http://www.africa-union.org/root/au/Documents/Treaties/List/Protocol%20on%20the%20Rights%20of%20Women.pdf>; last accessed 8 March 2009.

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... to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African governments may base their legislation.

The Declaration of Principles on Freedom of Expression in Africa and the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa were developed in pursuance to this provision. These are also reviewed as part of the body of 'soft law' developed by the African Commission.

The African Charter on the Rights and Welfare of the Child (hereinafter *the African Children's Charter*) was adopted at the 26th Ordinary Session of the Assembly of Heads of State and Government (OAU Assembly) on 11 July 1990 in Addis Ababa, Ethiopia. It entered into force on 29 November 1999. Its distinctive features are highlighted.

The 1969 OAU Refugee Convention addresses the specific circumstances of refugees in Africa. As one of the early documents within the African human rights system, it contains no provisions regarding groups with specific protection needs such as children and women, and yet they are at risk during displacement. These risks have been recognised and addressed to prevent violations and enhance protection through other regional human rights instruments setting standards relating to permissible conduct towards children and women facing forcible displacement in the relevant documents, that is, the Women's Protocol and the African Children's Charter. Given the 1969 OAU Refugee Convention's relevancy due to massive refugee movements in Africa, it remains a major document, and is also reviewed in this paper.

The Convention on Preventing and Combating Corruption is the AU's response to what was identified as one of the root causes of human rights violations on the continent during the First OAU Ministerial Conference on Human Rights in Africa.<sup>4</sup> Its objectives and principles, as well as an overview of its main features, are presented.

It is recognised that the challenges of translating commitments to human rights at the regional level into tangible rights for individuals requires changing the attitudes of those in decision-making positions, teaching people about the existence and content of these rights, and being creative with solutions – be

<sup>4</sup> See Footnote 1.

they legal or non-legal. Yet, it is an imperative which cannot be understated or minimised.

It is beyond the scope of this paper to present an in-depth analysis of each identified instrument. Therefore, the favoured approach has been to submit a short descriptive study, quoting abundantly from the texts. Reference is made to relevant case law developed by the African Commission, where applicable. In specific situations, comments are also given and reflections shared.

## **The African Charter on Human and Peoples' Rights**

The African Charter is the foundational normative instrument for the protection and promotion of human rights in Africa. It has been applauded as a document which departs from the norms in that it contains civil, political, economic, social and cultural rights. In addition, it provides for “peoples’ rights” and several rights not found in other instruments; and specific “third-generation” or collective rights such as the right to development, the right to a satisfactory environment, the right to peace, and the right of people to dispose of their wealth and natural resources. Such an approach enhances universality and indivisibility, and demonstrates the interdependence attaching to all human rights – at least on paper. It has also been labelled as the –<sup>5</sup>

... newest, the least developed or effective, the most distinctive and the most controversial of the regional human rights regimes.

This part of the paper first situates the African Charter in its historical context and then goes on to discuss three specific aspects, namely, the ‘claw-back clauses’, the concept of duties, and finally, collective rights. A brief discussion on civil and political rights follows, before completing with a presentation of economic, social and cultural rights. It is submitted that, as the foundation document of the African human rights system, the Charter still has potential to provide protection of the rights in Africa through proactive interpretation and increased use of the individual complaint’s procedure.

### **Situating the African Charter in its historical context**

The context from which the African Charter emerged requires to be briefly addressed. Post-colonial Africa in the 1960s and early 1970s was notorious for

<sup>5</sup> Steiner & Alston (2000:354).

its excesses in human rights violations perpetrated by several leaders<sup>6</sup> in defiance of the rule of law. The exact figure of those who lost their lives during that period would never be known, but hundreds were brutally massacred and thousands crossed borders to save their lives. Other dictators such as Mobutu Sese Seko in Zaïre (now *Democratic Republic of Congo*) moved in to exercise unlimited power at the expense of their population's development and welfare, leaving a legacy of human rights violations in their wake. Military coups followed one another in countries such as Nigeria, engendering civil wars and uprisings.

It was also a time when the Cold War between East and West was at its peak.<sup>7</sup> The OAU, set up in 1963, stood by and watched silently, fettered by its conservative interpretation of national sovereignty and territorial integrity, which was the main argument to explain its inaction, even when massive violations were committed. It considered human rights to be in the realm of domestic matters, internal to the country concerned.

Discussions concerning the adoption of a treaty dealing with human rights for Africa started at a Congress of African jurists in Lagos, Nigeria, in 1961. The idea was further considered by French-speaking jurists in Dakar, Senegal, in 1969. Such a document became pressing in the light of egregious violations being witnessed across the continent. "Real impetus" was gained during the OAU's 16th Ordinary Session held in Monrovia, Liberia, from 17 to 20 July 1979.<sup>8</sup> The OAU adopted a decision requesting its Secretary General, Edem Kodjo, to organise a meeting entrusted with the preparation of a preliminary draft of the envisaged treaty.

A first draft, reflecting the history, values, traditions and economic needs of the continent, was produced by a selected group of jurists from November 28 to 7 December 1979, exhorted by Senegal's President Leopold Sedar Senghor to be inspired by "those of our traditions that are beautiful and positive" while constantly keeping in mind "our values and [the] real needs of Africa".<sup>9</sup> The second draft of the Charter was prepared in Banjul, The Gambia, in June 1980 and in January 1981. This is why the document is also known as the *Banjul*

<sup>6</sup> Macias Nguema in Equatorial Guinea, Jean Bedel Bokasa in the Republic of Central Africa, and Idi Amin Dada in Uganda showed the extent of State viciousness.

<sup>7</sup> Mbazira (2006:338).

<sup>8</sup> Pers. comm., Henry Reed Cooper, former Chief Justice of Liberia, April 2007.

<sup>9</sup> Ankumah (1996:6).

*Charter*. On 27 June 1981, at its 18th General Assembly Meeting in Nairobi, Kenya, the Heads of State and Government of the OAU adopted the African Charter on Human and Peoples' Rights. It came into force on 21 October 1986.

While all the members of the African Union have adhered to the African Charter, its domestication, hence applicability by national laws, still remains an issue. It is left to the discretion of states parties to decide how to give effect to treaties in their national law. Some countries, like Namibia, include provisions defining the role of international law at the national level.<sup>10</sup> South Africa mandates courts to take international law into consideration when interpreting its Bill of Rights. The Preamble to the 1992 Constitution of the Malagasy Republic adopts the African Charter and declares it to be an integral part of its law.<sup>11</sup>

Among the 'dualist countries', Nigeria has enacted legislation to incorporate the African Charter into its national law. However, the African Commission holds the view that states are bound by ratification of the Charter, no matter what their system is, and —<sup>12</sup>

... any doubt that may exist regarding [a party's] obligations under the Charter is dispelled by reference to Article 1.

It also held that if a country (in the instant case, Nigeria) wanted to rescind its obligations by withdrawing its ratification, it would have to go through an "international process involving notice" and that it "cannot negate the effects of its ratification of the Charter through domestic action".<sup>13</sup>

<sup>10</sup> Chapter XXI, Final Provisions, Article 144 of the Constitution of the Republic of Namibia: "International Law: Unless otherwise provided by this Constitution or Act of Parliament, the general rules of Public International law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia"; [http://www.servat.unibe.ch/law/icl/wa00000\\_html](http://www.servat.unibe.ch/law/icl/wa00000_html), last accessed 21 March 2009.

<sup>11</sup> Preamble to the Constitution of Madagascar. [http://www.servat.unibe.ch/law/icl/wa00000\\_html](http://www.servat.unibe.ch/law/icl/wa00000_html); last accessed 21 March 2009.

<sup>12</sup> *129/94 Civil Liberties Organization v Nigeria*, 9th Annual Activity Report [in *Compilation of Decisions of the African Commission on Human and Peoples' Rights 1994–2001*, IHRDA, Banjul 2002, pp.203–206]. Article 1 of the African Charter reads as follows: "The Member States of the Organisation of African Unity, parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them".

<sup>13</sup> *129/94 Civil Liberties Organization v Nigeria*, 9th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp.203–206], para. 13.

## **Selected features of the African Charter**

The African Charter has remained the same as it was 28 years ago, except for the adoption of the above-mentioned protocols and the development of guidelines and principles in relation to specific guaranteed rights.<sup>14</sup> The African Charter provides for amendments, but –

... [a] State party [has to] make a written request to that effect to the Secretary General of the Organisation of African Unity.<sup>15</sup>

### ***‘Claw-back’ clauses***

The African Charter contains several ‘claw-back’ clauses which can have the effect of curtailing a specific right in question in normal circumstances for specified public reasons.<sup>16</sup> A number of civil and political rights are limited by, inter alia, terms such as “except for reasons and conditions previously laid down by law”,<sup>17</sup> “subject to law and order”,<sup>18</sup> or “within the law”.<sup>19</sup> These limitations have been severely criticised, given the concern that they subject guaranteed rights to domestic law, thus weakening their content and scope. Such clauses are not unique to the African Charter. Article 10(2) of the European Convention on Human Rights represents one such instance, where the right to freedom of expression –

... may be subject to such formalities, conditions, restrictions or penalties as are prescribed by the law and are necessary in a democratic society ...

and it goes on to specify the limits. The difference with the African Charter is that the ‘claw-back’ clauses were left rather broad.

Right from the early days when it started the examination of individual complaints, the African Commission rejected subjecting protected rights to domestic law.

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<sup>14</sup> In addition to the two discussed below, there are also the Robben Island Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (2002).

<sup>15</sup> African Charter, Article 68.

<sup>16</sup> Term coined by Professor Rosalyn Higgins, quoted in Udombana (2000:45).

<sup>17</sup> African Charter, Article 6 (Right to liberty and security).

<sup>18</sup> (ibid.: Article 8 – Freedom of conscience and religion).

<sup>19</sup> (ibid.: Article 9 – Freedom of expression); discussed further below.

For example, in *Civil Liberties Organization (In respect of the Nigerian Bar Association) v Nigeria*, regarding freedom of association, the Commission held that –<sup>20</sup>

... in regulating the use of this right, the competent authorities should not enact provisions which should limit the exercise of this freedom. The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international human rights standards.

The jurisprudence of the African Commission abounds in examples in which it has stated that limitations are to be in accordance with states parties' obligations under the Charter.<sup>21</sup> Thus, the Commission was able to “neutralise the claw-back clauses”<sup>22</sup> by relying on its duty to interpret the Charter in light of international human rights jurisprudence, as required by Articles 60 and 61.

### **Duties**

Articles 27 to 29 in Part I of Chapter II of the African Charter emphasise the duties of the African citizen (if such a term could be used). Article 27(1) imposes duties on the individual towards his/her “family and society, the State and other legally recognised communities and the international community”, while being called upon to exercise his/her rights “with due regard to the rights of others, collective security, morality and common interest”.<sup>23</sup>

While the inclusion of duties in an international instrument is not unique<sup>24</sup> to the African Charter, one author has considered it to be the Charter's “most radical

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<sup>20</sup> *101/93 Civil Liberties Organization (in respect of the Nigerian Bar Association) v Nigeria*, 8th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp.200–202], para. 16.

<sup>21</sup> *147/95 and 149/96 Sir Dawda K Jawara v The Gambia*, 13th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp. 108–121]; *212/98 Amnesty International v Zambia*, 12th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp.371–382].

<sup>22</sup> Heyns (2002:143).

<sup>23</sup> African Charter, Article 27(2).

<sup>24</sup> For example, duties are found in The American Declaration on the Rights and Duties of Man, Chapter V. Personal Responsibilities, Article 32, Relationship between Duties and Rights, American Convention on Human Rights, both of which predate the African Charter. The American Convention on Human Rights was signed in 1969 and entered into force in 1978.



contribution to human rights law”.<sup>25</sup> The individual has inalienable rights which attach to him/her because of his/her humanity, and the State is held responsible for breaches of fundamental rights. The imposition of duties on the individual is viewed as giving the State the opportunity on a golden platter to restrict guaranteed human rights.

Wa Mutua views this as “simplistic” and considers that a “valid criticism” would be to question the “precise boundaries, content and conditions of compliance contemplated by the Charter”.<sup>26</sup> Furthermore, he invites the African Commission to clarify, in its jurisprudence, which – if any – of these duties are moral or legal obligations, and what the scope of their application ought to be. N Barney Pityana, a former Commissioner of the African Commission, holds the view that “[f]ar from duties creating an environment for a gratuitous invasion of rights, duties should be understood as reinforcing rights”,<sup>27</sup> and that the moral duties referred to in the Charter need to be seen as quite separate from the legal duties.

### ***Collective rights – peoples’ rights***

The Charter provides for “peoples’ rights”, also categorised as collective or “group rights”. These include the right of people to self-determination, political sovereignty over their natural resources, the right to development, and the right to a clean environment. Articles 19–26 specifying these rights have tended to be among the most controversial.

The Charter gives no definition to the term *people*. It has been left to the Commission to provide interpretation, therefore, depending on the cases brought before it. For example, in the *Mauritania* cases<sup>28</sup> dealing with slavery and discrimination against black Mauritians, amongst others, the African Commission interpreted “people” in Article 19<sup>29</sup> as representing a specific group of the population within the boundaries of a country.

<sup>25</sup> Wa Mutua (1995:339, footnote 4).

<sup>26</sup> (ibid.).

<sup>27</sup> Pityana (2002:230).

<sup>28</sup> 54/91, 61/91, 98/93, 164/97 to 196/97, 210/98 *Malawi African Association, Amnesty International, Ms Sarr Diop, Union Interafricaine des Droits de l’Homme and RADDHO, Collectif des Veuves et Ayants Droit, Association Mauritanienne des Droits de l’Homme v Mauritania*, 13th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp. 161–191].

<sup>29</sup> “All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.”

In the *Congrès du Peuple Katangais v Zaïre*,<sup>30</sup> the African Commission examined a claim of self-determination by the Katangese, as per the provisions of Article 20(1). It recognised that while all people had the right to self-determination, there might be a controversy as to the definition of *peoples*. It went on to give instances in which self-determination could be exercised, namely through “independence, self-government, local government, federalism, confederation, unitarism ...”.<sup>31</sup> It felt —<sup>32</sup>

... obligated to uphold the sovereignty and territorial integrity of Zaïre, member of the Organisation of African Unity and a party to the Charter.

This is a “no secessionist” approach, in line with the Commission’s historical background of preservation of a status quo as far as colonial boundaries were concerned.

In recent years, the African Commission has developed its work in the area of collective rights through, inter alia, a study on indigenous populations. The Commission established a Working Group on Indigenous Populations in Africa mandated to examine the concept of indigenous people and communities in Africa, study the implications of the African Charter and well-being of indigenous communities, consider appropriate recommendations for the monitoring and protection of the rights of indigenous communities, and produce a report of its findings.<sup>33</sup>

Land alienation and dispossession as well as the dismissal of indigenous communities’ customary land rights and other natural resources resulted in the “negation of their livelihood systems and deprivation of their means”.<sup>34</sup> As a consequence, the very existence of indigenous peoples was threatened and they were becoming destitute and poverty-stricken, in violation of the —<sup>35</sup>

... African Charter (Article 20, 21 and 22), which states clearly that all peoples have the right to existence, the right to their natural resources and property, and the right to their economic, social and cultural development.

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<sup>30</sup> 75/92 *Congrès du Peuple Katangais v Zaïre*, 8th Annual Activity Report [in Compilation 1994–2001, IHRDA, Banjul 2002, pp.359–360].

<sup>31</sup> (ibid.:para. 4).

<sup>32</sup> (ibid.:para. 5).

<sup>33</sup> African Commission on Human and Peoples’ Rights (2005).

<sup>34</sup> (ibid.:108).

<sup>35</sup> (ibid.).

Thus, the term *people* can lend itself to various interpretations, given its broad scope. It is submitted that the Commission can indeed play a great role in creating defining jurisprudence in this area, contributing to the advancement and respect of collective rights in Africa.<sup>36</sup>

## **Civil and political rights**

While the African Charter has been hailed as a unique document, a three-in-one formula containing all three generations of rights, one author notes that –<sup>37</sup>

... the more ‘traditional’ civil and political rights constitute the daily staple of regional[,] and indeed domestic, human rights mechanisms.

Articles 2 and 3 of the Charter enshrine the underpinning principles of non-discrimination and equality before the law. The enjoyment of the rights and freedoms recognised in the Charter apply equally and to all –

... without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any opinion, national and social origin, fortune, birth or other status.

The inclusion of “other status” renders the list non-exhaustive, for example, discrimination on the basis of age, disability or sexual orientation could be read into it.

Other rights protected are –

- life and integrity of the person (Article 4)
- dignity, and freedom from slavery, the slave trade, torture, and cruel, inhuman or degrading punishment and treatment (Article 5)
- liberty and security of the person (Article 6)
- a fair trial (Article 7)
- freedom of conscience and religion (Article 8)
- freedom of expression (Article 9)
- freedom of association (Article 12)

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<sup>36</sup> See also *155/96 Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights v Nigeria*, 15th Annual Activity Report [in *Decisions of the African Commission on Human and Peoples’ Rights on Communications 2002–2007*, IHRDA, Banjul 2008, pp.277–293] discussed below.

<sup>37</sup> Heyns (2002:137).

- participation in government (Article 13), and
- property (Article 14).

In this part of the paper, a brief examination will be made of the sacrosanct right to life and integrity of the person, in the absence of which all the other rights become immaterial. The right to a fair trial and to freedom of expression, as well as other civil and political rights, have also been dealt with as pertinent elsewhere in the paper.

Article 4 of the African Charter provides as follows:

Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

Through its case law, the Commission has progressively distilled the elements of the right to life. In its earlier decisions, the Commission had a tendency to be rather laconic in its pronouncements – stating the facts of a particular case and then declaring whether a violation of the right to life had occurred or not. For example, presenting the contention of the complainants in one particular case, the Commission states –<sup>38</sup>

... Communication 47/90, in addition to alleged arbitrary arrests, arbitrary detention and torture, alleges extrajudicial executions which are a violation of Article 4.

It then goes to hold there has indeed been a violation of Article 4.<sup>39</sup>

Contrast this with a later case, that of *Forum of Conscience v Sierra Leone*, where the Commission had this to say:<sup>40</sup>

The right to life is the fulcrum of all other rights. It is the fountain through which other rights flow, and any violation of this right without due process amounts to arbitrary deprivation of life. Having found above that the trial of 24 soldiers constituted a breach

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<sup>38</sup> 25/89, 47/90, 56/91, 100/93 *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Inter africaine des Droits de l'Homme, Les Témoins de Jehovah v Zaïre*, 9th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp.360–366], para. 43.

<sup>39</sup> (ibid.).

<sup>40</sup> 223/98, 14th Annual Activity Report [in *Compilation of Decisions 1994–2001*, IHRDA, Banjul 2002, pp. 331–334] para. 20.

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of due process of law as guaranteed under Article 7(1)(a) of the Charter, the Commission finds their execution an arbitrary deprivation of the right to life provided for in Article 4 of the Charter.

Although this process cannot bring the victims back to life, it does not exonerate the Government of Sierra Leone from its obligations under the Charter.

The Commission also found that to consider only deprivation of life as a violation of Article 4 would be too narrow an interpretation. It held as follows:<sup>41</sup>

It cannot be said that the right to respect for one's life and the dignity of his person ... would be protected in a state of constant fear and/or threats, as experienced by the [victim].

Therefore, the acts of security agents, which forced the victim into hiding to avoid arbitrary arrest, constituted a violation of Article 4.<sup>42</sup>

The following are some instances where the Commission has held there has been a violation of Article 4:

- Shootings by police officers<sup>43</sup>
- Executions based on the authority of a defective trial<sup>44</sup>
- Denial of food and medical attention, burning people in sand and subjecting them to torture<sup>45</sup>

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<sup>41</sup> 205/97 *Kazeem Aminu v Nigeria*, 13th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp. 282–286], para. 18.

<sup>42</sup> (ibid.).

<sup>43</sup> 64/92, 68/92, 78/92 *Krishna Achutan (On behalf of Aleke Banda)*, *Amnesty International (On behalf of Orton and Vera Chirwa)*, *Amnesty International (On behalf of Orton and Vera Chirwa) v Malawi*, 8th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp.155–160].

<sup>44</sup> 137/94, 134/94, 154/96 and 161/97 *International PEN, Constitutional Rights Project, Interights and Civil Liberties Organization (On behalf of Ken Saro Wiwa Jnr) v Nigeria*, 12th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp.230–247] and 54/91, 61/91, 98/93, 164/97 to 196/97, 210/98 *Malawi African Association, Amnesty International, Ms Sarr Diop, Union Interafricaine des Droits de l'Homme and RADDHO, Collectif des Veuves et Ayants Droit, Association Mauritanienne des Droits de l'Homme v Mauritania*, 13th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp.161–191].

<sup>45</sup> 54/91, 61/91, 98/93, 164/97 to 196/97, 210/98 *Malawi African Association, Amnesty International, Ms Sarr Diop, Union Interafricaine des Droits de l'Homme and RADDHO, Collectif des Veuves et Ayants Droit, Association Mauritanienne des Droits de l'Homme v Mauritania*, 13th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul

- Killings, disappearances, assassination by unknown people, which the government did not attempt to prevent or investigate afterwards,<sup>46</sup> and
- Massacre of a large number of Rwandan villagers by the Rwandan armed forces and the many reported extrajudicial executions for reasons of their membership of a particular ethnic group.<sup>47</sup>

The Commission has adroitly used the right to life in the Charter to infer the right to food as well, thus demonstrating a holistic approach to all the rights therein protected. See the discussion on the SERAC Decision below.

### **Economic, social and cultural rights**

The inclusion in the African Charter of economic, social and cultural rights at a time when the Cold War was in full swing can be considered as proof enough that the continent ignored the influences and effects of diverging world politics. Thus, Africa was endowed with a unique foundational document on which the continent's human rights system could be built.

Economic, social and cultural rights as guaranteed by the African Charter are not circumscribed by claw-back clauses and limitations, in comparison with civil and political rights.<sup>48</sup> There is an obligation on states parties to implement economic, social and cultural rights without the progressive approach envisaged in the UN International Covenant on Economic, Social and Cultural Rights.

The right of an individual to “freely take part in the cultural life of his community” and “the promotion and protection of morals and traditional values recognized by the community [as] the duty of the state” are enshrined in the Charter.<sup>49</sup>

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2002, pp.161–191].

<sup>46</sup> 74/92 *Commission Nationale des Droits de l'Homme et des Libertés v Chad*, 9th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp. 72–76].

<sup>47</sup> 27/89, 46/91, 99/93, *Organisation Mondiale contre la Torture and Association Internationale des Juristes Démocrates, Comité International des Juristes (CIJ), Union Interafricaine des Droits de l'Homme v Rwanda*, 10th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp. 320–324]. These communications were filed before the 1994 genocide, but were decided afterwards, in 1996–1997.

<sup>48</sup> Odinkalu (2002:195).

<sup>49</sup> ACHPR, Article 17.

The State's duty is extended to "assist the family[,] which is the custodian of morals and traditional values recognised in the community".<sup>50</sup> In the *Mauritania* cases, the African Commission commented that –<sup>51</sup>

... [l]anguage is an integral part of the structure of culture; it in fact constitutes its pillar and means of expression par excellence. Its usage enriches the individual and enables him to take an active part in the community and in its activities. To deprive a man of such participation amounts to depriving him of his identity.

## The SERAC Decision

The African Commission delivered a landmark decision in the jurisprudence of economic, social and cultural rights in the *Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights v Nigeria* (referred to as *the SERAC Decision*).<sup>52</sup> The contention was that operations of the military government of Nigeria, through the State oil company, the Nigerian National Petroleum Company – the majority shareholder in a consortium with Shell Petroleum Development Corporation – caused environmental degradation and health problems resulting from contamination of the environment among the Ogoni people.<sup>53</sup> The case was filed by two non-governmental organisations (NGOs) after the execution of Ogoni activist Ken Saro Wiwa.<sup>54</sup>

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<sup>50</sup> (ibid.:Article 18).

<sup>51</sup> 54/91, 61/91, 98/93, 164/97 to 196/97, 210/98 *Malawi African Association, Amnesty International, Ms Sarr Diop, Union Interafricaine des Droits de l'Homme and RADDHO, Collectif des Veuves et Ayants Droit, Association Mauritanienne des Droits de l'Homme v Mauritania*, 13th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp. 161–191], para. 137.

<sup>52</sup> 155/96 *Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights v Nigeria*, 15th Annual Activity Report [in *Decisions of the African Commission on Human and Peoples' Rights on Communications 2002–2007*, IHRDA, Banjul 2008, pp.277–293].

<sup>53</sup> (ibid.:para. 1).

<sup>54</sup> 137/94, 134/94, 154/96 and 161/97 *International PEN, Constitutional Rights Project, Interights and Civil Liberties Organization (On behalf of Ken Saro Wiwa Jnr) v Nigeria*, 12th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp.230–247].

The complainants alleged violations of the right to life,<sup>55</sup> the right to health,<sup>56</sup> the right to a healthy environment,<sup>57</sup> the right to property,<sup>58</sup> the right to housing and food, and the protection of the family.<sup>59</sup> The petroleum consortium disposed of toxic waste in the environment and local waterways, thus polluting water, air, soil and crops. The consortium also did not adequately maintain its facilities, causing avoidable spills near villages. Environmental pollution caused skin infections, gastrointestinal and respiratory diseases, increased risk of cancers, and neurological and reproductive problems. Security forces as well as unidentified gunmen attacked and burnt villages, killed inhabitants, and destroyed crops and animals, thus putting in jeopardy the villagers' food sources – amongst other things.

Drawing on international law, the Commission restated the four obligations of states regarding human rights: to respect, protect, promote and fulfil them. The Commission insisted that these obligations applied to all guaranteed rights contained in the Charter. The Commission found that the right to health and the right to a generally satisfactory environment were violated. While the Government had the right to produce oil, it had failed in its obligation to prevent environmental degradation. The right to a healthy environment –<sup>60</sup>

... requires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure ecologically sustainable development and use of natural resources.

The failure not only to involve local communities in decisions affecting their development but also to monitor the oil consortium's activities violated Nigeria's duty to protect its residents from exploitation and plundering of their wealth and natural resources. "[T]he Government of Nigeria facilitated the destruction of Ogoniland", in breach of Article 21.<sup>61</sup>

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<sup>55</sup> African Charter, Article 4.

<sup>56</sup> (ibid.:Article 16).

<sup>57</sup> (ibid.:Article 24).

<sup>58</sup> (ibid.:Article 14).

<sup>59</sup> (ibid.:Article 18).

<sup>60</sup> *155/96 Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights v Nigeria*, 15th Annual Activity Report [in Decisions 2002–2007, IHRDA, Banjul 2008, pp.277–293], para. 52.

<sup>61</sup> (ibid.:para. 58).



As indicated above, the complainants alleged violations of the right to shelter or to housing, a right which the African Charter does not explicitly guarantee. Using proactive interpretation, it found that –<sup>62</sup>

... the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health ... the right to property, and the protection accorded to the family[,] forbids the wanton destruction of shelter ... .

This right obliges a State not to destroy the housing of its citizens, and not to obstruct efforts by individuals or communities to rebuild destroyed homes. It encompasses the right to protection against forced evictions, harassment and other means of coercion detracting from the right to shelter. The Commission found that “the conduct of the Nigerian government clearly demonstrates the violation of this right enjoyed by the Ogoni as a collective right”.<sup>63</sup>

The right to food is also not explicitly stated in the African Charter. The Commission found it closely linked to the dignity of human beings and, therefore, essential to the enjoyment of other rights such as health, education, work and political participation. A State is obliged “to protect and improve existing food sources and to ensure access to adequate food for all citizens”. Furthermore –<sup>64</sup>

... the minimum core of the right to food requires that the Nigerian Government should not destroy or contaminate food sources. It should not allow private parties to destroy or contaminate food sources, and prevent peoples’ efforts to feed themselves.

The Commission reached the decision that the destruction and contamination of crops by government and non-State actors violated the duty to respect and protect the implied right to food.

The African Commission ordered the Nigerian Government to stop its attacks on Ogoni communities and leaders, to carry out investigations into the human rights violations, to prosecute those responsible for the violations, and to compensate the victims adequately. The government also had to prepare environmental and social impact assessments for future oil development and, finally, provide information on health and environmental risks.

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<sup>62</sup> (ibid.:para. 60).

<sup>63</sup> (ibid.:para. 63).

<sup>64</sup> (ibid.:para. 65).

The SERAC Decision is remarkable, not only given the array of rights dealt with, but also with regard to the approach taken, that is, creative interpretation to infer rights not expressly guaranteed in the African Charter. It drew from several sources, including the International Covenant on Economic, Social and Cultural Rights, and the jurisprudence of the European Court of Human Rights as well as the Inter-American Court of Human Rights.

Nonetheless, what impact such a decision has on the lives of those whose plight it highlights is a question that remains; the question is also relevant to those who suffer from similar situations in different contexts. Africa is beset with severe problems in the enjoyment of economic, social and cultural rights, with widespread difficulties in access to clean water, food security, education, adequate shelter, comprehensive health care, and environmental degradation, among others. The stark reality is that even if these rights were protected, a vast majority do not have access to them because the facilities simply do not exist.

## **Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa**

In addition to the broad provisions regarding the right to equality and freedom from discrimination, the African Charter contains only one specific Article referring to women in its 68 Articles. More precisely, it provides that —<sup>65</sup>

... the state shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the **woman** and the child as stipulated in the international declarations and conventions. [Emphasis added]

Inserting women's rights into the context of an article referring to the family and other vulnerable groups (children, the aged and the disabled) was considered problematic and inadequate. Furthermore, juxtaposing women and children could be construed as detrimental to over half of the African population, lacking the necessary specificity to enhance effective enjoyment of their rights.

It is submitted that this inadequacy could be a main reason why no specific complaint dealing with women's rights was ever forwarded to the African Commission for consideration under the individual complaints procedure.

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<sup>65</sup> African Charter, Article 18(3).

Consequently, the African Commission's jurisprudence on women's rights is almost non-existent.

On the other hand, the African Charter can be considered as a catalyst for better protection of women's rights through the adoption of the Protocol on the Rights of Women in Africa. It presents several advances both for women in Africa and for those well beyond the continent's shores.

The preamble to the Protocol recalls that women's rights have been recognised and guaranteed in all international human rights instruments as inalienable, interdependent and indivisible human rights.<sup>66</sup> States parties are –<sup>67</sup>

... firmly convinced that any practice that hinders or endangers the normal growth and affects the physical and psychological development of women and girls should be condemned and eliminated ...

and states parties are –<sup>68</sup>

... determined to ensure that the rights of women are promoted, realised and protected in order to enable them to enjoy fully all their human rights.

## **Selected key principles and provisions of the Protocol on the Rights of Women in Africa**

### ***Equality, elimination of discrimination, and participation***

The Women's Protocol is premised on the principles of equality between the sexes, the elimination of discrimination against women, and their participation in all spheres of life. These fundamental principles run like a thread throughout the Protocol.

*Discrimination* is defined as –<sup>69</sup>

... any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment

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<sup>66</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Preambular para. 5.

<sup>67</sup> (ibid.:Preambular para. 13).

<sup>68</sup> (ibid.:Preambular para. 14).

<sup>69</sup> (ibid.:Article 1(f)).

Major African legal instruments

or the exercise by the women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life.

States parties are to combat –<sup>70</sup>

... all forms of discrimination against women through appropriate legislative, institutional and other measures ... [and] take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist.

They are also required to –<sup>71</sup>

... commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for men and women.

Regarding the other substantive provisions, women enjoy equal rights as refugees<sup>72</sup> and in marriage,<sup>73</sup> and, in the case of separation, divorce or annulment of marriage, women enjoy equal rights to an equitable sharing of the joint property deriving from the marriage.<sup>74</sup> Concerning rights to inheritance, a widow has the right to an equitable share in inheritance of the property of her husband, and women and men have the right to inherit their parents' properties in equitable shares.<sup>75</sup> Elderly women are protected from discrimination based on age<sup>76</sup> and disabled women from discrimination on the basis of their disability.<sup>77</sup>

Women have equal protection before the law, and equal representation in the judiciary and law enforcement organs.<sup>78</sup> Women have the right to equal participation in the political life of their countries; therefore, they participate without any discrimination and be equally represented at all levels with men in all electoral processes. Furthermore, they are equal partners with men at all

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<sup>70</sup> (ibid.:Article 2(1)).

<sup>71</sup> (ibid.:Article 2(2)).

<sup>72</sup> (ibid.:Article 4).

<sup>73</sup> (ibid.:Article 6).

<sup>74</sup> (ibid.:Article 7).

<sup>75</sup> (ibid.:Article 21).

<sup>76</sup> (ibid.:Article 22).

<sup>77</sup> (ibid.:Article 23).

<sup>78</sup> (ibid.:Article 8).

levels in the development and implementation of State policies and development programmes.<sup>79</sup> With regard to the right to peace, women have the right to participate in the promotion and maintenance of peace.<sup>80</sup>

Concerning the right to education and training, states parties are bound to take appropriate measures to eliminate all forms of discrimination against women, and guarantee equal opportunity and access in the sphere of education and training. States are also obliged to eliminate all stereotypes in textbooks, syllabuses and the media perpetuating such discrimination.<sup>81</sup>

As far as economic and social welfare rights are concerned, states parties guarantee equal opportunities in work and career advancement, as well as other economic opportunities. States are also obliged to promote equality of access to employment, equal remuneration for jobs of equal value, and equal application of taxation laws to both sexes.<sup>82</sup> Women have equal access to adequate housing, whatever their marital status.<sup>83</sup> The Women's Protocol further requires the participation of women "at all levels" in the determination of cultural policies and in the formulation of cultural practices.<sup>84</sup>

Moreover, states parties are obliged to ensure greater participation by women in the planning, management and preservation of the environment and sustainable use of natural resources "at all levels".<sup>85</sup> States have the obligation to introduce a gender perspective in national development procedures and ensure participation by women "at all levels" in the conceptualisation, decision-making, implementation and evaluation related to development policies and programmes.<sup>86</sup>

### ***Public v private spheres of life***

One of the positive gains in the field of human rights protection generally, but more specifically regarding women's human rights, is the deconstruction of the

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<sup>79</sup> (ibid.:Article 9).

<sup>80</sup> (ibid.:Article 10).

<sup>81</sup> (ibid.:Article 12).

<sup>82</sup> (ibid.:Article 13).

<sup>83</sup> (ibid.:Article 16).

<sup>84</sup> (ibid.:Article 17).

<sup>85</sup> (ibid.:Article 18).

<sup>86</sup> (ibid.:Article 19).

formerly strict divide between the public and private spheres of life. This division represented the basis on which states justified their reluctance to ‘interfere’ in domestic violence cases, for example, arguing that such behaviour fell within the confines of the ‘private’ sphere. Keeping the woman’s world restricted to the home acted as a means to keep control over her.

The public/private divide debate is still alive, however, and it would seem that it is a situation of two steps forward and one backward, but still with gradual progress for the advancement of women’s rights. For example, with reference to the definition of violence against women in the Women’s Protocol, reference is specifically made to “deprivation of fundamental freedoms in private or public life”, which settles the matter positively.

### ***Violence against women***

The Women’s Protocol addresses the issue of violence against women head on. Explicit mention of violence against women is made in Article 4, which deals with the rights to life, integrity and security of the person. States parties are obliged to prohibit “all forms of exploitation, [and] cruel, inhuman or degrading punishment and treatment”. They are bound to take appropriate and effective measures to –<sup>87</sup>

... enact and enforce laws to prohibit all forms of violence against women[,] including unwanted or forced sex whether the violence takes place in private or in public.

Article 4 is quite comprehensive, with obligations on states parties ranging from the identification of causes and consequences of violence with a view towards their elimination,<sup>88</sup> to the establishment of mechanisms and accessible services for effective information, rehabilitation and reparation for victims of violence.<sup>89</sup>

The Women’s Protocol gives a definition of *violence against women* at Article 1, as follows:

“Violence against women” shall mean all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the

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<sup>87</sup> (ibid.:Article 4(2)(a)).

<sup>88</sup> (ibid.:Article 4(2)(c)).

<sup>89</sup> (ibid.:Article 4(2)(f)).

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 situations of armed conflict or of war.

In comparison with the definition in the UN Declaration on the Elimination of Violence against Women,<sup>90</sup> the Women's Protocol's version extends violence against women to conflict situations. History provides countless examples where women were considered as 'the spoils of war'. A case in point was during the Rwandan genocide, where women were targeted because of their sex and the violence inflicted upon them was even more atrocious as a result.<sup>91</sup>

### *Elimination of harmful practices*

Many harmful practices, be they traditional or deriving from customs, may be viewed as violations of the human rights of women through the perpetuation of violence against them. To name but a few such practices: female genital mutilation (FGM), forced marriages, child marriages, levirate and similar forms of marriage, the treatment of widows generally by the community, and food taboos.

Article 5 of the Women's Protocol deals exclusively with women's protection from harmful practices. States parties are obliged to –

... prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards.

*Harmful practices* are described as –<sup>92</sup>

... all behaviour, attitudes and/or practices that negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity.

All forms of FGM, scarification, medicalisation and para-medicalisation of FGM are prohibited through legislative measures backed by sanctions.<sup>93</sup>

<sup>90</sup> Article 1, Declaration on the Elimination of Violence against Women, A/RES/48/104, adopted by the UN General Assembly on 20 December 1993.

<sup>91</sup> The Prosecutor v Jean Paul Akayesu, Case No. ICTR-96-4-T.

<sup>92</sup> Women's Protocol, Article 1(g).

<sup>93</sup> (ibid.:Article 5).

The language of Article 5 should be contrasted with that of Article 21 of the African Charter on the Rights and Welfare of the Child,<sup>94</sup> which deals with the protection of children from harmful *social and cultural*<sup>95</sup> practices. There is no mention of cultural, traditional or customary practices in the Women's Protocol.

### ***Firsts in the Women's Protocol***

The Women's Protocol contains "a number of global firsts"<sup>96</sup> in relation to women's human rights. Some examples are highlighted herein.

The controversial issue of monogamy and polygamy is resolved for the first time in an explicit manner by indicating that "monogamy is encouraged as the preferred form of marriage", and "rights of women ... in polygamous marital relationships are promoted and protected".<sup>97</sup> It is also the first time that an international treaty creates a specific obligation for the elimination of FGM.

The Women's Protocol presents the first articulation in an international human rights treaty of a woman's right to abortion,<sup>98</sup> medically, —<sup>99</sup>

... in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.

Furthermore, the Women's Protocol is the first human rights instrument that specifically highlights women's rights in the context of the HIV and AIDS pandemic.<sup>100</sup> Women have —<sup>101</sup>

... the right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS ...

and the right to be informed on their health status, including as regards HIV and AIDS.

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<sup>94</sup> See below.

<sup>95</sup> Author's emphasis.

<sup>96</sup> Centre for Reproductive Rights (2006).

<sup>97</sup> Women's Protocol, Article 6(c).

<sup>98</sup> Centre for Reproductive Rights (2006).

<sup>99</sup> Women's Protocol, Article 14(2)(c).

<sup>100</sup> Durojaye (2006:188).

<sup>101</sup> Women's Protocol, Article 14(2)(d).



The Women's Protocol is also the first binding treaty in international law introducing a gender perspective in national development procedures.<sup>102</sup>

Last, but not least, it is the first human rights treaty to acknowledge that the implementation of trade rules can have a disparate impact on women's rights.<sup>103</sup> It therefore imposes an obligation on states parties to –<sup>104</sup>

... ensure that the negative effects of globalization and any adverse effects of the implementation of trade and economic policies and programmes are reduced to the minimum for women.

### **Concluding remarks**

The above represents an impressive catalogue of rights, aiming at equality, non-discrimination, increased participation and gender sensitivity, all leading to the empowerment of women in Africa. Yet women remain persistently unequal partners in their homes, communities, countries and at continental level.

As an example, customary laws relating to marriage, family, inheritance, and land rights still endure and are given precedence over domestic laws. They perpetuate centuries-old discriminatory practices denying women the very fundamental human rights contained in the Women's Protocol. Domestication and implementation of the Women's Protocol requires innovative approaches from governments as well as women's rights advocates, who, despite prevailing circumstances, have reason to celebrate the adoption of this ground-breaking instrument.

In international law, states take up the obligation, upon acceding to or ratifying a treaty, to bring their domestic law – not only the enacted ones through the formal legislative process, but also customary and traditional law – into conformity with the provisions of the treaty in question. Therefore, it is incumbent on states parties to a human rights treaty to change their religious and customary law even in view of the “difficulty and complexity of the task”.<sup>105</sup>

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<sup>102</sup> (ibid.:Article 19(a)).

<sup>103</sup> Mengesha (2006:208).

<sup>104</sup> Women's Protocol, Article 19(c).

<sup>105</sup> An'Naim (1994:184).

## **Declaration of Principles on Freedom of Expression in Africa**

Freedom of expression is a basic human right and –<sup>106</sup>

... a potent and indispensable instrument for the creation and maintenance of a democratic society and the consolidation of development.

Nonetheless, the right to free expression and access to information remains under threat, with countless impingements due to restrictive laws and practices. With repressive laws still on statute books across Africa, legal guarantees for their enjoyment are weak, or worse, non-existent.

Even today, exercising the right to free expression can be fraught with danger. The following gives a non-exhaustive list of prevalent perils: harassment, assaults and attacks, persecutions, prosecutions and civil suits, various bans,<sup>107</sup> imprisonment, disappearances<sup>108</sup> and murders.<sup>109</sup> Such dangers or threats thereof affect veteran journalists or media professionals<sup>110</sup> as well as human rights defenders and ordinary citizens daily.<sup>111</sup>

It befits to refer to the adoption in 2000 of the Constitutive Act of the African Union, reiterating the often cited “respect for democratic principles, human rights, the rule of law and good governance”,<sup>112</sup> and the African Charter on

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<sup>106</sup> African Commission, Resolution on Freedom of Expression adopted at its 29th Ordinary Session in Tripoli, Libya, in May 2001, Preambular para. 2.

<sup>107</sup> In the wake of the African Union Summit in June 2006, authorities in The Gambia, host of the Summit and of the African Commission on Human and Peoples’ Rights, banned a Forum on Freedom of Expression meant to bring together journalists and members of civil society organisations, on the grounds that no prior official authorisation had been obtained.

<sup>108</sup> On 5 June 2008, the Court of Justice of the Economic Community of West African States (ECOWAS) gave a ruling ordering the release of Chief Ebrima Manneh, a Gambian journalist detained incommunicado since his arrest on 11 July 2006.

<sup>109</sup> Said Tahlil, former Director of HornAfrik, one of Somalia’s leading radio and television stations, was gunned down on 3 February 2009 in the course of duty; see the press statement by the Committee to Protect Journalists, “*Another murder in Somalia as HornAfrik director is killed*”; available at <http://www.cpj.org>; last accessed 7 March 2009.

<sup>110</sup> Baglo (2008).

<sup>111</sup> Similar concerns were expressed in the African Commission’s Resolution on Freedom of Expression adopted at its 29th Ordinary Session in Tripoli, Libya, in May 2001.

<sup>112</sup> Article 4(m), African Union Constitutive Act.

Democracy, Elections and Governance<sup>113</sup> at this juncture. The latter Charter calls for the “holding of regular, transparent, free and fair elections”, and it directs states to “take all appropriate measures to ensure constitutional rule, particularly constitutional transfer of power”.<sup>114</sup> In the recent past, the continent witnessed attacks on these very principles. The most notorious instances were the presidential and legislative elections in Kenya on 27 December 2007, and the presidential elections in Zimbabwe six months later, on 27 June 2008. Both impacted negatively on freedom of expression.

In Kenya, an order was issued on 30 December 2007 to ban live broadcasts, which in effect imposed a media blackout regarding the outbreak of violence following the controversial re-election of President Mwai Kibaki. The ban was lifted on 4 February 2008, following a lawsuit filed by the Media Institute and the Kenya Editors Guild in the High Court of Kenya against the government to quash the ban, accompanied by challenges from civil society and international media.<sup>115</sup>

Several human rights defenders received death threats in the aftermath of these contentious elections. They were targeted for having voiced their views against what they considered abnormalities during the election process, and against violations committed by the police and armed groups across Kenya. As a measure of precaution for their personal safety and that of their families, some of them stopped making declarations in public.<sup>116</sup>

In Zimbabwe, in the run-up to the presidential elections, –<sup>117</sup>

... numerous journalists and leading cast members of plays perceived as critical of the government, were allegedly harassed, arrested and some detained ... [and] journalists

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<sup>113</sup> While 25 countries have signed this document, only Mauritania has ratified it; available at [http://www.africa-union.org/root/au/Documents/Treaties/list/Charter\\_on\\_Democracy\\_and\\_Governance.pdf](http://www.africa-union.org/root/au/Documents/Treaties/list/Charter_on_Democracy_and_Governance.pdf); last accessed 27 March 2009.

<sup>114</sup> Article 3(3), African Charter on Democracy, Elections and Governance, adopted on 30 January 2007.

<sup>115</sup> Article 19, *Around Africa – January 2008*; available at <http://www.article19.org>; last accessed 5 March 2009.

<sup>116</sup> Author’s interviews in Nairobi, Kenya, in January 2008.

<sup>117</sup> Activity Report of the Special Rapporteur on Freedom of Expression and Access to Information in Africa, presented at the 44th Ordinary Session of the African Commission on Human and Peoples’ Rights, 10–24 November 2008, Abuja, Federal Republic of Nigeria; on file with the author.

allegedly ... convicted based on provision of the media law for offences such as “intentionally publishing falsehoods”.

The seminal document protecting human rights in Africa, the African Charter, provides for freedom of expression and access to information “within the law”.<sup>118</sup> Considering that these provisions did not offer the much sought-after guarantees, the African Commission developed a Declaration of Principles on Freedom of Expression in Africa, adopted at its 32nd Ordinary Session in 2002.

The first objective of this contribution is to analyse the scope of the right to freedom of expression and access to information through the jurisprudence developed by the Commission. Secondly, it proposes a bird’s eye view of the Declaration of Principles on Freedom of Expression.

### **Scope of freedom of expression and the right to information**

The African Commission ruled that –<sup>119</sup>

... freedom of expression is a basic human right, vital to an individual’s personal development and political consciousness, and to his participation in the conduct of public life in his country.

In a subsequent case, the Commission held that –<sup>120</sup>

... in keeping with its important role of promoting democracy in the continent, the African Commission should also find that a speech that contributes to political debate must be protected.

Moreover, Article 9 of the African Charter comprises the right to receive information and to express one’s opinion. Therefore, the intimidation and arrest or detention of journalists for articles published and questions asked deprived not only the journalists of their rights to freely express and disseminate their opinions, but also the public of their right to information.<sup>121</sup>

<sup>118</sup> “Article 9(1) Every individual shall have the right to receive information. (2) Every individual shall have the right to express and disseminate his opinion within the law.”

<sup>119</sup> *140/94, 141/94, 145/95 Constitutional Rights Project, Civil Liberties Organization and Media Rights Agenda v Nigeria*, 13th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp.248–256], para. 36.

<sup>120</sup> *228/99 The Law Offices of Ghazi Suleiman v Sudan*, 16th Annual Activity Report [in *Decisions 2002–2007*, IHRDA, Banjul 2008, pp. 352–361], para. 53.

<sup>121</sup> *147/95 and 149/96 Sir Dawda K Jawara v The Gambia*, 13th Annual Activity Report [in

The proscription of specific newspapers without a hearing to allow them to defend themselves represents harassment of the press. In addition, it has the effect of hindering those directly affected to disseminate their opinions while posing an immediate risk of self-censorship.<sup>122</sup>

Article 9 guarantees to every individual the right to free expression, within the confines of the law.<sup>123</sup> Implicit in this is that if such opinions were contrary to laid-down laws, the affected individual or government has the right to seek redress in a court of law. The Commission considered this to be the essence of the law of defamation. Therefore, it found a violation of Article 9 in circumstances where the government opted to arrest and detain a complainant without trial and to subject him/her to a series of inhuman and degrading treatments.<sup>124</sup>

However, while the dissemination of opinions may be restricted by law, it does not mean that the national law can set aside the right to express and disseminate one's opinion guaranteed at international level. To permit national law to take precedence over international law would defeat the purpose of codifying certain rights in international law and, indeed, the whole essence of treaty-making. The justifications of limitations are required to be strictly proportionate with and absolutely necessary for the anticipated advantages. Most importantly, a limitation may not erode a right such that the right itself becomes illusory.<sup>125</sup>

The Commission reiterated that there was no derogation allowed in the Charter and that, where it was necessary to restrict rights, the restriction should be as minimal as possible and should not undermine fundamental rights guaranteed under international law. In imposing a blanket restriction on the freedom of expression, a state party would be committing a violation of the spirit of Article 9(2).<sup>126</sup>

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*Compilation 1994–2001*, IHRDA, Banjul 2002, pp. 108–121], para. 63.

<sup>122</sup> *140/94, 141/94, 145/95 Constitutional Rights Project, Civil Liberties Organization and Media Rights Agenda v Nigeria*, 13th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp.248–256], para. 37.

<sup>123</sup> See above discussion on 'claw-back' clauses.

<sup>124</sup> *232/99 John D Ouko v Kenya*, 14th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp.144–150], para. 28.

<sup>125</sup> *140/94, 141/94, 145/95 Constitutional Rights Project, Civil Liberties Organization and Media Rights Agenda v Nigeria*, 13th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp.248–256], para. 40.

<sup>126</sup> *48/90, 50/91, 52/91, 89/93, Amnesty International, Comité Loosli Bachelard, Lawyers'*

The later case of *Liesbeth Zegveld and Mussie Ephrem v Eritrea*<sup>127</sup> reaffirmed the above principles, which were further elaborated on in the Declaration of Principles on Freedom of Expression in Africa. The Declaration lays down a more comprehensive framework to further strengthen freedom of expression and access to information in relation to Article 9 of the African Charter on Human and Peoples' Rights.

### **Bird's eye view of the Declaration of Principles on Freedom of Expression in Africa**

The Declaration expanded on the meaning and scope of *freedom of expression* and *access to information* as provided for in the Charter and the Commission's own case law in its interpretation of Article 9. Also, it addressed gaps and shortcomings in the enjoyment of freedom of expression and access to information.

In the Preamble to the Declaration, the African Commission reaffirms the –<sup>128</sup>

... fundamental importance of freedom of expression as an individual human right, as a cornerstone of democracy and as a means of ensuring respect for all human rights and freedoms.

In Principle I(1), *freedom of expression* is defined to include –

... the right to seek, receive and impart information and ideas, either orally, in writing or in print, in the form of art, or through any other form of communication, including across frontiers.

The definition expands that of the Charter and gives scope to address new forms of expression through modern channels.

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*Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan*, 13th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002: 335–352], para. 80. All of these communications pertain to the situation in Sudan between 1989 and 1993, with arbitrary arrests and detentions that took place following a coup on 30 July 1989. Hundred of members of opposition groups, trade unionists, lawyers, and human rights activists were detained and arrested following a decree that permitted the detention of anyone “suspected of being a threat to political or economic security” under a state of emergency.

<sup>127</sup> 250/02 *Liesbeth Zegveld and Mussie Ephrem v Eritrea*, 17th Annual Activity Report [in *Decisions 2002–2007*, IHRDA, Banjul 2008, pp.124–136].

<sup>128</sup> Preambular para. 1, Declaration of Principles on Freedom of Expression in Africa.

Freedom of expression and information is stated in the Declaration to be a “fundamental and inalienable human right and an indispensable component of democracy”. Specific reference is made to this fundamental principle in *The Law Office of Ghazi Suleiman v Sudan*.<sup>129</sup> It restates the basic principle of equal opportunity and non-discrimination in the exercise of the “right to freedom of expression and to access information”.<sup>130</sup>

No “arbitrary interference” is permitted in the enjoyment of freedom of expression. Any restriction would have three components: it should (i) be provided by the law; (ii) serve a legitimate interest; and (iii) be necessary in a democratic society.<sup>131</sup>

The Charter makes no specific reference to freedom of the media or the press. The practice thus far has been for the African Commission to consider such issues, through its decisions, under the broad ambit of Article 9. Broadcasting (private and public), print media and attacks on media practitioners are addressed in some detail in the Declaration as well.

States should encourage a diverse, independent private broadcasting sector. The principles do not favour a state monopoly of broadcasting, which is considered incompatible with freedom of expression. An independent regulatory body should be responsible for issuing broadcasting licences and for observance of licence conditions.<sup>132</sup>

With regard to public broadcasting, the principles provide that State- and government-controlled broadcasters should be transformed into public service broadcasters, accountable to the public through legislature rather than to the government. The editorial independence of public broadcasters should be guaranteed. Furthermore, their public service ambit should be clearly defined and include an obligation to ensure that the public receive adequate, politically balanced information, particularly during election periods.<sup>133</sup>

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<sup>129</sup> 228/99 *The Law Office of Ghazi Suleiman v Sudan*, 16th Annual Activity Report [in *Decisions 2002–2007*, IHRDA, Banjul 2008, pp. 352–361], para. 40.

<sup>130</sup> Declaration of Principles on Freedom of Expression in Africa, Principle I (2).

<sup>131</sup> (*ibid.*:Principle II).

<sup>132</sup> (*ibid.*:Principle V).

<sup>133</sup> (*ibid.*:Principle VI).

Concerning the print media, no registration system should impose substantive restrictions on the right to freedom of expression. In addition, efforts should be made to increase the scope of circulation of media, particularly to rural communities.<sup>134</sup>

Attacks on media practitioners are considered to undermine independent journalism, freedom of expression and the free flow of information. Such attacks include murder, kidnapping, intimidation of and threats to media practitioners and others exercising their right to freedom of expression, and the material destruction of communications facilities. States are obliged to take effective measures to prevent such attacks. When they occur, states have an obligation to investigate them and punish perpetrators, while ensuring that victims have access to effective remedies.<sup>135</sup> In addition, media practitioners are not required to reveal confidential sources of information or to disclose other material held for journalistic purposes, except in specific circumstances, clearly laid down in the Declaration.<sup>136</sup>

In conclusion, the Declaration of Principles on Freedom of Expression in Africa acts as a point of reference to evaluate states parties' compliance with Article 9. States parties to the African Charter are pressed into make every effort to give practical effect to the principles.

## **Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa**

The right to a fair trial protected by Article 7 of the Charter is a pillar of the rule of law. In the African Charter, this right should be viewed in conjunction with the duty befalling states under Article 26 to guarantee the independence of the courts.

The Commission explained the nexus between Articles 7 and 26 in *Civil Liberties Organization v Nigeria*, saying that —<sup>137</sup>

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<sup>134</sup> (ibid.:Principle VIII).

<sup>135</sup> (ibid.:Principle XI).

<sup>136</sup> (ibid.:Principle XV).

<sup>137</sup> *129/94 Civil Liberties Organization v Nigeria*, 9th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp.203–206], para. 15.



### Major African legal instruments

... [w]hile 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 that right. This Article clearly envisions the protection of the courts which have traditionally been the bastion of protection of the individual's right against the abuses of State power.

The right to a fair trial and the duty of states to guarantee the independence of courts have been the substance of a high percentage of cases decided by the Commission. However, in the early days, it felt the void and gaps in the terse provisions of the Charter and started to have recourse to its powers under Articles 60 and 61 to borrow from other international law instruments to beef up the protection afforded by Article 7. For example, in *Media Rights Agenda v Nigeria*, it said the following:<sup>138</sup>

Neither the African Commission nor the Commission's Resolution on the Right to Recourse Procedure and Fair Trial contain any express provision for the right to public trial. That notwithstanding, the Commission is empowered by Articles 60 and 61 of the Charter to draw inspiration from international law on human and peoples' rights and to take into consideration as subsidiary measures other general or special international conventions, customs generally accepted as law, general principles of law recognised by African states as well as legal precedents and doctrine. Invoking these provisions, the Commission calls in aid General Comment 13 of the UN Human Rights Committee on the right to a fair trial.

Recognising the need to further strengthen and supplement the provisions relating to fair trial in the African Charter<sup>139</sup> and to reflect international standards, the African Commission established a Working Group in 1999 to prepare general principles and guidelines on the right to a fair trial and legal assistance under the Charter. The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa were adopted at the AU Heads of State and Government Summit in Maputo, Mozambique, in 2003.

### **Overview of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa**

The Principles and Guidelines are fairly extensive, covering a broad spectrum of issues from general principles applicable to all legal proceedings to more specific

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<sup>138</sup> 224/98 *Media Rights Agenda v Nigeria*, 14th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp.286–300], para. 66.

<sup>139</sup> Specifically Articles 5, 6, 7 and 26 of the Charter.

ones such as *locus standi*, the role of prosecutors, legal aid and assistance, and children and the right to a fair trial.

The Principles and Guidelines seek predominantly to protect individuals from unlawful and arbitrary infringements of their basic rights, such as the right to life and liberty.<sup>140</sup> In *Avocats Sans Frontières (on behalf of Gaëtan Bwampamy) v Burundi*, the African Commission noted that –<sup>141</sup>

... the right to fair trial involves fulfilment of certain objective criteria, including the right to equal treatment, the right to defence by a lawyer, especially where this is called for by the interests of justice, as well as the obligation on the part of courts and tribunals to conform to international standards in order to guarantee a fair trial to all.

Among the general principles applicable to all legal proceedings, a fair and public hearing is given prominence. A fair hearing enshrines the principle of equality – “equality of arms between parties to a proceeding, whether they are administrative, civil, criminal or military”,<sup>142</sup> equality of all persons before any judicial body,<sup>143</sup> equality of access by women and men to judicial bodies, as well as equality before the law in any legal proceedings.<sup>144</sup> Respect for the inherent dignity of human persons is stressed, with specific mention made about the dignity of women who participate in any legal proceedings.<sup>145</sup>

### ***No undue delay***

A fundamental element of a fair hearing is the –<sup>146</sup>

... entitlement to a determination of ... rights and obligations without undue delay and with adequate notice of and reasons for the decisions.

The African Commission found a violation of Article 7 where several people were arbitrarily arrested by security forces and never brought before a court,

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<sup>140</sup> Udombana (2006:301).

<sup>141</sup> *231/99 Avocats Sans Frontières (On behalf of Gaëtan Bwampamy) v Burundi*, 14th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp.53–60].

<sup>142</sup> Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Article A(2)(a).

<sup>143</sup> (*ibid.*:Article A(2)(b)).

<sup>144</sup> (*ibid.*:Article A(2)(c)).

<sup>145</sup> (*ibid.*:Article A(2)(d)).

<sup>146</sup> (*ibid.*:Article A(2)(i)).

even if they were eventually set free.<sup>147</sup> In another case, where a complainant was detained in prison for seven years without trial, the Commission held it was a violation of Article 7.<sup>148</sup> However, the Commission itself falls foul of this provision in that its efficiency in delivering decisions in cases brought to it is quite poor. A case in point is the SERAC Decision discussed above, which was lodged in 1996. The decision was delivered in 2000, at a time when the military regime which perpetrated the violations was no longer in power.

### **Public hearings**

All hearings are public; however, in camera hearings are permitted only —<sup>149</sup>

- ... (1) in the interest of justice for the protection of children, witnesses or identity of victims of sexual violence; [and]
- (2) for reasons of public order or national security in an open and democratic society that respects human rights and the rule of law.

Furthermore, judgements in legal proceedings are pronounced in public. In *Media Rights Agenda v Nigeria*,<sup>150</sup> relying on comments of the UN Human Rights Committee, the African Commission held that trials should be in public, even if this was not provided for in the African Charter or the Commission's Resolution on the Right to Recourse Procedure and Fair Trial.

### **Independence of judicial bodies**

The independence of judicial bodies is to be guaranteed by domestic laws, including the constitution, and “is respected by the government, its agencies and authorities”.<sup>151</sup> The Guidelines and Principles reaffirm the basic precept relating to security of tenure so important in the separation of powers, in that judicial officers —<sup>152</sup>

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<sup>147</sup> 74/92 *Commission Nationale des Droits de l'Homme et des Libertés v Chad*, 9th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp. 72–76].

<sup>148</sup> 103/93 *Alhassan Abubakar v Ghana*, 10th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp.133–135].

<sup>149</sup> (ibid.:Article A(3)(f)).

<sup>150</sup> 224/98 *Media Rights Agenda v Nigeria*, 14th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp.286–300] at p. 293).

<sup>151</sup> (ibid.:Article A(4)(a)).

<sup>152</sup> (ibid.:Article A(4)(p)).

... may only be removed or suspended from office for gross misconduct incompatible with judicial office, or for physical or mental incapacity that prevents them from undertaking their judicial duties.

### ***Actio popularis***

The Principles and Guidelines provides for *actio popularis*, thus allowing individuals, groups of individuals or NGOs not directly affected by human rights violations to lodge cases on behalf of victims. On many occasions, this principle has permitted NGOs to bring cases for consideration before the African Commission on behalf of groups of victims.<sup>153</sup> This is a crucial provision, as a close scrutiny of the individual communications procedure under Article 55 of the African Charter does not explicitly provide for NGOs to institute cases on behalf of victims. Nevertheless, the Guidelines and Principles are addressed to states parties and *locus standi* provisions in several national jurisdictions still do not cater for *actio popularis*.

### ***Military courts and special tribunals***

Of particular relevance in Africa, the Principles and Guidelines state that military or other special tribunals that –<sup>154</sup>

... do not use the duly established procedure of the legal process should not be created to displace the jurisdiction belonging to ordinary judicial bodies.

Furthermore, the Principles and Guidelines reiterate the right of civilians not to be tried by military courts, and prohibit special or military tribunals to try offences which fall under the jurisdiction of ordinary courts.<sup>155</sup> A similar provision features under Article 5 of the UN Basic Principles on the Independence of the Judiciary.<sup>156</sup>

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<sup>153</sup> See e.g. *155/96 Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights v Nigeria*, 15th Annual Activity Report [in *Decisions 2002–2007*, IHRDA, Banjul 2008, pp.277–293].

<sup>154</sup> Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Article A(4)(e).

<sup>155</sup> (*ibid.*:Article L).

<sup>156</sup> This article stipulates as follows: “Everyone shall have the right to be tried by the ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals”.

Examples of states that contravene the provision still prevail on the continent, however. For instance, in the Democratic Republic of Congo (DRC), military courts are competent to try cases which normally fall under the jurisdiction of ordinary courts.<sup>157</sup> Such military or special courts can present serious problems as far as the equitable, impartial and independent administration of justice is concerned.<sup>158</sup>

### ***Non-derogability***

The Principles and Guidelines use strong language in the provision on non-derogability. Accordingly, no circumstances whatsoever – be it a threat of war, a state of international or internal armed conflict, internal political instability or any other public emergency – can be invoked to justify derogations from the right to fair trial. This is a reaffirmation of the non-derogability principle established by the African Commission on Human and Peoples' Rights in one of its early decision against Chad.<sup>159</sup>

### ***Effective remedy***

Regarding the right to an effective remedy, the Principles and Guidelines provide that –<sup>160</sup>

... the granting of amnesty to absolve perpetrators of human rights violations from accountability violates the rights of victims to an effective remedy.

### ***Legal aid and legal assistance***

Given that the vast majority of ordinary people on the continent do not have access to legal aid and to the courts, it is extremely pertinent that the Guidelines

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<sup>157</sup> In the DRC, military courts are competent over cases dealing with human rights violations committed by soldiers in violation of principles of international law. Leandro Despouy, the UN Special Rapporteur on the Independence of Judges and Lawyers, mentioned this in the report following his mission to the DRC (15–21 April 2007). See Despouy (2008).

<sup>158</sup> From the General Comment on Article 14 (Right to a Fair Trial), International Covenant on Civil and Political Rights, quoted in *224/98 Media Rights Agenda v Nigeria*, 14th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp.286–300], para. 65.

<sup>159</sup> *74/92 Commission Nationale des Droits de l'Homme et des Libertés v Chad*, 9th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp.72–76].

<sup>160</sup> (ibid.:Article C(d)).

and Principles assert the right to legal aid and legal assistance in both criminal and civil cases.<sup>161</sup> Indeed, in the case of *Avocats Sans Frontières (on behalf of Gaëtan Bwampamy) v Burundi*, the Commission recalled “emphatically ... that the right to legal assistance is a fundamental element of the right to a fair trial”.<sup>162</sup>

Where the interest of justice so require, an accused or a party in a civil case has a right to have legal assistance without payment if s/he does not have sufficient means. Article H(b) further provides for criteria to determine the interest of justice. In a criminal case, these are the seriousness of the offence and the severity of sentence. In a civil matter, the complexity of the case and the ability of the party to be adequately self-represented, the rights affected and the likely outcome of the case on the wider community should be considered.<sup>163</sup> In capital offences, legal aid and representation are always required. The right to an effective defence or representation is stressed, as is the right to choose one’s own legal representative at all stages of a case.

The Women’s Protocol also makes specific reference to legal aid, but the duty on the State is limited to ensuring “support to local, national, regional and continental initiatives directed at providing women [with] access to legal services, including legal aid”.<sup>164</sup>

The Principles and Guidelines implicitly recognise that the challenge to provide legal aid and assistance requires the participation of a variety of legal service providers and partnerships with different stakeholders. They therefore call on professional associations of lawyers to cooperate in the organisation and provision of services, facilities and other resources. In addition, lawyers should ensure that they offer their services when legal assistance is provided through a judicial body and that, where no legal aid is available in important or serious human rights cases, they provide legal representation to the accused or party in a civil case without any payment by him or her.<sup>165</sup> Specific reference is made to the role

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<sup>161</sup> (ibid.:Article H(a)).

<sup>162</sup> *231/99 Avocats Sans Frontières (On behalf of Gaëtan Bwampamy) v Burundi*, 14th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp.53–60], para. 30.

<sup>163</sup> (ibid.:Article H(b)).

<sup>164</sup> Women’s Protocol, Article 8(b).

<sup>165</sup> Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Article H(f).

that paralegals could play in the provision of legal assistance,<sup>166</sup> and NGOs are encouraged to establish legal assistance programmes and to train paralegals.<sup>167</sup>

## **Concluding remarks**

The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa attempt to collate standards relevant to fair trial in one single document. Many of these norms can also be found in the several non-treaty standards at universal level.<sup>168</sup> Also, several of these principles have been distilled from the Commission's own case law. They serve as benchmarks when determining state compliance. While the Guidelines and Principles do not have the binding legal force of a treaty, they are strongly persuasive, in that they have been formally accepted by the AU.

## **The African Charter on the Rights and Welfare of the Child**

Children in Africa face enormous, even life-threatening, vulnerabilities. Out of an extensive list, the following represent the most challenging ones affecting large proportions of African children:

- Infant and child mortality are among the highest in the world<sup>169</sup>
- They are exposed to malnutrition and diseases
- The HIV and AIDS pandemic causes havoc with their tender lives, either through suffering from opportunistic diseases, having to care for ailing parents, or forcing them to take on responsibilities within child-headed households
- They have limited access to education<sup>170</sup>

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<sup>166</sup> (ibid.:Article H(g)).

<sup>167</sup> (ibid.:Article H(i)).

<sup>168</sup> The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; The Standard Minimum Rules for the Treatment of Prisoners; The Basic Principles on the Role of Lawyers; The Guidelines on the Role of Prosecutors; The UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty; The UN Basic Principles on the Independence of the Judiciary.

<sup>169</sup> UNDP (2007:264). Life expectancy at birth for the period 2000–2005 in sub-Saharan Africa was 49.1; in 2005, the infant mortality rate at birth per 1,000 births was 102; and the under-five mortality rate per 1,000 births was 172.

<sup>170</sup> (ibid.:172). In sub-Saharan Africa, the net primary enrolment rate in 2005 was 72%, while the net secondary enrolment rate was 26%.

- They are exposed to child labour and violence, and enlisted as child soldiers, and
- Huge numbers become refugees or are internally displaced, following conflicts or natural disasters.<sup>171</sup>

Africa sought to address the plight of her children through the African Charter on the Rights and Welfare of the Child (hereinafter *the African Children's Charter*). Adopted in July 1990, eight months after the UN Convention on the Rights of the Child<sup>172</sup> (hereinafter *the CRC*), the African Children's Charter entered into force on 29 November that same year. Based on the provisions enshrined in the African Children's Charter, the body mandated to promote and protect the rights of the African child, namely the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), was established by the Assembly of Heads of State and Government during its 37th Session in Lusaka, Zambia, in July 2001.

In this short review, the African Children's Charter specificities are examined, while brief reference is made to the provisions of the CRC. An overview of the ACERWC's work is also presented,

### **Historical background to the African Children's Charter**

The CRC has attained near universal ratification status and, in comparison, 44 of the 53 AU member states have so far ratified the African Children's Charter.<sup>173</sup> The African Children's Charter contains several provisions akin to those of the CRC, thus begging the question: Was there any need for a specific document dealing with child rights in Africa?

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<sup>171</sup> Preambular para. 3 of the African Charter on the Rights and Welfare of the Child expresses "concern that the situation of most African children remains critical due to the unique factors of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger, and on account of the child's physical and mental immaturity he or she needs special safeguards and care".

<sup>172</sup> Adopted by the UN General Assembly on 20 November 1989, the CRC entered into force on 2 September 1990.

<sup>173</sup> The Central African Republic, Djibouti, the DRC, the Sahrawi Arab Democratic Republic, São Tomé & Príncipe, Somalia, Swaziland, Tunisia and Zambia have not yet ratified the Children's Charter; available at <http://www.africa-union.org/root/au/Documents/Treaties/List/African%20Charter%20on%20the%20Rights%20and%20Welfare%20of%20the%20Child.pdf>; last accessed 18 March 2009.



During the drafting of the CRC, the general view was that the document did not encapsulate the prevailing specificities of African children. In addition, only Algeria, Egypt, Morocco and Senegal had participated significantly in the drafting exercise, thus bringing about the reflection that Africa was under-represented. Therefore, it was considered necessary for the continent to formulate its own Children's Charter, which would reflect its social and cultural values.

Thus, the preamble to the African Children's Charter recognises the "unique and privileged position" of the child in African society<sup>174</sup> and declares that the "reflection on the concept of the rights and welfare of the child" should take into consideration the "virtues of their cultural heritage, historical background and the values of the African civilization".<sup>175</sup>

The African Children's Charter draws inspiration from the African Charter on Human and People's Rights and from other human rights instruments at regional and international level, including the CRC. While emphasising the African grounding of the African Children's Charter, the notion of complementarity between the CRC and the African Children's Charter is recognised. Both contain key principles of the best interests of the child, non-discrimination, participation, survival, and development of the child. However, the African Children's Charter includes explicit references to issues such as protection against harmful social and cultural practices, protection of children in armed conflicts, protection against apartheid, to name but these few. On its adoption, the African Children's Charter became the first – and, to date, only – regional children's rights document in the world.

### **Selected specificities of the African Children's Charter**

The CRC defines a *child* as "every human being below the age of 18, unless under the law applicable to the child, majority is attained earlier".<sup>176</sup> The African Children's Charter, on the other hand, answers the question "Who is a child?" unequivocally: every human being below the age of 18.<sup>177</sup> The definition is clear and precise, with no exception or qualification.

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<sup>174</sup> African Charter on the Rights and Welfare of the Child, Preambular para. 4.

<sup>175</sup> (ibid.:Preambular para. 6).

<sup>176</sup> CRC, Article 1.

<sup>177</sup> (ibid.:Article 2).

In line with the approach taken in the African Charter on Human and People's Rights, the African Children's Charter provides for the civil, political, economic, social and cultural rights of children. Hence, states parties are obliged to implement the African Children's Charter without making any distinction among the different categories of rights.<sup>178</sup> Regarding economic, social and cultural rights, states parties to the CRC only undertake to implement –<sup>179</sup>

... such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

The African Children's Charter takes a strong stand when asserting that –<sup>180</sup>

... any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency be discouraged.

This supremacy of the Charter is further strengthened in the detailed provision binding states parties to take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child. The Charter also explicitly sets the minimum age for marriage at 18 years.<sup>181</sup>

Conversely, the education of a child should, inter alia, be directed towards “the preservation and strengthening of positive African morals, traditional values and cultures”; the “preservation of national independence and territorial integrity”; and the “promotion and achievements of African Unity and Solidarity”.<sup>182</sup> The child should also be prepared for –<sup>183</sup>

... responsible life in a free society, in the spirit of understanding, tolerance, dialogue, mutual respect and friendship among all peoples, ethnic, tribal and religious groups.

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<sup>178</sup> African Children's Charter, Article 1.

<sup>179</sup> CRC, Article 4.

<sup>180</sup> African Children's Charter, Article 1(3).

<sup>181</sup> (ibid.:Article 21).

<sup>182</sup> (ibid.:Article 11(2)(f)).

<sup>183</sup> (ibid.:Article 11(2)(d)).

An African child has responsibilities and duties towards his/her “family, society, the State and other legally-recognized communities and the international community”.<sup>184</sup> The child has the duty –<sup>185</sup>

... to work for the cohesion of the family, to respect his parents, superiors and elders at all times and to assist them in case of need.

Respect for parents, superiors and elders can be seen as an impediment to the child’s participation in decision-making which has an effect on him/her. The family, as the “natural unit and basis of society”<sup>186</sup> is given prominence. However, this does not take into account the fact that duties imposed on the child can be construed as allowing for the exploitation of children by adults, and that the family can also be a space where children’s rights are violated.<sup>187</sup>

The African Children’s Charter has several clearly spelt out obligations on states parties to provide protection to children in specific circumstances. States have to ensure access to education for “female, gifted and disadvantaged children”. There is also an obligation on states to ensure that pregnant girls are able to continue with their education on the basis of their individual ability.<sup>188</sup> For children with disabilities, it imposes measures which ensure their dignity, and promote their self-reliance and active participation in the community.<sup>189</sup> Specific measures are required to protect children from abduction and all forms of begging.<sup>190</sup> A person can only take part in hostilities at the age of 18, that is, when no longer a child,<sup>191</sup> and the protection afforded to refugee children is equally extended to internally displaced children.<sup>192</sup>

The African Children’s Charter makes two references to discipline. First of all, it is presented as an obligation on states parties, in that they have to –<sup>193</sup>

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<sup>184</sup> (ibid.:Article 31).

<sup>185</sup> (ibid.:Article 31(a)).

<sup>186</sup> (ibid.:Article 18(1)).

<sup>187</sup> See e.g. Osarenren (2006).

<sup>188</sup> African Children’s Charter, Article 11(7).

<sup>189</sup> (ibid.:Article 13(1)).

<sup>190</sup> (ibid.:Article 29).

<sup>191</sup> (ibid.:Article 22(2)).

<sup>192</sup> (ibid.:Article 23).

<sup>193</sup> (ibid.:Article 11(5)).

... take all appropriate measures to ensure that a child who is subjected to school or parental discipline shall be treated with humanity and with inherent dignity of the child and in conformity with the present Charter.

Secondly, parents have the responsibility to ensure that “domestic discipline” is “administered with humanity and in a manner consistent with the inherent dignity of the child”.<sup>194</sup> These provisions leave the door open for corporal punishment, despite its recognisably negative effects on children. These provisions also represent stark distinctions from Article 19 of the CRC, which protects children from –

... all forms of physical and mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

Obviously, the protection in the CRC extends to corporal punishment.

### **The Committee of Experts on the Rights and Welfare of the Child**

The ACERWC was established to “promote and protect the rights and welfare of the child”.<sup>195</sup> It is composed of 11 members of high moral standing, integrity, impartiality and competence in matters of the rights and welfare of the child. The members are appointed by the AU Assembly of Heads of State and Government from a list of persons nominated by states parties.<sup>196</sup> Members of the ACERWC serve for a five-year term and are not eligible for re-election.<sup>197</sup>

The mandate of the ACERWC concentrates on the promotion and protection of the rights contained in the African Children’s Charter, particularly to collect and document information, commission interdisciplinary assessment of situations on African problems relating to the rights and welfare of the child, monitoring the implementation of the African Children’s Charter, and reviewing reports from states parties. If so required, the ACERWC gives its views and recommendations to governments and provides interpretation of the Charter at the request of a state party, institution of the AU, or an African organisation recognised by the AU.<sup>198</sup>

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<sup>194</sup> (ibid.:Article 20(1)(c)).

<sup>195</sup> (ibid.:Article 32).

<sup>196</sup> (ibid.:Articles 33, 34).

<sup>197</sup> (ibid.:Article 36).

<sup>198</sup> (ibid.:Article 42).

A globally unique function of the ACERWC is to consider communications forwarded to it, as per the provisions of Article 44 of the Children's Charter, which gives it the legal basis to receive such communications.<sup>199</sup> In its Guidelines developed for the consideration of communications, a *communication* is considered as any correspondence or complaint from a state, individual, or NGO denouncing acts that are prejudicial to a right or rights of the child.<sup>200</sup>

Individuals, including the victimised child, his/her parents or guardians or legal representatives, witnesses, a group of individuals or an NGO recognised by the AU, by member states or any institution of the UN can forward a communication to the ACERWC.<sup>201</sup> A communication may be presented on behalf of a victim without his/her agreement on condition that the author is able to prove that his/her action is taken in the supreme interest of the child.<sup>202</sup>

A provision in the Guidelines which could prove problematic in application is that the ACERWC may admit a communication in the overall best interest of the child from a state party which is a non-signatory to the Charter. In so doing, the Committee is required to collaborate with other related agencies implementing Conventions and Charters to which the non-signatory country is a party.<sup>203</sup> It would be interesting to see how such a provision would work in practice, given the principles on the law of treaties in international law, which provide that treaties are binding on parties. Exceptions are permitted only if the norms therein contained have become peremptory norms of *jus cogens*, that is, norms which are of concern to the international community as a whole. Some of these are the —<sup>204</sup>

... prohibition of the use of force, the law of genocide, the principle of racial non-discrimination, crimes against humanity, and the rules prohibiting trade in slaves and piracy.

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<sup>199</sup> The CRC does not provide for an individual complaints procedure at the moment, though there is a move to adopt one. The UN Committee on the Rights of the Child examines states reports.

<sup>200</sup> Guidelines for the Consideration of Communications Provided for in Article 44 of the African Charter on the Rights and Welfare of the Child, ACERWC/8/4, Chapter 1, Article 1(1).

<sup>201</sup> (*ibid.*:Chapter 2, Article 1(I)(1)).

<sup>202</sup> (*ibid.*:Chapter 2, Article 1(I)(3)).

<sup>203</sup> (*ibid.*:Chapter 2, Article 1(II)(2)).

<sup>204</sup> Brownlie (1990:513).

Torture is also considered part of this category.<sup>205</sup>

Since its establishment, the ACERWC has received only one communication<sup>206</sup> and, at the time of writing, no decision on the said communication had been made public. While the benefits of bringing a communication are yet to be tested, it remains to be seen how the ACERWC, through the individual complaints procedure, will advance the protection of children's rights and what difference it can make in the way states treat children in Africa.

## **The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa<sup>207</sup>**

The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (hereinafter *the 1969 OAU Refugee Convention* or *1969 Convention*) was adopted on 10 September 1969 in Addis Ababa. It entered into force on 20 June 1974, following the deposit of instruments of ratification by one third of OAU member states.<sup>208</sup> To date, 45 countries have ratified or acceded to the 1969 Convention.<sup>209</sup>

Africa's refugee population was conservatively estimated at 2,608,000 in 2007.<sup>210</sup> Conflicts, (inter-state as well as those caused by changes in government or ethnic clashes), socio-economic challenges, human rights violations, other life-threatening calamities and natural disasters are among the top causes of massive population movements within and beyond borders on the continent. Refugees

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<sup>205</sup> Regina v Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet Regina v Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet House of Lords (On Appeal from a Divisional Court of the Queen's Bench Division); available at <http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd990324/pino1.htm>; last accessed 27 March 2009.

<sup>206</sup> This is a communication submitted in 2005 by the Centre for Human Rights, University of Pretoria, against Uganda for numerous violations on children's rights in the conflict-ridden northern part of the country.

<sup>207</sup> Available at <http://www.africa-union.org/root/au/Documents/Treaties/List/Convention%20on%20Refugees.pdf>; last accessed 11 April 2009.

<sup>208</sup> 1969 OAU Refugee Convention, Article XI.

<sup>209</sup> Countries that have not yet ratified or acceded to the Convention are Djibouti, Eritrea, Madagascar, Mauritius, Namibia, the Sahrawi Arab Democratic Republic, São Tomé & Príncipe and Somalia.

<sup>210</sup> UNHCR (2007).

are forced to flee their countries and cross borders in order to look for safety and protection in states where they are not citizens. They derive rights from global instruments, supplemented by legal texts at regional level and by the national laws of the countries in which they find themselves.

This legal framework provides refugees with a range of rights (civil, political, socio-economic and cultural). They also have the right to *non-refoulement*, that is, the right not to be returned to a country where they may face persecution or be discriminated against. However, in practice, few refugees are able to assert rights found in legal instruments. The next section of this paper highlights the distinctive aspects of the 1969 OAU Refugee Convention. It also deals briefly with how refugees on the continent have made use of the 1969 Convention in a relevant legal forum, that is, at the African Commission on Human and Peoples' Rights.

## **The Draft African Union Convention on the Protection and Assistance for Internally Displaced Persons in Africa**

Africa is home to approximately 12 million internally displaced persons (IDPs) out of a global total of 25 million IDPs. The main difference in the framework applying to IDPs and refugees is that the former remain under the legal responsibility of their own states, as they have not crossed international borders. However, they also face serious deprivation, harsh conditions and human rights violations – a situation which underlines gaps in their protection. Lack of protection to IDPs was considered a major gap in the 1969 OAU Convention on Refugees.

In November 2008, African ministers in charge of forced displacement adopted a draft AU Convention on the Protection and Assistance for Internally Displaced Persons in Africa, paving the way for its adoption at a special Summit of Heads of State and Government in 2009.<sup>211</sup> With the adoption of this draft convention, four decades after the adoption of the 1969 OAU Refugee Convention, Africa again leads the way in safeguarding the rights of displaced people. Indeed, both the 1969 OAU Refugee Convention and the IDP Convention (when adopted)

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<sup>211</sup> “African ministers adopt historic Draft IDP Convention”. *Daily Monitor*, 16 November 2008.

would be the only legally binding regional treaties in the world protecting the rights of displaced people – including refugees and IDPs.

## **Historical background of the 1969 OAU Refugee Convention**

African states faced increased refugee problems in the 1960s. The founding fathers of the OAU grappled with mass population displacement caused by independence struggles, apartheid, and man-made or natural disasters. The applicable law was derived mainly from the 1951 UN Convention relating to the Status of Refugees, adopted in the aftermath of World War II, whose particular socio-political context inspired many of the latter Convention's provisions. A follow-up Protocol to the UN Convention on Refugees was adopted in 1966, entering into force in 1967 (hereinafter *the 1967 Protocol*).

Given that the unique aspects of the refugee situation on the continent were still not adequately addressed, African states concentrated their efforts in the drafting of an instrument that would bring a distinctive regional approach to refugee situations on the continent. The 1969 OAU Refugee Convention sought to be “the effective regional complement in Africa of the 1951 United Nations Convention on the Status of Refugees”<sup>212</sup> and the 1967 Protocol, while addressing the deficiencies which rendered such a specific instrument a matter of necessity.

## **Highlights of the 1969 OAU Refugee Convention**

### ***Who is a refugee?***

The 1969 OAU Refugee Convention expands the definition of *refugee*. The 1951 UN Refugee Convention and 1967 Protocol define a *refugee* as someone who has a well-founded fear of persecution because of his or her race, religion, nationality, membership in a particular social group, or political opinion, is outside his/her country of nationality, and is unable to or, owing to such fear, is unwilling to avail him-/herself the protection of that country.<sup>213</sup>

The 1969 OAU Refugee Convention went beyond these criteria to include external aggression, occupation, foreign domination and, significantly, events

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<sup>212</sup> 1969 OAU Refugee Convention, Article VIII(2) and Preambular para. 's 9, 10 and 11.

<sup>213</sup> 1951 UN Convention on Refugees, Article 1(2).



seriously disturbing public order as a source of refugee creation.<sup>214</sup> This definition demonstrates clearly the intent of the drafters to address the specific nature of the refugee problem in Africa. The fear of persecution criterion focuses on “the ideas a person holds, and not on the socio-political context itself”, whereas the broader definition gives the possibility of raising more factors while seeking refugee status – such as serious natural disasters – and need not affect a whole country.<sup>215</sup>

This broader definition has been of particular significance in situations of a massive influx of people forced to flee. In these circumstances, it would be impractical to examine individual claims for refugee status. Under the 1969 OAU Refugee Convention, refugee status can be granted to whole groups, not just individuals, whereas the UN refugee protection framework providing for a “well-founded fear of persecution” presupposes individual screening when individuals or small groups cross borders in search of safety and protection. Thus, while removing the condition that an individual demonstrates a personal risk of persecution, the 1969 OAU Convention on Refugees permits *prima facie* group determination.

### ***Grounds of disqualification***

The 1969 OAU Refugee Convention adds three further grounds to those found in the 1951 UN Refugee Convention in respect of disqualification as a refugee. A person would cease to enjoy or would not be granted refugee status if s/he has been guilty of acts contrary to the purposes and principles of the OAU,<sup>216</sup> has seriously infringed the purposes and objectives of the 1969 Convention,<sup>217</sup> or has committed a serious non-political crime outside his/her country of refuge prior to admission to that country as a refugee.<sup>218</sup>

### ***Subversive acts***

The prohibition of subversive activities is dealt with in Article III of the 1969 Convention. The Article prescribes, first of all, the duty of the refugee to conform to the laws and regulations of the host country as well as measures taken for the

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<sup>214</sup> 1969 OAU Refugee Convention, Article 1(2).

<sup>215</sup> Viljoen (1997).

<sup>216</sup> 1969 OAU Refugee Convention, Article I(5)(c).

<sup>217</sup> (*ibid.*:Article I(4)(g)).

<sup>218</sup> (*ibid.*:Article I(5)(b)).

maintenance of public order. Moreover, the refugee “shall also abstain from any subversive activities against any member of the OAU”.<sup>219</sup> The duty of signatories to the 1969 Convention extends to prohibiting —<sup>220</sup>

... refugees residing in their respective territories from attacking any state member of the OAU, by any activity likely to cause tension between member states, and in particular by use of arms, through the press, or by radio.

The language of duties in the 1969 Convention can be considered as a forerunner to that found in the African Charter, discussed above.

While the prohibition of subversive activities can be considered as critical in Africa, given the militarisation and politicisation of refugee camps, the 1969 Convention does not provide for sanctions in cases of violations.

### ***Asylum***

The 1969 OAU Convention on Refugees is unequivocal about signatories’ obligations to grant asylum to refugees:<sup>221</sup>

... they shall use their best endeavours, consistent with their respective legislation to receive refugees and to secure the settlement of those who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality.

Asylum may be described briefly as the granting of protection on its territory by a state to persons fleeing persecution or serious danger from another state. Asylum comprises several elements, as indicated in the quoted Article, such as *non-refoulement*, permission to remain on the territory of the asylum country, and humane standards of treatment.

### **Non-refoulement**

The 1969 OAU Convention does not allow *refoulement*. By contrast, the 1951 UN Refugee Convention allows for an exception in times of national emergency or in situations where national security is at stake. *Non-refoulement* represents a strong pillar of refugee law obliging a State to extend admission to its territory

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<sup>219</sup> (ibid.:Article III(1)).

<sup>220</sup> (ibid.:Article III(2)).

<sup>221</sup> 1969 OAU Refugee Convention, Article II(1)).

(at the very least until determination whether there is a need for protection), prohibiting it from returning refugees to countries in which their lives or freedom may be threatened.

Several African countries continue to host large numbers of refugees, in line with the principle of *non-refoulement*.<sup>222</sup> However, instances of *refoulement* have occurred. One of the many examples was the return of 5,000 Rwandans from Burundi in June 2005. In the period covering March to June 2005, the United Nations High Commission for Refugees (UNHCR) estimated that about 8,000 Rwandans from the Butare and Gikongoro Provinces entered Burundi, looking for asylum.<sup>223</sup> Many of these asylum-seekers expressed alarm about the implementation of the *gacaca* courts,<sup>224</sup> claiming that these could be controlled to persecute Hutus regardless of whether or not they had taken part in the genocide. Such claims were dismissed by the Rwandan Government on the grounds that these were unsubstantiated rumours, and that those fleeing were concerned about evading justice. During bilateral meetings between the Burundian and Rwandan Governments, it was concluded that these asylum-seekers were ‘illegal immigrants’, following which 5,000 Rwandans were quickly deported from Burundi. The UNHCR and local NGOs were not permitted to observe the exercise.<sup>225</sup> The UNHCR’s response was that claims of individuals should have been assessed and it should have been allowed to monitor the proceedings. Under the circumstances, the operation constituted a violation of the principle of *non-refoulement*.

### ***African solidarity***

Another distinctive feature of the 1969 Convention is that, in the spirit of African solidarity and international cooperation, states call on others when faced with a huge refugee influx. The others are required to take appropriate measures to lighten the burden of the member state granting asylum.<sup>226</sup> There is not much

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<sup>222</sup> As at 1 January 2007, Tanzania was hosting 485,000 and Chad 287,000 refugees (Office of the United Nations High Commissioner for Refugees 2007).

<sup>223</sup> UNHCR (2006:80).

<sup>224</sup> *Gacaca* courts are community-led traditional justice mechanisms aimed at promoting reconciliation after the 1994 genocide. These courts have been revived in order to deal with the huge number of genocide-related cases clogging up the formal justice system and jails in Rwanda.

<sup>225</sup> Amnesty International (2005); Rutazana (2006).

<sup>226</sup> 1969 OAU Convention on Refugees, Article II(4).

evidence to show the extent to which this provision has been successfully applied.

### ***Voluntary repatriation***

*Voluntary repatriation* is the return to the country of origin based on the refugee's free and informed decision. The 1969 OAU Refugee Convention was the first international legal instrument to specifically include the now universally accepted principles of voluntary repatriation.

Article 5 demonstrates that the drafters of the 1969 Convention envisioned that repatriation would take place in an organised manner, planned and supported by both sending and receiving states. There is no provision stipulating that there has to be a fundamental change in circumstances and human rights standards in the home country, prior to promoting, encouraging, or even allowing repatriation to occur.

One recent example of voluntary repatriation operations on the continent is that of Mauritanian refugees from Senegal, launched by the Mauritanian authorities and the UNHCR in line with decisions of the African Commission, on the case over the 1989 mass expulsion of black Mauritians to Senegal and Mali.<sup>227</sup> To date, more than 4,500 deportees have voluntarily returned to Mauritania. The repatriation process is still ongoing.<sup>228</sup>

### ***Vulnerable groups***

The 1969 OAU Refugee Convention does not address vulnerable groups, including children and women. However, such lacunae have been rectified. For example, the African Charter on the Rights and Welfare of the Child imposes an obligation on signatory states for the protection of and provision of humanitarian

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<sup>227</sup> 54/91, 61/91, 98/93, 164/97 to 196/97, 210/98 *Malawi African Association, Amnesty International, Ms Sarr Diop, Union Interafricaine des Droits de l'Homme and RADDHO, Collectif des Veuves et Ayants Droit, Association Mauritanienne des Droits de l'Homme v Mauritania*, 13th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp. 161–191].

<sup>228</sup> Information obtained at a workshop on the subject matter held in Dakar, Senegal, 1–2 December 2008, by the Institute for Human Rights and Development in Africa (IHRDA) and Rencontre africaine pour la défense des droits de l'homme (RADDHO).

assistance to refugee children, whether unaccompanied or accompanied by parents, legal guardians or close relatives.<sup>229</sup> States have the further obligation to undertake efforts aimed at family reunification. A noteworthy stipulation is that all the protections —<sup>230</sup>

... apply *mutatis mutandis* to internally displaced children whether through natural disaster, internal armed conflicts, civil strife, [and] breakdown of economic and social order ... .

The 1969 OAU Refugee Convention is gender-blind. Yet the rights of women and girls may be violated at all stages of their lives as refugees, be it during flight or in their host countries. There is ample documentation to this effect around the continent. Unimaginable numbers of women are victims of violence and mutilation and an untold number of women and girls are raped (Sierra Leone<sup>231</sup> and Liberia conflicts, Rwanda genocide, DRC conflicts, Darfur alleged genocide, to name but these few).

The Women's Protocol addresses the plight of women in situations of displacement. States parties are first of all obliged to take measures to ensure the increased participation of women in local, national, regional, continental and international decision-making structures to ensure the physical, psychological, social and legal protection of asylum-seekers, refugees, returnees and displaced persons, particularly women, as well as in the management of camps and settlements for such women.<sup>232</sup> In situations of armed conflict, states parties undertake to protect the foregoing group of women against all forms of violence, rape and other forms of sexual exploitation, and to ensure that perpetrators of such acts are brought to justice.<sup>233</sup>

## **The African Charter and the protection of refugees through communications before the African Commission**

The 1969 OAU Convention on Refugees remains the determining document relating to the protection of refugees in Africa. However, the protection of refugees

<sup>229</sup> African Charter on the Rights and Welfare of the Child, Article 23: Refugee Children.

<sup>230</sup> (ibid.:Article 23(4)).

<sup>231</sup> *249/02 Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v Guinea*, 20th Annual Activity Report [in *Decisions 2002–2007*, IHRDA, Banjul 2002, pp.203–214].

<sup>232</sup> Protocol on the Rights of Women, Article 10(2)(d) and (e).

<sup>233</sup> (ibid.:Article 11(3)).

in Africa should be viewed in conjunction with the equally important African Charter and its mechanism for protection, that is, the African Commission.<sup>234</sup>

The African Charter provides that —<sup>235</sup>

... every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the laws of those countries and international conventions.

This provision is distinctive in that it provides for the double right to seek but also to obtain asylum. Therefore, it may be argued that all AU states, regardless of whether or not they are party to the 1969 OAU Refugee Convention, are obliged to receive refugees and to grant them asylum. Article 12(3) also contains a provision against the mass expulsion of national, racial, ethnic or religious groups. The African Commission is an important quasi-judicial body before which states are accountable for the way they treat their own citizens and others who are within their jurisdiction, including asylum-seekers and refugees.<sup>236</sup>

The relevance of the mechanisms within the African system of human rights, including the African Commission, is that asylum-seekers and refugees on the continent can exercise their right to petition the Commission by taking their cases individually or in groups to seek protection of their rights where these have been violated by the host countries.<sup>237</sup>

In one such case, involving 14 Gambian nationals deported from Angola from March to May 2004 during the *Operação Brilhante*, the African Commission found, inter alia, that Article 12(4) of the African Charter relating to due process before expulsion had been violated.<sup>238</sup> In addition, while underscoring that

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<sup>234</sup> Protection standards for refugee children and women found in the Protocol on the Rights of Women and the African Charter on the Rights and Welfare of the Child have been discussed above.

<sup>235</sup> Article 12(3) of the African Charter.

<sup>236</sup> *71/92 Rencontre africaine pour la défense des droits de l'homme v Zambia*, 10th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp.367–371], at p.369.

<sup>237</sup> They can also exercise this right by petitioning the African Court on Human and Peoples' Rights.

<sup>238</sup> While the Gambians were economic migrants, others among the scores who faced expulsion were refugees.

any expulsions or deportations were required to comply with the human rights obligations in the African Charter, it found Angola in violation of Article 12(5) of the Charter.<sup>239</sup>

## **The AU Convention on Preventing and Combating Corruption**

Although the 53 AU states differ considerably in various regards,<sup>240</sup> one common challenge seems to be the presence of corruption,<sup>241</sup> despite the fact that this phenomenon is illegal almost everywhere. Interwoven deeply into the fabric of society, corruption has “devastating effects on the political, economic, social and cultural stability of the African people”.<sup>242</sup>

Corruption costs Africa approximately US\$148 billion annually, impacting negatively on development, investment and business, with prices of goods increased by as much as 20 per cent, most of which become the burden of the poor.<sup>243</sup> Corruption has other far-reaching consequences, as it undermines good governance, accountability and transparency. Politically, it challenges democracy through the tainting of the electoral process, thus bringing into disrepute the legitimacy of government. Lack of an independent judiciary makes a mockery of the rule of law. Corruption can spawn additional criminal activities, including drug trafficking and money laundering, to pinpoint but these two.

While the causes encouraging corruption are numerous, its connection with poor governance leaps to the forefront. Weak public institutions, poor capacity to implement effective policies and procedures to curb corruption, inadequately paid civil servants, and recruitment and promotion systems that are not merit-

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<sup>239</sup> 292/04 *Institute for Human Rights and Development in Africa v Angola*, 23rd and 24th Annual Activity Report of the African Commission on Human and Peoples’ Rights; available at [www.achpr.org](http://www.achpr.org); last accessed 29 March 2009.

<sup>240</sup> Including size, population, gross domestic product, legal traditions and political dispensation.

<sup>241</sup> First OAU Ministerial Conference on Human Rights in Africa, 12–16 April 1999, Grand Bay, Mauritius; para. 8 of the Grand Bay Declaration and Plan of Action identifies the following as the cause of violations of human rights in Africa: “(g) Mismanagement, bad governance, and corruption; (h) Lack of accountability in the management of public affairs ...”.

<sup>242</sup> African Union, Convention on Preventing and Combating Corruption, Preambular para. 6.

<sup>243</sup> Blunt (2004).

based – all combine to create a situation where opportunism flourishes. The lack of or poorly-resourced oversight bodies capable of tackling in-country as well as trans-border corruption efficiently, limited access to modern information and communications technology, laws that undermine independent media, and a civil society that is not vocal enough across Africa: all contribute to a culture of impunity that renders corruption rife.

The AU recognised “the need to address the root causes of corruption on the Continent”<sup>244</sup> in a coordinated manner and to develop workable solutions at continental level. Its response was the drafting of a legally binding treaty in order to prevent, detect and punish corruption.

African Union Heads of State and Government adopted the Convention on Preventing and Combating Corruption (hereinafter *the 2003 AU Corruption Convention* or simply *the 2003 Convention*) on 11 July 2003 in Maputo, Mozambique.<sup>245</sup> The 2003 AU Corruption Convention entered into force on 5 August 2006, after the deposit of the 15th instrument of ratification.<sup>246</sup> The 2003 Convention represents the AU’s blueprint in fighting the scourge of corruption by –<sup>247</sup>

... formulat[ing] and pursu[ing], as a matter of priority, a common penal policy, ... including the adoption of appropriate legislative and adequate preventive measures ...

and in the field of international cooperation.

## **Objectives and Principles of the AU Convention on Preventing and Combating Corruption**

Article 2 presents the five main objectives of the 2003 AU Corruption Convention. The first one is rooted in the continent’s programme to –<sup>248</sup>

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<sup>244</sup> Convention on Preventing and Combating Corruption, Preambular para. 8. The Grand Bay Declaration also recognised corruption as a major cause of human rights violations. See Footnote 1 in this paper.

<sup>245</sup> A total of 28 countries have ratified the 2003 Convention; see <http://www.africa-union.org/root/au/Documents/Treaties/List/African%20Convention%20on%20Combating%20Corruption.pdf>; last accessed 11 April 2009.

<sup>246</sup> Convention on Preventing and Combating Corruption, Article 23(2).

<sup>247</sup> (*ibid.*:Preambular para. 8).

<sup>248</sup> (*ibid.*:Article 2(1)).



### Major African legal instruments

... strengthen the development of mechanisms required to prevent, detect, punish and eradicate corruption and related offences in the public and private sectors.

The reference to the private sector is well worth noting. The second objective aims at the promotion, facilitation and regulation of cooperation among states parties in order to ensure the effectiveness of measures and actions to curb corruption,<sup>249</sup> while the third focuses on the coordination and harmonisation of policies and legislation.<sup>250</sup> The fourth objective derives from Africa's development agenda to promote socio-economic development by removing obstacles to the enjoyment of economic, social and cultural rights as well as civil and political rights,<sup>251</sup> thus firmly asserting its rights-based approach, with three references to the African Charter<sup>252</sup> and two to the African Commission.<sup>253</sup> Finally, to reverse Africa's negative record in terms of governance, the 2003 AU Corruption Convention seeks to establish the necessary conditions to foster transparency and accountability in the management of public affairs.<sup>254</sup>

Following from the foregoing objectives, the basic principles underpinning the obligations of states parties are expounded in Article 3. These are –

- respect for democratic principles and institutions
- popular participation
- the rule of law and good governance
- respect for human and peoples' rights in accordance with the African Charter and other relevant human rights instruments
- transparency and accountability in the management of public affairs
- promotion of social justice to ensure balanced socio-economic development, and
- condemnation and rejection of acts of corruption, related offences and impunity.

### **Overview of the 2003 AU Corruption Convention**

The 2003 AU Corruption Convention is a relatively short document. Containing 28 articles in all, it deals with the prevention and criminalisation of acts of

<sup>249</sup> (ibid.:Article 2(2)).

<sup>250</sup> (ibid.:Article 2(3)).

<sup>251</sup> (ibid.:Article 2(4)).

<sup>252</sup> (ibid.:Preambular para. 4, Article 3(2), Article 14).

<sup>253</sup> (ibid.:Preambular para. 11, Article 22).

<sup>254</sup> (ibid.:Article 2(5)).

corruption while advocating for international cooperation, mutual legal assistance, extradition, and broad participation in the fight against corruption.

Within the public sector, states parties are obliged to require —<sup>255</sup>

... all or designated public officials to declare their assets at the time of assumption of office during and after their term of office in the public service.

States parties are also obliged to adopt Codes of Conduct for their public service, as well as to —<sup>256</sup>

... ensure transparency, equity and efficiency in the management of tendering and hiring procedures in the public service.

States parties also undertake to —<sup>257</sup>

... adopt and strengthen mechanisms for promoting the education of populations to respect the public good and public interest, and awareness in the fight against corruption and related offences, including school educational programmes and sensitization of the media.

With respect to the private sector, the 2003 AU Corruption Convention requires states parties to —<sup>258</sup>

... adopt legislative and other measures to prevent and combat acts of corruption and related offences committed in and by agents of the private sector, to establish mechanisms to encourage participation by the private sector in the fight against unfair competition, respect of the tender procedures and property rights ...

as well as the adoption of measures “to prevent companies from paying bribes to win tenders”.

The 2003 AU Corruption Convention imposes an obligation on states parties to adopt legislation to criminalise acts of corruption under their domestic law. It covers a broad spectrum of offences, including diversion of public funds and property by public officials, trading in influence, illicit enrichment, money

<sup>255</sup> (ibid.:Article 7(1)).

<sup>256</sup> (ibid.:Article 7(4)).

<sup>257</sup> (ibid.:Article 5(7)).

<sup>258</sup> (ibid.:Article 11).

laundering, concealment of property and bribery.<sup>259</sup> It addresses both the supply and demand aspects of corruption, that is, the one who solicits and the one who accepts, directly or indirectly, “either through an act or omission in the discharge of his or her duties by a public official or any other person...”.<sup>260</sup>

Laundering of the proceeds of corruption should also be criminalised.<sup>261</sup> The 2003 Convention further outlines the legislative measures and mechanisms to be put in place for the confiscation and seizure of the proceeds of corruption,<sup>262</sup> while indicating that bank secrecy should not be a bar to investigation and prosecution.<sup>263</sup>

At the enforcement level, the 2003 AU Corruption Convention reaffirms the requirement of due process of the law in connection with anyone accused of corruption or related offences. The *ne bis in idem* or double jeopardy principle is specifically mentioned.<sup>264</sup> Unequivocal reference is made to a fair trial –<sup>265</sup>

... in accordance with the minimum guarantees contained in the African Charter on Human and Peoples’ Rights and any other relevant international human rights instruments recognized by the concerned states parties.

Member states undertake to cooperate in combating the plague of corruption in terms of prevention and investigation, as well as the prosecution of offenders. Similarly, member states are bound to render specific forms of mutual legal assistance in gathering and transferring evidence for use in court. Article 15 provides for the extradition of persons accused of corruption offences established in pursuance with obligations under the 2003 Convention and that fall within its jurisdiction. The 2003 Convention assumes the role of an extradition treaty among states parties. States parties undertake to include such offences as extraditable offences in extradition treaties existing between or among them.

The 2003 AU Corruption Convention allows for full participation of the media and civil society at large in the fight against corruption by enjoining states parties to

<sup>259</sup> (ibid.:Article 4: Scope of the Convention).

<sup>260</sup> (ibid.:Article 4(1)(c)).

<sup>261</sup> (ibid.:Article 6).

<sup>262</sup> (ibid.:Article 16).

<sup>263</sup> (ibid.:Article 17).

<sup>264</sup> (ibid.:Article 13(3)).

<sup>265</sup> (ibid.:Article 14).

create an environment that enables them to hold governments to the highest levels of transparency and accountability in the management of public affairs.<sup>266</sup>

A unique feature of the 2003 AU Corruption Convention relates to the funding of political parties.<sup>267</sup> States parties are bound to adopt legislative or other measures to proscribe the use of funds acquired through illegal or corrupt practices to finance political parties. Those measures should also incorporate the principle of transparency into funding political parties.

### **Monitoring of the 2003 AU Corruption Convention and follow-up mechanisms**

The 2003 AU Corruption Convention provides for follow-up mechanisms at two levels, namely one at national level through the creation of national authorities,<sup>268</sup> and one at supranational level in the form of an Advisory Board on Corruption within the African Union.<sup>269</sup>

Upon ratification of the 2003 Convention, states parties should create or designate a national authority or agency in application of corruption offences. Several member countries have in fact set up institutional frameworks or agencies, as required by the 2003 Convention. Representatives of 33 such institutions attended the 2nd Pan-African Meeting of National Anti-corruption Bodies, where they recommended, among other things, strengthening the capacities of such institutions.<sup>270</sup>

At their 12th Ordinary Summit, the AU Heads of State and Government elected 11 members to the Advisory Board, who serve for a period of two years; their terms are renewable only once.<sup>271</sup> The members – experts of the highest integrity, impartiality and recognised competence in matters relating to preventing and combating corruption and related offences – serve in their personal capacity.

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<sup>266</sup> (ibid.:Article 12).

<sup>267</sup> (ibid.:Article 10).

<sup>268</sup> (ibid.:Article 20).

<sup>269</sup> (ibid.:Article 22).

<sup>270</sup> African Union, Declaration of the 2nd Pan African Meeting of National Anti-Corruption Bodies, 24 February 2007, para. 4.

<sup>271</sup> African Union, Press Release N.43/2009, “12th AU Summit Decisions Summary”, 4 February 2009.

The Board's functions are quite extensive and specific, ranging from promoting and encouraging the adoption and application of anti-corruption measures, to the development of methodologies for analysing the nature and extent of corruption in Africa, the dissemination of information, and sensitisation of the public on the negative effects of corruption and related offences, and "advising governments on how to deal with the scourge of corruption and related offences in their domestic jurisdictions".<sup>272</sup> Interestingly, the Board also collects information and analyses the conduct and behaviour of multinational corporations operating in Africa.

Additional functions involve the development of codes of conduct for public officials and building partnerships, including with the African Commission on Human and Peoples' Rights, and African civil society. The Board receives and examines reports from states parties to the 2003 Convention on their progress in implementing the treaty. Last, but not least, states parties are directed to ensure and provide for civil society's participation in the corruption monitoring process and implementation of the 2003 Convention.<sup>273</sup>

While the monitoring and follow-up provisions seem reasonably robust, it remains to be seen what difference the Board can make in the struggle against corruption. Two conditions precedent required for substantive reforms to curb deep-rooted corruption are strong commitment and political will. Additionally, the Board needs to be adequately resourced in order to avoid the 'toothless watchdog' syndrome.

### **Concluding remarks**

The 2003 Convention gives a broad sketch of measures that states parties should put in place to enable the prevention, detection and investigation of corruption offences. It reinforces the legal framework relating to corruption through a detailed listing of offences that should be made punishable by domestic legislation. Furthermore, the 2003 Convention encourages participation, education and the promotion of public awareness in combating corruption.

The adoption and entry into force of the landmark AU Convention on Preventing and Combating Corruption represents a major step indeed, as the

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<sup>272</sup> (ibid.:Article 22(5)(d)).

<sup>273</sup> (ibid.:Article 12(4)).

continent handles the growing awareness of the damage corruption has caused to the enjoyment of human rights – civil and political, but more particularly, economic and social – by millions of Africans. Its real impact will depend on issues such as <sup>—274</sup>

... clarity of the substantive obligations imposed, conformity of the newly adopted norms with existing legal and human rights obligations, proper municipal implementation of these norms ... [and] good governance.

As regards monitoring and implementation, the powers and functions of the Advisory Board on Corruption and national agencies are only part of the reform process in the field of tackling continent-wide corruption. The strongest determining factor remains the willingness of states to change their own legal framework and culture of functioning, and to empower the Advisory Board and national agencies to act in accordance with their mandate – in perfect freedom.

## **Conclusion**

This paper's main objective was to present a short descriptive study of the major legal instruments making up the African human rights system, which is undergoing rapid evolution. New texts whose reach is yet to be tested are adding up to the core ones, namely the African Charter, the 1969 OAU Refugee Convention, and the Children's Charter. The development of 'soft law' to fill the gaps in the African Charter, such as the Declaration of Principles on Freedom of Expression in Africa and the Principles and Guidelines to a Fair Trial and Legal Assistance in Africa, is indeed welcome. The jurisprudence of the African Commission is also growing stronger.

Going by the numerous 'global firsts' noted in its major legal texts, Africa has shown that it can be innovative and progressive, leading the way in setting norms. The major legal texts have been trailblazers in the field of international human rights law:

- The African Charter incorporated the three categories of rights in one document
- The Women's Protocol dared tackled the issue of abortion
- The 1969 Refugee Convention included "voluntary repatriation" well before this became accepted within the UN system, and

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<sup>274</sup> Snider & Kidane (2007:693).

- The 2003 AU Corruption Convention insists on the principle of a fair trial for corruption-related crimes.

Yet why the nagging thought that all is not for the best? While recognising the African human rights system is wider than the African Charter-based mechanism, the latter remains its most important component. Calls for reform of the African Charter-based system have been made. Heyns contends that –<sup>275</sup>

... [t]he ideal option for the future would indeed be the reform of the system by means of a protocol, designed to rectify [identified] and other possible defects in a systematic and comprehensive manner.

On the other hand, Odinkalu is of the view that “the mechanism of the African Charter is not the altogether hopeless beast caricatured by the literature.”<sup>276</sup> Arguing that the real problem lies in addressing the effectiveness of the system, he would “prefer a reform process or forum that is not so state-centric”.<sup>277</sup>

The challenges are many. A first one facing the African human rights system is to give true meaning to the principle of indivisibility and universality to all human rights, including collective rights. The Commission’s case work on this issue has progressed. In the SERAC Decision, it holds as follows:<sup>278</sup>

The uniqueness of the African situation and the special qualities of the African Charter impose upon the African Commission an important task. International law and human rights must be responsive to African circumstances. Clearly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa. The African Commission will apply any of the diverse rights contained in the African Charter. It welcomes this opportunity to make clear that **there is no right in the African Charter that cannot be made effective.** [Emphasis added]

Yet, making all rights in the Charter effective is the second stumbling block identified: to turn the rights contained in all the documents into tangibles for all, so that they are roaring – and not the predicted “paper-tigers”.<sup>279</sup>

<sup>275</sup> Heyns (2001:155).

<sup>276</sup> Odinkalu (2001:225).

<sup>277</sup> (ibid.:246).

<sup>278</sup> *155/96 Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights v Nigeria*, 15th Annual Activity Report [in Decisions 2002–2007, IHRDA, Banjul 2008, pp.277–293], para. 68.

<sup>279</sup> Anthony (1997).

The third one is for implementation mechanisms to avoid the ‘toothless watchdog’ syndrome. What should their roles be in the new human rights dispensation on the continent? What should they do to avoid the pitfalls encountered by the African Commission in its formative years? These are crucial questions to be answered for the numerous treaty-monitoring mechanisms to succeed in their missions.

And finally, does the system really need these multiple treaty-monitoring mechanisms?

Immense hope has been pitched on the African Court of Human and Peoples’ Rights.<sup>280</sup> Conversely, concerns were expressed that, while the setting up of the Court was in itself a significant development, it was doubtful whether this would indeed sufficiently address the normative and structural weaknesses that affected the African human rights system right from the time it was set up.<sup>281</sup>

Right now, before the Court even got started on the business of hearing cases, it is going through a transitional period, phasing out, having been subsumed into the African Court of Justice and Human Rights. Fourteen countries have so far signed the merged protocol and none has ratified it.<sup>282</sup> There is no indication regarding the required declaration granting individuals or relevant NGOs access to the Court. From experience, the jurisprudence of the African Commission has been advanced thanks to the individual complaints procedure. Barring individuals and NGOs from access may have a negative impact on the enforcement of human rights on the continent.

Without giving way to pessimism, let us focus on the silver lining in anticipation of a golden era where an African Court of Justice and Human Rights will hand down binding decisions. Given the present ratification status, this is not going to be for the immediate future. It is submitted that the African Charter-based mechanism is functional, notwithstanding its several shortcomings and imperfections. It still offers unexplored potentials to be tapped into.

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<sup>280</sup> Udombana (2000).

<sup>281</sup> Wa Mutua (1999).

<sup>282</sup> These are Algeria, Benin, Burkina Faso, Chad, Gabon, Guinea, Mali, Nigeria, Senegal, Sierra Leone, Tanzania and Togo; available at <http://www.african-union.org>; last accessed 11 April 2009.



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